

**THE NATIONAL CREDIT ACT 34 OF 2005: BACKGROUND
AND RATIONALE FOR ITS ENACTMENT, WITH A SPECIFIC
STUDY OF THE REMEDIES OF THE CREDIT GRANTOR IN THE
EVENT OF BREACH OF CONTRACT**

BY

MONICA LAURA VESSIO

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**SUPERVISOR: PROFESSOR NJ GROVÉ
CO-SUPERVISOR: PROFESSOR CM VAN HEERDEN**

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Law is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.

Pearl Assurance Co v Union Government 1934 AD 560

FOREWORD

The National Credit Act 34 of 2005 was the ultimate product of an initiative by the Department of Trade and Industry to address the shortcomings of the previous legislative enactments in the area of credit regulation, that is the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980. The Act is a dramatic departure from the old bi-legislative credit dispensation. Its aims are, *inter alia*, to provide a fair and non-discriminatory marketplace, to prohibit unfair credit practices and reckless lending, to establish national norms and standards relating to consumer credit and to promote a consistent enforcement framework relating to consumer credit. The Act repealed the Usury Act and the Credit Agreements Act. Furthermore, it established two new bodies, namely the National Credit Regulator and the National Consumer Tribunal to monitor and enforce the framework relating to consumer credit.

Through enactment of the National Credit Act the government appears to have focused much energy on the prevention of over-indebtedness by instilling prohibitions on reckless lending practices by credit providers and a variety of processes for the prevention and alleviation of over-indebtedness. However, and despite these endeavours, the ever important considerations of the inevitably commonplace breach of the credit agreement by consumers and the recovery process available to credit providers, remain to be deliberated. The relationship between the two major role players – the provider and consumer – is the nub of any discussion, theory or legislative enactment pertaining to credit.

The thesis commences with an examination of the historical background and rationale for the Act, putting into context not only for the South African but so too for the foreign jurist, the rules and regulations which govern the relationship between the parties when an agreement is breached as well as the remedies and recourses that are available to the aggrieved party in terms of the Act. At all times the grounding of the common law, which acts as a stabiliser especially in times of changes in and of specific legislation, is examined in relation to breach and remedies as affected by the Act.

Chapter 1 is a basic Introduction to the topic, sets the background for the discussion which ensues and examines the purpose and methodology adopted in the work.

Chapter 2 encompasses a concise historical introduction to credit parameters; it looks at how the historical regulatory pendulum of the credit market swings to and fro. By examining the history one is able to discern what the current legislative trends are, and where they are likely headed. Chapter 3 examines the background and rationale for the new Act. The reasons why the previous credit regime was deemed ineffective for the present day credit market are also considered. Chapter 4 is a consideration of the previous legislative regime and introduction to the current legislative setting. Chapter 5 introduces the nature of the obligation and breach of contract, followed by a study of the procedures that are required before debts can be enforced through the courts. The procedures so required by the previous credit legislation, as well as those expected in foreign jurisdictions are also examined. The final chapter, Chapter 6, is an examination of specific remedies available to the credit provider as provided by the common law and by the Act and how the Act amends some of the common law remedies.

Throughout the thesis a comparative examination of the jurisdictions of England and Italy are conducted as well as how these countries have tackled the problem of regulation of consumer credit, breach and their ensuing remedies and consequences. The jurisdictions examined are an example of a common law system and a civilian one, respectively. Due to the movements in harmonisation of commercial private law and due to the massive influence of this process on individual regional legislations, it is submitted that with contemporary legal developments due to cross-border trade, analysis of legislative developments in any European country cannot be carried out without reference to the law-making sanction of the European Union. Accordingly, the European Union, in so far as it relates to credit, has been studied together with the other two foreign jurisdictions.

The conclusion is a consideration of whether the legislature has, through promulgation of the Act in relation to the remedies for breach, 'over protected' the consumer through overregulation and whether such paternalism has proved, over time, to be detrimental to the credit market. The 'under protection' of the consumer cannot be ruled out either, and this too has been considered – given that the import of the wording of the Act as well as the interpretations of its sections by the judiciary will be an on-going exercise. The common law, the thread that gathers the South

African legislative garment and sets it apart from the civilian tradition, and its effects are contemplated throughout the work. The closing remarks consider whether the Act is fair and sustainable in the South African environment and how it compares with foreign jurisdictions. The conclusion will reveal whether room exists for suggested improvements both to the Act and to the interpretation thereof in the area of recovery and whether the description given to the French Civil Code, that is that it is like an old lady, with both wisdom and weaknesses, will eventually be capable of assignment to the National Credit Act.

CHAPTER 1: GENERAL INTRODUCTION

1.1. Introduction

In a cash economy, or in a society arranged around barter only, there would be no need for credit.¹ Transactions based on credit occur when a person either chooses not to or cannot pay in cash, by way of exchange or in kind. Credit thus enables people to access products or services prior to having paid for them, usually at a cost represented by an interest rate. Where an item cannot be afforded from a single month's salary or income, credit enables people to distribute the cost over a number of months or even years. Unfortunately, we do not live in a purely cash economy and credit has become a staple commodity in almost all nations in the world. The credit industry forms an important and substantial sector of a country's economy and directly impacts the economic well-being of any nation.² Therefore the regulation of the consumer credit market is significant as it affects the performance and prosperity of this sector of the economy as well as consumers affected by it.

A contemporary study on the regulation of consumer credit law in South Africa, this work considers the particularities of breach of contract and the resultant remedies which the law, both common and legislative, provides. The thesis assesses the role and limitations of consumer credit law and policy, with specific focus on remedies available to the credit provider when the credit consumer is in breach of the credit agreement. The work considers whether regulation of recovery procedures after default by the debtor, through the National Credit Act 34 of 2005,³ are appropriate cures for certain communal 'pathologies' that plague contemporary, consumer societies, such as over-spending and over-indebtedness.⁴ Furthermore, the work explores whether the consumer credit

¹ *The Department of Trade and Industry South Africa's Consumer Credit Law Reform: Policy Framework for Consumer Credit* August 2004 4 (hereinafter '2004 Policy Framework').

² Howells and Weatherill *Consumer Protection Law* 1995 233.

³ Hereinafter 'the Act'.

⁴ 'Over-indebtedness' has become somewhat of a buzz word, or rather buzz problem throughout the world. This is a topic that has been debated by South African academics since prior to the promulgation of the Act. It is a theme that has been considered by economists and jurists the

laws (specifically those which regulate the remedies for breach of the credit agreement) now in place, are appositely progressive and effective, also by comparing the current law with the previous legislative dispensation as well as with regulation in foreign jurisdictions. The law and case law as reviewed and discussed in this work is as at October 2015. Although debt relief remedies which have been introduced by the National Credit Act may procedurally curtail the remedies available to a credit provider, these are beyond the scope of this discussion and have therefore been explained but not explored in this work.

world over. Prior to the Act, the courts had implemented many common law 'devices' in order to assist the over indebted consumer, the now abrogated *laesio enormis* rule and the common law *in duplum* rule are but two examples. As will become evident in this work, the efforts of the courts in the development of the common law in the area of consumer protection, more specifically credit consumer protection, does not fall by the way side due to the promulgation of the National Credit Act, rather, this body of law now applies to those credit agreements that fall outside the field of application of the Act and to aid, where applicable in the interpretation of the Act. Some examples of writings on the subject matter are: Renke S and Roestoff M 'Solving the Problem of Overspending by Individuals: International Guidelines' *Obiter* 2003 24 2, Renke S and Roestoff M 'The Consumer Credit Bill – A Solution to Over-Indebtedness?' 2005 68 *THRHR* 115, Renke S, Roestoff M and Bekink B 'New Legislation Measures in South Africa Aimed at Combating Over-indebtedness – Are the New Proposals Sufficient Under the Constitution and Law in General?' *IIR* 2006 91, Otto *The National Credit Act Explained* 2006 54, Naude T 'Law of Purchase and Sale: Over-indebtedness of Consumers' *ASSAL* 2006 244, Kelly-Louw M 'The Prevention and Alleviation of Consumer Over-indebtedness' 2008 *SA Merc LJ* 200, Otto JM 'Over-indebtedness and Applications for Debt Review in Terms of the National Credit Act: Consumers Beware! Firstrand Bank Ltd v Olivier' 2009 21 *SA Merc LJ* 272, Stoop PN 'South African Consumer Credit Policy Measures Indirectly Aimed at Preventing Consumer Over-Indebtedness' 2009 21 *SA Merc LJ* 365, *First Rand Bank v Olivier* 2009 3 SA 353 (SEL), *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP), Andanda P and Pretorius JT 'Miscellaneous Contracts (Loan): Over-indebtedness and the National Credit Act' *ASSAL* 2009 1108, Lotz DJ 'Law of Purchase and Sale: Over-indebtedness and Debt Counselling' *ASSAL* 2009 1004, Lotz DJ 'Law of Purchase and Sale: Declaratory Orders: Over-indebtedness and Reckless Credit' *ASSAL* 2009 1024, Stoop PN 'South African Consumer Credit Policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness' *SA Merc LJ* 2009 365, Van Heerden CM and Löt DJ 'Over-indebtedness and Discretion of the Court to Refer to Debt Counsellor' *THRHR* 73 2010 502, Munyai PS 'Higher Interest Rates and Over-indebtedness: A Comparison of Conventional and Islamic Banking' *SA Merc LJ* 2010 405, Koekemoer MM and Pretorius JT 'Miscellaneous Contracts (Loans: Credit Agreements): Reckless Credit and Over-indebtedness as Defences against Summary Judgments and Attachment Orders' *ASSAL* 2011 1114, Renke S 'Measures in South African Consumer Credit Legislation Aimed at the Prevention of Reckless Lending and Over-indebtedness: An Overview Against the Background of Recent Developments in the European Union' *THRHR* 2011 208, Roestoff M and Coetzee H 'Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward' 2012 24 *SA Merc LJ* 53, Koekemoer MM and Pretorius JT 'Miscellaneous Contracts (Loans: Credit Agreements): Debt Review: Discretion of the Court to Declare a Consumer Over-indebted and Relieve Over-indebtedness of a Consumer' *ASSAL* 2012 914, Swartz NP 'The Prevention of Over-indebtedness: The Problem of Interest and the Islamic Response' *AJBM* 2012 10099, Otto JM and Otto RL *The National Credit Act Explained* 2013 58, Mahomed I and Ngcobo 'Retrenching an Over-indebted Employee: Labour Law' *WP* 2013 64, Van Heerden CM and Roestoff M 'Over-indebtedness Under the National Credit Act as a *Bona Fida* Defence to Summary Judgment' *THRHR* 2014 276.

1.2. Setting the Scene

In order to consider the legal principles that govern breach of the credit agreement and the remedies available to the aggrieved party in such instances, it is necessary to have a command of certain basic *structural* terms, and an understanding of the framework and functioning of the legal system and sources of law that fashion the milieu of the National Credit Act.⁵ The following pages contain an examination of various terms that will inform the rest of the work.

The obvious starting point is to inspect the term and concept 'credit'.⁶ The following selected and germane definitions of 'credit' are taken from the Oxford dictionary:⁷

power to obtain goods etc. before payment [...]
on credit with an arrangement to pay later

'Credit' has also been defined as the trade practice where goods or services are supplied to a receiver and where the parties agree that the receiver is entitled to pay for these at a future date.⁸ The parties may agree that the receiver of credit

⁵ In effect, the milieu of any legislation.

⁶ Diemont and Aronstam posited that in a credit transaction the consumer is not in a position to pay cash and thus requires credit to trade or to live (*The Law of Credit Agreements and Hire-Purchase in South Africa* 1982 2). However, it would not be incorrect to say that a large sector of society use credit to live beyond their means, a 'keeping up with the Joneses syndrome' has developed, where spending on credit is often for luxury items and not for necessary ones. A case of purchasing 'wants' rather than 'needs'; an attitude with often negative repercussions. With the advent of the National Credit Act, this view point has been emphasised by the stringent onus now placed on the credit provider to ensure that the consumer is creditworthy and to avoid reckless lending. By implication the consumer who is borrowing has the means to subsist *and then some* in order to be able to afford the credit. This of course is only true for natural persons and private use of credit. The situation differs when one considers the 'trader' who obtains credit for the expansion of a business or in order to summit cash flow problems. The following extract from the 2004 Policy Framework outlines some reasons why people use credit: 'Consumers would generally not be able to purchase items such as houses or cars if it were not possible to obtain finance. In acquiring such items, it is necessary to be able to spread the payments over a number of months. For a huge number of people the same is true in respect of the purchase of a fridge, bed, radio or television. It is also true in respect of the cost of a university education and even true for a great many South Africans in respect of the cost of items such as school fees and school uniforms, or equipment or trading stock for a small business. Credit has the potential to unlock a diverse range of opportunities, some of which are economic, others educational and yet others simply to improve the 'standard of living' (2004 Policy Framework 4).

⁷ Thompson *The Pocket Oxford Dictionary of Current English* 8th edition 1992. Only the meanings relevant to the subject matter have been provided.

⁸ Walker *The Oxford Companion to Law* 1980 312. Tim Jenkins, with a drastic simplification, describes 'credit' as 'getting something and then paying for it later'. (<http://www.ces.org.za/docs/whatcredit.htm>) (7.02.08).

must pay an additional amount (in the form of interest or charges) for the right granted to him to pay the amount at a future date.⁹ At common law ‘credit’ or rather the granting of credit does not (necessarily) involve the obligation of the debtor to pay to the creditor some form of proceed¹⁰ for the deferral of payment.¹¹ The Act appears to have followed suit,¹² and defines ‘credit’, the noun, as:¹³

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

Both of the above definitions do not make provision for an extra charge or interest to be levied for the deferral of payment. Accordingly, it is submitted that ‘credit’ does not *per se* involve the levying of interest or a charge or fee for a deferred payment and therefore the Act does not alter the existing position in this regard. The common law does not prescribe interest as an *essentiale* of a

⁹ Grové and Jacobs *Basic Principles of Consumer Credit Law* 1993 1.

¹⁰ Often referred to as the opportunity cost of the credit provider.

¹¹ Directive 2008/28/EC of the European Parliament and of the Council of 23 April 2008 (hereinafter the ‘European Directive 2008’) was designed to harmonise the regulation of credit across Europe and to increase consumer protection. Member states were obliged to transpose the Directive by 11 June 2010. The part of the Directive which relates specifically to credit agreements, excludes from its ambit credit agreements where credit is granted free of interest and without any other charges (section 2 (2)(f)). For a further discussion cf paragraph 4.5 *infra*.

¹² Neither the Credit Agreements Act nor the Usury Act defined the word ‘credit’ and thus the common law definition was used.

¹³ Section 3(c) of the European Directive 2008, defines ‘credit’ as part of the definition of a ‘credit agreement’ as follows: “Credit agreement’ means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of installments. Section 1. The English Consumer Credit Act 1974 as amended by the 2006 Act, defines a ‘credit’ as: ‘(1) [...] a cash loan, and any other form of financial accommodation; (2) where credit is provided otherwise than in sterling it shall be treated for the purpose of this Act as provided in sterling of an equivalent amount; (3) without prejudice to the generality of subsection (1), the person by whom goods are bailed or (in Scotland) hired to an individual under a hire-purchase agreement shall be taken to provide him with fixed-sum credit to finance the transaction of an amount equal to the total price of the goods less the aggregate of the deposit (if any) and the total charge for credit; (4) for the purposes of this Act, an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment’ (section 9). The definition of ‘consumer credit’ is defined by Italian legislation (clause 121 of *Decreto legislativo* 93/385, as read with clauses 40-43 of *Decreto legislativo* 05/206) as: ‘consisting in the concession of credit, through delay of payment, through finance or analogous financial facilitation, in favour of a consumer. The ‘concession’ or ‘conceding’ (in more familiar South African terminology – ‘granting’) of credit is done by a commercial entity, for example banks, financial intermediaries, bodies or persons authorized to sell goods or services with payment being delayed (Gazzoni *Manuale di Diritto Privato* 2009 1227).

money loan; it is rather an *incidentale* of the agreement. However, it is submitted that it is unusual, in today's entrepreneurial economic environment, that payment is deferred without the credit grantor requiring a monetary *quid pro quo* from the receiver.¹⁴

'Lending', on the other hand, can be defined as permitting another the use of something, in the expectation that it will be returned. In connection with 'lending' of money, some compensation is typically expected for the opportunity cost of the lender for the period during which he is without the money that he has advanced.¹⁵ This compensation is commonly requested in the form of interest. Accordingly, it would be correct to say that one may grant credit (the noun) or lend money. Thus one may grant interest free loans, according to these definitions, but 'lending' money would imply an interest component.¹⁶

The expectation that money lent will be returned, has been defined by English writers¹⁷ as a fragile one. The problem of non-payment, however, is not a phenomenon pertaining only to the northern continents, and as the discourse progresses it will become patent how necessary it becomes in the credit relationship to have plain and unambiguous rules regulating the procedure after there has been a breach of the credit agreement.¹⁸

¹⁴ This can be seen from the use of credit in history, cf paragraph 2.1 for a discussion.

¹⁵ Thompson *The Pocket Oxford Dictionary* Oxford 1992.

¹⁶ Admittedly, the distinction is academic and refers (really) more to the common usage of the word 'lending'. The parties should, however, agree on the rate. It does not flow automatically from the mere agreement to lend and borrow.

¹⁷ The description was made with reference to bad debts in the English lending industry (Turner *Personal Lending and Mortgages* 2001 1).

¹⁸ The common law principle underlying all contracts - *pacta sunt servanda* - that agreements must be kept and that accordingly, the courts will enforce contracts is consistent with the constitutional values of dignity and autonomy (*Bills of Rights Compendium* 3H7-3H9, *Brisley v Drotzky* 2002 4 SA 1 SCA, *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 SCA 21, *Barkhuizen v Napier* 2007 5 SA 323 CC 57 & 87, *Den Braven SA (Pty) Ltd v Pillay* 2008 6 SA 229 D 32-33, *Nyandeni Local Municipality v Hlazo* 2010 4 SA 261 ECM 92, *Bredenkamp v Standard Bank of South Africa* 2010 4 SA 468 SCA 37 and Christie RH and Bradfield GB *The Law of Contract in South Africa* 2011 12). This principle also instils confidence in the contracting arena, that is, that parties can expect to have their contracts enforced and it is a principle that cannot be overlooked, even when applying the National Credit Act. This comment is made with specific reference to the sections of the Act which authorise the courts to suspend the re-payment commitments of a consumer to a provider (sections 83 and 84) or to re-arrange a consumer's obligations (sections 87 and 88). It is to be noted that these extraordinary powers of the courts do not allow derogation from the principle that agreements must be kept – even if the obligation may now take a little longer to fulfil.

In the Credit Agreements Act¹⁹ as well as in the Usury Act²⁰ the term ‘credit grantor’ and ‘credit receiver’ were employed. However, these terms were defined differently in each of those acts.²¹ The National Credit Act has now changed the terminology - the term used to describe a creditor in a credit agreement is ‘credit provider’, while the term for a debtor is ‘consumer’. The Act defines a ‘credit provider’ in respect of a credit agreement to which the Act applies as:²²

¹⁹ 74 of 1980 (hereinafter the ‘Credit Agreements Act’).

²⁰ 73 of 1968 (hereinafter the ‘Usury Act’).

²¹ The Credit Agreements Act defined a ‘credit grantor’ as ‘(a) a seller, a dealer or a person who renders a service, in terms of a credit transaction, and includes a person to whom the rights or the rights and obligations of any such seller or any such person so rendering a service have passed by assignment, cession, delegation or otherwise; (b) a lessor in terms of a leasing transaction, and includes a person to whom the rights and obligations of any such lessor have passed by assignment, cession, delegation or otherwise’. In the Usury Act ‘credit grantor’ meant ‘any person who is granting or has granted credit to a prospective credit receiver or to a credit receiver in terms of a credit transaction, or any person to whom, whether by delegation, cession or otherwise, the rights or the rights and obligations of a credit grantor in respect of a credit transaction have passed’. The definition of ‘credit receiver’ in the Credit Agreements Act was (a) any purchaser, or a person to whom a service is rendered, in terms of a credit transaction, and includes a person to whom the rights or the rights and obligations of any such purchaser or any person to whom a service is so rendered, have passed by assignment, cession, delegation or otherwise; (b) a lessee in terms of a leasing transaction, and includes a person to whom the rights or the rights and obligations of any such lessee have passed by assignment, cession, delegation or otherwise’. In the Usury Act ‘credit receiver’ was ‘any person to whom a credit grantor ha[d] granted credit in terms of a credit transaction, or any person to whom, whether by delegation, cession or otherwise, the rights and obligations of a credit receiver in respect of a credit transaction ha[d] passed’.

²² Section 1 of the Act. Besides the ‘arm’s length’ limitation and certain monetary caps where the consumer to a credit agreement is a juristic person, as indicated in section 4, the Act applies to almost all credit transactions in South Africa – a very different approach from the previous dispensation which was a bi-legislative system only governing transactions that involved a maximum amount of R500 000 or less (cf paragraph 4.4.3 *infra* for a detailed discussion on the application of the Act). The qualifier, that is that the Act applies to *almost* all credit transactions in South Africa, is to be noted. The Act does not apply to a large number of credit transactions (cf clause 4.4.3 *infra* for a discussion on the type of transaction excluded from the Act). The net effect of these exclusions is that there are certain credit transactions not governed by the Act and with the Usury and Credit Agreements Acts having been repealed, it is the common law that will apply to such transactions. The common law *in duplum* rule, for example, will apply as opposed to the statutory *in duplum* rule, with regards limitation of interest. The Act refers to transactions which deal at arm’s length and the Act does not apply to credit agreements between parties who are not dealing at arm’s length (cf. section 4 of the Act). Section 4 (2)(1)(b) defines what is considered in terms of the Act for parties not to be dealing at arm’s length. This definition incorporates a far wider concept than merely familial ties, and includes shareholder loans or other credit agreements where the consumer is a juristic person and the credit provider is a person that has a controlling interest in that juristic person; a loan to a shareholder or other credit agreement where the consumer has a controlling interest in the juristic person who takes on the role of credit provider; credit agreements between family members or natural persons who are co-dependent on each other or where one person is dependent on the other; the definition comprises any other arrangement where each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or a transaction held in law to be between parties who are not dealing at arm’s length.

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

It is interesting to note that the legislature elected to use the word ‘consumer’ instead of ‘receiver’. The word ‘consumer’ in contemporary global economics is somewhat of a ‘loaded’ term, in that protecting ‘consumers’ of credit, goods or services has become a very central theme in much of the developed world today. European legal science, for example, with its cross border discussions has placed much focus on consumer law. According to Grundmann and Schauer²³ consumer contract law has been a powerful – if not the most powerful – driving force in the development of the *Acquis Communautaire*²⁴ in contract law.

‘Consumerism’,²⁵ ‘consumer’ and ‘consumer society’ are not novel terms. Many legal historians have over the past few decades debated the origins or ‘birth’ of the consumer society,²⁶ but it is contemporary problems that face society today

²³ *The Architecture of European Codes and Contract Law* 2006 5.

²⁴ The body of harmonised contract law in Europe.

²⁵ An interesting economic concept has developed in opposition to consumerism, which is ‘enoughism’. ‘Enoughism’ is the theory that there is a point where consumers possess everything they need, and buying more actually makes their lives worse off. ‘Enoughism’ emphasizes less spending and more restraint in buying behaviour of consumers (Naish J *Enough: Breaking Free from the World of More* 2008). The fact that such a concept as ‘enoughism’ has been written about, demonstrates the state of society today – a society based on material acquirements, where purchasing consumer goods trumps common sense and people spend more than they have, to acquire goods that they don’t actually need. In writer’s opinion a conceptual corroboration for regulating the credit industry.

²⁶ Ramsay I *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* 2007 2. The subject of ‘consumerism’, albeit with mature roots, has been described as a creature of the second half of the twentieth century (Woodroffe G and Lowe R *Woodroffe and Lowe’s Consumer Law and Practice* 2007 1). The term ‘consumer credit’, however, can be stemmed

which necessitate modern sophisticated solutions. McQuoid-Mason²⁷ stated that in a 'broad sense everyone in society is a consumer'. In the narrow sense, he defined a 'consumer' as 'any person who buys or hires goods or services, or any person who uses such goods or services'. Similarly, the 'consumer' was characterised by the Molony Committee on Consumer Protection²⁸ as 'everybody all the time'.

While on a broader scale the 'consumer' is indeed 'everybody all the time' the focus of this thesis is 'credit', therefore a narrower view of 'consumer' is adopted in this work and a 'consumer' will be, as in the Act, one who uses credit, that is a debtor who uses capital of another and undertakes to pay at a later stage or one who buys goods or services with an arrangement to defer payment.

Where the word 'consumer' was used in relation to credit agreements under the Credit Agreements Act the courts restricted the meaning of 'consumer' to transactions where credit receivers would actually make use of the goods and not sell or lease them on.²⁹ The National Credit Act changes the law in this

back to an era when humans had moved just beyond the nomadic hunter-gatherer stage to discover the advantages of accumulation of capital in the form of livestock, tools and seed through the art of farming. Loans became payable in grain, animal or metal, with the earliest historic interest rates ranging from 20-50% per annum and later settling on 33% for loans on grain and 20-25% for loans on silver. These types of archaic loans were made for two reasons either to invest in future production or for non-productive purposes, the latter known as 'consumer credit' (Peterson CL 'Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act' *Florida Law Review* 2003 808 809).

²⁷ *Consumer Law in South Africa* 1997 1.

²⁸ Board of Trade *Final Report of the Committee on Consumer Protection* (Molony Committee) Cmnd 1781/1962 (hereinafter the 'Molony Report'). Clause 3 of the Italian Consumer Code, which deals with all aspects of consumer protection and not just credit, broadly defines the 'consumer' as a natural person who acts for reasons that can be defined as being outside the scope of his/her actual professional activity or trade'. This is writers own translation from the Italian: 'la persona fisica che [...] agisce per scopi che possono considerarsi estranei alla propria attivita professionale'.

²⁹ Cloete AJ in *Standard Credit Corporation Ltd v Strydom* 1991 3 SA 644 (W) 651: '[I]n my view, the credit receiver ceases to be a consumer (as opposed to a trader) where he does not intend to use the goods himself. If he sells or leases them then he becomes a trader in them albeit in respect of one isolated transaction'. This is often the attitude taken by jurists – that is, to restrict the meaning of 'consumer' to one that actually *consumes* and not to one who onward sells or rents or leases. Unfortunately, to limit the word in such a manner would exclude many small to medium sized businesses; which, much like natural persons, require protection of their rights against exploitation by larger, better equipped credit corporations (providers). It appears, however, that the National Credit Act has attempted to address the issue raised hereinabove, of the necessity to extend protection just beyond the consumer as a natural person (or non-trader) to the consumer as a small juristic entity, by having the Act cover credit transactions where the consumer is a juristic entity whose asset value and annual turnover is less than R1 000 000 per

respect, as seen from the definition of ‘consumer’, as such a consumer, in respect of a credit agreement to which the Act applies, comprises the following persons:³⁰

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

It was necessary to encompass the wide ranging definitions of ‘credit provider’ and ‘consumer’ in the Act due to the fact that the Act covers a very broad spectrum of transactions when referring to ‘credit agreement’. The consumer could be anyone from a person applying for an overdraft facility to a company purchasing a vehicle, albeit certain credit transactions are not covered by the Act.³¹ While the Act is applicable to natural persons that enter into credit agreements – it must be borne in mind that it applies to juristic persons, as consumers, on a limited basis.³²

annum. Interestingly, however, the most recent 2008 European Directive on credit limits the definition of *consumer* to natural persons who, in transactions covered by the Directive, act for purposes which are outside their trade, business or profession (section 3).

³⁰ Section 1 of the Act.

³¹ These limitations are discussed generally in paragraph 4.4.3 *infra*.

³² Section 4: ‘Application of the Act,’ read together with section 5 and 6 of the Act. Otto and Otto (2013 1) accordingly and correctly state that a consumer in the field of credit legislation is normally an individual or a small juristic person. A ‘juristic person’ is defined in the Act as: ‘a partnership, association or other body of persons corporate or unincorporated or a trust if (a) there are three or more individual trustees or (b) the trustee itself is a juristic person’. A *stokvel* is not a juristic person. The definition of ‘juristic person’ as defined by the Act is important because it differs from the common law understanding of ‘juristic person’. While the Act proposes to define a ‘juristic person’ for purposes of the Act, it cannot be that this definition will not influence or at least conflict with the generally accepted definition of juristic person in South African law. The effects of such conflict will have to be seen when the matter comes before court. The application and transactions excluded from the ambit of the Act are discussed in greater detail in paragraph 4.4.3.

It is submitted that the term ‘consumer protection’, however, is somewhat of a misnomer. The term tends to be consumer focused, whereas the actual regulatory exercise (in the form of credit law, whether common or codified) concerns the parameters that manage, limit and regulate the *relationship* between consumer and lender.³³ The concept initially developed from the need to protect perceptibly vulnerable consumers against exploitation by lenders, who are in a better position to determine the contractual terms of the loans.³⁴ The following paragraph from Grové and Otto³⁵ touches on some practical issues:

The spectacular growth in consumer credit during the last thirty years has, no doubt, contributed to a general increase in the living standards of those people who were in a position to obtain it. It did, however, give rise also to a host of problems on the legal, social and economic fronts. Consumer-credit legislation cannot solve all these problems. It can, for instance, not solve problems that result from an injudicious utilization of credit. It does not, furthermore, provide any solution for persons who are unable to meet their credit commitments through unemployment, deficiency of income and ill health.³⁶ Credit legislation can, however, provide an answer where exploitation occurs. It can be used to level a possible imbalance which may exist between the bargaining power of credit consumers and credit grantors, standardize the way in which credit information is disseminated, provide credit consumers with statutory rights in the formation and performance of a contract and limit a creditor’s rights and remedies.

³³ The following definition of credit legislation is in fact consumer focused: ‘[c]redit legislation is the means by which people, who borrow money, buy or hire goods or who obtain services on instalments, are usually protected’ (Grové NJ and Otto JM *Basic Principles of Consumer Credit Law* 2002 2). Definitions of ‘consumers’ or ‘consumer transactions’ cannot be described as universal. Epstein, a Professor of Law in Texas, defines a ‘consumer transaction’ as one ‘in which a man and/or woman borrows or buys for personal or household purposes’. This completely excludes the small business credit borrower, envisioned and now protected by the South African legislature. In a multicultural business environment like South Africa, it is submitted that the small-business practitioner, regardless of the vehicle in which he operates his business, should receive protection from the legislature with regards his credit transactions. While registering a company is a relatively simple and inexpensive process – the temptation, or rather need, to enter into credit transactions is often unavoidable due to the nature of cash flow issues in an active business, the consequences of which are not always simplistic. These may leave the small businessman exposed to perils that he may neither foresee or necessarily understand. It is submitted that the approach by the legislature to protect consumers by the amount of their net worth as opposed to the method through which they operate (be it in their personal capacity or in the form of a juristic entity) is the correct approach. The Act is, however, not consistent in this regard as some protections provided to natural persons are not afforded to juristic entities (cf section 6 of the Act).

³⁴ Often found in the form of standard form contracts.

³⁵ 2002 2.

³⁶ However, many contemporary studies, especially in Europe, focused on over-indebtedness, call upon new legislation or at least policy, to be formulated in such a way that such occurrences are to be considered when looking at a debtor’s financial position and ability to meet his commitments. The Act appears to be an attempt by the legislature to align the credit laws of South Africa with a more contemporary and global ideology.

As indicated earlier, the thesis involves an investigation of the methods of recovery when a receiver of credit is in breach of the contract. *Mora* is one of the many ways in which a credit consumer may breach the contract which he has entered into in order to obtain goods, services or loans of money while the credit provider grants him a deferral of the payment thereof, often at a cost to the consumer. *Mora* can be defined as ‘breach of the time factor of a promise,’ and also ‘delay without lawful excuse, of performance of a contractual duty; in other words *mora* is the wrongful failure to perform timeously’.³⁷ Christie³⁸ gives a more comprehensive definition of *mora*:

Time is an element common to all contracts, and to decide the consequences of failure to perform a contractual obligation within the appropriate time our law employs the concept of *mora*. A debtor is *in mora* in respect of a particular obligation when three elements are present. First, the obligation must be enforceable against him. If he would have a good defence to any action that might be brought against him to enforce the obligation he is not *in mora* (D12 1 40; D45 1 127; D50 17 53; D50 17 88). Second, performance must be due. [...] Third, the debtor must be or be deemed to be aware of the nature of the performance required of him and the fact that it is due. It is not necessary to show that his default is wilful or negligent. His ignorance will excuse him only if it is both *bona fide* and reasonable.

While this study begins with the common law, an examination of the Act is the pivotal point, as the credit contract and credit relationship between credit provider and consumer is dominated by this legislation. The field of consumer protection, its significance, and more importantly, the debate over how it should most effectively be regulated has been a much-deliberated question by jurists, both academic and practising. Furthermore this discourse is not only of national interest but also of international relevance. After a long period of prosperity, economic growth and the globalization of the credit markets, the trend of consumer credit binges have shown unmistakable signs of economic plight,³⁹ directing further attention to credit legislation and policy.

³⁷ Mulligan GA ‘*Mora*’ 1952 SALJ 276 278 and Kerr AJ *The Principles of the Law of Contract* 2002 615.

³⁸ Christie and Bradfield 2011 519.

³⁹ The European Sovereign Debt Crisis being a case in point, a period of time in which several European countries faced the collapse of financial institutions, high government debt and rapidly rising bond yield spreads in government securities. The European Sovereign Debt Crisis was seen to start in 2008, with the collapse of Iceland’s banking system and spread primarily to Greece, Ireland and Portugal in 2009 (Investopedia.com/terms/e/European-sovereign-debt-crisis.asp) (1.12.2014). European governments assisted banks in order to avoid a complete collapse of the banking system. 1.6 Trillion euros (an equivalent of 13% of the European Union’s

The methods of recovery upon breach of the credit contract, which are examined in this thesis, will not be looked at in isolation of the Act but rather within the common law setting, the previous legislative dispensation and comparatively with various foreign jurisdictions' approach in this area; namely, the European Union,⁴⁰ England and Italy.

It is submitted that legislation should not over-protect the consumer and must put the need to respect the *pacta sunt servanda* rule into perspective. Thus the legislature need consider the effects the credit industry has on the economy and that the withdrawal of lending investors due to overbearing legislation would have detrimental effects on the credit market.⁴¹ Overly zealous consumer protective

annual gross domestic profit) were committed between 2008 and 2011. The European Union also launched a Europe-wide recovery programme to safeguard jobs and social protection levels and to support economic investment. As part of such reforms, three European supervisory bodies were set up to help coordinate the work of national regulators and ensure European-level rules are applied consistently, namely, the European Banking Authority – which deals with the supervision of the recapitalisation of banks; the European Securities and Markets Authority – which deals with the supervision of capital markets and carries out direct supervision with regard to credit rating agencies and trade repositories and the European Insurance and Occupational Pensions Authority – which deals with insurance supervision (cc.europa.eu/economy-finance/explained/the-financial-and-economic-crisis/responding-to-the-financial-crisis/index-en.htm) (1.12.2014). The United States' housing bubble also being, a prime example, this economic bubble affected many parts of the United States housing market. Housing prices peaked in early 2006, started to decline in 2006 and 2007, and reached new lows in 2012. (<http://www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff--p-us---->) (19.03.2013). A credit crisis resulted from the bursting of the housing bubble, this was viewed as 'the primary cause' of the 2007–2009 recession in the United States (Holt J 'A Summary of the Primary Causes of the Housing Bubble and the Resulting Credit Crisis: A Non-Technical Paper' *The Journal of Business Inquiry* 2009 8 120).

⁴⁰ The European Union is examined in the thesis for two reasons, firstly because European countries are more and more attempting to resolve their individual national problems from a regional perspective, secondly because Europe is uniting on a mercantile level as a tactic to solution finding. Africa can learn some of these skills or approaches and adapt them in order to develop its own regional philosophy and jurisprudence.

⁴¹ In South Africa, when the National Credit Act was promulgated the reaction of the lending market was not at all positive. The following are a few extracts taken from media publications, which demonstrate an apprehensive public rejoinder: 'Foschini Group – which owns @home and Foschini fashion stores, as well as operating an external credit granting division RCS – cites the Act as an area of concern in its 2006 annual report'.

(<http://www.itweb.co.za/financial/2007/0701261035.asp?S=FinancialandA=FINO=FRGN> (26.01.07)); 'However, the National Credit Act imposes new and onerous conditions on credit providers for credit insurance'.

(<http://www.netsassets.co.za/insurance/insurance.asp?websiteContentItemID=62954> (8.02.07)); 'Finance houses, mortgage providers, in fact all companies and individuals that provide credit, are potentially facing an information overload due to significant changes in the regulatory and administrative frameworks within which they operate as a ready-to-be promulgated National Credit Act' (<http://www.lorge.co.za/Press%20Office/National%20Credit%20Act.htm> (8.02.07)).

practices could leave borrowers with a limited selection of lenders, offering credit at exceedingly high rates of interest. A fine balance needs to be struck between upfront or pre-contractual protection of the consumer and after the fact protection.⁴² An exploration of the effects of the Act in this regard, albeit limited to the fields of breach and recovery, will also be conducted.

1.3. Purpose of the Study

The study was conducted in order to provide careful and what will hopefully be useful insight to the interpretation of the National Credit Act and more specifically the remedies available to the credit provider when the consumer is in breach. The Act is relatively new and replaces legislation which had been in operation for upward of thirty years. It is also a very modern piece of legislation, in that some of the rules that it imposes and regulatory and judicial bodies that it creates are very contemporary and on par with international developments, yet fit into the South African setting because of the need to protect a majority indigent contingency of the population, a medium sized middle class and a small echelon of wealthy people. It is submitted that the most vulnerable group of the three is the middle class, at least the lower middle class that are in danger of losing their homes and livelihoods if protective implements, guarding against abuse, are not activated in their favour. The Act is primarily a consumer protective device; this is evident from its preamble and section 3 of the Act. The Courts have also understood the philosophy behind the Act.⁴³

It has previously been submitted that a balance between protecting the rights of the credit provider and the rights of the credit consumer is necessary in order to

⁴² The Act appears to have attempted this balance by placing stringent onuses on credit providers to know their consumers and assess their consumers' credit worthiness prior to supplying credit (or be accused and face the consequences of reckless lending) and the relief that a consumer may seek if declaring himself over-indebted. The former is an example of pre-contractual legislative protection and the latter one of post-contractual protection or relief.

⁴³ Cf *Absa Bank Ltd v Myburgh* 2009 3 SA 340 (T) per Bertelsmann J (clause 24): 'The Act is the latest in the various attempts by the Legislature to put enactments in place that regulate the granting of credit to the consumer and to restrict the financial gains that credit providers may garner from this enterprise that has often been more than a little controversial, it replaces and repeals the Usury Act and the Credit Agreements Act and creates a new dispensation that is intended to ensure that the consumer is effectively protected without restricting access to affordable credit provided and obtained in a responsible fashion'.

promote a healthy and poised economy, without stifling trade. It was in this vein, that the decision was made to investigate what could possibly be dubbed the heart of the credit relationship. That is, when the credit agreement is breached and the rights of the credit provider are pitted against the rights of the credit consumer – the thesis considers whether the Act protects and maintains equilibrium between both the parties. An examination of the earlier dispensation⁴⁴ and an inspection of the methods of the existing dispensation are conducted⁴⁵ and finally conclusions are drawn as to whether the Act managed a calibrated regulation of the consequences of the remedies for breach of the credit agreement.

1.4. Methodology

The thesis examines the remedies that are available to the credit provider once a credit consumer has breached the credit agreement. The discussion focuses specifically on the credit agreements that fall within the scope of the National Credit Act. An exposition of what therefore does fall within the ambit of the Act was necessary.⁴⁶ Despite the relatively wide scope of the Act, that is relative to its predecessor legislation, the Credit Agreements Act and the Usury Act and Exemption Notice,⁴⁷ there are quite a variety of credit agreements that do not fall within its range. While the nature of the contract together with breach and recovery, in terms of the common law of South Africa are examined as an introduction to the remedies available in terms of the Act, the remedies for breach of the credit agreement that fall beyond the reaches of the Act have not been examined.

The historical development of the Act is examined and a comparison with other jurisdictions and their approach to remedies for breach of the credit agreement are investigated to provide not only historical background but useful foreign sources for the development of the legislation. Not only is the history of the Act

⁴⁴ Chapter 4 paragraphs 4.2 and 4.3.

⁴⁵ In paragraph 4.4, Chapters 5, and 6.

⁴⁶ Cf paragraph 4.4.4 *infra*.

⁴⁷ Government Gazette no 713 of 1999.

examined through an analyses of its direct predecessors (Credit Agreements Act and Usury Act) but incorporated in the study is a look at the history of credit, interest and credit agreements, as these developed in South Africa and in the rest of the world.⁴⁸

The foreign comparative sections of the thesis are based on three aspects. Consideration of the European Union; this is an examination of a somewhat hybrid system. It has been dubbed a 'hybrid' jurisdiction for the obvious reason that the European Union is not a single country but a conglomerate of countries which have endeavoured or are endeavouring to harmonise their laws to facilitate, *inter alia*, cross border trade. Without an understanding of the evolution of consumer credit in Europe, it is submitted that any other examination of a European jurisdiction would be rendered more difficult given the influence of the European Union Directives, *inter alia*, in the credit field. General principles of European laws which form the basis for legislation may affect the conditions under which credit institutions do business.⁴⁹ The European Union has become increasingly active in the area of Consumer Protection, some legislation focused on consumer credit, such as the Consumer Credit Directive⁵⁰ and other is of more general influence, but nonetheless important to consumer credit transactions, such as for example, the Unfair Contract Terms Directive.⁵¹ Such legislation not only influences cross-border transactions but changes the legal landscape within which purely domestic transactions take place.⁵² Thus when looking at any European country, cognisance must be taken of the relevant national legislation but one needs to be familiar with the underlying European Union laws and with both the general rules and specific Directives, as these may affect the interpretation and effect of national law.⁵³

⁴⁸ As so fittingly put by Holmes: 'The life of the law has not been logic: it has been experience' (*The Common Law* 1881 from Zweigert K and Kötz H *Introduction to Comparative Law* 1998 181).

⁴⁹ Rott P in Goode RM *Consumer Credit Law and Practice* 2014 paragraph 121.1.

⁵⁰ Directive 87/102/EEC (OJ L42 12.2. 1987 p 48) and its successor, Directive 93/13/EEC (OJ L95 27.3. 1993 p 66).

⁵¹ Directive 93/13/ECC OJ L95 27.3. 1993 p 29.

⁵² Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 121.1.

⁵³ *Ibid.*

The second jurisdiction which has been examined, is that of England, because its credit legislation is so similar in nature and need, to that of South Africa. However, it must be mentioned that South Africa's unique first-world/third-world impasse requires particular attention. Furthermore, England's jurisdiction was of interest because in 2006 it amended its credit legislation, which had been in effect since 1974, a similar progression to the credit legislation in South Africa. Finally, the Italian jurisdiction was examined because the civilian tradition is so starkly different to the South African one and insight into such a different system may assist with innovative thinking both in the interpretation and development of our system. Furthermore, Italian credit law was of interest precisely because there is very little literature in South Africa that examines the civilian countries approach to credit.⁵⁴ Lastly, while the comparative sections are of valuable influence because of the global tendency towards harmonisation,⁵⁵ an in depth comparative study is beyond the scope of this work and more specialised comparative or specific studies will have to be referred to for greater detail. However, a differentiation must at this early stage be drawn between the European countries examined in this work and South Africa in terms of legal framework. That is the distinction of the overarching umbrella influence of European Union law. South African jurists are not obliged to take into

⁵⁴ Interestingly, the four systems, South Africa, the European Union, England and Italy derive and therefore bring to the fore the various roots of modern jurisdictions, namely, Roman law, civilian tradition and common law.

⁵⁵ Europe is the leader in this field, but it is submitted that Africa will closely follow suit, and has already started making huge strides which are indicative of a future African union. Formation of SADC and OHADA, are prime examples, SADC is the Southern African Development Community started as *Frontline States* whose objective was political liberation of Southern Africa. SADC was preceded by the Southern African Development Coordination Conference (SADCC), which was formed in Zambia in April 1980 with the adoption of the Lusaka Declaration (Southern Africa: Towards Economic Liberation). The formation of SADCC was the culmination of a long process of consultations by the leaders of the then only majority ruled countries of Southern Africa, thus Angola, Botswana, Lesotho, Mozambique, Swaziland, United Republic of Tanzania and Zambia, working together as Frontline States. In May 1979 consultations were held between Ministers of Foreign Affairs and Ministers responsible for Economic Development in Botswana. Subsequently a meeting was held in Tanzania in July 1979 which led to the establishment of SADCC. On August 17, 1992, at their Summit held in Windhoek, Namibia, the Heads of State and Government signed the SADC Treaty and Declaration that effectively transformed the Southern African Development Coordination Conference (SADCC) into the Southern African Development Community (SADC) The objective also shifted to include economic integration following the independence of the rest of the Southern African countries (<http://www.sadc.int/>) (4.03.2011). OHADA is the French acronym for '*Organisation pour l'Harmonisation du Droit des Affaires en Afrique*' translated in English as the 'Organization for the Harmonisation of Business Law in Africa'. It is an organisation created on October 17, 1993 in Port Louis (Mauritius) (<http://www.ohada.com>) (4.03.2011).

consideration any generalised legislation when interpreting the National Credit Act or common law in relation to credit. By generalised legislation one intends legislation which must, by its very nature, be based on fairly general principles so as to be suitable to many different jurisdictions, like European Union law and legislation. The South African lawyer's perspective can thus be described as being more insular, in that generally his considerations will be focussed on internal dynamics, such as past legislation and case law and (obviously) current legislation and common law. That is not to say he need not take cognisance of foreign legislation and rulings or where relevant and where applicable, international law; simply that his concerns are perhaps more sheltered when working with the credit law paradigms.

The examination of the remedies for breach of the credit agreement led to a need to scrutinise a number of other rules which relate to the regulation of breach of contract and remedies therefor. Some of these rules are imposed by legislation such as the Conventional Penalties Act 15 of 1962⁵⁶ which regulates the penalty provisions in contracts; while some such other rules are found within the ambit of the common law, such as those relating to acceleration clauses. Furthermore, while specific credit agreements, for example the sale of land on instalments, are regulated by other legislation, such as the Alienation of Land Act 68 of 1981,⁵⁷ yet in some areas overlap with the Act, these have not been dealt with in this thesis.

Legislation and common law were not the only sources used in the research and writing of this thesis; besides extensive reliance on academic writings, such as books and journals referenced and national and international publications; close attention was paid to research reports directly relevant to the National Credit Act and those that have been carried out in other jurisdictions mandated by their respective governments but which, it is submitted, lend to an international body of knowledge of consumer credit.

⁵⁶ Hereinafter the 'Conventional Penalties Act'.

⁵⁷ Hereinafter the 'Alienation of Land Act'.

As mentioned in the previous paragraph, data or information was obtained largely from academic writings, these found in their usual abodes – academic libraries or retailers of academic books and journals. The internet also played a very significant and reliable role in gathering information. Many government-mandated reports both national and international were accessed via the internet; as well as many articles written in relation to the Act. The examination of legislation and case law were obviously the spring board for every section and to mention their patent importance seems almost superfluous.

Finally, besides heavy reliance on the sources mentioned above, careful thought was given to the design and implementation of the thesis, and the relevance of its placement within the context of the field of study. Given that the National Credit Act is a relatively youthful piece of legislation, the area for contribution of original interpretation and understanding was perhaps fortuitously generous, however, the body of knowledge that has come forward from the courts and academic writers' interpretation of the old credit regime and contemporary one during this work, formed, without doubt, another indispensable tool.

The exercise of interpreting legislation through its purpose and objects by including social and political directions is known as the 'text-in-context approach' to interpretation.⁵⁸ The forerunner to this approach is known as the 'mischief rule',⁵⁹ which acknowledges the application of external aids for example the common law prior to the enactment of the legislation, defects in the law not provided for by the common law, new remedies and solutions provided by the legislature and the true reason for the remedies.⁶⁰ The mischief rule also looks at the historical context of particular legislation to place it in its proper perspective.⁶¹ The text-in-context approach provides a balance between grammatical and overall contextual meaning.⁶² Botha⁶³ submits that without taking the object and scope of the legislation, that is its contextual meaning into

⁵⁸ Du Plessis LM *The Interpretation of Statutes* 2002 96.

⁵⁹ This rule was laid down by Lord Coke in *Heydon's Case* 1584 3 Co Rep 7a 76 ER 637.

⁶⁰ Botha C *Statutory Interpretation An Introduction for Students* 2013 97.

⁶¹ Botha 2013 152.

⁶² Botha 2013 98.

⁶³ *Ibid.*

account, the interpretation process cannot be complete. The methodology adopted in understanding the remedies supplied to the credit provider in the event of breach of contract by the consumer by the National Credit Act, were indeed based on the text-in-context approach to interpretation together with the mischief rule.

1.5. Comparative Study

Studying and comparing jurisdictional systems is becoming, in today's global economy, almost a necessity. The following view posited by Lena and Mattei⁶⁴ is appropriate:

In the increasingly global environment of legal practice, there is a basic need to know something about the legal systems of different countries. International practise requires an essential understanding of the legal minds of colleagues operating outside of one's own legal system.

Peterson⁶⁵, discussing the two goals his article proposed to achieve – but which can be used as a concept base for comparative studies, remarks as follows:

The first is to provide a new conceptual tool for organizing discussions of consumer credit in general, and high-cost consumer credit in particular. The world's past civilizations have employed only relatively few types of strategies for addressing this fundamental dilemma. Unfortunately, historians - and in turn policymakers and legal practitioners – have not recognized the similarities between these strategies because most historical treatments focus either on one culture or one strategy. When we step back and paint with the broader brush strokes of historical case studies, patterns of common social responses to consumer credit problems emerge. These patterns are important both because they provide a new way of organizing discussions about consumer credit policy and because they shed contextual light on the limitations of our current strategies.

In a study of comparative law, Zweigert and Kötz,⁶⁶ initially define comparative law as 'an intellectual activity with law as its object and comparison as its process,' they continue to elaborate '[n]ow comparisons can be made between different rules in a single legal system, [...]. [However,] [i]f this were all that were meant by comparative law, it would be hard to see how it differed from what

⁶⁴ *Introduction to Italian Law* 2002 ix.

⁶⁵ *2003 Florida Law Review* 813.

⁶⁶ Zweigert and Kötz 1998 2.

lawyers normally do: lawyers constantly have to juxtapose and harmonize the rules of their own system, that is, compare them, before they can reach any practical decision or theoretical conclusion. Since this is characteristic of every national system of law, 'comparative law' must mean more than appears on the surface. The extra dimension is that of internationalism. Thus 'comparative law' is the comparison of the different legal systems of the world'. Comparative lawyers remain convinced that comparative law is both useful and necessary and that 'by the international exchanges which it requires, comparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma, [affording] us a glimpse into the form and formation of legal institutions which develop in parallel, possibly in accordance with laws yet to be determined, and permits us to catch sight, through the differences in detail, of the grand similarities and so to deepen our belief in the existence of a unitary sense of justice'.⁶⁷ It is submitted that the exercise of comparing the internal system with an external one, thereby internationalising the 'lawyering' venture, is of special benefit when new legislation is introduced into a legal system. Its stabilising and settling-in process will depend on the interpretation it receives, and comparative studies of similar systems can only be of valuable import.

There is truth, however, in the following words of caution:⁶⁸

It is surprising to what extent the same problems occur all over the world in spite of major differences in policy, degree of sophistication of financial institutions, level of development, etc. As regards this similarity in the problems experienced and, in a sense, also the solutions resorted to we never lost sight of the fact that one cannot simply transplant principles wholesale from a foreign jurisdiction to one's own system.

There is always a danger in an attempt to transplant legal institutions which have developed in the commercial and social organisation of a foreign society in response to its belief systems. Comparative legal study gives insight into the relation between any society and the interlocking rules within which it structures everyday transactions. To adopt foreign law without reference to the checks and balances which ensure consistency and justice in the system as a whole is also unlikely to be a success.

⁶⁷ Zweigert and Kötz 1998 2-3.

⁶⁸ Otto JM and Grové NJ *The Usury Act and Related Matters* 1991 6.

'Common law' systems are frequently contrasted with 'civil law' systems. A customary feature of the civil private law system is that their private law is based on a systematic set of general rules of law contained in legislative enactments typically known as 'codes'. Examples of these are the *Code Civil* of France and Belgium; the *Bürgerliches Gesetzbuch* in Germany, the *Burgerlijk Wetboek* in the Netherlands and the *Codice Civile* of Italy.⁶⁹ The existence of a code is not, however, the distinguishing feature as for example, the Scandinavian countries which are typically regarded to have civil law, do not have complete systematic codifications.⁷⁰ The term 'civil law' is used to describe European jurisdictions which have been heavily influenced by the language, ideas and structures of the Roman law which was initiated at the end of the eleventh century in Italy with the revival of Justinian's *Corpus Iuris Civilis* and spread throughout Europe, though varying in influence.⁷¹ While the reception of Roman law through Europe created a sense of a common law of continental Europe - the *ius commune*, England was not impacted by it in the same way; here the King's courts and the legal profession were already developing their own law.⁷²

Increasingly, consumer credit law is directly affected by international developments and institutions. A good example is the regional influence of the European Union.⁷³ Thus, where appropriate, the European Union's proposals and methods have been examined. Its influence is evident in the whole of Europe; England and Italy are no exception.

The term 'civilian' or 'civilian law' refers to the legal systems on the European continent.⁷⁴ These terms are used to differentiate from the (English) common law. The civilian tradition places emphasis on the basic unity of the European legal tradition; 'for the modern division of law into national legal disciplines is of

⁶⁹ Cartwright P *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* 2007 8.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Ramsay 2007 1.

⁷⁴ '[M]odern civil law of obligations remains remarkably Roman in its outline and in much of its substance. It is generally agreed that Roman law is the main contributor to the modern civil law of obligations, although Germanic elements and canonical contributions have also played an important if less obvious role in its formation' (Watkin TG *An Historical Introduction to Modern Civil Law* 1999 284).

comparatively recent origin'.⁷⁵ The following from Zimmermann⁷⁶ depicts the harmonisation of what has become known as the civilian tradition in Europe:

In the Middle Ages, the whole of educated Europe formed a single and undifferentiated cultural unit; and the Roman-canon 'common' law was part and parcel of this European culture. Law professors moved freely from a chair in one country to one in another; the same textbooks were used in Pavia or Bologna as much as in Halle, Alcalá or Oxford; and it was on a European level, too, that all the major transformations of that common law took place. Moving with the same cultural tides and moored to a common language, European legal science remained an essentially homogenous intellectual world.

To use (yet again) the words of Professor Zimmermann,⁷⁷ this is not merely an exercise in antiquarianism and accordingly the following paragraph is aptly relevant:

For the civilian tradition lives on, albeit often unrecognized, in the modern national legal systems. All the major European codes find their roots at one stage or another in the development of the *ius commune* therefore usually presents the most appropriate starting point for comparative research in the traditional core areas of continental private law. Apart from that, however, it provides the intellectual and doctrinal framework within which a new European legal unity may one day emerge. Anyone attempting to bolster the move towards greater political and economic unity by a harmonization of the legal rules applying in the various European countries would neglect their common historical basis at his peril. The *ius commune* even today constitutes a unifying force of great potential.

While the civilian tradition of continental Europe is often contrasted to the English common law system we are warned against misconceptions.⁷⁸ That is that while a useful distinction exists, the two systems are not so radically dissimilar.⁷⁹ Zimmermann⁸⁰ submits that this is due, not only to the common historical

⁷⁵ Zimmermann R *The Law of Obligations* 1990 ix. From the late Middle Ages until the time of the French Revolution, Western and Central Europe had a common law and a common legal science. The *ius commune* was part of the 12th century Renaissance. Both the Roman Church and the Roman Empire claimed supremacy and thus used rational legal systems as a source of legitimacy and as a means to control and organize. A new scholastic method of analysing and synthesizing was applied to the authoritative texts: the canons and Justinianic law, which came to be known as the *Corpus Iuris Civile*. Roman law and canon law, which was in any event heavily influenced by the Roman law, became the main medieval *ius utrumque*. It was this *ius utrumque* studied by the graduates of Bologna and then other universities throughout Europe, who then applied (and consequently spread) it when they moved into key administrative positions. Roman law was received at different times throughout Europe, starting in Italy in the twelfth Century; it reached Northern France and Holland in the thirteenth and fourteenth centuries and finally Germany in the sixteenth century (*ibid*).

⁷⁶ Zimmermann 1990 ix.

⁷⁷ *Ibid*.

⁷⁸ Maitland FW *The Forms of Action at Common Law* 1954 76.

⁷⁹ *Ibid*.

⁸⁰ Zimmermann 1990 ix.

framework within which the law developed but also due to the substantive legal rules. Practically, England was never cut off from the continental legal customs. In fact English law, at inception, has been described as not being English at all but ‘a species of continental feudal law developed into an English legal system by kings and justices of continental extraction’.⁸¹ Furthermore, throughout its development Roman (civil) law was of considerable influence on English law and jurisprudence.⁸² Despite the civil and canon law influences it absorbed a variety of indigenous influences and even where civilian influence was apparent English courts and writers have often proceeded to develop the law along independent lines.⁸³ The following advice, again from Zimmermann⁸⁴, should not go unheeded:

But it would appear to be a fruitful exercise to try to explore a common basis for comparative legal studies, to trace explicit as well as cryptic reception processes, to concentrate one’s attention, for once, not so much on the distance and the differences between common law and civil law as on their proximity and similarities; and to attempt a comparison of legal solutions against the background of a common ‘Western’ civilization.

While the recommendation above is directed at the harmonisation of the European countries legal culture – South Africa should not lag too far behind and should at all times, especially if it wishes to facilitate trade with Europe, keep its eye on the proverbial ball. South Africa’s private law has been described as ‘one of the last preserves in the modern world where the tradition of the *ius commune* still lives on, untrammelled, largely, by the intervention of the legislator’.⁸⁵ South Africa is one of a few ‘mixed jurisdictions’ which are not only based on the civilian system but which have absorbed a substantial amount of English law.⁸⁶ Its reception of English law during the course of the nineteenth century was likened to the process of absorption of the spread of Roman Law over Europe. Accordingly, the South African system has been but a matrix for the blending of

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Zimmermann 1990 ix.

⁸⁴ *Ibid.*

⁸⁵ Zimmermann 1990 xiii. However, as is evident these words were written in 1990, a good 24 years ago. South Africa, especially concerning consumer protection, has faced a rather extended bout of new legislation since 1994. The National Credit Act and Consumer Protection Act being on point.

⁸⁶ Zimmermann 1990 xiii.

‘the two main emanations of the ‘Western’, or European (in the broader sense), traditions’ and consequently the process of mutual assimilation that has occurred over the years, may ‘offer stimulating insights as well as valuable experiences for anyone interested in the prospect of a future European common law’.⁸⁷

While the South African common law may offer valuable insight to aid the processes of harmonisation of a European common law, it can be equally utilised for the development of a South African jurisprudential maturity in alignment with Europe and Africa (as trading partners). There is an ‘African’ initiative towards harmonisation of private commercial law. Organisations like UNIDROIT⁸⁸ and OHADA are consistently working towards these goals and early, focused comparative studies on particular areas of law can only lend to the harmonisation process. The description, provided in the preceding paragraph, of South Africa’s untrammelled body of law was made in 1990. Now, twenty four years later, we see the sickle of the legislator coming down in large sweeping motions. Slowly, adding to the drastic curtailment of the operations of South African common law. Instead of decaying, South African common law should develop into an exemplary model for harmonisation. South Africa should revere its own history of reception of English law and re-use the skill to ensure future alignment with the cross-border contract laws of the European Union, and equally as important, with its land neighbours. However, before looking abroad, it is important, with the introduction of new legislation, to determine exactly where the boundaries of the legislation end and those of the common-law begin.

⁸⁷ *Ibid.*

⁸⁸ International Institute for the Unification of Private Law. UNIDROIT is an independent intergovernmental organization with its seat in Rome. Its purpose is to study needs and methods for modernizing, harmonizing and co-coordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. It was set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute (<http://www.unidroit.org/dynasite.cfm?dsmid=103284>) (4.03.2011).

CHAPTER 2: HISTORICAL INTRODUCTION

2.1 General History of Credit, including Interest and Banking

The history of credit, interest and banking has received extensive focus over the years by academics and jurors alike. It is therefore not the purpose of this chapter to set out in explicit detail the history of these topics. A general examination thereof is not, however, without its merits. The lessons that can be drawn by looking at the progress of the history of credit, interest and banking over the centuries allows one to draw, from such studies, necessary information which enables one to recognize progressive or reactionary developments as well as advance forecasts as to future trends or, at the very least, correctly pinpoint the location of the contemporary one. From this type of observational exercise one can attempt to predict both legislative and judicial responses to particular regulatory environments.⁸⁹

It is trite that a statute should be construed in conformity with the existing law and that the legislature does not intend to alter existing law more than necessary.⁹⁰ Therefore, before new legislation can be handled with any degree of confidence and in order to avoid having to continuously amend it, one should first possess a sound knowledge of what the existing laws, especially the common law, allow.⁹¹ In order to comprehend the common law in a specific field it is valuable to study the historical development of that particular area of law.⁹² South Africa is especially interesting, in that, it is one of the best examples of a mixed system of law.⁹³ South African law consists of a diverse blend of Roman law, Roman-Dutch law, English law, Indigenous law and modern legislation, with a

⁸⁹ 'Look back over the past, with its changing empires that rose and fell, and you can foresee the future too' (Marcus Aurelius).

⁹⁰ *Van Heerden NNO v Queen's Hotel (Pty) Ltd* 1973 2 SA 14 (RA), *Casserley v Stubbs* 1916 TPD 310 312, Cockram *Interpretation of Statutes* 1987 98 and Grové NJ and Otto JM *Basic Principles of Consumer Credit Law* 2002 7.

⁹¹ Grové and Otto 2002 8.

⁹² *Ibid.*

⁹³ Hahlo HR and Khan E *The South African Legal System and its Background* 1973 578 and Otto JM 'The History of Consumer Credit Legislation in South Africa' 16 1 *Fundamina* 2010 257.

progressive Constitution,⁹⁴ and thus provides one of the most fecund jurisdictions for comparative and historical studies.⁹⁵

Credit legislation is no different and its historical background, especially the abuses which give rise to it, are of importance when interpreting an act and its contextual setting.⁹⁶ Legislation on credit agreements and related matters has far-reaching consequences on socio-economic matters due to the malpractices which they attempt to curb.⁹⁷ It is therefore necessary to take notice of historical developments as they provide social, economic and juridical background to present as well as future legislation.⁹⁸ The National Credit Act brought varied changes to the area of credit law, previously regulated by the Credit Agreements and Usury Acts. A brief examination of the South African historical background of the credit law dispensation will allow for a clearer understanding of the common law of credit and this will assist as a point of reference for interpreting the National Credit Act and more specifically breach of contract and the remedies therefore.

Consumer credit legislation is influenced by a myriad of factors, not least of all economic, social, political and religious considerations. These influences and their effects on South Africa's credit legislation are not unique to South Africa and certain similarities between consumer credit legislation in different countries exist.⁹⁹ It is therefore also useful to compare the historical developments of different countries.¹⁰⁰ Accordingly, later in the chapter, the background of European, English and Italian credit law are examined. It will become evident how, throughout history, each jurisdiction experienced similar trends, albeit at different periods.

⁹⁴ Constitution of the Republic of South Africa, 1994.

⁹⁵ Otto 16 1 *Fundamina* 2010 257-8.

⁹⁶ Otto *Credit Law Service* 1991 paragraph 1.

⁹⁷ *Ibid.*

⁹⁸ Grové and Otto 2002 8 and Otto *Credit Law Service* 1991 paragraph 1. They were referring to the previous credit dispensation, however, the concept is contemporarily applicable.

⁹⁹ Otto 16 1 *Fundamina* 2010 259.

¹⁰⁰ *Ibid.*

Consumer protection is not a twentieth-century phenomenon.¹⁰¹ Throughout history, it has been the exploitation and malpractices born from different types of contract and commercial practises that have led the earliest lawmakers to lay down rules in order to regulate relations among those subject to the law.¹⁰²

Many ancient societies, for example the Romans, whilst not necessarily under the guise of ‘consumer protection’, had firm rules in order to protect individuals.¹⁰³ Some examples are the warranty against latent defects in the sale of a *res*, the *beneficia* available to a surety and the *in duplum* rule.¹⁰⁴

The codification of common law principles developed over extended periods of time is also not a novelty.¹⁰⁵ The Romans, once again, provide a prime example: the Roman edicts establishing the *actio quanti minoris* and the *actio redhibitoria* are examples of legislative intervention in order to protect consumers when the common law, as it then was, did not sufficiently do so.¹⁰⁶

¹⁰¹ Otto 16 1 *Fundamina* 2010 258.

¹⁰² Grové and Otto 2002 8.

¹⁰³ Otto 16 1 *Fundamina* 2010 258.

¹⁰⁴ Once described by Otto as ‘an ancient form of consumer protection’ (*The National Credit Act Explained* 2007 3 and Otto 16 1 *Fundamina* 2010 258). The common law *in duplum* rule prevents unpaid interest from surpassing arrear but unpaid capital (*Union Government v Jordaan’s Executor* 1916 TPD 411, *Van Coppenhagen v Van Coppenhagen* 1947 1 SA 576 (T), *Stroebel v Stroebel* 1973 2 SA 137 (T), *Administrasie van Transvaal v Oosthuizen en ‘n Ander* 1990 3 SA 387 (W), *LTA Construction Bpk v Administrateur, Transvaal* 1992 1 SA 473 (A), *Standard Bank of South Africa SA Ltd v Oeanate Investments (Pty) Ltd* 1995 4 SA 510 (CPD), *Commercial Bank of Zimbabwe v MM Builders (Pty) Ltd* 1997 2 SA 285, *Leech and others v ABSA Bank Limited* 1997 3 All SA 308 (W), *Bellingham v Clive Ferreira* 1998 4 SA 382 (WLD), *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 1 SA 515 (A), *Commissioner for SA Revenue Service v Wouldige* 2000 1 SA 600 (C), *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 2 SA 647, *Absa Bank v Leech & Others* 2001 All SA 55, *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 1 SA 126 (Z), *Meyer v Catwalk Investments 354 (Pty) Ltd en Andere* 2004 6 SA 107, *Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 2 SA 451). Despite criticism and calls for its abrogation (Otto and Grové *The Usury Act and Related Matters Working Paper* 46 SA Law Commission 1993 375) this rule, albeit with modifications, has been included in the National Credit Act, more specifically in section 103 (5). Cf fn 2286 for a discussion on the statutory *in duplum* rule. Cf Vessio in Moorcroft J *Banking Law and Practice* 2014 Chapter 31 for a discussion of the differences between the common law and statutory *in duplum* rule.

¹⁰⁵ Otto 16 1 *Fundamina* 2010 259.

¹⁰⁶ Van Oven *Leerboek van Romeinsch Privaatrecht* 1948 264 taken from Otto 16 1 *Fundamina* 2010 259.

Central to the regulation of commercial practices and the contracts which relate thereto is the issue of charging of interest.¹⁰⁷ Academic and historical research have also demonstrated the fallacy of the impression that mercantile loans and banking transactions are the invention of the seventeenth century.¹⁰⁸ Statements such as '[t]he history of consumer credit regulation is as old as consumer credit itself'¹⁰⁹ and '[c]onsumer credit is older than money',¹¹⁰ albeit dramatic, reveal that the practice of exchanging things of value in return for the obligation of future repayments is one of humanities' ancient social designs.¹¹¹ Historians and archaeologists speculate that interest in the broad sense, originated some time during the late Palaeolithic or early Mesolithic ages between, about 8000 and 5000 BC.¹¹² Lending on interest was one of the first economic milestones of life in society and considered an essential driving force in its development.¹¹³ It is thus older than industry, banking and striking of coins.¹¹⁴

Curbing of interest rates has been a debated issue since 4000 years ago, the first known enactment in this regard being found in the Code of Hammurabi.¹¹⁵

¹⁰⁷ Not many commercial activities have met with as much resistance as the issue of usury (Grové NJ *Gemeenregtelike en Statutêre Beheer oor Woekerente* LLD, Randse Afrikaanse Universiteit, 1989 8).

¹⁰⁸ Peterson CL 'Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act' 2003 *Florida Law Review* 807 809.

¹⁰⁹ Franken in Niemi *et al Consumer Credit, Debt and Bankruptcy* 2009 129.

¹¹⁰ Peterson 2003 807 809

¹¹¹ Augustinus, whose view was supported by Noodt, opined that if one lends money with the expectation of receiving back more than one had given, not only in money but in some other kind of good (for example, wheat, wine or oil) one was then a moneylender. Cf Ambrosius *De Tobia* c 14, where he states that 'food is interest, clothing is interest and in fact anything that is added to the principal is interest – irrespective of the name given, such increment is interest' (from Thomas PHJ 'Anitchresis, Hemiolia and the Statutory Limit on Interest in Gerard Noodt's *De Foenore et Ususris*' 2007 *De Jure* 52 57).

¹¹² The following passage is elucidating: 'Deferred payments played an important part in the life of primitive communities from a very early stage. [...] Credit existed in a fairly extensive scale before the stage of money economy was reached. There are many ethnographic instances of credit in kind in communities where no trace of any medium of exchange or even standard value has been discovered. [...] Even during the most primitive phase of barter when the exchange of goods assumed the form of reciprocal presents or services, there was often a discrepancy between the time of making the original payment or rendering the original service and that of the reciprocation. In a sense, it is therefore true to say that credit existed from the very earliest phases of economic activity, even before the evolution of barter proper' (Einzig P *Primitive Money in its Ethnological, Historical and Economic Aspects* 1966 362-3).

¹¹³ Gelpi R-M and Julien-Labruyère F *The History of Consumer Credit Doctrines and Practices* 2000 1.

¹¹⁴ *Ibid.*

¹¹⁵ Buckley SL *Teachings on Usury in Judaism, Christianity and Islam* 1998 11. The Code was decreed in Mesopotamia by Hammurabi who reigned in Babylon from 1792 to 1750 BC. It is made up of about 282 paragraphs, about 260 of which have been preserved. The Code concerns

In ancient Greece the development of commercial loans from the fifth century onwards became one of the factors contributing to the economic prosperity of the country.¹¹⁶ Despite this acceptance of credit by both population and the authorities, eminent philosophers, such as Plato and Aristotle condemned it.¹¹⁷ Plato was not in favour of economic development.¹¹⁸ According to him citizens should be forbidden to work in 'productive' occupations, which he considered degrading.¹¹⁹ Instead, he believed they should devote themselves entirely to the affairs of the city.¹²⁰ In his Utopian City, Plato banned gold and silver as well as lending.¹²¹ Aristotle, on the other hand, condemned usury¹²² because he considered it incompatible with the very nature of money.¹²³ He viewed money as a convention, its principal purpose was to facilitate exchange and be used as a store of value.¹²⁴ Aristotle differentiated between natural things and conventional things, advocating that only natural things can reproduce.¹²⁵ Since money is a convention, it cannot reproduce.¹²⁶ He therefore condemned lending at interest, because according to him, with such loans money 'itself' becomes reproductive and therefore diverted from its principal function of facilitating exchange and against its very nature.¹²⁷ Aristotle also condemned the

litigation between borrowers and lenders (Gelpi and Julien-Labruyère 2000 3). Some authors, however, are of the view that the Code of Hammurabi is not the oldest code of laws in the world (Driver GR and Miles JC *The Babylonian Laws* 1968 2 39). Buckley postulates that it was from the Babylonians who were accustomed to charging interest at 20 percent *per annum*, that the post-exilic Jews learned much in the way of legal terms and forms. The first reference in the Babylonian Talmud to a rate of interest is in fact to one of 20 percent (1998 13).

¹¹⁶ Gelpi and Julien-Labruyère 2000 7.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Gelpi and Julien-Labruyère 2000 7.

¹²⁰ *Ibid.*

¹²¹ Gelpi and Julien-Labruyère 2000 7-8.

¹²² The philology of the word 'usury' is interesting to note. Initially an increase given to a creditor for the use of his capital was known as '*foenus*' and '*usura*' did not actually mean interest but the use of anything whatsoever. However, due to the general and common use of the word, the notion took hold that the word '*usura*' could be accepted in the sense of '*foenus*' (Van Niekerk SJ *et al The Three Books on Interest Bearing Loans and Interest (Foenus et Usurae) by Gerard Noodt Jurist and Professor of Law Van Der Linden JR 1724 2009 7*).

¹²³ Gelpi and Julien-Labruyère 2000 8.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Gelpi and Julien-Labruyère 2000 8.

¹²⁷ *Ibid.* He stated: 'The most hated sort (of wealth getting) and with the greatest reason, is usury, which makes a gain out of money itself and not from the natural object of it. For money was intended to be used in exchange but not to increase at interest. And this term interest (*tokos*), which means the birth of money from money is applied to the breeding of money because the offspring resembles the parent. Wherefore of all modes of getting wealth, this is the most unnatural' (Aristotle *Politics* 1258b).

occupation of money-lender, because he was of the view that the money-lender attempts to extract profit from money which is naturally sterile and which has no properties or uses other than serving as a means of exchange.¹²⁸ As far as the Romans were concerned, Seneca, a prominent Roman philosopher, like most Roman philosophers of the time, was opposed to usury on moral grounds.¹²⁹ He considered it morally wrong as usury, effectively, involved paying for time.¹³⁰

Because the Old Testament proscribed charging of interest,¹³¹ much of the earlier debate by theologians, economists and jurists centred on whether or not interest should be charged at all.¹³² Some writers took the view that with the New Testament, making profit on money became completely acceptable.¹³³ However, it is submitted that there was much debate with regard the interpretation of the New Testament and conflicting views existed, specifically with regard to lending with interest.¹³⁴ The Church had been fighting against interest-bearing loans since the first century, that is, against any surplus gain whether in currency or in kind.¹³⁵ Saint Clement of Alexandria, a Greek Church

¹²⁸ *Ibid.* He stated: ‘...those who ply sordid trades, pimps and all such people, and those who lend small sums at high rates. For all these take more than they ought, and from the wrong sources. What is common to them is evidently a sordid love of gain...’ (Aristotle Ethics 1122a).

¹²⁹ Buckley 1998 96.

¹³⁰ *Ibid.* Seneca, with regard to lending on interest, described it as ‘a voluntary evil deriving from our system, in which there is nothing that can be scrutinised by our eyes, that can be held in our hands – a mere dream of empty avarice’ (Van Niekerk *et al* 2009 60).

¹³¹ Exodus 22:25, Leviticus 25:36-7, Deuteronomy 23:19-20, Psalms 15:5, Proverbs 28:8, Ezekiel 18:8,13,17, Ezekiel 22:12, Nehemiah 5:7. For an elaborate discussion on religious influences on usury cf Buckley 1998. The Mosaic Law forbade the lending of money at interest by a Hebrew to a Hebrew, but did not forbid lending at interest to a foreigner by a Hebrew or to a Hebrew by a foreigner, and held that the practise of interest was disadvantageous only among their own fellow citizens and not to all people equally (Van Niekerk *et al* 2009 65).

¹³² Considerable attention was given by historical jurists to charging of interest. The humanists are one example; during the sixteenth century there were many publications on various aspects of interest. One example is a Dutch legal historian, Gerard Noodt, whom relied on classical authorities such as Accius, Varro and Vossius (Thomas 2007 *De Jure* 52 54).

¹³³ Kelly, relying on Matthew 25:27 and Luke 19:23 for this conclusion (‘A Summary of the History of Usury with an Examination of the Policy of the Systems, and Suggestions for its Amendment, Together with Collection of Statutes’ 13 1853 HeinOnline 15-16 (<http://heinonline.org> 2.4.2013). Otto draws on the same sources for a similar conclusion (16 1 *Fundamina* 2010 260).

¹³⁴ Cf Matthew 5:42 and Luke 6:34, 35, cf also the discussion by Buckley and the authorities cited on a Christian understanding of usury (1998 85-173).

¹³⁵ As with contemporary lending where the consumer is most often in a more vulnerable position than the credit provider, so in ancient times creditors lent to those in desperate need of food or shelter, and this relative advantaged bargaining position left the consumers at a significant disadvantage. Coupled with this issue was the problem that in the absence of standardized currencies – ambiguities over what constituted acceptable payment of the debt opened the parameters for abuse (Peterson 2003 *Florida Law Review* 807 809). It was the Code of Hammurabi which attempted to address this problem by asserting that debts could be tendered in

father, was one of the first to denounce credit on the basis of the Old Testament writ.¹³⁶ In the second and third centuries, Saint Basil, Saint Gregory of Nysse and Saint Ambrose of Milan led campaigns against usury on the basis of biblical scripture.¹³⁷ From the end of the fourth century to the beginning of the fifth century the councils, particularly the Council of Nicea in 325 AD, forbade the practise of usury amongst clerics as it was incompatible with Christian principles.¹³⁸ Although this ban was generalized in the fifth century, it was not extended to the lay community until the time of Charlemagne,¹³⁹ under whom usury was for the first time forbidden against the layperson by secular legislation in the *Admonitio Generalis*, which implemented the wish of the Council of Clichy of 626 AD.¹⁴⁰ Distinct from the Frankish world, Gothic law unlike the Greeks and Romans, did not impose a ban on money lending but rather regulated it.¹⁴¹ In the time of the Carolingians the lending of money on interest was allowed and common, however, as early as the ninth century the Church preached the doctrine of sinfulness of charging of interest.¹⁴² By the twelfth century, this was viewed as law and interest could only be charged where it represented fair compensation for special risks and after the debtor was in *mora*. A second exception was used as a means to circumvent the prohibition – an early date was fixed for repayment, a date which was not really intended and after its lapse interest could legitimately be charged.¹⁴³ By the thirteenth century, with developing commerce, resistance to the prohibition on interest was becoming stronger as it was slowly realised that every loan involves some risk, justifying

various types of goods. This, ostensibly, thwarted some abuses by creditors by prohibiting them from requiring payment in some rare or out of season good (Buckely 1998 13).

¹³⁶ Gelpi and Julien-Labruyère 2000 20.

¹³⁷ Gelpi and Julien-Labruyère 2000 20-1.

¹³⁸ Gelpi and Julien-Labruyère 2000 22.

¹³⁹ Also known as Charles the Great, he was the King of the Franks from 768 AD, the King of Italy from 774 AD and from 800 AD the first emperor of Europe since the collapse of the Western Empire three centuries earlier.

¹⁴⁰ The Roman Emperor Lothario continued the work of Charlemagne and in 825 he reinforced the ban on usury, expressly granting power to the bishops not only to seek out and punish usurers but laid down penal sanctions for the misdemeanour of usury by decreeing reprimands, fines and even imprisonment as punishment for usurers (Gelpi and Julien-Labruyère 2000 25 and Hahlo and Khan 1973 461). A very influential body of ecclesiastical legislation for Charlemagne's empire were a collection of Cannons known as the *Hadriana*. In the *Hadriana* is the epistle '*Nec hoc quoque*' of Pope Leo 1, a papal decree that categorically forbids clerics to take usury and declares that laymen who take it are guilty of seeking shameful gain – *turpe lucrum* (Buckely 1998 99-100).

¹⁴¹ Gelpi and Julien-Labruyère 2000 25.

¹⁴² Hahlo and Khan 1973 462.

¹⁴³ *Ibid.*

the payment of interest.¹⁴⁴ Martin Luther, with his reformative views, frowned on international trade, banking, credit and capitalist industry.¹⁴⁵ In his 'Sermons on Usury', in 1519 and 1520, he insisted that loans should be interest free.¹⁴⁶ During the course of the fifteenth century Florence passed laws restricting interest rates to 15.5 percent per annum, then 20 percent and then 30 percent.¹⁴⁷ Eventually municipal pawnbrokers were set up to try and circumvent even higher black market rates.¹⁴⁸ The Catholic Church set up, what were known as *Montes Pietatis*, these were institutions whose funds had been created by donations so that the Church could extend interest free loans.¹⁴⁹ However, in 1515, Pope Leo X, a member of the Medici banking family, authorised these loans to be made at such interest rates as were necessary in order to cover costs.¹⁵⁰ During the sixteenth century attempts by the Catholic Church and the Protestants were made to revive the prohibition of interest but by the end of the sixteenth century the prohibition had ceased to operate.¹⁵¹ Jean Calvin, however, accepted that the charging of interest was permissible within certain limits: that is, interest that is 'biting' was not allowed.¹⁵² By the seventeenth century 'usury' had gained a new meaning, that is, the charging of excessive interest.¹⁵³

¹⁴⁴ *Ibid.*

¹⁴⁵ Gelpi and Julien-Labruyère 2000 48.

¹⁴⁶ *Ibid.*

¹⁴⁷ Philpott F and Neville S *et al The Law of Consumer Credit and Hire* 2009 1.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Philpott and Neville 2009 1.

¹⁵¹ Hahlo and Khan 1973 462.

¹⁵² Grové 1989 73 fn 16. Noodt postulated that the reason why interest could not be forbidden is that commerce would not survive without interest and he was of the view that commerce is man's only protection against poverty, peace and in war, whether one is considering private individuals or states, or princes, or the advantage of ready cash in the greatest or smallest transactions (Noodt *I Praefatio* 175, from Thomas 2007 *De Jure* 52 54 fn 11). After the reformation, this issue appears to have become resolved and charging of interest was accepted in certain circumstances. Thereafter the issue of disclosure of interest in a contract was brought to the fore (Grové and Otto 2002 19).

¹⁵³ Hahlo and Khan 1973 462. This is precisely where South Africa's regulatory regime is today: the contemporary consideration is not whether interest should be allowed, but how much interest should be allowed. That is, what level of interest rate ceiling would provide an adequate balance to protect the consumer from exploitation, while simultaneously insuring the provider's risk is adequately considered. However, see the more recent cases on this matter that declare that there is no common law ceiling on the rate of interest: Cf *Structured Mezzanine Investment (Pty) Ltd v Dawids and Others* 2010 6 SA 622 (WCC) and *Structured Mezzanine Investments (Pty) Ltd v Basson NO and Others* (22732/2009) [2013] ZAWCHC 63 (24 April 2013).

Linked to credit is the practise of banking and modern discoveries have shown that the history of banking transactions refers back to a period not less than two thousand years before Christ.¹⁵⁴ The history of banks and evidence of banking transactions are dated back to antiquity. Pastoral nations such as Hebrews, while including moneylenders, had no system of banks that would be considered adequate from the modern point of view.¹⁵⁵ However, as early as 2000 BC, the Babylonians had developed just such a system.¹⁵⁶ This was a result of services performed by the organized and wealthy institutions: the temples of Babylon, like those of Egypt, which were also banks, recorded transactions on clay tablets, with inscriptions on them evidencing the extension of credit.¹⁵⁷

Banking operations developed from religious institutions to private business institutions, when in 575 BC a formal banking institution was established in Babylon: the Igibi Bank of Babylon.¹⁵⁸ The records of this bank show that it acted as buying agent for clients; loaned on crops, attaching them in advance to ensure reimbursement; loaned on signatures and deposited and received deposits on interest.¹⁵⁹ Similar banking institutions existed in Greece, Rome, Egypt and other developed nations, centuries before Christ, and they too deposited money, lent it on interest, extensively used letters of credit and financial papers and traded in them.¹⁶⁰

Initially temples served as banks, and lent to individuals and states at moderate interest rates. In the fifth century private individuals began to receive money on deposit and to lend it to merchants at interest rates that varied from 12 to 30

¹⁵⁴ http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#74-75 (27.08.2007).

Moorcroft states: '[i]t is safe to assume that as soon as trade developed between individuals and tribes in prehistoric times the need arose for someone to act as intermediary, to hold bartered goods and to exchange goods for the purpose of barter' (2014 paragraph 1.2).

¹⁵⁵ Initially the objective of the depositor was to ensure the safekeeping of his money or other movables, however, this objective evolved over time as commerce and technology developed (Moorcroft 2014 paragraph 1.2).

¹⁵⁶ Buckley 1998 12.

¹⁵⁷ The priestess Amat-Schamach, it seems, was the accredited agent of one of these institutions. The clay tablet with the inscription can easily be likened to what we would refer to today as a negotiable commercial instrument (*ibid*).

¹⁵⁸ *Ibid*.

¹⁵⁹ Buckley 1998 12.

¹⁶⁰ *Ibid*.

percent according to the risk involved.¹⁶¹ In this way these individuals became 'private' bankers.¹⁶² These early private bankers were Greeks named *trapezites* or 'the men at the table', who took their methods from the near East, improved on them, and passed them on to Rome, which handed them down to modern Europe.¹⁶³ The practice of commercial, industrial and agricultural loans advanced on the basis of interest were so prevalent in the Roman Empire that Justinian¹⁶⁴ had to promulgate a law determining the rates of interest which could be charged to different types of borrowers.¹⁶⁵ This law¹⁶⁶ was promulgated in the Byzantine Empire shortly before Justinian's death, and remained in force for some time after its promulgation.¹⁶⁷

The above overview demonstrates that the practice of granting credit, lending on interest and setting up of lending institutions has been a widely popular and

¹⁶¹ http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#77 (27.08.2007).

¹⁶² *Ibid.*

¹⁶³ http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#77 (27.08.2007). Referring to bankers in Roman times, Voet stated that 'most Romans had the conditions of their contracts, the accounts of their money and transactions, their payments, expenses and so on made up and recorded by them as having special skill, so that it was their main service and work to make up careful accounts of their doings' (Voet *The Selective Voet being the Commentary on the Pandects* 2 13 20). Cf fn 178 for a discussion on the different interest rates set by Justinian.

¹⁶⁴ Byzantine emperor (527-565 AD).

¹⁶⁵ http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#78 (27.08.2007). Cf. the discussion in fn 178 *infra*.

¹⁶⁶ *Novellae* 121, 138 and 160.

¹⁶⁷ The Arabs, especially of Mecca, had constant business relations with Syria, one of the most civilized provinces of the Byzantine Empire. The business relations of the Arabs were not restricted to Syria, but extended to Iraq, Egypt and Ethiopia. Their economic and financial relations with the Byzantine Empire were so prominent that the currency used throughout the Arabian Peninsula was the *dirhams* (of silver) and *dinars* (of gold) coined by the Byzantine Empire. These Byzantine coins remained in use throughout the Muslim world till the year 76 A.H., when Abdulmalik ibn Marwan started coining his own dinars (http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#78. (27.08.2007)). In the ninth century, during the time of the Frankish Empire, bills of exchange payable to order or to the bearer came into use and holder and bearer clauses were reflected on promissory notes in Italy soon thereafter (Hahlo and Khan 1973 391). Negotiable instruments and discounting were common in the thirteenth century in Italy, France Germany and the Netherlands. Bills payable to a named payee or order was known by the sixteenth century and by the seventeenth century a number of endorsements were permissible. In the Middle Ages there were a variety of coins from differing origins in circulation. Thus money exchanges were common and by the twelfth century money changers had developed a network of money exchanges. According to Moorcroft, money-changers were the predecessors of modern bankers. They provided clearing services and discounted bills and granted loans. Initially only to kings and princess. Also initially deposits were accepted on the basis of a partnership agreement between the bank and the depositor, similar to systems followed by Islamic banks today (Moorcroft 2013 paragraph 1.2). Italy, with its Bank of Venice and the Casa di San Giorgio of Genoa, established in the twelfth century, played a leading role in the development of banking. These two banks were the first large banks as we understand them today (Hahlo and Khan 1973 467-8).

ancient practice, invoking discussion and debate from theologians, economists and jurists, throughout the world and throughout history. The concept of protecting the consumer is also not a contemporary one. It is society's evolution and industry progresses that requisite continual upgrades to consumer laws in order that such legislation remains current and thus relevant to modern advances and therefore not only ensures that the consumer is duly protected, but that the relationship between provider and consumer remains in balance.

The above discussion furthermore delineates the similarities in regulatory trends, not only across different nations but over different periods. So, while the debate over the regulation of interest rates was as important in the Roman Empire as in the Frankish one, the need to develop banking policies moved with the evolution of banking practises. The same can be said when looking at contemporary legislative policies and reasons therefore.¹⁶⁸ Albeit, with reference to interest, the debate, with the exclusion of Muslim countries under Shariah law, is no longer centred on whether to charge interest but how much interest should be charged. As far as banking policies are concerned these will ever need to change as modern methods of transacting are continuously innovated.

2.2 Roman and Roman-Dutch Law¹⁶⁹

¹⁶⁸ This is also evident in the following chapter which, while centred on the background and rationale for the National Credit Act, also examines the motives behind English, Italian and European Union consumer legislation. These different jurisdictions have very similar reasons for enacting legislation which protects and regulates the credit environment.

¹⁶⁹ Roman-Dutch law was the legal system that applied in Holland during the seventeenth century. It was a fusion of medieval Dutch law, mainly of Germanic origin and the Roman law of Justinian as adopted in the Reception. Roman-Dutch law can be divided into four broad periods: the Germanic period, which continued up to the fifth century (this period ended with the breakup of the Western Roman Empire in 726 AD); the Frankish period, from the fifth century to the ninth century (this period was ended with the Treaty of Verdun of 843 AD which divided the Frankish Empire into three parts); the Middle Ages, from the ninth century to the sixteenth century and which ended with the birth of the Dutch Republic in 1581. Roman-Dutch law was brought to an end in Europe with the end of the Dutch Republic, towards the end of the eighteenth century, with the introduction of the Napoleonic Codes (Hahlo and Khan 1973 330-1). The following from Wessels is a light hearted explanation of what is meant by Roman-Dutch law: 'I heard of a lady who thought it extremely clever of her English nephew to pass an examination in Roman Dutch law – "So clever" she said, "of an English boy to write his Roman law papers in Dutch [,]"'. He continues, 'Roman Dutch law is not Roman law codified in Dutch nor is it Dutch law written in Latin. It is a system of law which was developed during the sixteenth and seventeenth centuries out of diverse legal elements. One of these elements was the Roman law' (Wessels 'The Future of Roman Dutch Law in South Africa' *SALJ* 37 1920 265).

From the earliest times in the Republic of Rome lending and borrowing were a common feature of commercial society.¹⁷⁰ The contract of loan of money for consumption was known as *mutuum*.¹⁷¹ If the lender wanted to demand interest to such loan, he would have to do so by way of another contract known as a *stipulatio*.¹⁷² The *stipulatio* would novate the *mutuum* for payment of the capital amount and interest.¹⁷³ While Roman law emphasized the autonomy of contracting parties, the one area where the state intervened from an early stage was in the control of interest rates,¹⁷⁴ as usually in contracts of loan it was the creditor who dictated the terms, thereby essentially subtracting from the freedom of contract ideal.¹⁷⁵ From the foundation of the Republic, Roman common law which, like most ancient societies was based on custom, gave way to statutory law.¹⁷⁶ One of the most prominent examples is the Twelve Tables.¹⁷⁷ A ceiling rate was contained in the Twelve Tables and in case of contravention the usurer would incur criminal liability.¹⁷⁸ The Twelve Tables were complemented by the

¹⁷⁰ Grotius 2 12 1 and 6, Voet 12 1 1 and 19, Lee RW *An Introduction to Roman-Dutch Law* 1953 128; *Tucker v Ginsberg* 1962 2 SA 58 (W) 62, *Credit Corporation v Roy* 1966 1 SA 12 (D). The loan for consumption was the oldest of the real contracts; its predecessor was *nexum*, which was a formal moneylending transaction by which the debtor gave himself by way of formal transaction as hostage to the creditor for payment of the debt. The creditor could then choose to enslave him, execute him or sell him (Thomas *et al Historical Foundations of South African Private Law* 2000 269).

¹⁷¹ It must be noted, however, that the contract of *mutuum* involved the transfer of ownership of the money or other consumable to the borrower who then had an obligation to return the equivalent (in quantity and quality) to the lender at a stipulated or reasonable future time (Grotius 3 10 6, Voet 12 1, Lee 1953 128, *Damont NO v Van Zyl* 1962 4 SA 47 (C), Thomas *et al* 2000 269).

¹⁷² Thomas JAC *Textbook of Roman Law* 1976 272

¹⁷³ If interest were to be paid without a *stipulatio* then the payment went to reduce the capital amount loaned, as an informal agreement to pay interest would impose only a natural obligation, it being a rule of classical law that no action arose from a pact (*ibid*).

¹⁷⁴ There were always maximum rates of interest that varied from period to period (Thomas *et al* 2000 273).

¹⁷⁵ *Ibid*.

¹⁷⁶ Gelpi and Julien-Labruyère 2000 9.

¹⁷⁷ *Ibid*.

¹⁷⁸ Digest 22 1 and 2, Voet 22 1 2, Lee RW *Elements of Roman Law* 1956 284, Kaser M *Roman Private Law* 1980 202, Thomas 1976 272. In an interesting article, Thomas argues that the provision on interest was not part of the Twelve Tables. According to him the Twelve Tables were not a codification of substantive Roman law, but a precursor of the edict of the *praetor*. In his paper he also points out that the *lex Duilia Menenia* of 357 BC, mentioned by Livius in Book VII Chapter 16, which law put a maximum rate of interest at 12 percent *per annum*, was the first law which placed a limit on interest. He draws from the views of De Martino (*Riforme del IV Secolo a C* 1975 *BIDR* 27) and Pikulska (*Fenus Uncicarum* 2002 *RIDA* 165). The predominant view, however, holds that the *lex Duilia Menenia* merely re-affirmed the provision of the Twelve Tables (cf Kaser I *Das Romische Privatrecht* 1971 168) (Thomas PHJ 'Did the Twelve Tables Limit Interest?' *TSAR* 2008 1 52-65). Buckley states that it could not be determined exactly whether the Twelve Tables fixed a maximum rate of interest at 10 or 12 per cent per annum because of the

Licinian laws which were decreed by the plebeian Tribune Licinius Solon in 376 BC as a response to people's demand for a reduction in debts.¹⁷⁹ These laws granted, *inter alia*, a reduction on debts, remission of interest to insolvent debtors and a three year moratorium to pay back the capital sum outstanding.¹⁸⁰ Roman law permitted charging of interest, with various limitations on rates of interest being imposed throughout different periods. Unfortunately, lenders persistently ignored stipulated interest rate ceilings and this led to a complete ban on the practice of charging interest – the ban was imposed through the *Lex Genucia*.¹⁸¹ Though, this did not eradicate the institution of charging for the extension of credit, time and practice having sanctioned it.¹⁸² Such severe provisions, as completely banning the charging of interest, proved counterproductive and culminated in the slaying of a praetor.¹⁸³ Thus, towards the end of the Republic, fixed interest rates for ordinary people were set at 12 percent and 6 percent for senators.¹⁸⁴ When Justinian came into power, being heavily influenced by his Christian beliefs, he lowered the rate to 6 percent for ordinary persons and 4 percent for senators.¹⁸⁵ Compound interest was forbidden and thus simple interest was charged.¹⁸⁶

expression '*unicarius foenus*'. It appears the legal rate of interest was gradually reduced until the year 347 BC, when it was fixed at 5 percent as a maximum. In 342 BC, however, interest was forbidden all together by the *Lex Genucia*, though this was in practice an inoperative law as it was easily evaded. Consequently the maximum rate of interest – the *Centesima* – of 12 percent remained in force until Justinian fixed the maximum rates of interest, with maritime loans at 12 percent, loans to ordinary persons not in business at 6 percent and loans to high personages and agriculturalists at 4 percent (O'Brien G *An Essay on Medieval Economic Teaching* 1967 160-1 taken from Buckley 1998 96-7; cf also Gelpi and Julien-Labruyère 2000 13).

¹⁷⁹ Gelpi and Julien-Labruyère 2000 9.

¹⁸⁰ *Ibid.* Solon's moratorium/waivers came at a time of great economic distress and while they provided some relief for poor debtors, he neither banned nor imposed maximum rates (Buckley 1998 96).

¹⁸¹ Earlier, there existed the *Lex Marcia* (104 BC).

¹⁸² Zimmermann R *The Law of Obligations – Roman Foundations of Civilian Tradition* 1990 167 1.

¹⁸³ Praetor Aesillio, who, unable to resolve their differences, allowed the creditors and debtors to proceed against each other in the courts, was murdered in the centre of the *forum Romanum*. Bringing the issue before judges was seen as a resuscitation of the almost obsolete *Lex Genucia*, the moneylenders' exasperation led to the praetor's murder and then the concealment of the evidence (Zimmermann 1990 168).

¹⁸⁴ See fn 174 *supra*.

¹⁸⁵ *Ibid.*

¹⁸⁶ Thomas 1976 273.

The Canon Law, which was the dominant rule in the Middle Ages,¹⁸⁷ forbade charging of interest altogether.¹⁸⁸ However, the economic realities were more forceful than religious tenet, with the eleventh and twelfth centuries marked by rampant development and huge growth in capitalism.¹⁸⁹ As finance was required for production and investment, various transactions were evolved in order to circumvent the prohibition on interest.¹⁹⁰ Consequently, during the sixteenth century and with the Reformation, the prohibition on usury was no longer tenable and by the time imperial legislation was decreed in 1654, which acknowledged the possibility of allowing the charging of interest, the Canonical prohibition had been abrogated by convention. This realized a general move back towards Roman rules on usury and interest, with certain modifications, for example the interest rate for general loans was reduced from 6 to 5 percent.¹⁹¹ After the Reformation, the courts of Holland allowed charging of interest.¹⁹² However, Holland had no *certum modum usurarum*.¹⁹³

¹⁸⁷ Zimmermann 1990 170.

¹⁸⁸ The courts in Holland mainly disregarded this law, especially after the Reformation (*Dyason v Ruthven* 3 Searle 282 292-4).

¹⁸⁹ Buckley 1998 20.

¹⁹⁰ Furthermore, the Church endured usury by Jews: 'excluded from agriculture, not allowed to own landed property, unable to join the guilds and thus become artisans or ordinary merchants, they were forced to take up the shadier business of moneylending/pawn broking' (Zimmermann 1990 172-3). It is interesting to note that the Hebrew word for usury is *neshekh* which literally means 'a bite' due to its painfulness to the debtor. It appears that the prohibition on taking interest in Exodus (22:25) and Leviticus (25:36, 37) was confined to the poor in dire straits and not to moneylending in the normal course of business, whereas in Deuteronomy (23:19, 20) the prohibition applies to all moneylending, except business dealings involving foreigners (Buckley 1998 20).

¹⁹¹ Zimmermann 1990 175.

¹⁹² Otto JM and Grové NJ *The Usury Act and Related Matters South African Law Commission Working Paper* 1991 19.

¹⁹³ Without the Canon Law, the courts of Holland had to look back to various authorities regarding the rate of interest; at least Justinian's Code sanctioned that charging of interest was not unlawful. Van der Linden seemed to stipulate that 6 percent interest should not be exceeded and anything above that should be considered usurious (*Inst.* 1 15 3). Grotius distinguished between two types of loan (3 10 9); while both Van der Linden and Grotius looked to reasons why the borrower required the money. If the borrower looked to the loan in order to obtain necessities, the loan ought to be granted, according to Grotius, without any expectation of return. If, however, the borrower required the loan in order to make a profit, or for his convenience, it would only be natural to require a return from the loan. Grotius deemed lenders to be generally selfish and therefore concluded that their unchecked rates may in time have burdened borrowers; thus requiring provisions stipulated by the Municipal laws to come into effect (*Dyason v Ruthven* 295). Loenius in his 21st case stated that in Holland there was no *certum modum usurarum*, but that the rate of interest allowable at common law was regulated according to the circumstances of time, places and persons, and therefore it was never seen that any one from the circumstance of his taking higher interest was accused of usurious practices (*Decis.* 21; *Dyason v Ruthven* 296). In effect however, Loenius, one of the Judges of the High Court, was not advocating a non-interventionist approach. In 1610 certain interest rates were adjusted in various cases in

In the same fashion, Roman-Dutch law permitted charging of interest subject to certain maximum rates at various developmental periods.¹⁹⁴ In Roman-Dutch law ‘interest properly so called’¹⁹⁵ was only of two kinds: either an estimation of damage to property or loss suffered that consequently led to a prevention of recovery of anticipated profit.¹⁹⁶ It was thus left to judges, whom had to make use of the guidance of fixed general rules to make accurate estimations of interest due according to the specific circumstances in the cases before them.¹⁹⁷

Interest for money loans was referred to as ‘usury’ or ‘rent’.¹⁹⁸ Usury was payment for money owed, as well as for goods handled in terms of length, capacity and weight. Any other type of goods that could not be measured by length, weight or capacity or any immovable property could not have this particular interest charged to them because, it was reasoned, that to constitute usury, the property had to be of a decisive ratio.¹⁹⁹

accordance to the very circumstances surrounding the cases. Bell J examined various other cases (these include: case 166 of 1563; case 248 of 1590; a case mentioned by *Neostadius* in 1592 and two cases commented on by *Christinaeus* in 1596 and 1601) that allowed the charging of interest, with the rate always varying between 6 and 12 percent. However, Bell J held that these cases were simply demonstrative of the Courts’ of Holland willingness to intervene, by allowing the charging of interest where none had before been stipulated. It is shown in this case that Van der Keessel stated that there was no express law in Holland on the matter of interest (*Dyason v Ruthven* 297).

¹⁹⁴ Van Leeuwen (*Censura Forensis* 1 4 4 5 and 1 4 4 9, Rooms-Hollands Regt 4 6 6), Van de Keessel (*Praelectiones* 3 10 9) and Huber (*Heedendaegse Rechtsgeleertheit* 3 16 3; 3 16 11; 3 16 14-15; 3 36-37) Grotius expressed the difference between the use and abuse of usury as follows: ‘if the compensation allowed by law does not exceed the hazard run, or the want felt by the loan, its allowance is neither repugnant to the revealed nor the natural law; but if it exceeds these bounds then it is oppressive Usury, and though the municipal laws may give it impunity they cannot render it just’ (*De Jur. Belli et pacis*, 1.1.c.12, s22).

¹⁹⁵ Huber 1 37 1.

¹⁹⁶ Huber 1 36 2.

¹⁹⁷ Huber 1 36 4. Huber, here, further identifies the rules used to determine this type of interest.

¹⁹⁸ ‘Next comes usury, though, because the name is odious, we rather use in place of it the name of rent or interest (*interessen*)’ (Huber 1 37 1).

¹⁹⁹ Huber 1 37 5, D 22 1 4, D 19 5 24, Code 4 32 11, Code 4 32 12. What is interesting to note is Huber’s constant reference to the fact that interest or usury should not be charged because loans for consumption should be made without profit, as these were contracts to be entered ‘by way of charity and affection’. He also stated that it was the avarice of mankind which attached usury to these contracts under the name of interest, but that this nevertheless, could only be extracted by way of a separate and express stipulation (Huber 1 16 11, D 12 1 17 3, Voet 12 1 4). Voet, on the other hand, defended the charging of interest. He did not perceive interest as being in conflict with the principles of fairness or of natural law. When use of cash, he argued, is granted to another by a loan for consumption, the lender essentially deprives himself of the power to gain from that money, but provides a chance for others to gain - therefore he should be entitled to claim a moderate and definite interest (Voet 12 1 4).

Usury became divided into three types: 'compensative', 'punitive' and 'lucrative' interest.²⁰⁰ 'Compensative' was a reimbursement of any loss for damage sustained or profit lost.²⁰¹ 'Punitive' interest was the penalty charge paid by a defaulting debtor for making a late payment.²⁰² 'Lucrative' interest was simply interest charged in view of making profit from money loans.²⁰³

Interest upon interest was strictly forbidden²⁰⁴ and a debtor who acknowledged this interest would simply decrease, upon payment, his capital amount or alternatively had the option to claim it back.²⁰⁵ This view was so strictly adhered to that even if a debtor defaulted on a judgment debt he would not owe more interest than that declared owed by the judgment derived from the capital amount.²⁰⁶ The *ratio* was that a debtor not servicing his debt, implied at face value, his depreciating financial state and that the incurrance of even more interest upon his already outstanding interest, would evidently run him 'aground'.²⁰⁷

Interest was charged in three ways: by stipulation, when a debtor was in *mora* and judicial demand.²⁰⁸ With a stipulation, no more interest could be charged other than that stipulated for in the contract.²⁰⁹ *Mora* gave rise to interest in all

²⁰⁰ Huber 1 37 6.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Huber 1 37 6.

²⁰⁴ Huber 1 37 7. This rule however was only applicable to interest upon unpaid interest (Code 4 32 11, Code 4 32 12, D 22 1 29, Code 4 32 28).

²⁰⁵ Huber 1 37 6.

²⁰⁶ *Ibid.*

²⁰⁷ Compound interest was seen as nothing more than 'a canker to the commonwealth [... as] a country cannot languish more quickly than by the decay of its households' (Huber 1 37 6). The exception to this rule lay in a debtor who acted capriciously or *mala fide*, delaying payment caused not due to need, but avarice. In such cases, a judge could then order that interest upon interest be charged, not only from the time of judgment, but even from *litis contestatio* (Lee 1953 128, Huber 1 37 10, Grotius 3 10 10, Voet 12 1 18, *CIR v Lever Brothers* 1946 AD 441 450-451). In modern times it has been held that there is an implied agreement to pay interest on bank overdrafts (*Standard Bank v Lotze* 1950 2 SA 698).

²⁰⁸ Huber 1 37 13.

²⁰⁹ Thus, if one year's worth of interest was contemplated in the contract and the debtor did not pay within the year, he could not be charged more interest on this debt. If, however, a debtor paid beyond the stipulated time this would amount to a tacit agreement on further interest (Huber 1 37 15-16).

spheres of contract, with the exception of book debts, which required stipulation in order to bear interest.²¹⁰

Thus, we see how the *birth* of consumer credit protection was really founded in the control of interest rate charges. It is submitted that regulating other aspects of the credit transaction was a necessitated and natural development which advanced from the regulation of interest. The first way that a consumer could be taken advantage of was through excessive, unregulated interest rates. Thereafter, as the commerce of money and credit transactions evolved and became more widespread, so the need to broaden the spectrum of regulation to incorporate, if not the entire, at least a broad range of the debtor-creditor dynamic, took root.

After the initial struggle of whether interest was morally acceptable and should be levied at all, the debate really centred on what rate interest charges should be limited. An ebb and flow of changes in the maximum amount of interest is identifiable through Roman and Roman-Dutch law. A pattern that has continued into contemporary times and that is certain to continue, as the volatile, global economic climate vacillates. The same dynamic can be noted with reference to the regulation of many aspects of the credit relationship, a case in point being the regulation of the procedure to be followed when looking to enforce a debt. The following sections take an in-depth look at the evolution of credit regulation as a whole in South Africa. As will be seen, legislative control of the procedure relating to the steps that a credit provider must take prior enforcement when faced with a breach by the consumer, only formed part of twentieth century legislation.²¹¹ Prior to which it was the common law that regulated this aspect of the credit relationship.

²¹⁰ Huber 1 37 17.

²¹¹ It was section 12 of the Hire Purchase Act 36 of 1942 and section 11 of the Credit Agreements Act 75 of 1980, which started the regulation of pre-enforcement procedures in South Africa.

2.3 South African Law

2.3.1 Common Law

Consumer credit protection in South Africa has developed slowly and perhaps not always under the guise of this label. It initiated or rather came to the fore, like in all other countries, through the continued and increased ‘commerce’ of money. Throughout human history and as exemplified in the preceding paragraphs, lending and lending rates have always been critically debated themes. South Africa’s teething problems in the area of consumer credit protection started with a public requirement of the control of interest rate charges. These controls developed both through the common law and legislative enactments. The advancement of these enactments was, however, slow and developed in piecemeal fashion. At first, there was no statutory or common-law control over finance charges.²¹² The discussion that follows examines South Africa’s common law evolution and legislative development.

The history of South African common law with its Roman origins, and mostly fostered on the Old Testament,²¹³ consists also of the history of Roman-Dutch law and its transportation to and reception in South Africa.²¹⁴ Roman-Dutch law came to South Africa with the arrival of the Dutch East India Company in 1652.²¹⁵ The Law of Holland was applied for the next 150 years in the Cape, with some variations.²¹⁶ Early in the nineteenth century the Cape came under British rule, but remained under Roman-Dutch law.²¹⁷

In *Dyason v Ruthven*,²¹⁸ one of the earliest South African cases dealing with the extension of credit, the court looked at the laws of Holland as authority, in the absence of specific local enactments or declarations.²¹⁹ An examination of the

²¹² Otto and Grové 1991 19.

²¹³ Grové 1989 8 and Grové and Otto 1991 18.

²¹⁴ Hahlo and Khan 1973 324.

²¹⁵ Hahlo and Khan 1973 330.

²¹⁶ *Ibid.*

²¹⁷ The Roman-Dutch law, in the Netherlands, then under French domination, was replaced by the Napoleonic Codes (*ibid.*).

²¹⁸ 3 Searle 282.

²¹⁹ Watermeyer J expressed himself as follows: ‘I shall endeavour to state succinctly the rules which appear to me to have guided the Courts of Holland in deciding questions of interest or of

laws of Holland turned the discussion to Roman law, which was viewed as 'provid[ing] the most essential foundations of the "civilian tradition"'.²²⁰

As indicated, the South African common law is of Roman and Roman-Dutch extraction. Thus, understandably, the first cases to deal with the question of usury, as shown above, looked to these authorities in order to settle the common law position. It is submitted that 'awareness' of the need for consumer protection legislation to be put into place arose from the abuses and malpractices derived from lending practises and charging on interest. Initially, according to common law, usurious contracts were considered void.²²¹ However, no *certum modum usurarum* or stipulated common law maximum rate of interest was established²²² (and still none exists).²²³ This is regulated by statute.²²⁴ Where an illegal rate of interest has been stipulated, the maximum rate may still be recoverable.²²⁵ The common law gives the courts the power to decrease excessive interest rates and allow the remaining terms of the contract to be enforced.²²⁶

usury, and the foundation upon which these rules rested. In the absence of direct local enactments absolutely fixing a rate of interest, the law which prevailed in Holland is our law' (305).

²²⁰ Zimmermann 1990 167.

²²¹ *Sutherland v Elliot Brothers* 1841 1 Menz 99, *Dyason v Ruthven supra*, Wessels stated: 'The practical difficulty is to determine when a contract is usurious and when not' (*The Law of Contract in South Africa* 2 21 1951 573).

²²² *Dyason v Ruthven supra*, *Reuter v Yates* 1904 TS 835, per Wessels J in *S.A. Securities v Greyling* 1911 TPD 352: 'It is difficult for me to find any definite principle upon which a case of usury has been or can be decided. I think the most you can say is that the transaction must show that there has been extortion or oppression or something akin to fraud'. This case involved a holder of a promissory note for £100, refusal to renew the note unless the promisor agreed to pay £140 after 4 months. The court did not find any fraud, extortion or oppression and thus ordered the payment of the £140.

²²³ Cf *Structured Mezzanine Investment (Pty) Ltd v Dawids and Others* 2010 6 SA 622 (WCC) and *Structured Mezzanine Investments (Pty) Ltd v Basson NO and Others* (22732/2009) [2013] ZAWCHC 63 (24 April 2013).

²²⁴ Section 105 of the National Credit Act as read with regulation 42 (GG 28864 of 31.05.2006). Section 105 came into operation on the 1 June 2007. The Minister of Trade and Industry after consulting with the National Credit Regulator may prescribe the maximum rate of interest applicable to each subsector of the consumer credit market. Prior to its promulgation, the maximum recoverable rate of interest was determined by the Usury Act 73 of 1968 (hereinafter the 'Usury Act').

²²⁵ *Spencer v The Merchant's Credit Corporation* 1933 WLD 69 and Wessels 2 21 1951 583.

²²⁶ *Dyason v Ruthven supra* and *Reuter v Yates supra*. The National Credit Act prescribes when a credit agreement is unlawful, in which event despite any provision of common law or any other legislation or any provision of an agreement to the contrary a court when finding a credit agreement to be unlawful, must order the credit agreement void *ab initio* (section 89). Furthermore, the Act prescribes what are to be considered unlawful provisions of a credit agreement. In any credit agreement, a provision that is unlawful in terms of section 90 is void as from the date that the provision purported to take effect. In which event a court must sever the unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is

In *Dyason v Ruthven*²²⁷ both Roman and Roman-Dutch authorities were analysed, in order to assess the South African common-law position with regard to consumer credit protection in terms of interest rate charges. The action in this case was instituted in order to recover £65 together with interest owed at 12 percent per annum. It was contended by the defendant that the plaintiff was not entitled to contract or stipulate for interest at such an amount and that the law of the Cape Colony (as it then was) permitted only 6 percent per annum.²²⁸ The court looked at various Governmental resolutions and Placaats issued, to establish whether the legal rate of interest at the time - as the defendant claimed - was in fact 6 percent.²²⁹ Having reviewed the relevant Placaats, Resolutions,

reasonable to do so having regard to the agreement as a whole. Otherwise, the court may declare the entire agreement unlawful as from the date that the agreement or amended agreement took effect (section 89 (5)). A credit agreement which purports to charge an interest rate which is higher than that prescribed by the Minister does not appear to fall under the list of unlawful agreements as per section 90 of the Act. Such a term, if incorporated in a credit agreement, would however, it is submitted, defeat the purposes and policies of the Act. It is further submitted that a term in a credit agreement purporting to charge a rate of interest, for a particular credit agreement, in excess of the rate allowable in terms of the regulations would be an unlawful provision in terms of section 90 (2)(b)(iii) in that it would be a term purporting to set aside or override the effects of section 105 of the Act. This section, however, does not specify the sanctions in the event of non-compliance therewith. Furthermore, it is submitted that in such instances the courts should take the approach taken by the courts before an interest rate was legislatively stipulated and declare interest levied on a credit agreement by a rate higher than that stipulated in section 105 to be unlawful. While the agreement as a whole need not be unlawful or void, the clause dealing with interest should be altered to the extent required to make it lawful, that is a recalculation of the contractual interest should be ordered. For a discussion on unlawful provisions generally cf Otto and Otto 2013 54 – 57 and Otto JM ‘Statutêr Verbode Bedinge in Kredietooreenkomste’ 2011 TSAR 38.

²²⁷ *Supra* 767.

²²⁸ *Supra* 282–3.

²²⁹ The 1793 Instructions to Notaries was held to be pertinent only to notarial instruments, and even then did not render the instruments invalid if the 6 percent watermark was not adhered to. The court noted that the stipulation of a higher rate of interest in a notarial bond might have had adverse effects on the notary, such as suspension for example. The court examined the directions issued to the Government Loan Bank in 1794, which stipulated that loans under 100 rix dollars should be charged at 9 percent *per annum* and anything above that should be charged at 6 percent. In 1803 the rate was altered to a standard 5 percent *per annum* for all loans. In 1808 a further change was made and that was to a rate of 6 percent. The court held that this was a direction to the Bank and did not create an overseeing rate of interest in respect of the whole Colony, and that in any event the rate had varied from 5 to 9 percent. No invariable rate had been fixed (301). Ordinance 42 1828, regulating the Orphan Chamber also stipulated a 6 percent interest rate, but was held to apply only to itself and not to affect the rest of the community. A Placaat of 1743 declaring: ‘upon all obligations [...] made by parties before their departure for India or return to Holland, from whatever nature they may arise, in no case shall more interest be allowed than at the highest rate of 6 percent’, was held by the court to be referring only to special matters regarding parties leaving Holland for India and thus did not affect the Colony as a whole (302). In conclusion Watermeyer J stated that he did not doubt that the same government which issued various restrictive Ordinances and Placaats, would have no difficulty in ‘fixing the price of

Decisions, Proclamations and Comments the court concluded that no law existed in the Colony that stipulated a fixed amount of interest be charged in loan contracts.²³⁰ Bell J, however, held that the *dictum* would not lead to the conclusion that no law regulated what interest could be charged, whether stipulated or not.²³¹

In *Reuter v Yates*²³² the case of *Dyason v Ruthven*²³³ was cited with approval and it was emphasized that there was no fixed common-law rate that would render a loan transaction usurious *per se*, but that illegal and excessive interest would not be enforced.²³⁴

In *SA Securities Ltd v Greyling*²³⁵ Wessels J found the common-law view in this regard rather vague and would not consider interest charged at 120 percent *per annum* as usurious.²³⁶ Rather, he found that a usurious transaction should show 'either extortion or oppression, or something akin to fraud'.²³⁷ It is submitted that Wessels J's difficulty with determining a 'definite principle' in this regard was

money, as they had no difficulty in fixing the price of sheep, corn, and wine'; accordingly, he stated: 'they have left us no enactment of the kind' (312).

²³⁰ 'I am aware that many persons have entertained an opinion that an usury law is in operation in this Colony, [...]. This may have arisen from the circumstances, which I have already averted to, i.e. that 6 percent has been the usual and accustomed rate of interest allowed by this Court, and stipulated between lenders and borrowers of money. But law taken for granted often fails when its sources are reached' (291-292).

²³¹ As per Bell J: 'The question whether this or that rate of interest may be taken in any particular case will be a question of circumstances of the case, and according to what may be found to be the current market-rate of interest from information howsoever derived' (*supra* 302). Circumstances which the Court indicated should be taken into account when considering the legality of an interest rate charged on a credit transaction, included (i) the interest rate agreed on by the parties; (ii) the amount of money lent; (iii) the period of repayment; (iv) the security furnished; (v) the risk attached to the loan; (vi) the market-rates at the time of loan; and (vii) the parties' particular circumstances in relation to each other (Otto and Grové 1991 20). *Van Leeuwen's* statement in this regard is also relevant: 'Where, however, it has not been stipulated and expressed how much, and how, interest should be paid, it is computed at so much as it is usual to contract for, according to the custom of the country or place where the contract is made' (*SA Securities Ltd v Greyling supra* 356).

²³² 1904 TS 855 859.

²³³ *Supra*.

²³⁴ Per Innes CJ: 'The law of Holland prohibited excessive usury; and the courts of this country, administering that law, will refuse to enforce contracts shown on due enquiry to be usurious and extortionate in their nature. But our law does not define any particular rate of interest as being necessarily usurious; it does not fix a limit up to which interest is legitimate and proper, and beyond which it becomes illegal and excessive. That must depend upon the circumstances of the case' (856).

²³⁵ *Supra* 356.

²³⁶ *Supra* 358.

²³⁷ *Ibid*. In *Taylor v Hollard* 1888 2 SAR 78 85 the court concluded that where an excessive rate of interest has been agreed to by the parties such rate could be lawfully reduced because it would not be in the public interest to allow usurious rates.

demonstrative of the need for legislation to regulate this area of law. As will be seen in the following section, legislation was indeed enacted, however, the scope was much larger than the mere regulation of interest. The legislative intervention covered a diversity of aspects of the consumer-provider relationship.

Aronstam,²³⁸ writing in 1979 on legislative control relative to consumer protection, made the following comment:

Generally speaking, one may remark that the lack of common-law shield in South Africa to protect the abused consumer has led the legislature to attempts to provide one. This shield has, in the main, been constituted out of new material. The legislation, in other words, does not tend merely to codify the common law. This is not in itself undesirable; there are a number of advantages attaching to a wise legislative control of abuse. Parliament is not bound by any rules of precedent or court procedure. It is able to intervene directly in any case of abuse, whereas a court has to wait for litigation. Legislation can be used to regulate all areas of contractual activity, and all would be well if it were done wisely. Moreover, legislative remedies constitute, obviously, a useful tool for the prevention of future abuses.

2.3.2 Legislation

Instances where persons borrow money or receive credit are rife with striking examples of some of the problems that arise when inequality in the bargaining process is present.²³⁹ Credit legislation protects consumers who borrow money, buy or hire goods on credit or who obtain services on instalments.²⁴⁰ It is patent that there is a need for credit transactions in the modern commercial environment and that credit may be beneficially used; for example, by a borrower who uses credit to bridge the gap between spending and receipt of income, or it may permit him to purchase necessary items, at prices in excess of what is *de facto* sanctioned by his own earnings and/or savings.²⁴¹ However, a prospective credit consumer may not always be seeking credit for luxury uses – often times he may need the money urgently for some other reason, for instance, to cope with an

²³⁸ 1979 47.

²³⁹ Aronstam 1979 64.

²⁴⁰ Otto *LAWSA* 1986 volume 24 paragraph 106. Once the Supreme or Constitutional Court interpret the common law or legislation and make a finding, such ruling applies to all activities and even to matters currently at court. Whereas legislative intervention is usually applicable to future activity and then will still have to be subject to interpretation by the courts.

²⁴¹ Aronstam 1979 64.

unforeseen emergency. And by virtue of such a dire need – he may be placed in a disadvantageous bargaining position, where he may be prepared to accept any contractual term imposed on him. Furthermore, in many instances credit consumers are not wealthy individuals, often without immovable property or assets to use as security for debt and with very low standards of education. The following reflects a correct extrapolation of ground level reality:²⁴²

People with small earnings may find themselves incapable of making repayments because of their inability to deal with unforeseen changes in their financial circumstances. Lenders who are aware of this often take advantage of this weakness. [...] People who live in poverty or near poverty are often tempted to enjoy the material pleasures of prosperity so obviously enjoyed by the wealthy in society. The consumer who is poor is exposed just as much as his rich counterpart to the blandishments of press and radio advertising that seek to persuade all to acquire the ‘essential’ of prosperity. [...] It is not surprising, therefore, that such persons often incur debts they can never hope to repay. Nor is it surprising, therefore, that persons who do grant credit facilities to such borrowers’ attempt, by means of harsh penalties and security over the borrowers’ goods, to secure the money that they have lent or credit that they have granted.

It is precisely against the background of abuses by credit providers of the poor, uneducated or needy borrowers that consumer protective legislation began to be introduced, globally and also in South Africa.²⁴³ Statutes protecting and regulating the credit relationship have been correctly described as ‘international phenomena, which differ from country to country depending on each country’s needs, circumstances, resources, political agenda, economic philosophy and

²⁴² Aronstam 1979 65.

²⁴³ The South African legislature has generally waited for other countries to legislate before following suite, many countries promulgated credit legislation much earlier than South Africa (Otto in Scholtz 2014 paragraph 1.3.2). England for example, enacted its first consumer credit legislation in the ninth century, while the United States passed its first legislation in the eighteenth century (Grové 1989 80 and 91). England has appeared to be the forerunner as far as credit legislation is concerned: in 1974 it passed the Consumer Credit Act 39 of 1974. The various Australian states promulgated legislation in the mid-1980s and with the promulgation of the European Union Directives on Consumer Credit in 1986 (CD 87/102/EEC of 22 December 1986 as amended by CD 90/88/EEC of 22 February 1990) – a flood of consumer credit legislation swept through Europe in the 1990s. Bülow lists 17 European countries that passed legislation following the EEC Directive (*Heidelberger Kommentar zum Verbraucherkreditrecht* 19 and Otto in Scholtz 2014 1-4). However, Europe has seen a new scramble of national legislation to accommodate the latest directive (2008/38/CE).

history of the particular country'.²⁴⁴ Regional trading and considerations of uniformity may also play a role, Europe providing an accessible example.²⁴⁵

Due to the need to protect poor, uneducated and needy borrowers, credit legislation often covers only those contracts which extend credit to a certain 'ceilinged' amount.²⁴⁶ Credit extended above this amount no longer falls within the parameters of the legislation and the relationship, terms and conditions between the provider and receiver are determined partly through their contractual affiliation and partly through the common law. Of course, not all credit legislation adheres to these norms and differs from country to country. South Africa, however, fell in line with this pattern and it was in 1926 that Parliament introduced the Usury Act.²⁴⁷ The 1926 Usury Act was the first national consumer legislation passed in South Africa.²⁴⁸ Prior to this Act the various colonies regulated their own consumer legislation.²⁴⁹ There was, however, a period where neither statutory nor common-law controls existed.²⁵⁰ Both Natal and the Free State Law Books read that people were entitled to demand as much interest as they deemed fit.²⁵¹ The Cape Colony, from 1909, had the Usury Act, 1908²⁵² which applied to moneylending transactions but did not incorporate business transactions and allowed different rates according to different amounts lent.²⁵³ Anyone requesting or exacting more than was allowed by that Act was guilty of an offence, and could be ordered by a court to pay the extra interest back to the

²⁴⁴ The EEC directive of 1986.

²⁴⁵ The EEC directive of 1986 leading to the European member states passing new credit legislation in the 1990s, with shared common principles being a prime example (Otto 'The EEC Directive on Consumer Credit: a Model for Southern Africa?' 1996 *SALJ* 297).

²⁴⁶ Or sometimes to the type of consumer, for example, credit legislation may apply to any natural persons but not to all juristic persons, as with the National Credit Act and the Consumer Protection Act.

²⁴⁷ Act 37 of 1926 (hereinafter the '1926 Usury Act').

²⁴⁸ Otto and Grové 1991 24. It must be noted that at first the Act did not create complete homogeneity, whereas both the Free State and Cape Colony repealed their laws to make way for the 1926 Act, Natal did not. Natal only conformed in 1967 with the Pre-Union Statute Law Revision Act 78.

²⁴⁹ Grové 1989 132.

²⁵⁰ *Ibid.*

²⁵¹ Free State Law Book and Act 6 of 1858 (Van Zyl FH '*n Kritiese Evaluering van die Wet op Bepanking en Bekendmaking van Finansieringskoste* LLM Dissertation 1984 7, Otto and Grové 1991 22 and Working Paper 46 1993 22-29).

²⁵² Act 23 of 1908.

²⁵³ Cf section 5 of the Usury Act, 1908

debtor.²⁵⁴ The Act further extended to sale transactions where interest could be charged on amounts outstanding.²⁵⁵ For the first time various disclosure requirements were legislatively stipulated.²⁵⁶ These are what have been termed first generation consumer credit legislation, the main feature of which was the autonomy of the colonies.²⁵⁷

The 1926 Usury Act prescribed a maximum fixed interest rate.²⁵⁸ This rate varied according to the principal amount loaned.²⁵⁹ Any person exacting more than the prescribed rate was found guilty of an offence and held liable for a fine not exceeding £100.²⁶⁰ The Act was not applicable to banks,²⁶¹ hire-purchase contracts²⁶² and to commercial transactions where a moneylender was not a party to the contract.²⁶³ The moneylending agreement had to be in writing and the Act prescribed various other conditions regarding the form and content of the agreements.²⁶⁴ This Act did not, however, prescribe any particular procedure to be followed by a credit provider who wished to issue summons following a breach of contract by the consumer. It is submitted that the common law on breach and recovery regulated this process.²⁶⁵

In 1967 the Minister of Finance appointed a committee known as the Franszen Committee headed by Dr Franszen to consider the 1926 Usury Act, and suggest possible improvements.²⁶⁶ The committee's main areas of focus were: how to impose maximum prescribed interest rates; whether the 1926 Usury Act should apply to hire-purchase and leasing agreements; and, if so, what rates should be charged in regard to these transactions and finally, whether the credit grantor

²⁵⁴ Cf section 6 of the Usury Act, 1908.

²⁵⁵ Cf section 16 of the Usury Act, 1908, Otto and Grové 1991 23 and *Working Paper* 46 1993 22-29.

²⁵⁶ Cf section 3 of the Usury Act, 1908 and Otto and Grové 1991 24.

²⁵⁷ Otto and Grové 1991 24.

²⁵⁸ Section 2 of the 1926 Usury Act.

²⁵⁹ Section 2 of the 1926 Usury Act.

²⁶⁰ Section 1 (2) of the 1926 Usury Act.

²⁶¹ Section 14 (3) of the 1926 Usury Act.

²⁶² Section 14 (2) of the 1926 Usury Act.

²⁶³ Section 14 (4) of the 1926 Usury Act.

²⁶⁴ Cf section 5 of the 1926 Usury Act.

²⁶⁵ Cf Chapters 5 and 6 for discussions on breach and remedies in terms of the common law.

²⁶⁶ *First Franzsen Report* (Report of the Committee of Inquiry into the Usury Act (Chairperson D G Franzsen) (1967) GP 11/1968) and *Second Franzsen Report* (Report of the Committee of Inquiry into the Usury Act (Chairperson D G Franzsen) (1977)).

should be obliged to furnish the credit receiver with information regarding the total cost of the loan (interest and all other sundry charges thereto related). The report was extensive and shortly thereafter the Limitation and Disclosure of Finance Charges Act²⁶⁷ was passed,²⁶⁸ thereby repealing the 1926 Usury Act.²⁶⁹ The Limitation and Disclosure of Finance Charges Act was drastically amended in 1980²⁷⁰ and on various occasions thereafter.²⁷¹ In 1986 it was once again renamed the Usury Act.²⁷² In 1992 the first micro loan exemption, under the Usury Act, was published exempting loans under R6000 from interest rate ceilings;²⁷³ with the Usury Act Exemption of 1 June 1999 exempting loans under R10 000 from interest rate ceilings where the repayment period did not exceed 36 months, where such credit was not advanced by credit card or overdraft.²⁷⁴ Once again the 1968 Usury Act as amended did not purport to regulate the procedure to be followed by a credit provider when faced with breach of contract by the consumer, the common law remained the ruling force.

The 1926 Usury Act did not cover finance for the purchase of goods on credit, better known as hire-purchase contracts.²⁷⁵ It regulated only moneylending transactions. This is why, in 1942, the Hire-Purchase Act²⁷⁶ was brought into force. The two Acts affected different transactions.²⁷⁷ The Hire-Purchase Act was passed in order to protect consumers who purchased goods in this way.²⁷⁸

²⁶⁷ Act 73 of 1968 (hereinafter the '1968 Usury Act').

²⁶⁸ The purpose of this Act, according to its preamble, was to provide for the limitation and disclosure of finance charges levied in respect of moneylending and credit transactions and to deal with matters incidental thereto. The term 'interest' was replaced by the term 'finance charges', an attempt to provide an all-embracing concept in order to attempt to prevent its circumvention (Otto 16 1 *Fundamina* 2010 261).

²⁶⁹ The new Act did not replace the Hire-Purchase Act (Otto and Grové 1991 27).

²⁷⁰ By Act 90 of 1980.

²⁷¹ By the Limitation and Disclosure of Finance Charges Amendment Act 42 of 1986, the General Law Amendment Act 49 of 1995 and the Usury Amendment Acts 62 of 1987, 100 of 1988, 91 of 1989, 67 of 1990, 30 of 1993, 81 of 1995 and 10 of 2003.

²⁷² By section 9 of Act 42 of 1986.

²⁷³ GN 3451 of 31 December 1999. Capitec was founded in 2001. With African Bank being renamed in 1999.

²⁷⁴ This led to large scale unsecured lending in South Africa, for example through the likes of Capitec and African Bank.

²⁷⁵ Otto and Grové 1991 24. It is interesting to note that the supply of goods or services on credit is not considered to constitute a loan in England (Goode RM *Consumer Credit Law and Practice* April 2014 paragraph 1.8).

²⁷⁶ 36 of 1942 (hereinafter the 'Hire Purchase Act').

²⁷⁷ Otto and Grové 1991 24-26.

²⁷⁸ The contract of hire-purchase was not found in Roman-Dutch law. As a substantive form of contract it was only implemented in the commercial world in the middle of the nineteenth century

The Hire-Purchase Act was described as an example of many attempts made by the legislature to protect those whom it regarded as incapable of protecting themselves.²⁷⁹ The hire-purchase contract fulfilled a social and economic need and legislatively filled a gap in the common law.²⁸⁰ It was viewed as a relatively simple piece of legislation which protected purchasers and certain lessees of movable goods against certain provisions in contracts, by limiting the rights of the sellers and by curtailing the cancellation of contracts.²⁸¹ The Act, however, covered only a small number of transactions and this, coupled with rapid developments in commerce, led to its replacement by the Credit Agreements Act of 1980²⁸² which had a far wider scope.

The Credit Agreements Act covered sales and leases of movable goods but had a higher ceiling of application. Whereas the Hire-Purchase Act applied to contracts where the purchase price was not in excess of R4 000, the Credit Agreements Act applied to contracts where the cash price was up to R500 000.²⁸³ In terms of the Hire-Purchase Act, a creditor was not entitled to enforce any provision in the agreement for the payment of any amount as

in Europe (*Otto Die Regte van 'n Huurkoper t o v Beëindiging van die Kontrak* LLD Thesis 1980 5). A variety of factors led to an enormous growth in the hire-purchase trade, but it was not until the end of the nineteenth century that the hire-purchase contract was put to use in South Africa (*Van Waasdijk Hire Purchase Credit* 24). Interestingly enough, the first legislation known to deal with hire purchase was the German Act of 1894; many other countries such as Austria, France, the Scandinavian countries and Switzerland soon followed suit (*Otto* 1980 14).

²⁷⁹ Diemont and Aronstam 1982 1.

²⁸⁰ In Roman-Dutch law, in a cash sale, ownership in the *merx* is transferred against delivery of the thing and simultaneous payment of the price. In a credit sale ownership is transferred by delivery (*Eriksen Motors v Protea Motors* 1973 3 SA 685 (A)). Thus a seller would lose his most important form of security – dominium. This was solved by incorporating a *pactum reservati dominii* in credit agreements. In terms of which the purchaser receives delivery, pays the price in instalments but only becomes owner of the goods once he has fulfilled his obligations in terms of the contract. This type of financial agreement became known as the hire-purchase agreement (*Kennedy v Botes* 1979 3 SA 836 (A), *AA Farm Sales (Pty) Ltd v Kirkaldy* 1980 1 SA 13 (A) and *Otto* 16 1 *Fundamina* 2010 262).

²⁸¹ *Otto* 16 1 *Fundamina* 2010 264.

²⁸² 75 of 1980 (hereinafter 'Credit Agreements Act').

²⁸³ *Otto Credit Law Service* 1991 paragraph 6. The Sale and Service Matters Act 25 of 1964, previously known as the Price Control Act also played a role in the consumer credit protection realm, as certain conditions pertaining to credit agreements were promulgated under this Act (GN R722 and R723 Government Gazette 2137 of 11 April 1975). However, these were repealed (GN R430 Government Gazette 3147 of 27 February 1981) and similar regulations promulgated under the Credit Agreements Act. The Price Control Act conferred on the (then) Minister of Economic Affairs and the Price Controller the power to regulate prices at which goods could be sold and to determine the terms and conditions of sale. The Price Controller was given power, in terms of section 9 of that Act, to make regulations relating to the terms and content of conditional sale contracts. His powers thus extended to hire-purchase and credit agreements (Diemont and Aronstam 1982 352).

damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment, unless he had made written demand providing no less than ten days within which the consumer could remedy the default and the consumer failed to do so.²⁸⁴ In terms of the Credit Agreements Act, the credit provider was not, when faced with a breach by the consumer, entitled to claim the return of the goods to which the credit agreement related unless the credit provider had in writing notified the consumer that he had so failed and required him to comply with the obligation in question within such period, being not less than thirty days after said notification, and the credit receiver had failed to comply with such requirement: Provided that had the consumer failed on two or more occasions to comply with obligations in terms of any credit agreement and the credit provider had given notice as aforesaid, the said period was reduced to fourteen days.²⁸⁵

There was some overlap between the Usury Act and the Credit Agreements Act, although there were also important distinctions between the two, and the Acts had to be applied jointly to credit transactions.²⁸⁶ This arrangement made the area of consumer credit 'an extremely difficult and confusing environment'.²⁸⁷

This fragmented approach to credit protection was to set a trend that remained in vogue until the Consumer Credit Bill was published and subsequently the National Credit Act, passed in 2005 as Act 34 of 2005 and assented to by the President in 2006 by Government Notice 230 in Government Gazette 28619 of 15 March 2006. The National Credit Act contains 173 sections with 3 schedules. The regulations were published in the first half of 2006 in GN R489 Government Gazette 28864 of 31 May 2006 and were amplified and amended by GN R949 Government Gazette 29 245 of 2 September 2006, GN R1209 Government Gazette 29 442 of 30 November 2006, GN 789 Government Gazette 30225 of 28 August 2007, GN 713 Government Gazette 28893 of 1 June 2006 and GN R362 Government Gazette 35 327 of 10 May 2012. The Act came into operation in a piecemeal fashion, apparently to give creditors an opportunity to get their

²⁸⁴ Cf section 12 (1)(b) of the Hire-Purchase Act.

²⁸⁵ The section 11 notice of the Credit Agreements Act is discussed in greater detail in Chapters 4 and 5.

²⁸⁶ Cf the following chapter for a discussion on both of these Acts.

²⁸⁷ Otto in Scholtz 2014 paragraph 1.3.3.

financial systems, contracts, documents and other forms into place and to register as credit providers.²⁸⁸ Various parts of the Act came into force on 1 June 2006, others on 1 September 2006 and yet others on 1 June 2007.²⁸⁹ The National Credit Act 19 of 2014 was published in Government Gazette 37665 of 14 May 2014 and at the time of writing the Act has not come into force.

The various credit areas, namely the purchase of goods or services on credit, leasing of goods or services on credit, money loans and the alienation of land on credit had up until 2005 been governed by separate acts: the Credit Agreements Act, the Usury Act and the Alienation of Land Act.²⁹⁰ The National Credit Act repealed both the Credit Agreements and Usury Acts in an attempt to implement current, cohesive and effective legislation. Although affected by the National Credit Act, the Alienation of Land Act is still in force today. Schedule 2 of the National Credit Act provides that the provisions of the Act enjoy preference over the provisions in Chapter II of the Alienation of Land Act.²⁹¹ The result is that the two Acts will apply jointly with the National Credit Act taking preference when conciliation between the two Acts is not possible. Examples of such differences are the provisions dealing with prohibited terms in contracts²⁹² and with the provisions dealing with the termination and enforcement of contracts.²⁹³

²⁸⁸ Otto and Otto 2014 8.

²⁸⁹ For a detailed summary cf Otto and Otto 2013 8-10.

²⁹⁰ Act 68 of 1981 (hereinafter 'Alienation of Land Act').

²⁹¹ The sale of immovable property on instalments is another form of credit common to the modern economy. In 1973, the sale of land on instalments became regulated by the Sale of Land on Instalments Act 72 of 1971 (Otto and Grové 1991 28). This Act was dubbed 'a failure' (Otto in Scholtz 2014 paragraph 1.3.4) and described as 'ill-conceived, theoretically unsound and poorly drafted' (Van Rensburg ADJ and Treisman SH *The Practitioner's Guide to the Alienation of Land Act* 1984 1). Usually the contract in such agreements for the sale of land provides that the seller shall retain ownership until the final instalment is paid. The Sale of Land on Instalments Act was amended on various occasions but even in its amended version, could simply not resolve the many problems which arose in the property market in the 1970's with regards sale of land on credit. This Act was therefore subsequently replaced by the Alienation of Land Act. The Alienation of Land Act was perceived a much better Act it being the result of many bills, commentaries and recommendations (Otto and Grové 1991 28).

²⁹² Section 15 (1) of the Alienation of Land Act and section 90 (2) of the National Credit Act.

²⁹³ Section 19 of the Alienation of Land Act and section 129 and 130 of the National Credit Act (Van Rensburg *De Rebus* 1981 584 and Otto in Scholtz 2014 paragraph 1.3.4). This is somewhat of an ineffective manner of drafting legislation, especially given that the National Credit Act replaced a legislatively fragmented area of law. One would have expected the new legislation to have been comprehensive. To still have various legislative enactments regulating one area of law simply results in confusion and either ends with costs (of litigation) being downloaded onto the consumer, as it will be the consumer who will need to clarify the confusion while seeking to

Thus the credit legislation in South Africa has in the last eight years been almost completely revamped. The National Credit Act bringing with it a fresh set of rules by which consumers and providers must abide by. This has led to quite a number of cases being brought to the courts in order to iron out certain discrepancies and interpretational difficulties in the Act, not least of all in relation to the remedies available to the creditor when faced with a breach of the agreement by the credit consumer. By studying the movements in history, not only of legislative intervention but of judicial trends one can see the direction that the pendulum is swinging. For example, the more the courts distance themselves from declaring a common law ceiling rate, the more the legislature will have to regulate this area of law. It is submitted that with the latest spate of cases on this matter,²⁹⁴ it would be of no surprise if the legislature brought out legislation to ceiling the amount of interest that may be charged by persons or institutions to persons who do not fall under the protection of the National Credit Act. It is submitted, however, that whilst a slower trend to legislate the remedies available to the credit provider in the event of breach by the consumer, now long established in the common law, will be notable, codifications of the procedure which the credit provider is obliged to respect before he may institute action against the consumer is now well entrenched in the credit legislative culture. It is further submitted that such procedures will keep being regulated through legislative enactments well beyond the promulgation of the successor of the National Credit Act.

2.4 European Union

Since South African law of contract is a mixed legal system partly founded on the civilian tradition and partly on the common law one,²⁹⁵ the historical development

protect his rights, or more detrimentally in people just ignoring the rules or opting to use the 'easier' legislation.

²⁹⁴ *Structured Mezzanine Investment (Pty) Ltd v Dawids and Others* 2010 6 SA 622 (WCC) and *Structured Mezzanine Investments (Pty) Ltd v Basson NO and Others* (22732/2009) [2013] ZAWCHC 63 (24 April 2013).

²⁹⁵ This was due to the fact that a civil law system based on Roman-Dutch law was already well established by the time of the British occupation at the end of the eighteenth century and thus

of these two systems, using the jurisdictions of Italy and England as respective examples, will be briefly examined against the context of the European Union in order to induce a better understanding of the concept of the credit agreement against its background setting.²⁹⁶

The European civil tradition is a milieu of multifarious influences. It is, historically, a product of Roman law, sixteenth century natural law scholastic influence and the nineteenth century influence of the so-called 'will theory' on contract law.²⁹⁷

In broad terms, in Roman law, the enforceability of a contract depended on its category.²⁹⁸ Contracts were binding because there was consent,²⁹⁹ delivery,³⁰⁰ a formality had been carried out³⁰¹ or because they did not fall in any of the above three categories and were informal promises to barter, known as innominate contracts.³⁰² Initially Roman jurists did not explain these distinctions in theory but were only concerned with the practicalities of working out the rules.³⁰³ In medieval times in much of continental Europe where there was no local statute or

South African law became enhanced rather than replaced by the English common law rules and principles (Cartwright P *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* 2007 9).

²⁹⁶ The following is an interesting justification as to the dynamic between comparative law and legal history: 'The relationship between comparative law and legal history is surprisingly complex. At first sight one is tempted to say that while comparative studies legal systems coexistent in space, legal history studies systems consecutive in time. But there is more to it than that. For one thing, all legal history involves a comparative element: the legal historian cannot help bringing to the study of his chosen system, say Roman law, the various preconceptions of the modern system he is familiar with; thus he is bound to make comparisons, consciously if he is alert, unconsciously if he is not. Again, unless the comparatist is content merely to record the actual state of play, he really has to take account of the historical circumstances in which the legal institutions and procedures under comparison evolved' (Zweigert K and Kötz H *Introduction to Comparative Law* 1998 8).

²⁹⁷ Gordery J *The Enforceability of Promises in European Contract Law* 2001 2-10.

²⁹⁸ Gordery 2001 4. Roman law has been examined in greater detail in paragraph 2.2 *infra*.

²⁹⁹ Contracts *consensu*, which included sale, lease, partnership and *mandatum*.

³⁰⁰ Contracts *re* or 'real contracts', which included loan of goods gratuitously for consumption (*mutuum*) or use (*commodatum*), the pledge of goods (*pignus*) or to deposit them gratuitously for safekeeping (*depositum*).

³⁰¹ Large gifts required a document describing the gift executed before witnesses and officially registered (*insinuatio*) and *stipulatio* was an all-purpose formality which could be used to make almost any promise binding.

³⁰² Gordery 2001 2.

³⁰³ *Ibid.*

custom and Roman law became a type of substitute law.³⁰⁴ While some found them puzzling,³⁰⁵ the medieval jurists preserved these distinctions.³⁰⁶

In the sixteenth century a group of philosophers and jurists referred to as late scholastics or Spanish natural lawyers, attempted to incorporate philosophical Aristotelian and Aquinian theories with the Roman law.³⁰⁷ These jurists were the first to look for theoretical justifications of the Roman rules.³⁰⁸ They explained contract law in terms of three Aristotelian virtues: fidelity, liberality and commutative justice.³⁰⁹ In time the views which the late scholastics ascribed to natural law became accepted as positive law and most progressively innominate contracts became enforceable.³¹⁰ By the eighteenth century this view had become widely accepted.³¹¹ However, by the nineteenth century the contract theories of the late scholastics and natural lawyers were replaced by, what became known as, 'will theories', where a contract would be defined in terms of the will of the parties.³¹² Consequently, the principle that contracts are binding on consent was now understood to imply that whatever the parties willed was to be enforced.³¹³

³⁰⁴ *Ibid.*

³⁰⁵ Cf Iacobus de Ravanis *Lectura Super Codice* (published under the name of *Petrus de Bellapertica*) (Paris, 1519, repr. *Opera Iuridica Rariora* vol 1 Bologna 1637, C 4 64 3).

³⁰⁶ Gorderly 2001 3.

³⁰⁷ Gorderly 2001 4. Bix posits that the best known ancient formulation of a natural law position was offered by the Roman orator Cicero, although he admits that Cicero, together with many writers on Roman law, was strongly influenced by the works of Greek Stoic philosophers (*Jurisprudence: Theory and Context* 2003 66).

³⁰⁸ *Ibid.*

³⁰⁹ Gorderly 2001 4.

³¹⁰ *Ibid.*

³¹¹ Gorderly 2001 4 and 7.

³¹² Gorderly 2001 7. A very influential natural law thinker whose work emphasises 'will' when analysing natural moral law, is Francisco Suárez. Though Grotius did not share Suárez' focus on 'will' he was greatly influenced by his writings (Bix 2003 70-1). The following from Harker is noteworthy: 'Individual freedom and the corollary freedom to contract were seen as the insignia of civilized society: the idea was that individuals should be free to regulate their affairs by entering into contracts which were beneficial alike to themselves and to society. Contractual justice during this period and, indeed, up until the mid-twentieth century was seen almost solely as a question of procedural justice. Provided that the law ensured that the agreement was entered into freely and voluntarily by adults of competent understanding, it was believed that the ensuing contract would be substantively just also' ('The Role of Contract and the Object of Remedies for Breach of Contract in Contemporary Western Society' 1984 101 *SALJ* 121 123).

³¹³ *Ibid.*

European law as we know it today, in the form of the various directives, was not known until relatively recently. The unifying law of Europe was Roman law, which influence was strongly felt in the Middle Ages.³¹⁴ It was, however, only in the twentieth century when the broader concept of creating a liberal market in Europe through the establishment of equality of laws, developed and thus the concept of a European Union came to fruition.

The principles of European contracts are the product of work that was carried out by the Commission on European Contract law, a body of lawyers drawn from all the Member States of the European Community.³¹⁵ They were inferred as a response to a need for a community-wide infrastructure of contract to consolidate the rapidly expanding volume of community law regulating different types of contracts in Europe.³¹⁶ However, a bigger ideology preceded this collaboration and that is the concretisation of Europe as a community and thereafter as a union.³¹⁷

In 1992 it was agreed at Maastricht to create a European Union,³¹⁸ of which the European Community, first established by the Treaty of Rome in the 1950s,³¹⁹ would form part.³²⁰ The European Union³²¹ finds its roots in a broader concept – the ‘European Community’. Initially, there were three European Communities: the first of these was formed in 1952 and was the European Coal and Steel Community; the second and third were created in 1958 by the Treaties of Rome

³¹⁴ Cf paragraph 2.2 *infra* for a detailed discussion on the history and influence of Roman Law.

³¹⁵ Olando O and Beale H *The Principles of European Contract Law Part 1: Performance, Non Performance and Remedies* Part 1 1995 XV.

³¹⁶ *Ibid.* For an interesting discussion on consumer contract law and contract law in the European Union cf Grundmann S *The Architecture of European Codes and Contract Law* 2007 16-17.

³¹⁷ Olando and Beale 1995 XV.

³¹⁸ Treaty of Maastricht 7 February 1992.

³¹⁹ The Treaty of Rome was agreed in 1957 and came into force in 1958, the Treaty of Maastricht on 7 February 1992. The Treaty of Lisbon amends these two treaties which comprise the constitutional basis of the European Union. The Lisbon Treaty was signed by the European Union member states on 13 December 2007, and entered into force on 1 December 2009. It amends the Treaty on European Union (Maastricht Treaty) and the Treaty establishing the European Community (Treaty of Rome) (Weatherhill S *EU Consumer Law and Policy* 2005 1).

³²⁰ Weatherhill 2005 1-2. The reasons and benefits for a formulation of principles of contract law within Europe are many, some of these, in relation to consumer credit, are explored in Chapter 3. It is submitted that the broader objective of creating a liberal market in Europe and creating equality of laws applicable to consumers contracting in different European countries (see the Preamble of the Directives on Consumer Credit) is as applicable to laws relating to general commerce as it is to consumer credit.

³²¹ Hereinafter ‘EURATOM’.

and were the European Economic Community and European Atomic Energy Community.³²² The largest and most influential of these was the European Economic Community which was concerned with economic integration across all economic sectors and to achieve a political restructuring of the European continent.³²³ The European Economic Community's ambitions were powered by a treaty that gave it the muster to possess its own institutions and adopt legislation in those areas that had been transferred to it from national areas.³²⁴ Thus the vision of economic integration was to be realised through the application of legal rules.³²⁵ The Treaty of Rome was not significantly amended until 1987 when the Single European Act³²⁶ came into force.³²⁷ The vision was to secure the completion of an internal European market by 1992.³²⁸ The pattern of consumer protection policy in Europe was altered with the entry of the Treaty on European Union on 1 November 1993.³²⁹

In 1991 the Member States of the European Community meeting in Maastricht in the Netherlands agreed on the restructure of the European Community in a Treaty on European Union.³³⁰ The Treaty advocates a 'common market' with a view to the free circulation of the factors of production; that is the 'four freedoms' as the cornerstone of the notion of the common market: free movement of goods, persons, services and capital.³³¹ The ideal was to lose individual State independence over trade policy and create a common external commercial policy.³³² The treaty on European Union was followed by the Treaty of

³²² Howells GG and Weatherhill S *Consumer Protection Law* 1995 100.

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ Howells GG and Weatherhill S 1995 100

³²⁶ Hereinafter 'SEA'.

³²⁷ SEA's main purpose was to set a deadline for the creation of a full single European market by 1992. It also created deeper integration by making it easier to pass laws, strengthening the European Union Parliament and laying the basis for a European foreign policy (<http://www.civitas.org.England/eufacts/FSTREAT/TR2.htm>) (27.05.2010). Article 100a of SEA permitted the adoption by majority vote of measures required to secure the completion of an internal European market by the end of 1992 (Howells and Weatherhill 1995 80 and Cuthbert M *Nutshells European Union Law* 2006 1).

³²⁸ Howells and Weatherhill 1995 100.

³²⁹ Howells and Weatherhill 1995 101 and Cuthbert 2006 1.

³³⁰ The Treaty came into force on 1 November 1993.

³³¹ Howells and Weatherhill 1995 101.

³³² The theory behind these goals was that removal of borders would create increased competition – generating wider consumer choice; ideally with higher quality goods and services. With production runs being extended allowing for more efficient use of plants and thus lowering costs of production (Howells and Weatherhill 1995 82).

Amsterdam, 1997, the Treaty of Nice, 2001 and the Treaty of Lisbon, 2007.³³³ Critical to such amalgamation was the European Court of Justice, which was renamed the Court of Justice of the European Union with the Lisbon Treaty,³³⁴ which consistently tried to interpret the law, in cases of doubt, in a manner conducive to integration.³³⁵ For example, in the *Cassis de Dijon*³³⁶ case the Court insisted that European Community law could be enforced at national level – the principle of direct effect³³⁷ – and further that the European Community law should be applied by national courts in preference to any conflicting national law – the principle of supremacy.³³⁸ The Court was of the view that without such principles the system of integration envisioned by the Treaty would not come to fruition.³³⁹ Thus the rulings of the Court of Justice of the European Union³⁴⁰ empowered individuals to enforce their rights at national level by challenging public authorities in national courts.³⁴¹

In 1987 the European Commission enacted a Directive³⁴² approximating the laws, regulations and administrative provisions concerning consumer credit.³⁴³ This Directive placed emphasis on information provisions, contained rules requiring the supervision of creditors, restricting creditor's remedies, allowing for rebate if credit is repaid ahead of time and introducing a limited form of connected lender liability for the quality of goods supplied.³⁴⁴ The Directive was

³³³ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 121.2.

³³⁴ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 121.3.

³³⁵ For an in depth study of the influence and importance of the courts of Alter KA *Establishing the Supremacy of the European Law* 2001, where besides examining the influence of the courts, she argues that it was by enforcing European law through the national courts which helped to create an international rule of law in Europe.

³³⁶ Formally known as *Rewe Zentrale v Bundesmonopolverwaltung für Branntwein* Case 120/78 1979 ECR 649.

³³⁷ *Van Gend en Loos* Case 26/62 1963 ECR 1.

³³⁸ *Costa v ENEL* Case 6/64 1964 ECR 585.

³³⁹ *Ibid.*

³⁴⁰ Article 177.

³⁴¹ Howells and Weatherhill 1995 85.

³⁴² Directive 87/102/EEC for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer credit OJ 1987 L 42/48 (hereinafter the '1987 Directive').

³⁴³ Howells G and Weatherhill S *Consumer Protection Law* 2005 297. Goode *Consumer Credit Law and Practice* 2014 paragraph 121.4.

³⁴⁴ Howells and Weatherhill 2005 298.

a minimal harmonisation directive, in that it did not preclude Member States from retaining or adopting more stringent provisions to protect consumers.³⁴⁵

The Directive was amended by Directive 90/88/EEC,³⁴⁶ to introduce a common method of calculating the annual percentage rate of interest.³⁴⁷ In April 2008 a new Consumer Credit Directive³⁴⁸ was adopted by the European Parliament and the Council of the European Union. The 2008 Directive repealed Directive 87/102/EEC and Member states had to adopt the regulations laid down therein into their national laws before 12 May 2010.³⁴⁹ An analysis of the national laws transposing the 1987 Directive, as amended, showed that Member States used a variety of consumer protection mechanisms, in addition to the 1987 Directive, on account of differences in the legal or economic situation at national level.³⁵⁰ The *de facto* and *de jure* situation resulting from those national differences in some cases led to distortions of competition among creditors in the European Community and created obstacles to the internal market where Member States adopted different mandatory provisions more stringent than those provided for in the 1987 Directive.³⁵¹ It restricted consumers' ability to make direct use of gradually increasing availability of cross-border credit.³⁵² Those distortions and restrictions were seen to have the potential to threaten the demand for goods and services.³⁵³ In the years leading up to the 2008 Directive, types of credit offered to and used by consumers evolved considerably and new credit instruments appeared.³⁵⁴ The European Parliament saw it fit to therefore amend existing provisions and to extend their scope, where appropriate. Accordingly, it was found that 'full harmonisation' was necessary in order to ensure that consumers received equivalent levels of protection of their interests in order to

³⁴⁵ Article 15 of the 1987 Directive.

³⁴⁶ Council Directive of 22 February 1990 Amending Directive 87/102/EEC for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit 90/88/EEC OJ 1990 L 61/14.

³⁴⁷ *Ibid.*

³⁴⁸ Council Directive 2008/48/EC L 133/66 of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC. The 2008 Directive for Consumer Credit became effective on June 2010 (hereinafter the '2008 Directive').

³⁴⁹ Article 27(1) of the 2008 Directive.

³⁵⁰ 2008 Directive Preamble paragraph 3.

³⁵¹ 2008 Directive Preamble paragraph 4.

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ 2008 Directive Preamble paragraph 5.

create a genuine internal market.³⁵⁵ In terms of the 2008 Directive, Member States are not allowed to maintain or introduce national provisions other than those laid down in the 2008 Directive.³⁵⁶ In 2010 the Consumer Credit (EU Directive) Regulations 2010³⁵⁷ were promulgated in order to assist in the implementation of the 2008 Consumer Credit Directive.

Both England and Italy are member states of the European Union and therefore their laws must comply with the harmonisation provisions of the 2008 Directive.³⁵⁸ In areas which it covers, European Union law must take precedence over English and Italian law.³⁵⁹ It is against this background that the history of these two jurisdictions is examined below.

2.5 England

Although the term ‘common law’ extends beyond only English law, as many other legal systems, most particularly South Africa, use this term – it has been submitted that the origin of the ‘common law’ is found in England and that other modern ‘common law’ legal systems trace their genealogy historically to their roots in English law.³⁶⁰ In its narrowest sense the term ‘common law’ means that law which is found in or traced back to the decisions of a particular group of courts, known as the King’s courts or the common law courts, that existed in England from the early middle ages to the late nineteenth century.³⁶¹ Another meaning, however, which is ascribed to the term ‘common law’ is that law which

³⁵⁵ 2008 Directive Preamble paragraph 9.

³⁵⁶ It is to be noted that such restriction only applies where there are provisions harmonised in the Directive. That is, where no such harmonised provisions exist, Member States remain free to maintain or introduce national legislation. Member States may, for instance, maintain or introduce national provisions on joint and several liability of the seller or the service provider and the creditor. Another example of this possibility for Member States could be the maintenance or introduction of national provisions on the cancellation of a contract for the sale of goods or supply of services if the consumer exercises his right of withdrawal from the credit agreement. In this respect Member States, in the case of open-end credit agreements, are allowed to fix a minimum period needing to elapse between the time when the creditor asks for reimbursement and the day on which the credit has to be reimbursed (2008 Directive Preamble paragraph 9).

³⁵⁷ SI 2010/1010.

³⁵⁸ By virtue of the Treaty Establishing the European Community, as amended by subsequent Treaties, Rome, 25 March 1957, more specifically article 100A.

³⁵⁹ *Costa v ENEL* Case 6/64 1964 ECR 1964 CMLR 425 ECJ.

³⁶⁰ Cartwright 2007 1.

³⁶¹ *Ibid.*

is found in the decisions of the courts in general and this is contrasted with the law which is to be found in legislative enactments.³⁶²

Unlike Germany and Holland, England did not have a wholesale reception of Roman law but was nonetheless influenced by it to a large extent.³⁶³ However, prior to the twelfth century the influence of Roman law in England was small.³⁶⁴ With the defeat of the Anglo-Saxons in the Battle of Hastings in 1066,³⁶⁵ the Norman kings and their officials had a profound influence on the administration of law.³⁶⁶ The Normans introduced an integrated and simply organised feudal system, with the King as the supreme feudal overlord.³⁶⁷ The Normans then developed a central royal authority, from which were born the central courts during the twelfth and thirteenth centuries; these were staffed by judges capable of acting in the absence of the King and fixed at Westminster.³⁶⁸

During the twelfth and thirteenth centuries England received a great influence from Roman law as explained by the Glossators.³⁶⁹ During the thirteenth century Roman law also played an important part; judges were found quoting large parts of the Institutes and Digest in their judgments.³⁷⁰ After the thirteenth century there was a sharp decline in Roman law influence for various reasons.³⁷¹

³⁶² Cartwright 2007 4. It is submitted that it is this second meaning of common law to which South Africa subscribes. The South African common law refers to the *law, inter alia*, developed in the case reports (precedent). It is differentiated from acts of parliament. The two, however, cannot be viewed as mutually exclusive concepts. While the legislature may deem it necessary to particularly legislate one area of the law, as with credit law and the National Credit Act, it is the common law which is used by judges and practitioners to supplement and interpret these legislative enactments. Furthermore, the South African common law and legislation has since 1993 had an added enhancement by way of the Constitution of the Republic of South Africa, 1996. The values enshrined therein, more particularly those in the Bill of Rights are slowly seeping into the common law, which in turn seeps into the interpretative process of legislation. Cf paragraph 3.2.2 *infra*, for a discussion on the influence of the Constitution.

³⁶³ Hahlo and Khan 1973 504.

³⁶⁴ *Ibid.*

³⁶⁵ Zweigert and Kötz are of the view that the Norman influence was so great after 1066, that any earlier influences of law can be 'confidently ignored' (1998 3).

³⁶⁶ Zweigert and Kötz 1998 182.

³⁶⁷ *Ibid.*

³⁶⁸ Zweigert and Kötz 1998 183.

³⁶⁹ Many English students travelled to the University of Bologna and other Italian universities to study the law at its source. Two major works on the law are Glanvill (c. 1188), whom wrote a commentary of various writs and Bracton (c. 1256) both entitled *De Legibus et consuetudinibus Angliae* and were strongly influenced by Roman law (Hahlo and Khan 1973 504).

³⁷⁰ Hahlo and Khan 1973 505.

³⁷¹ *Ibid.*

English kings did not view themselves as successors of ancient Roman Emperors; England achieved a large measure of political unification and thus found less of a need to rely on Roman law as a basis for centralization (like Germany, for example) and there was a strong emotional attachment of Englishmen to their indigenous institutions.³⁷²

Although there was an influential decline after the thirteenth century, Romanistic influences did not vanish.³⁷³ They played a role on equity jurisdiction during the fourteenth and fifteenth centuries.³⁷⁴ They also played a role in the ecclesiastical courts, which exercised jurisdiction in matters of marriage until 1857 and the courts of admiralty, which gradually extended their jurisdiction in maritime and commercial cases.³⁷⁵ The English borrowed from Italian maritime, mercantile and insurance law, with English constitutional law being influenced by Roman law.³⁷⁶

The English law of contract initially developed around a form of action known as the action of *assumpsit*.³⁷⁷ This was a remedy which became used in the early sixteenth century as a remedy for breach of informal agreements reached orally.³⁷⁸ It was only three centuries later that the common law courts acquired general jurisdiction over both formal and informal contracts.³⁷⁹ This did not mean, however, that no forum existed for the contractual business – only that the remedies were sought elsewhere through a diversity of courts which fell outside the common law system.³⁸⁰ These included country courts, borough courts, courts of markets and fairs, university courts, courts of the Church, courts of manors and courts of privileged places.³⁸¹

³⁷² Hahlo and Khan 1973 505.

³⁷³ Hahlo and Khan 1973 506.

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ Hahlo and Khan 1973 507.

³⁷⁷ Chesire Fifoot and Furmston's *Law of Contract* 1986 1.

³⁷⁸ Early common law of England developed around the twelfth century but was concerned with crime and land tenure. Glanvill writing in about 1180 stated 'it is not the custom of the court of the Lord King to protect private agreement' (Glanvill X, 18).

³⁷⁹ Chesire Fifoot and Furmston's 1986 1.

³⁸⁰ *Ibid.*

³⁸¹ Chesire Fifoot and Furmston's 1986 2.

Being a money economy the necessity to recover debts was eminent and thus debt (known as debt *sur contract*) and detinue could be enforced.³⁸² Attempts, however, were soon made to replace the action of debt *sur contract* with assumpsit.³⁸³ From the 1520's the King's Bench allowed the plaintiff to elect between the older and the newer remedies, and in the 1570's the Court of the Common Pleas did the same.³⁸⁴ However, in the late sixteenth century the practice became a matter of controversy between the two courts, the Court of the King's Bench allowed assumpsit to supersede debt *sur contract*, whereas the Court of the Common Pleas was of the view that this was improper. This debate was settled in 1602 with *Slade's Case*,³⁸⁵ in which case the plaintiff could use assumpsit in place of debt *sur contract*; thereby making assumpsit the general remedy on informal contracts.³⁸⁶

For a very long time England lagged behind in the commercialisation of consumer credit and while in urban centres there were specialist 'usurers', lenders were mostly the more prosperous members of the community.³⁸⁷ In

³⁸² Chesire Fifoot and Furmston 1986 3.

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ 4 Co Rep 91a, Yelv 21, Moore KB 433, 667.

³⁸⁶ The common law was not taught at universities until the nineteenth century as common lawyers until then were either practitioners or judges, and little literature existed on contract law, except that which was to be found in reported cases. The first treatise on the common law of contract was by Powell in 1790 (Simpson 'Innovation in Nineteenth Century Contract Law' *LQ Rev* 1975 247 250-1). What is known as the English common law of contract grew from two writs (Medieval law). The one was a covenant which could be used to enforce a promise given under seal. This was a formality originally performed by making an impression in wax on a document containing the promise and the other, as indicated, was 'assumpsit'. Assumpsit, originally a cause of action for delict was formally recognised as an action for a breach of promise in the sixteenth century with the case of *Pickering v Throughgood* 1533 93 YB Sel Soc 4 (Chesire Fifoot and Furmston 1986 4-6). Another principle evolution of the sixteenth and seventeenth century was the doctrine of consideration (Chesire Fifoot and Furmston 1986 7). While at first the common law judges did not look to precisely explain the doctrine of consideration, the treatise writers began to explore a more systematic approach. 'The English law of contract [...] was evolved and developed within the framework of assumpsit, and, so long as that framework endured, it was not necessary to pursue too fervently the search for principles. But when the forms of action were abolished this task could no longer be avoided' (Chesire, Fifoot and Furmston 1986 19). One school labelled the rules that governed the actions of covenant and assumpsit as constituting the English law of contract, while another innovation was to attempt to define consideration. Pollock defined consideration as one party abandoning some legal right in the present, or limiting his legal freedom of action in the future, as an inducement for the promise of the other party (*Principles of Contract* 1921 186). Consequently, semblances appeared between continental law and the common law of contract. The contract, in common law, was either a bargain, in which event it was enforceable without a formality in assumpsit, or it was a liberality in which case it was enforceable with the formality of the seal of a covenant (Gorderly 2001 10-12).

³⁸⁷ Philpott and Neville *et al* 2009 2.

1545, the Act in Restraint of Usury, permitted interest for the first time, capped at 10 percent.³⁸⁸ Capitalism, during this period was on the rise and many evasions were deployed to circumvent the legislation, for example, loans with interest were disguised as payments for fictitious consideration, or sales goods were priced as double to incorporate the interest component.³⁸⁹ Eventually, in 1572 charging of interest was once again permitted at 10 percent.³⁹⁰ In 1713 England passed the Statute of Anne in order to lower interest rates to 5 percent.³⁹¹ This Act was very influential and remained in place, until 1854 with the Usury Laws Repeal Act of 1854, which ushered in a period of uncontrolled interest rates.³⁹²

Nineteenth century England was heavily influenced by continental law,³⁹³ mainly through Pothier's Treatise on the Law of Obligations, which was translated into English in 1806 and in 1822; its authority was declared to be 'as high as can be

³⁸⁸ Crowther Report 1971 32, Grove 1989 81-2 and Philpott and Neville *et al* 2009 2.

³⁸⁹ Duggan AJ and Lanyon EV *Consumer Credit Law* 1999 paragraph 1.1 and Philpott and Neville *et al* 2009 2.

³⁹⁰ Under rule of Elizabeth I (Philpott and Neville *et al* 2009 2). The prohibition of usury had gone somewhat full circle, with its ban under Edward VI, its re-imposition under Elizabeth, although lowered to 8 percent and fixed at 5 percent under the reign of Anne (Duggan and Lanyon 1999 paragraph 1.1).

³⁹¹ Chesire, Fifoot and Furmston 1986 19.

³⁹² Duggan and Lanyon suggest that thereafter interest rates were left to find their 'own level in the market' (1999 paragraph 1.2). However, the result of the legalisation of interest charges was that loans between neighbours, ordinarily not subject to interest, began to resemble business credit. The state was then faced with a social problem, as opposed to a moral one. Furthermore, there was a steady rise in standards of living of the general population which meant that consumer credit in England was moving away from 'being predominantly offsetting of misfortune to being a method of anticipating future income' (Crowther Report paragraph 2.17, cf fn 415; Philpott and Neville *et al* 2009 2).

³⁹³ Nineteenth century common lawyers found additional ways to limit the enforceability of promises which brought the common law even closer to the continental law, as it appeared to be more compatible with will theories of the continent. The two further limitations included the necessity that the parties intended their promise to be legally binding (accepted by the English court in 1919: *Balfour v Balfour* 1919 2 KB 571 578) and the second limitation was the doctrine of offer and acceptance (*Payne v Cave* 1789 3 Term. R. 148; *Cooke v Oxley* 1790 3 Term. R. 653; *Adams v Lindsell* 1818 1 Barn and Ald 681). Common law jurists explained it as a consequence of the will theory, that is, the contract being the will of the parties required each party to express his will to be bound (Gorderly 2001 14). The following passage gives reasons as to why the nineteenth century was regarded as the classical age of English contract law: 'The first is that the century witnessed an extensive development of the principles and structure of contract law into essentially the form which exists today, [...]. The second involves a change in the attitude of thinking lawyers to contract. In previous years lawyers, in so far as they troubled themselves at all, conceived of contract law primarily as an adjunct to property law. In the nineteenth century a powerful school of thought, originating in the work of Adam Smith, saw in the extension of voluntary social co-operation through contract law, and in particular through 'freedom of contract', a principal road to social improvement and human happiness, and one distinct from the static conditions involved in the possession of private property' (Chesire Fifoot and Furmston 1986 11).

had, next to a decision of a court of justice in this country'.³⁹⁴ Furthermore, this century was influenced by economic theory, where:³⁹⁵

Individualism was both fashionable and successful: liberty and enterprise were taken to be the inevitable and immortal insignia of a civilised society. The state, as it were, delegated to its members the power to legislate. When voluntarily and with a clear eye to their own interests, they entered into a contract, they made a piece of private law, binding on each other and beneficial alike to themselves and to the community at large. The freedom and the sanctity of contract were the necessary instruments of laissez-faire, and it was the function of the courts to foster the one and to vindicate the other.

This outlook greatly influenced the nineteenth century stance on consumer protection.³⁹⁶ Whilst contract law was dominated by commercial contracts (in what would now be regarded by the contemporary jurist as consumer transactions) the view of judges tended to assume that a gentleman purchasing goods could look after himself,³⁹⁷ hence this superb statement capturing the essence of the ideology:³⁹⁸

Economic theory might proclaim that in the market place the consumer was king but in the law courts he was uncrowned.

Before the second half of the nineteenth century buying goods on extended credit had become common practice.³⁹⁹ Prices were inflated to compensate for the risk and enforcement for default could be severe.⁴⁰⁰ Imprisonment for small debts had slowly been limited over the eighteenth century, though a debt of £20 could still lead to imprisonment after 1827.⁴⁰¹ Only during the second half of the nineteenth century, when in 1846 the County Courts were set up, did a more modern approach to credit arise.⁴⁰² These created an effective system for execution through the courts.⁴⁰³ During this period there was a rise in franchising or branch stores and department stores which lent to the development of shop

³⁹⁴ Per Best J in *Cox v Troy* 1822 5 B and Ald 474 480.

³⁹⁵ Chesire Fifoot and Furmston 1986 18.

³⁹⁶ *Ibid.*

³⁹⁷ *Hopkins v Tanqueray* 1854 15 CB 130 from Chesire Fifoot and Furmston 1986 18. 'The chancery mends no man's bargain' per Lord Nottingham in *Maynard v Mosekey* 1676 3 Swan 651.

³⁹⁸ Chesire Fifoot and Furmston 1986 23.

³⁹⁹ Philpott and Neville *et al* 2009 2.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² Philpott and Neville *et al* 2009 2.

⁴⁰³ Philpott and Neville *et al* 2009 3.

credit as we know it today. This replaced extended credit with payments against weekly or monthly accounts.⁴⁰⁴ Apart from enactments controlling usurious loans and pawn broker activities,⁴⁰⁵ consumer credit as a subject of regulation in England was essentially ignored by monarchs, Parliament and the common law, until 1854 which saw legislative intervention through the first Bills of Sale Act 1854.⁴⁰⁶ Only much later in 1900 was the Moneylenders Act promulgated.⁴⁰⁷ However, abuses continued and further legislation was introduced in the form of the Moneylenders Act 1927.⁴⁰⁸ This Act imposed many detailed requirements on contracts by moneylenders and pawnbrokers that lent over £50.⁴⁰⁹ It introduced a licensing system and provided that if the interest rate exceeded 48 percent per annum, the interest was to be presumed excessive and the transaction harsh and unconscionable.⁴¹⁰ Certain formalities had to be followed,⁴¹¹ failing which the credit agreement would be unenforceable.⁴¹² The effect of the stringent requirements of the legislation encouraged growth of other forms of credit that was not moneylending, such as the sale of goods and services on credit.⁴¹³ The continued growth of abuses in this unregulated industry led to further legislation.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Pawn broking caused particular concern and hence it was one of the first credit activities to be subjected to legislative control in 1603. This legislation was to prevent the sales of pledges before redemption at a time when pawnbrokers still largely serviced the wealthy. During the eighteenth century similar legislation followed which also controlled interest rates on small loans, with low rates of interest being considered inappropriate for short-term loans on small sums. By the beginning of the nineteenth century, the Pawnbrokers Act of 1800 laid down requirements relating to records and receipts, the sale of pledges and the rate of interest. During this century the poor were reliant on pawn broking and the law on pawn broking was repeatedly amended until the Pawnbrokers Act 1872 which provided comprehensive regulation. The 1872 act introduced a licensing system and set out requirements for loans below £5 and loans between £5 and £50, loans over £50 were not covered. This Act was subject to some minor amendments, but effectively remained in force until after the coming into force of the Consumer Credit Act 1974, by this time, however, pawn broking had become a minor source of consumer credit (Philpott and Neville *et al* 2009 3).

⁴⁰⁶ Later amended by the Bills of Sale Amendment Act 1866 (Philpott and Neville *et al* 2009 4). This Act was eventually replaced by the Bills of Sale Act 1878, which was supplemented by the Bills of Sale Act (1878) Amendment Act 1882 (Howells and Weatherhill 2005 299 and Goode, Rosenthal and Makin in Goode *Consumer Credit Law and Practice* 2014 paragraph 1.2 and 1.3).

⁴⁰⁷ Which was to control 'harsh and unconscionable' contracts by moneylenders, cf section 1 (Philpott and Neville *et al* 2009 3). This Act came into force after the Report of the House of Commons Select Committee on Moneylending was published in 1898, reporting serious abuses in the industry (Howells and Weatherhill 299 and Goode 2010 paragraph 1.4).

⁴⁰⁸ Philpott and Neville *et al* 2009 4.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

⁴¹¹ The date, the amount of the loan and the rate of interest had to be placed in writing, signed and a copy delivered to the borrower.

⁴¹² Philpott and Neville *et al* 2009 4.

⁴¹³ *Ibid.*

The Hire-Purchase Act 1938 was one such act, followed by the Hire-Purchase Act of 1954 and then 1964. The 1964 Hire-Purchase Act implemented a number of recommendations made by the Molony Committee on Consumer Protection.⁴¹⁴ The 1938, 1954 and 1964 Acts were replaced by the Hire-Purchase Act 1965.

It was the Committee on Consumer Credit producing the Crowther Report, published in 1971, that saw the most wide-ranging review of consumer credit undertaken in England.⁴¹⁵ The Committee, after a detailed evaluation of the law relating to credit transactions, concluded that the existing law was defective and that it would be useless to approach the *status quo* through piecemeal amendments and thus recommended the repeal of the entire range of existing legislation affecting credit and security in personal property and the replacement thereof by two new Acts, the Lending and Security Act and the Consumer Sale and Loan Act.⁴¹⁶ While the details of the Government's response to the Crowther Report are not pertinent to this discussion, it shall suffice to say that the Report was shortly followed by and culminated in the Consumer Credit Act of 1974.⁴¹⁷

⁴¹⁴ Final Report on Consumer Protection (Cmnd 1781). While this Act contained many of the rules regarding the formalities, as had the Moneylenders Act 1927, subject to cancellation notices required for cancellation of agreements not signed at the premises of the credit provider, the court could allow enforcement of the agreement even if any of the details had been omitted, provided that the non-compliance did not prejudice either party and it was just and equitable to dispense with the requirement (Philpott and Neville *et al* 2009 5). The increased regulation of hire-purchase agreements caused some companies to change to rental contracts as a means of circumventing regulation. This resulted in the Crowther Committee recommending that hire agreements be brought within the scope of credit legislation (Howells and Weatherhill 2005 300). It is notable that the supply of goods or services on credit has never been considered to constitute a loan in English Law and thus such transactions did not attract the operation of the Moneylenders Acts (*Beete v Bidgood* 1827 7 B & C, *Olds Discounts Co Ltd v Cohen* 1938 3 All ER 281n). Likewise a reservation of ownership under a conditional sale or hire-purchase agreement is not viewed as a security for loan and therefore outside of the Bills of Sales Acts (*McEntire v Crossley Bros Ltd* 1895 AC 457 1999 GCCR 11 HL). Furthermore, the finance charge added to a cash price under a hire purchase or instalment transaction is not viewed as interest but merely a 'time-price differential', a higher price for payment in the future than for payment immediately (Goode 2010 paragraph 1.8).

⁴¹⁵ There had been a Report of the House of Commons Select Committee on Moneylending published in 1898 – which resulted in the Moneylenders Act of 1900, however, the subject topic in the latter report was much less encompassing than that in the Crowther Report, which covered the entire field of consumer credit in Britain (Goode 1979 6 and Goode 2010 paragraph 1.41).

⁴¹⁶ *Ibid.*

⁴¹⁷ (Commencement no 8) order 1983, SI 1983/1551 made under the Consumer Credit Act 1974 section 182 (2), 192 (2) and (4).

Since then, the twentieth century, with its massive mechanical and technical advances, saw a need for additional consumer protection.⁴¹⁸ Consumers faced with products and credit abound, organised themselves into pressure groups⁴¹⁹ in an attempt to seek protection.⁴²⁰ The law of contract followed suit aiming to protect consumers.⁴²¹ Legislative enactments were the most obvious steps taken by England to achieve this goal, including such acts as the Unfair Contract Terms Act 1977, Fair Trading Act 1973 and the Consumer Credit Acts of 1974⁴²² supplemented by the more recent 2006 Act.

The Consumer Credit Act 1974 came into force on 6 April 2007.⁴²³ The main provisions of the 2006 Act were to extend the scope of the Consumer Credit Act 1974, to create an Ombudsman scheme, and to increase the powers of the Office of Fair Trading in relation to consumer credit.⁴²⁴ In addition, it permits borrowers to challenge 'unfair relationships between creditors and debtors' in court. The 2006 Act brings two further types of agreement under the scope of the 1974 Act: consumer agreements above £25,000, to reflect growing levels of consumer borrowing and debt and to include small, one-man businesses and partnerships of up to three people.⁴²⁵ The 2006 Act gives consumers the option of using the Financial Ombudsman Service if they are unhappy with their lender's dispute resolution service, whether the lender consents or not. Complaints may also be raised against other types of credit related companies, such as debt-

⁴¹⁸ Goode 1979 6 and Goode 2010 paragraph 1.41.

⁴¹⁹ As examples: the Office of Fair Trading and the National Consumer Council.

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² Cf discussion by Goode, Rosenthal and Makin in Goode *Consumer Credit Law and Practice* 2014 paragraph 1.6.2B for a discussion on the structure of consumer credit legislation immediately after the Consumer Credit Act 1974.

⁴²³ Goode states that it is 'principally an amending act'. And while it largely amended the Consumer Credit Act 1974, it also amended the Financial Services and Markets Act 2000 by applying the Financial Services Ombudsman Scheme to consumer credit agreements and consumer hire agreements (2010 paragraph 1.64A).

⁴²⁴ As of 1 April 2014, responsibility for the regulation of consumer credit activities has been transferred from the Office of Fair Trading to the Financial Conduct Authority. This transfer has been accompanied by a significant change in the legislative regime governing consumer credit regulation. The Consumer Credit Act 1974, as amended, no longer provides the statutory framework for consumer credit regulation. Instead, the regulatory regime has been brought under the Financial Services and Markets Act 2000 and by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) (http://www.ftg.co.uk/assets/docs/newsletter_documents/fca_regulation_of_the_consumer_credit_act_the_scope_of_regulation.pdf) (27.01.2014).

⁴²⁵ Section 1.

collection agencies.⁴²⁶ The 2006 Act empowers the Office of Fair Trading to investigate applicants for consumer credit licences, to impose conditions on licences, and to impose civil penalties of up to £50 000 on companies which fail to comply with its conditions, appeals from which lie to the First-tier Tribunal (formerly known as the Consumer Credit Appeals Tribunal) and thereafter, with leave, to the Upper Tribunal.⁴²⁷

The 1987 Directive⁴²⁸ set minimum harmonisation requirements and was seen to have had little practical impact on English consumer credit legislation.⁴²⁹ However, the revised 2008 Directive,⁴³⁰ a maximum harmonisation Directive, had dramatic effect on the English credit legislation,⁴³¹ and is implemented by the Consumer Credit Directive Regulations,⁴³² Consumer Credit Total Charge for Credit Regulations,⁴³³ Consumer Credit Advertisements Regulations,⁴³⁴ Consumer Credit Disclosure of Information Regulations⁴³⁵ and the Consumer Credit Agreements Regulations.⁴³⁶ The Directive has resulted in a two-pronged consumer credit regime: agreements with individuals for credit which do not exceed £60 260 fall within the ambit of the Directive whilst agreements with individuals for credit exceeding this amount remain governed by the Consumer Credit Act 1974, as amended and fall outside the scope of the Directive.⁴³⁷ Thus the two are regulated by differing sets of regulations.⁴³⁸ What is interesting about such a bifurcated system is its resemblance to the South African credit regime. The National Credit Act creates a similar two-pronged approach to the regulation

⁴²⁶ <http://www.legislation.gov.uk/Englandp/2006/14/introduction> (7.06.2011).

⁴²⁷ *Ibid.* Cf for a further discussion Goode, Rosenthal and Makin in *Goode Consumer Credit Law and Practice* 2014 paragraph 1.64A and Chowdhury, Makin Mawray and Rosenthal in the same publication Chapter 21.

⁴²⁸ 87/102/EEC.

⁴²⁹ *Goode Consumer Credit Law and Practice* 2014 paragraph 1.100A.

⁴³⁰ 2008/48/EC. It is to be noted that 'The Study of the Effects on the English Economy of the Revised Consumer Credit Directive' stated that the Directive was to be implemented in English law by no later than 11 June 2010 (Department for Business Enterprise and Regulatory Reform Copenhagen 14 May 2009).

⁴³¹ Although it does not regulate consumer hire (*Goode Consumer Credit Law and Practice* 2014).

⁴³² SI 2010/1010

⁴³³ SI 2010/1011

⁴³⁴ SI 2010/1012

⁴³⁵ SI 2010/1013

⁴³⁶ SI 2010/1014 and *Goode* 2010 paragraph 1.100A.

⁴³⁷ *Goode, Rosenthal and Makin Consumer Credit Law and Practice* 2014 paragraph 1.100A.

⁴³⁸ *Ibid.*

of consumer credit, albeit not due to regional legislation but due rather to the limited scope of this legislation. For example, it applies to juristic persons whose asset value or annual turnover is below a certain threshold.⁴³⁹ The National Credit Act regulates specific credit agreements and in some instances regulates them differently, the details can be found elsewhere in the thesis.⁴⁴⁰ However, conceptually the South African jurist, much like the English one, finds that he will have to apply different “rules” to different transactions.

2.6 Italy

Italy is viewed as having a strong claim to being considered the cradle of European legal culture, because it was in Italy that Roman civil law was first developed in the ancient world and it was also in Italy that this system re-emerged in the Middle Ages to become the foundation upon which the majority of European states chose to erect their modern legal systems.⁴⁴¹ This influence does not stop on the European continent but can be seen to have reached all those nations that established their legal systems upon the traditions received when they were European colonies.⁴⁴² When Justinian came into power in the sixth century, he made as one of his goals as emperor, the restoration of the classical law of Rome, which had been diluted for various reasons; such as change from a republican to an imperial government under the Caesars, conversion of people from paganism to Christianity and the shifting of the centre of the government from west (Rome) to the east (Constantinople).⁴⁴³ At the time the sources of law were to be found in mainly two places: the enactments of his

⁴³⁹ Currently it is at R1 000 000 (section 4 (1) and section 7 (1)(a) of the Act).

⁴⁴⁰ Cf paragraph 4.4.3 *infra*.

⁴⁴¹ Roman civil law began as the legal system of Rome, at that time a small city state, and as it grew and became the largest empire the world had seen, so its legal system came to influence much of Europe, the Middle East and North Africa (Glyn Watkin T *The Italian Legal Tradition* 1997 1). However, a debate exists as to whether one can talk about the actuality of the history of Italian law prior to the political unity of Italy in 1860. In fact, the ‘History of Italian Law’ only became part of the studies at the law schools in 1876. Debate over the subject was intense and prolonged, as the recent unification of the Peninsula, that is the modern nation-state of Italy known today, called for the search for a pre-existent national identity (Lena JS and Mattei U *Introduction to Italian Law* 2002 1).

⁴⁴² Glyn Watkin 1997 1.

⁴⁴³ *Ibid*. Cf also Lena and Mattei 2002 2.

imperial predecessors and the works of classical jurists.⁴⁴⁴ Accordingly, Justinian appointed a series of commissions to examine the voluminous sources and to extract from them those rules which were to remain valid, amend those which required updating, discard what was no longer necessary and present their work in a systemised, accessible form. The first commission produced the *Codex Vetus* promulgated in 530 AD and later due to changes in the law was revised and republished as the *Codex Repetitae Praelectionis*.⁴⁴⁵

The second commission produced in 533 the Digest or Pandects.⁴⁴⁶ Justinian soon realised that the work of the Digest, despite its merits, was not appropriate⁴⁴⁷ for law students, accordingly he appointed three of the commissioners who had worked on the Digest to produce a more succinct work.⁴⁴⁸ By the end of 534 a student textbook, was produced.⁴⁴⁹ It was divided into four books and became known as Justinian's Institutes.⁴⁵⁰ The Code, the Digest and the Institutes became the sole source of law in the Byzantine Empire.⁴⁵¹

During the fifth century Italy was invaded by the Ostrogoths, who moved from the north to dominate the peninsula, their leader, Theodoric, promulgated a crude and simplistic code, known as the Edict of Theodoric.⁴⁵² During the sixth century, the Ostrogoths were displaced by the Lombards, who settled in Italy more permanently.⁴⁵³ The Lombard leader, Rothari, also promulgated a code of laws,

⁴⁴⁴ Glyn Watkin 1997 2

⁴⁴⁵ Glyn Watkin 1997 3 and 4.

⁴⁴⁶ Which consisted of fifty books. Glyn Watkin postulates the appropriateness of both titles, with 'pandects' illustrating its comprehensiveness and 'digest' pointing to the degree of assimilation achieved (1997 3).

⁴⁴⁷ The phrase 'easily digestible material' comes to mind.

⁴⁴⁸ Glyn Watkin 1997 4.

⁴⁴⁹ Glyn Watkin 1997 5.

⁴⁵⁰ *Ibid.*

⁴⁵¹ Posthumously, these three works were later termed the *Corpus Iuris Civile* (Glyn Watkin 1997 4).

⁴⁵² This consisted in the main of lists of compensation payments, detailing fixed amounts to be paid in the event of wrongs committed, for example so much for a broken arm, so much for a broken leg and so on (Glyn Watkin 1997 4).

⁴⁵³ Glyn Watkin 1997 5 and Lena and Mattei 2002 2.

named after him, the Code of Rothari, which code was not much more sophisticated than its predecessors.⁴⁵⁴

The Christian Church was the only great institution of the Roman Empire that survived its fall in the west and continued to govern western Christendom from Rome.⁴⁵⁵ The monasteries and cathedrals were effectively the only centres of learning during the Dark Ages in Europe and preserved what little was known of classical literature, history and philosophy.⁴⁵⁶ While the main subject of study in the cathedral schools and monasteries was theology, humanities were also studied, especially with the revival of learning in the ninth century.⁴⁵⁷ Law was studied at certain centres and during the tenth century the cathedral school at Pavia emerged as a very important centre of legal studies.⁴⁵⁸ The law studied there was mostly the feudal law of the Lombard kingdom.⁴⁵⁹ A great revival of learning occurred in Europe during the eleventh and twelfth centuries and one of its products was the University of Bologna.⁴⁶⁰ Here a scholar named Irnerius discovered what appears to have been the sole surviving copy of Justinian's Digest.⁴⁶¹ Irnerius and his contemporary found this manuscript far superior, more sophisticated and therefore more worthy of serious study than the law codes by which they were governed.⁴⁶² Irnerius started the work of glossing the Digest in order to remove all apparent contradictions; his dedicated efforts, were followed by the four doctors, Martinus, Hugo, Jacobus and Bulgarus, whom are generally known as the Glossators.⁴⁶³ This work took two centuries to complete.⁴⁶⁴ The

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Glyn Watkin 1997 5.

⁴⁵⁷ Known as the Carolingian renaissance. The Carolingian period stretched from 774 to 888 AD and was marked by the introduction into Italy of new laws and customary rules which were mostly of Frankish origin (Lena and Mattei 2002 3).

⁴⁵⁸ Glyn Watkin 1997 6.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Glyn Watkin 1997 8.

⁴⁶¹ *Ibid.*

⁴⁶² Glyn Watkin 1997 9.

⁴⁶³ Glyn Watkin 1997 9. The Renaissance of Roman law studies in Italy during these centuries was taken up in the South of France; the study of the Corpus Iuris was well established at the Universities of Montpellier and Toulouse in the twelfth century. Thus acquaintance with the Roman law gradually filtered northwards; it did not however, displace the traditional customary law of the Franks (Zweigert and Kötz 1998 75).

⁴⁶⁴ Zweigert and Kötz 1998 75 and Lena and Mattei 2002 4.

Glossators worked at the school of law in Bologna and finally published the complete gloss, the *Glossa Ordinaria*, in 1260.⁴⁶⁵

From the thirteenth through to the sixteenth century many of the city states and communes of northern Italy, saw a considerable expansion in trade and commerce.⁴⁶⁶ These commercial developments required laws to facilitate the growth in trade and thus people turned to the university trained jurists of the time to provide solutions to particular problems.⁴⁶⁷ These jurists turned to the Digest to find suitable answers to these problems, but when the Digest or the *Glossa Ordinaria*, which was considered of equal authority, did not provide an exact solution, the jurists would then use their legal expertise in order to develop solutions.⁴⁶⁸ These jurists came to be known as the Commentators.⁴⁶⁹ From the sixteenth century on, the centre of legal culture in Europe shifted for the first time outside of Italy to other European countries.⁴⁷⁰ The eleventh through to the sixteenth century, a period of flourishing in Italy, saw a new science of law developed in Bologna and spread quickly across Europe, eventually forming a vast system of common law, the *ius commune*, which did not depend nor was it limited by national or linguistic boundaries.⁴⁷¹

After the unification of Italy, in the nineteenth century,⁴⁷² the political class of Italy had to decide on a model upon which to construct the legal order of the new state.⁴⁷³ A unitary centralised model, fashioned largely along the lines of the French model, was ultimately adopted.⁴⁷⁴ The Constitution of the Kingdom of

⁴⁶⁵ Glyn Watkin 1997 8-9.

⁴⁶⁶ Lena and Mattei 2002 3 and Glyn Watkin 1997 13.

⁴⁶⁷ Glyn Watkin 1997 13.

⁴⁶⁸ Glyn Watkin 1997 13 and Lena and Mattei 2002 5.

⁴⁶⁹ And were said to have taken the revived Roman law out of the classroom and into the courtroom (Glyn Watkin 1997 13 and Lena and Mattei 2002 5).

⁴⁷⁰ During the sixteenth century the school of Roman legal studies was in France at the University of Bourges, and in the second half of the sixteenth century, at the Theological School in Salamanca in Spain (Glyn Watkin 1997 18-9 and Lena and Mattei 2002 6).

⁴⁷¹ Lena and Mattei 2002 3.

⁴⁷² Italy became a unified state in 1860.

⁴⁷³ Lena and Mattei 2002 16.

⁴⁷⁴ Prior adoption of the centralised model, there was debate with regard adopting a federal model which advocated the preservation of the specificity and legal traditions of the pre-unification states and the unitary model (*ibid*). The French Code Civil had entered Italy through Napoleon's armies. While Sicily and Sardegna escaped French occupation due to the English fleet, in the rest of Italy the Code Civil came into force, even if only for a short while. The Code

Sardegna of 1848 was maintained as the constitutional text of the Kingdom of Italy and it remained in force until the approval of the republican Constitution in 1948.⁴⁷⁵ In the period following unification the new civil and commercial codes, together with the new Codes of civil and criminal procedure, were approved and subsequently adopted in 1865.⁴⁷⁶ A new Commercial Code was adopted in 1882.⁴⁷⁷ In 1942 the Civil Code⁴⁷⁸ was passed and this is still in force today.⁴⁷⁹

The sources of law in Italy are constituted from written text.⁴⁸⁰ That is, codified legislation; for example the Constitution and amendments,⁴⁸¹ the Italian Civil Code⁴⁸² as well as other legislative enactments.⁴⁸³ These codifications are rigorously hierarchical.⁴⁸⁴ Section 1 of the Civil Code of Italy was enacted in 1942⁴⁸⁵ and indicated four main sources of law: legislation, regulations, corporate rules and customary rules or laws.⁴⁸⁶ This list has been substantially amended; the corporate laws were amended after the fall of fascism in 1944,⁴⁸⁷ and the Constitution⁴⁸⁸ as well as regional legislation⁴⁸⁹ were later introduced changing

Civil was repealed in 1814 almost everywhere in Italy, however its influences remained (Zweigert and Kötz 1998 105).

⁴⁷⁵ Lena and Mattei 2002 16.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ R.D 16 March 1942 n.262 (G.U. 4-4-1942 n. 79 ed. straord (hereinafter referred to as the ('Civil Code'))).

⁴⁷⁹ Lena and Mattei 2002 17-8.

⁴⁸⁰ It seems that the idea of creating a unified normative system in order to create a general code sprung from the egalitarian (equalitarian) ideology of the French Revolution. It was believed that the more general the laws the more this would tend to regulate all aspects of the private relationship between persons and consequently the better such laws would protect the individual from discriminations that could occur from legislation based on class privileges. The first civil code in the modern sense was enforced in France by Napoleon in 1804, which code formed the model which inspired the Italian legislator to dictate the first unified code in 1865. The 1865 Code did not, however, regulate corporate law, which laws were later regulated by the Commercial Code of 1882 (Gazzoni *Manuale di Diritto Privato* 2009 24).

⁴⁸¹ *Costituzione della Repubblica* or *La Carta Costituzionale*.

⁴⁸² The Code covers the entire span of private law in Italy, made up of 2969 sections and represented in six volumes including law of persons and family law, law of succession, property law, labour law, law of obligations and protection of rights.

⁴⁸³ Gazzoni 2009 20.

⁴⁸⁴ Gazzoni 2009 21.

⁴⁸⁵ There are sixteen preliminary articles to the Italian Civil Code which dictate the arrangement of the laws in general.

⁴⁸⁶ Translated from the term used in Italian 'consuetudini' the customary law is generally accepted standard procedures that are uniformly repeated over extended periods accompanied by the belief that a legal rule is being observed, or more plausibly from a tacit expectation of reciprocity (Bessone *Lineamenti di Diritto Privato* 2009 16).

⁴⁸⁷ *Decreto legislativo luogotenenziale* 44/369.

⁴⁸⁸ Promulgated in 1948.

⁴⁸⁹ *Costituzione della Repubblica* article 117 (1960).

the list (and hierarchy) of sources as follows: the Constitution, national legislation, regional legislation, regulations and customary laws.⁴⁹⁰ A last category which the Italians label *legislazione speciale* or special legislation⁴⁹¹ are enactments relating to the various disciplines of private law, these special enactments are said to work alongside the Civil Code and regulate, *inter alia*, bills of exchange, cheques, patents, copyright, lease, divorces, adoptions and issues relating to movable property.⁴⁹²

Despite these historical developments, during the twentieth century, under the Italian legal system, the majority of Italian scholars acknowledged a lack of effective protection for consumers.⁴⁹³ Courts refrained, on what appears to be the majority of occasions, to protect consumers in disputes concerning standard terms, for example by allowing clauses that excluded the provider's liability for non-performance or malperformance, nor were those clauses that imposed excessive penalties in the event of delay or non-performance struck down.⁴⁹⁴ Niglia⁴⁹⁵ argues that this was due to socio-economic and political reasons.⁴⁹⁶ During this period Italy was characterised by heavy state interventionism in the economy, in that the state was actively involved in the economy as producer of goods and services and interested in defending its near monopolistic position in the market.⁴⁹⁷ Almost every sector of the economy, from banking to energy and insurance to transport, were directly administered by the state.⁴⁹⁸ Niglia⁴⁹⁹

⁴⁹⁰ Gazzoni 2009 20.

⁴⁹¹ Own translation.

⁴⁹² Gazzoni 2009 25.

⁴⁹³ In fact Niglia states that this has been unanimously acknowledged by Italian scholars (*The Transformation of Contract in Europe* 2003 55 cf fn 96).

⁴⁹⁴ This, despite the fact that Article 1384 of the *Codice Civile*, authorises judges to reduce excessive penalties (or any penalty in case of non-performance (Niglia 2003 55 and fn 97). This non-protective stance, applied by the courts was based on Articles 1341 and 1342 of the *Codice Civile* These two articles provided a control of unfairness in that they conferred upon the judge the power to strike down standard form terms, or 'terms unilaterally predisposed for an indeterminate number of addressees, under either of the following conditions: a consumer being unaware of standard terms, except in the event of 'negligent ignorance' and in the event of a consumer's failure to countersign or sign next to a series of burdensome terms. In reality the court practised on the latter type of control and even then harsh terms were nonetheless permitted in the case of a consumer's approval in writing.

⁴⁹⁵ 2003 57-60.

⁴⁹⁶ Cf also the views of Lena and Mattei, who posit the view that the authoritarianism of the regime of the fascist period (1922-1942) only in part affected legislation (2002 17).

⁴⁹⁷ Irti N 'Iniziativa Privata e Concorrenza' 1997 *Giurisprudenza Italiana* IV 225 226 and cf also Amato G 'Il Mercato nella Costituzione' 1992 *Quaderni Costituzionali* 7.

⁴⁹⁸ Niglia 2003 57.

argues that protecting consumers through unequivocal rules would have undermined the power of the state to control social and economic processes through its policies, with reference to goods and services, as consumer-protectionist rules would have set rigid boundaries in the form of mandatory rules.⁵⁰⁰ This would have had to be incorporated in a set of consumer-protectionist standards to be inserted in any government standard from contract, thereby diluting government discretion.⁵⁰¹ Accordingly, the courts, viewed as 'governmental machines whose work governments have set in motion and whose output they ultimately control'⁵⁰² were seen to avoid any form of consumer protection enforcement, since such protection would have meant preventing the major economic actor of the time, the state, from exercising its discretionary powers.⁵⁰³ Niglia⁵⁰⁴ argues that this was due to a change in the political climate in Italy, with a decline of an interventionist state to liberalisation and marketization of the economy.

Contemporarily, there is a greater tendency in Italy, to enact 'special legislations'⁵⁰⁵ as opposed to updating the law by amending the Civil Code.⁵⁰⁶ This tendency has resulted in diminishing the absolute centrality of the Code, which some authors feel should have been maintained.⁵⁰⁷ This due to the fact that these special enactments, so called, reintroduce privileges in favour of new corporations and thus detract from the principles of uniformity, which lay at the very base of the idea of codification.⁵⁰⁸ Furthermore, the continual amplification of certain areas of law, through the enactment of special legislation, such as that

⁴⁹⁹ Niglia 2003 58.

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² Slaughter AM and Stone Sweet A *The European Contract and National Courts – Doctrine and Jurisprudence, Legal Change in Its Social Context* 1998 328.

⁵⁰³ Niglia 2003 58. For example, in March 1999 the *Corte di Cassazione* declared that banking contractual practises that calculate interest rates to the disadvantage of the clients, that is the practise of anatocism (compound interest), was unfair. A decision made on Article 1283 of the Civil Code opposite to what the courts had allowed for 18 years prior to that judgment (Niglia 2003 59-60). Article 1283 reads: 'In the absence of contrary usage, interest due can only produce interest from the date of institution of an action or as a result of an agreement subsequent to its becoming due, and provided that such interest has been due for at least six months'.

⁵⁰⁴ Niglia 2003 60.

⁵⁰⁵ Translated by writer from the Italian *legislazione speciali*.

⁵⁰⁶ *Niglia 2003 60.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

of consumer laws, is said to resemble the old divide between the Civil Code and the Commercial Code.⁵⁰⁹

Legislative authority of the laws in Italy, however, does not only derive from the Constitution but from sources of international law and from rules and regulations of the European Community.⁵¹⁰ The international norms are recognised by section 10 of the Italian Constitution and are binding on Italy, limited by the fact that such international norms must observe certain fundamental principles, more specifically customary rules.⁵¹¹ International rules must be ratified by a decree by the President of the Republic of Italy and are sometimes given legislative authority through ordinary enactments.⁵¹² These international rules, known as 'community norms'⁵¹³ interfere with national as well as ordinary legislation. Enactment 57/1203 recognised the Treaty of Rome,⁵¹⁴ which treaty constituted the European Community, which in turn formed the basis of the European Union.⁵¹⁵

Compared to other European countries⁵¹⁶ the Italian consumer found relief in national legislation directed at his protection, only relatively recently.⁵¹⁷ Towards the end of the eighties discussions opened up in Italy with regards consumerism, before which the issue of consumer protection did not appear particularly important.⁵¹⁸ Consumer protection was limited to the sale of goods on credit, with deferred payments, interest and retention of ownership, controlled by the Civil Code of 1942.⁵¹⁹ Even consumer protection organisations, until the 1980's,

⁵⁰⁹ Niglia 2003 60.

⁵¹⁰ Gazzoni 2009 26.

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

⁵¹³ Translated from the Italian – *le norme comunitarie*.

⁵¹⁴ 10 March 1957.

⁵¹⁵ Refer to paragraph 2.5 *supra* for the discussion on the development of the European Union.

⁵¹⁶ Like England, Germany and France.

⁵¹⁷ Bertuzzi S and Cottarelli G *Il Codice del Consumo* 2009 21.

⁵¹⁸ Bertuzzi and Cottarelli 2009 20 and Dona M *I Singoli Contratti del Consumo* 2008 VII. Galletto states that the Italian situation in relation to consumer protection differed, prior to the intervention of the European Union Directives, to the English, French and German experiences (Visintini G *Trattato della Responsabilità Contrattuale* vol II 2009 674).

⁵¹⁹ Visintini 2009 679.

were not prevalent in Italy.⁵²⁰ It was the progresses in the European Union in this area that promoted and stimulated the Italian jurisprudential interest with regards consumer protection.⁵²¹ The first interventions by the national legislature in Italy were essentially implementations in the Italian system of European norms or directives, received by Italy.⁵²² Besides efforts by the Minister of Trade and Industry, various conferences were held and organisations were formed in order to assist on a consultative basis.⁵²³ The Italian body of law was decisively deficient in this area as neither the Constitution nor the Civil Code, save as indicated above,⁵²⁴ dealt directly with consumer protection rights and the consumer, prior the influence of the European directives, had to rely on indirect measures for the protection of his rights.⁵²⁵ The non-interventionist mentality in the consumer credit area prior to the 1980's in Italy is astonishing, especially when one's exposure to consumer credit protective legislation and practises predate the 20th century. Perhaps this phenomenon can be ascribed to the socialist milieu of Italy, where unlike in South Africa, the average salaried individual did not have to pay for private medical aid, ensure private pensions were in place and where public transport was available – circumventing the absolute need for a vehicle, vehicle finance and maintenance. The differences in dynamics are fundamental, however, as will be seen in the next chapter, by joining the European Union, Italy had to make perhaps the biggest strides out of the three jurisdictions compared in this work, in order to align its laws with the contemporary consumer protection ideology of the European Union.

⁵²⁰ In fact, until the 1980's only two consumer associations were in existence; *L'Unione Nazionale Consumatori* (National Union of Consumers) [own translation] founded in 1955 and the *Lega Consumatori* (Consumer League) [own translation] founded in 1971 (Bertuzzi and Cottarelli 2009 20 and fn 16).

⁵²¹ *Ibid.* More particularly Directives 87/102/CEE and 90/88/CEE.

⁵²² Bertuzzi and Cottarelli 2009 21. These included Law 19 February 1992 number 142 (sections 18 – 24) which was a law that directed the reception of the European Community Directives (Vistinini 2009 680). As well as Decreto Legislativo number 385 of 1 September 1993 *Testo Unico delle Leggi in Materia Bancaria e Creditizia*, as amended by article 1 of d.lg.n. 37/2004 (hereinafter 'T.U.'). The title of this legislation can be translated as the Unitary Text of the Laws on Credit and Banking Matters [own translation]. The T.U. covers a variety of aspects such as defining the concept of consumer credit, defining who is entitled to dispense finance, TAEG (which is the effective interest rate per annum), marketing and advertising, training, the contents and validity of contracts, execution of the contract, invalidity, and breach of contract by the credit provider (Dona 2008 3 - 4). Interestingly enough neither the banking T.U nor the Consumer Code deal with breach of contract by the consumer.

⁵²³ Bertuzzi and Cottarelli 2009 21.

⁵²⁴ Limited to the regulation of sale of goods on credit.

⁵²⁵ Thus consumers were sought to be protected by the same general principles which were used to protect the individual.

CHAPTER 3: BACKGROUND TO AND RATIONALE FOR THE NATIONAL CREDIT ACT

3.1 Rationale for Consumer Law and Policy Generally

Moneylending transactions, [...] have at all times posed a challenge to the legislator.⁵²⁶

In the period after the Second World War, the world, led by Europe and America, embarked on massive production and delivery ventures of novel goods and services.⁵²⁷ This manufacturing profusion led to a plethora of consumerist behaviour,⁵²⁸ which conduct was presaged by various factors, including the growth in consumer income which led to the emergence of a large scale 'middle class' purchasing power that in turn led to high demand for consumer goods, which in turn exacted a need for a variety of credit arrangements.⁵²⁹ This evolution of society has been explained as being caused by the growing affluence of the population.⁵³⁰

Economists and sociologists noted that the growing affluence of the population during the post-World War Two period, together with changes in occupational structure, began to produce a large and stable consumer market.⁵³¹ This

⁵²⁶ Zimmerman R *The Law of Obligations – Roman Foundations of Civilian Tradition* 1990 166.

⁵²⁷ Ramsay I *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* 2012 2.

⁵²⁸ By this is meant that a frenzy of purchasing consumer goods by cash or credit occurred. The psychology of the post-world war consumer, whether due to intense advertising or simply abundance in availability, was fixated on acquisition of goods. Harvey advocates that 'freedom' has become associated with 'mindless consumerism' (*A Brief History of Neoliberalism* 2005 taken from Ramsay 2012 8).

⁵²⁹ Ramsay 2012 2. The expansion of commerce and trade has been proposed as the more significant mainspring for the development of a general theory of contract, with religion as the second main force (Harker R 'The Role of Contract and the Object of Remedies for Breach of Contract in Contemporary Western Society' 1984 101 SALJ 121 123).

⁵³⁰ Offer A *The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain since 1950* 1996 1. It is submitted that a similar development is evident in post-1994 South Africa, albeit not precisely for the same reasons. The repeal of racially prejudiced laws that had curbed the earning capacity of the majority of the population thereby limiting their access to credit, amongst many other sanctions imposed, resulted in a sudden intensification of demand for durable goods. This (delayed) greater demand was fashioned by the bulk population joining the previous (minority) market as equal role players in the consumer emporium.

⁵³¹ Ramsay 2012 2.

development was seen as the beginning of the breakdown of traditional class barriers.⁵³² This evolution was dubbed 'embourgeoisment', essentially 'the working class was gradually being assimilated, through consumption of products similar to those of the middle class, to the style and manners of that class'.⁵³³

It is submitted that with the rise in consumerism came the rise of hypotheses on how to best protect the consumer – if he was to be protected at all.⁵³⁴ And since the turn of the millennium the regulation of consumer credit has been at the centre of policy discussions in many parts of the world.⁵³⁵ Selection processes or rationale for legal frameworks for particular jurisdictions are entangled with difficult economic, political and institutional choices. What is prevalent, however, is the similarity in policy concerns across jurisdictions. Often, reports, research and findings on the topic of consumer protection in one country are relied on or reflected in another's. Thus, what follows is a discussion on the rationale for consumer policies, drawn from various jurisdictions; demonstrating that the overlap of problems encountered and solutions implemented in the various jurisdictions are common. Furthermore, it will be shown that rationale

⁵³² Ramsay 2012 2. The following is a poignant remark by Sir Henry Maine: 'movement of progressive societies has hitherto been a movement from status to contract' (from Harker 1984 SALJ 121 122 fn 13).

⁵³³ Goldthorpe JH *et al The Affluent Worker in the Class Structure* 1969 198. Again, the situation can be assimilated to the twenty year old South African democracy. The difference being that the contemporary assimilation was not crossing a class barrier (although on a certain level this happened as well: the majority of black people were from a working class background; however, not due to custom or legacy but due to 'legalised' constraint) but the major shift was the crossing of the colour bar. The 'consumer society' of goods (and obviously of credit) increased by a vast percentage as people, that had been previously discriminated against due to race, were now provided with the same access to consumer goods and credit as those that had not been subjected to the same restrictions.

⁵³⁴ The degree of sophistication of legal theory has historically been closely linked to the level of economic activity within a given society (Harker 1984 SALJ 121). As historic examples one can look at the revival of trade which followed in the wake of the crusades, this has been advanced as the revival of the study of Roman law on the continent (cf Hahlo HR and Khan E *The South African Legal System and its Background* 1973 487); the golden age of the Dutch Republic is the period during which Roman-Dutch law achieved its full flowering (cf Hahlo and Khan 1973 543); the advances in the English law of contractual obligation followed in the wake of the self-sustained economic growth of the Industrial Revolution, which began to take off around 1760 to 1770 (cf Atiyah PS *The Rise and Fall of Freedom of Contract* 1979 2244ff and 398ff) (from Harker 1984 SALJ 121 fn 5).

⁵³⁵ The history of consumer credit regulation is, however, as old as consumer credit itself. The first civilizations known in history had already endeavoured to find a balance between facilitating economically useful credit extensions and protecting vulnerable borrowers against abuse by lenders (Franken in Niemi *et al Consumer Credit, Debt and Bankruptcy Comparative and International Perspectives* 2009 127). Cf Chapter 2 above for a detailed discussion in this regard.

motivating the change in legislation in South Africa as well as other jurisdictions were founded on past experience.

Broadly speaking, two central policy strategies or approaches to the study of the consumer market exist: some theorists posit that competition and market forces are the best protection for consumer interests;⁵³⁶ other views tend to favour a redress of the imbalance of power between producers and consumers through public regulation.⁵³⁷ The former viewpoint is based on the idea of liberalization of the credit market with the empowerment of the consumer,⁵³⁸ while the latter envisions regulation of both the procedure for granting credit as well as the content of the contract to ensure fair and secure contracts that protect consumers.⁵³⁹ The two disparate regulatory strategies are dubbed 'neo-liberal' and 'social-market',⁵⁴⁰ respectively. Niemi⁵⁴¹ posits that the United States and

⁵³⁶ Board of Trade, Final Report of the Committee on Consumer Protection (Molony Committee) Cmnd 1781/1962 (hereinafter the 'Molony Report').

⁵³⁷ *Committee on Consumer Credit* 1971 Report of the Committee on Consumer Credit under the presidency of Lord Crowther Cmnd 4596 (hereinafter the 'Crowther Report'). Cf also Cartwright: '[W]e need to consider the relationship between consumer protection and the market economy. It is sometimes argued that the state, through the law, should play only a restricted role in protecting consumers, because consumer protection is most effectively achieved by the operation of free and open markets. Law should be used to ensure that the markets function as freely as possible. Where markets do not work perfectly, the law should intervene to address this failure, provided this can be done cost effectively' (*Consumer Protection and the Criminal Law: Law, Theory, and Policy in the United Kingdom* 2006 1).

⁵³⁸ Here the consumer is assumed to follow the rational actor model in his decision making. The 'rational actor model' of consumer behaviour assumes that a consumer that acts with complete information will choose outcomes that maximise his benefits and minimizes his costs (Hastie and Dawes *Rational Choice in an Uncertain World: The Psychology of Judgment and Decision Making* 2001 and Block-Lieb S and Janger EJ 'The Myth of the Rational Borrower: Rationality, Behaviouralism and the Misguided Reform of Bankruptcy law' 2006 84 *Texas Law Review* 1481).

⁵³⁹ If one looks at a broader theory of contract, two main methods of regulating the production and allocation of goods can also be identified. The first is by letting private individuals contract autonomously and the second is through collective planning where agencies in society (such as government) are responsible for social and economic planning and public officials by means of a planned economy are able to achieve social purposes directly (Harker 1984 *SALJ* 121 136). The latter, it is submitted, is an example of socialist ideology. Harker submits that in Western capitalist, free-enterprise societies the former- autonomous ordering – is the preferred ideology. For social and economic planning to therefore be accomplished through private contracting the existence of rules is essential (*ibid*). This discussion is expanded in the introduction to Chapter 6 *infra*.

⁵⁴⁰ The following paragraph, notwithstanding it being an individual view, gives a fine indication of what the 'social-market' approach entails: 'Through its ideal of perpetual growth, the market favours those who have and punishes those who have not, thereby increasing over-indebtedness, and necessitating that we frame market power with a public and social ideal. Unlike the tradition of the welfare state, I do not assume that welfare can only be introduced into markets through centralised state power, as the creation of centralised authority can sometimes cause more harm than good. Welfare is not synonymous with the state but has a collective dimension. The dimension can only be introduced into individual (market) behaviour through the

England fall under the former model and countries such as Germany fall under the latter model. It is submitted that South Africa, with the advent of the National Credit Act, now definitively falls into the category of the 'social-market'.⁵⁴²

Conventional justifications for interventionist regulatory policies and legislation can elementarily be diagnosed into two camps: the correction of market failures and ethical goals such as distributive justice.⁵⁴³ It is submitted that justification for intervention in the consumer market fall under either or both of these two camps; consumers are either suffering unjustly at the hands of providers (distributive justice) or the economy is afflicted (market failure). One of the chief rationale for consumer policy is the inequality of bargaining power between consumers and suppliers of goods, services or credit.⁵⁴⁴ The disparity between the two role players in the consumer relationship is natural and the profundity of the imbalance authentic.

The so-called neo-liberal approach or the free market ideology⁵⁴⁵ posits that market forces and competition are the best protections for consumer interests,

use of rules. [...] It is important to explore how these rules should be construed in order to create the necessary political pressure to reform a system, which is not individualistic by a choice of actors but through a compulsory legal form, serving the powerful interests of individuals and firms' (Reifner in Niemi 105).

⁵⁴¹ Niemi 2009 3.

⁵⁴² Or in writer's own words, the 'regulated market' supposition.

⁵⁴³ Michell adds paternalism as a further fundamental ('Alternative Consumer Credit Market and Financial Sector' *Canadian Business Law Journal* 2001 360 363). However, it is submitted that paternalism *per se* is not a standalone motive for intervention. Paternalism or paternalistic approaches to regulation are a consequence or method of regulation, rather than justifications for intervention. It is the basic needs of the consumer and the failure of the market which result in what may be viewed as paternalistic government reactions in regulating.

⁵⁴⁴ Michell refers to it as 'market power' advocating that in certain urban neighbourhoods, for example, companies may be able to exercise a kind of jurisdictional monopoly power because of high transportation costs and habit and convenience, which deter individuals from shopping outside the proximity of their neighbourhoods (*Canadian Business Law Journal* 2001 364). Squires, writing from an American perspective, argues that a more fundamental transformation that shapes credit practices is a dramatic increase in economic inequality: 'Over the past three decades, the trajectories of inequality that have most dramatically changed the face of the nation's metropolitan areas are the persistence of racial segregation, concentration of poverty coupled with increasing economic inequality, and sprawl [...]. The world of financial services has been hardly immune to these forces. In many ways, restructuring of financial services both reflects and reinforces these patterns of inequality and uneven metropolitan development. A two-tiered system of financial services has emerged, one features conventional products distributed by banks and savings institutions primarily for middle- and upper-income, disproportionately white, suburban markets, and the other featuring high-priced, often predatory products, offered by check-cashers, payday lenders, pawnshops, and others targeted at low-income and predominantly minority communities concentrated in central cities' (Niemi 2009 12-3 and 17).

⁵⁴⁵ Terminology in writer's own words.

thus creating an optimally balanced and fair market.⁵⁴⁶ However, the conditions which would create such optimal performance of a market involve making very sanguine assumptions that are not in reality constant or continuous.⁵⁴⁷ Some of the assumptions of a free market economy are:-⁵⁴⁸

- There are enough buyers and sellers in the market at any one time that the activities of one economic actor (supplier) will only minimally impact the output price in the market;
- There is free entry into and out of the market;
- Commodities sold in the market are homogenous, that is each seller trading in a particular commodity trades in essentially the same product;
- All consumers have the same information with regards the nature and value of commodities being traded;
- All production costs of commodities are borne by the producer and all the benefits accrue to the consumer, that is, no externalities exist;
- Stability of individual tastes and preferences; and
- Existing distribution of wealth and resources.

In practice, the assumptions as outlined above are often not a true depiction of the market paradigm.⁵⁴⁹ When these optimum conditions are not reached, one refers to them as 'market failures'.⁵⁵⁰ Market failures include situations such as lack of competition, like in countries dominated by monopolies or oligarchies, which is especially true of small economies such as that of South Africa. There may be barriers to entry, lack of product homogeneity,⁵⁵¹ information gaps

⁵⁴⁶ Ramsay 2012 7-13.

⁵⁴⁷ The following comment not only interesting but humorous: 'It may be useful to begin with a model of an economic system which is as alluring as it is unrealistic. [...] A society based on this model of 'perfect competition' in the market should secure the best of all possible worlds for the consumer. The consumer, indeed is dominant. He or she exercises the power of commercial life or death over suppliers in the shape of his or her purchasing decisions. The consumer will be supplied according to his or her preference and, for society generally, there will be no waste of resources. [...] Increased demand will in theory lead to an increase in price, but corresponding increase in supply will quickly restore equilibrium between supply and demand (Howells and Weatherill 2005 1).

⁵⁴⁸ Ramsay 2012 42 and 47.

⁵⁴⁹ Ramsay I *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* 2007 55.

⁵⁵⁰ *Ibid.*

⁵⁵¹ That is, the existence of qualitative differentiation between products.

between producer/provider and consumer,⁵⁵² and external costs which are not incorporated in the market price.⁵⁵³ Ramsay⁵⁵⁴ submits that market failure occurs where there is a failure in one or more of the conditions for the optimal operation of a competitive market.

Reasons for market failures include such issues as monopoly power, price fixing, abuse of a dominant position in the market, information gaps, switching costs,⁵⁵⁵ lack of confidence in a particular market, unsophisticated consumers' inability to make informed decisions about complex issues⁵⁵⁶ or consumers' inability to obtain redress.⁵⁵⁷

Adequate information on prices, quality and terms of the products or services provided are essential to the smooth functioning of trade – it allows consumers to make efficient choices when purchasing.⁵⁵⁸ The perception that many consumers are inadequately informed as to the nature and consequences of their transactions has provided justification for the institution of consumer protection measures.⁵⁵⁹ The discussion below on rationale for South Africa's legislative credit consumer protection demonstrates that indeed, concerns over imperfectly informed consumers, was a motivating factor for intervention by the legislature.⁵⁶⁰ The problem with this rationale is that consumers, in general, will rarely have all the information and different markets will provide differing quantities and qualities

⁵⁵² Caplovitz posited that such information gaps were the cause of fraud and deception in lower income markets (*The Poor Pay More* 1967 and cf Michell *Canadian Business Law Journal* 2001 364).

⁵⁵³ Ramsay 2007 56.

⁵⁵⁴ Ramsay 2007 55.

⁵⁵⁵ Switching costs refers to the expenses that a consumer would have to embrace in order to switch to another product or provider, for example the expenses time and energy that a consumer would have to expend changing banking institution including the time that he would require in order to understand and choose the new institution.

⁵⁵⁶ Gailbraith is of the view that larger firms are able to manipulate consume demand through strategies such a sproduct promotion, on which much money is invested (Gailbraith 1987 85) and further the concept of 'false consciousness' describes the situation where consumers in modern society cannot under such circumstances really know what they want' (Kennedy D 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory terms and Unequal Bargaining Power' 1981 - 1982 41 *Maryland Law Review* 563).

⁵⁵⁷ In 2005 the Department of Trade and Industry of England resolved this criteria for determining whether, and if so how, the Central Government should intervene in the markets (DTI *A Fair Deal for All: extending Competitive Markets: Empowered Consumers Successful Business* 2005).

⁵⁵⁸ Ramsay 2012 15.

⁵⁵⁹ Ramsay 2007 16.

⁵⁶⁰ Cf paragraph 3.2 *infra*.

of information.⁵⁶¹ Thus, it has been suggested that the rationale of the uninformed or imperfectly informed consumer will continuously motivate for further interventions.⁵⁶² A limitation on this would be a balancing between the costs and benefits of any proposed intervention that is ensuring an *adequately* informed consumer as opposed to a *perfectly* informed consumer.⁵⁶³

Another perceived market failure is one often criticised as derisory, that is the institutional framework which secures the performance of market exchanges, the already existing structure that ensures protection of rights and maintenance of obligations of the parties to the consumer transaction – this is the private law system of individual enforcement.⁵⁶⁴ It is submitted that the following view is an exemplary illustration of one of the principal motivational rationale for intervention and regulation in the consumer market:⁵⁶⁵

A major issue in consumer protection has been the perceived inadequacy of this system of individual private law litigation to secure the performance in a mass consumption economy where the impact of harm is large in the aggregate but small for any one individual. Since the transaction costs (information, time and trouble, uncertainty of outcome) of enforcing individual consumer claims may often outweigh the 'expected recovery, the private law system may fail either to deter socially wasteful activity or to compensate for violations of rights.

In short, the redress provided by private law or common law of contract is perceived as expensive and risky, with inherent time delays. This often results in lack of confidence in the system.

Although market failure is viewed as a dominant rationale for intervention, Ramsay⁵⁶⁶ submits that it is not always a sufficient rationale, because it is necessary to estimate the effect of the failure on the price, quantity and quality of goods or services and thereafter to compare these with the cost of remedying the failure.⁵⁶⁷ Government intervention is not without cost and an analysis of the

⁵⁶¹ The credit market and the vehicle market, for example, will avail different information in different formats and media.

⁵⁶² Ramsay 2007 25.

⁵⁶³ *Ibid.*

⁵⁶⁴ Ramsay 2007 21.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Ramsay 2012 42.

⁵⁶⁷ *Ibid.*

costs and benefits of intervention and the potential impact of a remedy on the market and the behaviour of the consumer who is affected is necessary.⁵⁶⁸ Market failure may lead to potential inefficiencies in the price, quality or quantity of goods and services produced in a particular market. Since almost all markets will be imperfect, it is important to diagnose the extent of any particular market failure and its effects on these three aspects. Minor imperfections may not justify corrective action, since such corrective action will itself entail costs and may have unintended side effects.⁵⁶⁹ Market failures, such as those indicated above, are principal motivating factors which propel governments to regulate the consumer market, through legislative intervention.⁵⁷⁰

A further fundamental rationale for intervention is the notion of the injudicious consumer, that is, perceptions that consumers do not act rationally when making choices.⁵⁷¹ Consumers often make impulsive decisions which, in retrospect were not beneficial to them.⁵⁷² While the topic is largely grounded in behavioural economic theories and research, it has been mentioned here because, when considering intervention in the credit market, legislators should and often do take such comportment realities into consideration. Providers may manipulate marketing practices for gain and many consumers fall into the same or similar behavioural pattern.⁵⁷³ Furthermore, a consumer may only choose from what is available, which in turn is limited to the institutions of the society they live in and

⁵⁶⁸ *Ibid.* Cf Michell *Canadian Business Law Journal* 2001 365.

⁵⁶⁹ Ramsay I 'Rationale for Intervention in the Consumer Marketplace' *IDC* 1984 17.

⁵⁷⁰ *Ibid.*

⁵⁷¹ Ramsay 2012 42.

⁵⁷² *Ibid.*

⁵⁷³ Research during the past decade suggests that there may be failures in the credit card market caused by consumer behavioural biases. Initial work by Ausubel (1991, 1997) concluded that credit card companies in the United States earned supra normal profits because individuals underestimate the future extent of their borrowing on the card. Since they did not intend to use the card as a borrowing mechanism from the outset (reflecting also over-optimism) they paid little attention to the interest rate charged on the card but were concerned about the immediate costs of the annual fee (Ausubel, 1991; Bar-Gill, 2004). Since competition will focus on the annual fee, this will result in pressure to reduce the annual fee but maintain a high interest rate and increase late payment charges and fees. Research on low interest introductory offers also indicates that consumers underestimate the amount of their future borrowing on the new card and overestimate the benefits of switching cards (Ausubel, 1999). Neoclassical economists countered Ausubel's explanation with the argument that consumers borrowed on credit cards because of the lower transaction costs of doing so, compared with other forms of short-term borrowing (Brito and Hartly 1995 from Ramsay 2007 79-80).

the relative economic position of the consumer and the other party to the contract.⁵⁷⁴

Equity has also been viewed as an important component motivating consumer protection legislation.⁵⁷⁵ In fact consumer laws and policies are often recognized as attempts to redistribute power and resources, such as rights, from providers to consumers.⁵⁷⁶ This theory comes, however, with the proponent that in general consumers are less wealthy and have less means than providers or producers.⁵⁷⁷ Aronstam⁵⁷⁸ encapsulates the issues by remarking:

The poor and less-educated, because of their ignorance both of the credit market and the protection afforded to them by the law, are frequently placed in a position where their ignorance is abused by moneylenders. They may be charged usurious rates of interest or inveigled into entry into unduly burdensome credit transactions. They may be presented with contracts worded so obscurely as to be unintelligible to them.

It will be shown in the section below that South Africa is perceived as precisely such a model, with the majority population being considerably poorer and less equipped than the wealthier counterparts to the credit transaction - the credit providers. It is submitted that commercial society does appear to be weighted in favour of the wealthy. A simple example is banking costs in South Africa: depending on what tier a consumer 'qualifies for', which is measured according to the amount of money that he earns – then the costs of borrowing credit and of banking decrease. Ramsay⁵⁷⁹ observes that '[a]n efficient policy is ultimately justified by equity since consumers are able to obtain goods and services of a

⁵⁷⁴ Zweigert K and Kötz H *Introduction to Comparative Law II: The Institutions of Private Law* 1977 7-9.

⁵⁷⁵ Ramsay 2012 70.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ Aronstam PJ *Consumer Protection, Freedom of Contract and the Law* 1979 65.

⁵⁷⁹ Ramsay 1984 12. However, the fact that low income consumers pay more, whether the discrepancy is merely relative or direct, cannot be discounted. Interest rate ceilings have been one attempt to redress the unfairness. However, views have been posited that attempts to redistribute wealth are futile, as long as individuals remain free to contract business will 'pass along' the costs to consumers and where businesses are prevented from so doing, they may be unwilling to contract with consumers. Particular to the credit market, this could result in credit providers refusing to supply credit. Consequently consumers may resort to illegal methods of borrowing such as from loan sharks. A further counter argument is that redistribution should be handled through taxes and transfers and the burden thereof should not be placed solely on the shoulders of the providers (Michell *Canadian Business Law Journal* 2001 366-7).

quality, on terms, and at the price that they are willing to pay'. As far as redistributive policies relating to credit are concerned, one needs to look at the central question in relation to low-income markets, which is whether redistributive policies of consumer protection are legitimate or an effective method of achieving more general redistributive goals; examples of such policies are the regulation of interest rates to protect high-risk, low-income consumers and restrictions on creditors' remedies.⁵⁸⁰

Community values, including such concepts as honesty, fair-dealing and loss-sharing are also advanced as rationale for intervention. Furthering such line of thinking is the broader view of creating trust and similar values in order to create an efficient market.⁵⁸¹ Consumer policy and regulation is viewed as one of the tools for creating security in the market environment.⁵⁸² It is submitted that an economic society has to be sufficiently sophisticated to rely on such conceptual rationale to motivate intervention.

The above has been an exposition of some of the rationale that propel intervention in the consumer market through policy and legislation. It is submitted, however, that the question is no longer *whether* to regulate, but *how much* to regulate. It is further submitted, that regulation in this global profit-based, credit-reliant, economic environment is a necessity. Cartwright⁵⁸³ suggests that the market, buttressed by private law, is important for ensuring that consumers are able to operate comfortably in terms of goods and services that they want, and suggests that intervention which assists the proper functioning of the market is valuable. It is submitted that the buttressing by private law is not

⁵⁸⁰ Ramsay 2007 97. In terms of South African legislation, the National Credit Act regulates how credit providers may pursue the credit consumer that has reneged on his contractual obligations. It is submitted that the Act does not, however, and in terms of remedies, provide or fashion any therapies or procedures that have not been available to credit providers prior its enactment. Nor does the Act so severely restrict creditors' remedies so as to truncate access to relief from errant consumers. The Act does, however, introduce novel concepts to South Africa with regards debt counselling and debt review procedures. It is *how* these new procedures interrelate to the remedies that produce a different consumer legislation matrix to that of the previous legislative dispensation. This discussion is expanded in Chapter 6 *infra*.

⁵⁸¹ Ramsay 2012 80.

⁵⁸² Ramsay submits that the European Union Commission appeal to this value by promoting harmonisation programmes for consumer law in the European Union (Ramsay 2012 80).

⁵⁸³ Cartwright 2006 2-3.

only necessary to bring comfort and a sense of stability of the contractually based consumer market to the consumer but to both role players in the credit relationship, that is consumer and credit provider.⁵⁸⁴ A credit provider that is ensured that the credit it provides to a consumer will be recouped through the legal process in the event of breach of the agreement by the consumer will extend credit and probably at a better interest rate than a credit provider that is expected to operate within an unstable environment.⁵⁸⁵ It is further submitted that while the National Credit Act, initially brought about some concern regarding recoupment of fees, the courts assisted by precedent and academic interpretation do and have stabilised the credit environment.⁵⁸⁶

It is submitted that three main considerations that should be measured when assembling policy or deciding upon which regulations to adopt and which to discard are:

- (a) the cost effectiveness of the particular rules and consequences of implementation thereof;
- (b) that the direct result of such legislation does not disproportionately benefit one class of consumer;⁵⁸⁷ and
- (c) that state intervention does not completely remove the judgment from the consumer and thus essentially and incrementally erode freedom of contract.⁵⁸⁸ Knowing that a contract freely and voluntarily entered into is or will be enforceable is in effect the necessary basis upon which a contracting party enters into a contract.

⁵⁸⁴ It is further submitted that in the South African context the common law, within which any legislation is 'birthed', creates a sense of security in the market for the contracting parties.

⁵⁸⁵ Or in an unsecured environment, such as with unsecured loans.

⁵⁸⁶ Some political theorists have, however, argued that government endeavours to bring about substantive public objectives through legal directive would be at the cost of the 'over legalization of social relations and would ultimately be ineffective' (Offer C *Contradictions of the Welfare State* 1984 280).

⁵⁸⁷ While low-income consumers are generally perceived as necessitating relatively more protective measures in policy making, this cannot be to the detriment of middle or high income earners- such policies would have a pejorative effect on consumer markets and may result in discrimination by providers.

⁵⁸⁸ The ideas have largely been adopted from Ramsay 2007 Chapter 2. Cf fn 597 below for an elaboration on the meaning of freedom of contract.

Firstly, any decisions to intervene in the market and the extents of such intervention have to be weighed against the costs and the benefits of the intervention, the behaviour of those affected by it and the equitable effects of the costs and benefits amongst different groups of consumers and providers.⁵⁸⁹ Economists are great proponents of cost benefit analysis made up of identifying the sources of the problems in the market and analysing alternative responses in terms of benefits to both consumers and providers; compliance costs; costs of drafting and implementing the legislation; costs of enforcement and consequential costs to buyers and sellers.⁵⁹⁰ Thus it is advocated that ideally efficient legal intervention should minimise these costs and require that the economic benefits exceed the costs.⁵⁹¹ It is submitted that this is a very 'economic theorist' outlook – but again, that in reality the law maker, especially with reference to the credit market should take such matters into consideration. Not accurately analysing the costs of regulating may have two results: the first is that it may eventually harm the very consumer that the legislation is attempting to protect – as the costs may be downloaded on to him. The second is that the credit provider may withdraw from the market or a certain sector of the market because the costs of compliance are simply curtailing too much of the profit margin.⁵⁹²

The second consideration of consumer protection is important, that is that the direct consequence of legislating does not disproportionately benefit one class of consumer, this is because measures are often designed to protect particular groups of consumers, for example low income or vulnerable consumers.⁵⁹³ The concern here would be to ascertain whether such measures would benefit the individuals targeted⁵⁹⁴ and would not result in the excessive cost being reassigned to other consumers, whether directly or indirectly.

⁵⁸⁹ Ramsay 1984 17.

⁵⁹⁰ *Ibid.*

⁵⁹¹ Ramsay 1984 18.

⁵⁹² Cayne and Trebilcock have argued that consumer protection laws can be exclusionary, where lenders refuse to supply credit, or even degenerative – where consumers turn to the black market (Cayne D and Trebilcock M 'Market Considerations in the Formulation of Consumer Protection Policy' 1973 *UTLJ* 396)

⁵⁹³ The elderly or the young.

⁵⁹⁴ Ramsay 1984 17.

'Paternalism' is a factor that must be contemplated in relation to consumer legislation.⁵⁹⁵ Consumer legislation naturally takes somewhat of a paternalistic role in that it must protect the vulnerable consumer whilst ensuring that this is not done to the detriment or harm of the provider, whilst and at the same time protecting the consumer-provider relationship. 'Paternalism' *per se* is not necessarily to be construed as a negative notion; it is the extent of the intrusion that may distort the concept.⁵⁹⁶

Coupled with the slippery nature of paternalism is the issue of erosion of freedom of contract through too stringent regulation.⁵⁹⁷ As will be seen in the discussion below on economic necessity and legal certainty,⁵⁹⁸ the National Credit Act has already been criticised as 'almost paternalistic'.⁵⁹⁹ A balance is required with any legislative intervention, whether consumer related or otherwise. And, it is submitted that this is where South African law which, unlike the civilian tradition,

⁵⁹⁵ If removed of the familial connotations, 'paternalism', may be understood as a 'protective' attitude or stance.

⁵⁹⁶ The following is an economic explanation of paternalism: 'Paternalistic measures override individual preferences, substituting government judgment for that of the individual. These interventions are often based either on distrust of the consumer's ability to evaluate information or on the fear of individuals, even with accurate information, will act irrationally, mis-estimating product risks. It is associated with regulation where mistakes by consumers might have costly consequences [...] or where consumers' short-term preferences appear to need to be overruled in favour of their long-term interests. The behavioural literature has underlined the slippery nature of paternalism for it may not be easy to distinguish between situations where intervention accords with an individual's real preferences [...] and those where government overrules an individual's real preferences, substituting its own judgment' (Ramsay 2007 100).

⁵⁹⁷ The following from Zewigert and Kotz gives an excellent understanding of the concept of freedom of contract: 'Freedom of contract has always had many meanings, even if we confine ourselves to obligational contracts. Given that the limits of public order are not overstepped ... freedom of contract means the freedom to select and enter contracts of any imaginable type, the freedom to decide whether to contract or not and the freedom of each contractor to fix the terms of his own promise, subject to the agreement of the other party. The freedom to choose what type of contract to adopt is just a variation of the freedom to choose what the content and consequences of one's contract are to be, so in asking whether freedom of contract is still a vital principle today we can confine ourselves to the question whether parties still have a free choice *whether* to conclude a contract and *how*, or on what terms. Indeed the 'whether' and 'how' of contract often, perhaps even usually, coalesce into just one single question, since whether a person will contract at all commonly depends on the terms open to him' (1977 8). In contradistinction to the above, Harker provides an interesting view on freedom of contract: 'Freedom of contract, as a general principle, simply does not exist in contemporary society. The legal order may require that certain contracts be made, or it may dictate the terms which must or may not be included in contracts into which the parties do voluntarily enter. Moreover, true freedom of contract is a workable social norm only in so far as it presupposes economic and social equality between the parties to the contract. Freedom of contract in this sense is itself a chimera, a fantasy which has never existed in any way as a reality; it certainly does not exist today – the age of mass production and standardized transactions' (1984 SALJ 121 129).

⁵⁹⁸ Cf paragraph 3.1.1 *infra*.

⁵⁹⁹ Cf Otto JM and Otto R-L *The National Credit Act Explained* 2013 14.

based on the common law, nourishes legislation through the interpretative function of the courts, which rely on precedent, creating a certitude for all role-players. The principle of legal certainty is discussed later in this chapter,⁶⁰⁰ however, it must be mentioned here that a requirement for a stable contracting environment is that performance must be certain. And while state legislative intervention is welcomed in protecting the consumer, a line must be drawn to ensure that a credit provider is ensured of enforceability. It must be certain at the time of contracting that the agreement will be enforced, especially in the event of breach. An overly regulated regime will result in the attrition of such fundamentals, and is to be guarded against.

3.1.1. Economic Necessity and Legal Certainty

Economic concerns⁶⁰¹ are one of the most important considerations that the lawmaker must contemplate when deciding on legislative frameworks, especially in the credit market. The legislative and regulatory framework that is requisite to have a smoothly flowing economic market is largely dependent on economic and social factors being taken into consideration by the policy maker. The legislator must consider the type of population that makes up the country. Is it a largely educated and sophisticated consumer market, or an uneducated and unsophisticated market or, as with the South African market, he has to consider whether there is a large discrepancy between the wealthy and educated and the poor and uneducated. The rules that a state decides to implement and the extent of the intervention will be determined by such considerations. However, the counter balancing consideration is that legal certainty cannot be forsaken. World Bank policy has long recognized the importance of open and efficient courts to sustained and widely shared economic growth, the fact that contracts must be enforced, property rights must be protected and foreign and domestic investors must have confidence in the legal security of their investments.⁶⁰² This

⁶⁰⁰ At paragraph 3.1.1.

⁶⁰¹ And often times social ramifications.

⁶⁰² The World Bank, *Human Rights and Development: The Role of the World Bank*, 23188 September 1998 15 (<http://www.worldbank.org/html/extdr/rights/hrtext.pdf>) (30.11.2009).

evidences the importance placed on the enforcement procedures and protection of rights as relative to healthy economic growth.

Once again, emphasis must be placed on achieving the right balance as criticism of paternalism is often levelled at policy makers. The following extract is relevant:⁶⁰³

Paternalism is an important concept in discussions of consumer policy. It is frowned upon by economists who make the assumptions of market economics since it assumes that government knows better than an individual what he or she wants or what is good for him or her. Yet the growth of the pejorative connotation of the term 'paternalism' is relatively recent, coinciding with the dominance of liberal individualism (Kleining 1983: 3). Paternalism is viewed by some as both compassionate and humanitarian – as an attempt to overcome the alienation of individualism and to show sympathy for others (Kennedy 1976; 1982). [...] Paternalism also invites us to question the assumption of the market model (and liberal individualism?) that individuals are the best judge of their own interests and that they prefer what they choose in the market-place (Offer, 2006: ch 2). Economists have traditionally considered preference and choice synonymous – reinforcing the doctrine of consumer sovereignty.

How does one, however, fit what appears to be scholarly rhetoric to pragmatic ground level legislating - if at all? If one looks at debt and over-indebtedness, it can be seen that these concepts are defined by those who have the power to decide, including such role players as the state, suppliers of goods and services and investors or creditors. Unmonitored, it will be credit providers that tend to define who will be counted as indebted or over-indebted.⁶⁰⁴ Indebtedness or over-indebtedness is scrutinised as a tangible sign of inadequate prospects for an economically feasible future that would ultimately require credit thrust.⁶⁰⁵ Thus, any negative diagnosis by creditors would result in low 'score' assessments or rather a negative credit history⁶⁰⁶ of particular credit consumers. It is such practical concerns that plague the lawmaker:⁶⁰⁷

[A]ny freedom in the choice of intervention is constrained by the fact that measures which directly attack over-indebtedness tend to have redistributive effects. This is why regulatory approaches that want to avoid changing the legal system, in which insolvency procedures lead to a significant loss of income, mostly favour the more subjective forms of prevention. They propagate '(a)

⁶⁰³ Ramsay 2007 101.

⁶⁰⁴ Or in a completely unregulated environment not to bother to make a determination either way.

⁶⁰⁵ Reifner in Niemi 2009 107.

⁶⁰⁶ Cf section 70 of the National Credit Act.

⁶⁰⁷ Reifner in Niemi 2009 107.

financial literacy', '(b) microlending', '(c) responsible lending and borrowing' ('reduced access'), '(d) debt advice with supervised repayment plans', or on rare occasions '(e) anti-usury laws'. Each of the above-mentioned measures pretends to know the reasons for over-indebtedness: unconscious and unskilled behaviour (a), lack of access to adapted loans (b), over-generous offers and too much borrowing (c), unprofessional handling of debt (d), or the exploitation of weakness (e).

The preventative methodology of legislating, described above, is akin to the measures laid out in the National Credit Act. A cursory view of the Act will demonstrate that the legislature covered the abovementioned inventory, that is: financial literacy,⁶⁰⁸ responsible lending and borrowing,⁶⁰⁹ reduced access to credit according to the consumer's means,⁶¹⁰ debt advice with supervised repayment plans⁶¹¹ and anti-usury laws.⁶¹² However, as correctly pointed out by Reifner,⁶¹³ these agenda seem to have little result on the degree of over-indebtedness in society. A consequence of which is that the emphasis then falls on the effectiveness of the legal rules put in place to regulate the relationship between the credit provider and the credit consumer once the consumer is in breach of his credit commitments.

Credit provides access to supplementary resources, which resources are calculated on the approximation of future liquidity of the borrowers.⁶¹⁴ While on a realistic level the credit consumer is borrowing the savings of others, the extension of credit, access to it and repayment methods are factually and legally organised so that the consumer borrows from his own future income.⁶¹⁵ Reifner⁶¹⁶ submits that the availability of this income, together with the repayment structure as legally and contractually arranged 'are the two pillars that balance consumer credit relations'. He argues that in order to prevent over-indebtedness of consumers two options are available: the first, by structuring debt enforcement practices so that the consumer adapts to the repayment requirements of the

⁶⁰⁸ Literacy and the right to access comprehensible and complete information. Cf sections 62-65; 69,70,72,73, 77, 92, 107-115 of the Act.

⁶⁰⁹ Cf sections 78-82 of the Act.

⁶¹⁰ Cf sections 82, 43 of the Act and GG 29442 30 November 2006.

⁶¹¹ Cf sections 82-88 of the Act.

⁶¹² Cf sections 100-106 of the Act.

⁶¹³ Reifner in Niemi 2009 107.

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.*

⁶¹⁶ Reifner in Niemi 2009 107.

credit provider; the other, through implementing methods of refinancing, rescheduling and discharge, in order to adapt credit to the actual needs and capacities of the consumer.⁶¹⁷ It is submitted that South Africa has adopted the latter approach. The conceptual terminology used in the National Credit Act are 'debt review', 'suspension' and 're-arrangement'.⁶¹⁸ It is notable that the South African legislature has adopted the consumer protection route. This attitude brings into question the neo-liberal approach or market economy. The question to be posed, is then: *should the market respond to the needs of the people or should people adapt to the needs of the market?* With his view posited against the neo-liberal nuance of consumer protection, Reifner⁶¹⁹ postulates, that while the basic democratic answer is obvious, it is also unrealistic:

If people rule they should also rule the economy and the market. But representative democracy, as the only form of democracy that has proved effective, is no suitable means where the welfare of individuals is concerned. Nobody knows what 'people need' but only what 'people want'. This is why the socialist dream of a planned economic democracy is misleading. But the 'needs' remain the goal, while 'profit orientation' can only be addressed as a tool to satisfy these human needs. Consumer protection is thus a complementary programme that intends to defend consumer needs rather than merely defending aggregate demand.

Although the above comments are essentially theoretically sound, the delicate balance between protecting that which is a 'need' and discarding that which is a 'want' is no small legislative task. Abandoning the consumer protection responsibility to the market economy is not, it is submitted a viable option for South Africa given its first-world/third-world impasse, nor has South Africa evidently taken a neo-liberalist stance. On the contrary, the consumer orientated National Credit Act is a sign of a more regulated market approach. Furthermore, the extensive Consumer Protection Act,⁶²⁰ is a sure sign of the very pro-active steps that the legislature is taking in order to stalwartly protect the consumer. The preamble of the Consumer Protection Act states that the people of South Africa recognise that apartheid and discriminatory laws of the past have

⁶¹⁷ *Ibid.*

⁶¹⁸ Cf Chapter 4 Part D of the Act.

⁶¹⁹ Reifner in Niemi 2009 107.

⁶²⁰ Act 68 of 2008 (hereinafter the 'Consumer Protection Act'). The Act became operative 18 months after the date on which the President signed the Act, save particular sections which took effect on the date one year after the date on which the Act was signed by the President (Schedule 2). The Act was signed by the President on the 29 April 2009.

burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality, and therefore it is necessary to employ innovative means to fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers; protect the interests of the consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and to give effect to internationally recognised customer rights. Amongst other reasons offered, the Consumer Protection Act motivates its enactment in order to promote and protect the economic interests of consumers.⁶²¹ These are not the objectives of a government seeped in neo-liberal ideology.

Both the National Credit Act and the Consumer Protection Act commence by concentrating on the 'marketplace': the former Act purports to 'promote a fair and non-discriminatory marketplace'⁶²² in relation to credit, while the latter purports to 'promote a fair, accessible and sustainable marketplace' in relation to consumer products and services.⁶²³ What becomes of concern in a regulated market economy, as it has been of concern in Europe, is the risk of financial exclusion, which is symptomatic of consumer weighted policies. Thus, where legislation is over-protective of the consumer and becomes zealous in its recriminations of the credit provider, and where the credit provider faces risks such as suspension of its credit agreement with the credit consumer if found to be a reckless lender,⁶²⁴ then the credit provider may rebuff certain credit applications.⁶²⁵

Reifner⁶²⁶ indicates that consumer credit law has shifted responsibility for the asocial effects of the credit system onto the consumer. It assumes, he argues, that markets offer all the essential opportunities to avert over-indebtedness

⁶²¹ Preamble to the Consumer Protection Act.

⁶²² Preamble to the National Credit Act.

⁶²³ Preamble to the Consumer Protection Act.

⁶²⁴ The effects that the relevant sections in the National Credit Act (sections 80-84) have on the *essentialia* of the credit agreement are discussed in Chapter 6 *infra*.

⁶²⁵ The counter argument is that the creditor does not really face the risk of suspension of a credit agreement if it has properly assessed the credit history of the consumer; however, it is not impossible that a debt re-arrangement or suspension may affect a credit provider that was not responsible for lending recklessly. The courts will have to take a very pragmatic approach to these sections (Cf Vessio ML 'Beware the Provider of Reckless Credit' *TSAR* 2009 2 274).

⁶²⁶ His view is obviously European in focus.

through rational choice.⁶²⁷ He refers to the European Commission, criticising it of using out dated research and he submits that according to the Commission, in a competitive European market, consumers will only need three tools to overcome their predisposition to spending, namely: education, information and reflection.⁶²⁸ These tools will in turn create the virtues required of the average ‘good’ consumer⁶²⁹ who will not only gain strength, but simultaneously create the necessary competitive market. Reifner⁶³⁰ criticises this line of thinking saying that ‘[c]ompetition is not the outcome but the precondition of rational choice’. He concludes that despite ‘this misconception, most specialised credit law, and particularly the new EU-Consumer Credit Directive follow the path that perpetuates that the debtor has to adapt himself to the requirements of the market’.

The European Coalition for Responsible Credit,⁶³¹ an advocate of ‘productive credit’,⁶³² is of the view that where consumers have a true and empirically verifiable chance to use productive credit through informed choice, this should be preferred to legal intervention. The role of legislation would then be to provide frameworks to markets in order to induce them to favour productive credit and punish exploitation.⁶³³ The ECRC’s principles of responsible credit campaign the facilitation of market pressure, orientation and the development of legal frameworks for responsible credit. These principles are not posited as legal rules, but are ‘one-sided and an expression of social interest to balance the basic

⁶²⁷ Reifner in Niemi 2009 107.

⁶²⁸ European Union Commission, Consumer Policy Strategy 2007 2013 COM.

⁶²⁹ Wilhelmsson T *et al Private Law and the Cultures of Europe* 2007 243.

⁶³⁰ Reifner in Niemi 2009 108.

⁶³¹ Hereinafter ‘ECRC’. The ECRC is a networking and policy influencing association of consumer agencies, academics, and other nongovernmental organisations formally created in 2006 during the concluding sessions of the international ‘Responsible Credit’ conference in Brussels. The Coalitions goals are to further the idea of responsibility in credit and banking and promote a set of principles for responsible credit and fair lending; organise and maintain a continuing dialogue among consumer and money advice organisations, social welfare organisations and trade unions, alternative financial institutions and other NGOs; influence bank thinking, strategies, products and services to benefit underserved and excluded groups; promote the production of research and transparency; organise conferences and other forums that increase people’s and NGOs’ understanding and abilities to promote fair access to lending products and services and act as a collective voice for underserved people to the public with respect to financial services (<http://www.responsible-credit.net/index.php?id=2520>) (20.11.2009).

⁶³² ‘Productive credit’ is credit which renders a return for the borrower that is higher than the cost. ‘In short a credit is productive if it neither leads to impoverishment nor to over-indebtedness’ (Reifner in Niemi 2009 end note I).

⁶³³ Reifner in Niemi 2009 109.

countervailing economic interest of profit maximisation'.⁶³⁴ What is being supported here is 'a moral purpose-driven form of quasi-legal principles' which does not have to comply with the rule of law and which may incorporate economic language with its formulation being brought closer to the interests of its supporters.⁶³⁵ Whereas legally framed principles (of law), states Reifner,⁶³⁶ 'offers more shelter from political misuse than economic or moral norms which through their purpose-driven formulation hinder the creation of self-certainty, legitimacy and collective behaviour'. The problem, however, is that the law of contract is unsympathetic to social interest. Reifner⁶³⁷ argues that the solution lies in the integration of the principles for responsible credit to be incorporated into the rule of law:

Consumers are seen as buyers or borrowers instead of indebted hungry persons and dependent wage workers. They are addressed as debtors and not as overindebted families who have seen their contractual relation cancelled. Likewise, evicted persons are not seen as homeless and garnished debtors are not seen as poor people. Principles of responsible credit would introduce human needs into the flow of capital and social rights into formal contracts. Thus, they would break the immunity of legal formalism, which turns social reality into a purposeless game, for which behavioural finance and game theory, instead of poverty and needs, provide explanations.

This is quite a tall order for any jurisdiction. However, it is submitted that the National Credit Act's principles and sections are not too far removed from this line of thinking. The legislature has, by enacting the National Credit Act, attempted to prevent discrimination in the market place, making responsible and affordable credit available to all.⁶³⁸ Although, it must be argued that no legislation, much less credit legislation, can truly achieve this principle, as the cost of credit and its fluctuations together with the dissuasive value that a credit consumer's lack of financial security (be it in terms of income or assets) may have on a credit provider, cannot be controlled by legislative enactments, no matter how sophisticated. The Act has further attempted to make credit relations transparent and understandable with its accurate credit cost disclosure

⁶³⁴ Reifner in Niemi 2009 110-11 and cf also Reifner 'European Coalition for Responsible Credit – Principles of Responsible Credit' in Twigg-Flesner *et al The Yearbook of Consumer Law* 2008 419-27.

⁶³⁵ *Ibid.*

⁶³⁶ Reifner in Niemi 2009 112.

⁶³⁷ Reifner in Niemi 2009 113.

⁶³⁸ Cf the Preamble and sections 3, 60, 61 and 62 of the Act.

regulations.⁶³⁹ The Act advocates responsible lending and penalises reckless lending, with debt re-organisation and if necessary suspension of consumer obligations in terms of the credit agreement.⁶⁴⁰

Contracts, entered into freely and voluntarily, are and must be enforceable. While agreements must be kept⁶⁴¹ one must differentiate between a natural obligation and a civil obligation. The honouring of a natural obligation is dependent on equity and plausibly founded on morality, whilst the civil obligation is rooted in law. Blurring the line between these two types of obligations would remove legal certainty from the transaction. In the realm of the credit regime, the law which enforces the civil obligation is, in most jurisdictions, entrenched in legislation. South Africa is no different; we have had many years of legislative intervention, however, it is the common law within which such enactments are ensconced that differentiates it from other jurisdictions and which provides a stabilising ingredient. The National Credit Act, while a relatively youthful enactment, comes into a body of law, in terms of interpretation and application which has been preserved in case law and textbooks. It forms the very foundation from whence the Act and consumer credit protection thinking must emanate. The following remarks, correctly encapsulate the challenges of the task of the legislator and the courts when protecting the interests of both parties to the credit contract:⁶⁴²

Credit plays an important part in the modern management of commerce. The rights of creditors to recover the debts that are owed to them should command our respect, and the enforcement of such rights is the legitimate business of our law. The granting of credit would otherwise be discouraged, with unfortunate consequences to society as a whole, including those poorer members who depend on its support for a host of their ordinary requirements. That does not mean, however, that the interests of creditors may be allowed to ride roughshod over the rights of debtors’.

⁶³⁹ Cf sections 63, 64, 65, 92 and regulations 28, 29, 36, 38, 40 and 41 of the Act.

⁶⁴⁰ ‘The provisions of the National Credit Act dealing with the prevention and consequences of reckless credit are not only far-reaching but also extremely important to all concerned’ (Otto and Otto 2013 85). For detailed discussions cf Van Heerden in Scholtz 2014 paragraph 11.4, Vessio 2009 *TSAR* 274, Renke 2011 *THRHR* 208 and Van Heerden 2011 *De Jure* 39.

⁶⁴¹ The Latin - *pacta sunt servanda*.

⁶⁴² *Coetzee v Government of the Republic of South Africa* 2005 4 SA 631 (CC).

The efficiency of the judicial system and its procedures, including debt enforcement, have long been recognised as necessary prerequisites for a functioning credit market that sustains economic growth.⁶⁴³ It is, however, an unavoidable truth, that no matter how ambitious a legislative endeavour, some credit consumers will breach their credit agreement for a variety of reasons. While the private individual credit consumer that is, the natural person, has many options in terms of credit restructuring and suspension,⁶⁴⁴ there will be those credit consumers that cannot for whatever reason use these options,⁶⁴⁵ and those credit consumers which are juristic persons and to which sections of the Act are not accessible.⁶⁴⁶ Such circumstances will compel the creditor to make use of the remedies available to it to recover from errant debtors. It is, then, the remedies available to the credit provider that must ensure fair procedure for recovery, because credit legislation must not only be preventative in nature but ensure procedural fairness if or when there is a breach of the credit agreement.

Development of legal framework to encourage growth of credit has been considered to be a major instrument in the conversion of third world and communist economies to capitalism. While the Act has been criticised as an 'almost paternalistic protective inclination of the legislature'⁶⁴⁷ and when compared to previous legislation of its kind the Act is perceived as 'overly prescriptive and protectionist – an instance of the 'nanny State' at work',⁶⁴⁸ it is submitted that the National Credit Act is very much in line with global trends. And while the emphasis of the Act is determined on prevention of over-indebtedness due to the credit dilemma, which South Africa along with the rest of the world finds itself in, the Act does not ignore the very necessary measures required for recuperation after breach of contract. While extra preventative measures have most certainly been added to South Africa's credit regime in place of old or absent regulation of the past, it is submitted that the protection of

⁶⁴³ Niemi 2009 98 and Striglitz J *Globalization and its Discontents* 2002 139.

⁶⁴⁴ Cf Part D of Chapter 4 of the Act.

⁶⁴⁵ *Ibid.*

⁶⁴⁶ Cf section 6 of the Act and the discussion on applications and transactions excluded from the ambit of the Act in paragraph 4.4.3 *infra*.

⁶⁴⁷ Otto and Otto 2013 14.

⁶⁴⁸ Scholtz 2014 paragraph 2-2.

rights of both parties, in particular that of the credit provider have not been ignored or neglected by the new regime.

3.2. Rationale for Credit Reform in South Africa

The general rationale for implementing new consumer laws in a country are typically universal and the reasoning for the new credit legislation in the preceding paragraphs are undoubtedly applicable to the South African dynamic. This section serves in addition thereto and examines challenges that carried particular influence in the local legislator's considerations.

A single reason for the research, investigation, preparation and final promulgation of the Act does not exist. There is no one pivotal fact that catalysed the paradigm shift in the legislative credit regime, but rather a conglomeration of factors that together motivated the reform.

South Africa's discriminatory legal history resulted in the development of a credit market which was viewed as inappropriate for the contemporary economic and social context of South Africa.⁶⁴⁹ South Africa's credit market has been dubbed a bi-economic market: one market is described as being 'modern, globally integrated and producing most of the country's wealth,' while the other market has been characterised by underdevelopment and criticised as being structurally disconnected from the first and the global market.⁶⁵⁰ The market as a whole is thus viewed as having a lack of transparency, limited competition with a high cost of credit and limited consumer protection.⁶⁵¹ With these telling signs, the only

⁶⁴⁹ Dr Johan Erasmus *National Credit Act Seminar Presentation* 3 August 2006 Rosebank – Johannesburg. See also *Standard Bank of South Africa v Dhlamini* 2013 1 SA 219 KZN 227 where the court referred to the Act as part of a 'raft of national legislation aimed specifically at consumers, to reverse historical socio economic inequalities and adjust the imbalances'.

⁶⁵⁰ Dr Johan Erasmus *National Credit Act Seminar Presentation* 3 August 2006 Rosebank – Johannesburg.

⁶⁵¹ *Ibid.*

solution was that government should step in to better regulate the credit industry.⁶⁵²

Much focus was placed on credit legislation being inapt due to South Africa's politically tarnished history, in order to propel the initiative for new legislation in this field. The following, taken from the 2003 Consumer Credit Review, emphasises the point:⁶⁵³

The need for a review of the consumer credit legislation has long been recognized. There is broad agreement that current laws are weak and out dated; they reflect the political reality of the apartheid era. The Department of Trade and Industry made certain changes to address specific problems such as increasing the protection on micro-loans, one change that was introduced in the revised exemption notice. The approach has, nevertheless, been piecemeal and a thorough and holistic assessment became essential.

It is submitted that the law is and has to be a dynamic animal which must exist in a 'mutualistic' relationship with political, social and economic realities and advances. Without evolving, the law would be but a 'ball and chain' locked around society's ankles, preventing progressive and necessary improvement.

Logically, credit legislation need, too, move with the current trends.⁶⁵⁴ It is submitted, however, that the fallibility of legislation cannot only be specifically attributed to a particular political agenda, but rather to changing trends inclusive of political but also, and perhaps more importantly, social and economic trends.

As far back as 1991 the South African Law Commission⁶⁵⁵ identified certain exploitative practises in the Usury Act and recommended the replacement of the bi-legislative system of credit in South Africa. However, it must be stated that countries without a past of racially discriminatory laws and political systems are

⁶⁵² *Ibid.* For a general discussion of Worker T 'Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons behind the Promulgation of the National Credit Act and the Consumer Protection Act' *Obiter* 2010 217.

⁶⁵³ The Department of Trade and Industry *Credit Law Review August 2003: Summary of Findings of the Technical Committee* 'Credit Law Review: Setting the Scene' 1 (hereinafter 'Credit Law Review 2003').

⁶⁵⁴ The influence which the Constitution, more particularly the Bill of Rights, has had on the common law and will still have on the common law are a contemporary example. For a more detailed discussion of the interrelation between the Constitution and the Act, cf paragraph 3.2.2 *infra*.

⁶⁵⁵ Otto JM and Grové NJ *The Usury Act and Related Matters* 1991 Project 67 Working Paper 67.

constantly changing their credit systems and legislation to accommodate changing times, trends and influences.⁶⁵⁶ The global market, internal long-term economic fluctuations and other less politically infused reasons also motivate change. The degree of sophistication of legal theory has generally and historically always been closely related to the level of economic activity within a given society.⁶⁵⁷

Same can be said for the degree or volume of legislation which a government, through its legislature, churns out. The gross domestic product in 2000 for South Africa was 922 148 million rand and in 2005 it rose to 1 523 254 million rand.⁶⁵⁸ Such a rapid increase in economic growth must also have acted as a catalyst need for greater legislative intervention in the area of credit law.

In South Africa, in particular, the disarming of a racially based system and the subsequent empowerment, due to increased income flows to the black population (previously disadvantaged by discriminatory practices) had, and still has, major stimulating effects on the economy. An increased need for housing, vehicles and consumer goods by the majority segment of the population (previously denied these rights) has augmented the demand for credit. To suggest that the previous credit legislative dispensation was out of kilter with modern times is sanctionable – but to say that the credit legislation – that is the Credit Agreements and Usury Acts reflected any political agenda is unfounded. These two acts were not *per se* racist laws.

In the 1991 Review, the Law Commission identified and isolated numerous shortcomings of the Credit Agreements and Usury Act. The list of these shortcomings will not be provided here as it is beyond the scope of this discussion. However, upon a study of the shortcomings it is evident that the legislation was weak in many respects.⁶⁵⁹

⁶⁵⁶ The changes in the credit regimes of England and Italy are two such examples.

⁶⁵⁷ Harker 'The Role of Contract and the Object of Remedies for Breach of Contract in Contemporary Western Society' 1984 *SALJ* 101 121.

⁶⁵⁸ <http://www.indexmundi.com/facts/south-africa/gdp> (11.12.2009).

⁶⁵⁹ For a detailed exploration of Otto and Grové 1991 104-119.

The inadequacies of credit legislation, however, will never be able to curtail the disposition of human nature to gain or acquire, which in consumer terminology translates into 'spending'. This 'weakness' can be attributed largely to today's modern consumerist society. Global trends, since the end of World War II have noted a manifest increase in the number of credit consumers. This has largely been due to rising incomes creating an increase in the equal distribution of wealth to a larger segment of society. Due to this universal benchmark increase in affluence, family unit desires and needs have increased and in turn, consumption has increased.⁶⁶⁰ The satisfaction level of the family unit has not increased proportionally to the household income, and thus it is no longer possible to satisfy demands and needs for credit.⁶⁶¹ The following paragraph, used here as an academic example, is a conceptually relevant statement by the erstwhile Chairman of the Civil Imprisonment Committee:⁶⁶²

There can be no question that the evidence put before us shows very clearly that very many people are tempted to buy goods that they cannot afford at all, because of the easy terms of payment offered to them, or they are tempted to buy goods at a far higher price than they can afford to pay.

At the same select Committee the erstwhile Government spokesman stated that:

[P]eople are losing money which they cannot afford to lose and this is the fundamental reason for the introduction of this hire-purchase legislation. Something must be done to protect the poorer people from the consequences of these transactions.

The concerns of the modern legislator have not changed drastically, if at all.

Consumer law and regulation are aimed at protecting consumers and providing them with rights against providers, whether of goods, services or credit. It is thus not surprising that much of the rationale posited by research commissioned by government, which led up to the promulgation of the National Credit Act, is very

⁶⁶⁰ Cf Vessio ML 'The Preponderance of the Reckless Consumer' 2006 *THRHR* 649 for an in-depth discussion.

⁶⁶¹ Stephenson G *Consumer Credit* 1987 3.

⁶⁶² He was giving evidence before the Select Committee of the House of Assembly in 1939 on the subject of the Hire-Purchase Bill; the Bill was introduced that same year.

sympathetic towards the consumer and more precisely towards vulnerable⁶⁶³ or low income consumers. The credit market is one that by its very nature is based on an unequal footing between borrower and lender, the tendency being to protect the borrower, he often with fewer resources to ensure protection of his rights. Goode⁶⁶⁴ posits the view that consumer credit legislation, though often associated with the protection of the indigent, is neither designed nor equipped for the special needs of the low-income consumer. He points out that there is nothing that consumer credit legislation can do to provide the consumer with a good job, a reasonable income or a roof over his head, these being questions of social welfare and therefore the responsibility of governments.⁶⁶⁵

The protection of the consumer is and has, in most countries become a common feature of all legal systems. Although the nature and scope of consumer legislation may differ, such legislation nevertheless exists for the protection of the consumer, as consumer contracts can and do give rise to misuse but also for the regulation of the credit provider-credit consumer relationship. The consumer is often exploited by contractual credit agreements, the terms of which he may not understand, together with alluring methods of payment, which may leave him exposed and liable. Some terms may even prove to be dishonest, or may be misrepresentations of the truth excluding, *inter alia*, liability and common-law warranties and including exorbitant finance charges or forfeiture clauses with drastic rights of cancellation in favour of the provider.

The consumer is often helpless against these forces, especially in light of the most common standard form contracts.⁶⁶⁶ Furthermore, because the consumer-borrower is usually in a weaker economic position (this is why he is seeking a

⁶⁶³ The term has been taken from Scott C and Black J *Cranston's Consumer and the Law* 2000 4. The term, however, appears to have originated from research published by the Office of Fair Trading in England in 1998, which identified seven categories of vulnerable consumers: those on low income, unemployed persons, those suffering from long-term illnesses or disabilities, persons with low level education, members of ethnic minorities, older people and the youth (Office of Fair Trading *Vulnerable Consumer Groups: Quantification and Analysis* Research Paper 15 Ramil Burden 1998).

⁶⁶⁴ Goode RM *Consumer Credit* 1978 98. It is submitted that a government must protect the weak but not at the cost of alienating or prejudicing the strong, alternatively, there is a risk of shifting from democratic governance to a socialist regime.

⁶⁶⁵ Goode 1978 98.

⁶⁶⁶ Nagel CJ *et al Business Law* 2006 164.

loan) it is likely that without protection his position may be exploited.⁶⁶⁷ Thus, governments and courts have stepped into this realm to assist the consumer in his plight, through legislative enactments and developments in the common law.

It was these concerns which prompted the Department of Trade and Industry, after a long gestation period, to publish the Consumer Credit Bill of 2004,⁶⁶⁸ and why the President signed into law, on 24 March 2006, the National Credit Act.⁶⁶⁹ The bill was intended as a practicable reflection of the call for more prominent progress in consumer protection and more specifically in the consumer credit protection field. South Africa's consumer debt crisis was alleged to have been costing the country an approximate R500 million a month in productivity losses.⁶⁷⁰ The Bill purported 'to promote a fair and non-discriminatory marketplace' providing general regulation of consumer credit.⁶⁷¹ The same wording was used in the Act.⁶⁷²

The goal of a new and unified Act was to 'make the world of credit safer for debtors, and thus more sustainable for the industry'.⁶⁷³ While the centrepiece of this creation is to facilitate and expedite competition, the question remains as to whether too much consumer protection and not enough credit provider protection may in the long run fetter the credit market or send those 'uncreditworthy' consumers scampering to elicit 'underground' loans. While the credit provider is one of the most elemental ingredients in the credit market economy; even more basic are the supplier's investment and profit motives. The drastic reduction or

⁶⁶⁷ Zimmerman 1990 166.

⁶⁶⁸ Government Gazette vol 470 no 26678, Cape Town 17 August 2004.

⁶⁶⁹ Government Gazette 28619 of 15 March 2006. Certain sections of the Act became operative on the 1 June 2006, while the remainder of the Act on the 1 June 2007. Cf Otto and Otto 2013 8-11 for a detailed discussion of how and in what phases the Act was implemented.

⁶⁷⁰ A recent study by the Department of Economic Affairs and Tourism revealed that 40% of households nationally were experiencing financial difficulty, unable to pay loan instalments to micro lenders and other credit providers ('Debt sinking into Poverty' Pretoria News 2004 -10-04 1 and Renke R and Roestoff M 'The Consumer Credit Bill – A Solution to Over-Indebtedness?' 2005 *THRHR* 115).

⁶⁷¹ From the Preamble of the Consumer Credit Bill 2004.

⁶⁷² Cf section 3 of the Act. For a detailed discussion of the purposes of the Act cf paragraph 3.3 *infra*.

⁶⁷³ Credit Law Review 2003, Credit Contract Disclosure and Associated Factors' 2. A Market Research Report, incorporated in the Credit Law Review, was conducted by Rudo Research and Training and AfriData Research, their objective: to obtain comments on the perceived weaknesses in the previous credit legislation in South Africa with the further aim to improve the protection of consumers of credit.

regulation of the turnover may not encourage competition within the provider market but may rather dissuade providers to invest in the lending panorama, and in effect dramatically decrease competition, which may, in turn, increase both the price of credit and seriously hamper availability across all levels of income groups. Bertelsmann J in *ABSA Bank v Myburgh*⁶⁷⁴ captured this dynamic as follows:

The Act is the latest in various attempts by the Legislature to put enactments in place that regulate the granting of credit to the consumer and restrict the financial gains that credit providers garner from this enterprise that has often been more than a little controversial, it replaces the Usury Act and the Credit Agreements Act and creates a new dispensation that is intended to ensure that the consumer is effectively protected without restricting access to affordable credit provided and obtained in a responsible fashion.

While it is important to understand that one of the functions of consumer legislation is to protect the consumer from exploitation,⁶⁷⁵ it is equally important to keep in mind that additional costs for additional services will have to be ‘down-loaded’ onto credit consumers. Consumer credit legislation is a costly procedure, and the capacity of the credit industry to absorb new credit legislation is limited. Costs or additional costs are often ‘down-loaded’ onto the consumer and where legislation limits these charges and they cannot be underwritten directly to the credit provider then indirect ‘subsidisation’ will occur.⁶⁷⁶ ‘Indirect’ cost osmosis may be carried out by means of cross subsidization, such as for example, investors receiving lower interest rates on deposits or cash buyers having to pay higher prices.⁶⁷⁷ Credit legislation need thus be cost-effective. The social attractiveness of consumer credit legislation is often the founding motive behind it, with economic considerations neglected.

The underlying principles for the creation, existence and/or modification of consumer credit legislation are often determined by the attractiveness of their social charisma and economic deliberations are often not adequately considered. The relevant question to be posed is therefore: which policy issues should

⁶⁷⁴ 2009 3 SA 340 T paragraph 24.

⁶⁷⁵ Grové and Otto 2002 4.

⁶⁷⁶ National Commission on Consumer Finance: Consumer Finance in the United States 1972 103 - 105; Grové and Otto 2002 3 – 4.

⁶⁷⁷ *Ibid.*

endure in this regard? It is not the establishment of legislation ‘that may at the very best save the consumer from petty vexations’,⁶⁷⁸ without considering the advantages against the disadvantages it entails, but a weighing up of the demands of the individual consumer for protection in any given transaction as against the interests of society at large, that must be endorsed.⁶⁷⁹ Thus, it is policy issues that need to be considered and sometimes some will override others. The following is a notable view:⁶⁸⁰

Before consumer legislation is introduced, the legislature should weigh up the demands of the individual consumer for protection in a particular transaction against the interests of society at large. This is a daunting task.

The caveats cannot, however, completely deter the regulation of credit. There are obvious significant economic benefits to a credit market that works, such as helping individuals accumulate interest on savings and exploiting economic opportunities and assisting businesses to grow and thus to create new jobs. The credit market is an industry that requires relatively high levels of regulation⁶⁸¹ to ensure that potential consumer abuses are minimised.⁶⁸² Whilst bearing lots of benefits, the credit-market is not risk free and a considerable imbalance of power exists between consumers and credit providers. The South African credit market has low levels of consumer education; consumers are poorly informed regarding their rights⁶⁸³ and thus there exists an inability of these consumers to enforce such rights either through negotiation or legal action; marketing practises are often deceptive and weak disclosure of information results in enticement to contract for credit. In this manner and when used unwisely, credit borrowing has the potential to cause financial hardship and destruction of households.⁶⁸⁴

⁶⁷⁸ Credit Contracts: *Report of the Contracts and Commercial Law Reform Committee* (Chairperson C I Patterson) 1977 18-19, from Grové and Otto 2002 4.

⁶⁷⁹ Grové and Otto 2002 4, where they end by stating that these demands made on the lawmakers make for ‘a daunting task’. For a fuller discussion on these views see Vessio 2006 *THRHR* 649.

⁶⁸⁰ Grové and Otto 2002 3.

⁶⁸¹ Even at the risk of being criticised as overly protective (Scholtz 2009 paragraph 2-2).

⁶⁸² 2004 Policy Framework 6.

⁶⁸³ The opening statement of the 1999 White Paper on consumer law in England states: ‘Confident Consumers, making informed decisions in modern, competitive markets, promote the development of innovative, good value products’. It was also pointed out that about two-thirds of people living in England are not aware of their legal rights (Department of Trade and Industry *Modern Markets: Confident Consumers* Cm 4410 1999).

⁶⁸⁴ 2004 Policy Framework 6.

Sometimes already indebted consumers borrow extra credit in an attempt to pay back existing loans which often only leads to a downward debt spiral.⁶⁸⁵ It is for these and other similar reasons relating to the regulation of the credit market and protection of the consumer that the State took a highly prescriptive regulatory approach to consumer credit through its endeavours to design and promulgate new credit legislation.⁶⁸⁶

The South African financial sector is a complex one; it is comprised of both a highly developed formal sector and an informal financial market that serves about 85% of the population.⁶⁸⁷ Prior to the promulgation of the National Credit Act, South African consumer credit legislation was seen to have remained behind the increasing sophistication and complexity of the modern consumer credit market, with problems developing in the years leading up to the promulgation to the Act, in the consumer credit market as well as in the small loans market, and thus the need for regulatory reform became patent.⁶⁸⁸ Inappropriate legislation, whether in the form of the Usury Act, the Credit Agreements Act or the debt collection procedures that were in the Magistrate's Court Act,⁶⁸⁹ together with a lack of enforcement contributed to what was viewed by government as an unacceptable state of affairs. These factors as well as an increasing use of credit by low-income consumers resulted in an urgent need for closer examination of the previous legislation.⁶⁹⁰ As a result, the Department of Trade and Industry⁶⁹¹ appointed a Technical Committee to investigate and assess the position and

⁶⁸⁵ *Ibid.*

⁶⁸⁶ *Ibid.* Closely linked to this discourse is the importance of attention to every detail of the legislation. The legislature need ensure that every facet of the credit agreement and credit relationship is correctly controlled and regulated. Inattention to one regulatory area of the credit agreement, for example that of recovery by the credit provider due to breach by the credit consumer, an area which may have been overshadowed by too much attention to areas such as prevention of over-indebtedness, may create much confusion and frustration both to credit providers and legal practitioners brought in to assist them, not to mention Magistrates that are asked to adjudicate the quandary. All the while the costs of 'ironing out' the difficulties being placed onto the consumers.

⁶⁸⁷ FinMark Trust *The National Credit Act and its Regulations in the Context of Access to Finance in South Africa* 8.

⁶⁸⁸ Technical Committee, *Summary of Findings of the Technical Committee* DTI 2003 8.

⁶⁸⁹ Act 32 of 1944 (hereinafter 'Magistrates' Court Act').

⁶⁹⁰ Technical Committee, *Summary of Findings of the Technical Committee* DTI 2003 9.

⁶⁹¹ Hereinafter 'the DTI'.

ultimately make proposals for a policy framework for the regulation of consumer credit.⁶⁹²

3.2.1. The Department of Trade and Industry Policy Framework

In 2004 the Department of Trade and Industry published a Policy Framework for Consumer Credit, which reiterated the inefficiency and inappropriateness of the then credit regulatory system.⁶⁹³ The credit market was described as one that:⁶⁹⁴

⁶⁹² Technical Committee, *Summary of Findings of the Technical Committee* DTI 2003.

⁶⁹³ In March 2002, the DTI established a task team to undertake a review of the legislation that impacted on consumer credit and make proposals for a new regulatory framework for consumer credit in South Africa. The task team drew on several reports, including the 1992 South African Law Commission review; the 1995 South African Law Commission report on debt collection; the 2001 investigation into SME finance by a task group of the Policy Board of Financial Services and Regulation and Ntsika's 1999 National Small Business Regulatory Review (2004 Policy Framework 8). The need for reform had, however, been identified decades earlier. In 1990 the Registrar of Financial Institutions and his staff found considerable difficulties in applying the Usury Act 73 of 1968. For the most part the problems arose due to differences in interpretation to which the Usury Act gave rise and the lack of mechanisms in the Usury Act for the speedy resolution of disputes, inadequate sanctions that could be applied in the event of contraventions and the fact that the inspectorate of the Registrar was often unsuccessful in instituting criminal proceedings (Cf Grové 'Renteberekening, Regshervorming en die Woekerwet 73 van 1968' 1990 53 *THRHR*). Consequently, the Registrar approached the South African Law Commission (established by the South African Law Commission Act 19 of 1973) which in turn appointed a Research Committee to investigate the then consumer credit legislation in South Africa with a view to providing simplified and homogenous legislation in this field (through the Centre for Banking Law at the Rand Afrikaans University, now University of Johannesburg) the South African Law Commission requested a Research Committee consisting of Professor NJ Grové, Professor FR Malan and Professor JM Otto) (hereinafter the 1992 'Research Committee'). At first the Research Committee were requested to look only at the Usury Act, however, the Committee was of the view that the credit legislation in South Africa should rather be examined as a whole and consolidated as far as possible, as an investigation relating solely to the Usury Act would once again result in fragmented and unsatisfactory legislation (Otto and Grové 1991 2)). More particularly, the Committee was required to look at problems which arose from the Usury Act, the Credit Agreements Act and the Lay-by Regulations of 1980 and finally to recommend in draft form less complicated credit legislation (Otto and Grové 1991 2-3). The Task Team endeavoured to meet a number of policy objectives. For example, to provide simplified legislation which would not be susceptible to give rise to too many problems of interpretation and which would be difficult to apply. Another main consideration was the necessity to consolidate the Usury and Credit Agreements Act. The Committee found that the two Acts essentially (except for money lending, to which only the Usury Act applied) regulated the same type of contract but in different ways. This state of affairs gave rise to considerable confusion in practice as it was necessary to determine from case to case whether a particular contract was subject either to the one Act or the other, both or neither. This placed a difficult burden on credit providers, credit consumer's and their legal representatives. The Committee found that it was no longer acceptable in the consumer credit field to have diverse legislative enactments; unless really good reasons existed for regulating a particular matter separately, as, for example, instalment sales of land where problems and practices warrant a separate Act, such as the Alienation of Land Act. The Usury Act was administered by the Department of Finance while the Credit Agreements Act fell under the

Reflects but also reinforces, the two economies of South Africa – one economy that is modern, globally integrated and producing most of the country’s wealth; the other characterised by underdevelopment and structurally disconnected from the first and the global economy. It is furthermore a market that is characterised by a lack of transparency, limited competition,⁶⁹⁵ the high cost of credit and limited consumer protection.

These reasons, *inter alia*, according to the 2004 Policy Framework are what necessitated a fundamental review of the consumer market and its regulation.⁶⁹⁶

According to the 2004 Policy Framework, research in the areas of consumer credit and SME financing revealed that financial markets were segmented into two markets, one for low-income consumers and SME’s characterised by limited access to credit at high cost and the other market, serving primarily middle and high-income consumers and large enterprises with easy finance to credit and

Department of Trade and Industry (hereinafter ‘DTI’). The Committee were of the view that it was undesirable for different Government Departments to administer credit legislation and recommended that the appropriate department was that of Trade and Industry. While the Committee was in the process of writing the Report the administration of the Usury Act was in fact transferred to the DTI (GN 2434 11.10.1991). Further policy considerations, included, but were not limited to issues of access to credit to all sectors of society and the issue of consumer legislation as a fiscal and monetary measure. It is the ‘balancing of interests’ concept that commands some attention. The Committee found that ‘consumer credit legislation is nothing but the accommodation of divergent and conflicting interests’ (58). The Committee was faced with often opposing requests regarding the inclusion or deletion of various proposed draft sections, depending on whether the request was made by a credit provider or a consumer or body or person concerned with consumers’ interests. While the Committee started from the premise that credit legislation is aimed primarily at protecting consumers, they maintained that credit providers also have, or ought to have rights. A one sided view, which loses sight of the provider’s interests would not suffice. Thus, the Committee took the view that while there should be no hesitation in protecting consumers in the event of proven or potential exploitation, simultaneously the credit provider’s reasonable expectation of profit and the recovery of his expenses should be protected (59). For various reasons, the recommendations of the 1992 Committee were not acted by the legislature. And, as indicated above, the matter was once again reignited in 2002.

⁶⁹⁴ ‘Credit Contract Disclosure and Associated Factors’ Prepared by Reality Research Africa for the Department of Trade and Industry December 2002, Credit Law Review 2003, hereinafter ‘Reality Research Africa Findings’. It is submitted that much of the conclusions reached in the 2004 Policy Framework appear to have been based on the findings of the Technical Committee of the Credit Law Review 2003. In particular, research to determine public awareness of credit contract disclosure and associated factors was co-ordinated by the MFRC on behalf of the Technical Committee.

⁶⁹⁵ The Technical Committee highlighted the particular importance of cultivating a culture of competitiveness: ‘[I]t has become clear that neither the cost nor the access to consumer credit or SME finance will improve substantially and in a sustainable manner if there is not *more effective competition* between banks, and between bank and non-bank credit providers. This is the key to sustainable improvement in the access to finance and lowering of the cost of finance’ (Credit Law Review 2003 31).

⁶⁹⁶ 2004 Policy Framework 12.

preferential costs.⁶⁹⁷ Furthermore, the 2004 Policy Framework indicated that under the old legislative regime credit was often inflated by other costs such as credit life insurance, loan application fees, administration fees, club fees, irregular service charges and various bank charges.⁶⁹⁸ These additional charges were often badly disclosed and a survey demonstrated that the cost of different products indicated that such charges could increase the cost of certain products by up to two to three times the interest rate cap as had been set by the Usury Act.⁶⁹⁹ The Framework also posited that the situation in the consumer credit market was largely mirrored in the enterprise finance market as a clear distinction existed between the volume and cost of credit made available to small businesses and that extended to medium-sized and large businesses. The split in the credit market was consigned to the old bi-legislative regime.⁷⁰⁰

However, the fragmented and out dated nature of the old credit regime was not the only factor which, according to government, contributed to a need for reform. A major contributing factor was South Africa's history of 'systematic discrimination against the majority of the population and the stripping of their asset base,'⁷⁰¹ which required, according to the 2004 Policy Framework, special measures in order to address the 'historical legacy of apartheid economic policies and of apartheid educational policies, which placed black people at a fundamental disadvantage'.⁷⁰² The old legislative regime dated from the late 1960's to the early 1980's which was a time of limited access to credit by the black working class in South Africa.⁷⁰³ This lack of access to credit proscribed

⁶⁹⁷ The Finmark Trust was commissioned to collate data through primary and secondary research programmes in order to establish credible benchmark levels of access to credit and financial services; profile the characteristics of those who lacked access to credit by their age, race, geographical distribution and literacy skills and to establish reasons from consumers about why they lacked access to credit and how they might respond to different types of product offered as a means of expanding access ('Finmark Trust Pilot Study Findings Credit Habits and Attitudes Addendum 1' from Reality Research Africa Findings).

⁶⁹⁸ 2004 Policy Framework 12.

⁶⁹⁹ *Ibid.*

⁷⁰⁰ *Ibid.*

⁷⁰¹ 2004 Policy Framework 16.

⁷⁰² *Ibid.*

⁷⁰³ It must, however, be noted that the problem of financial exclusion is not exclusive to South Africa. In 1999 the British government considered how the rules surrounding credit unions could be altered to increase their role in providing credit to people with low incomes (HM Treasury *Taskforce Report: Credit Unions of the Future* November 1999). The government also appointed a review of competitiveness of the British banking industry (Review of Banking Services in the

investment in housing, education and economic opportunities generally.⁷⁰⁴ In the late 1980's and early 1990's there was an increase in the provision of credit to black South Africans by furniture and clothing retailers.⁷⁰⁵ However, the same opportunities were not extended to finance in other sectors such as for business start-ups and education.⁷⁰⁶ The 1992 Exemption⁷⁰⁷ increased availability of money loaned to lower income groups giving consumers freedom in terms of use of credit but also gave rise to abuses.⁷⁰⁸ Furthermore, the exemption did not address the issue of lack of enterprise finance; the loans were also short-term in nature and inappropriate to finance real asset accumulation.⁷⁰⁹

The 2004 Policy Framework dealt quite extensively with the issue of availability and enforceability of collateral being a critical component of credit with reference to capital accumulation.⁷¹⁰ The premise being that a close relationship exists between having a mortgage on a property and the cost of credit in general, as consumers with a mortgage will generally have better access to credit as well as

United Kingdom, *Banking Review: Interim Report* (1999); *Competition in United Kingdom Banking* (March 2000) and the Office of Fair Trading conducted a survey on the access that vulnerable consumers had to basic financial services. Basic financial services were identified as bank or building society accounts, home content insurance, short-term credit and long-term savings (*Vulnerable Consumers and Financial Services, The Report of the Director General's Inquiry* Office of Fair Trading 1999).

⁷⁰⁴ 2004 Policy Framework 77.

⁷⁰⁵ 2004 Policy Framework 78

⁷⁰⁶ *Ibid.*

⁷⁰⁷ Towards 1992, government realised that the Usury Act and its stringent limitations on the cost of credit had contributed to inadequate access to credit for the majority of the population. Consequently, in 1992, to promote better access, government introduced the first Exemption Notice to the Usury Act (GN 3451 of 31 December 1992). This exempted all loans below R6 000 from the Usury Act. This Exemption Notice was the main factor that precipitated the establishment of a formal micro-lending industry

(<http://www.theforumsa.co.za/forums/showthread.php?t=1441>).

⁷⁰⁸ Whilst the 1992 Exemption was successful in providing more access to credit, government was concerned about certain abuses and malpractices that developed in this unregulated environment. These malpractices included the retention of bank cards, pins and identity documents by the micro lenders, as well as abusive collection methods. Government introduced a second Exemption Notice in June 1999. In terms of this notice, micro-lenders were still permitted to charge unlimited interest for credit disbursed, but they were required to register with a regulatory entity (Micro Finance Regulatory Council or MFRC). The Exemption Notice also prescribed minimum standards of conduct and operations that micro-lenders were required to comply with. The MFRC was given authority to monitor and enforce compliance with these standards. The Exemption was limited to loan agreements where the capital amount loaned R10 000 or less with a repayment period not exceeding 36 months. The 1999 Exemption Notice was repealed and substituted by Exemption Notice 1407 of 2005.

(<http://www.theforumsa.co.za/forums/showthread.php?t=1441>).

⁷⁰⁹ 2004 Policy Framework 16.

⁷¹⁰ 2004 Policy Framework 17.

access to cheaper credit.⁷¹¹ However, it was pointed out that the value of property is dependent upon clarity of ownership and there being a market for such property, including availability of buyers, availability of finance for such buyers and the possibility of transferring ownership to such buyers.⁷¹²

The 2004 Policy Framework identified the Usury Act as a contributory factor to certain of these issues, 'both through the application of interest rate regulation and through inappropriate provisions on security provided against loans'.⁷¹³ It is submitted, that the Usury Act did not necessarily directly contribute to these problems but perhaps lacked, in that it did not actively regulate certain areas. This deficiency is what the National Credit Act or at least the legislature prior the inception of the Act, sought to address through promulgation of new legislation by seeking to modernise and simplify legislation dealing with collateral.⁷¹⁴

Much frustration was reported with regard to credit bureaux and with the processes of 'blacklisting' and 'redlining' of certain areas by banking institutions.⁷¹⁵ Credit bureaux were identified as an area to be improved with new legislation as the bureaux could establish sources of objective information for client selection and thus help in reducing the scope for discrimination in

⁷¹¹ *Ibid.*

⁷¹² With regards to these issues the 2004 Policy Framework advanced the following: 'Outside the prime housing areas (and in township areas in particular), the housing market is ineffective and mortgage finance is generally unavailable. Problems in housing registration and in the housing transfer process contribute substantially to this state of affairs. The impact of an inefficient housing market is that, of the estimated 2.3 million urban residential properties registered in the names of black South Africans, only between 5% and 10% have mortgages registered. At an estimated average property value of R50, 000, this implies that township residents have at least R115 billion of property that could potentially serve as collateral, but is currently a 'stranded asset'. As a result, most historically disadvantaged South Africans are either (a) locked out from the opportunity to acquire property by their inability to access finance, or (b) have acquired property, but with the appreciation of the property value being undermined due to obstacles to property transfer and the lack of access to finance for the potential purchasers, are unable to realise the value of their underlying asset and leverage additional funds. In rural areas, barriers to land ownership similarly constrain asset and wealth accumulation. A large majority of the population can thus not gain the benefit of what should be their best security, their home, and therefore face generally high costs of finance' (17).

⁷¹³ At 14.

⁷¹⁴ The 2004 Policy Framework indicated that the feasibility of establishing a 'Collateral Register' would be investigated, as a similar mechanism made an important contribution to increasing the collateral-based lending in countries such as Canada (14). This, however, does appear to have been incorporated in the new Act.

⁷¹⁵ 2004 Policy Framework 14.

decisions about credit.⁷¹⁶ Credible credit bureaux information was also seen as a basis for statistical analysis for the detection of potential racial bias in client selection by any particular credit provider.⁷¹⁷ Credit bureaux were thus recognized as very important role players in supporting more efficient financial markets, and more equitable credit allocation.⁷¹⁸

The Department of Trade and Industry was of the view that in order to address the structural discrimination in the credit market, it was necessary to develop an integrated solution that could address underlying structural problems.⁷¹⁹ Government had various key issues that it intended to address in order to promote a credit market that would prove equitable, competitive and transparent, and that would foster sustainable and socially responsible credit provision in an environment where consumers would have rights and access effective redress.⁷²⁰

The Usury Act and the Credit Agreements Act were found to be lacking in various areas: the Usury Act applied to leasing, credit and money lending transactions,⁷²¹ it was limited to money lending transactions where the principal debt did not exceed R500 000 and lease agreements that did not exceed R500 000 in value.⁷²² The Credit Agreements Act applied to specified credit agreements relating to movable goods.⁷²³ There was a lack of uniformity in the transactions that were protected, with the Usury Act being more comprehensive.⁷²⁴ The

⁷¹⁶ *Ibid.*

⁷¹⁷ *Ibid.*

⁷¹⁸ 2004 Policy Framework 17. The Act has made provision for the regulation of credit bureaux and their functioning (cf section 43, 46 and Part C of the Regulations of the Act). However, it is submitted that any form of discrimination with regard to granting of credit post the interim and final Constitution of the Republic of South Africa, 1996 would be an anomaly that would not have withstood constitutional muster. At least not unless the discrimination was based on law of general application to the extent that the discrimination was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Cf paragraph 3.2.2 *infra* for a discussion on the influence of the Constitution on the new credit regime.

⁷¹⁹ 2004 Policy Framework 22.

⁷²⁰ *Ibid.*

⁷²¹ Section 2 (1) of the Usury Act.

⁷²² Section 15(g). The Minister of Trade and Industry was entitled to vary the amount by way of negotiation in the Gazette. Initially, when the act was promulgated, the amount was R100 000. In 1986 it was reduced to R50 000 (R286 in RG 3924 of 1986.02.11), thereafter it was raised to R70 000 (R 2566 in RG 4026 of 1986.12.05) and in 1988 it was set at R500 000 (R943 in RG 4205 of 1988.05.05).

⁷²³ Section 2 (1) of the Credit Agreements Act.

⁷²⁴ Grové NJ and Jacobs L *Basic Principles of Consumer Credit Law* 1993 19.

Credit Agreements Act applied only to items that had been listed by the Minister of Trade and Industry in a Government Notice.⁷²⁵ Credit agreements in respect of items that were not listed were not covered by the Credit Agreements Act.⁷²⁶ This inconsistency in the statutes created various logistical issues in that some items were regulated in terms of either the one Act or the other, some were regulated by both statutes and yet others may not have been regulated by either Act.

The 1999 Exemption Notice to the Usury Act⁷²⁷ exempted transactions below R10 000 from interest rate limits.⁷²⁸ The Department of Trade and Industry was of the view that the different application of interest rate regulation skewed the market in favour of money-lending transactions and resulted in a limited set of products being offered to low-income consumers, that it limited competition between different types of products and market segments and, as a result, limited innovation.⁷²⁹

⁷²⁵ Section 2 of the Credit Agreements Act.

⁷²⁶ Cf paragraphs 4.2 and 4.3.1 in the subsequent chapter for a detailed discussion of the application of both the Usury and Credit Agreements Acts.

⁷²⁷ Government Gazette no 713 10 June 1999.

⁷²⁸ The Exemption Notice required a 'regulatory body' to be established, whose purpose was to provide consumer protection to consumers that obtained credit which fell within the scope of the exemption. The Micro Finance Regulatory Council was approved as such a regulatory body. The 2004 Policy Framework criticized this regulatory structure as creating a number of inconsistencies, with different and inconsistent regulatory requirements applying to financial transactions that were inherently very similar. There were marked differences in the compliance standards, registration costs and compliance costs that applied to money-lending that fell under the Usury Act, money-lending that fell under the Exemption Notice, credit for the purchase of items listed in the Credit Agreements Act, and credit related to items that were not listed and which may potentially not have been governed by either law. It was maintained that the previous regulatory framework not only created different regulatory standards, but it also created incentives for, what the 2004 Policy Framework referred to as 'regulatory arbitrage' and 'circumvention'. As an example, the purchasing of a fridge was used. To purchase a fridge in terms of a hire purchase agreement, a deposit was required. However, the same fridge could, under the old regime, have been purchased with a credit card or with a money loan, under which circumstances no deposit was required. While differences existed in the transactions in that the asset did not belong to the consumer in terms of a hire purchase agreement until such time as the purchase price together with interest has been settled, from the consumer's perspective, it was pointed out that there may have been little difference (2004 Policy Framework 22). It is submitted that differences were in fact notable. A purchase of a consumable with a credit card facility, for example, often attracts much high interest rates. And a fridge, for a further example, purchased under a higher purchase agreement would most likely have been subject to contractual terms that entitled the provider to retain ownership, whilst a credit card purchase would transfer ownership to the consumer upon delivery.

⁷²⁹ 2004 Policy Framework 23.

The Department of Trade and Industry was also of the view that enforcement of the Usury Act and Credit Agreements Act had largely been ineffective, in part due to unequal treatment of different products and providers.⁷³⁰ And through the lack of enforcement, the practices of less scrupulous providers had become the norm, stigmatising certain segments of the credit market.⁷³¹ This, it was felt, discouraged reputable credit providers, in particular banks, from venturing into the low-income market and from providing more affordable finance to low-income earners.⁷³²

It was postulated that South Africa required a single piece of legislation to replace the current Usury Act, Credit Agreements Act and Usury Exemption Notice, in order to ensure a consistent approach to interest rate regulation, minimising arbitrage and circumvention.⁷³³ The new act, it was envisaged, would have to apply to all credit transactions, and to all credit providers; however, any regulation of the credit market needed to recognise that differences exist between pawn transactions, mortgage and credit card or overdraft facilities and accordingly it was foreseen that the new law would provide for differential treatment to accommodate differences in products and in costs associated with smaller transactions, but overall would then introduce a common regulatory scheme.⁷³⁴ It is submitted that to some extent this has been achieved with the National Credit Act, although the Act is not quite as far reaching as initially predicted.⁷³⁵

The standardisation of charges for the initiation and maintenance of credit, into three categories for all service providers, being loan origination fees, monthly service fees and interest, with the Minister of Trade and Industry to introduce limitations for all three categories of fees, was seen as an important factor to be incorporated into the new Act.⁷³⁶ Furthermore, it was felt that to further enhance

⁷³⁰ *Ibid.*

⁷³¹ *Ibid.*

⁷³² 2004 Policy Framework 23.

⁷³³ *Ibid.* The South African Law Commission's review drew similar conclusions (Otto and Grové 1991 105).

⁷³⁴ 2004 Policy Framework 19.

⁷³⁵ Cf Parts B and C of Chapter 1 of the Act as well as paragraph 4.4.3 *infra* with reference to the limitation of the application of the Act.

⁷³⁶ 2004 Policy Framework 19.

consistency and transparency, it was necessary that credit insurance be treated consistently with other finance charges.⁷³⁷

Investors and financial service providers perceived the low-income personal finance market and SMME market to be high risk with high levels of uncertainty; these perceptions reinforced by a number of factors, including, costly and time-consuming contract enforcement, with high levels of uncertainty about the likelihood of success; high degree of uncertainty for investors that was felt to be created by the Usury Act Exemption Notice, as it was perceived that unfavourable regulatory changes could be effected fairly quickly with limited consultation and oversight; weaknesses in consumer protection, in compliance monitoring and in regulatory enforcement were seen to be exacerbating perceptions of risk and uncertainty.⁷³⁸ The Department of Trade and Industry was of the view that such weaknesses created the perception of an undesirable market characterised by predatory practices in the lower income market and concerns about arbitrary and *ad hoc* government intervention.⁷³⁹ It was felt that the new Act would address these concerns and create more certainty in the market place, thus stimulating investment and innovation, while encouraging credit providers to take a longer-term view on their products and services, if the new Act addressed, where possible, the concerns outlined.⁷⁴⁰

Another factor identified by the Department of Trade and Industry as requiring attention in the new dispensation was disclosure; it was felt that the credit market lacked transparency due to weak disclosure of the full cost of credit and the financial complexities of some products.⁷⁴¹ In essence, it was difficult for consumers to understand the risks of borrowing or the implications of purchasing

⁷³⁷ As the Department of Trade and Industry was of the view that the previous credit legislation allowed for considerable scope where credit insurance was concerned, and as a result credit insurance had become a major area of growth for credit providers and insurers. The intention of the 2004 Framework Policy and the new credit legislation was not to regulate the insurance market, but seek to regulate the relationship between credit products and insurance products, particularly where there is potential for over-selling or over-insuring to the detriment of the consumer and where consumers will be limited in their choice of insurance product (2004 Policy Framework 19).

⁷³⁸ 2004 Policy Framework 24.

⁷³⁹ *Ibid.*

⁷⁴⁰ 2004 Policy Framework 24.

⁷⁴¹ 2004 Policy Framework 26.

goods on credit and make informed choices.⁷⁴² The 2004 Policy Framework advocated the need for standardizing information in a simple, comparable form in order to allow consumers to make informed choices.⁷⁴³ The Act sets out certain consumer rights in this regard, including the right to receive documents required in terms of the Act in an official language⁷⁴⁴ and that such documents must be in plain and understandable language.⁷⁴⁵

The Department of Trade and Industry was also of the view that the regulation of credit advertising and sales under the old regime was inadequate, allowing for incomplete or even misleading disclosure of the cost of credit and the terms under which credit could be obtained.⁷⁴⁶ The Act now provides for pre-contractual disclosure in the form of a compulsory, written quote, which is binding on the credit provider for a minimum period providing the consumer's circumstances do not change.⁷⁴⁷ This, prior to the inception of the Act, was viewed as a factor that would allow consumers the time and provide them with the information needed to enable them to shop around, helping consumers to make better choices between cash and credit purchases and between different credit providers.⁷⁴⁸ Furthermore, Part D of Chapter 5 of the Act makes it compulsory for a credit provider to issue statements of account,⁷⁴⁹ determines what the maximum periods between issuing of statements of accounts are,⁷⁵⁰ regulates the form and content of statements of account;⁷⁵¹ procedures when a consumer disputes all or part of any particular credit or debit entered into under a

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ Section 63 of the Act.

⁷⁴⁵ Section 64 of the Act. Unfamiliar contractual language and information that makes little sense to consumers was viewed as being unfair with the effect that consumers' rights were frequently undermined by the inclusion of complex and compromising clauses in contracts. Attempts to reduce consumers' common law rights through contractual clauses was not an uncommon practise; with certain contract clauses undermining the courts' ability to protect consumers' rights where action had been instituted following late payments or defaults. The Department of Trade and Industry envisioned the new Act to have outright prohibition of certain undesirable contract clauses and contractual practices, and to define certain standard protective clauses that would be included (or deemed to be included) in all consumer credit contracts (2004 Policy Framework 26-7).

⁷⁴⁶ 2004 Policy Framework 26.

⁷⁴⁷ Section 92 of the Act.

⁷⁴⁸ 2004 Policy Framework 26.

⁷⁴⁹ Section 108 of the Act.

⁷⁵⁰ Section 108 of the Act.

⁷⁵¹ Section 109 of the Act.

credit agreement;⁷⁵² the dating and adjustments of debits and credits to consumer's accounts;⁷⁵³ and, *inter alia*, the handling of disputes with regard statements of account.⁷⁵⁴

Increasing credit card limits, increasing limits on store cards,⁷⁵⁵ unsolicited mail offerings for loans and credit, misleading advertising, coercive sales techniques and aggressive agents and brokers were viewed as factors that needed regulating.⁷⁵⁶ The new credit legislation would have to impose limitations on certain types of marketing strategies and door-to-door sales, implement tougher regulations regarding agents and brokers, while unsolicited solicitation and harassment of consumers by commission-driven agents, would have to be prohibited.⁷⁵⁷ The Act, in comparison with the previous legislative regime, regulates credit marketing practises in relative detail.⁷⁵⁸

Improving consumer education was high on the agenda as a motivator for credit legislative reform.⁷⁵⁹ It was felt that more discerning and knowledgeable consumers would also increase competition in the industry and raise quality of supply.⁷⁶⁰ The balance of power between the credit provider and the credit seeker was seen as heavily skewed toward the credit provider which imbalance was exacerbated by a lack of experience with consumer credit amongst the majority of South Africans.⁷⁶¹ Thus the estimation that higher skills levels and greater awareness of consumer rights in respect of credit transactions would build confidence in the consumer to demand better levels of service from

⁷⁵² Section 111 of the Act.

⁷⁵³ Section 112 of the Act.

⁷⁵⁴ Section 115 of the Act.

⁷⁵⁵ Increasing and decreasing of credit facilities are now regulated by sections 118 and 119 of the Act.

⁷⁵⁶ 2004 Policy Framework 30.

⁷⁵⁷ *Ibid.*

⁷⁵⁸ Cf Part C of Chapter 4 of the Act.

⁷⁵⁹ The following taken from the 2004 Policy Framework, is indicative: 'Ensuring that the information is disclosed, and in a standard format, is not by itself sufficient to ensure that people are going to be able to convert this information into effective knowledge. Basic literacy and numeracy skills are prerequisites. South Africa faces a tremendous challenge in this regard, and new consumer credit policy must address consumer education at both the adult education and school learner levels. This is critical in terms of the President's vision of an integrated economy with equal participation of all citizens, given that commercial life (including consumer credit) is becoming increasingly complex and a certain level of knowledge is required to understand and participate fully' (27).

⁷⁶⁰ 2004 Policy Framework 28.

⁷⁶¹ *Ibid.*

business.⁷⁶² In this regard it was opined that the legislative and regulatory framework should make specific provision for consumer education, and provide institutional and financial support for implementation.⁷⁶³ It was thus indicated that '[c]onsumer education should be incorporated in the mandate of the consumer credit regulator and in the mandates of the provincial consumer protection agencies'.⁷⁶⁴

According to the 2004 Policy Framework, prior the promulgation of the Act, South African law did not provide effective protection against over-indebtedness and there were felt to be insufficient rehabilitation mechanisms to assist consumers whom had become over-indebted.⁷⁶⁵ Furthermore, it was felt that credit providers, were indulging in reckless behaviour and that exploitation of consumers by micro-lenders, intermediaries, debt administrators and debt collectors existed.⁷⁶⁶ Moreover, the requirements for the granting of court orders, such as garnishee orders or emolument attachment orders, did not take into account whether the credit provider might have acted in a reckless manner in granting the credit, which it was felt, created an incentive for reckless credit provision.⁷⁶⁷

⁷⁶² 2004 Policy Framework 29.

⁷⁶³ *Ibid.*

⁷⁶⁴ 2004 Policy Framework 30. It is submitted that although this has been done, the Act does not detail how the Credit Regulator should approach such a mandate. It merely concludes that it is responsible to increase the knowledge of the nature and dynamics of the consumer credit market and industry and to promote public awareness of consumer credit matters, by implementing education and information measures to develop public awareness of the provisions of the Act (section 16 (1) (a) of the Act).

⁷⁶⁵ 2004 Policy Framework 30.

⁷⁶⁶ Section 43 of the Act. For a detailed discussion of reckless lending and over-indebtedness of Vessio ML 'Beware the Provider of Reckless Credit' *TSAR* 2009 272, Lotz DJ 'Law of Purchase and Sale: Declaratory Orders: Over-indebtedness and Reckless Credit' *ASSAL* 2009 1024, Boraine A and Van Heerden C 'Some Observations Regarding Reckless Credit in terms of the National Credit Act 34 of 2005' *THRHR* 2010 650, Van Heerden C 'The Money or the Box: Perspectives on Reckless Credit in terms of the National Credit Act 34 of 2005' *De Jure* 392 and Koekemoer MM and Pretorius JT 'Miscellaneous Contracts (Loans: Credit Agreements): Reckless Credit and Over-indebtedness as Defences against Summary Judgments and Attachment Orders' *ASSAL* 2011 1114, Renke S 'Measures in South African Consumer Credit Legislation Aimed at the Prevention of Reckless Lending and Over-indebtedness: An Overview against the Background of Recent Developments in the European Union' *THRHR* 2011 208 and Stoop PN and Kelly-Louw M 'The National Credit Act Regarding Suretyships and Reckless Credit Lending' *PELJ* 2011 67.

⁷⁶⁷ 2004 Policy Framework 29.

The Department of Trade and Industry was of the view that certain consumer behaviour increased the uncertainty and risk in the credit market and raised the overall cost of credit.⁷⁶⁸ Consumers, when indebted, incurred new debts at a high cost to pay off old debts *and* in order to access further credit, consumers did not always disclose the full extent of their liabilities or simply tried to escape their debt commitments by moving to a new location.⁷⁶⁹ For these reasons it was designated that it would be necessary to review the (old) legislation relating to debt collection and court orders to ensure that mechanisms and sanctions were introduced to curb reckless lending and credit provision.⁷⁷⁰

Another legislative concern was the introduction of some form of relief, other than more extreme measures such as debt administration, for those who are unable to repay their debts.⁷⁷¹ The 2004 Policy Framework envisaged a national network of regulated debt counsellors.⁷⁷² Monitoring indebtedness was also a concern of the Department of Trade and Industry, which found that it is critical for the public sector to have accurate statistics with respect to the levels of debt and the number of people who find themselves in an over-indebted position, as this type of information enables government to monitor the position, and to introduce

⁷⁶⁸ *Ibid.*

⁷⁶⁹ *Ibid.*

⁷⁷⁰ 2004 Policy Framework 30. It is submitted that this has been one of the more dynamic changes that the new Act has brought with it – that is the sections regulating reckless lending and behaviour – together with sections regulating the registration of credit bureaux. Part D of Chapter 4 of the Act which addressed Consumer Credit Policy, regulates issues of over-indebtedness (section 79) and reckless credit (section 80). It defines what is meant by reckless lending, how it is to be prevented, (section 81) various assessment mechanisms and procedures to enable credit providers to meet their assessment obligations in terms of the Act, (section 82) the powers of the courts in suspending reckless credit agreements, in declaring and relieving over-indebtedness (section 85) and re-arranging consumer's obligations, (section 87) the effects of suspension, (section 84) and debt review or re-arrangement orders (section 88). In terms of section 25 of the National Credit Amendment Act 19 of 2014 (hereinafter the 'National Credit Amendment Act') published in Government Gazette 37665 of 19 May 2014, section 83 is amended to empower the Tribunal to declare any agreement as reckless credit. Currently the Act only refers to (and therefore only empowers) a court. The National Credit Amendment Act came into force on the 13 March 2015 (Regulation Gazette no 38557 of 13 March 2015).

⁷⁷¹ 2004 Policy Framework 31.

⁷⁷² *Ibid.* The enabling sections to this end have been introduced by the Act (section 44); for example, whom may consider applications by consumers for debt reviews (section 86). The Act also authorises debt counsellors to make recommendations of debt re-arrangements if the consumer and the respective credit providers voluntarily agree and they may issue proposals recommending that Magistrates make orders that one or some or all of the consumer's agreements be declared to be reckless credit or that they be rearranged (section 86 (7)).

further protective measures if required.⁷⁷³ The National Credit Regulator has been tasked with conducting regular surveys on the levels of indebtedness, so that trends may be monitored.⁷⁷⁴

Securing compliance with credit legislation and providing suitable access to redress was viewed by the legislature as a task that would require much attention from all role players in the credit market.⁷⁷⁵ Once again the National Credit Regulator⁷⁷⁶ was tasked with the responsibility of ensuring enforcement and regulation of the credit industry and promoting access to redress for consumers.⁷⁷⁷

⁷⁷³ 2004 Policy Framework 32.

⁷⁷⁴ Part A of Chapter 2 in particular establishes and regulates the National Credit Regulator. Section 16 of the Act specifically directs the National Credit Regulator to monitor socio-economic patterns of consumer credit activity within the Republic and in particular identifying factors concerning over-indebtedness and the patterns, causes and consequences of over-indebtedness. For a broader discussion of the functions and duties of the National Credit Regulator cf fn 724 below and Vessio ML 'What does the National Credit Regulator Regulate?' 2008 *SA Merc LJ* 227.

⁷⁷⁵ 'To provide effective consumer protection and effective access to redress, without undue interference in the relationship between the credit providers and their customers and without excessive regulatory and compliance costs, requires cooperation between the different stakeholders involved in the consumer credit market. National government, provincial government, industry, Non-Governmental Organisations (NGOs), Community Based Organisations (CBOs) and consumers each have a role to play. Increasing numbers of people, even at relatively low income levels, use credit. It is imperative to provide effective protection and effective access to redress. Effective enforcement and the quick resolution of complaints are also beneficial to the industry. Reputable credit providers require assurance that their competitors play by the same rules. Low levels of compliance, high levels of reckless behaviour and a lack of responsiveness to consumer complaints are negative for the consumer, but also for the growth of a stable and sustainable credit industry' (2004 Policy Framework 28).

⁷⁷⁶ Described as 'a suitably empowered statutory regulator' (2004 Policy Framework 34).

⁷⁷⁷ The National Credit Regulator is required to register consumer credit providers, (sections 14 and 40) to perform inspections and to generally monitor compliance with the Act (section 15). It is charged with the responsibility of resolving complaints against credit providers, (section 136) referring matters to appropriate institutions, (section 139) and to pro-actively investigate systemic market conduct problems and violations of consumer rights. The latter function was viewed by the Department of Trade and Industry as being of particular importance due to the 'fundamental inequality between consumers and credit providers in the credit market and the inability of consumers, especially low-income consumers, to negotiate' (2004 Policy Framework 34). The Regulator is also tasked with promoting consumer education (section 16) and establishing a network of accredited debt counsellors. It must ensure the registration and accreditation of debt counsellors and the accreditation of training programmes (section 44). However, the 2004 Policy Framework provided that the responsibility for consumer education and debt counselling would be shared, by the National Credit Regulator, with provincial government, NGOs and CBOs and that it is important that significant resources be allocated to these functions at a national level). Finally, the National Credit Regulator is charged with encouraging and approving industry codes and guidelines for the resolution of complaints, and to monitor the enforcement of such codes and guidelines (section 13). The National Credit Regulator is directed by a board, (section 19) consisting of members nominated by the Minister of Trade and Industry, as well as individuals with specific expertise in the area of credit extension and consumer protection. The National Credit Regulator is accountable to Parliament through the offices of the Department of Trade and Industry. The following, reveals the structure and finance of the National Credit Regulator: 'In

Due to the volume of complaints and investigations anticipated in what would become a very regulated market, post the promulgation of the National Credit Act, as well as what was perceived as a need to ensure quick and effective redress for consumers, the National Consumer Tribunal⁷⁷⁸ was established. The Tribunal adjudicates contraventions of the Act and has the power to impose administrative mechanisms and sanctions and issue orders.⁷⁷⁹ The powers of the National Consumer Tribunal do not affect the role of the courts in matters of breach of contract, unfair contracts and other contractual matters, including debt administration.⁷⁸⁰

Co-operation between national and provincial government were seen as a necessity to the successful implementation and preservation of the provisions of the Act. Effective consumer protection and access to redress in the credit market were perceived to only be possible if both spheres were successful in working together to achieve these aims.⁷⁸¹ In terms of the Constitution, consumer protection is an area of concurrent responsibility between national and provincial government.⁷⁸² Due to the fact that the regulation of the credit market is primarily concerned with providing protection to consumers, the regulation of the credit market can be considered to fall within the ambit of consumer protection.⁷⁸³ In terms of the old regime, provinces had some responsibility for consumer credit in

recognition of the unique experience and expertise gathered by the Micro Finance Regulatory Council (MFRC) over the five years of its operation, it is proposed that the National Credit Regulator will absorb the MFRC, but also the national Usury Act inspection function within the Department of Trade and Industry. The National Credit Regulator will be jointly funded from credit provider registration fees and levies, and an annual transfer from National Government' (2004 Policy Framework 34). It is interesting to note that in England money lenders have been required, by law, to register as such since 1900 with the enactment of the Moneylenders Act (Goode 1979 2).

⁷⁷⁸ Established in terms of section 26 of the Act.

⁷⁷⁹ Section 27 of the Act. As previously mentioned (fn 770 *supra*) the National Credit Amendment Act will empower the Tribunal to declare an agreement reckless (section 25).

⁷⁸⁰ Interestingly enough the legislature was of the view that in order to ensure that the new credit regulatory framework was cost-efficient and did not result in duplication of functions, that eventually the function of the Tribunal be expanded to other areas of consumer protection; and it was therefore envisaged that the Tribunal will also hear matters in respect of contraventions of general consumer law as well as other areas of consumer protection (2004 Policy Framework 35). The Consumer Tribunal is indeed now empowered to adjudicate matters relating to the Consumer Protection Act 68 of 2008 (cf sections 1 and 75 of that Act).

⁷⁸¹ 2004 Policy Framework 36.

⁷⁸² Part A Schedule 4 of the Constitution.

⁷⁸³ 2004 Policy Framework 35.

their respective jurisdictions. Provinces were tasked with dealing with complaints regarding credit and in some cases also for the enforcement of the Credit Agreements Act.⁷⁸⁴ However, the Usury Act was enforced only at a national level. Thus and 'in order to provide each consumer, wherever located, with advice, assistance or protection, it is necessary that national and provincial government perform complementary roles'.⁷⁸⁵ Accordingly, the 2004 Policy Framework proposed that national government and the National Credit Regulator would be responsible for the enforcement of systemic practices and the regulation of credit providers with national reach or which operate across provincial boundaries, as well as the conduct of credit bureaux and the registration of debt counsellors.⁷⁸⁶ It was envisaged that, where no provincial capacity to register or regulate credit providers exists, the National Credit Regulator would retain responsibility.⁷⁸⁷

3.2.1.1 Statistics and Data as Motivators for Change

As seen above, the need for comprehensive reform in the credit law regulation field was recognised since at least the South African Law Reform Commission's Report in 1994.⁷⁸⁸ Subsequent reports also pointed out the weaknesses in the previous consumer credit legislation.⁷⁸⁹ South Africa has in the past absorbed a range of political, social, economic and technological changes. These changes

⁷⁸⁴ Section 2A of the Credit Agreements Act.

⁷⁸⁵ 2004 Policy Framework 35.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ Section 37 of the Act bestows responsibility on the Minister with the responsible MEC of any province concerned to co-ordinate and harmonise the functions relating to consumer credit to be performed by the National Credit Regulator and one or more provincial credit regulators as well as to facilitate the settlement of any disputes between these bodies. If no provincial credit regulator has been established in a certain province or the Minister determines on reasonable grounds that the particular provincial credit regulator is unable to perform that function then the Minister in consultation with the MEC of that province must determine steps to be taken in order to ensure the fulfilment of that particular statutory obligation. Section 38 also ensures that information is shared between provincial credit regulators and the National Credit Regulator as well as other provincial regulators as well as reporting by provincial regulators to the National Credit Regulator.

⁷⁸⁸ Cf fn 693 *supra* for greater detail on the 1994 Law Commission's establishment and findings.

⁷⁸⁹ These included the Strauss Report on Rural Finance; the National Small Business Regulatory Review by Ntsika Enterprise Promotion Agency in 1999 and the Falkena Report of 2001 on SMME Finance.

have substantially influenced the consumer credit market since 1968, when the Usury Act was promulgated.⁷⁹⁰

While sophisticated risk management and information technology is available in South Africa, as well as access to capital in what was described as a 'relatively developed capital market', the cost of credit was exceedingly high in certain market sectors and the supply of credit in certain segments appeared to fall below the demand for credit. These were perceived as areas of dysfunctionality or market failures.⁷⁹¹

In 2003 the Department of Trade and Industry mandated a financial economic analysis by Dr Penelope Hawkins.⁷⁹² The Feasibility Study reported on the cost volume and allocation of consumer credit in South Africa. The Feasibility Study is of interest as it appears to have provided much of the statistical backbone for the Credit Law Review. While the Credit Law Review has been analysed in some detail above,⁷⁹³ below is a brief exposition of the data that became available through the Feasibility Study. Statistical data, which the legislature would have had to consider in contemplation of new credit legislation.

The Feasibility Study aimed to quantify different types of credit and small loans that were being provided in the South African market and to assess the effective cost of credit for each sub-category of loan.⁷⁹⁴ The product categories included: mortgages, overdrafts, credit cards, unsecured personal loans, and other similar products.⁷⁹⁵ The Study examined only the debt market.⁷⁹⁶ The importance of

⁷⁹⁰ At the time credit cards, access bonds and micro loans did not exist in South Africa (*Report for the Credit Law Review* Hofmeyer Herbststein and Gihwala Inc. R Willemse and N Mxunyelwa 2), nor had the Constitution of the Republic of South Africa, 1996 been enacted.

⁷⁹¹ Dr P Hawkins *The Cost Volume and Allocation of Consumer Credit in South Africa Feasibility Financial Economic Analysis Strategy* March 2003 Mandated by the Department of Trade and Industry paragraph 1.4 (hereinafter the 'Feasibility Study').

⁷⁹² *Ibid.*

⁷⁹³ Cf Paragraph 3.2.

⁷⁹⁴ Feasibility Study paragraph 2.1.

⁷⁹⁵ *Ibid.*

⁷⁹⁶ The difficulties that were encountered in the gathering of the data included incomplete coverage and lack of consistency of information, especially with regard to credit extension data; there was a lack of disclosure or partial disclosure in the cost of credit; in the allocation field there was a drastic lack of transparency by providers. The data on volumes of consumer credit in South Africa was found to be unreliable and incomplete due to different authorities dealing with bank

conducting such statistical analyses is that legislation pertaining to credit has an impact on the costs, volume and allocation of credit.⁷⁹⁷

Statistical data showed that different groups of consumers paid different amounts for credit and that the distinctions were distorted.⁷⁹⁸ Generally it was low-income consumers that paid the highest rate for credit. An evaluation of the competitiveness of various market segments based on the level of disclosure to the consumer prior to the presentation of the contract; market structure (the number of players and the apparent pricing competitiveness between players) and the degree of freedom of consumers to choose between substitute suppliers and or products revealed that competition was limited to high-end mortgages, leases and high-end instalment sales whereas the informal money-lending area formed the least competitive segment.⁷⁹⁹

The Usury Act cap⁸⁰⁰ together with the exemption was perceived to have created an uneven playing field in the market for credit.⁸⁰¹ The market was seen to be

and non-bank credit, with Reserve Bank collecting data from banks, StatsSA collecting data from retailers (inclusive of sales on open accounts) and the Micro Finance regulatory Council obtained data from micro-lenders. The researcher of the Feasibility Study constantly warned about the inconsistent classification of data. The classification of published consumer credit data appeared to be neither consistent over time nor between institutions. This, concluded the Study, implied that historical comparisons using aggregate data may not have been accurate; suggesting further that the share attributed to households across each category of loan could be incorrect. These constraints appeared to affect both bank and non-bank data (paragraph 2.3). The Study also examined the volume of credit, the following taken from the report is of interest: 'The volume of credit advanced in the economy provides an indication of the degree to which those with expenditure plans in excess of current income, are able to give effect to such plans. However, where the cost or price of this credit is far in excess of that which would prevail in a competitive market, access to credit may unduly burden future income streams and lead to further misery for those who use credit for short term consumption needs' (Feasibility Study paragraph 2.1).

⁷⁹⁷ The following from the Feasibility Study is relevant: 'The regulation of the consumer credit market profoundly affects the profile, range and depth of credit products within a country' (Feasibility Study paragraph 2.2).

⁷⁹⁸ While the average rate was 26%, the costs were unequally distributed with some sectors, predominantly mortgages and pension backed by loans, paying between 15-19% and per annum compared to the average cost of short term micro loans of around 222-360%.

⁷⁹⁹ Feasibility Study paragraph 1.3.

⁸⁰⁰ Section 2 of the Usury Act provided for maximum rates in money lending, leasing and credit transactions. The last rates were as follows: (i) where the total amount of money lent (in the case of a money lending transaction) or the money value of the principal debt (in the case of credit and leasing transactions) did not exceed R10 000, the rate was 24% and (ii) where the amount exceeded R10 000, the rate was 21%. In the event of a breach of contract or an agreement to defer payment, additional finance charges could be claimed at the same rate as that at which finance charges were charged on the outstanding balance of the principal debt in terms of the contract (section 4 of the Usury Act). With a money lending transaction, the moneylender could

segmented into those that could be served within the ambit of the cap and those that could not.⁸⁰² It was also put forward that there was ‘credit rationing’ in the industry for loans sought above R10 000,⁸⁰³ while for micro-loans of less than R10 000 there were many providers.⁸⁰⁴ It was in cases such as mortgages where banks claimed that they could not recoup their costs at the low-end of the mortgage market.⁸⁰⁵ A similar problem was found with small business’ where a gap in the market was identified in terms of loans being sought between R150 000 and R500 000 where providers stated that the cap prevented risk pricing for these sized loans.⁸⁰⁶ For this reason providers failed to offer such ‘small’ loans and preferred to work beyond the ambit of the Usury Act.⁸⁰⁷

It was the aforementioned factors that were localised as creating or at least contributing to areas of dysfunction in the consumer credit market.⁸⁰⁸ From a consumer’s perspective, factors that were identified to undermine market forces included:⁸⁰⁹

- weak disclosure to consumers, which impaired their ability to evaluate comparative rates;
- inability of individuals to review personal credit records;
- difficulties of redress; and
- limited choice.

claim interim interest from the date of approval of the loan until the money was paid to the borrower against a prescribed rate (section 2A of the Usury Act).

⁸⁰¹ Feasibility Study paragraph 2.2.

⁸⁰² *Ibid.*

⁸⁰³ *Ibid.*

⁸⁰⁴ Feasibility Study paragraph 2.2.

⁸⁰⁵ Feasibility Study paragraph 2.2. The problem does not appear to have been resolved by the National Credit Act, given that without passing the credit worthiness test (cf sections 80-82 of the Act) the consumer, whether in the lower or upper end, will not receive credit at all, if the provider does provide credit to an ‘uncreditworthy’ consumer, then it may stand to be accused of reckless credit and suffer the consequences thereof (cf sections 80, 83-87 of the Act). A risk not many providers would take given the repercussions (cf Vessio 2009 *THRHR* 274). The result of which may be the inflation of an already existent illegal lending market – so-called loan shark lending – which has lent in the past and will lend in the future to desperate uncreditworthy consumers at greater cost to the consumer and the economy.

⁸⁰⁶ Feasibility Study 2.2.

⁸⁰⁷ *Ibid.*

⁸⁰⁸ Feasibility Study paragraph 1.4.

⁸⁰⁹ *Ibid.*

On the other hand factors that were recognized to contribute to the high cost of credit, from the providers' perspective, included:⁸¹⁰

- poor access to information and poor sharing of information;⁸¹¹
- difficulties associated with accessing payment mechanisms;
- unreliability of the debit order collection mechanism – which made collection difficult;
- difficulties in accessing funds and the costs thereof;⁸¹²
- legal and institutional factors generated uncertainty and undermined property rights; and
- regulatory uncertainty and the risk of government intervention encouraged high pricing.⁸¹³

It was posited that a sense of uncertainty prevailed in the consumer credit market, which view was enhanced by uncertainty with regards the future approach to interest rate regulation and the treatment of credit life insurance.⁸¹⁴ Furthermore, doubt with regard the risk of government intervention and the uneven enforcement of the (previous) legislation created an environment where credit providers were encouraged to take a short-term view, which inevitably led to an increase in the cost of credit.⁸¹⁵

It was these areas of dysfunction, which resulted in constrained consumer choice, lack of contestability of markets and shortages in certain credit categories.⁸¹⁶ An environment with neither a cap nor an exemption was advocated, but the study also points out that any legislative reform of this sort is

⁸¹⁰ *Ibid.*

⁸¹¹ This undermined credit risk assessment, increased origination costs associated with initial loans and worsened bad debt charges.

⁸¹² This constrained activity in certain market segments.

⁸¹³ These factors were identified as having their origins in the unequal playing fields caused by disparate consumer credit legislation. Distortions created by the previous fragmented legislation resulted in the following abuses by market players, (mostly credit providers): provision of some categories of credit occurred only because there were opportunities to sell associated profitable products; opportunities for arbitrage between different categories of credit were cultivated; provision of some categories of credit were stifled as they could not be economically provided, this lead to a limited choice of credit products for consumers (Feasibility Study paragraph 1.4).

⁸¹⁴ Feasibility Study paragraph 1.4.

⁸¹⁵ *Ibid.*

⁸¹⁶ Feasibility Study paragraph 1.5.

a necessary, but not sufficient, condition to address the dysfunctionality observed in the market.⁸¹⁷ The Feasibility Study posited that any legislative reform of the cap or the exemption should take place in conjunction with a number of other changes.⁸¹⁸

The combination of the usury cap and exemption was judged to have created problems for the provision of consumer credit, with a split market into those that could be profitably served and those that could not.⁸¹⁹ The Feasibility Study suggested that '[t]he Consumer Credit Law Review should itself address the issues of regulatory uncertainty and provide a clearer indication of the rules of the game [...], [s]implified legislation, that is easier to enforce, should also encourage compliance'.⁸²⁰ Further recommendations made in the Feasibility Study were, *inter alia*, that any new legislation, that would replace the old credit regime, should incorporate at least the following features: that a central register of loan commitments be instituted, with providers being obliged to update same as loans were made; better leveraging of certain forms of security, such as township mortgages, payroll deduction facilities, which should allow both greater security for providers and the capacity to ensure cheaper rates on the part of the consumer; standardized and simplified disclosure measurements be put in place, so that consumers have the means by which to compare the total cost of credit from different providers and for different credit instruments and finally the Feasibility Study placed emphasis on the need to educate consumers, with regard to their competence in terms of household cash flow, as well as in terms of their consumer rights and knowledge of recourse to dispute resolution.⁸²¹ Hawkins was of the view that such range of measures should 'ensure that the most innovative and progressive of the providers succeed in what is a complex and nuanced operating environment, and that the greatest number of consumers have access to the most reasonably priced and best designed credit products'.⁸²²

⁸¹⁷ *Ibid.*

⁸¹⁸ *Ibid.*

⁸¹⁹ Feasibility Study paragraph 1.4.

⁸²⁰ *Ibid.*

⁸²¹ Feasibility Study paragraph 1.4

⁸²² Feasibility Study paragraph 1.5.

While the new legislation has attempted to eliminate what would otherwise have appeared to be unfair discrimination, that is discrimination in interest rates between people who borrow at certain amounts,⁸²³ the Act now prevents persons, juristic or otherwise,⁸²⁴ from being advanced credit if they are not creditworthy,⁸²⁵ otherwise the credit provider runs the risk of being a reckless lender, which label carries with it certain legislative repercussions.⁸²⁶ This method, in any event, excludes many low-income consumers from obtaining credit.

It is submitted that the statistical data collected did not directly impact the structure of the remedies provided to the credit provider when initiating procedures against the consumer upon breach by him. However, given that the broader purpose of the National Credit Act was to provide solutions for a very varied consumer market through the elimination of discrimination between high-end and low-end consumers, the remedies available to the credit provider would have had to have been formulated in such a manner as to encompass the varied scope of the consumer market, especially in light of the repeal of the Usury Act Exemption Notice. The 'new' remedies have to now be applied to the amalgam of consumers, secured and unsecured loans and deferred credit. The legislator would have to have been sensitive to the statistical data in order to formulate pre-collection and collection provisions.

3.2.2 Constitutional Compliance

While an understanding of the common law and a country's legislative enactments on a specific area of law brings with it a required study of the historical development, South African law with its particular constitutional dispensation cannot be interpreted or examined outside of its constitutional

⁸²³ Although the Act does establish maximum interest rates in accordance with the type of credit agreement applicable (cf section 103 as read with regulation 42 of the Act).

⁸²⁴ If the consumer is a juristic entity, however, only if it falls within the ambit of the Act; and then one must consider what policy of lending risk financial institutions adopt.

⁸²⁵ Cf sections 80-82 of the Act.

⁸²⁶ Cf sections 83-87 of the Act and Vessio 2009 *THRHR* 274.

setting.⁸²⁷ In this regard, Scholtz⁸²⁸ stated that given the National Credit Act's clear socio-economic aims, it is not surprising that it would be tested and interpreted in light of the Constitution.⁸²⁹ Thus a brief examination of the Constitution will set the foundation for a clearer understanding of the Act, especially in light of the fact that both of the Act's predecessors were drafted before the Constitution. The National Credit Act was born into a constitutional legal ethos, one that was not in existence when the Credit Agreements Act and the Usury Act were promulgated.⁸³⁰

As of April 27, 1994 a new legislative dispensation of constitutional supremacy was introduced in South Africa.⁸³¹ The new constitutional dispensation was a move to eradicate the injustices and discriminations which had tainted South Africa's past and to establish core constitutional values based on freedom, equality and human dignity.⁸³² The Constitution changed the way statutes are interpreted.⁸³³ Chapter 2 of the Constitution contains a Bill of Rights, the cornerstone of democracy in South Africa; the spirit, purport and objects of which, are to enshrine the rights of all people in South Africa and affirm the democratic values of human dignity, equality and freedom.⁸³⁴ The Constitution is the supreme law⁸³⁵ and all law or conduct that is inconsistent with it is invalid.⁸³⁶

⁸²⁷ This is so because of Constitutional supremacy, cf section 2 of the Constitution, which section reads: '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. Furthermore, section 39 (2) places a general duty on every court tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. Thus statutory interpretation must positively promote the Bill of Rights and other provisions in the Constitution (Currie I and De Waal J *The Bill of Rights Handbook* 2013 57). In *Harksen v President of the Republic of South Africa* 2000 2 SA 828 CC 18, the court stated: '[t]he Constitution is the supreme law of the land. It is unnecessary for legislation expressly to incorporate terms of the Constitution. All legislation must be read subject thereto'.

⁸²⁸ Scholtz 2014 paragraph 2.5.

⁸²⁹ The Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution').

⁸³⁰ As these Acts came into force in 1980 and 1968 respectively.

⁸³¹ Thus replacing the principle of parliamentary sovereignty (Botha C *Statutory Interpretation* 2012 13). This was preceded by the Interim Constitution (Constitution of the Republic of South Africa 2000 of 1995 (hereinafter 'the Interim Constitution')) which made provision for the first democratic election in South Africa and for an interim parliament which, in its capacity as a constitutional assembly, was to be responsible for drafting the final Constitution within two years (Chaskalson *et al Constitutional Law of South Africa* 1999 2, Freedman DW *LAWSA* vol 5 part 3 2nd ed 2012 12 and Currie and De Waal 2013 57).

⁸³² Barnard A *Critical Legal Argument for Contractual Justice in the South African Law of Contract* Thesis: University of Pretoria 2005 136.

⁸³³ Botha 2012 13.

⁸³⁴ Section 7 (1) of the Constitution.

⁸³⁵ *Lex Fundamentalis* (Botha 2012 12).

Through the Bill of Rights, the Constitution ensures the protection and enforcement of human rights through the principle rule of law. The Bill of Rights further has the function of protecting the individual against the arbitrary exercise of public power and places positive obligations on the State and other individuals to respect and contribute to the realisation of these rights.⁸³⁷

The concept of a right to legislative protection for consumer issues has been explored before.⁸³⁸ Consumer protection ideology has also been advocated as a design to protect the individual's right to be treated with dignity and in a way that will not damage his self-respect.⁸³⁹ Consumer rights are part of the new range of social rights found in modern society.⁸⁴⁰

Deutch⁸⁴¹ has argued that consumer rights should be treated as human rights⁸⁴² and that consumer protection should be enforced, notwithstanding that on a

⁸³⁶ Section 2 of the Constitution. The approach in the European Union to consumer rights is an interesting one in this regard. The impact of the European Convention rights in private law since the Human Rights Act 1998 came into force is visible in the case law. In *Wilson v First County Trust Ltd* 2001 3 W.L.R 42 the Court of Appeal had to consider whether a particular section of the English Consumer Credit Act, 1974 could be read and given effect by using section 3 (1) of the Human Rights Act, so as to be compatible with article 6 of the Convention (the right to a fair and public hearing in the determination of civil rights) and article 1 of the First Protocol (the right to peaceful enjoyment of possessions) and if it could not, whether a declaration of incompatibility should, instead, be issued under the Human Rights Act. The Court concluded that a declaration of incompatibility should be issued. The following paragraph is of interest: 'where a court is faced with a provision in primary legislation which appears to require it to make an order which would be incompatible with a Convention right, the court must consider whether it is possible to read and give effect to that provision in a way which does not lead to that result. If it is possible to do so, then the court must take that course. The court will make an order which is not incompatible with the Convention right' (per Morrit V.-C paragraph 10). Cf also Bamforth N 'Human Rights and Consumer Credit' *L.Q.R* 2002 118 (Apr) 203.

⁸³⁷ Bekink B *Principles of the South African Constitutional Law* 2012 115.

⁸³⁸ *Ibid.* Deutch S 'Are Consumer Rights, Human Rights?' 1994 32 *Osgoode Hall CJ* 537. For an interesting perspective on the integration of the National Credit Act and the Constitution cf Renke S, Roestoff M and Bekink B 'New Legislative measures in South Africa aimed at combating Over-indebtedness – are the new proposals sufficient under the Constitution and law in general?' 2006 *IIR* 91. Although the article was referenced to the National Credit Bill, the views therein posited are relevant.

⁸³⁹ Ramsay 2013 77-78.

⁸⁴⁰ The United Nations Guidelines on Consumer Protection adopt a rights approach. A 'rights approach' is the concept of the right of the consumer to regulatory protection, ultimately drawn from the Kantian idea of personal autonomy – that is that an individual may not be used as a means to social ends (Ramsay 2013 78).

⁸⁴¹ Deutch *Osgoode Hall CJ* 537.

⁸⁴² Socio-economic rights have also been recognized as human rights in a number of international human rights documents, such as the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights (Khoza S *Socio-Economic Rights in South Africa* 2007 19).

broader scale and taking cost benefit analysis into consideration, the economy might benefit if the individual consumer receives a lesser product or protection. She compares consumer rights to human rights, which place emphasis on the individual as opposed to the collective and advocates that the acknowledgement that human rights protect the individual's prosperity, honour, and development make consumer rights suitable to be declared as human rights.⁸⁴³ Deutch⁸⁴⁴ argues that without a right to fair trade, right to a fair contract and the right of access to court, a person's dignity can be disregarded:

Consumer rights are similar to other accepted human rights [...] Human rights are intended to protect the individual from arbitrary infringements by government. In the same way, the individual consumer is entitled to protection against big business organisations, monopolies, cartels and multinational corporations. The big business organization should be considered less like an individual, who bargains on equal terms, and more like a government, which controls private consumers.

Deutch⁸⁴⁵ posits that one school of thought views the issue of standard contracts as 'private law making' by large economic corporations and that the inequality of bargaining power between consumer and corporation results in contracts of adhesion and erodes the basic right to negotiate. Where one party is a large juristic corporation and the other party is an individual consumer, then the corporation often imposes its terms on the consumer on a 'take it or leave it basis',⁸⁴⁶ which she argues disregards the consumer's honour and dignity.⁸⁴⁷ In order to introduce equality and justice into the consumer market – the issue of inequality must be addressed and alleviated by consumer protection legislation.⁸⁴⁸

The arguments put forward to promote a consumer rights ideology are convincing and emphasize some important areas of concern as far as the consumer market is concerned. However, the discrepancy that lies between

⁸⁴³ Deutch 1994 *Osgoode Hall LJ* 577.

⁸⁴⁴ Deutch 1994 *Osgoode Hall LJ* 551. Acknowledging corporations as having an equal footing to governments is rather a daunting concept and the debate thereon extends beyond the scope of this thesis, however, it is submitted that such an acknowledgment is not only daunting but may also encompass a list of unexpected ramifications if seriously entertained.

⁸⁴⁵ Deutch 1994 *Osgoode Hall LJ* 552.

⁸⁴⁶ Usually in the form of standard-form contracts.

⁸⁴⁷ *Ibid.*

⁸⁴⁸ *Ibid.*

theory and practise must be kept in mind. In countries where there is a first-world/third-world dynamic such as South Africa, it may be difficult to justify the enforcement of some of the more sophisticated consumer rights and elevate or associate them to human rights, when so many more basic rights need urgent tending to, such as rights to water and medical care. What is essentially being propagated by Deutch is the fundamentality of the interconnection between second generation or socio-economic rights and civil rights or first generation rights. Second generation rights, are also known as positive rights in that they impose obligations on the state to take such actions in order to secure for all members of society a basic set of social goods.⁸⁴⁹ On a practicable level the question is really, whether basic, well considered legislative consumer protection devices may be recognized as being sufficient. It is submitted that the legislation already enacted by the State⁸⁵⁰ as read with the Constitution, adequately protects the consumer and there is little need to elevate these consumer rights to the same status as human rights, although deprivation of one may result in the infringement of the other. In *Absa Bank Ltd v Myburgh*,⁸⁵¹ Bertelsman J, stated:

The Act is indubitably aimed at protecting the consumer's fundamental rights to dignity, equality, non-discrimination and fair administrative and trial procedures and must be purposively interpreted for that reason alone [...] The Constitution requires legislation to be interpreted, where possible, in ways which give effect to its founding values.

The following pages contain an evaluation of how some of the rights contained in the Bill of Rights relate and have fared, in relation to consumer rights or even as consumer related rights. It is submitted that the Constitution does not obligate

⁸⁴⁹ See also De Waal and Currie 2013 564 for a discussion on first and second generation rights. It is submitted that consumer rights, if they were to be constitutionally promulgated, would obligate the state to take some action in order to ensure that they are upheld. As there is a Constitutional obligation on the State to respect, protect, promote and fulfil the rights in the Bill of Rights (section 7 (3)). However, such rights are not absolute; in terms of section 7 (1) of the Constitution, an internal limitation qualifier, the rights in the Bill of Rights are subject to limitations contained or referred to in section 36 or elsewhere in the Bill. In terms of section 36 (1) the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. Section 36 (2) provides that except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right in the Bill of Rights.

⁸⁵⁰ The National Credit Act and the Consumer Protection Act.

⁸⁵¹ 2009 3 SA 340 T.

the State to enact specific credit legislation, nonetheless, the National Credit Act as well as the Consumer Protection Act as read with the Constitution go far in protecting some important consumer rights.

The integration of the Constitution into the common law, brought with it much debate over the most appropriate method of interpretation.⁸⁵² Many disputes followed in this regard, for example, classical liberal interpretation *vis-à-vis* a transformative approach and so on. No uncertainty, however, lies in the importance of the role of the courts. The judiciary is tasked with the responsibility to interpret and protect the values of the Constitution,⁸⁵³ strike down any law which is inconsistent with it, develop the common law in accordance with the spirit, purport and objects of the Bill of Rights and declare conduct which is inconsistent with the Constitution invalid.⁸⁵⁴

The Constitution provides that all fundamental rights apply to all types of law, bind the legislature, the executive, the judiciary and all organs of state.⁸⁵⁵ Section 8 (2) provides some limit, however:

A provision of the Bill of rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Cockrell⁸⁵⁶ refers to section 8 (2) as creating a 'restricted direct application' of certain fundamental rights in respect of natural and juristic persons.⁸⁵⁷ Section 8 (3) enjoins the courts to apply or if necessary develop the common law to the

⁸⁵² *In Pharmaceutical Manufacturers Association of SA; In Re: Ex parte Application of the President of the Republic of South Africa* 200 2 SA 674 CC Chaskalson P placed the common law in a constitutional framework. He stated that the common law was not a separate and distinct body of law from the Constitution: 'There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control' (paragraph 44).

⁸⁵³ Section 39 (1) and (2) of the Constitution.

⁸⁵⁴ Section 39 and section 172 of the Constitution.

⁸⁵⁵ Section 8 (1) of the Constitution.

⁸⁵⁶ Cockrell 'Private Law and the Bill of Rights for the Law of Contract and Delict' 1995 *SAJHR* 55.

⁸⁵⁷ See Currie and De Waal *The Bill of Rights Handbook* 2013 for a discussion on direct application of the Bill of Rights to natural and juristic persons (page 34 and 35).

extent that legislation does not give effect to that right.⁸⁵⁸ It is the horizontal application of the Constitution that allows the courts to infuse (and obligates them to infuse) the relationships between private individuals and more specifically the common law of contract with constitutional principles.

Elaborate discussions by constitutional lawyers continue regarding the direct and indirect application of the Constitution.⁸⁵⁹ Direct application of the Constitution is found in its various sections; these shall be mentioned and discussed briefly below. Indirect application of the Constitution, and more specifically of the values and principles of the Bill of Rights, have been viewed as having a radiating effect on the common law which is reflected in open-ended principles of the law such as *boni mores*.⁸⁶⁰ This view is maintained by section 39 (2) of the Bill of Rights which places the responsibility of developing the common law as contained by the constitutional milieu, on every court, tribunal or forum by directing that they promote the spirit, purport and objects of the Bill of Rights.⁸⁶¹ This clause has been referred to as the 'seepage clause'.⁸⁶²

In terms of the direct horizontal application of the Bill of Rights there are various sections in the Constitution which provide instruction. As already mentioned above, section 39 directs that when interpreting any legislation and when developing the common law or customary law, the courts must infuse these with constitutional principles.⁸⁶³ Furthermore, the Constitution provides that a

⁸⁵⁸ There exists a presumption that the legislature does not intend to alter the common law unless it is clear from the language of the statute that the very object is to alter or modify it (*Johannesburg Municipality v Cohens Trustees* 1909 TS 811, *Stadsraad van Pretoria v Van Wyk* 1973 2 SA 779 (A) and *ABSA Bank v De Villiers*). Botha states that this presumption reflects on interest respect and esteem for our common law heritage (Botha 2012 78). The common law also needs to be critically evaluated in light of the values of the Bill of Rights, before it is allowed to influence the interpretation of legislation (*ABSA Bank v De Villiers supra* paragraph 28 and *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 (CC)).

⁸⁵⁹ Currie and De Waal 2013, Freedman LAWSA vol 5 Part 4 2012 and Bekink 2012, are a few examples.

⁸⁶⁰ Van der Walt J 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Cooperative Relationship between Common Law and Constitutional Jurisprudence' 2001 *SAJHR* 352.

⁸⁶¹ Barnard 2005 142.

⁸⁶² Jordaan DW 'The Constitution's Impact on the Law of Contract in Perspective' 2004 *De Jure* 58 62.

⁸⁶³ Cf also section 8 (3) of the Constitution.

provision in the Bill of Rights binds both natural and juristic persons.⁸⁶⁴ Section 36, the so-called 'limitations clause', provides the conditions under which a right in the Bill of Rights may be limited. It provides that the rights in the Bill of Rights may be limited only in terms of general application and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose. Except as provided in section 36 (1) or in any other provision of the Constitution, no law may limit any right in the Bill of Rights.⁸⁶⁵ Section 36 not only provides a balancing exercise but also implements principles of proportionality.⁸⁶⁶

In the area of private law, more specifically with regards contractual disputes the courts bear a constitutional responsibility to weigh competing rights and interests and thereafter decide which of the parties' rights and interests outweigh the other; minding that the preliminary basis of contractual relationships is contractual autonomy.⁸⁶⁷ When confronted with a constitutional dispute the courts must critically analyse and test such disputes against the norms and values of our society as they have been extended by the Constitution.⁸⁶⁸ The Constitution is the supreme law and no norms or values that are inconsistent with it can have legal validity.⁸⁶⁹ This has the effect of making the Constitution a system of objective, normative values for legal purposes.⁸⁷⁰

It is obvious how these constitutional directives influence the courts in the interpretation of new legislation and more specifically with the integration of the Act. The Constitutional Court has provided some guidance with regards interpretation of the Act when pitted against rights enshrined in the Constitution.

⁸⁶⁴ Section 8 (2) of the Constitution. Cf also Tladi 'Breathing Constitutional Values into the Law of Contract: Freedom of Contract and the Constitution' 2002 *De Jure* 306 309.

⁸⁶⁵ Section 7 (3) of the Constitution.

⁸⁶⁶ Van der Walt 2001 *SAJHR* 351.

⁸⁶⁷ Barnard 2005 144.

⁸⁶⁸ *Ibid.*

⁸⁶⁹ *Ibid.*

⁸⁷⁰ *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA), *K v Minister of Safety and Security* 2005 6 SA 419 (CC) and Renke, Roestoff and Bekink 2006 *IIR* 92.

In *Sebola and Another v Standard Bank of South Africa Ltd and Another*⁸⁷¹ the Constitutional Court confirmed that a purposive approach must be adopted for purposes of interpretation of the Act, with specific reference to the preamble and objects of the Act and also the right to equality as enshrined in section 9 of the Constitution.⁸⁷² In *Kubayana v Standard Bank of South Africa Ltd*⁸⁷³ the Constitutional Court held that it is well established that statutes must be interpreted with due regard to their purpose and within their context.⁸⁷⁴ The Court went further to state that this general principle is buttressed by section 2 (1) of the National Credit Act, which expressly requires a purposive approach to the Act's construction.⁸⁷⁵ The Court in the *Sebola* matter also agreed with the 'balancing of competing interests' approach adopted by the Supreme Court of Appeal in *Nedbank Ltd and Others v National Credit Regulator and Another*.⁸⁷⁶ Whilst Mhlantla AJ in the *Kubayana* matter⁸⁷⁷ went on to state that legislation must be understood holistically and interpreted within the relevant framework of constitutional rights and norms. The Constitutional Court found that this did not mean that ordinary meaning and clear language may be disregarded, and it held: 'interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament'.⁸⁷⁸

As indicated above, the Constitution does not directly oblige the State to enact particular credit legislation in order to codify specific basic consumer rights;⁸⁷⁹ but

⁸⁷¹ 2012 5 SA 142 CC.

⁸⁷² In *Standard Bank of South Africa v Dlamini* 2013 1 SA 219 KZD the court also made reference to the right to equality in interpreting the Act, more specifically sections 63 and 64 thereof. Pillay J stated that when the National Credit Act applies, 'the constitutional right to equality comes to mind immediately [...] The Preamble of the Constitution and to the NCA connects them'.

⁸⁷³ 2014 ZACC 1 at paragraph 18. Cf also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2008 ZACC 12 at paragraph 61 and *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 ZACC 10 at paragraphs 17 – 18.

⁸⁷⁴ At paragraph 18.

⁸⁷⁵ Section 2 (1) of the Act states: '[t]his Act must be interpreted in a manner that gives effect to the purposes set out in section 3'.

⁸⁷⁶ 2011 3 SA 581.

⁸⁷⁷ *Supra* at paragraph 18. Cf also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 ZACC 15.

⁸⁷⁸ *Supra* at paragraph 18.

⁸⁷⁹ However, indirectly, the State has been continuously mandated to *inter alia*, provide effective, transparent, accountable and coherent government (section 41 (1) (c)). The Constitution also protects and entrenches the principles of openness, responsiveness and accountability (section 1 (d)), for a discussion cf Ndima DD 'An Assessment of the Role of Accountability in Delivering Quality Democracy in SA' 2001 *Codicillius* 20). Such principles imply that government institutions must be accessible and officials should respond to the needs and requests of the people they

the Act has nonetheless codified a number of fundamental rights of credit consumers.⁸⁸⁰ According to the 2004 Policy Framework the credit market that had developed over the forty years prior to the promulgation of the Act, was viewed as inappropriate for the contemporary and future political, economic and social context of South Africa.⁸⁸¹ The study showed that low-income groups, which represent the majority of the population, had access to only 6% of total credit extension with little access to conventional credit products such as mortgages, credit cards or overdraft facilities.⁸⁸² This part of the population group was thus forced to relegate to non-bank credit, informal sector loans and other marginal providers.⁸⁸³ These alternate methods of obtaining credit cost the individuals in the poorest income category up to ten times the price paid by the wealthiest income groups.⁸⁸⁴ Accordingly, the inequity in the cost of credit between the low-income and high-income earners in the previous dispensation discriminated against the low-income consumers, thus affecting their right to equality guaranteed by section 9 (1) of the Constitution. Section 9 (1) of the Constitution states that everyone is equal before the law and everyone has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms.⁸⁸⁵ In an interesting minority view and with specific reference to the consumer's right to equality, the importance of considering the living conditions of poor, black people when interpreting the provisions of the National Credit Act was emphasised by Zondo AJ in *Nedbank Ltd and Others v National Credit Regulator and Another*.⁸⁸⁶

govern (Bekink 2012 38). It is submitted that implementing legislation that protects its citizens forms part of such duties.

⁸⁸⁰ Renke, Roestoff and Bekink 2006 *IIR* 92.

⁸⁸¹ 2004 Policy Framework 12.

⁸⁸² *Ibid.*

⁸⁸³ *Ibid.*

⁸⁸⁴ 2004 Policy Framework 12.

⁸⁸⁵ Section 9 (2), the rest of which reads: 'To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'. It is submitted that while having a much higher charge in interest and fees to lower end credit consumers may appear and in some instances, however, even be a form of discrimination, the other aspect that need be considered in such instances is the credit providers risk profile *vis-à-vis* a low-income consumer of credit who may have little or no security.

⁸⁸⁶ *Supra* paragraphs 160-162.

Section 9 (1) also formed the basis of the matter in *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Rupert Henry Ingram*.⁸⁸⁷ Here the defendants (a juristic person and an individual whom stood surety for the obligations of the juristic person) argued that their exclusion from the protection of the Act because of sections 4 (1)(a), (b) and 4 (2)(c) of the National Credit Act was unconstitutional in so far as it states that the Act is not applicable to a juristic person and that the Act only applies to the person that has signed as surety if the Act applies to the contract in respect of which the suretyship was granted.⁸⁸⁸ The second defendant submitted that section 4 (2)(c) should be interpreted so as to afford him the same protection as any other natural person who signed as surety for the debt of another natural person.⁸⁸⁹ Defendants quoted section 9 (1) of the Constitution and submitted further that section 36 of the Constitution, dealing with limitation of rights did not save the violation of the Defendants' rights to equality.⁸⁹⁰ The court looked at the purpose of the Act in terms of section 3 thereof and found that in essence the Act attempts to prevent the reckless provision of credit by institutions to people who cannot afford credit.⁸⁹¹ The court stated that attacks on the legislation founded on the provisions relating to equality in the Constitution raise difficult questions of constitutional interpretation and require careful analysis of the facts of each case and an equally careful application of those facts to the law.⁸⁹² The Court found

⁸⁸⁷ 2008 ZAWCHC 92.

⁸⁸⁸ At paragraph 15.

⁸⁸⁹ At paragraph 16.

⁸⁹⁰ At paragraph 18.

⁸⁹¹ *Standard Bank v Hunkydory supra* paragraph 20.

⁸⁹² In this regard the court quoted from the case of *Prinsloo v Van Der Linde and Another* 1997 3 SA 1012 CC where it was stated that the courts 'should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and hopefully surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context which each problem arises'. The court sought guidance from the judgment in *Harksen v Lane NO and Others* 1998 1 SA 300 CC 320 regarding arguments relating to lack of equality, where the Court there stated that an enquiry should be directed by the Court to question whether the impugned provisions do differentiate between people or categories of people. If such provision does so differentiate, then in order not to fall foul of equality provisions in the Constitution, there must be a rational connection between the differentiation in question and the legitimate governmental purpose such provision is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of the relevant section. The Court quoted Goldstone J in this regard: 'If the differentiation complained of bears no rational connection to a legitimate governmental purpose which is proffered to validate it, then the provision in question violates the provisions of s 8 (1) of the Interim Constitution, if there is such a rational connection, then it becomes necessary to proceed to the provisions of s 8 (2) to determine whether, despite such rationality, the differentiation none the less amounts to unfair discrimination' (paragraph 24).

that there may be instances of discrimination which do not amount to unfair discrimination and that in the final analysis it has been held that it is the impact of discrimination on a complainant that is the determining factor regarding the unfairness of the discrimination.⁸⁹³ To establish unfairness in this context various factors must be considered, including the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, the nature of the provision and the purpose sought to be achieved by it.⁸⁹⁴ If the purpose is aimed at achieving a worthy societal goal, this purpose may have a significant bearing on the question whether complainants have in fact suffered the impairment in question.⁸⁹⁵ Finally, the Court held that there was no doubt that a rational connection existed between the differentiation created by the relevant provisions of section 4 of the Act and the legitimate governmental purpose behind its enactment.⁸⁹⁶ The Supreme Court of Appeal and the Constitutional Court both refused leave to appeal on the grounds that there were no reasonable prospects of success.

The Constitution also protects the right to privacy which includes the right not to have a person's, home or property searched, their possessions searched and the privacy of their communications infringed.⁸⁹⁷ The unreasonable attachment of debtors' property could be an infringement of this right⁸⁹⁸ and while the Act does regulate the surrender of goods⁸⁹⁹ and debt enforcement by repossession or judgment⁹⁰⁰ it is submitted that in instances where the procedures in the Act are infringed – the consumer may very well have a constitutional claim under section 14. Section 14 of the Constitution should be read with section 25 which prohibits arbitrary deprivation of property except in terms of law of general application.⁹⁰¹

⁸⁹³ At paragraph 24.

⁸⁹⁴ *Ibid.*

⁸⁹⁵ *Ibid.*

⁸⁹⁶ *Standard Bank v Hundydory supra* paragraphs 13-27. The issue was once again raised in *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others* 2009 ZAWCHC 81 but again dismissed by the court.

⁸⁹⁷ Section 14 of the Constitution.

⁸⁹⁸ Renke, Roestoff and Bekink 2006 *IIR* 94.

⁸⁹⁹ Cf Part B of Chapter 6 of the Act.

⁹⁰⁰ Cf Part C of Chapter 6 of the Act.

⁹⁰¹ Renke, Roestoff and Bekink opine that because 'property' is not limited to land only, section 25 could have significant impact on debtor-creditor relations (2006 *IIR* 94). Yet the authors fail to mention what impact significant or otherwise this section may have on the [very general] 'debtor-creditor relations'. It is submitted that the rights in the Bill of Rights are limited by a limitations

In the matter of *Opperman v Boonzaaier*⁹⁰² the Western Cape High Court was requested to consider section 89 (5)(c) of the National Credit Act⁹⁰³ and it declared the section inconsistent with section 25 (1) of the Constitution and thus invalid. This order was referred to the Constitutional Court for confirmation and was so confirmed.⁹⁰⁴

Some consumer rights as encapsulated in the National Credit Act have not come before the courts but can be examined in light of certain sections of the Constitution. That are certain rights enshrined in the Constitution that have been specifically encapsulated as consumer rights in the National Credit Act. For example, section 12 (1)(e) of the Constitution states that people may not be treated or punished in a cruel, inhuman or degrading way. It has been suggested that under this constitutional right issues such as the protection of debtors against unreasonable interest rates on debt⁹⁰⁵ and unfair treatment by debt collectors should be included.⁹⁰⁶ The National Credit Act caps interest rate charges⁹⁰⁷ and regulates the collection, repayment, surrender and enforcement areas of the credit relationship.⁹⁰⁸

clause, see the discussion above, and that any deprivation of property in terms of the Act would not be arbitrary deprivation and would be deprivation by law of general application, and that any such deprivation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (section 36). Any deprivation of property which may have occurred in a credit relationship in the previous credit dispensation would have been subject to the same constitutional limitations.

⁹⁰² 2012 JDR 0619 WCC.

⁹⁰³ Section 89 (5)(1) read: 'If a credit agreement is unlawful in terms of this section, despite any provision of the common law, any other legislation or any provision of an agreement to the contrary, a court must order that all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer'. Section 27 of the National Credit Amendment Act deletes sub-sections 89 (5)(b) and (c) of the Act. Cf also, Otto JM 'Die *Par Delictum* – Reel en die National Credit Act' *TSAR* 2009 3 417.

⁹⁰⁴ *National Credit Regulator v Opperman* 2013 2 SA 1 CC.

⁹⁰⁵ The Usury Act did regulate the maximum amount of interest that could be charged for a credit transaction of the last Government Gazette published with regards the finance rates before the promulgation of the National Credit Act: GG 26809 17.09.2004. The Usury Act, however, only regulated transactions where the capital or principal amount was R500 000 or less.

⁹⁰⁶ Renke, Roestoff and Bekink 2006 *IIR* 94.

⁹⁰⁷ Cf Part C of Chapter 5 of the Act. There are credit agreements which do not fall within the ambit of the Act which would then not be subject to these limitations. However, the Act regulates all credit agreements where natural persons are consumers in credit agreements.

⁹⁰⁸ In particular of Chapter 6 of the Act.

The Constitution further provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and in order to give effect thereto the State must enact national legislation.⁹⁰⁹ In compliance with this section the State has enacted the Promotion of Administrative Justice Act.⁹¹⁰ There may be instances where parties to a credit agreement may rely on this Act. Chapter 7 of the National Credit Act, for example, deals with dispute settlement other than debt enforcement and refers to the National Credit Regulator⁹¹¹ and National Consumer Tribunal⁹¹² – in such instances there may be scope for a consumer or even a credit provider or any person whose rights or legitimate expectations are materially and adversely affected by any administrative action taken in terms of the Act, to have such administrative action be procedurally fair and, in such instances, may rely on the Promotion of Administrative Justice Act in order to enforce such rights.

Section 34 of the Constitution guarantees that everyone has the right to have any dispute that can be resolved by the application of law decided by a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum. The Act has, as mentioned in the previous paragraph, established two public bodies to deal with various issues related to credit and credit relationships. Although the function of the National Credit Regulator in this instance is not to resolve a dispute but merely to accept a complaint concerning an alleged contravention of the Act or even initiate a complaint in its own name,⁹¹³ the National Consumer Regulator may apply to the Tribunal for an order resolving a dispute related to various issues.⁹¹⁴ Access to an independent court or forum in credit provider and consumer disputes is thus constitutionally guaranteed.⁹¹⁵ The issue of whether only the Magistrates' Courts would have jurisdiction over disputes in terms of the National Credit Act was canvassed by the Courts and after conflicting interpretations – the matter was settled in

⁹⁰⁹ Section 33 of the Constitution.

⁹¹⁰ Act 3 of 2000.

⁹¹¹ Section 12 of the Act.

⁹¹² Section 26 of the Act.

⁹¹³ Section 136 of the Act.

⁹¹⁴ The precise features of which are not pertinent to this discussion, for further detail cf section 137 of the Act.

⁹¹⁵ Renke, Roestoff and Bekink 2006 *II*R 95.

Nedbank v Stringer and another.⁹¹⁶ The High Court as well as the Magistrates' Court have jurisdiction.

In broad terms there was a move by the legislature to eradicate discrimination in credit granting by enacting the National Credit Act.⁹¹⁷ According to the explanatory memorandum to the National Credit Bill this right is conceptually linked to both the Bill of Rights and the Promotion of Equality and Protection of Unfair Discrimination Act.⁹¹⁸ This concept is operatively realised in various sections of the Act. The Act protects consumers against unfair discrimination by credit providers *vis-à-vis* other consumers when such consumers are exercising, asserting or seeking to uphold any right as set out in the Act.⁹¹⁹ Section 61 of the Act specifically protects consumers and prospective consumers against discrimination in respect of credit, directing that credit providers, credit bureaus, ombuds with jurisdiction, alternative dispute resolution agents, debt counsellors and employers or trade unions must not unfairly discriminate directly or indirectly against consumers or prospective consumers on one or more grounds as set out in section 9 (3) of the Constitution or in Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.⁹²⁰ Furthermore, the right to information relating to the credit agreement as well as disclosure of information, the contract and account statements in plain and understandable language, and the right to choose whether to receive specific documents electronically or in hard (paper) copy are incorporated in the Act.⁹²¹

The above synopsis, albeit broad, allows at least a bird's eye view of how the Constitution has a radial influence both relative to private contracts as well as in the formation and interpretation of legislation. A discussion of credit law

⁹¹⁶ 2008 4 SA 266 TPD 279.

⁹¹⁷ Cf section 3 (a) and (d) of the Act. It was argued by Renke, Roestoff and Bekink, prior the enactment of the Act, notwithstanding that the Constitution does not directly obligate the State to enact laws to regulate consumer credit that the old consumer credit legislation indeed discriminated against low-income consumers thereby limiting their fundamental rights (2006 *IIR* 96).

⁹¹⁸ Act 4 of 2000.

⁹¹⁹ Cf section 66 of the Act.

⁹²⁰ The section sets out particular circumstances in this regard.

⁹²¹ Cf section 3 (f) of the Act. The right of access to information is enshrined in section 32 of the Constitution, which rights was further consolidated through the Promotion of Access to Information Act 2 of 2000.

encompasses both aspects. This is because on the one hand credit is extended and received through the formation of a contractual relationship and simultaneously the legislature has, through the promulgation of the National Credit Act, 'stepped in' and regulated some aspects of this relationship.

It is trite that South African contract law is founded on the principle of freedom of contract.⁹²² Simply put, this gives any person with contractual capacity, the power to determine whether, with whom and on which terms to contract and create legally enforceable relationships in terms of which performance becomes executable.⁹²³ The Supreme Court of Appeal has confirmed this as against at least two fundamental constitutional values, namely freedom and human dignity:⁹²⁴

[C]ontractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity[.]

In Kant's classical construction of dignity he posits that because human beings possess capacity to reason, every adult person of sound mind, has the capacity to differentiate between right and wrong and make moral judgments.⁹²⁵ In this regard Jordaan states:⁹²⁶

Every person is therefore perceived as a moral agent with moral autonomy. Having the status of being a moral agent endows every human with unconditional incomparable worth, also known as dignity. Moral autonomy relates to every action by a moral agent, and therefore includes actions that relate to contracting. Infringing contractual autonomy thus infringes moral autonomy, which in return infringes dignity. To disregard contractual autonomy is to disregard dignity.

The court in *Barkhuizen v Napier*⁹²⁷ followed much the same line of thinking by indicating that while on the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken, expressed in the maxim *pacta sunt servanda* which, as the Supreme Court of Appeal has

⁹²² *Wynn's Car Hire Products (Pty) Ltd v First National Industrial Bank* 1991 2 SA 754 (A).

⁹²³ Jordaan 2004 *De Jure* 59.

⁹²⁴ Per Cameron JA in *Brisley v Drotsky* ZASCA 35 paragraph 94.

⁹²⁵ Jordaan 2004 *De Jure* 59.

⁹²⁶ Jordaan 2004 *De Jure* 59-60.

⁹²⁷ 2007 5 SA 323 (CC) per Ngcobo J paragraph 57.

repeatedly noted, gives effect to the central constitutional values of freedom and dignity.⁹²⁸ The court was of the view that self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.⁹²⁹ The court posited further that the extent to which the contract was freely and voluntarily concluded is clearly a pivotal factor as it will determine the weight that should be afforded to the values of freedom and dignity.⁹³⁰

Contractual autonomy has been protected by the courts as it was found to be in the public interest:⁹³¹

[D]ie elementêre en grondliggende beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word.

However, this autonomy may be curtailed by public policy. In *Brisley v Drotzky*⁹³² the court supported Aquilius' definition of a contract against public policy by indicating that a contract against public policy is one stipulating a performance which is not per se illegal or immoral, but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interests of the community. With South Africa's constitutional dispensation, public policy is now rooted in the Constitution and the fundamental values which it enshrines.

Jordaan,⁹³³ from whom the precise of Kant's views on dignity was drawn, was discussing contractual autonomy; however, extending the debate with regards contractual autonomy is not fundamental for the purposes of this discussion. It is submitted, however, that a very similar reasoning for the curtailment of contractual autonomy by the courts can be used for limitation on contractual freedom through legislative enactments. As indicated above, Kant's analysis of

⁹²⁸ *Ibid.*

⁹²⁹ *Ibid.*

⁹³⁰ The court also mentioned the importance of the right of persons to seek judicial redress (*Barkhuizen v Napier* 2007 5 SA 323 (CC) per Ngcobo J paragraph 57).

⁹³¹ *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A) 767A.

⁹³² *Supra* per Harms, Streicher and Brand JJA paragraph 29.

⁹³³ 2004 *De Jure* 59-60.

contractual autonomy *vis-à-vis* dignity is based upon the premise that every adult person possesses the inherent capacity to reason and is therefore capable of differentiating between right and wrong and making moral judgments. This is a fair argument when referring to morality (albeit even then not completely infallible) but the same does not and, it is submitted, cannot hold true when referring to a person's 'commercial rationality'. Commercial skill and know-how are not by any means equal in all human beings. Consumers in society have different levels of education and training or lack thereof, are of varied wealth and have varied business acumen. This disparity is further highlighted in the South African context where a first-world/third-world divide is cogent. Thus, it is submitted, that some interference with contractual autonomy is necessary to preserve basic consumer rights in the credit relationship. These invasive devices should always be clearly defined and limited.⁹³⁴ Thus, the same prudence that the courts have heralded with regard to public policy should be similarly imposed on legislation, lest it create uncertainty as to the validity of contracts. The following forceful comment on the possibly unmanageable nature of public policy if not properly curtailed, it is submitted, may be applicable to legislation if the legislator does not, when legislating, take cognisance of certain basic principles already present in the South African common law:⁹³⁵

Public policy in the interpretation of contracts has, for some reason, inspired a shower of equine analogies. It has been variously described as a very unruly horse, a high horse to mount and difficult to ride, one which stampedes in opposite directions at the same time and one whose reigns must be tightly held.

3.3. Purpose of the National Credit Act

It has been posited that every jurist that concerns himself with consumer legislation has at one time or another expressed a view on the purpose of this type of legislation.⁹³⁶ A list of the purposes of credit regulation generally would be inexhaustive; however, a useful condensed and relevant list of the objectives

⁹³⁴ To some extent the Act has pierced the veil of *pacta sunt servanda* for example Part D of the Act gives a court varied powers to suspend or terminate a credit agreement, leaving the credit provider somewhat unsheltered in terms of certainty in contracting.

⁹³⁵ *Interland Durban (Pty) Ltd v Walters NO* 1993 1 SA 223 (A) 224-5.

⁹³⁶ *Otto and Grové* 1991 62.

of consumer credit legislation was adopted by the Crowther Commission.⁹³⁷ Albeit the Crowther Report was conducted in relation to a different jurisdiction,⁹³⁸ is over forty years old and despite that the trade of credit has evolved since its publication and that the types of credit agreements have become more complex and sophisticated, its findings are still relevant in that the nature of lending, the vulnerability of the consumer as well as the rights of the credit provider precipitate off the same elemental base that was established after the world wars when consumerism became endemic. Furthermore, while a discussion of this style can become very convoluted, a simplistic outlook is to be valued. According to the Crowther Commission,⁹³⁹ protective credit legislation has three main functions, these include:

- addressing the consumer's unequal bargaining position;
- curbing malpractices in the commercial environment; and
- managing the exercise of remedies.

The consumer's lack of bargaining power is addressed by prohibiting particular clauses in contracts, while making others compulsory, by providing for certain compulsory contractual rights, requiring disclosure of the debtor's obligations and by prohibiting deceptive practises.⁹⁴⁰ Exploitation or malpractice in the commercial, especially credit environment is a notorious malady.⁹⁴¹ Therefore curbing these malpractices is carried out by identifying them and proscribing them with suitable sanctions.⁹⁴² Sanctions for this purpose may be civil or criminal in nature and may include the power to prohibit a person from supplying credit.⁹⁴³ The prohibition or limitation of certain remedies and the rules that govern the methods of controlling the exercise thereof are important in any credit economy. The certainty established by reliable and consistent private law regulation of the consequences of breach by the credit consumer is of major

⁹³⁷ Crowther Royal Commission on Consumer Credit Cmnd 4596/1971 234-235 (hereinafter 'Crowther Report').

⁹³⁸ England.

⁹³⁹ *Ibid.*

⁹⁴⁰ Crowther Report 235.

⁹⁴¹ *Ibid.*

⁹⁴² *Ibid.*

⁹⁴³ Crowther Report 235.

significance and not to be undermined. While regulating the credit relationship from inception is also essential, it is the confidence that the law will ensure that the consumer will be bound by his contractual obligations which creates comfort for the credit providing industry. Predictable collection methods and the ability to have the obligation enforced by judicial agents (courts, sheriffs etc.) also create public awareness and can be of dissuasive value.

The National Credit Act⁹⁴⁴ changed the old credit regulatory regime rather dramatically and the following comments from Scholtz encapsulate the dynamic effects of the changes brought about by the Act quite appropriately:⁹⁴⁵

The National Credit Act is a far-reaching piece of legislation which forms part of a raft of contemporaneous legislation or proposed legislation aimed at protecting consumers and making credit and banking services more accessible. Cumulatively these measures constitute perhaps the most comprehensive change of the legal landscape (and the common law) since the adoption of the Constitution since 1996. Credit providers and consumers should not, therefore, see the Act as merely an amendment of the Usury Act and the Credit

⁹⁴⁴ The main drafter of the Act was Professor Philip Knight, a Canadian legislative drafter. Professor Michelle Kelly-Louw from the University of South Africa provided legal advice during the drafting process of the Act and she drafted the amendments contained in Schedule 2 of the Act. During the drafting process key players, interest groups and associations were consulted. The State Law Advisors also played a vital role in approving and signing off, on the Act. Parliament also held various public hearings with regard the National Credit Bill before it was finalised into an Act (Niemi *et al* 2009 181). It is submitted that this decision was not wise, as in order to draft legislation for a common law jurisdiction such as South Africa, the drafter would have to have had a keen understanding of the common law to avoid contradictions and deviations from the already existing body of common law. Otto points out that the Act imports definitions that deviate drastically from the basic principles of South African law and concepts foreign to the South African legal system and traditional legal terminology. He points out that it is indeed unfortunate that the legislation did not pay great attention to harmonizing the provisions of the Act with the common law, as the lack of harmonization detracts from the laudable objectives, general utter-friendliness and clarity of the Act and that the uncertainties, deviations from the common law and numerous problems of interpretation likely to arise which may well give rise to a spate of litigation – at the instance of those wishing to avoid the application of the Act and at the expense of the consumers (Scholtz 2014 paragraph 2.1, cf also *Westbank v Papier* 2011 JDR 0045 WCC paragraph 14, *Nedbank Ltd v the National Credit Regulator* 2011 3 SA 581 SLA and *Absa Bank Ltd v Petersen* 2012 A11 SA 642 WCC). The added problem is that the Act, with its lack of clarity and deviation from the common law, impacts not only those attempting to interpret it from a judicial point of view, but those attempting to advise clients on how to implement it from a procedural standpoint. In *Renier Nel Incorporated v Cash on Demand (KZN) (Pty) Ltd* 2011 JOL 26935 JSJ Willis J said that it had ‘become a notorious fact that cases requiring the interpretation of the National Credit Act result in a scarcely muffled cry of exasperation resounding from the leathered benches of the judiciary’ and made reference to the ‘wide spread lack of clarity and certainty which various traditional colleagues around the country have experienced when trying to interpret the NA. If Judges have such difficulty, how much more so must this be the case among the men and women of business?’ (paragraph 15 and 27).

⁹⁴⁵ Scholtz 2014 paragraph 2.1.

Agreements Act. It is a wholesale replacement of legislation that has regulated consumer credit for more than a quarter of a century.

According to Goodwin-Groen,⁹⁴⁶ the fundamental purpose behind the Act is to achieve 'integrity in the credit market and remove the multitude of unfair practices, inappropriate disclosure and anti-competitive practices from the market'. The Act has introduced many innovative concepts into the law in relation to those credit agreements to which it applies. It has been described as an 'ambitious (perhaps even an idealistic) piece of legislation with pronounced socio-economic aims'.⁹⁴⁷

The Act's self-proclaimed purpose⁹⁴⁸ is 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.⁹⁴⁹ These purposes are to be attained by:⁹⁵⁰

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
- (b) ensuring consistent treatment of different credit products and different credit providers;
- (c) promoting responsibility in the credit market by:-
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

⁹⁴⁶ Finmark Trust Report: The National Credit Act and its Regulations in the Context of Access to Finance in South Africa 2006 16.

⁹⁴⁷ Scholtz 2014 paragraph 2.3. *Absa Bank Ltd v Myburgh supra* 7: 'Even a cursory reading of the Act underlines the objects pursued by the Legislature by its promulgation; namely to protect the credit receiving consumer from being exploited by credit providers, to prevent predatory lending practices; to level the playing field between a relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider and to limit the financial harm that the consumer may suffer if he is unable to perform in terms of a credit agreement he entered into'.

⁹⁴⁸ Cf section 3.

⁹⁴⁹ Section 3 elaborates extensively on how the Act will protect consumers. Some of these protection methods include the promotion and development of an accessible credit market to all South Africans but in particular to those who have been historically disadvantaged, in that they have been precluded from accessing credit under sustainable market conditions and by ensuring consistent treatment of credit products and providers. The Act further proposes to promote responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness, fulfilment of financial obligations by consumers and by discouraging reckless credit granting by credit providers. The list in section 3 is extensive, all of which shall not be discussed here.

⁹⁵⁰ Section 3(a)-(i) of the Act.

- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by
 - (i) providing consumers with education about credit and consumer rights;
 - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
- (f) improving consumer credit information and reporting and regulation of credit bureaux;
- (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
- (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

Three particular methods for achieving the purposes of the Act are of relevance, that is, the fulfilment of financial obligations by the consumer,⁹⁵¹ discouragement of contractual default by the consumer,⁹⁵² and providing a consistent and harmonised system of debt enforcement and judgment.⁹⁵³ Unfortunately, one is not directed to other sections in the Act which would specifically achieve these goals. However, it is interesting to note that the emphasis lies not only in discouraging the consumer from defaulting but also on consistent enforcement. The importance of legislation which imposes honouring of obligations and the fulfilment thereof as a stabiliser for the credit market cannot be overemphasised. Providing effective protection and enforcement as well as assurance to credit providers that their competitors will be forced to abide by the same rules, creates a sustainable credit industry and entrenches confidence in the investor.⁹⁵⁴ Accordingly, a single Act, which provides for consistent procedures and remedies with respect to debt enforcement, has to be welcomed.

⁹⁵¹ 3(c)(i) of the Act.

⁹⁵² 3(c)(ii) of the Act.

⁹⁵³ 3(i) of the Act.

⁹⁵⁴ As Mhlantla AJ put it in *Kubyana v Standard Bank of South Africa Ltd* 2014 ZACC 1, while there can be no doubt that the Act is directed at consumer protection, this should not be taken to mean that the Act is relentlessly one-sided and concerned with nothing more than devolving rights and benefits on consumers without any regard for interests of credit providers (paragraph 20).

The suggestions by the Crowther Committee appear, in principle, to be addressed in the content of the Act; however, the only true method of gauging the effectiveness of such an important piece of legislation is observance of its implementation by commercialists, attorneys, jurists and most importantly the courts.⁹⁵⁵ This thesis focuses especially on the last function postulated by the Crowther Report in relation to credit legislation, that is, whether the remedies available for breach of the credit agreement are properly and effectively managed.

3.4. European Union

As already mentioned at the beginning of this chapter, the growth of affluence after the world wars in Europe and America was initiated by the harnessing of technological developments in order to procure large scale production methods, which in turn made available a broad range of relatively sophisticated products and assisted the growth in credit use by consumers. These new dynamics in society resulted in the need for a regulatory reaction from governments. Europe has worked as an integrated whole, and its Directives have an umbrella effect on the national legislation that is implemented in each European country in order that those jurisdictions do not fall foul of the policies that emanate from the European Parliament. The following discussion examines the progress of the European block as a whole and then looks at England and Italy, and how these two countries have recently undergone regulatory change in order to harmonise their local legislation with the regional policies.

As the process of legal harmonisation in Europe continues, so the sophistication of consumer law and policy through that continent develops and thus makes for

⁹⁵⁵ The following cautionary words by the Honourable Mr Justice A V D S Centlivres CJ, should be heeded: 'For it must always be remembered that, however carefully an Act may be drafted, 'it is', as Austin reminds us, 'far easier to conceive justly what would be a useful law, than so to construct that same law that it may accomplish the design of the lawgiver'.

an interesting study.⁹⁵⁶ The harmonisation arose from a need both within and outside of Europe to eliminate the differences in national laws which were found inimical to the efficient conduct of cross-border business in Europe.⁹⁵⁷ Harmonisation confers particular benefits on contracting parties carrying on business in different countries, enabling them to contract with reference to a set of rules that apply uniformly over the territories of the various countries and which are detached from any particular legal system.⁹⁵⁸ The appeal of this to anyone studying the facilitation of cross-border trade, not only within Europe but also with Europe, is patent. To have contractual principles that apply outside of a country's own contractual principles and beyond them, to agreements between parties conducting cross-border business and entering cross-border contracts to concretise such dealings is of obvious convenience value to the contracting parties and, if the matter so escalates, to the relevant forum dealing with the dispute, not to mention the monetary benefits to the independent economies.⁹⁵⁹ The harmonisation of the principles of contract law in Europe was carried out with a view to achieve a proper functioning of a single European market.⁹⁶⁰ The goal was to achieve a unitary approach to law and regulation in order to surmount obstacles to trade and distortions of the market which resulted from the differences in the national laws of Member States affecting trade with Europe.⁹⁶¹ It is submitted, that the now, over fifty year old history of the European Union, can be utilised by Africa by drawing from the continental experience for purposes of Africa's own harmonisation processes.⁹⁶² While South Africa is far from

⁹⁵⁶ The unification of Europe, the unfastening of its trade markets, the unlocking of borders and the harmonisation of its laws will be the greatest contemporary example for Africa in its pursuit for similar confederacy ambitions.

⁹⁵⁷ Olando O and Beale H *The Principles of European Contract Law Part 1: Performance, Non Performance and Remedies* 1995 XV.

⁹⁵⁸ *Ibid.*

⁹⁵⁹ The following comment is taken from a 'Study of the Effects on the English Economy of the Revised Consumer Credit Directive': 'If the Directive creates an efficient single market for consumer credit, the potential benefits to the United Kingdom economy could be in the range of £370-500 million'. This was according to estimates by the Department for Business Enterprise and Regulatory Reform, Copenhagen (14 May 2009 5).

⁹⁶⁰ Olando and Beale 1995 XV.

⁹⁶¹ *Ibid.*

⁹⁶² Thomas posits a very sophisticated view on this issue: 'However, harmonisation in order to create a common market should be limited to the primary fields of the law dealing with economic transactions. Harmonisation is not unification, but should recognise diversity within a framework set out by communal principles. The history of South African private law shows that such objective is achievable. The British method introduced in the Cape colony and subsequently in the Union consisted in the introduction of institutions, structure and process; by placing the focus

having contract principles (for cross-border dealings) synchronized with European Union laws – there is nothing to prevent the courts from being guided by our own common law and interpreting legislation so that it does, indirectly, come into some form of harmonisation with European Union contractual principles.⁹⁶³ This can be achieved, especially by utilizing judgments that have interpreted and applied similar legislation to develop South African law and apply new legislation.⁹⁶⁴

While a comprehensive examination of the European Union is beyond the scope of this work, a brief exposition of the nature of the historical development of the European Union from a consumer perspective has been outlined in Chapter 2 above. Below is a focused discussion on the more recent development of consumer credit regulation.

Regional market integration in Europe required various controls which extended beyond the broad basic treaty framework⁹⁶⁵ to incorporate policy and legislation. A Community consumer protection policy was begun as early as 1975 by Council Resolution.⁹⁶⁶ The first of its kind, the policy maintained that in the modern

on legal procedure instead of values, law has become the language of debate between conflicting legal cultures and succeeded in keeping the balance in society. Thus, cross economical transactions may pave the way for cross-cultural harmonisation as abstract choices between value systems and the consequent conflict are avoided. The role of law in this shift from values to practices should be minimalist, restricted to the case at hand and striving for agreement on the commonalities which will construct the normative skeleton of the African Union' (2008 *Fundamina* 'Harmonising the Law in a Multilingual Environment with Different Legal Systems' 133 153-4).

⁹⁶³ Otto gave his own views on this in relation to the Council Directive 87/102/EEC of 22 December 1986 for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit, as amended by Council Directive 90/88/EEC of 22 February 1990 and by Directive 98/7/EC of 16 February 1998 in an article entitled: 'The EEC Directive on Consumer Credit: A Model for Southern Africa?' *SALJ* 1996 297.

⁹⁶⁴ Section 2 (2) of the National Credit Act specifically directs that any person, court of tribunal interpreting or applying the Act may consider appropriate foreign and international law. However, it must be noted that in terms of section 4 of the Act it (the Act) applies to credit agreements that have an effect within the Republic (section 4 (1)) and it applies to a credit agreement or proposed credit agreement, irrespective of whether the credit provider resides or has its principle office within outside of the Republic (section 4 (3)). If the Act applies to a credit agreement it continues to apply to that agreement even if a party to that agreement ceases to reside or have its principle office within the Republic and it applies in relation to every transaction, act or omission under that agreement whether that transaction act or omission occurs within or outside the Republic (section 4 (4)). What is interesting is that in terms of section 4 of the Act, a foreign court may have to apply the Act if finds that it otherwise has the jurisdiction to hear the dispute.

⁹⁶⁵ Cf paragraph 2.4 *supra* for a discussion on the development of the European Community.

⁹⁶⁶ Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy OJ 1975 C92/1.

market economy the balance had moved away from the consumer and shifted in favour of the supplier.⁹⁶⁷ An annex to the 1975 Resolution, entitled 'Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy' offered a statement of five basic rights of the consumer:⁹⁶⁸

- the right to protection of health and safety;
- the right to protection of economic interests;
- the right to redress;
- the right to information and education; and
- the right to representation.

There followed a number of other Resolutions in 1981,⁹⁶⁹ 1986,⁹⁷⁰ 1989,⁹⁷¹ 1992⁹⁷² and two consecutive three year action plans were published by the European Commission for Consumer Policy in the European Economic Community.⁹⁷³

The approach to consumer protection in Europe has been one of integration rather than regulation.⁹⁷⁴ Where laws differ from state to state, the classic European Community response is an attempt to harmonise such laws in order to eventually establish a common community rule.⁹⁷⁵ Over the years, where these divergences in state laws have demonstrated themselves, the Community has

⁹⁶⁷ Howells GG and Weatherhill S *Consumer Protection Law* 2005 121.

⁹⁶⁸ *Ibid.*

⁹⁶⁹ Council Resolution 19 May 1981 on a Second Programme of the European Economic Community for a Consumer Protection and Information Policy OJ 1981 C133/1.

⁹⁷⁰ Council Resolution of 23 June 1986 Concerning the Future Orientation of the Policy of the European Economic Community for the Protection and Promotion of Consumer Interests OJ 1986 C167/1.

⁹⁷¹ Council Resolution of 9 November 1989 on Future Priorities for Relaunching Consumer Protection Policy OJ 1989 C294/1.

⁹⁷² Council Resolution of 13 July 1992 on Future Priorities for the Development of the Consumer Protection Policy OJ 1992 C186/1.

⁹⁷³ Three Year Action Plan of Consumer Policy in the EEC (1990-1992) COM (90) 98 final of 3 May 1990 and COM (93) 378 published in June 1992 (Howells and Weatherhill 2005 121).

⁹⁷⁴ De Cristofaro G *La Nuova Dicipinaria Europea del Credito al Consumo* 2009 X1.

⁹⁷⁵ De Cristofaro states that the common feature in all the Directives is the objective to reach complete harmonization of legislation of member States, removing from national legislators any margin of discretion, negating them even the possibility to maintain or introduce internal regulations which would allow an elevated and more incisive form of protection for the consumer with respect to the form guaranteed by the Directive (2009 XI).

acted to put in place some directives regarding consumer protection.⁹⁷⁶ These are not formal laws, but they do filter through and become implemented at state level – especially given that in the event of trial the European Court of Justice (as well as national courts) will align their judgments along the lines of the Directives.⁹⁷⁷ In any event the Member States are under an obligation in terms of Articles 5 and 189 of the European Council Treaty to implement these Directives in their domestic legal orders.⁹⁷⁸ As discussed above, there have been a number of Directives by the European Council. Pertaining particularly to credit law, however, Council Directive of 22 December 1986,⁹⁷⁹ Council Directive of 22 February 1990⁹⁸⁰ and Council Directive amending the 1986 Directive for the approximation of laws, regulations and administrative provisions of Member States concerning consumer credit, were subsequently repealed by the European Consumer Credit Directive 2008/48/EC.⁹⁸¹

The wide differences in the laws of the Member States in the field of consumer credit were seen to lead to distortions of competition between grantors of credit in the common market, to limit the opportunities the consumer had to obtain credit in other Member States; to affect the volume and the nature of the credit sought and also the purchase of goods and services.⁹⁸² As a result, these differences were seen to have an influence on the free movement of goods and services obtainable by consumers on credit and thus to directly affect the functioning of the common market.⁹⁸³ Given the increasing volume of credit granted in the European Community to consumers, the establishment of a common market in

⁹⁷⁶ *Ibid.*

⁹⁷⁷ *Ibid.*

⁹⁷⁸ It is a violation of the Treaty for a Member State to fail to implement a Directive, such default may lead to proceedings brought by the Commission in terms of Article 169 of the EC Treaty against the State before the European Court in Luxembourg (Howells and Weatherhill 2005 138 and Cuthbert M *E.U Law in a Nutshell* 2006 24).

⁹⁷⁹ Directive 87/102 OJL 42/48

⁹⁸⁰ Council Directive of 22 February 1990 Amending Directive 87/102/EEC for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer credit 90/88/EEC.

Directive 90/88 OJ 1990 61/14.

⁹⁸¹ Council Directive 2008/48/EC of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC. The 2008 Directive for Consumer Credit became effective on June 2010

([http://www.csa-England.com/media/editor/file/Consumer%20Credit%20Directive\(1\).pdf](http://www.csa-England.com/media/editor/file/Consumer%20Credit%20Directive(1).pdf) (16.06.10)).

⁹⁸² Preamble 1987 Directive.

⁹⁸³ *Ibid.*

consumer credit was viewed to benefit consumers, grantors of credit, manufacturers, wholesalers and retailers of goods and providers of services.⁹⁸⁴ The Directives aim to bring about a certain degree of approximation of the laws, regulations and administrative provisions of the Member States of the European Union concerning consumer credit.⁹⁸⁵ The Directives emphasised information provisions, required rules to be put in place that regulated the creditors, by *inter alia*, restricting creditors' remedies, allowing for rebates if credit is repaid early and introduced a limited form of creditor liability for the quality of goods supplied.⁹⁸⁶ The Directives also introduced a common method for calculating the

⁹⁸⁴ *Ibid.*

⁹⁸⁵ All the Directives related to credit make this proclamation. The following from Weatherhill, albeit relating to the 1987 Directive as amended, is relevant: 'the measure is not only designed to create an integrated market for credit but also to achieve protection of consumers of credit. It possess a dual aim (*Berliner Kindl Brauerei AG v Andreas Siepert* Case C-208/98 2000 ECR I-1741)' (*EU Consumer Law and Policy* 86).

⁹⁸⁶ Directive 87/102/EEC as amended did not regulate the following: credit agreements for the purpose of acquiring or retaining property rights in land or a building; credit agreements for the purpose of renovating or improving a building; hiring agreements which do not provide for the title passing to the hirer; credit free of interest or any other charge; interest-free credit agreements where the consumer repays the credit in a single payment; credit in the form of advances on a current account granted by a credit institution or financial institution, with the exception of credit card accounts; credit agreements involving amounts less than € 200 or more than € 20 000; credit agreements whereby the consumer undertakes to repay the credit either within three months or by a maximum of four payments within a twelve month period (article 2 (1)). Credit agreements had to be in writing (article 4 (1)). Besides the essential terms of the contract, an agreement had to state the annual interest rate charge and the conditions under which it could be amended (article 4 (2)). Where credit was granted in the form of an advance on a current account, the consumer had to be informed in writing, at or before the time the agreement was concluded: of the credit limit, if any; of the annual rate of interest and the charges applicable and of the procedure for terminating the agreement (article 6 (1)). The consumer had to be notified of any change in the annual rate of interest or in the relevant charges, during the period of the agreement. In the case of credit granted for the acquisition of goods, Member States were obliged to lay down the conditions under which the goods could be repossessed and ensure that neither of the parties was unjustly enriched. The consumer could discharge his obligations under a credit agreement before the time fixed by the agreement and was entitled to an equitable reduction in the cost of the credit (article 8). Where the creditor's rights were assigned to a third person, the consumer's rights remained unaffected and action to enforce any claim could be taken against that third person (article 9). The Member States had to ensure that consumers using bills of exchange were suitably protected. In such events Member States were obliged to ensure that the existence of a credit agreement did not affect the rights of the consumer vis-à-vis the supplier of goods or services purchased by means of such agreements in cases where the goods or services were not supplied or were not in conformity with the contract (article 11). The consumer could seek redress against the grantor of credit when the following conditions were fulfilled: (1) the consumer has entered into a credit agreement with a person other than the supplier of the goods or services purchased; (2) the credit provider and the supplier of the goods or services have a pre-existing agreement under which credit is made available exclusively by the former; (3) the consumer obtains his or her credit pursuant to that pre-existing agreement; (4) the goods or services covered by the credit agreement are not supplied or are not in conformity with the contract; (5) the consumer has sought redress against the supplier but has failed to obtain satisfaction. Member States had to ensure that credit providers obtained official authorization to provide credit; ensure that the providers were subject to inspection by an official body; promote

annual percentage interest rate.⁹⁸⁷ Member States which already had a method for calculating the interest rate were entitled to retain their respective methods during the period of transition.⁹⁸⁸

The European Parliament and the Council of 23 April 2008 on credit agreements for consumers repealed Directive 87/102/EEC, as amended.⁹⁸⁹ In 1995, the European Commission presented a report on the operation of Directive 87/102/EEC and undertook a broad consultation with the interested parties.⁹⁹⁰ A second report was produced in 1996 on the operation of Directive 87/102/EEC.⁹⁹¹ In 1997, the Commission presented a summary report of reactions to the 1995 report.⁹⁹² Those reports and consultations revealed some of the reasons for the repeal of the 1987 Directive; such as the existence of substantial differences between the laws of the various Member States in the field of credit.⁹⁹³ An analysis of the national laws transposing Directive 87/102/EEC showed that Member States used a variety of consumer protection mechanisms, in addition to Directive 87/102/EEC, on account of differences in the legal or economic situation at national level.⁹⁹⁴ The *de facto* and *de jure* situation resulting from those national differences in some cases was found to lead to distortions of competition among creditors in the Community and to create obstacles to the internal market where Member States had adopted different mandatory provisions that were more stringent than those provided for in

the establishment of appropriate bodies for providing information and advice to consumers in respect of credit agreements and for receiving associated complaints (article 12). The Member States may introduce more stringent rules than those laid down in the Directive.

(http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32021_en.htm (15.06.2010)). Directive 90/88/EEC set out a single mathematical formula for calculating the annual percentage rate cost throughout the Community and for determining credit cost items used in the calculation, while Directive 98/7/EC focused on the calculation of the annual percentage rate cost of credit charge.

(http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdocandlg=ENandnumdoc=31987L0102andmodel=guichett (15.06.2010)).

⁹⁸⁷ *Ibid.*

⁹⁸⁸ However, subsequently and in terms of article 2 of Directive 98/7/EC Member States were obliged to bring into force the laws, regulations and administrative provisions necessary for them to comply with that Directive no later than two years after the entry into force of the Directive and were further obliged to inform the European Commission of such compliance.

⁹⁸⁹ <http://vlex.com/vid/credit-agreements-consumers-repealing-38424844> (16.06.10).

⁹⁹⁰ *Ibid.*

⁹⁹¹ <http://vlex.com/vid/credit-agreements-consumers-repealing-38424844> (16.06.10).

⁹⁹² *Ibid.*

⁹⁹³ *Ibid.*

⁹⁹⁴ *Ibid.*

Directive 87/102/EEC.⁹⁹⁵ These actions by individual Member States were felt to restrict consumers' ability to make direct use of cross-border credit, which in turn could affect demand for goods and services.⁹⁹⁶

Furthermore, the years leading up to the 2008 Directive saw a considerable evolution in the types of credit offered to and used by consumers in Europe. New credit instruments had appeared, and their use continued to develop.⁹⁹⁷ It was thus felt necessary to amend existing provisions and to extend their scope, where appropriate. The development of a more transparent and efficient credit market within the European Union without internal frontiers was viewed as vital in order to promote the development of cross-border activities.⁹⁹⁸

The strides that Europe has and is taking in developing, *inter alia*, its consumer credit laws and the reasons for so doing form part of a philosophy that it has been following since 1957 which is that of harmonisation of national laws in order to facilitate open border trading. In consequence, each individual state in Europe is aligning their national credit laws, regulations and policies so as not to derogate from the European Directives, Italy and England, discussed below, are primary examples.

⁹⁹⁵ <http://vlex.com/vid/credit-agreements-consumers-repealing-38424844> (16.06.10).

⁹⁹⁶ *Ibid.*

⁹⁹⁷ The following is taken from a Report issued by the Minister of the Department of Trade and Industry England: 'The European Commission has recognised that the 1987 Consumer Credit Directive is out of date, has failed to open up the internal market in consumer credit and is in need of reform' (*Consumer Credit Law A Consultation on a Proposed European Consumer Credit Directive* 25 February 2005 URN 05/834 (<http://www.dti.gov.uk/files/file14388.pdf>) (16.06.10)).

⁹⁹⁸ <http://vlex.com/vid/credit-agreements-consumers-repealing-38424844> (15.06.10). Thus, the following relevant paragraph taken from the preamble of Directive 2008/48/EC: 'In order to facilitate the emergence of a well-functioning internal market in consumer credit, it is necessary to make provision for a harmonised Community framework in a number of core areas. In view of the continuously developing market in consumer credit and the increasing mobility of European citizens, forward-looking Community legislation which is able to adapt to future forms of credit and which allows Member States the appropriate degree of flexibility in their implementation should help to establish a modern body of law on consumer credit' (The European Parliament of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC).

3.5. England

Prior to the revision of its credit legislation in 2006,⁹⁹⁹ the English credit regime, similarly to its South African counterpart, was faced with comparable complications.¹⁰⁰⁰ It can thus be observed that as the world globalizes, the problems which legislatures face are indeed analogous. Credit consumers worldwide face similar difficulties (standard form contracts, unfair terms, insufficient information and the like) and when they breach the contract, credit providers rely on the remedies available to them by their country's private laws. These problems are universal, the subtlety lies in the application of the remedies and, it is submitted, South Africa has the consistency of the common law to reassure credit providers of a more stable absorption of any new legislation. That is not to say that one cannot benefit by observing progress in comparable jurisdictions, especially ones that regulate cosmopolitan and progressive markets such as England. Below is a brief outline of the credit reform progress over the past century in Britain. As will be seen, the legislation was reactionary to various trends in the market. The war, increase in production followed by increase in consumerism were some of the factors that prompted various changes in legislation and policy in England. Finally, we see how over-indebtedness and the rise of the European Union propelled England to re-evaluate its consumer credit legislative regime.

After the 1890's there seemed to be a move towards hire-purchase as the preferred method of instalment credit in England for purchasing products, as alternative forms of selling on instalment became less popular due to certain restrictive legislation such as the Bills of Sale Act¹⁰⁰¹ and the Factors Act 1889.¹⁰⁰² Hire-purchase secured the seller's rights against third parties, as the consumer under a hire-purchase agreement was merely hiring the goods and not committed to purchasing them. This principle, developed by the House of

⁹⁹⁹ With the advent of the Consumer Credit Act, 2006.

¹⁰⁰⁰ Detailed in this paragraph.

¹⁰⁰¹ In terms of which a consumer purchased an item and gave security over it for the credit granted.

¹⁰⁰² The legislation was drafted in such a manner that consumers purchasing products on credit could, in certain circumstances, pass title to an innocent third party and thus defeat the rights of the seller (*Lee v Butler* 1893 2 QB 318).

Lords,¹⁰⁰³ allowed the seller to then seize the goods.¹⁰⁰⁴ Gradually, due to abuses by businesses, hire purchase was subject to greater controls, initially by the courts and by 1938 the Hire-Purchase Act came into force. By the 1960's hire-purchase was no longer perceived as a favourable form of contracting, as a security interest in items that were sold on credit were not so sought after, given that their resale value when repossessed was often quite low. Furthermore, consumers began to require credit for other purposes such as for acquiring services.¹⁰⁰⁵

In any event, after the Second World War, there was a move in England, to eradicate war time controls and trade-protection legislation which were seen as factors that hampered competitiveness and jeopardized the post-war goal of having no unemployment figures for British society.¹⁰⁰⁶ It was these ideologies and visions which spurred further ideas for a transformation of the market in order to meet consumer demands and needs; the culmination of these principles formed the background to the establishment of the Molony Committee.¹⁰⁰⁷ Thus the Molony Report is a historically appropriate point of entry to understanding consumer regulation in England. The report intended to provide a foundation for policy making for the next twenty years, but really stood at the beginning of many policy measures that were taken subsequent to it in an attempt to protect consumers.¹⁰⁰⁸ It was criticised as 'not quite sufficiently radically pro-consumer'¹⁰⁰⁹ and its legal recommendations as 'good hearted [...] unimaginative and insular'.¹⁰¹⁰ The broad mandate of the committee was to consider and report what changes, if any, in the law and what other measures, if any, were desirable

¹⁰⁰³ *Helby v Matthews* 1895 AC 471.

¹⁰⁰⁴ Criticized as being an artificial conceptualisation of the transaction, given that almost all consumers that entered hire-purchase transactions did so with the intention of acquiring ownership (Scott C and Black J *Cranston's Consumer and the Law* 2000 233).

¹⁰⁰⁵ Scott and Black 2000 234.

¹⁰⁰⁶ Ramsay 2012 3.

¹⁰⁰⁷ Board of Trade (*Final Report of the Committee on Consumer Protection* (Molony Committee) Cmnd 1781/1962 (hereinafter 'the Molony Report'). Of course Britain had its very own history of consumer credit laws and controls. The earliest forms of credit in London began with tradesman's credit (during the seventeenth and eighteenth centuries), pawn broking (late sixteenth century) and money lending. Pawn broking was first regulated in 1603 and a comprehensive consolidating statute was passed in 1872 which remained in force, albeit with amendments, until it was replaced by the Consumer Credit Act 1974.

¹⁰⁰⁸ *Ibid.*

¹⁰⁰⁹ *The Economist* 1962 326.

¹⁰¹⁰ Diamond 1963 66 from Ramsay 2012 3.

for the further protection of the consuming public.¹⁰¹¹ The Committee, however, restricted its focus to the situation of persons who purchased or hire-purchased goods for private consumption.¹⁰¹² The underlying philosophy of the Molony Report was that competition and market forces were the best protection for consumer interests.¹⁰¹³ The Committee was, however, aware of the potential dangers of the new changes that had occurred in the market-place, and consequently outlined the concerns regarding the potentially detrimental impact of these changes.¹⁰¹⁴ These included the alleged development of inequality of bargaining power;¹⁰¹⁵ the consumer's so called "shopping problems",¹⁰¹⁶ the complexity of goods in the market; vulnerability of consumers;¹⁰¹⁷ reluctance to pursue claims;¹⁰¹⁸ unorganised consumers; calls and arguments for fundamental alteration of the system¹⁰¹⁹ and inadequate enforcement.¹⁰²⁰

Not quite a decade later and in the 1970's of major concern in England was the necessity to redress the patent imbalance of power between consumers and providers through the introduction of public regulation and subsidisation of consumer organisations.¹⁰²¹ These innovations sparked and then subsequently drew from documents such as the Crowther Committee's report on Consumer

¹⁰¹¹ *Ibid.*

¹⁰¹² Ramsay 2012 3.

¹⁰¹³ *Ibid.*

¹⁰¹⁴ Ramsay 2012 3; cf Stephenson G *Consumer Credit* 1987 3.

¹⁰¹⁵ The Committee found that the old established balance between the parties had been seriously disturbed by markedly different methods of manufacture, distribution and merchandising, as a result of which the system protecting consumer rights had become inadequate (Ramsay 2012 3).

¹⁰¹⁶ Development of complicated production techniques, wide range of alternative choices and increased sale of branded and internationally advertised products reduced the retailer's function to that of simply handing over what the customer had already been persuaded to buy, disempowering the retailer to provide any form of expert advice (Ramsay 2012 3).

¹⁰¹⁷ It was felt that consumers found it beyond their power to make informed and wise decisions and that this opened them up to exploitation and deception (Ramsay 2012 4).

¹⁰¹⁸ The ordinary consumer – devoid of technical knowledge or at the very least lacking ready access to independent technical advice and uncertain of the strength of his case – would be reluctant to incur the considerable trouble and cost of pursuing what he regarded as his legitimate complaint. This reluctance is deepened if the cost of expert investigation and legal proceedings would be disproportionate to the price paid for the goods, together with the fact that relief would only (and maybe) be relieved by trial (Ramsay 2012 4).

¹⁰¹⁹ The main thrust here was that on the side of the providers there existed effective organisation, providing mutual assistance and potent representation of various sectors – the approach of such organisations to consumers and consumer woes was found to be one of indifference (Ramsay 2012 4).

¹⁰²⁰ Ramsay 2012 4.

¹⁰²¹ Ramsay 2012 5.

Credit¹⁰²² and the political support for consumer protection which infused the 1970s.¹⁰²³ The justification for public regulation to protect consumers against economic losses lay in the fact that such losses, which although very large in total, were so diffuse in nature that any individual found it uneconomical to seek redress in the courts.¹⁰²⁴ The findings in the Crowther Report, together with the political views of the time culminated in the Consumer Credit Act 1974. New agencies were created in order to assist, such as the Office of Fair Trading, established in 1973 and the National Consumer Council, established in 1975.¹⁰²⁵

The transformation that occurred in consumer policy regulation in England since the 1970's was mainly due to global influences such as the development of global capital markets that restricted the abilities of states to pursue redistributive policies, and neoliberalism.¹⁰²⁶ Large scale privatization and deregulation of markets occurred during this period.¹⁰²⁷ Furthermore, during the prime ministership of Margaret Thatcher competition was posited as the best consumer policy, and this ideology was favoured over extensive consumer regulation.¹⁰²⁸ Between the periods 1979 to 1997 consumer law developments were generally stimulated by the need to give effect to European Directives.¹⁰²⁹ During this period there was little support for regulating the consumer market and criticisms were levelled at attempts to regulate, such as high compliance costs burdening businesses and creation of barriers to market entry.¹⁰³⁰ The British government was also criticised for failing to rationalise the reasons for intervention and the view was that any attempt by the government to bring about substantive social objectives through legal regulation would only result in over legalisation and was thus opposed.¹⁰³¹ The ideology at the time was to manage the issue of consumption through education and expert advice by providing more choice to

¹⁰²² Crowther Royal Commission on Consumer Credit Cmnd 4596/1971.

¹⁰²³ *Ibid.*

¹⁰²⁴ *Ibid.*

¹⁰²⁵ Ramsay 2012 5.

¹⁰²⁶ Ramsay 2012 8.

¹⁰²⁷ *Ibid.*

¹⁰²⁸ Ramsay 2012 9.

¹⁰²⁹ *Ibid.*

¹⁰³⁰ *Ibid.*

¹⁰³¹ Ramsay 2012 9.

the consumer through deregulation and privatisation.¹⁰³² The theory was that by being forced to make more choices, individuals were invited to regulate themselves.¹⁰³³ This was specifically applied to the credit market where it was believed that the consumer, through self-discipline would curb his reliance on credit and save more.¹⁰³⁴ As part of a deregulation initiative a review of the Consumer Credit Act 1974 was commissioned by the Office of Fair Trading and conducted by the then Director General of Fair Trading.¹⁰³⁵ The 1974 Act was supported and in particular its non-interventionist policies endorsed.¹⁰³⁶ The desired effect of a balanced credit market through non-intervention was, however, not realized and, consequently, over-indebtedness¹⁰³⁷ of consumers became a priority for the new government which came into power in 1997 in England.¹⁰³⁸

On a broader scale, the Blair government took the view that through efficient consumer markets England would be able to achieve global competitiveness, and that the state had a definitive role to play as regulator. In 1999 a White Paper¹⁰³⁹ was released discussing the aim of policy in England, which in short was to reinforce the idea of strong consumers, strong business' and consumer and competition policy as methods of increasing competitiveness in the global economy.¹⁰⁴⁰ The White Paper posited that albeit a number of measures had been previously introduced, these were uncoordinated, often failed to address the real needs of people and overlooked the contribution that consumers could make to competitiveness.¹⁰⁴¹ Essentially, the strategic approach expounded in

¹⁰³² Ramsay 2012 10.

¹⁰³³ *Ibid.*

¹⁰³⁴ *Ibid.*

¹⁰³⁵ Sir Bryan Carsberg *Consumer Credit Deregulation* Office of Fair Trading 1994 (hereinafter the 'Carsberg Review').

¹⁰³⁶ 'Perhaps the greatest strength of the Act is that it does not seek to meet its objectives through interventionist action such as interest rate-capping or direct control of the substance of contracts. Rather, it explicitly endorses freedom of contract within a framework of rules designed to ensure openness: consumer protection is attained in large through measures to ensure that full and truthful information about credit contracts is available to consumers' (Carsberg Review 6).

¹⁰³⁷ Some theorists add 'obesity'. Cf Offer *The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain Since 1950* 2006 365.

¹⁰³⁸ Ramsay 2012 10.

¹⁰³⁹ DTI *Modern Markets, Confident Consumers* Cm 4410/1999.

¹⁰⁴⁰ Ramsay 2012 10.

¹⁰⁴¹ Ramsay 2012 11.

the White Paper was the establishment of a policy framework.¹⁰⁴² The Paper stated that the government would first look at opportunities to make markets work, *inter alia*, through better information and self-regulation but that it would not hesitate to regulate if these methods failed.¹⁰⁴³ After the White Paper certain changes were affected; the National Consumer Council and Office of Fair Trading were rejuvenated and significant changes adopted to the enforcement of consumer law through the Enterprise Act 2002.¹⁰⁴⁴ In 2003 the Department of Trade and Industry commissioned an international benchmarking study of English consumer law and policy: *Comparative Consumer, The United Kingdom*.¹⁰⁴⁵ The study outlined contemporary institutional frameworks of English consumer policy and assessed its strengths and weakness.¹⁰⁴⁶ The 2003 *Comparative Study* brought to the fore the concern with risks and management of risk in society; even though many societies were found to be much richer than in the past.¹⁰⁴⁷ The study found that these risks were no longer localised but had crossed national borders; so for example, volatility in the international financial system may result in unsustainable growth in consumer credit which ultimately results in a financial crash that leaves many consumers over-indebted, as happened in many European countries in the 1980s.¹⁰⁴⁸ Thus, many English jurists are of the view that management of risk and the concept of risk as an organising framework for regulation should be a central contemporary theme.¹⁰⁴⁹

However, in terms of credit law regulation, since the inception of the 1974 Consumer Credit Act, the credit market in England changed fundamentally. In 2001 the Department of Trade and Industry issued a Consultation Document.¹⁰⁵⁰ The purpose of the discussion paper was to initiate a review of the Consumer

¹⁰⁴² *Ibid.*

¹⁰⁴³ *Ibid.*

¹⁰⁴⁴ Ramsay 2007 9.

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ Ramsay 2007 10.

¹⁰⁴⁸ *Ibid.*

¹⁰⁴⁹ Ramsay 2007 15.

¹⁰⁵⁰ *Tackling Loan Sharks - and more:- Consultation Document on Modernising The Consumer Credit Act 1974*

(<http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/CACP/ca/consultation/loanshark.htm>) (22.06.10).

Credit Act.¹⁰⁵¹ There were five main motivating factors that led to a review of the Consumer Credit Act: implementing the government's manifesto commitment to tackle loan sharks; the need for improvements in the then consumer credit licensing regime; Financial Services Authority regulation of mortgages which was to become effective, with knock-on effects for the Consumer Credit Act; the European Commission consultation on a revised Consumer Credit Directive and building on a previous report from a Task Force on tackling over-indebtedness, published in July 2001.¹⁰⁵² Furthermore, it was felt that because the Consumer Credit Act was nearly thirty years old, besides some piecemeal amendments that had previously been undertaken, a major review was required to ensure the Act remained relevant to the modern consumer credit market and maintained appropriate consumer protection measures.¹⁰⁵³

In 2003 the Department of Trade and Industry conducted a study of the credit market, *Fair Clear and Competitive: The Consumer Credit Market in the 21st Century*.¹⁰⁵⁴ The White Paper outlined problems in the consumer credit market and which reforms it aimed to address. The issues that the White Paper found with the British consumer credit market can be summarised as follows: (a) informational problems before purchase of goods on credit;¹⁰⁵⁵ (b) undue surprises after purchase of goods on credit;¹⁰⁵⁶ (c) unfair practices;¹⁰⁵⁷ (d) illegal

¹⁰⁵¹ *Ibid.*

¹⁰⁵² *Ibid.*

¹⁰⁵³ The priority issues where changes were viewed to be necessary were also set out in the consultation paper; these included: (a) changes to the licensing regime to target enforcement on keeping loan sharks out of the market; (b) making extortionate credit provisions more effective; (c) changing the financial limit and categories of exempt agreements to increase consumer protection by bringing more credit agreements within the regulatory regime; (d) enabling consumers to conclude credit agreements on-line; (e) simplifying the advertising regulations; (f) amending the early settlement regulations to give consumers a fairer deal and (g) addressing issues of over-indebtedness (<http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/CACP/ca/consultation/loanshark.htm> (25.06.2010)).

¹⁰⁵⁴ Cm 6040/2003 (hereinafter the 'White Paper').

¹⁰⁵⁵ Consumers need clear, consistent information to be able to make informed comparisons between the plethora of products available to them. While innovation and evolution in the credit market benefited consumers through increased choice and flexibility, it was found that contemporary products had become difficult for consumers to understand because they are so complex, and because there is a lack of transparency of standardised information (White Paper 5).

¹⁰⁵⁶ Often, problems arising from misinformation occurred after a credit agreement had been signed and the consumer committed. In this way, the widespread use of large early settlement fees and other hidden costs caused undue surprises for the consumer after purchase (White Paper 5).

money lenders¹⁰⁵⁸ and (e) over-indebtedness.¹⁰⁵⁹ The White Paper aimed to establish a more transparent regime so consumers could make better-informed decisions and get fairer deals, to this end they recommended changes in the advertising regulations to make credit advertisements clearer and simpler for consumers to understand, and the regulations easier for authorities to enforce.¹⁰⁶⁰

Alongside the White Paper, a consultation document was published,¹⁰⁶¹ in what was seen as a significant first step towards the implementation of the reformation.¹⁰⁶² Further reforms contemplated in the White Paper were suggested in order to encourage and reward vigorous competition, innovation, choice and enterprise, while stamping out irresponsible and unfair lending practices.¹⁰⁶³ Another priority indicated in the White Paper was to adapt English law so that it would align itself into a properly functioning single European marketplace for credit with the potential to boost competition, generate better deals and ensure consumers have enough protection to shop across borders.¹⁰⁶⁴

¹⁰⁵⁷ Some practices by traders were found to be unfair to the consumer, with consumers finding it difficult in such instances to obtain redress and for the regulatory authorities to take effective action to stop a trader continuing such practices (White Paper 5).

¹⁰⁵⁸ Money lenders, who are unlicensed and operate outside the law, commonly referred to as loan sharks take advantage of vulnerable lenders and bring legitimate lenders into disrepute. Britain's Department of Trade and Industry commissioned another research paper in 2006 on illegal lending, entitled 'Illegal lending in the United Kingdom: Research Report' November 2006 URN 06/1883.

¹⁰⁵⁹ The White Paper disclosed that 20% of households in England that made use of credit, experience financial difficulties, while 7% had levels of credit use associated with over-indebtedness. The view was that tackling over-indebtedness would contribute to social justice and prosperity for all would be achieved by improving financial inclusion. The vision was to educate consumers and provide easier access to help and advice for those in financial difficulty and to assist low-income consumers to have access to affordable credit (White Paper 5 and 7).

¹⁰⁶⁰ This included providing consumers with clearer information, before and after agreements are signed; enable consumers to enter and conclude credit agreements online, speeding up application procedures and reducing burdensome paperwork; raise awareness of early settlement charges and change the law to prevent those who repay early from being penalised (White Paper 5).

¹⁰⁶¹ Entitled: 'Establishing a Transparent Market: A consultation on proposals for regulations on Early Settlement; Form and Content of Credit Agreements: APRs on Credit Cards; and On-line Agreements'.

¹⁰⁶² Philpott F *et al* *The Law of Consumer Credit and Hire* 2009 12.

¹⁰⁶³ These included strengthening the credit licensing regime to target rogue and unfair practices and provide enforcers with the powers required to supervise a fair and effective credit market; change the law to end unfair selling practices, replacing a limited 'extortionate' test with a wider 'unfairness' test, providing an effective dispute resolution mechanism; and removing the £25,000 financial limit that (then) created a two-tier lending framework and curtailed consumer protection and further examined some of the existing provisions governing the enforceability of agreements.

¹⁰⁶⁴ White Paper 6

To this end the White Paper canvassed cross-border data access on an equal and fair basis, a common approach to advertising and information regulation, unfair practices, rules on the calculation of the annual rate of interest, and debt-recovery and collection practices, high level consumer rights and redress mechanisms and an effective 'passporting' regime for lenders wanting to market and sell credit products cross-border.¹⁰⁶⁵

Consequently, the Consumer Credit Act 1974 was fully implemented on 1 October 2008.¹⁰⁶⁶ The Act was implemented in 3 phases: firstly, on the 6 April 2007, the duties of the Financial Ombudsman Service were extended to cover consumer credit and the Unfair Relationships Test was introduced for new agreements.¹⁰⁶⁷ Secondly, on 6 April 2008, the Office of Fair Trading's new strengthened licensing regime was introduced, the Consumer Credit Appeals Tribunal, for appeals against the Office of Fair Trading's licensing decisions, was established, the financial limit of £25,000 was removed so all new credit agreements in Britain (unless specifically exempt) are regulated, and the Unfair Relationships Test was extended to all existing credit agreements.¹⁰⁶⁸ Thirdly, on 1 October 2008: a requirement for lenders to provide borrowers with much more information about their accounts on a regular basis, such as an annual statements and notices when consumers fall into arrears or incur a default sum was introduced.¹⁰⁶⁹ Furthermore, the Office of Fair Trading's regulatory powers were extended to credit information and debt administration services which means debt administration and credit information service providers require a consumer credit licence, and consumers can go to the courts asking for an extension of time in order to pay back their loan when they receive a notice advising them of arrears.¹⁰⁷⁰

However change did not stop here. The European Directive 2008/48/EC on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC

¹⁰⁶⁵ White Paper 6-7.

¹⁰⁶⁶ Philpott 2009 12.

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ Philpott 2009 12

¹⁰⁶⁹ *Ibid.*

¹⁰⁷⁰ Prior October 2008, consumers in Britain could only seek a time order when they received a default notice.

has influenced the English credit regime. Changes implemented in response to this Directive include changes to advertising, the giving of explanations to consumers, rights of cancellation, termination and early settlement, agreement documentation, overdrafts and assignments.¹⁰⁷¹

In light of the above discussion it can be seen that the rationale for effecting legislative changes in England were motivated largely due to internal market shortcomings. Similarly to South Africa, the English credit market was faced with lack of sufficient information being provided to consumers prior to the purchase of goods on credit, hidden costs of credit found in standard form contracts, unfair practices by credit providers towards consumers, the widespread rise of illegal money lenders and general consumer over-indebtedness. This prompted the need for the amendment to the Consumer Credit Act and, it is submitted, that most of the amendments would probably and in any event have been effected, despite the European Directive imperative.

3.6. Italy

Similarly to the European community discipline and until the second half of the 1990's, Italian laws regarding consumer protection were fragmented.¹⁰⁷² Thus during this period, the legislative arrangement was the result of varied efforts by specific sectors in an attempt to protect consumers.¹⁰⁷³ The sources of these enactments were community rules, state laws, regional legislation and progresses through legal action taken by various administrative authorities,¹⁰⁷⁴ and self-disciplinary directives issued by various associations.¹⁰⁷⁵ These sources

¹⁰⁷¹ Philpott 2004 12. The Consumer Credit Act, as amended, is discussed in greater detail in paragraph 4.6 *infra*.

¹⁰⁷² The Consumer Code (D.Lgs 206/2005) has tempered but not completely eliminated, the fragmentation of legislation in the area (Bertuzzi S and Cottarelli G *Il Codice del Consumo* 2009 22 and fn 19).

¹⁰⁷³ *Ibid.*

¹⁰⁷⁴ Such as Antitrust Institution, Isvap, Consob, Institution for Electric Energy and Gas, Agcom etc. (Bertuzzi and Cottarelli 2009 22).

¹⁰⁷⁵ *Ibid.*

formed a complex mosaic of norms required to assist in protecting the consumer.¹⁰⁷⁶ Most of these legislative enactments have now been repealed.¹⁰⁷⁷

A significant step towards policy making in the realm of consumer protection was brought about by a legislative enactment in 1996.¹⁰⁷⁸ The enactment of Law number 52 of 6 February 1996 emanated from the implementation of the ratification of Directive 93/13/CEE relating to unfair clauses in standard form contracts.¹⁰⁷⁹ Law 52 added to Chapter 2, Book IV of the Civil Code, section XIV-*bis* entitled 'Contracts of the Consumer'.¹⁰⁸⁰ This section introduced the concepts of 'professionals'¹⁰⁸¹ and 'consumers' into Italian law making, establishing an *azione inhibitoria*¹⁰⁸² by which consumer representative associations or bodies and professional associations or organisations and the relative chambers of commerce¹⁰⁸³ could take action against the professional or the relevant professional association which made use of general contractual terms contrary to national and community legislation.¹⁰⁸⁴

Law number 281 enacted on the 30 July 1998 strengthened the beginnings of consumer rights protection, both in terms of individual rights and collective rights.¹⁰⁸⁵ Section 1 of this law guarantees, as fundamental rights of the consumer a myriad of aspects, such as: the right to health; security and quality of products and services; accurate information in advertising; education on consumption; accuracy, transparency and equity in contracts concerning goods and services; promotion and development of free and democratic association

¹⁰⁷⁶ *Ibid.*

¹⁰⁷⁷ Bertuzzi and Cottarelli 2009 22.

¹⁰⁷⁸ *Ibid.*

¹⁰⁷⁹ *Ibid.*

¹⁰⁸⁰ Own translation from *dei contratti dei consumatori*. These sections have now been formally repealed and replaced by sections 33ff of the Consumer Code.

¹⁰⁸¹ The term *professionali* in Italian, translated as 'professionals' by the author, implies to what in South Africa we refer to as the 'credit provider' in discourse relating to the extension of credit (a term introduced by the Act) and when referring to a 'consumer' generally (of goods and services) we refer to the supplier of goods or services, though the Consumer Protection Act 68 of 2008 (hereinafter 'Consumer Protection Act') does not use a single noun but refers to 'suppliers', 'service providers' and the 'supply chain' which incorporates 'producers, distributors, importers, retailers, service providers and intermediaries' (section 1 of the Consumer Protection Act).

¹⁰⁸² Probably akin to the South African interdict remedy.

¹⁰⁸³ Of industry, craftsmanship and agriculture.

¹⁰⁸⁴ Bertuzzi and Cottarelli 2009 23.

¹⁰⁸⁵ Bertuzzi and Cottarelli 2009 22.

between consumers and users and the supply of public services according to set quality and efficiency standards.¹⁰⁸⁶ This law also saw the formation, through the Italian Minister of Industry of the National Council for Consumers and Users¹⁰⁸⁷ assigned, *inter alia*, to provide opinions, formulate proposals, promote study and research, elaborate programmes to distribute information, enhance consumer access to justice and coordinate national policy with regional policy with regards to consumer protection.¹⁰⁸⁸ While some regions, since the late 1980's, intervened in what were sporadic attempts to protect the consumer,¹⁰⁸⁹ it was Law number 281 which sparked a real initiative from the regions of Italy in this field of law.¹⁰⁹⁰ In 2002 a further law was enacted; Law number 24 of 2 February 2002, which amended the Civil Code further by inserting sections 1519-*bis*ff which dealt with aspects of contracts of sale and guarantees concerning movable goods.¹⁰⁹¹

However, the consummate implementation of legislative intervention, as a mechanism for the protection of consumer rights, was reached through the assent to the Consumer Code.¹⁰⁹² This was preceded by a delegation conferred to the Italian Government by section 7 of Law 229 of the 29 July 2003.¹⁰⁹³ The culmination of the codified consumer protection laws in Italy was initiated in December 2002 when the Minister of Production Activities nominated a research committee to draft the Bill.¹⁰⁹⁴ This committee was coordinated by the *Direzione Generale Armonizzazione del Mercato e Tutela dei Consumatori*.¹⁰⁹⁵ In November 2003 the research committee presented the draft Bill to the various associations of the professionals and the consumer associations in order to obtain comments prior to initiating the procedure to formally pass the Bill.¹⁰⁹⁶ In

¹⁰⁸⁶ Bertuzzi and Cottarelli 2009 23-4.

¹⁰⁸⁷ Own translation from *Consiglio Nazionale dei Consumatori e Degli Utenti*.

¹⁰⁸⁸ Bertuzzi and Cottarelli 2009 24.

¹⁰⁸⁹ All the Regions in Italy except Trento and Bolzano relied on *ad hoc* legislation to protect the consumer. In Sardegna, however, there were various attempts to pass various regional legislative enactments to protect the consumer but none came to fruition (Bertuzzi and Cottarelli 2009 25).

¹⁰⁹⁰ Bertuzzi and Cottarelli 2009 24.

¹⁰⁹¹ *Ibid.*

¹⁰⁹² *Decreto Legislativo* del 6 September 2005 numero 206.

¹⁰⁹³ Bertuzzi and Cottarelli 2009 27 fn 2.

¹⁰⁹⁴ *Ibid.*

¹⁰⁹⁵ General Directive on the Harmonisation of the Market and Protection of Consumers (own translation).

¹⁰⁹⁶ Bertuzzi and Cotteralli 2009 27.

the beginning of 2004 the Bill was placed before the Council of Ministers and in October 2004 the Bill was approved.¹⁰⁹⁷ Thereafter, the opinion of the *Conferenza Unificata Stato-Regioni*¹⁰⁹⁸ and the State Council, and of the various competent Parliamentary commissions was obtained.¹⁰⁹⁹ The State Council and the Regional Parliament put forward their suggestions, in December 2004 the enactment of the Bill was postponed for six months and eventually the Consumer Code came into force in July 2005.¹¹⁰⁰

For the first time in Italy, consumer legislation was gathered under one enactment.¹¹⁰¹ The Consumer Code is not described as innovative but rather as an Act which reinforces consumer protection through the augmentation of legislation which is simplified and coordinated in such a way that it provides consumers the possibility to know the rights and protection which the law affords them.¹¹⁰² The code only dedicates four sections to the issue of consumer credit, delegating the bulk of the regulation to the Inter-ministerial Committee on Matters of Consumer Credit and Savings,¹¹⁰³ and to adjust the relevant sections in the Consumer Code so as to align them with the reference to the banking T.U.¹¹⁰⁴ Galletto¹¹⁰⁵ submits that while the choice to regulate consumer credit under the banking T.U. as opposed to completely under the Consumer Code may at first glance appear surprising, it finds justification, he argues, in the fact that the majority of consumer credit agreements are to be found in the banking and credit sectors and consequently the banking T.U. is reasoned to be the best place for the regulation thereof.

In light of the above, it can be seen that the rationale for enacting consumer legislation in Italy emanated principally from external factors; those being the unification of the European Community, the harmonisation of laws in Europe and the Directives issued by the European Union. In South Africa the need for credit

¹⁰⁹⁷ *Ibid.*

¹⁰⁹⁸ Regional Parliament.

¹⁰⁹⁹ *Ibid.*

¹¹⁰⁰ Bertuzzi and Cottarelli 2009 28.

¹¹⁰¹ *Ibid.*

¹¹⁰² *Ibid.*

¹¹⁰³ Hereinafter 'CICR'.

¹¹⁰⁴ Vistinini 2009 681.

¹¹⁰⁵ *Ibid.*

reform was, comparatively, more of an internal organic process; with the constitutional milieu and the market forces encouraging transformation. England as seen above, had its own internal forces motivating the 2006 amendment. On the contrary Italy appears to have been propelled into revisiting, or rather visiting, its credit consumer legislation, which prior to 1992 and except for the sale of goods on credit, appears to have been suppositional. This is a completely interesting dynamic and one wonders whether such delays in activating consumer protection legislation were not due to a broader underlying socialist mindset. In such a milieu, conceptually, production of goods and services is primarily for use, that is in order to satisfy economic demand and human needs and goods and services are valued on their use-value or utility as opposed to being structured upon the accumulation of capital and production for profit.¹¹⁰⁶ This ideology does not marry to the contemporary consumer and capitalist mentality pervasive in the modern world - Italy not excluded. Thus, and albeit, the influence of the European Directives on the Italian legislative credit regime can by no means be discounted, it is submitted that despite this external influence, Italy would eventually have been forced, by its own internal dynamic changes, to reconsider a stronger consumer credit regulatory scheme. It is submitted that the timing was coincidental and that the European Directives did not force 'its hand' but simply quickened and facilitated the process.

¹¹⁰⁶ The ideas have largely been adopted from <http://en.wikipedia.org/wiki/socialism> (9.01.2014)

CHAPTER 4: THE PREVIOUS LEGISLATIVE DISPENSATION AND GENERAL INTRODUCTION TO THE NATIONAL CREDIT ACT

4.1 Introduction

Legislation protecting consumers, more especially credit consumers is a common feature of almost all jurisdictions. The nature and scope of the legislation will differ from country to country; although, as seen in the previous chapters, there is much movement, especially in Europe, to harmonise regulation in order to facilitate cross-border trade. On a practical level, in today's contemporary environment and even historically, consumer credit legislation is and has been an effort by governments to protect credit consumers who purchase or lease goods or services on credit or who loan money. As seen in Chapter 2, this justification for legislating in the credit field is not a modern phenomenon but age old, and yet as time moves on, providers become more powerful, availability of goods becomes more widespread, the problems relating to credit relationships between consumers and providers evolve and old legislation tends to require 'upgrading' in order to align itself with more sophisticated transactions. Legislation that is being replaced should not, however, be discounted and discarded, in fact, it must and should be used as a springboard for the development of new legislation, and previous 'interpretative work' carried out by the courts should be relied upon to assist with the new task. When looking at breach of contract by the consumer and the available remedies to the credit provider in terms of the National Credit Act, one has to be familiar with the background of the previous legislation in order to handle the new legislation with any degree of aptitude. Furthermore, familiarity with the background and milieu of the current Act contextualise breach and remedies, creating an interpretational nexus between the Act and how it should be interpreted *vis-à-vis* the common law. Accordingly, this Chapter is an examination of what the previous credit legislative dispensation entailed followed by a synopsis of how the current Act compares.¹¹⁰⁷

¹¹⁰⁷ The following comment in relation to the National Credit Act is therefore apropos: 'The National Credit Act must be interpreted anew, but, when other legislation is comparable with the

A distinction between 'vendor credit' and 'lender credit' existed, historically, in the South African context.¹¹⁰⁸ Interest on money loans, as far as lender credit was concerned, was regulated partly by the common law¹¹⁰⁹ and partly by the 1926 Usury Act. The first comprehensive statutory provision which regulated vendor credit came in the form of the 1942 Hire-Purchase Act. Developments in the market necessitated change and upon the recommendation of the First and Second Franzsen Reports,¹¹¹⁰ the 1926 Usury Act was repealed and replaced in 1968, by the Limitation and Disclosure of Finance Charges Act.¹¹¹¹ The latter Act was, again renamed the Usury Act in 1986.¹¹¹² In 1980 the Hire-Purchase Act, also through the influence of the Franzsen Reports, was repealed and replaced by the Credit Agreements Act 75 of 1980.¹¹¹³

It was suggested that two statutory enactments to regulate the credit market¹¹¹⁴ were necessary, due to what was considered a feasible differentiation between the contractual and financial aspects of credit transactions.¹¹¹⁵ Accordingly, the

Act, court decisions of the past dealing with those acts may at least play a persuasive, perhaps even decisive, role' (Otto JM 'Notices in Terms of the National Credit Act' 2010 *SA Merc LJ* 595 598).

¹¹⁰⁸ Grové NJ and Otto JM *Basic Principles of Consumer Credit Law* 2002 4.

¹¹⁰⁹ *Dyason v Ruthven* 3 Searle 282, *Taylor v Hollard* 1885-1888 2 SAR 78, Zimmerman R *The Law of Obligations – Roman Foundations of Civilian Tradition* 1990 166 and Grové 'Die Gemeenregtelike Beheer van Woeker in die Suid-Afrikaanse Reg' 1990 *De Jure* 118.

¹¹¹⁰ First Franzsen Report of the Committee of Inquiry into the Usury Act (Chairperson D G Franzsen) (1967) GP 11/1968) and Second Franzsen Report of the Committee of Inquiry into the Usury Act (Chairperson D G Franzsen) (1977)).

¹¹¹¹ Act 73 of 1968.

¹¹¹² Considerable amendments were made to this Act in 1980, specifically through section 9 of the Limitations and Disclosure of Finance Charges Amendment Act 90 of 1980.

¹¹¹³ Hereinafter the 'Credit Agreements Act'. Cf paragraph 4.2 *infra* for more detail. And for an historical overview cf Otto *Die Regte van 'n Huurkoper tov Beëindiging van die Kontrak* LLd Thesis 1980 UP.

¹¹¹⁴ Similarly two acts governed the sale of land on instalments, namely, the Usury Act and the Alienation of Land Act (Grové and Otto *Basic* 2002 5). The regulation of sale of land on instalments is currently still covered by two Acts, namely, the Alienation of Land Act which has remained in force and National Credit Act and its Regulations. Schedule 2 of the National Credit Act provides that the provisions of the National Credit Act take preference over the provisions in Chapter II of the Alienation of Land Act. Chapter II deals with the sale of land on instalments. Examples where there is a conflict between the two Acts, therefore the National Credit Act prevailing, are the provisions dealing with prohibited terms in agreements (section 15 (1) of the Alienation of Land Act and section 90 (2) of the National Credit Act) and the provisions dealing with the termination and enforcement of contracts (section 19 of the Alienation of Land Act and sections 129 and 130 of the National Credit Act). For a discussion on the overlap of the sections of these two Acts cf paragraph 5.6.1.8 *infra*.

¹¹¹⁵ A similar system was in place in England. Goode described credit transactions as capable of division 'into two separate, self-contained compartments, [so] that two parallel and distinct branches of law have developed, one to regulate lending, and the other to regulate sales on credit, each branch having its own separate rules and transactions being slotted neatly into one

contractual aspects were regulated by the Credit Agreements Act and the financial aspects by the Usury Act 73 of 1968.¹¹¹⁶ This distinction made it necessary for practitioners and the courts to understand and use these Acts in tandem.¹¹¹⁷ The practicability of this system of two separate Acts governing one area of law was criticized as artificial and unnecessary.¹¹¹⁸

The Credit Agreements Act controlled credit agreements in terms of which certain goods were purchased or leased on credit or services rendered on credit and the Usury Act controlled the salient aspects of loan agreements. The Credit Agreements Act had a life span of some twenty-four years, and the Usury Act of some thirty-seven years, both collecting, over time, much case law on the application of their sections. Due to the Credit Agreements and Usury Acts' common law 'experience' and because the National Credit Act is so relatively 'young', drawing on the case law from the previous dispensation will be of value both to practitioners and courts, when advising their clients or deciding on what import the sections of the Act may have, respectively. What follows is a brief orientation of the three Acts; that is the repealed Credit Agreements Act, the repealed Usury Act and the current National Credit Act.

4.2 The Credit Agreements Act 75 of 1980

4.2.1 Application of the Credit Agreements Act

The preamble of the Credit Agreements Act outlined its objectives as follows: 'to provide for the regulation of certain transactions in terms of which movable goods are purchased or leased on credit or certain services are rendered on credit'.¹¹¹⁹

set or the other' (Goode in Diamond *Instalment Credit* taken from Duggan and Lanyon *Consumer Credit Law* 1999 56).

¹¹¹⁶ Hereinafter the 'Usury Act'.

¹¹¹⁷ Grové and Otto 2002 12.

¹¹¹⁸ 'The two acts were originally meant to function complementarily, however, they were administered by different government departments for a certain period of time, and this created problems for credit consumers and the credit industry. It followed, that in some transactions, both the Usury Act and the Credit Agreements Act would apply; in other transactions only the Usury Act, and not the Credit Agreements Act; and *vice versa* (Grové and Otto 2002 5).

¹¹¹⁹ The Credit Agreements Act also repealed the Hire-Purchase Act 1942.

Credit agreements regulated by the Credit Agreements Act and as defined by this Act were 'credit transactions' and 'leasing transactions'.¹¹²⁰ Consequently, the sale of movable goods on credit, rendering of services on credit and a lease of moveable goods were viewed as credit agreements.¹¹²¹ Cash transactions were excluded as the Credit Agreements Act was applicable to credit or leasing transactions with the price to be paid in instalments at a fixed or determinable future date.¹¹²²

The Credit Agreements Act was limited to transactions which the Minister of Trade and Industry determined from time to time by notice in the Gazette. The Minister had declared the transactions to be applicable to the leasing or selling of goods mentioned in the regulations to the Act,¹¹²³ provided the cash price¹¹²⁴ of the goods did not exceed R500 000¹¹²⁵ and provided that the duration of the credit agreement was not to be less than six months.¹¹²⁶ The Credit Agreements Act was, furthermore, not made applicable to goods which were sold or leased with the sole purpose of onward selling or leasing the goods to others.¹¹²⁷ Dealers, lessors or manufacturers were thus not protected by the Credit Agreements Act if they purchased or leased movable property with the intention to sell or lease same to their customers.¹¹²⁸ It was said that it was only the 'end

¹¹²⁰ These transactions are discussed in paragraph **Error! Reference source not found.** *infra*.

¹¹²¹ Section 1 of the Credit Agreements Act.

¹¹²² Otto *Credit Law Service* 1991 paragraph 6 and Fouché *Legal Principles of Contracts and Commercial Law* 2005 147.

¹¹²³ GN R402 in RG 3147 1981.02.27, as amended by GN R2233 in RG 3496 1982.10.15, GN R2827 in RG3524 1982.12.31, GN R946 in RG 4206 1988.05.05 and GN R989 in RG 4850 1992.03.27.

¹¹²⁴ 'Cash price' was defined in the Act in relation to credit transactions in terms of which a service is rendered, as 'the cash price at which the credit receiver may obtain that service from the credit grantor' and in relation to a leasing transaction as 'the cash price at which the goods leased in terms of that leasing transaction are normally sold by the credit grantor on the date on which that leasing transaction is entered into or, if the credit grantor is not a trader normally selling any such goods, the reasonable money value of those goods as agreed upon between the credit grantor and the credit receiver' (section 1 of the Credit Agreements Act). 'Cash price' was also defined in the regulations of GN R402 in RG 3147 1981.02.27.

¹¹²⁵ GN R2233 in RG 3496 1982.10.15 and GN R946 in RG 4206 1988.05.05.

¹¹²⁶ GN R2233 in RG 3496 1982.10.15.

¹¹²⁷ *Standard Credit Corporation Ltd v Strydom* 1991 3 SA 644 (W). The same restriction has not been incorporated in the National Credit Act of paragraph 4.4.3 *infra* for a discussion on the application of the Act.

¹¹²⁸ Section 2 (1)(a) of the Credit Agreements Act. Cf also *Standard Credit Corporation Ltd v Strydom supra* and *Parker v Dorbyl Finance (Pty) Ltd* 1997 1 SA 862 (A). The credit receiver's

consumer' which enjoyed the protection of the Credit Agreements Act.¹¹²⁹ This Act was, in addition, not applicable to the sale or lease of goods on credit if such goods were to be used in connection with manufacturing, mining, engineering and building including building of roads.¹¹³⁰ Finally, the Credit Agreements Act was not applicable were the State was the credit grantor.¹¹³¹ As seen from the above discussion and with respect to the application of the National Credit Act,¹¹³² the Credit Agreements Act was relatively narrow in scope.

4.2.2 Definition

The Credit Agreements Act differentiated between credit transactions,¹¹³³ credit agreements,¹¹³⁴ leasing transactions,¹¹³⁵ albeit the latter two fell within the definition of the former, and instalment sale transactions.¹¹³⁶

intention or purpose with the goods had to be present at the time the contract was concluded (Otto *Credit Law Service* 1991 paragraph 7, Grové and Otto 2002 15 fn 38).

¹¹²⁹ Van Jaarsveld *et al Suid-Afrikaanse Handelsreg* 1988 390.

¹¹³⁰ Section 2 (1)(a) of the Credit Agreements Act.

¹¹³¹ Section 2 (1)(b) of the Credit Agreements Act.

¹¹³² Cf paragraph 4.4.3 *infra*.

¹¹³³ Some debate existed over whether the words 'or in whole or in part' qualified instalments and whether the Act applied to transactions where the price was to be paid in future by way of a lump-sum payment. A credit transaction was defined as a form of credit agreement and applied to both sales and services, it was defined as: (a) a transaction, including an instalment sale transaction, in terms of which goods are sold by the seller to the purchaser against payment by the purchaser to the seller of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future; (b) a transaction in terms of which a person renders a service against payment to him by the person to whom the service is rendered of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future (section 1 of the Credit Agreements Act). A credit transaction was defined as a form of credit agreement and applied to both sales and services, it was defined as some debate existed over whether the words 'or in whole or in part' qualified instalments and whether the Act applied to transactions where the price was to be paid in future by way of a lump-sum payment (Otto *LAWSA* first reissue vol 5 (1) 1994 paragraph 7, Otto *Credit Law Service* 1991 paragraph 7, Diemont and Aronstam 1982 46-47, *Sandoz Products (Pty) Ltd v Van Zyl NO* 1996 3 SA 726 (C) and Otto JM 'Credit Card Transactions and a Spouse's Consent in terms of the Matrimonial Properties Act' 1997 *TSAR* 163).

¹¹³⁴ A 'credit agreement' was defined as: '(a) a credit transaction or a leasing transaction; (b) a transaction which or transactions which together have the same import as a transaction referred to in paragraph (a), irrespective of the form of the first-mentioned transaction or transactions and irrespective of whether any such transaction or transactions are subject to a resolutive or suspensive condition' (section 1 of the Credit Agreements Act).

¹¹³⁵ This was a transaction in terms of which a lessor leased goods to a lessee against payment by the lessee to the lessor of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future, but did not include a transaction by which it was agreed at the time of the conclusion thereof that the debtor or any person on his behalf, would at any stage during or after the expiry of the lease or after the

The definition of a 'credit agreement' encompassed a credit transaction in terms of which movable goods were sold or services were rendered on credit, as well as leasing transactions in terms of which movable goods were leased and the price paid in instalments.¹¹³⁷ The inclusion of a lease of movable goods in the Credit Agreements Act was a departure from the Hire-Purchase Act, which it repealed.¹¹³⁸ The purpose of the latter part of the definition was to prevent simulated contracts from being entered into for the purpose of evading the reach of the Act.¹¹³⁹ In *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd*¹¹⁴⁰ it was held that the court would not consider itself bound by the designation given by the parties to their contract, but would have regard to the contract as a whole and give effect to what it regarded as the true import thereof.

The first part of the definition of a 'credit transaction' did not address the issue of transfer of ownership with regards the sale of movable goods on instalments. It was submitted that in such events the common-law principles would be applicable and therefore the rule that ownership is transferred upon delivery and delivery takes place before the full price has been paid, would apply.¹¹⁴¹ It was,

termination of that transaction become the owner of those goods or after such expiry or termination retain the possession or use or enjoyment of those goods (section 1 of the Credit Agreements Act).

¹¹³⁶ These were defined as: '(a) goods are sold by the seller to the purchaser against payment by the purchaser to the seller of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future; and (b) the purchaser does not become the owner of those goods merely by virtue of the delivery to or the use, possession or enjoyment by him thereof; or (c) the seller is entitled to the return of those goods if the purchaser fails to comply with any term of that transaction' (section 1 of the Credit Agreements Act).

¹¹³⁷ Section 1 of the Credit Agreements Act.

¹¹³⁸ *Otto Credit Law Service* 1991 paragraph 8 (3) and Fouché 2005 147.

¹¹³⁹ *De Jaager Kredietooreenkomste en Finansieringskoste* 1982 10. Interestingly a similar non-evasionary concept was incorporated in the 1987 European Directive (Directive 87/102/EEC for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer credit OJ 1987 L 42/48 from the Counsel of 22 December 1986) (now repealed) where Member States were obliged to ensure that the rules set out in the Directive were complied with and were not circumvented as a result of the way in which agreements were formulated, for example by distributing the amount of credit over several agreements (article 14). The 2008 European Directive on credit does not incorporate a similar limitation (Council Directive 2008/48/EC L 133/66 of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC). Cf paragraph 4.5 *infra* for a discussion on these Directives.

¹¹⁴⁰ 1978 2 SA 872 (A) and cf *Margo v Seegers* 1980 3 SA 708 (W).

¹¹⁴¹ *Grové and Otto* 2002 14.

thus, not at all uncommon for reservation of ownership clauses¹¹⁴² to be incorporated in credit agreements.

The latter part of the definition of the 'instalment sale transaction', that is (b) and (c) distinguished it from the normal credit transaction. It was suggested that by the phrase 'the purchaser [...] does not become owner of the goods [...] by [...] use, possession or enjoyment', the legislature had 'something like acquisitive prescription in mind'¹¹⁴³ or that in a certain sense the section was merely 'stating the obvious'.¹¹⁴⁴ It was also suggested that when defining the 'leasing transaction' 'the legislature had the normal, everyday contract of lease of movable goods in mind'.¹¹⁴⁵ The Credit Agreements Act was applicable only to movable goods. In fact 'goods' were defined in the Act as such.¹¹⁴⁶ The same definition has not been provided in the National Credit Act.¹¹⁴⁷ The problem with this lack of definition in the contemporary Act is that various types of credit agreements, as defined in the Act refer to 'goods' or 'things'. The reasoning for this differentiation has not been explained in the Act. Furthermore, unlike the Credit Agreements Act, the National Credit Act is applicable to credit agreements which involve immovable property.¹¹⁴⁸

¹¹⁴² Otherwise known as a *pactum reservati dominii*, which clause was described as the 'very essence of a hire-purchase agreement (Grové and Otto 2002 14 fn 30, Otto JM 'The Background to and Scope of the Credit Agreements Act' 1980 *BML* 21 22 and Otto *Credit Law Service* 1991 paragraph 7).

¹¹⁴³ Otto 1980 *BML* 22, Otto *LAWSA* 1994 paragraph 7, Otto *Credit Law Service* 1991 paragraph 7 and De Jager *Credit Agreements and Finance Charges* 1981 20.

¹¹⁴⁴ Grové and Otto 2002 14 fn 31.

¹¹⁴⁵ Fouché 2005 149.

¹¹⁴⁶ Section 1 of the Credit Agreements Act.

¹¹⁴⁷ Cf paragraphs 4.4.3 and 4.4.4 *infra* for a discussion on the application of the Act and classification of credit agreements, respectively.

¹¹⁴⁸ See paragraph 4.4.3 *infra*. Interestingly enough, the word 'service', as used in the Credit Agreements Act did not include a service that was rendered or provided by a person practising a profession in respect of which his name had in terms of any Act of Parliament been entered into a roll or register (section 1 of the Credit Agreements Act).

4.2.3 Requirements for a Credit Agreement

The Credit Agreements Act required that the credit agreement, as a formality, be in writing.¹¹⁴⁹ Unlike its predecessor, the Hire-Purchase Act, the Credit Agreements Act did not render credit agreements that were not reduced to writing, invalid.¹¹⁵⁰ It did, however, render the failure to reduce the agreement to writing a criminal offence in terms of section 23. The Credit Agreements Act listed the following minimum statutory requirements, accordingly a credit agreements needed to:¹¹⁵¹

- be reduced to writing and signed by or on behalf of every party thereto;
- state the names of the credit grantor and the credit receiver and their business or residential addresses or, if they did not have such addresses, any other address in the Republic;
- state the amount paid or to be paid as an initial payment or as initial rental;
- contain a description whereby the goods or service to which that credit agreement related, and any goods delivered to the credit grantor as payment, could be readily identified;
- if it was an instalment sale transaction, it had to state the conditions, if any, as to the reservation and passing of the ownership of the goods to which that credit agreement related;
- if it was an instalment sale transaction or a leasing transaction, it had to state the conditions, if any, as to the right of the credit grantor to the return of the goods to which that credit agreement related;
- contain a reference to the provisions of section 13;¹¹⁵²
- be in the official language which the credit receiver could request in writing;
- have printed on the face thereof in bold type capital letters the wording of section 13 (1), with a clear space of not less than one centimetre immediately between that wording and any other wording on the same page.

¹¹⁴⁹ Section 5 (1)(a) of the Credit Agreements Act.

¹¹⁵⁰ Fouché 2005 149.

¹¹⁵¹ Section 5 of the Credit Agreements Act.

¹¹⁵² Section 13 referred to the right of the credit receiver to terminate the credit agreement (the so-called 'cooling-off' right). Cf paragraph 4.2.6.1.2 *infra* for a discussion on this right in terms of the Credit Agreements Act.

4.2.4 Prohibition of Certain Agreements

Sections 6, 7 and 10 of the Credit Agreements Act prohibited the inclusion of certain undertakings by the parties to a credit agreement, certain actions by the parties or certain agreements in general.¹¹⁵³ The Act contained a general provision which provided that any person who contravened or failed to comply with the Act would be guilty of an offence.¹¹⁵⁴ Furthermore, the Act introduced criminal vicarious liability.¹¹⁵⁵ Such provisions in credit legislation counter the often harsh terms of standard-form contracts and prohibit provisions which in the past were regularly included in contracts of the debtor.¹¹⁵⁶

Furthermore, the Credit Agreements Act prohibited certain acts, contracts and also certain terms in credit agreements. A credit grantor could not require or induce a credit receiver to acknowledge the receipt of goods or services unless the goods had been delivered or services rendered;¹¹⁵⁷ the result was that such acknowledgement would be valid but the credit grantor was guilty of an offence.¹¹⁵⁸ No person was entitled to be a party to any agreement or document

¹¹⁵³ Acts prohibited included: where a person agreed to enter into a credit agreement in the future, whether as grantor or receiver; where a person acting on behalf of the credit grantor was appointed or deemed to be the credit receiver's agent; where the credit grantor was exempted from liability for any act, omission or representation by any person acting on his behalf; the liability of the credit grantor in terms of an implied warranty or implied guarantee; the agreement could not provide for the credit grantor or a person acting on his behalf to enter premises to repossess goods or exempt them from liability for such entry; the credit receiver was not entitled to choose any address other than his residential or business address as *domicilium citandi et executandi*; the credit receiver could not agree to forfeit payments of claims in respect of goods or services if he failed to comply with a term of the agreement before the goods are delivered or the services rendered; the agreement could not prohibit the credit receiver from resiling from the agreement, if without reluctance on his part to receive performance, the credit grantor had not performed within thirty days after the date of the agreement; the parties could not fail to determine the period of the agreement; the credit receiver could not guarantee or warrant that the agreement was signed on the business premises of the credit grantor; the credit receiver could not acknowledge that the credit grantor or his representative did not make any representations or give warranties before the conclusion of the contract or in connection with the credit agreement; a provision where the credit consumer acknowledged that he had inspected the goods was also void.

¹¹⁵⁴ Section 23. This meant that acts which would normally only have private law consequences were now criminalized (*Otto Credit Law Service* 1991 paragraph 10.1).

¹¹⁵⁵ Thus if a manager, agent or employee of a credit grantor did or omitted to do any act which would be an offence for the credit grantor, it was presumed that the credit grantor had done or omitted to do it himself, and he was therefore guilty of an offence (section 24). For a discussion of *Otto Credit Law Service* 1991 paragraph 10.1.

¹¹⁵⁶ *Otto Credit Law Service* 1991 paragraph 20.

¹¹⁵⁷ Section 6 (3) of the Credit Agreements Act.

¹¹⁵⁸ Section 23 of the Credit Agreements Act.

that had the effect of cancelling and substituting an earlier agreement in terms of which the goods or part of the goods to which the earlier agreement related and any payment or consideration made in terms of it were used as a deposit in terms of the second agreement.¹¹⁵⁹ Contravention of the section constituted an offence but left the contract intact.¹¹⁶⁰ A prospective credit grantor or his manager or employee could not, as an inducement to enter into a credit agreement, offer, give or promise any benefit to a prospective credit receiver unless such benefit in the ordinary course of events, constituted a condition of the credit agreement. Offering such a benefit did not affect the contract, in fact the credit receiver could enforce the benefits but the credit grantor was guilty of an offence.¹¹⁶¹

A person was prohibited from ceding more than 25% of his income as security for payments under a credit agreement.¹¹⁶² A credit grantor was not entitled to accept post-dated negotiable instruments as payment of the deposit.¹¹⁶³ A credit grantor was not permitted to require or induce a receiver to sign a document to terminate a credit agreement and return the goods before the thirty days' notice prescribed by section 11 of the Credit Agreements Act had expired.¹¹⁶⁴ Furthermore, a credit grantor or his manager or employee could not enter into a credit agreement with a person who was under an administration order if the price payable exceeded R200 and the persons' gross monthly income was less than R500 unless the administrator consented in writing.¹¹⁶⁵ The contract was nevertheless treated as valid; the credit grantor would, however, have been guilty of an offence.¹¹⁶⁶ The waiver by the credit receiver of any right conferred by the Act was invalid and the waiver therefore void¹¹⁶⁷ and an offence was

¹¹⁵⁹ Section 6 (4) of the Credit Agreements Act.

¹¹⁶⁰ Diemont MA and Aronstam PJ *The Law of Credit Agreements and Hire-Purchase in South Africa* 1982 117.

¹¹⁶¹ Section 23 of the Credit Agreements Act, Flemming HCJ *Krediettransaksies* 1982 122 and Otto *Credit Law Service* 1991 paragraph 21.

¹¹⁶² Section 9 (1) of the Credit Agreements Act.

¹¹⁶³ Section 10 of the Credit Agreements Act.

¹¹⁶⁴ Section 12 (3) of the Credit Agreements Act.

¹¹⁶⁵ Section 20 of the Credit Agreements Act.

¹¹⁶⁶ Section 23 of the Credit Agreements Act. No countervailing section protected the credit grantor in this manner.

¹¹⁶⁷ Section 22 of the Credit Agreements Act.

committed.¹¹⁶⁸ Regulation 5 prohibited a credit agreement from being concluded if the terms included that payments, other than the deposit, were to be made before the goods had been delivered¹¹⁶⁹ or that any instalment payable after the deposit differed by more than 10% from another, with the exception of the final instalment which could be smaller.¹¹⁷⁰ No advertisement prohibited by the Minister of Trade and Industry as being in conflict with the Credit Agreements Act was allowed.¹¹⁷¹ No person was entitled to use personal information, such as pin codes and bank cards as security for any money lending transactions or as collection arrangement.¹¹⁷² The Minister regulated that any contravention of this kind constituted an offence.¹¹⁷³

The sanctions for the failure to adhere to these prohibitions were criticised as not being sufficiently crystallised in the Credit Agreements Act and depended on the interpretation of the statutory provision, whether the contract as a whole or only a part thereof was void or whether the parties were guilty of an offence.¹¹⁷⁴ The following comment expresses some of the difficulties encountered:¹¹⁷⁵

Various writers have experienced problems with the interpretation of the Act and the sanctions. They usually suggest a solution on an *ad hoc* basis. While it is conceded that certain general rules regarding the effect of acts in conflict with statutory provisions have been developed by the courts, it remains a matter of contract in each case.

4.2.5 Initial Payment and Manner of Payment

The Credit Agreements Act stipulated that a credit agreement would not be binding until the credit receiver had paid the initial deposit or rental as prescribed

¹¹⁶⁸ Section 23 of the Credit Agreements Act.

¹¹⁶⁹ Except where the goods had been imported as per order of the credit receiver or manufactured according to his requirements.

¹¹⁷⁰ This was to prevent the so-called balloon payments, with a series of small instalments and a large one at the end. There were certain exceptions to this rule, cf regulation 5 (b) (*Otto Credit Law Service* 1991 paragraph 21).

¹¹⁷¹ Section 3 (1)(A) of the Credit Agreements Act.

¹¹⁷² R6959 Government Gazette 20145 of 13 December 2000.

¹¹⁷³ Section 17 of the Usury Act was referenced.

¹¹⁷⁴ Fouché 2005 152.

¹¹⁷⁵ *Otto LAWSA* paragraph 19 vol 5, cf also De Jaager 1981 52 and Flemming 1982 108.

by regulation.¹¹⁷⁶ This deposit was calculated on the cash price and consequently varied for different transactions.¹¹⁷⁷ The initial payment could in whole or in part have consisted of goods.¹¹⁷⁸ Thus goods could be traded in when other goods were purchased on credit.¹¹⁷⁹ The credit receiver had to obtain the money for the deposit himself and could not have the money advanced by the credit grantor to enable him to pay the deposit.¹¹⁸⁰ Furthermore, the regulations of the Credit Agreements Act stipulated the maximum periods of payments for various credit agreements.¹¹⁸¹

Section 9 (1) of the Credit Agreements Act prevented a credit receiver from ceding or hypothecating more than 25% of the amount that was periodically paid to him by way of salary or maintenance, as security for payments in terms of a credit agreement. When determining what constituted the 25% all credit agreements entered into by that credit receiver were taken into account and any cession or hypothecation was invalid to the extent that it exceeded the 25% of the salary or maintenance.¹¹⁸² A credit receiver was, at any time, entitled to revoke any authority that had been given by him to collect his salary or maintenance or part of it even if it was for less than 25%.¹¹⁸³ Revocation of such authority was not considered breach of contract on the part of the credit receiver.¹¹⁸⁴

¹¹⁷⁶ Section 6 (5) of the Credit Agreements Act.

¹¹⁷⁷ Section 7 of the Credit Agreements Act.

¹¹⁷⁸ *Ibid.*

¹¹⁷⁹ Section 5 (1)(d) and 6 (7)(b) of the Credit Agreements Act. Cf *Corwal House v Colsock Agencies* 1963 3 SA 179 (W), *Massyn's Motors v Van Rooyen* 1965 3 SA 717, *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 2 SA 208 (O), cf Otto *LAWSA* 1994 paragraph 23 for a more developed discussion.

¹¹⁸⁰ Section 6 (7)(c) of the Credit Agreements Act. Requiring a minimum deposit, from a consumer's point of view, was a method of ensuring that only a person capable of raising the necessary money would be allowed to bind their credit (Hamman 'Die Wet op Huurkoop No.36/1942' 1942 *THRHR* 68). Requiring an initial deposit with the effect that the balance owing in terms of the contract was reduced had the effect of rendering the instalments smaller and the requirement of a maximum period for the duration of the agreement, were viewed as forms of 'insurance' that consumers did not bind themselves for prolonged periods (Otto *LAWSA* 1994 paragraph 22). This view was developed from the tendency of the consumer to be misled by the fact that instalments are smaller when paid over a longer period, however, these are only relatively smaller and the total amount paid is far greater due to the finance charges that are levied (Otto JM 'Die Gemeeregterlike Verbod teen die Oploop van Rente' 1992 *THRHR* 559).

¹¹⁸¹ Otto *LAWSA* paragraph 22.

¹¹⁸² Section 9 (1) of the Credit Agreements Act.

¹¹⁸³ Section 9 (2) of the Credit Agreements Act.

¹¹⁸⁴ Grové NJ and Jacobs L *Basic Principles of Consumer Credit Law* 1993 34.

4.2.6 Rights and Duties of the Parties

Like the majority of credit legislation generally, the Credit Agreements Act was primarily concerned with safe-guarding the common-law rights of debtors and creating statutory rights for them.¹¹⁸⁵ Accordingly, almost all the provisions in the Credit Agreements Act created or protected or enhanced some form of right for the consumer.¹¹⁸⁶

4.2.6.1. Rights and Duties of the Credit Receiver

4.2.6.1.1. The Section 11 Notice

In terms of section 11 of the Credit Agreements Act the credit receiver was entitled to specific notice prior to a claim for return of the goods by the provider. Accordingly, a credit provider could not claim the return of goods to which the contract related for breach of contract by the credit receiver, unless he had notified the credit receiver of his breach and made demand for performance. The section 11 notice could thus be viewed as an entitlement by the receiver but a duty of the provider. The notification had to be in writing,¹¹⁸⁷ and it had to notify the credit receiver of his failure and had to require him to comply with his obligations within thirty days from the date of handing over of the notice or from date of posting. The credit grantor could only then claim return of the goods if the credit receiver's breach continued beyond the thirty days.¹¹⁸⁸ If the credit grantor had failed to give the required notice and simply repossessed the goods, this would have made him guilty of breach of contract in the form of repudiation and entitled the credit receiver to cancel the contract.¹¹⁸⁹ In the event that the credit receiver had failed on two or more occasions to perform, the credit grantor was entitled to shorten the notice period to fourteen days, as opposed to

¹¹⁸⁵ *Otto Credit Law Service* 1991 paragraph 27.

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ The notice had to be delivered by hand, in which event an acknowledgment of receipt was required, or sent by prepaid registered post at his address as indicated in the credit agreement or the address as changed in accordance with section 5 (4) of the Credit Agreements Act.

¹¹⁸⁸ *Otto Credit Law Service* 1991 paragraph 29.

¹¹⁸⁹ Nagel CJ *et al Business Law* 2000 270.

thirty.¹¹⁹⁰ The section 11 notice was required in the event that the credit receiver failed to comply with any obligation imposed upon him in terms of the credit agreement and in the event that the credit provider wished to claim the return of the goods. Accordingly, the section 11 notice was not required where the credit grantor sought specific performance¹¹⁹¹ from the receiver, or where he sought to enforce an acceleration or penalty clause. And in the event that the grantor sought to cancel the contract on a ground other than breach of contract such as for misrepresentation, section 11 would also not apply.¹¹⁹² This entitlement was described as a protective measure of 'the utmost importance, the purpose of which [was] to grant a purchaser or lessee a second opportunity if he [had] committed a breach of contract'.¹¹⁹³ Section 11 did not prescribe the content of the notice in detail.¹¹⁹⁴ The notice, however, had to be clear enough for the credit receiver to understand that he had committed a breach, that he was obliged to rectify it and the period within which he had to do so.¹¹⁹⁵ The credit grantor could not in the same demand, notify the credit receiver of his breach and also advise him that the grantor would cancel if the credit receiver were to breach again.¹¹⁹⁶

Section 11 prescribed the date of posting of the notice as the relevant date; Otto,¹¹⁹⁷ however, submitted that it would seem that a notice allowing the credit receiver thirty days from receipt thereof would have been in order. He submitted that this would give the receiver a longer period to rectify the breach and such an interpretation aligned itself with the spirit of the Act.¹¹⁹⁸

The issue of whether the notice would only become effective if it had reached the credit receiver was distinguished from the question of the commencement of the period of demand.¹¹⁹⁹ The issue was not finally decided prior to the repeal of the

¹¹⁹⁰ Section 11 of the Credit Agreements Act.

¹¹⁹¹ *Santam Bpk v Dempers* 1987 4 SA 639 (O) 642F.

¹¹⁹² *Otto Credit Law Service* 1991 paragraph 29.

¹¹⁹³ *Nagel et al* 2000 270.

¹¹⁹⁴ *Otto Credit Law Service* 1991 paragraph 29(c).

¹¹⁹⁵ *Ibid.*

¹¹⁹⁶ *Ex Parte Thorrold* 1954 2SA 83 (O) 86.

¹¹⁹⁷ 1991 paragraph 29(d).

¹¹⁹⁸ *Ibid.* Cf also *Otto* 1982 DR 254 and 1984 DR 315.

¹¹⁹⁹ *Otto Credit Law Service* 1991 paragraph 29(e).

Act.¹²⁰⁰ However, the case law is discussed in greater detail in Chapter 5¹²⁰¹ as the interpretation relating to the section 11 notice is of importance in relation to interpretation of section 129 of the National Credit Act.¹²⁰²

4.2.6.1.2. The Cooling-off Right

Section 13 created a statutory right of termination for the credit receiver, otherwise known as a right of cooling-off.¹²⁰³ This section applied to credit transactions and leasing transactions. In terms of this section a credit receiver could, within five days¹²⁰⁴ after the conclusion of the credit agreement, terminate the agreement in writing by sending a notice of termination to the credit grantor by pre-paid registered post or hand delivering it and by tendering the return of the goods already delivered to the credit receiver.¹²⁰⁵ In order to have exercised the section 13 right, the credit receiver must have entered the credit agreement at a place other than the business premises of the credit grantor¹²⁰⁶ and the initiative in respect of the agreement had to have emanated from the credit grantor or his manager or employee.¹²⁰⁷ There was an onus on the credit grantor to draw the attention of the prospective credit receiver, in writing, to the provisions of section 13.¹²⁰⁸ Upon termination of a credit agreement in terms of this section, the credit grantor was obliged, within ten days from the delivery of the notice of termination,

¹²⁰⁰ *Ibid.*

¹²⁰¹ More particularly paragraph 5.5 *infra*.

¹²⁰² Cf paragraph 5.6 *infra*.

¹²⁰³ Cf Van Eeden 'Rescission of Consumer Contracts' 1976 *THRHR* 315, Otto 'Die Beginsel van 'Cooling-off' by Kredietooreenkomste' *De Jure* 1981 101 259 and Otto *Credit Law Service* 1991 paragraph 32 for fuller discussions on the topic.

¹²⁰⁴ These were business days and excluded Saturdays, Sundays and public holidays. If the credit receiver chose to send the notice of cancellation by post it was submitted by Grové and Otto that it was sufficient that the notice was posted within the five day period and did not have to reach the credit grantor within that period (2002 25, Otto *Credit Law Service* 1991 paragraph 32, Burger 'Die Wet op Kredietooreenkomste No 75 van 1980' 1981 *The Magistrate* 2 5, Diemont and Aronstam 1982 168. De Jaager was of the view that the notice had to reach the grantor with five days (Credit Agreements and Finance Charges 1981 77)).

¹²⁰⁵ The duty of the credit receiver was merely to tender the goods, the onus to collect the goods was on the credit grantor (section 13 (1)(b) inserted by the Credit Agreements Amendment Act 9 of 1985).

¹²⁰⁶ Cf Otto *Credit Law Service* 1991 paragraph 32 fn 6 for a discussion on the wording of the legislation being, entering an agreement as opposed to signing an agreement.

¹²⁰⁷ Section 13 (1) of the Credit Agreements Act.

¹²⁰⁸ Section 4 of the Credit Agreements Act. The credit agreement was also required to contain a reference to the provisions of section 13 and to contain the wording as stipulated in section 13 (section 5 (1)(g)(i) of the Credit Agreements Act).

to refund the credit receiver any amounts paid by him and to collect any goods delivered by him in terms of the credit agreement.¹²⁰⁹ The cooling off right has been a phenomenon of many jurisdictions; the first country to implement such a right was Austria in 1961.¹²¹⁰ The cooling-off right is a long-standing consumer protection tool which allows the consumer to exit a contract, subject to procedural adherences, without committing breach.

4.2.6.1.3. The Right of Re-instatement

A further right of the credit receiver under the Credit Agreements Act was a right of reinstatement after he had returned the goods to the credit grantor.¹²¹¹ In terms of section 12 the credit receiver could, within thirty days after the credit grantor had repossessed the goods, claim the return of the goods. This section was applicable to both credit and leasing transactions. Thus, where a credit grantor cancelled a contract due to the receiver's breach and recovered possession of the goods after having given thirty days' notice the receiver was, by virtue of this section, given a second chance to rectify his breach and to continue with the contract.¹²¹² This right of redemption, was subject to the following conditions: the credit grantor should not have obtained the goods by means of a court order¹²¹³; the credit receiver should not have terminated the contract himself; the credit receiver had to, within thirty days of recovery of the goods, pay the amounts due and owing to the credit grantor together with any reasonable costs that the credit grantor may have incurred.¹²¹⁴ The credit grantor was not entitled to refuse return of the goods¹²¹⁵ and was prevented from inducing or requiring the credit receiver to sign a document in terms of which the

¹²⁰⁹ Section 13 (3) of the Credit Agreements Act. The Cooling-off right did not apply if the transaction had been initiated and concluded entirely by means of the official state postal service (regulation 3 of GN R401 in RG 3147 of 1981.02.27 as amended).

¹²¹⁰ Otto *Credit Law Service* 1991 paragraph 30.

¹²¹¹ Section 12 of the Credit Agreements Act. If the credit grantor failed or refused he was in breach of a statutory duty in terms of section 12 (2) and therefore liable for damages (*Da Silvo v Coutin* 1971 3 SA 123 A, Otto JM 'Right of the Credit Receiver to Re-instatement after Return of the Goods to the Credit Grantor' 1981 SALJ 516 and Grové and Otto 2002 47). Furthermore, this constituted an offence in terms of section 23.

¹²¹² Nagel *et al* 2000 272.

¹²¹³ *Trust Bank van Afrika Bpk v Eales* 1989 2 SA 586 (T).

¹²¹⁴ *Mdakane v Standard Bank of South Africa* 1999 1 SA 127 (W) and Grové and Otto 2002 47.

¹²¹⁵ Section 12 (1) of the Credit Agreements Act. Cf Otto 1981 SALJ 516, Otto *Credit Law Service* 1991 paragraph 33 Grové and Otto 2002 46.

credit receiver terminated the credit agreement and agreed to return the goods to the credit grantor before the expiry of the thirty days contemplated in section 11.¹²¹⁶ The credit receiver was obliged to go to the credit grantor's place of business to obtain possession of the goods.¹²¹⁷ If the credit receiver requested it, or if the credit grantor had no place of business, the goods had to be returned to the credit receiver at the premises where they were kept.¹²¹⁸ The credit receiver, within thirty days after the return of the goods to the credit grantor, was obliged to pay all amounts which were then claimable and unpaid in terms of the agreement¹²¹⁹ and all reasonable costs incurred by the credit grantor in connection with the return of the goods.¹²²⁰

4.2.6.1.4. Waiver of Rights

Section 22 of the Credit Agreements Act prevented a credit receiver from waiving any rights granted to him in terms of that Act. A provision in a credit agreement purporting to waive such rights was void.¹²²¹ This provision was seen to safeguard the rights conferred on credit receivers.¹²²² An offence was committed if such rights were waived.¹²²³

4.2.6.1.5. Notification of Location of Goods

In terms of duties, the credit receiver was obliged to advise a credit grantor in writing by registered post, within fourteen days of his change of address or if the goods were removed from the place where they were ordinarily kept, or if he lost possession of the goods.¹²²⁴ Upon request by the credit grantor or the sheriff, the credit receiver was obliged to furnish his residential or business address, the

¹²¹⁶ Section 12 (3) of the Credit Agreements Act.

¹²¹⁷ Grové and Otto 2002 47.

¹²¹⁸ *Ibid.*

¹²¹⁹ If the credit receiver did not pay the amounts within thirty days, he lost his right of reinstatement, however, not his common law rights (*Maswangonyi v First National Western Bank Ltd* 2002 3 SA 365 (W)).

¹²²⁰ Grové and Otto 2002 47.

¹²²¹ Section 22 of the Credit Agreements Act.

¹²²² Nagel *et al* 2000 273.

¹²²³ Section 23 of the Credit Agreements Act and Otto *Credit Law Service* 1991 paragraph 21.

¹²²⁴ Section 8 of the Credit Agreements Act.

premises at which the goods were ordinarily kept and if he had lost possession of the goods, in whose possession they were and the address and location of the goods.¹²²⁵ The receiver's failure to carry out any of his duties would have rendered him guilty of an offence.¹²²⁶

4.2.6.2. Rights and Duties of the Credit Grantor

Some of the duties of credit grantors were directly correlated to the rights of the credit receivers, such as the duty to notify the credit receiver before return of the goods was claimed,¹²²⁷ to notify of the cooling-off right and the duty to keep the goods after repossession for purposes of the right of redemption.¹²²⁸

While consumer legislation is aimed primarily at protecting the consumer, it is purported in this work that the balancing of the rights and duties of the role players in the credit relationship is of utmost importance. Credit providers have, in order to protect themselves against recalcitrant credit consumers, incorporated in standard credit agreements certain clauses that give them certain rights to counter malperformances of consumers.¹²²⁹ The credit grantors under the old regime did not operate any differently.

4.2.6.2.1. The Right to Receive Payment

The first, and most obvious, right of a credit grantor is his right to receive payment in terms of the credit agreement. Section 10 of the Credit Agreements Act prevented the credit grantor from accepting a post-dated instrument as payment for the deposit; but other than that he was entitled to accept negotiable instruments as payment, even if post-dated.

¹²²⁵ *Ibid.*

¹²²⁶ Section 23 of the Credit Agreements Act.

¹²²⁷ For a further discussion on the delivery of the section 11 cf paragraph 5.5.1.3 *infra*.

¹²²⁸ Nagel *et al* 2000 276.

¹²²⁹ *Ibid.*

4.2.6.2.2. Interdict Against Removal or Use

The Credit Agreements Act gave the credit provider the statutory right to interdict against the removal or use of the goods.¹²³⁰ The notice was issuable at the same time as the summons in any proceedings relating to any credit agreement.¹²³¹ The notice could prohibit any person from using the goods or removing them from the place where they were kept when the summons was served, or from allowing the use or removal of them by anyone other than the plaintiff or sheriff.¹²³² The notice had the effect of an interdict against any person that had knowledge of it. While no person could ignore or fail to comply with the notice, they could apply to court to have it set aside.¹²³³ This remedy did not constitute a means of repossessing the goods but served only as an interdict against the removal of the goods.¹²³⁴

4.2.6.2.3. Orders Restricting or Prohibiting Use

In terms of section 17 of the Credit Agreements Act, the credit grantor could apply to court, while proceedings were pending, to have the goods in question valued or protected from damage or depreciation including orders restricting or prohibiting the use of the goods or as to the custody thereof.

4.2.6.2.4. Additional Finance Charges

Upon breach of contract by the credit receiver, the credit grantor was entitled to claim additional finance charges at the same rate that had been charged on the outstanding balance of the principal debt.¹²³⁵

¹²³⁰ This notice could be issued simultaneously with the summons (section 18 (1) of the Credit Agreements Act).

¹²³¹ Section 18 (1) of the Credit Agreements Act.

¹²³² Section 18 (3) of the Credit Agreements Act.

¹²³³ Section 18 (4) of the Credit Agreements Act.

¹²³⁴ Otto *Credit Law Service* 1991 paragraph 38.

¹²³⁵ Section 4 of the Credit Agreements Act.

4.2.6.2.5. *Lex Commissoriae*, Acceleration, Penalty and Forfeiture Clauses¹²³⁶

The credit grantor was entitled to incorporate a *lex commissoria*¹²³⁷ in the credit agreement. However, its enforcement was subject to section 11 of the Credit Agreements Act.¹²³⁸ Acceleration clauses¹²³⁹ were not prohibited by the Credit Agreements Act, unlike its predecessor the Hire-Purchase Act which limited the enforcement of acceleration clauses.¹²⁴⁰ In the event of penalty and forfeiture clauses, the Credit Agreements Act applied. It provided that a credit receiver that had committed a breach of contract was not bound to make any payment or to perform any act which would place the credit grantor in a better financial position than he would have been in had there not been a breach of the contract.¹²⁴¹ This meant that the credit grantor could recover his actual damages and no more.¹²⁴² This section only applied where the credit agreement had not been terminated or rescinded. The duties of the credit grantor in a credit agreement, were also largely defined by section 3 of the Usury Act, these are discussed in the following section.¹²⁴³

4.3. The Usury Act 73 of 1968

4.3.1. Application and Definitions of the Usury Act

The preamble of the Usury Act posited that the purpose of the Usury Act was to 'provide for the limitation and disclosure of finance charges levied in respect of money lending transactions, credit transactions and leasing transactions and for matters incidental thereto'.¹²⁴⁴

¹²³⁶ These clauses are discussed at length in Chapter 6.

¹²³⁷ For a fuller discussion of *lex commissoriae* cf paragraph 6.4.1.3 *infra*.

¹²³⁸ Otto *Credit Law Service* 1991 paragraph 39.

¹²³⁹ For a fuller discussion of acceleration clauses cf paragraph 6.2.2 *infra*.

¹²⁴⁰ They could only be enforced if a certain number and percentage of instalments were due and the consumer had received a ten day notice.

¹²⁴¹ Section 14 of the Credit Agreements Act.

¹²⁴² Nagel *et al* 2000 278. These clauses are more fully discussed at paragraphs 6.2.2, 6.4.1.3 and 6.5.2 *infra*.

¹²⁴³ Cf paragraph 4.3.4.1.

¹²⁴⁴ The Usury Act repealed the 1926 Usury Act.

The Usury Act provided for, *inter alia*, the financing side of the sale and lease of movable goods and the rendering of services on credit and the lending of money. Many definitions and other aspects found in the Usury Act were also contained in the Credit Agreements Act. The purpose of the Usury Act was to ensure that all finance charges were disclosed and to prevent ‘hidden costs’ in credit agreements. Consequently, a credit grantor could not demand or receive finance charges that had not been disclosed in an instrument of debt.¹²⁴⁵ Even though there was overlap between the Credit Agreements and Usury Acts - the definitions of credit and leasing transactions did not correspond, one with the other.¹²⁴⁶

The Usury Act applied to three main classes of transaction: moneylending,¹²⁴⁷ credit¹²⁴⁸ and leasing transactions.¹²⁴⁹

¹²⁴⁵ Otto JM and Grové N ‘Verbruikerskrediet: te Veel Wette, te Min Eenvormigheid’ 1986 *De Rebus* 599

¹²⁴⁶ Section 2 (9) of the Usury Act. Cf also Otto and Grové 1986 *De Rebus* 599.

¹²⁴⁷ A ‘moneylending transaction’ was defined in the Act as: any transaction which, whatever its form may be, and whether or not it forms part of another transaction, is substantially one of money lending, and includes— (a) any agreement in terms of which goods are sold under a condition of repurchase of such goods at a higher price, in which case the lower price at which the goods are sold shall for the purposes of this Act be deemed to be a sum of money lent; (b) any transaction under which goods are purchased by or services are rendered to or any amount of cash is obtained by a credit card holder in terms of a credit card scheme, in which case the price at which the goods are so purchased or such services are so rendered or such amount of cash is so obtained shall for the purposes of this Act be deemed to be a sum of money lent by the manager concerned to such credit card holder; (c) any transaction under which immovable property is sold against payment by the purchaser to, or to any person on behalf of, the seller of a sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future, in which case such sum, excluding finance charges, shall for the purposes of this Act be deemed to be a sum of money lent by the seller to the purchaser, but does not include a transaction under which immovable property is sold and in terms of which—(i) no finance charges are levied by the seller on the purchase price; (ii) the full purchase price is payable against registration of the immovable property in the name of the purchaser or a transferee nominated by the purchaser; and (iii) no interim instalment is payable by the purchaser between the date of the sale and such registration, save for an initial deposit payable in one amount by the purchaser to a practising attorney or an estate agent to be held in trust pending such registration, and rent or occupational interest constituting a reasonable compensation for the use and enjoyment by the purchaser of the immovable property in question.

¹²⁴⁸ A ‘credit transaction’ was defined in the Act as: ‘any transaction, whatever its form may be, and whether or not it forms part of another transaction, by which— (a) a credit grantor sells or supplies to a credit receiver movable property or services against payment by the credit receiver to the credit grantor of a sum of money; or (b) a credit grantor transfers or grants to a credit receiver the use or enjoyment of movable property or services against payment by the credit receiver to the credit grantor of a sum of money’.

¹²⁴⁹ While a ‘leasing transaction’ was defined as: ‘any transaction, whatever its form may be, and whether or not it forms part of another transaction, by which— (a) a lessor leases movable

The court in *C and T Products (Pty) Ltd v MH Goldschmidt*¹²⁵⁰ established that a moneylending transaction, as defined in the Usury Act, had a greater scope of application than a money loan at common law. Three types of moneylending transactions were identified in *S v Friedman Motors (Pty) Ltd*,¹²⁵¹ the first being an ordinary loan, where X loans Y a sum of money. The second, a loan of money that the parties attempted to disguise and the third, an agreement where the parties made no attempt to simulate or disguise their transaction, but entered into a transaction that was not a loan but had the same effect as a loan.¹²⁵²

The definition of a 'credit transaction' in the Usury Act was criticised as not being a paragon of statutory drafting, as paragraph (a) of the definition appeared to incorporate even cash sales.¹²⁵³ However, it was posited that the legislature most probably had transactions in mind where a debt was payable after the conclusion of the contract.¹²⁵⁴ As far as paragraph (b) of the definition was concerned, it was suggested that the legislature had probably intended a permanent transfer of the use or enjoyment of the property, as opposed to a normal common law lease. By virtue of the *eiusdem generis rule*, the element of permanence clearly present in paragraph (a) was then applicable to paragraph (b).¹²⁵⁵

While the definition of 'leasing transaction' did not differentiate between financial and operational leases, and while some jurists¹²⁵⁶ were of the view that the Usury Act should not have applied to operational leases, it was suggested that the situation had been somewhat relieved by the ministerial exemptions that had

property to a lessee; and (b) the amount which is owing or will be owed by a lessee to a lessor in connection with a transaction referred to in paragraph (a), is payable or will be payable after the date of the conclusion of the said transaction' (Grové and Jacobs 1993 14).

¹²⁵⁰ 1981 3 SA 619 (C).

¹²⁵¹ 1972 1 SA 76 T.

¹²⁵² De Jager T *Credit Agreements and Finance Charges* 1981 130.

¹²⁵³ Oelofse 'Book Review: Van Jaarsveld en Oosthuizen SA Mondelsrey 1 1988' 1990 *THRHR* 293 296 and Grové and Otto 2002 18.

¹²⁵⁴ 'The interpretation of the word 'credit' in the definition of 'credit grantor' and 'credit receiver', as well as the objectives and intention of the Act, inevitably [led] to such a deduction' (Grové and Otto 2002 18).

¹²⁵⁵ Grové and Otto 2002 19.

¹²⁵⁶ *Ibid.*

been granted in terms of section 15A and the statutory exemptions in terms of section 15 of the Act.¹²⁵⁷

The definitions of 'credit transaction' and 'leasing transaction' posed a problem, as the definition of 'credit transaction' made no mention of future payments whereas the definition of 'leasing transaction' referred to payment 'after the date of the said transaction'. This led some to conclude that the Usury Act applied to credit transactions on a cash basis as well.¹²⁵⁸ However, such a construction was criticised as running against the context, structure and nature of the Usury Act, which in essence was concerned with the provision of credit.¹²⁵⁹

4.3.2. Transactions Excluded from the Ambit of the Usury Act

The Usury Act did not apply to any of the following transactions: moneylending, credit or leasing transactions that had been entered into before the amendment in 1980 of the Limitation and Disclosure of Finance Charges Act;¹²⁶⁰ transactions of the then Land and Agricultural Bank of South Africa, transactions of the South African Reserve Bank; a money-lending transaction in terms of which a money-lender based outside the Republic granted a loan of money which was outside the Republic to a credit receiver inside the Republic; moneylending transactions where an amount of money was deposited or lent to a banking institution or a building society; any transaction where the principal debt exceeded R500 000 on the date of the transaction;¹²⁶¹ a leasing transaction that was entered into for less than three months, which was not renewed at the expiry of the lease and where the principal debt and finance charges had to be paid before the expiry of the

¹²⁵⁷ *Ibid.*

¹²⁵⁸ Oelofse 1990 *THRHR* 296.

¹²⁵⁹ *Otto Credit Law Service* 1991 paragraph 10.

¹²⁶⁰ Except where the principal debt was increased or the transaction renewed. Section 15 (a) of the Usury Act, *Otto Credit Law Service* 1991 paragraph 11, Grové and Otto 2002 19 and *Boland Bank Bpk v Steele* 1994 1 SA 259 (T).

¹²⁶¹ Section 15 (g) of the Usury Act. The Minister of Trade and Industry could vary the amount by way of regulation in the *Gazette*. Cf *Otto and Grové* 1986 *De Rebus* 599.

lease¹²⁶² and a debenture that had been quoted on the stock exchange in the Republic.¹²⁶³

In terms of section 15A, the Minister of Trade and Industry was empowered, by notice in the Government Gazette, to exempt to the extent that he saw fit, certain categories of transactions from any or all of the provisions of the Act.¹²⁶⁴ Accordingly, the following transactions were exempted: leasing transactions where the lessor and the lessee agreed that the Act would not apply, if the cash price or market value of the book value of the goods exceeded R100 000;¹²⁶⁵ leasing transactions which in terms of the lease agreement may have been terminated by the lessee by written notice at any time after the date on which the agreement was signed, but not in excess of ninety days, without the lessor being held responsible for any additional or increased payments under the lease or for any amount as compensation for its having been terminated;¹²⁶⁶ leasing transactions where the payments under the lease were wholly or partially deductible from the income of the lessee for tax purposes and the ownership of the leased goods would not pass to the lessee at any time during or after the expiry of the period of the lease or after termination of the transaction and the lessee was neither liable for nor guaranteed an amount in respect of the value of the transaction and money-lending transactions where the loan did not exceed R10 000 subject to certain requirements and conditions, which if not satisfied would have had the effect of forcing the transaction under the auspices of the Usury Act, despite that the loan amount was smaller than R10 000.¹²⁶⁷

4.3.3. Requirements for an Agreement Concluded under the Usury Act

¹²⁶² Section 15 (h) of the Usury Act.

¹²⁶³ Section 15 of the Usury Act.

¹²⁶⁴ Section 15A was inserted by section 8 of Act 100 of 1988 and substituted by section 6 of Act 91 of 1989.

¹²⁶⁵ In addition the lessee had to sign a clause in the lease agreement in which he waived the protection granted to him by the Act in order for the agreement to be effective (GN 2262 in GG 11563 of 1998.11.4 as amended by GN 1697 in GG 12040 of 1 August 1989).

¹²⁶⁶ GN 2262 in GG 11563 of 4 November 1998 as amended by GN 1697 in GG 12040 of 1 August 1989.

¹²⁶⁷ This exemption was aimed at the micro lending industry (Grové and Otto 2002 21 fn 69).

Section 3 of the Usury Act required certain particulars to be included in every written contract of loan which fell under the Usury Act. A money-lending transaction had to contain the following particulars:¹²⁶⁸ the cash amount borrowed; the principal debt; the annual finance charge rate as well as the amount of finance charges and the amounts of the instalments and dates when they were payable or the date upon which the whole debt was payable. A credit transaction required the following information to be incorporated:¹²⁶⁹ the purchase price; the principal debt and how it was made up; any deposit payable; the finance charge rate and the amount of finance charges and the date upon which the whole debt became payable or the dates and amounts of the instalments. In terms of leasing transactions the contract required the following particulars:¹²⁷⁰ the cash price or the market value of the leased goods; any deposit payable; the present value of the book value of the goods; the book value of the goods; the principal debt and how it was made up; the finance charge rate, the date when the lessee had to start paying finance charges and the amount thereof and the date upon which the rent was payable or the amount and date of the instalments.¹²⁷¹

If a written agreement did not meet the requirements in terms of the Usury Act, it was not rendered invalid, rather the person who executed it or held it as cessionary was guilty of an offence.¹²⁷² An important sanction was that non-disclosed finance charges could not be recovered except with debit balances in a cheque account.¹²⁷³

As far as prohibitions of certain terms and conditions were concerned, two prominent ones contained in the Usury Act were the prohibition on terms that stipulated for, demanded or received finance charges at a rate exceeding the

¹²⁶⁸ Section 3 (1) of the Usury Act.

¹²⁶⁹ Section 3 (2) of the Usury Act.

¹²⁷⁰ Section 3 (2A) of the Usury Act.

¹²⁷¹ Certain types of transactions did not require the information, such as bills of exchange executed or discounted by a bank and certain public institutions, debit balances on cheque accounts and money loans by an insurer to policy holders.

¹²⁷² Section 3 (6) of the Usury Act.

¹²⁷³ Section 2 (9) of the Usury Act. Cf Otto JM 'Failure to Disclose Finance Charges in an Instrument of Debt' 1998 SALJ 254.

prescribed rate.¹²⁷⁴ Furthermore, a credit receiver was prohibited from recovering more from the debtor than those items specified in section 5 of the Usury Act.¹²⁷⁵

4.3.4. Rights and Duties of the Parties

4.3.4.1. Rights and Duties of the Creditor

4.3.4.1.1. Disclosure Requirements

The rights and duties of the creditor under the previous credit regime were largely regulated by section 3 of the Usury Act. This section differentiates between money lending transactions, credit transactions and leasing transactions. The requirements of disclosure, however, were similar for all three types of transactions. A credit grantor or lessor who transacted credit or leasing transactions in the normal course of his business had to, on demand and before the conclusion of the credit agreement in connection with which finance charges were payable, furnish in writing and, whether or not any such demand was made, set out distinctly in every instrument of debt executed in connection with any such transaction, the following: the selling price of the goods sold or to be sold or the sum of money charged for the use and enjoyment of the goods; all other charges that would form part of the principal debt; the cash amount in money or the reasonable value of goods deducted or which would have been deducted from the selling price at the conclusion of the transaction; the sum of the principal debt; the amount of the finance charges calculated at the annual finance charge rate; the annual finance charge rate; the date upon which or the number of instalments in which the principal debt together with the finance charges had to be paid, the amount of each instalment and the date upon which such had to be paid or the manner in which that date was to be determined.¹²⁷⁶ There were

¹²⁷⁴ Section 2 (1)-(3) of the Usury Act. The Usury Act contained primarily a list of restrictions and limitations.

¹²⁷⁵ Section 5 listed eighteen items, which shall not be listed here as this would be a mere repetition of section 5 of the Usury Act.

¹²⁷⁶ Section 3 (2) and 3 (2A) of the Usury Act.

some exemptions where the duty to supply particulars did not apply. These included a bill of exchange when the bill was executed or discounted by the South African Reserve Bank, the Corporation for Public Deposits or a banking institution; a debit balance in an account with a banking institution out of which withdrawals could have been made by cheque or other instruction of the receiver and a money loan given by the life insurer to the 'owner' of a policy in terms of which the insurer was subject to any obligation, where the loan was secured by the 'pledge' of the policy.¹²⁷⁷

Any person who made or executed or was a party to an instrument of debt which did not comply with the disclosure provisions, knowing that same did not so comply was guilty of an offence.¹²⁷⁸ Any person who wilfully made or executed an instrument of debt that contained statements which were false as to any of the particulars required as indicated above, and any person whom uttered any such instrument knowing that it contained such false statements was guilty of an offence.¹²⁷⁹ Despite these provisions, no instrument of debt would be deemed invalid or defective merely by reason of the fact that it did not comply with the provisions of section 3 of the Usury Act.¹²⁸⁰

4.3.4.1.2. Maximum Rates of Interest

The purpose of the Usury Act was to regulate the limitation and disclosure of finance charges and thus maximum rates allowed in terms of the Act were prescribed frequently by the Minister. The maximum annual finance charge rate at which a creditor could stipulate, demand or receive finance charges varied according to the amount of the principal debt.¹²⁸¹ The National Credit Act serves this function and also regulates maximum finance charge rates for agreements that fall within its ambit.¹²⁸²

¹²⁷⁷ Section 3 (3) of the Usury Act.

¹²⁷⁸ Section 3 (6) of the Usury Act.

¹²⁷⁹ Section 3 (7) of the Usury Act.

¹²⁸⁰ Section 3 (8) of the Usury Act.

¹²⁸¹ Grové and Otto 2002 72.

¹²⁸² Cf section 103 as read with regulation 42 of the National Credit Act.

As far as the common law is concerned, *mora* interest on unpaid interest is not claimable and may be claimed only if the parties have specifically agreed to it.¹²⁸³ The Usury Act made it possible for the creditor to claim *mora* interest on unpaid interest.¹²⁸⁴ The maximum amount that a creditor could recover from a consumer could, however, not exceed the sum of certain defined amounts.¹²⁸⁵ The National Credit Act does not regulate the situation and it is submitted that the common law must be reverted to in such instances.

4.3.4.1.3. Variable Interest Rates

The Usury Act also gave creditors the right to contract for variable finance charges and the Act made provision for variable and non-variable rates.¹²⁸⁶ If the Usury Act was applicable to the transaction, the creditor was obliged to give the debtor notice of the variance no later than three months after the date upon which the alteration of the finance charge rate had commenced.¹²⁸⁷ The Act did not provide a sanction for failure to deliver such notice, however, it was submitted¹²⁸⁸ that the creditor would be entitled subject to the general principles and the provisions of the contract between the parties, to receive or claim the new rate even though no notice had been given. Failure to give notice did,

¹²⁸³ *United Building Society v Labuschagne* 1950 4 SA 651 (W).

¹²⁸⁴ Sections 4 and 5 of the Usury Act applied. Cf Grové and Otto 2002 74 for a fuller discussion and Botha D 'Interest on Debts' 1989 *SA Journal of Economic and Management Sciences* 1.

¹²⁸⁵ Sections 5 (1) and 5A of the Usury Act. These included the principal debt; where money loans were concerned and a bond was registered over immovable property as security, certain expenses which the creditor incurred after the conclusion of the contract as well as inspection fees for the purposes of granting a loan; finance charges on the principal debt and if applicable on certain defined expenses; interim interest if applicable; *mora* interest if applicable; legal costs; reasonable ledger fees in case of a cheque or credit card account; costs of repair or maintenance of leased goods; raising fees payable to attorneys, auditors and estate agents; reasonable underwriting fees; administration fees; administration fees recoverable in terms of a home loan and certain disbursements by mortgagees (Grové and Otto 2002 82).

¹²⁸⁶ Section 2B (1) of the Usury Act. The parties had to make an election in the contract. It must be noted that in terms of common law the Supreme Court of Appeal finalised the matter in 1999, holding clauses allowing for variable interest rates valid in principle and not void for vagueness. The court also held that there is no difference between overdrawn cheque accounts and other loans. The debtor may, however, challenge the amended rate if he is of the view that the creditor has failed to exercise its discretion in a reasonable manner (*NBS Boland Bank Ltd v One Berg River Drive CC*; *Deeb v ABSA Bank Ltd*; *Friedman v Standard Bank of South Africa Ltd* 1999 4 SA 928 (SCA)).

¹²⁸⁷ Section 10 (6) of the Usury Act.

¹²⁸⁸ Otto *Credit Law Service* 1991 paragraph 44.

however, render the creditor guilty of an offence.¹²⁸⁹ The National Credit Act also permits and regulates variable interest rates to apply to credit agreements, provided that such variation is by fixed relationship to a reference rate, which must be stipulated in the agreement.¹²⁹⁰

4.3.4.1.4. Disclosure Requirements

The Usury Act obliged a creditor who carried on the business of a money-lender or who transacted credit and leasing transactions in the normal course of business to provide a free written quotation to a prospective debtor on request.¹²⁹¹ The same obligation was not imposed on a person who lent money or granted credit on an incidental basis.¹²⁹² The particulars that had to be incorporated in such a quotation were the same as those that had to be incorporated in an instrument of debt.¹²⁹³

The disclosure requirements of each type of transaction that was regulated by the Usury Act have been listed above. The Act did provide that such particulars furnished in a document that contained other information had to be furnished in writing that was not less conspicuous than the writing in which the other information was furnished.¹²⁹⁴ The National Credit Act also imposes certain pre-agreement disclosure requirements.¹²⁹⁵

The Usury Act also imposed certain post-contract disclosure obligations on the creditor. Within fourteen days of conclusion of the agreement, a creditor that carried on the business of money lender, credit grantor or lessor had to provide

¹²⁸⁹ Section 17 of the Usury Act (*Absa Bank Bpk v Saunders* 1997 2 SA 192 (NC)).

¹²⁹⁰ Section 103 (4) of the Act, cf also Van Zyl in Scholtz 2014 paragraph 10.6.5 and paragraph 6.5.1 *infra* on recovery of interest as damages.

¹²⁹¹ Section 3 (1) of the Usury Act.

¹²⁹² Section 2 of the Usury Act.

¹²⁹³ Section (2A) of the Usury Act.

¹²⁹⁴ Section 3 (4) of the Usury Act. Diemont and Aronstam 1982 296, De Jager 1981 172 and Grové and Otto 2002 88.

¹²⁹⁵ Cf paragraph 4.4.5 *infra* for an elaboration.

the consumer with a free duplicate or copy of the instrument of debt.¹²⁹⁶ The creditor was obliged to provide the consumer with periodic statements, the first one within three months of conclusion of the agreement and after that at intervals not less than three months.¹²⁹⁷ Upon written demand and against payment of a fee, the creditor was obliged to provide the consumer with a comprehensive statement of the account.¹²⁹⁸ The National Credit Act also makes provision for a consumer to receive a copy of the credit agreement to which it is a party,¹²⁹⁹ as well as prescribing the form, content and manner in which documents are to be received.¹³⁰⁰

4.4. The National Credit Act 34 of 2005

The National Credit Act is a seemingly cohesive, legislative enactment brought in to regulate the credit market.¹³⁰¹ It swept the dual system of the Credit Agreements Act and Usury Act under the rug, repealing both Acts and simultaneously widening the scope of the legislative parameters in the credit arena.¹³⁰² The National Credit Act was assented to by the President on the 15

¹²⁹⁶ Section 10 (1) of the Usury Act; section 10 (2) entitled the consumer to a second copy against payment of a prescribed fee. Section 10 (5) prescribed certain exceptions to the provision of section 10 (1).

¹²⁹⁷ Section 10 (3) of the Usury Act – which section also directed how these should be sent and the particulars required in them.

¹²⁹⁸ Section 10 (2) of the Usury Act.

¹²⁹⁹ Section 93 of the Act.

¹³⁰⁰ Cf sections 63, 64, 65 and 93 of the Act.

¹³⁰¹ This brought about a consolidation of credit legislation in South Africa (Van Zyl E in Scholtz *Guide to the National Credit Act* 2014 paragraph 18.1). Although the sale of land on instalments are regulated by a separate Act, The Alienation of Land Act, 68 of 1981 and certain juristic persons fall beyond the scope of the Act to be regulated by common law.

¹³⁰² Section 172 (4) of the Act repealed the Usury Act, the Credit Agreements Act and the Integration of Usury Laws Act Act 57 of 1996. The Act also affects fifteen other Acts, either through amendment or partial repeal. Cf section 172 (2) read with Schedule 2 of the Act. Despite the repeal of the previous credit laws, for a period of three years after the effective date and in respect of matters that occurred during the period of three years immediately prior to the effective date, the transitional requirements of the Act empowered the National Credit Regulator to exercise any power of the Minister in terms of any such provision of the Act to investigate and prosecute any breach of that Act, as if it were proceeding with a complaint in terms of the Act. Furthermore, Schedule 3 empowered the Tribunal to make any order that it is authorised to make in terms of the Act that could have been made in the circumstances by a court under any previous Act as if it were proceeding with a complaint in terms of the Act. Cf Item (10) of Schedule 3. The final transitional remedy that Schedule 3 ordained is one relating to regulations. Item 11 of the Schedule states that for a period of sixty business days after the effective date, the Minister was empowered to make any regulation contemplated in the Act without meeting the procedural requirements as set out in section 171 or elsewhere in the Act, provided the Minister

March 2006¹³⁰³ and came into full force and effect on 1 June 2007.¹³⁰⁴ The Act became operative in three phases in order to afford credit providers sufficient time to become registered as such with the National Credit Regulator¹³⁰⁵ and to put in place the necessary systems, contracts and other documentation to ensure compliance with the Act.

The Act can, at first glance, be described as a somewhat daunting piece of legislation, not merely due to its volume,¹³⁰⁶ but also due to its introduction of new terms,¹³⁰⁷ novel ideas and concepts.¹³⁰⁸ Upon examination of some of the 'new-fangled' terms, one is tempted to conclude that the Act introduced 'new credit agreements', however, it is submitted, that it would be more accurate to state that the Act 'brought in' new *terms* to better regulate already existing credit agreements, or at the very least, existing credit practices.¹³⁰⁹

published such proposed regulations in the *Gazette*, allowing for a period of at least thirty business days for comment.

¹³⁰³ GN 230 *Government Gazette* 28619 of 15 March 2006.

¹³⁰⁴ For the particulars of the whole process cf Otto JM and Otto R-L *The National Credit Act* 2013 8-9.

¹³⁰⁵ Cf Chapter 3 of the Act for registration requirements. Until provincial legislation has been enacted in each province establishing for that province, a provincial credit regulator as contemplated in Part D of Chapter 2 of the Act, the Minister, by notice in the *Government Gazette*, may delegate to the relevant MEC of that province all or any of the functions of the National Credit regulator to be exercised within that province and in accordance with the Act (item (9) of Schedule 3). To date no provincial credit regulators have been established.

¹³⁰⁶ The Act is made up of 173 sections, 3 Schedules and a number of Regulations.

¹³⁰⁷ As examples: as the codification of the concepts over-indebted, reckless credit, incidental credit, developmental credit.

¹³⁰⁸ Such as the suspension of a consumer's credit agreement or the re-arrangement thereof.

¹³⁰⁹ The repeal of the previous credit legislation resulted in the affected legislation having to be amended to accommodate these changes, thus the Act made provision for this transition. Schedule 1 of the Act provides regulation concerning conflicting legislation; Schedule 2 makes provision regarding the amendment of the affected legislation; while Schedule 3 contains the transitional provisions that applied between the repeal of the previous credit laws and the effective date of the Act. The last schedule also sets out the application of the Act to pre-existing agreements. Schedule 1 of the Act as read with section 172 (1) indicates that in the event that there is conflict between the Act and other legislation as indicated in the Schedule, when the Act should prevail and in what circumstances or whether the other legislation or sections of legislation should prevail. Exactly which Acts were affected and how shall not be listed here as this would result in a mere repetition of Schedule 2. Suffice it to say that the Act affected 19 other Acts. Schedule 1 does not deal with a conflict or possible conflict between the Act's section dealing with confidentiality of consumer credit information, which is regulated by Part B of Chapter 4 of the Act and the Promotion of Access to Information Act, 2 of 2000 (hereinafter 'PAIA'). This conflict or possible conflict is dealt with by section 67 of the Act, which states that in cases of inconsistency between a provision of Part B of Chapter 4 of the Act and a provision in PAIA – the provisions of Part B of Chapter 4 and the provisions of PAIA shall apply concurrently to the extent that Part B of Chapter 4 are not excluded in terms of section 5 of PAIA. Section 5 of PAIA states that PAIA shall apply to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record of a public body or private body and/or that is materially inconsistent

One can take this a step further and say that the Act has taken the variety of credit agreements that are entered into on a daily commercial basis, and defined and branded them. Whether this ‘boxing-in’ of credit agreements is beneficial in assisting the regulation of credit agreements generally or not remains to be seen. Minding also that in order to avoid this so called boxing-in of credit agreement possibilities, it appears that the legislature – when drafting the Act – attempted to cast the net as widely as possible in order not to curtail the influence of the Act. This is evident from the long definitions of the various credit agreements, as well as from the extensive overlap of these definitions.¹³¹⁰ Unlike the Usury and Credit Agreements Acts, the National Credit Act does not have, with regard to natural persons, a monetary threshold.¹³¹¹ Furthermore, the Act is not limited to regulating credit agreements in respect of goods or services, but incorporates the regulation of the extension of credit or loans and the sale of land on instalments in so far as there is a conflict between the Act and Chapter 2 of the Alienation of Land Act.¹³¹²

The very nature of breach of contract and subsequent remedies available to a credit provider can be said to be founded on basic traditional common law tenets. The Act as a whole must, however, be examined in order to firstly understand what definitional changes it provides to the scope of credit agreements as known in South Africa in order to gain an understanding of how it has ordered and regulated the issues of breach and recovery. Furthermore, and from an examination of the Act, it will become evident that while the remedies for breach of the credit agreement have not been drastically altered, the legislature has attempted, through legislative implements in the Act, to inhibit the amount of

with an object or a specific provision of PAIA. There does not appear to be any specific reason why the legislature decided to separate the conflict resolution section dealing with PAIA and the Act from the rest of the conflict resolution sections which are dealt with in Schedule 1 of the Act.

¹³¹⁰ Chapter 1 Part C of the Act deals with the classification and categories of credit agreements that fall under the auspices of the Act. ‘The National Credit Act seeks to regulate every aspect of the granting of credit in South Africa. It regulates a wide spectrum of credit agreements [...]’ (Van Zyl in Scholtz 2014 paragraph 4.1).

¹³¹¹ It does, however, have one relative to juristic entities. Cf paragraph 4.4.3 *infra* for a discussion on the application of the Act.

¹³¹² Act 68 of 1981.

matters that are resolved through litigation.¹³¹³ For example, the option of a consumer to make application to a debt counsellor and to be declared over-indebted and the repercussions thereof in terms of his obligations with regards his credit agreements,¹³¹⁴ the ability of any person to institute a complaint concerning an alleged contravention of the Act to the National Credit Regulator¹³¹⁵ and the alternative dispute resolution provision which provides an alternative to filing such a complaint with the Regulator.¹³¹⁶ An interesting innovation brought in by the Act is a finding of reckless credit, which may curtail or even extinguish a credit provider's remedy for breach of contract.¹³¹⁷ Furthermore, the Act lays down quite stringent requirements of what steps a credit provider is obliged to take prior to debt enforcement.¹³¹⁸ It shall be seen¹³¹⁹ how the legislature has attempted, not so much to alter the remedies available to credit providers when faced with breach of contract by a consumer, but to have the parties use them only as a final resort.

4.4.1. Initial Problems

Initially the National Credit Act was not received with open arms. South African Banks were expected to spend in the region of R1,3 billion to comply with the Act and this was viewed as the biggest compliance cost project since the 1999 Y2K IT software conversion which cost over R2 billion.¹³²⁰

Concerns that the Act would have negative effects on the South African property industry were tangible. The anticipation of the Act had already been cited as a contributing factor to the dampened growth in housing prices.¹³²¹ Furthermore,

¹³¹³ Part A of Chapter 7 of the Act deals with dispute settlement other than through debt enforcement.

¹³¹⁴ Part D of Chapter 4 of the Act.

¹³¹⁵ Section 136 of the Act.

¹³¹⁶ Section 134 of the Act.

¹³¹⁷ The sections on reckless credit can be found in Part D of Chapter 4 of the Act.

¹³¹⁸ The required procedures before debt enforcement in terms of the Act are discussed in great detail in Chapter 5 *infra*.

¹³¹⁹ In Chapter 5 and 6 *infra*.

¹³²⁰ SABC News 18 April 2007.

¹³²¹ 'Speculation exists that the stringent credit profiling required under the new Act will slow home sales as banks begin to implement the provisions of the Act and check on the overall

there were grave concerns as to whether the necessary framework would be in place to cope with the implementation of the Act by 1 June 2007, such as, for example, the shortage of debt counsellors.¹³²²

exposure of all borrowers before they can approve any new home loans. Home sellers could possibly wait as long as 60 days to find out if a potential buyer is approved for a home loan. Additionally, fears exist amongst property developers that financial institutions will be setting unreasonably strict requirements for applicants to qualify for project finance' ('New National Credit Act Affects SA Property Industry' (<http://www.eprop.co.za> (9.03.2007))).

¹³²² It was feared that '[a] lack of trained and registered debt counsellors to assist over indebted consumers could delay debt recovery for months and severely prejudice creditors' ('National Credit Act might be in jeopardy' <http://www.iol.co.za> (2.05.07)). In 2007 a survey was carried out on the impact of the Act on ordinary South Africans. 676 People in metropolitan areas were contacted to investigate the perceptions of the Act. Of those 177 had never heard of the law, the remaining 499 respondents had heard about the Act and 41% believed they had personally been affected by the new enactment. A further 44% of the respondents had stated that their banks had communicated with them about the Act. One third of those interviewed believed that the Act would have a positive effect on the local industry, while 37% believe that the Act is good for the overall South African economy. Furthermore, 28% of the respondents stated that they had recently been contacted by a South African credit provider who offered them credit they had not applied for either via post or telephone calls

(http://www.synovate.com/southafrica/news/2007/news_nat_cred_act_28?112007.html (13.10.2009)). Schedule 3 deals with the issue of 'pre-existing credit agreements'; that is, credit agreements that were entered into before the effective date and which fall under the auspices of the Act (Item 1 of Schedule 3). In terms of item 4 of this Schedule the Act applies to all credit agreements that were concluded prior to the effective date if the credit agreement would have fallen within the application of the Act had it been entered into thereafter. This is irrespective of whether the credit agreement fell within the auspices of the Credit Agreement and Usury Acts or not. As Van Zyl points out the transitional provisions are not easily applied and may lead to confusion. The following statement is thus apt: 'The Act clearly intends to bring as many credit agreements as possible within its ambit. Pre-existing credit agreements are no exception. An agreement validly concluded before the effective date of the Act and which at the time complied with all the relevant laws remains valid; however, the contractual regime between the parties may be altered by the Act. This may lead to complaints to the Regulator, alternative dispute resolution or litigation' (Scholtz 2014 paragraph 18.4.1). This rule is, however, subject to the conditions set out in sub items (2) to (5) of the Schedule. Sub item (2) lists the provisions of the Act which apply to pre-existing credit agreements and the extent of their application. A detailed discussion of which, is beyond the scope of this thesis. For further discussion and detail cf Van Zyl in Scholtz 2014 paragraph 18.4.2. With respect to a credit agreement, other than a pawn transaction, made within a year before the effective date, the credit provider had to, within six months after the effective date, provide the consumer with a statement that met the requirements of section 92 and a document that met the requirements of section 93 of the Act and introduce a form or periodic statements that meet the requirements of section 108 of the Act (Sub item (3) of Schedule 3). The credit provider could apply to the National Credit Regulator for an extension of such time periods (Sub item (4) of Schedule 3). A change to any credit agreement, after the effective date, made before the effective date constitutes the making of a new credit agreement, unless the change related to the interest rate under a variable interest rate agreement or the interest rate or the credit limit under a credit facility, despite section 95 of the Act. Sub item (5) of Schedule 3. Section 95 stipulates that the provision of credit as a result of a change to an existing credit agreement, or a deferral or waiver of an amount under an existing credit agreement, is not to be treated as creating a new credit agreement for the purposes of this Act if the change, deferral or waiver is made in accordance with this Act or the agreement. The transitional requirements are quite far reaching, in that despite the duration of any credit agreement that was entered into before the date(s) the Act came into force, the Act will, albeit sometimes in limited scope, apply to such agreements.

Compared with other credit legislation, the Act has been perceived as overly prescriptive and protectionist,¹³²³ an instance of the ‘nanny State at work’.¹³²⁴ Despite these criticisms, some writers are of the view that because many South Africans from previously disadvantaged communities have in recent years increasingly become enticed into entering credit agreements that they could not afford to repay and by their contractual actions became participants in a ‘burgeoning credit industry’,¹³²⁵ and because these consumers were low-income individuals with little to no bargaining power and reticent financial sophistication, leading often to their over-indebtedness and exploitation,¹³²⁶ the Act, it was hoped, would cure some of these abuses.

The consolidating effect that the Act, as a single comprehensive piece of consumer credit legislation, has had on the credit regime is without doubt an improvement from the previous dispensation, which in some agreements entailed both the application of the Credit Agreements and Usury Acts, often leading to uncertainty and confusion.¹³²⁷ The Act has also been lauded for being more user-friendly and written in a plainer language than its predecessors, which tended to incorporate sometimes rather complicated provisions and definitions.¹³²⁸ However, the Act has also been criticised as not being ‘a model of legal accuracy or elegance,’ importing definitions that deviate dramatically from the basic principles of South African law and concepts that are foreign to South Africa’s legal system and traditional legal terminology.¹³²⁹

¹³²³ Scholtz 2014 paragraph 2.1. Cf the discussion in paragraph 2 *supra* on paternalism.

¹³²⁴ Otto 2006 12.

¹³²⁵ Scholtz 2014 paragraph 2.1, Campbell J ‘The Excessive Cost of Credit Under Small Money Loans under the National Credit Act 34 of 2005’ 19 *SA Merc LJ* 251-253, Jones MW and Schoeman SC *An Introduction to South African Banking and Credit Law* 2007 147 and Roestoff and Renke 2005 *Obiter* 563.

¹³²⁶ *Ibid.*

¹³²⁷ Otto *Credit Law Service* 1991 cf chapters 2 and 3.

¹³²⁸ The definition of ‘principal debt’ in the Usury Act spanned over three pages.

¹³²⁹ The following comment from Scholtz is apropos and accurately captures the cost of such drafting *faux pas*: ‘It is unfortunate that the legislature did not pay greater attention to harmonising the provisions of the Act with our common law, because the lack of such harmonisation detracts from the laudable objectives, general user-friendliness and clarity of the Act. In this regard, the Act could ironically prove to be a law of unintended consequences, in that the uncertainties, deviations from the common law and numerous problems of interpretation which are likely to materialise may well give rise to a spate of litigation, generally at the instance of those seeking to avoid the application of the Act and to the detriment and at the expense of consumers’ (2014 paragraph 2.1). Cf also similar comments in *Wesbank v Papier* 2011 JDR 0045 (WCC), *Nedbank*

The transitional provisions¹³³⁰ have also been criticised, in that some of the Act's provisions are applicable to existing credit agreements which would have been subject to the Act had it been in effect at the time the agreements were concluded; however, the discrepancy arises where, in some instances, sections of the Act apply fully to existing credit agreements, others partially and others only after a prescribed period. Besides the fact that the transitional provisions are difficult to apply, they also interfere with existing contractual rights and are contrary to the general presumption against retroactive effect of legislation. Otto¹³³¹ has suggested that they may not pass constitutional muster in all cases.

The above discussion on the Act has focused largely on academic opinion that has been provided with regards the Act and its implementation. Below follows a brief overview of statistical studies that have been carried out by mandated researchers to capture the ground level reaction and understanding of the Act, namely, the effect of the Act as viewed by the credit providers and consumers.

4.4.2. The Impact of the National Credit Act

Since 2007 the National Credit Regulator has mandated several impact assessment reports on the Act. The aim of these assessments, certainly the earlier ones,¹³³² is, *inter alia*, to measure the awareness levels and evaluate the

v The National Credit Regulator 2011 3 SA 581 (SCA) and *Absa Bank Ltd v Petersen* 2012 4 SA 642 (WCC).

¹³³⁰ Schedule 3 of the Act deals with transitional provisions, cf also Otto and Otto 2013 and Van Zyl in Scholtz 2014 paragraph 18.1 for a full discussion.

¹³³¹ Otto 2006 5 and 96-97 and Scholtz 2014 paragraph 2.1.

¹³³² Prior to the implementation of the new legislation, the National Credit Regulator embarked on an awareness campaign to sensitize the public and credit providers about the National Credit Regulator and its implementation. The awareness campaign was conducted through the media and information sessions were held for credit providers and industry stakeholders. The main focus of the information sessions were to brief credit providers and the industry about the impending legislation and its implications. The focus for the general public was also about the impending legislation, but with more emphasis on the regulation of credit bureaus. It is against this background that the National Credit Regulator required an impact assessment to check if this awareness campaign was effective. The results were varied and findings from these results indicated that as far as credit providers were concerned information on the Act and its implications was adequate. Most providers mentioned that they further interacted with the Act as individual organizations through internal workshops, industry forums and expert advice. The challenge, however, was the implementation of the Act. The registration requirements were found problematic in that there appeared to be too long a period waiting for feedback from the National

effectiveness of the educational and media campaigns on the National Credit Act and the National Credit Regulator amongst various stakeholders and role-players, which comprised of consumers, banks and retailers, NGOs, Consumer Desks as well as other stakeholders like the Department of Justice.¹³³³

Challenges identified by the *2008 Impact Assessment Report* were mostly attributed to the implementation of the Act. These included criticisms of fragmented complaints process, accreditation of debt counsellors was regarded as deficient, information provided to stakeholders, like the South African Local Government Association,¹³³⁴ was often too generic and it was indicated that municipalities were not clear on how to comply with the Act.¹³³⁵ It also indicated that the Court system was found not to be equipped to handle debt rearrangement cases, that negative marketing was still practiced in some areas and that credit providers' staff were still not articulate on the legislation and how it should be applied.¹³³⁶

Credit Regulator in terms of what had been submitted and waiting a long time for the new certificates. Credit providers were of the view that disclosure requirements were clear from the Act, but that the challenge was the implementation, for example, that the National Credit Regulator's response on areas of uncertainty was guarded and cautious, generally disclosure requirements were perceived as difficult to implement and that the National Credit Regulator was not supportive in such instances. Interestingly enough the Financial Services Board were regarded as more helpful than the National Credit Regulator in this instance, as they were prepared to take a stand and offer precise advice. Information regarding compliance and reporting was regarded as good; however, the difficulty identified was compiling the reports. Banks attributed this challenge to the absence of written guidelines and recommended a standard check-list be developed. Information provided by the National Credit Regulator on over-indebtedness was perceived as good, but concerns were raised regarding consumers' responsibilities with regards to honest disclosure of their state of indebtedness. The results indicated that the concept of debt counselling and its process was communicated effectively. However, there were various concerns raised by the banks such as the quality of the debt counsellors; quality of training; lack of basic resources from some of the debt counsellors like fax machines; banks felt that the system of debt counselling needed to be realigned and that the National Credit Regulator be more supportive to the counsellors (*2008 Impact Assessment Report 12*).

¹³³³ *2008 Impact Assessment Report 12*.

¹³³⁴ Better known by the acronym 'SALGA'; an autonomous association of municipalities. SALGA interfaces with parliament, the National Council of Provinces, cabinet as well as provincial legislatures.

The association is a unitary body with a membership of 278 municipalities, with its national office based in Pretoria and offices in all nine provinces (<http://www.salga.org.za/pages/About-SALGA/Welcome-to-SALGA>) (11.11.2013).

¹³³⁵ *2008 Impact Assessment Report 12*.

¹³³⁶ As far as consumers are concerned the *2008 Impact Assessment Report* mainly focused on the impact of the communication vehicles utilized by the National Credit Regulator and whether the communication on the implementation of the Act was successful. The results indicated that overall, 51% of the consumers questioned were aware of the National Credit Regulator, with 54% of consumers indicating awareness of the Act. While middle and high income consumers

In the *2010 Impact Assessment Report* indicated that credit providers still demonstrated dissatisfaction with the pace of resolution of debt review issues which include the clarification of the court process and the training and accreditation of debt counsellors; the entry requirements of debt counsellors were thought to be low, resulting in the accreditation of low calibre debt counsellors with no capacity to deal with legal issues; there was dissatisfaction with the National Credit Regulator's provision of feedback and poor turnaround time; that the National Credit Regulator's staff did not provide feedback on reports submitted as well as attending to their queries.¹³³⁷ Where feedback was provided, it was provided late or after numerous reminders from the creditors.¹³³⁸

The main themes that emerged from the *2012 Literature Review on the Impact of the National Credit Act on South Africa's Credit Market* were as follows:¹³³⁹

- Shopping around for the best deal is not as easy as intended due to a lack of standardisation, limited implementation and a negative impact on credit scoring because of the multiple enquiries at credit bureaus;
- Consumers are creating additional dynamics to the system by reacting to the opportunities the legislation has presented and use these to their advantage;
- The credit system, specifically the debt counselling environment with debt counsellors, voluntary resolution via the National Debt Mediation Association,

recorded high awareness levels, low-income consumers also had difficulty differentiating between the National Credit Regulator and the Act. The 2008 *Impact Assessment Report* found that 'general discussions indicate[d] a limited understanding of the legislation and implications, its consumer protection attributes the NCR's role, the credit bureau amnesty, and contact details of the NCR'. While the 2009 *Impact Assessment Report* reflected that 65% of the consumers questioned were aware of the National Credit Regulator, with 69% of consumers indicating awareness of the Act (Rudo Research and Training *Impact Assessment Report* 12 May 2009). In 2010 the percentage consumer awareness of the National Credit Regulator increased marginally to 66% while the percentage consumer awareness of the Act decreased to 65% (Rudo Research and Training *Impact Assessment Report* 7 April 2010).

¹³³⁷ 2010 *Impact Assessment Report* 7.

¹³³⁸ *Ibid.*

¹³³⁹ *Literature Review on the Impact of the National Credit Act (NCA) has had on South Africa's Credit Market* Report by Devnomics Developmental Economics (Pty) Ltd Final Report June 2012 12-13 (hereinafter the '*2012 Literature Review*'). The 2012 *Literature Review* was only published in 2013 and there is no 2013/2014 Review or assessment that has been published at the time of writing of this work (cf http://www.ncr.org.za/index.php?option=com_content&view=article&id=8 (30.04.14)).

alternative debt resolution channels, credit and banking ombudsmen as well as legal channels is complex and not all that transparent to consumers;

- Regulation and standardisation based on compulsory rulings and voluntary engagement of stakeholders still requires significant expansion;
- The challenges of creating access for low income earners to credit;
- The remedies of the National Credit Act remain a challenge;
- Credit providers, debt counsellors and Payment Distribution Agencies¹³⁴⁰ are all commercial institutions and the smaller size loan, or very limited repayment abilities, makes these low income earners not attractive from a business point of view to the credit providers; they prefer to extend credit to higher income consumers that give them a better return on the same amount of effort.

The *2012 Literature Review* found that the impact of the Act on credit providers has two aspects.¹³⁴¹ Firstly, the financial impact of compliance to the Act is significant in direct and indirect cost terms.¹³⁴² Processes from granting of credit through to the ultimate recovery of debt, have added complexity and thus the level of credit granting has been constrained by the provisions of the Act to promote responsible lending, fee and interest rates have been capped, hence reducing the top line revenue for providers.¹³⁴³ While it was argued that this is offset by the positive impact of a reduction in risk which leads to lowered cost of default, and improved return on capital held to cover such risk,¹³⁴⁴ it was concluded that there is a net negative impact to the credit provider.¹³⁴⁵

The *2012 Literature Review* found that debt counselling had a significant impact on a number of aspects.¹³⁴⁶ Credit providers had to build infrastructure to interact with debt counsellors.¹³⁴⁷ As a result, they established the National Debt Mediation Association as a collective approach and body to interact with other

¹³⁴⁰ Not defined in the National Credit Act, a 'payment distribution agent' has been defined in the National Credit Amendment Act 19 of 2014 as a person who on behalf of a consumer, that has applied for debt review in terms of the Act, distributes payments to credit providers in terms of a debt re-arrangement, court order, order of the Tribunal or an agreement (section 1 (f) of the National Credit Amendment Act).

¹³⁴¹ *2012 Literature Review* 14.

¹³⁴² *Ibid.*

¹³⁴³ *Ibid.*

¹³⁴⁴ *2012 Literature Review* 14.

¹³⁴⁵ *Ibid.*

¹³⁴⁶ *Ibid.*

¹³⁴⁷ *2012 Literature Review* 14.

stakeholders, whilst also providing alternative debt resolution via this organisation.¹³⁴⁸

It was established that credit bureaus are a key enabling service in the Act and the provisions that allow consumers to query and challenge their records are important consumer rights.¹³⁴⁹ Apart from the initial increase in queries after the extensive marketing campaigns in the initial time of the implementation of the Act, the level of enquiry by consumers was found to be very low.¹³⁵⁰

It was further found in the 2012 *Literature Review* that debt counsellors' responsibilities require significant negotiation skills both with consumers unwilling to let go of their standard of living, and with credit providers who are not always willing partners in this process.¹³⁵¹ The changes in the process due to court rulings have increased the burden on debt counsellors and it was noted that a significant level of legal skills is required to successfully fulfil this role.¹³⁵² In this context, many smaller operators in this space have seized operations.¹³⁵³ Furthermore, the cost of debt counselling is carried by the consumer, and due to lack of commercial viability as debt counselling clients, the most vulnerable consumer loses out in access to this process.¹³⁵⁴ Once agreed in a debt restructure plan, Payment Distribution Agencies are the utilities managing the consumers' payment plans.¹³⁵⁵ These agencies are not regulated by the Act, seemingly an oversight of the legislator, but they do engage with all stakeholders and the National Credit Regulator.¹³⁵⁶ Furthermore, the North Gauteng High Court confirmed that the National Credit Regulator is entitled to accredit Payment

¹³⁴⁸ *Ibid.*

¹³⁴⁹ *Ibid.*

¹³⁵⁰ It was found that data privacy legislation once promulgated, will impact the credit bureaus further as well as their relationship with the consumer and credit provider. It is likely to change consent process, and this may become more onerous. The question is whether the consumer will benefit from this considering the fact that not consenting to the credit check will most likely result in a decline of credit altogether (2012 *Literature Review* 14).

¹³⁵¹ 2012 *Literature Review* 15.

¹³⁵² *Ibid.*

¹³⁵³ *Ibid.*

¹³⁵⁴ 2012 *Literature Review* 15.

¹³⁵⁵ *Ibid.*

¹³⁵⁶ *Ibid.*

Distribution Agents as part of the debt review process.¹³⁵⁷ The National Credit Amendment Act now defines payment distribution agents.¹³⁵⁸ The Amendment Act also provides for the registration of Payment Distribution Agents with the National Credit Regulator, as well as providing the requirements for one to be so registered. This engagement is focused on managing the payments by the consumer in the debt review process.¹³⁵⁹ However, given the increasing stream of funds into these payment utilities, financial oversight will become a necessity.¹³⁶⁰

Credit providers, debt counsellors and Payment Distribution Agencies all have codes of conducts supplementing the legislative frameworks.¹³⁶¹ It was noted that debt collection on the other hand is ignored within this framework of enforced and industry driven regulation.¹³⁶² Furthermore, their code of conduct is more prohibitive by curbing excesses in the industry rather than having the hallmark of a positive code regulating good business practice.¹³⁶³

From the above assessments it can be gauged that the implementation of the Act, even seven years after its complete implementation is still being assessed. A constant monitoring of the market and the role players is invaluable. As seen from the *2012 Literature Review*, some of the lacunas in the Act have been supplemented by the industry, whilst some of these have been identified and attended to by the National Credit Amendment Act.¹³⁶⁴

4.4.3. Application and Transactions Excluded from the Ambit of the Act

¹³⁵⁷ *Debt Monitoring SA (Pty) Ltd v National Credit Regulator* unreported GNP case no. 38342/2010.

¹³⁵⁸ A payment distribution agent is defined in the Amendment Act as ‘a person who on behalf of a consumer, that has applied for debt review in terms of this Act, distributes payments to credit providers in terms of a debt re-arrangement, court order, order of the Tribunal or an agreement’ (section 12).

¹³⁵⁹ *2012 Literature Review* 15.

¹³⁶⁰ *Ibid.*

¹³⁶¹ *Ibid.*

¹³⁶² *2012 Literature Review* 15.

¹³⁶³ *Ibid.*

¹³⁶⁴ The amendments relevant to the work have been discussed throughout.

The National Credit Act is divided into 9 Chapters, with 3 Schedules and Regulations. Subject to several exceptions, the Act applies to all credit agreements¹³⁶⁵ between parties dealing at arm's length,¹³⁶⁶ which are concluded within South Africa.¹³⁶⁷ The Act does not apply to credit agreements where credit is extended but no charge,¹³⁶⁸ fee or interest is levied.¹³⁶⁹ However, the discount transaction qualifies as a credit agreement in terms of the Act; here no charge, fee or interest is levied but a discount is granted if there is early payment of the amount due.¹³⁷⁰ The Act has limited application to credit agreements where the consumer is a juristic entity,¹³⁷¹ incidental credit agreements,¹³⁷² credit guarantees¹³⁷³ and pre-existing credit agreements.¹³⁷⁴

¹³⁶⁵ Otto gives the following as examples of credit agreements which fall within the ambit of the Act: direct personal loans, loans secured by mortgage bonds, overdrawn cheque accounts, credit cards, rendering of services, sale and leases of movable goods and credit guarantees (Otto and Otto 2013 19).

¹³⁶⁶ The Act specifically defines what is meant by 'dealing at arm's length', accordingly, the following agreements are not between parties dealing at arm's length: where a shareholder loan or a loan to a shareholder or other credit agreement where the consumer is a juristic person and where the credit provider is a person who has a controlling interest in that juristic person; a credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent on the other and any other arrangement in which each party is not independent of the other and thus does not necessarily strive to obtain the utmost possible advantage out of the transaction or the courts or legislation hold that the arrangement is between parties who are not dealing at arm's length (section 4 (2)(b)). The list is not closed, thus any other arrangement which has been held in law to be between parties who are not dealing at arm's length will not be considered an arm's length transactions for the purposes of the Act (section 4 (2)(b)(iv)(bb)). The following cases are relevant: *Hicklin v Secretary for Inland Revenue* 1980 1 SA 481 (A), *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 2 SA 670 (C), *Cooper and Another NNO v Merchant Trade Finance Limited* 2000 3 SA 1009 (SCA) and *Commissioner, South African Revenue Services v Woulidge* 2002 1 SA 68 (SCA). Cf also Van Zyl in Scholtz 2014 paragraph 4.2.

¹³⁶⁷ Section 4 (1) of the Act. It is a common law presumption of interpretation that statutes do not have extraterritorial application (Van Zyl in Scholtz 2014 paragraph 4.2).

¹³⁶⁸ The Court in *Carter Trading (Pty) Ltd v Blignaut* 2010 2 SA 46 (ECP) interpreted the word 'charge' to have a wide meaning and may even include the costs of having a document drafted.

¹³⁶⁹ In *Evans v Smith* 2011 4 SA 472 (WCC) the court held that the words 'charge, fee or interest' as used in the Act were to have a wide import and therefore include any consideration payable in respect of a credit agreement in terms of which payment of an amount is owed. Cf also *Voltex (Pty) Ltd v Chenleza CC* 2010 5 SA 267 (KZP). Cf also Otto JM 'Die Toespaslikheid (al dan nie) van die Nasionale Kredietwet op Rentevrye Kontrakte' 2012 *De Jure* 45.

¹³⁷⁰ Section 1 of the Act.

¹³⁷¹ Section 6 of the Act lists these imitations.

¹³⁷² Section 5 of the Act lists these imitations. Cf also *JMV Textiles Ltd v De Chalain Spareinvest* 14 CC 2010 6 SA 173 KZD, *Mitchell v Beheerliggaam RNS Mansions* 2010 5 SA 75 (GNP), *Seaworld Frozen Foods (Pty) Ltd v The Butcher's Block* 2011 JDR 1614 (ECG), Govan P 'Dentist's Accounts and the National Credit Act of South Africa, 2005 (NCA) – (Incidental Credit Agreement)' 2009 7 *SADJ* 292, Otto JM 'The Incidental Credit Agreement' 2010 *THRHR* 637, Renke S 'Aspects of Incidental Credit in Terms of the National Credit Act 34 of 2005' 2011 *THRHR* 464 and Tennant S-L 'The Incorrect Understanding of an Incidental Credit Agreement Leads to Undesirable Consequences: *JMV Textiles Ltd v De Chalain Spareinvest*' 2011 *SA Merc LJ* 123. Where an agreement provides that a supplier of a utility or other continuous service (a 'utility' is defined in the Act as the supply to the public of an essential commodity, such as

Below is a list of exemptions, where the Act does not apply:

- Instances where the state or an organ of state is the consumer in a credit agreement.¹³⁷⁵
- Juristic persons¹³⁷⁶ whose asset value or annual turnover, together with that of all related juristic persons,¹³⁷⁷ at the time the agreement was entered into, equals or exceeds the threshold value determined by the Minister.¹³⁷⁸

electricity, water, or gas; or service, such as waste removal, or access to sewage lines, telecommunication networks or any transportation infrastructure (section 1)) will defer payment by the consumer until the supplier has provided a periodic statement of account for that utility or other continuous service ('continuous service' means the supply for consideration of a utility or service, other than credit or access to credit, or the supply of such a utility or service combined with the supply of any goods that are essential for the utilisation of that utility or service by the consumer, with the intent that, so long as the agreement to supply that utility or service remains in force, the supplier will make the service continuously available to be used, accessed or drawn upon from time to time as determined by the consumer and with any frequency or in any amount as determined, accessed, required, demanded or drawn upon by the consumer, subject only to any total use or cost limits set out in the agreement (section 1)) and will not impose charges (as contemplated in section 103 of the Act) in respect of the amount so deferred unless the consumer fails to pay the full amount due within at least thirty days after the date on which the periodic statement is delivered to the consumer, that agreement is not a credit facility but incidental credit to which the Act applies (section 4 (6)(b) of the Act. Cf *Pareto Ltd v Kalnisha Sigaban t/a KS Flowers N More Pareto Limited and Others v Kalnisha Sigaban t/a KS Flowers N More supra*; *Nelson Mandela Bay Metropolitan Municipality v Nobumba NO and Others* 2010 1 SA 579 (ECG) and Otto JM 'Rekeninge vir Munisipale Dienste en die National Credit Act' 2011 *De Jure* 10).

¹³⁷³ Section 4 (2)(c) and (d) of the Act refer. Cf also *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 T, *Geodis Wilson South Africa (Pty) Ltd v ACA (Pty) Ltd* unreported case nr 41609/2008 (SGJ), *Standard Bank v Hunkydory Investments 194 (Pty) Ltd* 2010 1 SA 627 (C), *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 5 SA 523 (GSJ); *Ribeiro v Slipknotts Investments 777 (Pty) Ltd* 2011 1 SA 575 (SCA), *Silver Falcon Trading 333 v Nedbank Ltd* 2012 3 SA 371 (KZP), Stoop PN and Kelly-Louw M 'The National Credit Act regarding Suretyships and Reckless Lending' 2011 *PER* 67 and Kelly-Louw M 'Default Notices as required by the National Credit Act 34 of 2007' 2012 *SA Merc LJ* 298.

¹³⁷⁴ Schedule 3 of the Act and Van Zyl in Scholtz 2014 paragraphs 18.4 – 18.9.

¹³⁷⁵ Section 4 (1)(a)(ii) and (iii) of the Act. The Act applies where the credit provider is an organ of state, an entity controlled by an organ of state, an entity created in terms of any public regulation or the Land and Agricultural Development Bank (section 8 (3)(b) of the Act).

¹³⁷⁶ The statutory definition of 'juristic person' differs from South Africa's common law definition in that it includes partnerships, associations or other bodies of persons corporate or unincorporated or trusts, but only if such trusts are made up of three or more individual trustees; or the trustee is itself made up of a juristic person (but does not include a '*stokvel*') (section 1).

¹³⁷⁷ A juristic person is related to another juristic person if one of them has direct or indirect control over the whole or part of the business of the other or a person has direct or indirect control over both of them (section 4 (2)(d)).

¹³⁷⁸ Section 4 (1)(a)(i) as read with 4 (2)(a). The Minister must at intervals of not more than five years by notice in the Gazette determine the threshold value for the monetary asset value or annual turnover threshold which may not exceed R1 000 000 for purposes of juristic persons (section 7). This section, in its current format, appears odd in that at present the Minister has already announced this threshold to be at R1 000 000 (GN 713 of 1 June 2006). Accordingly, and in terms of the Act, this quantum may never be changed again unless it is decreased, which would be of no assistance to future small juristic persons given the realities of inflation. It is submitted that the Act, more specifically the limitation in section 7 (1)(a) will have to be changed. The constitutionality of the exclusion of juristic persons from the ambit of the Act on the grounds that the distinction between juristic persons and natural persons violates the rights of juristic

- The following provisions of the Act do not apply to a credit agreement or a proposed credit agreement in terms of which the consumer is a juristic person:
 - Parts C and D of Chapter 4;¹³⁷⁹
 - Section 89 (2)(b)¹³⁸⁰ and section 90 (2)(o)¹³⁸¹ of Part A of Chapter 5 and Part C of Chapter 5.¹³⁸²
- A juristic person as consumer, whose asset value or annual turnover at the time the agreement is entered into is less than the threshold value determined by the Minister, enters into a large agreement.¹³⁸³
- The Act does not apply to an acknowledgment of debt that is based on a claim for damages.¹³⁸⁴
- Any credit agreement where the credit provider is the Reserve Bank of South Africa will not fall under the auspices of the Act.¹³⁸⁵
- While the application of the Act extends to credit agreements or proposed credit agreements irrespective of whether the credit provider resides or has its principal office within or outside the Republic,¹³⁸⁶ consumers may apply to the Minister for exemption of these credit agreements.¹³⁸⁷

persons to equality was challenged and rejected in *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd* 2010 1 SA 627 (C) and *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd* 2010 1 SA 634 WCC. Leave to appeal was denied by both the Supreme Court of Appeal and the Constitutional Court. Cf paragraph 3.2.2 *supra* for a discussion on the Act and the Constitution.

¹³⁷⁹ These sections regulate the marketing practices and over-indebtedness and the meaning and effects of reckless credit lending.

¹³⁸⁰ This section does not render a credit agreement entered into by a juristic person, where there is negative option marketing and opting out requirements by the credit provider, unlawful. Conversely, a natural person induced into entering this type of transaction would be able to rely on the fact that these marketing options rendered the agreement unlawful.

¹³⁸¹ Allows a credit agreement to contain a variable interest rate.

¹³⁸² This section deals with the consumer's liability, interest and charges.

¹³⁸³ 'Large agreements' are defined in section 9 (4) of the Act and are considered 'large' credit agreements if they are mortgage agreements or any other credit transactions, excepting pawn transactions or credit guarantees, where the principal debt equals or exceeds the higher threshold as determined by the Minister by notice in the Gazette at intervals of no more than five years, in terms of section 7 (1)(b) of the Act. The Act distinguishes between small, intermediate and large agreements (section 9). Cf the discussion in paragraph 4.4.4.1 *infra* and Stoop PN 'Kritiese Evaluasie van die toepassingsveld van die National Credit Act' 2008 *De Jure* 352 and *Silver Falcon Trading 333 v Nedbank Ltd* 2012 3 SA 371 KZP.

¹³⁸⁴ *Grainco (Pty) Ltd v Broodryk NO* 2012 4 SA 517 (VB).

¹³⁸⁵ Section 4 (1)(c) of the Act.

¹³⁸⁶ Section 4 (3)(a) of the Act.

¹³⁸⁷ Section 4 (1)(d) of the Act. The following from Van Zyl is relevant: 'It is a common law presumption of interpretation that statutes do not have extraterritorial application. The National Credit Act expressly provides that it applies only to credit agreements 'made within, or having an effect within', South Africa (section 4 (1)). Parties to a credit agreement will accordingly not be able to circumvent the provisions of the Act merely by concluding their agreement offshore. Whether an agreement has 'an effect' in South Africa will be a factual inquiry in each case. Questions of private international law may also arise, especially when offer and acceptance do not take place in the same jurisdiction. Determination of the proper law of the contract may be

- Where a seller accepts as payment for goods or services full payment in the form of a cheque or similar instrument and payment on such cheque or instrument is subsequently refused, the Act will not apply.¹³⁸⁸
- Similarly, a charge by the buyer against a credit facility where a third party, and not the seller, is the credit provider which or whom subsequently refuses that charge for any reason, the resulting debt owed by the buyer does not constitute a credit agreement.¹³⁸⁹
- Where a consumer pays fully or partially for goods or services through a charge against a credit facility provided by a third party the person who sells those goods or services is not regarded as having entered into a credit agreement with the consumer.¹³⁹⁰
- An agreement irrespective of its form is not considered a credit agreement for the purposes of the Act, if it is a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance.¹³⁹¹
- A lease of immovable property does not fall under the auspices of the Act.¹³⁹²
- A transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel is not subject to the Act.¹³⁹³
- Levies and interest charged on arrear levies paid by members of a body corporate in terms of the Sectional Titles Act do not fall under the Act.¹³⁹⁴

The Act is limited in its application to credit guarantees, and applies to them only to the extent that the Act applies to the credit facility or credit transaction in respect of which the credit guarantee is granted.¹³⁹⁵

crucial' (Scholtz 2014 paragraph 4.2). The Act continues to apply if both the credit provider and consumer cease to reside or have their principal offices in South Africa (section 4 (4)(a)).

¹³⁸⁸ For example where a cheque is dishonoured. Section 4 (5)(a) of the Act. Cf *SA Timber (Welkom) (Edms) Bpk v Lezmin 2815 BK 2607/2008 2008 ZAFSHC 49*, *Essa v Asmal 2012 3 SA 576 (KZP)* and *Otto JM 'Onteerde Tjeks, Wanbetalings Uit 'n Kredietfasiliteit en die National Credit Act' 2009 THRHR 653*.

¹³⁸⁹ Section 4 (5)(b) of the Act.

¹³⁹⁰ Section 4 (6)(a) of the Act.

¹³⁹¹ Section 8 (2)(a) of the Act.

¹³⁹² Section 8 (2)(b) of the Act. Cf *Pareto Ltd v Kalnisha Sigaban t/a KS Flowers N More Pareto Limited and Others v Kalnisha Sigaban t/a KS Flowers N More A3096/09 2010 ZAGPJHC 21*.

¹³⁹³ Section 8 (2) of the Act.

¹³⁹⁴ 95 of 1986. Cf *Mitchell v Beheerliggaam RNS Mansions supra*.

¹³⁹⁵ Section 4 (2)(c) of the Act. Cf *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd 2009 3 SA 384 (T)*, *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others 2010 5 SA 523 (GSJ)*, *Structured Mezzanyme Investments v Dawids and Others 2010 6 SA 622 (WCC)* at paragraph 15, *Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd 2011 1 SA 575 (SCA)*, *Absa Bank Ltd v Uys 2011 ZAWCHC 231* and *Prisma Verpakking Norde (Pty) Ltd v Holtzhausen and Others 2010 ZAGPPHC 1*. Cf also *Stoop P and Kelly-Louw M 'The National Credit Act Regarding Suretyships*

Furthermore, as indicated, the Act is limited with reference to incidental credit agreements.¹³⁹⁶ Limited provisions of the Act apply when an incidental credit agreement is involved, and due to the nature of the incidental credit agreement it would be impractical for the seller of goods or services to comply with the more onerous provisions of the Act. It is not the intention of the Act to govern all transactions for the sale and purchase of goods or services.¹³⁹⁷ Accordingly, the credit provider is exempt from complying with various provisions of the Act.¹³⁹⁸

4.4.4. Classification and Categories of Credit Agreements¹³⁹⁹

In terms of section 8 of the National Credit Act an agreement is viewed as a credit agreement¹⁴⁰⁰ for purposes of the Act if it is one of the following: a credit facility,¹⁴⁰¹ credit transaction,¹⁴⁰² credit guarantee¹⁴⁰³ or any combination of the above.¹⁴⁰⁴ Each of these will be briefly examined below.

and Reckless Lending' 2011 *PER* 11 and Kelly-Louw M 'Should all Natural Persons Standing Surety be Protected by the National Credit Act 34 of 2005' *SA Merc LJ* 2012 24 298.

¹³⁹⁶ An 'incidental credit agreement' is an agreement, irrespective of its form, in terms of which an account is tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply a fee, charge or interest becomes payable when payment of an amount charged in terms of that account was not made on or before a determined period or date or two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date (section 1). Cf *JMV Textiles Ltd v De Chalain Spareinvest 14 CC* 2010 6 SA 173 (KZD), *Voltex (Pty) Ld v Chenleza CC and Others* 2010 5 SA 267 (KZP) and for a discussion on incidental credit agreements see Otto JM 'The Incidental Credit Agreement' 2010 *THRHR* 637. Cf also Stoop PN 'The Impact of the National Credit Act 34 of 2005 on School Fees Charged by Public Schools' 2010 *THRHR* 451, where he suggests that a school fees agreement can also constitute an incidental credit agreement, cf also Renke S 'Aspects of Incidental Credit in terms of the National Credit Act 34 of 2005' *THRHR* 2011 74 3 464..

¹³⁹⁷ Scholtz 2014 paragraph 4.4.1.

¹³⁹⁸ The details of the limited application of the Act to incidental credit agreements is beyond the scope of this work, section 5 of the Act however, sets out such limited application.

¹³⁹⁹ The types of credit agreements are not discussed in great detail here as they are beyond the scope of this work. For a detailed discussion of same cf Otto and Otto 2013 Chapter 3 and Otto in Scholtz 2014 Chapter 8.

¹⁴⁰⁰ The Act utilises this generic term for all agreements that fall under its auspices.

¹⁴⁰¹ Section 8 (3) of the Act. Cf *JMV Textiles Ltd v De Chalain Spareinvest 14 CC supra*, *Bridgeway v Markham* 2008 6 SA 123 (W) and Otto in Scholtz 2014 paragraph 8.2.2

¹⁴⁰² Section 8 (4) of the Act.

¹⁴⁰³ Section 8 (5) of the Act.

¹⁴⁰⁴ Section 8. The breadth of transaction covered by the Act is very extensive. This is distinct from, for example the 2008 European Directive where a 'credit agreement' is limited to an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a

A 'credit facility' is an agreement whereby a credit provider undertakes to supply goods or services or to pay amounts as determined by the consumer from time to time to the consumer or on behalf of or at the direction of the consumer and defers the consumer's obligation to pay any part of the cost of the goods or services or to repay to the credit provider any amount and there is a charge fee or interest payable to the credit provider.¹⁴⁰⁵ Alternatively, the consumer may be billed periodically for the cost of goods or services or any amount provided to him and may be charged, have a fee or interest levied or the charge, fee or interest is payable due to the deferred amount not being paid within the time specified in the agreement.¹⁴⁰⁶ An example of a credit facility where the credit provider provides amounts of money to the consumer from time to time would be a credit card facility or overdraft facility¹⁴⁰⁷ rendered by a banking institution.¹⁴⁰⁸

A 'credit transaction' is a pawn¹⁴⁰⁹ or discount transaction,¹⁴¹⁰ an incidental credit agreement,¹⁴¹¹ an instalment agreement,¹⁴¹² a mortgage agreement,¹⁴¹³ a

deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments (article 3 (c)). However, it must be noted that the objectives of the European Directives are markedly different from those of the Act. The European Union has as its aim regional market integration and must issue Directives which will allow Member States some form of regulatory autonomy, while simultaneously harmonising national legislation so as to encourage and stimulate cross-border trade and finance. The 2008 Directive incorporates penalties to be imposed on Member States in the event of infringements by Member States (article 23). Cf paragraph 4.5 *infra* for a discussion on the 2008 European Directive.

¹⁴⁰⁵ Section 8 (3)(a)(i)(aa) and 8 (3)(b)(ii) of the Act.

¹⁴⁰⁶ Section 8 (3)(a)(ii)(aa) and 8 (3)(b)(1) of the Act.

¹⁴⁰⁷ The 2008 European Directive on credit, in stark contrast to the convoluted definition of the Act, defines an 'overdraft facility' as 'an explicit credit agreement whereby a creditor makes available to a consumer funds which exceed the current balance in the consumer's current account', while 'overrunning' means a tacitly accepted overdraft whereby a creditor makes available to a consumer funds which exceed the current balance in the consumer's current account or the agreed overdraft facility (article 3 (d) and (e)).

¹⁴⁰⁸ In the event of a credit card facility – banks often offer interest free periods where the consumer may have the opportunity to repay the amount loaned prior to the interest being levied. Cf *JMV Textiles Ltd v De Chalain Spareinvest 14 CC supra*, *Bridgeway Ltd v Markham* 2008 6 SA 123 (W), Stoop 2008 *De Jure* 356, Otto JM 'Verkoop van Regte teen 'n Diskonto en die Toespaslikheid van die National Credit Act' 2009 *TSAR* 198 and Otto in Scholtz 2014 paragraph 8.2.2.

¹⁴⁰⁹ This is an agreement, irrespective of its form, in terms of which one party advances money or grants credit to another, and at the time of doing so, takes possession of goods as security for the money advanced or credit granted; and either the estimated resale value of the goods exceeds the value of the money provided or the credit granted, or a charge, fee or interest is imposed in respect of the agreement, or in respect of the amount loaned or the credit granted; and the party that advanced the money or granted the credit is entitled on expiry of a defined period to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations under the agreement (section 1). Cf Otto in Scholtz 2014 paragraph 8.2.3.1.

secured loan agreement,¹⁴¹⁴ a lease¹⁴¹⁵ or any other agreement (except a credit facility or credit guarantee) in terms of which payment of an amount is deferred

¹⁴¹⁰ This means an agreement, irrespective of its form, in terms of which goods or services are to be provided to a consumer over a period of time and more than one price is quoted for the goods or service, the lower price being applicable if the account is paid on or before a determined date, and a higher price or prices being applicable if the price is paid after that date, or is paid periodically during the period (section 1). Cf *Otto* in *Scholtz* 2014 paragraph 8.2.3.2.

¹⁴¹¹ This is defined in the Act as an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply: a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date (section 1). Cf *JMV Textiles Ltd v De Chalain Spareinvest 14 CC supra*, *Mitchell v Beheerliggaam RNS Mansions supra*, *Seaworld Frozen Foods (Pty) Ltd v The Butcher's Block supra*, *Nelson Mandela Bay Metropolitan Municipality v Nobumba NO and Others supra*, Govan P 'Dentists Accounts and the National Credit Act of South Africa, 2005 (NCA) – (Incidental Credit Agreements)' 2009 *SADJ* 292, *Otto* 2010 *THRHR* 637, Renke 2011 *THRHR* 464, Tennant 2011 *SA Merc LJ* 123, Van Zyl in *Scholtz* 2014 paragraph 4.4.1, *Otto* in *Scholtz* 2014 paragraph 8.2.3.3 and 9.1.2 and *Otto* and *Otto* 2013 20.

¹⁴¹² A sale of movable property in terms of which all or part of the price is deferred and is to be paid by periodic payments; possession and use of the property is transferred to the consumer; ownership of the property either passes to the consumer only when the agreement is fully complied with; or passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred (section 1). Cf *Otto* JM 'Afbetalingskoop- en Huurkontrakte van Roerende Goed: Vanmelewe en Nou. Die Nasionale Kredietwet Bied Interessante Leesstof' 2011 *THRHR* 121, Renke S and Pillay M 'The National Credit Act 34 of 2005: the Passing of Ownership of the thing Sold in terms of an Instalment Agreement' 2008 *THRHR* 641 and *Otto* in *Scholtz* 2014 paragraph 8.2.3.4.

¹⁴¹³ Means a credit agreement that is secured by a pledge of immovable property (section 1). Cf *Otto* and *Otto* 2013 25 and *Otto* in *Scholtz* 2014 paragraph 8.2.3.5.

¹⁴¹⁴ Is an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person advances money or grants credit to another, and retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement (section 1). Cf *Essa v Asmal* 2012 2 SA 576 (KZP) and *Otto* in *Scholtz* 2014 paragraph 8.2.3.6.

¹⁴¹⁵ Means an agreement in terms of which temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer; payment for the possession or use of that property is made on an agreed or determined periodic basis during the life of the agreement; or deferred in whole or in part for any period during the life of the agreement; interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and at the end of the term of the agreement, ownership of that property either passes to the consumer absolutely; or passes to the consumer upon satisfaction of specific conditions set out in the agreement (section 1). Cf *Absa Technology Finance Solutions Ltd v Pabi's Guest House CC* 2011 6 SA 606 (FB), *Absa Technology Finance Solutions Ltd v Michael's Bid a House CC* 2012 JDR 0247 (GSJ), *Absa Technology Finance Solutions Ltd v Viljoen t/a Wonderhoek Enterprises* 2012 3 SA 149 (GNP), *Otto* 2011 *THRHR* 120, *Otto* in *Scholtz* 2014 paragraph 8.2.3.7 and for criticisms on the definition of 'lease' in the Act of *Otto* 2006 20.

and a charge, fee or interest is payable to the credit provider in respect of the agreement or the amount that has been deferred.¹⁴¹⁶

If a particular credit agreement constitutes both a credit facility and a credit transaction then such agreement is equally subject to any provision of the Act that applies specifically or exclusively to either credit facilities or mortgage agreements or secured loans, as the case may be, and for the purpose of applying section 108,¹⁴¹⁷ that agreement must be regarded as a credit facility or as a large agreement if it is a mortgage agreement.¹⁴¹⁸

An agreement, irrespective of its form constitutes a 'credit guarantee' if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies.¹⁴¹⁹

4.4.4.1. Small, Intermediate and Large Credit Agreements

Every credit agreement in the Act is characterised as a small, intermediate or large agreement. A credit agreement is a 'small agreement' if it is a pawn transaction a credit facility, if the credit limit under that facility falls at or below the lower of the thresholds established in terms of section 7 (1)(b) or any other credit transaction except a mortgage agreement or a credit guarantee, and the principal debt under that transaction or guarantee falls at or below the lower of the

¹⁴¹⁶ *Bridgeway Ltd v Markham supra*; *Evans v Smith* 2011 4 SA 472 WCC, *Carter Trading (Pty) Ltd v Blignaut* 2010 2 SA 46 (ECP), *Renier v Nel Inc v Cash on Demand (Pty) Ltd* 2011 5 SA 239 (GSJ), *Otto* 2009 TSAR 198 and *Otto in Scholtz* 2014 paragraph 8.2.3.8

¹⁴¹⁷ Section 108 regulates the delivery to consumers of statements of account.

¹⁴¹⁸ Section 8 (6) of the Act.

¹⁴¹⁹ Section 8 (5) of the Act. Cf *Gideos Wilson South Africa (Pty) Ltd v ACA (Pty) Ltd supra*, *Nedbank Ltd v Wizard Holdings (Pty) Ltd supra*, *Ribeiro v Slip Knots Inv 777 (Pty) Ltd supra*, *Silver Falcon Trading 333 v Nedbank Ltd supra*, Mostert D 'Must a Suretyship Agreement Comply with the NCA?' 2009 June *De Rebus* 53, *Boraine and Renke* 2007 DJ 233, *Stoop and Kelly-Louw* 2011 PER 67 and *Otto in Scholtz* 2014 paragraph 8.2.4. Kelly-Louw suggests that section 4 (2)(c) of the Act should be amended to give protection to natural persons who provide security in terms of a credit guarantee even though the underlying contract concluded by a juristic person falls outside the ambit of the Act (2012 SA Merc LJ 298).

thresholds established in terms of section 7 (1)(b).¹⁴²⁰ Presently the threshold for small agreements is when the principal debt is less than R15 000.

A credit agreement is an intermediate agreement if it is a credit facility, if the credit limit under that facility falls above the lower of the thresholds established in terms of section 7 (1)(b) or any credit transaction except a pawn transaction, a mortgage agreement or a credit guarantee, and the principal debt under that transaction or guarantee falls between the thresholds established in terms of section 7 (1)(b).¹⁴²¹ Presently the threshold for intermediate agreements is between R15 000 and R250 000.

A credit agreement is a large agreement if it is a mortgage agreement or any other credit transaction except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7 (1)(b).¹⁴²² Presently the threshold for large agreements is when the principal debt is above R250 000.

4.4.4.2. Other Credit Agreements

The Act has introduced two further types of credit agreements, namely the 'developmental credit agreement'¹⁴²³ and the 'public interest credit agreement'.¹⁴²⁴ Developmental credit agreements are credit agreements, irrespective of form, type or category, if at the time the agreement is entered into, the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in section 41 of the Act and the credit agreement is between a credit co-operative as credit provider, and a member of that credit co-operative as consumer, if profit is not the dominant purpose for entering into the agreement, and the principal debt under that agreement does not exceed the

¹⁴²⁰ Section 9 (2) of the Act as read with GN 713 of 1 June 2006. For a more detailed discussion of small, intermediate and large agreements cf Van Zyl in Scholtz 2014 paragraph 4.5, Otto and Otto 2013 35 and Stoop 2008 *DJ* 352.

¹⁴²¹ Section 9 (3) of the Act as read with GN 713 of 1 June 2006.

¹⁴²² Section 9 (4) of the Act as read with GN 713 of 1 June 2006.

¹⁴²³ Section 10 of the Act.

¹⁴²⁴ Cf Otto in Scholtz 2014 paragraph 8.5.2 for a discussion on public interest credit agreements.

prescribed maximum amount; an educational loan; or is entered into for any of the following purposes: (i) development of a small business; (ii) the acquisition, rehabilitation, building or expansion of low income housing; or any other purpose prescribed in terms of subsection (2)(a).¹⁴²⁵

The Minister by declaration or by regulation, may declare that credit agreements entered into in specified circumstances, or for specified purposes, during a specific period or until the declaration or regulation is repealed, are public interest credit agreements.¹⁴²⁶ The Minister, by notice in the *Gazette*, may make such a declaration in order to promote the availability of credit in all or part of the Republic in circumstances of natural disaster or similar emergency and grave public interest; and with or without prior notice or consultation, as the Minister may determine having regard to the circumstances. Such regulation may be made in order to promote the availability of credit in all or part of the Republic in any circumstances that the Minister considers to be in the public interest and in accordance with the provisions of section 171 (2).¹⁴²⁷

4.4.5. Requirements to Conclude a Credit Agreement

¹⁴²⁵ In terms of section 10 (2) of the Act the Minister may prescribe additional purposes, as contemplated in subsection (1)(b)(iii)(cc), that are designed to promote the socio-economic development and welfare of persons contemplated in section 13 (a); a maximum principal debt above which a developmental credit agreement where the credit co-operative is the credit provider and a member of such is the consumer does not automatically qualify as a developmental credit agreement; and criteria and standards to be applied by the National Credit Regulator in considering whether a credit provider's dominant purpose for making an agreement was profit or a purpose other than profit, including but not limited to the extent to which the credit agreement concerned contributes to the socio-economic development and welfare of persons contemplated in section 13 (a). Section 13 (a) refers to historically disadvantaged persons; low income persons and communities; and remote, isolated or low density populations and communities. Cf Otto in Scholtz 2014 paragraph 8.5.1 for a detailed discussion of developmental credit.

¹⁴²⁶ Section 11 of the Act.

¹⁴²⁷ When making a declaration or regulation as contemplated in this section, the Minister must prescribe the following criteria applicable to determining whether a credit agreement qualifies as a public interest credit agreement: the public interest circumstances in which credit may be granted or made available to a consumer; the maximum permissible principal debt; the maximum permissible duration of the credit agreement; and the area within the Republic in which the consumer under such an agreement must reside or carry on business. A public interest credit agreement is exempt from the application of Part D of Chapter 4 to the extent that it concerns reckless credit.

There are very few formal requirements for the conclusion of a credit agreement under the Act.¹⁴²⁸ The first port of call would be to ensure that the credit agreement meets the requirements under the general principles of contract in order to ensure that a valid and binding contract exists. The common law requirements for the conclusion of a binding contract are:¹⁴²⁹

- consensus between the parties;
- the parties must have contractual capacity;
- performance must be possible and determinable;
- the contract must not be unlawful; and
- formalities if prescribed by law must be satisfied.¹⁴³⁰

The Act has a limited but sometimes important, impact on these basic principles and their application to credit agreements.¹⁴³¹

The Act commands certain pre-agreement disclosures; a credit provider must not enter into a credit agreement unless it has given the consumer a pre-agreement statement and quotation¹⁴³² in the prescribed form with respect to small agreements¹⁴³³ or with respect to intermediate and large agreements, a pre-

¹⁴²⁸ For a discussion of Renke S and Kinnear L 'Formaliteitsvoorskrifte (of Gebrek Daaraan) Ingevolge die Nasionale Kredietwet 34 van 2005' *THRHR* 2013 7654 665.

¹⁴²⁹ Christie RH and Bradfield GB *Christie's The Law of Contract* 2011 Chapters 2, 3, 5, 10 and 11, Nagel *et al Commercial Law* 2011 Chapters 3–7, Van der Merwe *et al Contract General Principles* 2012 Chapters 2,5,6,7 and 8 and Otto in Scholtz 2014 paragraph 9.1.1.

¹⁴³⁰ Otto in Scholtz 2014 paragraph 9.1.1 and Otto and Otto 2013 49.

¹⁴³¹ *Ibid.*

¹⁴³² Section 92 (1) of the Act. It has been correctly stated that 'the quotation gives the consumer an opportunity to consider his intended agreement and to shop around for better or cheaper credit' (Otto and Otto 2013 50). However, it appears that the Act, has in this respect, not wholly succeeded in encouraging consumers to 'shop around'. The *2012 Literature Review* found that this was due to a lack of standardisation, limited implementation and a negative impact on credit scoring because of multiple enquiries at credit bureaus (14). It is submitted that the failure of the intended consequence of this section is also due to a lack of 'advertising' by the National Credit Regulator – consumers are perhaps not aware that they are entitled to consider the quotation for a certain period, and using the opportunity to obtain further quotations. However, it is also likely that consumers do not shop around due to the inconvenience of having to do so, in an otherwise frenetic and busy day-to-day living environment. And equally correct is the view that given that, subject to various conditions, the credit provider is bound by the quotation for five business days (section 92 (3)) the quotations 'are in the nature of an option created by statute with the prospective consumer as the option holder' (Otto and Otto 2013 50).

¹⁴³³ The specifics on the pre-agreement statement and quotation vary depending on whether the transaction involves small, intermediate or large agreements. The Minister may prescribe different forms in respect of developmental and other credit agreements (section 92). Cf Campbell in Scholtz 2014 paragraph 6.5.3 and Otto in Scholtz 2014 paragraph 9.2

agreement, quotation and statement in the form of the proposed agreement or in another form provided it contains the prescribed information.¹⁴³⁴

While it appears that the Act does not specifically direct that the credit agreement must be in writing and signed by the parties,¹⁴³⁵ it does place an onus on the credit provider to deliver to the consumer, without charge, a copy of the document that records their credit agreement, which must be transmitted to the consumer in a paper form or in printable electronic format.¹⁴³⁶

Sections 92 and 93 of the Act do not indicate what sanction will be applied to credit providers who do not comply with the disclosure requirements. It is assumed that by virtue of section 57, if the credit provider does not adhere to the directive of these sections, it will be levied with a fine or its license to trade as a credit provider may be revoked by the National Consumer Tribunal on request by the National Credit Regulator,¹⁴³⁷ but the parties will still be bound by their obligations in terms of the agreement.¹⁴³⁸ The following comment by Otto,¹⁴³⁹ with regards the validity of a credit agreement that has not been reduced to writing, is germane:

¹⁴³⁴ As contemplated in section 93 of the Act (section 92 (2)).

¹⁴³⁵ If one looks at the types of credit agreements as defined in section 8 it will be noticeable that the agreements as described shall be such, 'irrespective of [their] form' (sections 8 (2), (3), (4), (5) and 10).

¹⁴³⁶ Section 93 of the Act. Where a prescribed form exists, for example in small agreements (regulation 30 read with prescribed form 20.2) and with regard to some intermediate and large agreements, (regulation 31) such document that records such agreements must be in that prescribed form, or at the least contain the minimum content prescribed by the relevant regulation. Where there is no prescribed form, the form may be determined by the credit provider which must, however, comply with any prescribed requirements for the category or type of credit agreement concerned. The Minister may prescribe different forms in respect of developmental and other credit agreements. Furthermore, the National Credit Regulator may prescribe guidelines for methods of assessing whether a statement satisfies any prescribed requirements (section 93). For a detailed discussion of the form and content of credit agreements cf Otto in Scholtz 2014 paragraph 9.2.1 – 9.2.3 and Otto and Otto 2013 50-52. If credit agreements were not reduced to writing in terms of section 5 (2) of the Credit Agreements Act and section 3 (8) of the Usury Act, they were not rendered invalid merely by this fact, however, failure to reduce the agreement to writing constituted an offence in terms of section 23 of the Credit Agreements Act and section 3 (6) of the Usury Act (cf Otto *Credit Law Service* 1991 paragraph 17). Section 2 (1) of the Alienation of Land Act renders an agreement void if not reduced to writing and signed by the parties or their authorised representatives.

¹⁴³⁷ Section 57 of the Act.

¹⁴³⁸ Section 57 (9) provides that the obligations, of a registrant under the Act or under any credit agreement in respect of which it is the credit provider, will survive the suspension or cancellation of its registration and that likewise the obligations of a consumer under a credit agreement will survive the cancellation of the credit provider's registration.

¹⁴³⁹ Otto in Scholtz 2014 paragraph 9.2.4.

The National Credit Act neither declares the contract void nor creates an offence for want of compliance with the formality of requirements. Section 93, however, like many other provisions of the Act, creates an obligation for credit providers and a corresponding obligation for consumers. Like any right, this one can also be enforced. Moreover, repeated failure by a credit provider to furnish copies of agreements with the necessary details may even lead to deregistration of that credit provider.

The National Credit Act does not make the same demands of the credit consumer as was with the Credit Agreements Act, with reference to initial payment requirements.¹⁴⁴⁰ The credit provider is not obliged in terms of the National Credit Act to obtain a deposit or any form of initial payment in order to render the agreement valid. Nor are credit agreements which fall under the Act limited by maximum periods. It was submitted that the provisions of having to pay initial deposits and limiting the period of the agreements were not to be seen as harassment of the consumer but rather as protecting the consumer against himself and that such decisions, that is determination of maximum deposits and minimum periods, were 'policy orientated decision[s] of the executive' and that for instance minimum deposits are sometimes 'lowered to stimulate a particular sector of the economy, and sometimes raised to reduce consumer spending and to curb inflation'.¹⁴⁴¹ It is submitted that the executive no longer has this 'tool' to stimulate any particular sector of the economy, reduce consumer spending or curb inflation. However, the National Credit Act has attended to the implementation of these policy-orientated apparatus using other techniques, such as for example curbing consumer spending through shifts in the interest rate cap and which rates are regulated by the Act.¹⁴⁴² This is not to say that the Act ignores the protection of the credit consumer, it merely takes a different and perhaps more robust approach to the protection of the consumer.

The consumer, as a natural person, must now be creditworthy in order to be granted credit, failing which, the credit provider may be guilty of reckless lending

¹⁴⁴⁰ Cf paragraph 4.2.5 **Error! Reference source not found.** *supra* for a discussion on these requirements in the Credit Agreements Act.

¹⁴⁴¹ Otto *LAWSA* 1994 22.

¹⁴⁴² Section 101 (d) as read with section 105 which states that the Minister after consulting with the National Credit Regulator may prescribe a method for calculating a maximum rate of interest and the maximum fees. In this regard, cf Chapter 5 of the Regulations published in GN R489 in Government Gazette 28864 of 31 May 2006.

and find itself faced with various legislative sanctions and/or consequences *vis-à-vis* the credit agreement to which it is a party. Part D of Chapter 4 of the Act places a great onus on credit providers to become more responsible in their credit lending services, by ensuring they do not overreach the consumer. A greater responsibility is placed on the credit provider to (comprehensively) check, prior to extending credit, that a consumer is creditworthy and in a position to repay the deferred capital loaned to prevent him from becoming over-indebted.¹⁴⁴³ While the effects of Part D are dramatic, more especially for the credit providers; by forcing them to take much greater care when lending to natural persons,¹⁴⁴⁴ consumers are also affected, and this is where we see how the Act protects the consumer while not using the same methods as used in the Credit Agreements Act – that is of minimum deposits and maximum periods. The consumer is now limited as to the amount of credit which he may borrow (according to his means) and in the event that he finds himself over-committed the Act has now provided an avenue for debt relief in the form of debt restructuring¹⁴⁴⁵ or if there is a particular offending reckless credit agreement – for the re-arrangement or even suspension of same.¹⁴⁴⁶ Much onus has been placed on South African courts, more especially on the lower courts and without immediate and intensive training,¹⁴⁴⁷ as re-structuring and re-arrangement orders

¹⁴⁴³ The consequences of lending recklessly are far reaching. A credit provider may find that a consumer's rights and obligations in terms of a credit agreement are set aside completely, or a provider may find that a court decides it just and reasonable to suspend the effect of a credit agreement, in which event no fees, interest or charges may be charged to the consumer either during or after the suspension for the time during which the agreement was suspended. The biggest effect which Part D of Chapter 4 may have on a credit provider is that despite it not having lent recklessly – due to an over-indebted consumer's debt restructuring by a court – the agreement entered into by that credit provider may be re-arranged; for example that the periodic repayments be made over a longer period and thereby lessened on a monthly basis. It has been submitted, however, that the total interest repayable will ensure that the credit provider does not lose its profit in these instances, provided, it did not lend recklessly (Vessio ML 'Beware the Provider of Reckless Credit' *TSAR* 2009 274, Boraine A and Van Heerden CM 'Some Observations Regarding Reckless Credit in terms of the National Credit Act 34 of 2005' *THRHR* 2010 73 650 and Renke S 'Measures in South African Consumer Credit Legislation Aimed at the Prevention of Reckless Lending and Over-indebtedness: An Overview Against the Background of Recent Developments in the European Union' *THRHR* 2011 74 2 208).

¹⁴⁴⁴ The sections in the Act pertaining to reckless lending and over-indebtedness apply to natural persons (section 6 and Chapter 4 Part D).

¹⁴⁴⁵ However, even here the Act's provisions, were found wanting. According to the *2010 Impact Assessment Report*, mostly due to the fact that the Magistrates' courts were not equipped to handle debt rearrangement matters (16).

¹⁴⁴⁶ Cf sections 83, 84, 87 and 88 of the Act.

¹⁴⁴⁷ The South African Justice College, with financial assistance from the United-States Agency for International Development, developed a training manual aimed at magistrates and

may have the effect of 'burnt' credit providers withdrawing credit from the market, in turn having the net-effect of credit being made available to a privileged few, which further in turn will raise the cost of credit.¹⁴⁴⁸ All of these consequences will have the effect of depriving the smaller consumer of access to credit. Alternatively, after having been failed by the debt counselling procedure, they may have to attempt to declare themselves insolvent.¹⁴⁴⁹ Not quite, it is submitted, the intention of the legislature.

4.4.6. Prohibition of Certain Agreements and Unlawful Provisions

4.4.6.1. Introduction

The National Credit Act declares certain credit agreements unlawful and forbids specific terms being incorporated in credit agreements. Part A of Chapter 5 of the Act deals specifically with unlawful credit agreements and provisions. This part is divided into three distinct sections, section 89 entitled 'Unlawful Credit Agreements', section 90 entitled 'Unlawful Provisions of Credit Agreements' and section 91 entitled 'Supplementary Requirements and Documents'. Each of these sections are discussed separately below.

4.4.6.2. Unlawful Credit Agreements

Section 89 does not apply to pawn transactions.¹⁴⁵⁰ The Act declares the following credit agreements unlawful:

implemented a training programme that started in March 2007 (*National Credit Regulator Annual Report 2007 9*).

¹⁴⁴⁸ According to the *2012 Literature Review*, after the introduction of the Act there was a quarter by quarter drop of credit granting in the South African market. Only in the last quarter of 2011 did the levels of credit granting return to the level seen in the last quarter of 2007 (48).

¹⁴⁴⁹ Although, even insolvency may not be an option as a consumer will have to prove an advantage for creditors in declaring himself insolvent. In those instances he may not be able to utilize the insolvency route and its concomitant relief (Boraine A, Van Heerden CM and Reostoff M 'A Comparison Between Formal Debt Administration and Debt Review – the Pros and Cons of these Measures and Suggestions for Law Reform (Part 1 and Part 2)' *DE JURE* 2012 45 and 45 respectively and Boraine A and Van Heerden CM 'To Sequestrate or not to Sequestrate in View of the National Credit Act: A Tale of Two Judgments' *PELJ* 2010 13 83).

¹⁴⁵⁰ Section 89 (1) of the Act.

- where the consumer lacked contractual capacity when entering the agreement;¹⁴⁵¹
- where a consumer is subject to an administration order,¹⁴⁵² and the administrator concerned did not consent to the agreement, and the credit provider knew, or could reasonably have determined, that the consumer was the subject of such an order;¹⁴⁵³
- if the agreement results from an offer made by negative option marketing or opting out requirements;¹⁴⁵⁴
- if the agreement is a supplementary agreement or document prohibited by section 91 (a);¹⁴⁵⁵
- if at the time the agreement was made, the credit provider was unregistered but was required in terms of the Act to be registered.¹⁴⁵⁶
- where the credit provider was subject to a notice by the National Credit Regulator or a provincial credit regulator requiring it either to stop offering, making available or extending credit under any credit agreement, or agreeing to do any of those things; or to stop offering, making available or extending credit under the particular form of credit agreement used by the credit provider, whether or not the Act requires that credit provider to be registered, and no further appeal or review is available in respect of that notice.¹⁴⁵⁷

If a credit agreement is unlawful in terms of section 89, a court must, in such instances, declare the agreement void retrospectively, despite any provision of the common law or any other legislation or any provision of any agreement to the

¹⁴⁵¹ At the time the agreement was entered into the consumer was an unemancipated minor or mentally unfit person. In terms of the latter, the common law renders an agreement with such a person void even if the person has not formally been declared unfit by a court (Christie and Bradfield 2012 256). Because the contract is void but not unlawful, the consequences are that both parties must restore their performances. However, the National Credit Act changes the situation when a person is declared mentally unfit by a competent court and they conclude an agreement, essentially 'elevating' the agreement to being an unlawful agreement which means that the credit provider in terms of section 89 (5) forfeits his performance while the consumer's performance must be restored (Otto in Scholtz 2014 paragraph 9.3.2 fn 31).

¹⁴⁵² In terms of section 74 (1) of the Magistrates' Courts Act.

¹⁴⁵³ Section 89 (2)(a) of the Act. A credit agreement will not be unlawful in such instances if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by an act or omission induced the credit provider to believe that the consumer had the legal capacity to contract; or attempted to obscure or suppress the fact that the consumer was subject to an administration order.

¹⁴⁵⁴ Section 89 (2)(b) of the Act.

¹⁴⁵⁵ This section stipulates that a credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document that contains a provision that would be unlawful if it were included in a credit agreement (section 89 (2)(c)).

¹⁴⁵⁶ Section 89 (2)(d) of the Act. This section does not apply to a credit provider if at the time the credit agreement was made, or within thirty days after that time, the credit provider had applied for registration, and was awaiting a determination of that application; or at the time the credit agreement was made, the credit provider held a valid clearance certificate issued by the National Credit Regulator.

¹⁴⁵⁷ Section 89 (2)(e) of the Act.

contrary.¹⁴⁵⁸ Furthermore, the credit provider must refund to the consumer any money paid by the consumer under that agreement with interest at the rate set out in that agreement.¹⁴⁵⁹ Section 89 (5)(c) declares that the credit provider's contractual rights to recover money paid or goods delivered to, or on behalf of the consumer are either, by order of court, to be cancelled (unless the court decides that this would unjustly enrich the consumer); or forfeited to the State if the court concludes that cancelling the said rights would enrich the consumer. Not surprisingly, this section has been declared unconstitutional by the High Court in *Opperman v Boonzaaier*¹⁴⁶⁰ and confirmed so by the Constitutional Court in *National Credit Regulator v Opperman*.¹⁴⁶¹ Section 27 of the National Credit Amendment Act changes section 89 (5) by removing the reference to the common law in this section and removing the statutory directive on the courts to declare such agreements void but rather, that in such instances the courts make a just and equitable order including but not limited to an order declaring the agreement void. Section 27 of the Amendment Act also deletes section 89 (5)(b) and (c).

It is submitted that the consequences prescribed by section 89, more especially 89 (5)(c) are too far reaching. By attempting to remove the common law rights of the credit provider, it ignores the important function of credit legislation which is to balance the individual yet competing interests between credit provider and consumer. For many centuries it has been the credit consumer which has most often needed protection against exploitative methods of contracting in money loans or credit transactions and to a certain extent it is still the consumer that requires protectionist legislation, however, to over protect the consumer and under protect the credit provider, will simply tilt the imbalance, the repercussions

¹⁴⁵⁸ Section 89 (5)(a) of the Act. Cf Van de Merwe *et al Contract General Principles* 2012 173. For criticisms on this section cf Otto JM 'Die Par Delictum-Reël en die National Credit Act' 2009 *TSAR* 417, Otto 'National Credit Act, Ongeoorloofde Ooreenkomste en Meervallertjies vir die Fiscus' 2010 *TSAR* 161 and Otto in Scholtz 2014 paragraph 9.3.4.

¹⁴⁵⁹ And for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer (section 89 (2)(b)). Otto is of the view that this section, as was with section 89 (2)(c), will be declared unconstitutional (in Scholtz 2014 paragraph 9.3.4.1).

¹⁴⁶⁰ 2012 ZAWCHC 27.

¹⁴⁶¹ 2013 2 SA 1 CC. Cf also *Cherangani Trade and Invest 107 (Edms) Bpk v Mason* 2009 ZAFSHC 30 and *Cherangani Trade & Invest 107 (Pty) Ltd v Mason and Others* 2011 ZACC 12.

of which may include withdrawal of credit from the market and down loading of costs for litigation onto the consumer.

4.4.6.3. Unlawful Provisions of Credit Agreements

Section 90 (2) of the Act lists an extensive number of unlawful provisions which may not be incorporated in a credit agreement. Section 90 (1) quite simply directs that a 'credit agreement must not contain an unlawful provision'. To list the unlawful provisions here would amount to a mere repetition of section 90 (2) and therefore this exercise has not been done. Only the consequences of incorporating such unlawful provisions in a credit agreement are examined below.

The consequences of incorporating an unlawful provision in a credit agreement would be to render the unlawful provision void.¹⁴⁶² If an agreement contains any unlawful provision, as contemplated in section 90 (2), a court must sever the unlawful provision from the agreement, if it finds that it is reasonable to do so having regard to the agreement as a whole. Alternatively, a court may declare the entire agreement unlawful.¹⁴⁶³ The court should then make any further order that is just and equitable in the circumstances in order to give effect to section 89 (5), that is a court must order that the credit agreement is void as from the date the agreement was entered into.¹⁴⁶⁴ Otto¹⁴⁶⁵ describes the discretion of the court to declare the entire agreement unlawful as 'phenomenal' and states further that courts should be loath to declare contracts void in their entirety on the ground of an unlawful provision, as this has not been the approach of the courts in the past. A court will sever an unlawful provision from a contract if possible and enforce the remainder of the contract, unless the severance will leave the parties with a contract substantially different from the one they intended,¹⁴⁶⁶ for example when

¹⁴⁶² Section 90 (3) of the Act.

¹⁴⁶³ Section 90 (4) of the Act.

¹⁴⁶⁴ Subsections 89 (5)(c) has been declared unconstitutional by the Constitutional Court and the National Credit Amendment Act intends to delete subsection 89 (5)(b) from the Act. Cf paragraph 4.4.6.2 *supra* for a discussion of this section.

¹⁴⁶⁵ Otto in Scholtz 2014 paragraph 9.3.4.2 and cf Otto 2009 TSAR 417 for a full discussion.

¹⁴⁶⁶ *Sasfin v Beukes* 1989 1 SA 1 (A).

several contractual terms are found to be in contravention of public policy.¹⁴⁶⁷ Otto¹⁴⁶⁸ submits that this should be the approach adopted by the courts when faced with matters pertaining to section 90 (4) of the Act.

It is submitted that the call to revert to the common law position by Otto is germane, further the view is correct and should be heralded. Section 90 (4) upsets well-established common law principles and is demonstrative of an Act which was not drafted with sufficient consideration for the background setting of the South African common law. It is further submitted that if the courts are mindful of the common law, section 90 (4)(b) should almost always be superseded and at very best a 'phenomenal' remedy used only in the most particular of circumstances.¹⁴⁶⁹ As will be seen in later chapters¹⁴⁷⁰ – the courts will likewise have to revert and have reverted to the common law position when interpreting the sections in the Act relating to breach and remedies.

4.4.7. Rights and Duties of the Parties

Consumer rights and protection of the consumer are the essence of any credit legislation. However, as previously submitted, the rights of the credit consumers should not trump or overshadow the rights of credit providers, and while the Act recognises the importance of promoting such equity in the credit market through balancing the respective rights and responsibilities of credit providers and consumers, this has not been achieved in all quadrants of the legislation.¹⁴⁷¹ Due to the large number of illiterate and unsophisticated consumers in the South African credit industry, extensive consumer protection in the form of consumer rights is, however, essential.¹⁴⁷²

¹⁴⁶⁷ Otto in Scholtz 2014 paragraph 9.3.4.2.

¹⁴⁶⁸ *Ibid.*

¹⁴⁶⁹ Where by its very nature an unlawful provision taints the whole agreement between the parties and severing it cannot remedy the contract.

¹⁴⁷⁰ Chapters 6 and 7.

¹⁴⁷¹ Section 3 (d) of the Act. For an example of such a section cf the discussion of section 89 (5)(c) above at paragraph 4.4.6.2.

¹⁴⁷² Campbell in Scholtz 2014 paragraph 6.2.1.

Because any form of credit regulation will be a series of rights and duties bestowed on credit consumers and credit providers, the rights and duties of the parties to the credit agreement cannot all be found concentrated in one place in the legislation concerned, nor in any discussion of the legislation. However, the Act does provide in Part A of Chapter 4 a condensed list of consumer rights. Because the Act also affects entities beyond the contracting parties, for example but not limited to, credit bureaus, the rights of the consumer impose duties on such third parties and not only on the credit provider. Another difficulty is that a right of the consumer granted in terms of the Act, is quite logically a corresponding duty of the credit provider, accordingly it becomes quite difficult to neatly list the rights and duties of each party under separate headings.¹⁴⁷³ However, some of the more salient rights and duties are briefly discussed in the following sections.

4.4.7.1. Rights of the Credit Provider

Otto¹⁴⁷⁴ remarked that ‘the legislature was not in a generous mood when it created rights for the credit providers in the National Credit Act,’ and that the Act is ‘one sided and biased towards consumers, creating a huge amount of duties for creditors’. It is submitted that the nature of the credit relationship is such that legislation enacted in this regard should tend to favour the rights of the credit consumer. The credit provider requires very basic rights to be protected in order to benefit from the relationship, such as the right to receive payment and the right to enforce the agreement when the consumer does not pay or does not pay on the due date. It is, however, the consumer that is in the more vulnerable position if the rights of the credit provider, with regards enforcement of rights upon breach by the consumer, are not regulated and managed.

Otto¹⁴⁷⁵ posits that the credit provider’s most important rights are the right to enforce the contract, to receive payment together with interest that is due or to cancel the agreement and claim return of the goods in the event of breach by the

¹⁴⁷³ Otto and Otto 2013 83.

¹⁴⁷⁴ Otto and Otto 2013 81.

¹⁴⁷⁵ *Ibid.*

consumer.¹⁴⁷⁶ It is submitted that the right to enforce the contract is indeed a credit provider's most significant right, as security in the enforcement process creates a stabilising effect on the credit industry, through reassurance that legislation through the agents authorised to uphold and enforce it, such as attorneys, advocates and the courts, will be able to protect their legitimate contractual interests.¹⁴⁷⁷ These most imperative rights have been restrained, somewhat, by the Act. The right to access or make use of the remedies available to the credit provider in the event of breach of contract by the consumer are discussed later in the thesis in detail.¹⁴⁷⁸

A credit provider has a right to refuse to enter into a credit agreement with any prospective consumer on reasonable commercial grounds that are consistent with its customary risk management and underwriting practices.¹⁴⁷⁹

A credit provider has been given the right to suspend a credit facility at any time the consumer is in default under the agreement or close that credit facility by giving the consumer ten business days written notice.¹⁴⁸⁰

A credit provider who has unsuccessfully attempted to resolve a dispute over the costs of attachment of property directly with the consumer or through alternative dispute resolution is entitled to apply to court for a costs order.¹⁴⁸¹

4.4.7.2. Duties of a Credit Provider

¹⁴⁷⁶ The provisions relating to the enforcement of the Act are found in Chapter 8 of the Act.

¹⁴⁷⁷ 'The enforcement of law is crucial to the working of a free market economy' (Goodwin-Groen RP with input from Kelly-Louw M FinMark Trust *The National Credit Act and its Regulations in the Context of Access to Finance in South Africa* November 2006 61).

¹⁴⁷⁸ They are dealt with in Chapter 6 *infra*. Cf Also Van Heerden in Scholtz 2014 Chapter 12.

¹⁴⁷⁹ Section 60 (2) of the Act. This section is subject to sections 61 and 66 of the Act.

¹⁴⁸⁰ Section 123 (3) of the Act. This does not cause the credit provider to commit a breach of the contract (Otto and Otto 2013 83). It is submitted that the right to immediately suspend or terminate with ten days' notice is a rather dramatic right as it gives the consumer no right to be heard. The section does not require the provider to prove that the consumer is in breach – it simply entitles the consumer, upon non-payment and without warning to the consumer to suspend the credit facility. Section 123 is discussed in greater detail in paragraphs 6.4.2.1 *infra*.

¹⁴⁸¹ Section 132 of the Act. Cf Van Heerden in Scholtz 2014 paragraph 12.11 and Otto and Otto 2013 82.

First and foremost credit providers are under an obligation make application to be registered with the National Credit Regulator as credit providers¹⁴⁸² and will only be entitled to offer, make available or extend credit, enter into credit agreements or agree to do any of these things unless they are so registered.¹⁴⁸³ Not all credit providers are obliged to register. In terms of the Act, only those who supply credit under at least one hundred credit agreements, other than incidental credit agreements, or where the total principal debt owed to that credit provider,¹⁴⁸⁴ other than incidental credit agreements, exceeds R500 000 must be registered. However, section 10 of the National Credit Amendment Act deletes the first part of section 40 of the Act, making registration for credit providers only necessary where the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceed R500 000. The consequences of defiance of the registration requirements are dire and a credit agreement entered into by a credit provider who is required to be registered but is not, is an unlawful credit agreement which is void.¹⁴⁸⁵

A further obligation imposed on the credit provider by the Act is the duty to, upon request from a consumer, to advise that consumer in writing of the dominant reason for taking any of the following actions (affecting that consumer): refusing to enter into a credit agreement; offering a lower credit limit under a credit facility than applied for by the consumer, or reducing the credit limit under an existing credit facility; refusing a request to increase a credit limit under an existing credit facility or refusing to renew an expiring credit card or similar renewable credit

¹⁴⁸² Section 40 (1) of the Act. The registration requirements, criteria and procedures are set out in Part A of Chapter 3 of the Act. Cf also *JMV Textiles (Pty) Ltd v de Chalain Superinvest 14 CC and Others* 2010 6 SA 173 (KZD) at paragraph 6.

¹⁴⁸³ Section 40 (3) of the Act.

¹⁴⁸⁴ Commonly referred to as the 'book debt'.

¹⁴⁸⁵ Section 40 (4) of the Act. The effects of this section are very interesting, because it places in peril the single private financing transaction. If we take an example as follows: A sells his business (he runs a lodge) together with the property it operates on, to B. B does not have the finance and the parties agree that B will pay A for the value of the going concern and the property over fifteen years, together with interest. The transaction is valued at R2 500 000 and therefore A is required to register as a credit provider with the National Credit Regulator. A does not know that he has to register as a credit provider with the National Credit Regulator at the time the credit agreement was made or within thirty days after that time (section 89 (2)(d) as read with 89 (4)(a)-(b)). The transaction is therefore void. The consequences of the void transaction would result in at least one of the parties incurring substantial losses. Cf *National Credit Regulator v Opperman* 2013 2 SA 1 CC, *Cherangani Trade and Invest 107 (Edms) Bpk v Mason NO and Others* 2009 ZAFSHC 30 12 March 2009, *Cherangani Trade and Invest 107 (Edms) Bpk v Mason NO and Others* 2011 ZACC 12 and *Opperman v Boonzaaier and Others* 2012 ZAWCHC 27.

facility. When responding to such a request, a credit provider who has based its decision on an adverse credit report received from a credit bureau must advise the consumer in writing of the name, address and other contact particulars of that credit bureau.¹⁴⁸⁶

A credit provider must not, in response to a consumer exercising, asserting or seeking to uphold any right set out in the Act or in a credit agreement, discriminate directly or indirectly against the consumer, compared to the credit provider's treatment of any other consumer; penalise the consumer; alter, or propose to alter, the terms or conditions of a credit agreement with the consumer to the detriment of the consumer; or take any action to accelerate, enforce, suspend or terminate a credit agreement with the consumer.¹⁴⁸⁷

A credit provider must not enter into a credit agreement unless it has given the consumer a pre-agreement statement and quotation in the prescribed form.¹⁴⁸⁸ The credit provider is also obliged to deliver to the consumer, free of charge, a copy of the document that records the terms and conditions of their credit agreement.¹⁴⁸⁹ A credit provider must maintain records of all applications for credit, credit agreements and credit accounts in the prescribed manner or form and for the prescribed period time.¹⁴⁹⁰

Where, after delivery of goods to the consumer which are subject to a credit agreement, the consumer and credit provider agree to substitute other goods or all or part of the goods then the credit provider is obliged to prepare and deliver to the consumer an amended credit agreement describing the substituted goods, without making any other changes to the original agreement.¹⁴⁹¹

¹⁴⁸⁶ Section 62 (1) and (2) of the Act. A credit provider may make an application to the National Credit Tribunal limiting the credit provider's obligation in terms of providing reasons for the refusal to grant credit if the consumer's requests are frivolous or vexatious (section 62 (3)).

¹⁴⁸⁷ Section 66 (1) of the Act.

¹⁴⁸⁸ Section 92. The Act differentiates as far as the requirements relating to the prescribed forms are concerned between small and large and intermediate agreements.

¹⁴⁸⁹ An agreement may be transmitted to the consumer in either printed or electronic format. The Act differentiates between requirements for small and intermediate or large agreements (section 93).

¹⁴⁹⁰ Section 170 of the Act as read with regulation 55 and 56.

¹⁴⁹¹ Section 98 (b) of the Act.

As indicated, one of the purposes of the Act is to discourage reckless credit granting by credit providers.¹⁴⁹² To this end the Act places an obligation on credit providers to enter credit agreements only and unless they have taken reasonable steps to assess the proposed consumer's debt re-payment history, existing financial means, prospects and obligations.¹⁴⁹³ Failure to carry out such an assessment, irrespective of the outcome of the assessment, will render the credit agreement reckless.¹⁴⁹⁴ A finding of reckless credit may result in a court order setting aside all or part of the consumer's rights and obligations under that agreement or suspending the agreement or restructuring the agreement.¹⁴⁹⁵ The National Credit Amendment Act provides that a Tribunal will have the same powers as the Courts in this regard.¹⁴⁹⁶

There is a further obligation on credit providers to give notice, prior to commencement of legal proceedings to enforce the agreement in terms of section 129 (1)(a) and section 86 (10).¹⁴⁹⁷ The notice which has to be provided in terms of section 129 forms part of the discussion relating to required procedures before debt enforcement and accordingly, is not discussed further here but in detail in Chapter 5 below. Suffice it to point out that the notice must be in writing and must propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud

¹⁴⁹² Cf section 3 (c)(ii) of the Act.

¹⁴⁹³ Section 81 (2). Part D of Chapter 4, which part deals with over-indebtedness and reckless credit does not apply to a credit agreement in respect of which the consumer is a juristic person (section 78 (1)). *Horwood v Firststrand Bank Ltd* 2011 ZAGPHC 121, *SA Securitisation (Pty) Ltd v Mbatha* 2011 1 SA 310 (GSJ), *Absa Bank v COE Family Trust and Others* 2012 3 SA (WCC) and Van Heerden in Scholtz 2014 paragraph 11.4.

¹⁴⁹⁴ Section 89 (1)(a) of the Act. There are other criteria that render credit agreements reckless, cf VanHeerden in Scholtz 2014 paragraph 11.4.3 and Borraine A and Van Heerden C 'Some Observations Regarding Reckless Credit in terms of the National Credit Act' 2010 73 *THRHR* 1. It is interesting to note that the concept of knowing and investigating a potential debtor is age-old, the following is from Ulpianus (D 17 1 42): 'At least if I have instructed you to investigate the financial position of him to whom I intend giving credit, and you report back that he is able to pay' (translation by Thomas PHJ 'Anitchresis, Hemiolia and the Statutory Limit on Interest in Gerard Noodt's *De Foenore et Ususris*' 2007 *De Jure* 52 55).

¹⁴⁹⁵ Section 83 of the Act. For detailed discussion cf Van Heerden in Scholtz 2014 Chapter 11 and Vessio 2009 *TSAR* 274. The idea of not lending to consumers that are over-indebted or rather to consumers that cannot afford the credit is also an age old concept. The following serves as an ancient source: Noodt, a Dutch jurist, stated 'a loan is not given to someone vexed by constant indigence, for money would be loaned in vain to one who has nothing: but he is given alms' (Van Niekerk *et al* 2009).

¹⁴⁹⁶ Cf section 25 of the National Credit Amendment Act.

¹⁴⁹⁷ The pre-enforcement procedures are discussed in Chapter 5 *infra*.

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.¹⁴⁹⁸

Where a court finds a credit agreement or a provision of an agreement unlawful or such provision is severed from the agreement, the credit provider who is a party to that agreement must not, in response to that decision directly or indirectly penalise another party to that agreement when contemplating an application for credit, alter the terms or conditions of any other credit agreement with another party to the impugned agreement, except to the extent necessary to correct a similarly unlawful provision or take any action to accelerate, enforce, suspend or terminate another credit agreement with another party to the impugned agreement.¹⁴⁹⁹ This serves to protect other consumers against retribution by the credit provider.

Part B of Chapter 4 deals with confidentiality of personal information and consumer credit records. Any person who, in terms of the Act, receives, compiles, retains or reports any confidential information¹⁵⁰⁰ pertaining to a consumer or prospective consumer has the obligation to protect the confidentiality of that information, and in particular, must use that information only for a purpose permitted or required in terms of the Act, other national legislation or applicable provincial legislation and must report or release that information only to the consumer or prospective consumer, or to another person to the extent permitted by legislation or as directed by the consumer or prospective consumer or an order of a court or the Tribunal.¹⁵⁰¹ In the case of an inconsistency between a provision of the confidentiality sections (Part B of Chapter 4) in the Act as read with any relevant definition in section 1 and a provision of the Promotion

¹⁴⁹⁸ 129 (1)(a) of the Act. Van Heerden discusses the section 129 notice in great detail in Scholtz 2014 at paragraphs 12.4 and 12.6. The relevant case law on this section is discussed in paragraph 5.6 *infra*. It is, however, notable how the legislature has attempted to facilitate that the dispute resolves prior to reaching litigation.

¹⁴⁹⁹ Section 66 (2) of the Act.

¹⁵⁰⁰ Defined in section 1 of the Act as personal information that belongs to a person and is not generally available to or known by others.

¹⁵⁰¹ Section 68 (1) of the Act.

of Access to Information Act,¹⁵⁰² then in such event the relevant provisions of both Acts will apply concurrently, to the extent that the provisions of Part B of the Act are not excluded in terms of section 5 of the Promotion of Access to Information Act.¹⁵⁰³

Section 91 prohibits a credit provider from directly or indirectly requiring or inducing a consumer to enter into a supplementary agreement, or sign any document, that contains a provision that would be unlawful if it were included in the agreements. Furthermore, a credit provider is prohibited from requesting or demanding that the consumer give the credit provider temporary or permanent possession of an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device, other than for the purpose of identification, or to make a copy of the instrument; reveal any personal identification code or number or direct, or knowingly permit, any other person to do the same on behalf or for the benefit of the credit provider.¹⁵⁰⁴

The producer of a document that is required to be delivered to a consumer in terms of the Act must provide that document in the prescribed form,¹⁵⁰⁵ if any, for that document or if no form has been prescribed for that document, in plain language.¹⁵⁰⁶ A credit provider is obliged to deliver to a consumer, without

¹⁵⁰² Act 2 of 2000 (hereinafter 'Promotion of Access to Information Act').

¹⁵⁰³ Section 67 of the Act.

¹⁵⁰⁴ Section 91 of the Act.

¹⁵⁰⁵ Section 65 of the Act. Campbell submits that the implication of this provision is that the forms promulgated in the regulations (GN R489 in *Government Gazette* 28864 of 31 May 2006) contain plain and understandable language as required by section 64 (Scholtz 2014 paragraph 6.2.6).

¹⁵⁰⁶ Section 64 (1) of the Act. A document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort, having regard to the context, comprehensiveness and consistency of the document; the organisation, form and style of the document; the vocabulary, usage and sentence structure of the text and the use of any illustrations, examples, headings, or other aids to reading and understanding (section 64 (1) and (2)). It is submitted that these are at first blush and with a consumer rights protectionist view in mind, reasonable requirements, however it becomes very difficult for the persons who must draft the terms and conditions attaching to credit agreements, such as attorneys and legal advisors, to ensure that these requirements are met but at the same time protect the rights of credit providers, as agreements of this kind may often be lengthy and incorporate legal language not often understood by lay persons. This section does not apply to a developmental credit agreement if the National Credit Regulator has pre-approved the form of all documents to be used by the credit provider for such credit agreements in terms of this Act and the credit provider has used only

charge a copy of the document that records their credit agreement, which must be transmitted to the consumer in paper form or in a printable electronic format.¹⁵⁰⁷ Furthermore, every person that is required to deliver a document to a consumer in terms of the Act, must do so in the prescribed manner and if no method has been prescribed for the delivery of a particular document to a consumer then the person required to so deliver must make the document available to the consumer in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail by fax, by email or by printable webpage and the consumer is entitled to choose the manner of delivery from one of these options.¹⁵⁰⁸ A credit provider must not charge a fee for the original copy of any document required to be delivered to a consumer.¹⁵⁰⁹ Upon written request from the consumer the credit provider must provide the consumer with a single replacement copy of a document, without charge to the consumer, at any time within a year after the date for original delivery of that document and any other replacement copy, subject to any search and production fees permitted by regulation.¹⁵¹⁰

Furthermore, credit providers are obliged to offer to deliver to each consumer periodic statements of account.¹⁵¹¹ Different types of credit agreements oblige the credit provider to different periodical statements, for example a credit provider under a mortgage bond is obliged to deliver a statement to the consumer at least every six months,¹⁵¹² at least every two months under an instalment agreements,

those pre-approved forms in dealing with the particular consumer (section 64 (4)). The National Credit Regulator may publish guidelines for methods of assessing whether a document satisfies these requirements (section 64 (3)). When pre-approving any form of documents as contemplated in subsection (4), the National Credit Regulator must balance the need for efficiency of the credit provider with the principles of subsection (l)(b) (section 64 (5)). Cf *Standard Bank of South Africa v Dlamini* 2013 1 SA 219 (KZD).

¹⁵⁰⁷ Section 93 (1) of the Act.

¹⁵⁰⁸ Section 65 (2) of the Act.

¹⁵⁰⁹ Section 65 (3) of the Act.

¹⁵¹⁰ Section 65 (4) of the Act. The Act entitles the credit provider to apply to the Tribunal to limit its obligations in terms of this section (section 65 (5), subsections 65 (3), (4) and (5) do not apply to a developmental credit agreement subject, however, to certain specified requirements (section 65 (6)).

¹⁵¹¹ Section 108 (1) of the Act. Section 109 stipulates the form and content of the account. Cf Otto and Otto 2013 50-51. Statements of Accounts are dealt with in Part D of Chapter 5 of the Act, cf also Van Heerden in Scholtz 2014 Chapter 19 for a detailed discussion.

¹⁵¹² Section 108 (2)(c) of the Act.

lease or secured loan¹⁵¹³ and in respect of all other credit agreements, the statement of account must be issued every month.¹⁵¹⁴

Credit providers that enter into pawn transactions have certain obligations placed on them. They must specify the date on which the credit agreement ends; they must retain, until the end of the credit agreement and at their own risk, the property of the consumer that is delivered to the provider as security; they must deliver such property to the consumer if the consumer pays or tenders the value required to settle the agreement.¹⁵¹⁵ The Act directs what the Tribunal must order in the event of the credit provider's failure to deliver any property to the consumer upon settlement or tender of settlement.¹⁵¹⁶

4.4.7.3. Rights of the Consumer

In order to ensure a credit market that is accessible to all South Africans, in light of the large number of uneducated and illiterate and particularly in light of those that have been historically unable to access credit under sustainable market conditions,¹⁵¹⁷ it is essential for the Act to provide extensive protection in the form of a wide variety of consumer rights.¹⁵¹⁸ Accordingly, not all consumer rights will be dealt with, as these are peppered throughout the Act, however, some of the more salient rights are examined below.

The Act gives every adult natural person, and every juristic person or association of persons, the right to apply to a credit provider for credit.¹⁵¹⁹ Nothing, however, in the Act is to be construed as establishing a right of any person to require a credit provider to enter into a credit agreement with that person.¹⁵²⁰

¹⁵¹³ Section 108 (2)(b) of the Act.

¹⁵¹⁴ Section 108 (2)(a) of the Act.

¹⁵¹⁵ Section 99 (1) of the Act.

¹⁵¹⁶ Section 99 (2) of the Act.

¹⁵¹⁷ Section 3(a) of the Act.

¹⁵¹⁸ Campbell in Scholtz 2014 paragraph 6.2.1.

¹⁵¹⁹ Section 60 (1) of the Act.

¹⁵²⁰ Section 60 (3) of the Act. However, for a period of five business days after the date on which a quotation is presented with respect to a small agreement, the credit provider must, at the request of the consumer, enter into the contemplated credit agreement at or below the interest rate or credit cost quoted; while with respect to an intermediate or large agreement, the credit

A consumer has, in terms of the Act, a right to receive any document that is required in terms of the Act in an official language that the consumer reads or understands, to the extent that is reasonable having regard to usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ordinarily served by the person required to deliver that document.¹⁵²¹

The Act now provides for the regulation of, *inter alia*, credit bureaux,¹⁵²² which entities must now be registered with the National Credit Regulator.¹⁵²³ While the details of regulation of credit bureaux will not be discussed here, they have been mentioned as certain rights of the consumer are relative to having access to and challenging credit records and information held by credit bureaux. A consumer has a right to be advised by a credit provider before adverse information concerning that person is reported by the provider to a credit bureau and to receive a copy of that information upon request.¹⁵²⁴ Consumers have a right to inspect certain information free of charge on an annual basis¹⁵²⁵ and they have a right to challenge the accuracy of any information concerning that person, this right extends to information held by credit bureau or the national credit register.¹⁵²⁶ A consumer has a right to be compensated by any person who reported incorrect information to a registered credit bureau or to the National

provider must, at the request of the consumer, enter into the contemplated credit agreement at an interest rate or credit cost that is at or below the interest rate or credit cost quoted or is higher than the interest rate or credit cost quoted by a margin no greater than the difference between the respective prevailing bank rates on the date of the quote, and the date the agreement is made (section 93 (3)).

¹⁵²¹ Section 63 (1) of the Act.

¹⁵²² Section 70–73 of the Act. ‘Credit bureaux play an important role for the purposes of the National Credit Act, for example, through providing credit providers with information on the credit worthiness of consumers. They are, however, in possession of information which may be damaging to consumers. This information may include a person’s credit history, income, assets and debts. It is expected of a credit bureau, therefore to verify the accuracy of the information reported to it and not to provide, knowingly or negligently, a report containing inaccurate information’ (Otto and Otto 2013 61-62).

¹⁵²³ Section 43 of the Act.

¹⁵²⁴ Section 72 (1) of the Act. Campbell submits that this implies that the credit provider must advise the consumer, before, submitting the information to the bureau of its intention to submit the adverse information of not only its intention, but the content of that information (Scholtz 2014 paragraph 6.2.10).

¹⁵²⁵ Section 72 (2)(a) and (b) of the Act.

¹⁵²⁶ Section 72 (2)(c) of the Act.

Credit Regulator for the cost of correcting that information.¹⁵²⁷ A consumer whose debts have been re-arranged in terms of the Act, may apply to a debt counsellor for a clearance certificate relating to that debt re-arrangement and file a certified copy of such certificate to the national credit register or a credit bureau, who upon receipt of such certificate or upon receipt of a copy of a court order rescinding any judgment, must expunge from their records any adverse information relating to the debt re-arrangement, pre-dating the debt re-arrangement and even that the consumer's debts were or are subject to re-arrangement or the judgment.¹⁵²⁸ To alleviate the adverse effects of such adverse credit records a credit amnesty was enacted in terms of regulations passed by the Minister during 2014, these regulations compelled credit bureaux to remove adverse consumer information as reflected on consumers' credit records at the effective date of the Regulations, the effective date being 1 April 2014, and credit bureaux were and are compelled to remove information relating to paid up judgments on an on going basis.¹⁵²⁹

A consumer may apply to a debt counsellor to be placed under debt review.¹⁵³⁰ The rights relating to debt review do not apply to juristic persons.¹⁵³¹

With respect to lease and instalment agreements entered into at any location other than the registered business premises of the credit provider, consumers may terminate such credit agreements in accordance with a statutory cooling-off right, within five business days after the date on which the agreement was signed by the consumer.¹⁵³² When a credit agreement is terminated in such a manner, the consumer is not in breach of the agreement and the credit provider is obliged to refund any money the consumer has paid under the agreement within seven business days after delivery of the notice to terminate.¹⁵³³

¹⁵²⁷ Section 72 (2)(d) of the Act.

¹⁵²⁸ Section 71 of the Act.

¹⁵²⁹ Government Gazette 36889 of 30 September 2013 GN 966.

¹⁵³⁰ Section 86 of the Act.

¹⁵³¹ Section 6 (a) of the Act.

¹⁵³² Section 121 (2) of the Act as read with regulation 37.

¹⁵³³ Section 121 (3) read with regulation 37. In *Standard Bank v Dlamini supra*, the court held that the non-disclosure of the content of section 121 (3)(a) violates the rights of consumers to education and information in terms of section 3 of the Act (paragraph 66). The cooling-off right was introduced into South Africa by section 13 of the Credit Agreements Act in 1980 and later

A consumer has a right, in terms of the Act, to settle the credit agreement at any time with or without advance notice to the credit provider,¹⁵³⁴ and accordingly terminate the agreement.¹⁵³⁵ At any time, without notice or penalty, a consumer may prepay any amount owed to a credit provider under a credit agreement.¹⁵³⁶ A consumer also has rights of termination with respect to instalment agreements, secured loans and leases of immovable property.¹⁵³⁷

A consumer has a right to participate in a hearing at the National Consumer Tribunal in person or through a representative and may put questions to witnesses and inspect books, documents or items presented at the hearing, where he alleges discriminatory treatment by the credit provider¹⁵³⁸ or any other contravention of the Act.¹⁵³⁹

4.4.7.4. Duties of the Consumer

The National Credit Act does not make provision for very many consumer obligations - most of a consumer's obligations are usually determined by the

extended to microloans and sales of land on instalments (Otto in Scholtz 2014 paragraph 9.5 and cf Otto JM *LitNet Akademies 30 March 2012* at <http://www.litnet.co.za/Article/die-afkoelreg-in-die-nasionale-kredietwet-en-die-wet-op-verbruikerskerming> for a comparison of the cooling-off right in the Consumer Protections Act 68 of 2008.

¹⁵³⁴ Section 125 (1) of the Act. Cf Otto JM 'Vervroegde Betaling van Skulde by Verbruikerskredietkontrakte' 2006 *THRHR* 349. In the event of large agreements, the consumer will have to pay an early termination charge (section 125 (2)(c)). The Usury Act introduced a change to the common law in this regard, giving debtors the right to prepay their debt subject to certain exceptions (cf sections 3A, 6A and 68 of the Usury Act and Otto 2006 *THRHR* 349 for a discussion of these provisions). The common law entitles a debtor to pay a debt in advance if the date for payment was postponed in his interest. If the future date was set for the benefit of the creditor, or in the interest of both parties the debtor may not prepay his debt without the creditor's consent, alternatively if he also pays all future interest (Voet 12 1 20, Van Leewuwen 4 40 5, Van der Linden 1 14 9 3, Van der Keesel *Theses Selectae* n 542, Huber 3 38 14-15, *Kelly v Holmes Bros* 1927 OPD 29, *McCabe v Bursich* 1930 TPD 261, *Bernitz v Euvard* 1943 AD 595, *Dold v Bester* 1984 1 SA 365 D and Otto in Scholtz 2014 paragraph 9.5.2.3.

¹⁵³⁵ Section 122 (1) of the Act.

¹⁵³⁶ Section 126 (1) of the Act.

¹⁵³⁷ Section 122 (2) as read with section 127. Otto refers to this right as an 'extraordinary right', which allows the consumer 'to rid himself of his agreement where goods are involved by unilaterally deciding to return the goods to the credit provider so that it can be sold by the credit provider in order for the account to be settled' (Otto in Scholtz 2014 paragraph 9.5.4.1). Cf also Coetzee H 'Voluntary Surrender, Repossession and Reinstatement in terms of the National Credit Act 34 of 2005' 2010 *THRHR* 669.

¹⁵³⁸ Section 61 of the Act.

¹⁵³⁹ Section 143 of the Act.

provisions of a credit agreement and the rules of the common law, for example the manner and time and period over which he will pay the money borrowed or deferred or to take certain precautions with the goods he has leased or purchased, for example by insuring them.¹⁵⁴⁰ That is not to say that the Act does not place obligations on the consumer; most of the obligations, however, are related to a concomitant right. For example, the right of termination which is provided to the consumer in terms of section 127, places certain corresponding obligations on him once he has exercised that right.¹⁵⁴¹

The Act does place a duty on the consumer to disclose the location of the goods that are subject of the credit agreement.¹⁵⁴² Until termination of the agreement to which the goods are subject to, the consumer is obliged to inform the credit provider in the prescribed time, manner and form of any change concerning the consumer's residential or business address, the address of the premises where the goods are kept and the name and address of any other person to whom possession of the goods has been transferred.¹⁵⁴³ A consumer who knowingly provides false or misleading information to a credit provider, deputy sheriff or messenger of the court or acts in a manner contrary to this section with intent to frustrate or impede a credit provider exercising rights under the Act or a credit agreement, is guilty of an offence.¹⁵⁴⁴

A further duty of a consumer is to fully and truthfully answer any requests for information made by a credit provider as part of the assessment required of the provider to prevent reckless credit.¹⁵⁴⁵

If a consumer has made application to a debt counsellor to be declared over-indebted, he must comply with any reasonable and requests made by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness

¹⁵⁴⁰ Otto and Otto 2013 78.

¹⁵⁴¹ Such as the obligation to return the goods and pay the settlement value to the credit provider if the sale of the goods did not realise the necessary amount.

¹⁵⁴² Section 97 (1) of the Act.

¹⁵⁴³ Section 97 (2) of the Act.

¹⁵⁴⁴ Section 97 (5) of the Act.

¹⁵⁴⁵ Section 81 (4)(a) of the Act.

and the prospects for responsible debt re-arrangement¹⁵⁴⁶ and participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.¹⁵⁴⁷

4.5. European Union

The 2008 European Directive¹⁵⁴⁸ is a much more comprehensive regulatory policy than its predecessors;¹⁵⁴⁹ with a 51 paragraph preamble, 32 Articles and 3 Annexures. It regulates information and practices preliminary to the conclusion of the credit agreement,¹⁵⁵⁰ pre-contractual information generally¹⁵⁵¹ and pre-contractual information requirements for certain specific credit agreements such as overdraft facilities¹⁵⁵² as well as exemptions from pre-contractual information requirements.¹⁵⁵³

The 2008 Directive applies to all credit agreements, except the following:¹⁵⁵⁴

- credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property;
- credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building;
- credit agreements involving a total amount of credit less than € 200 or more than € 75 000;
- hiring or leasing agreements where an obligation to purchase the object of the agreement is not laid down either by the agreement itself or by any separate agreement;
- such an obligation shall be deemed to exist if it is so decided unilaterally by the creditor;
- credit agreements in the form of an overdraft facility and where the credit has to be repaid within one month;

¹⁵⁴⁶ Section 86 (5)(a) of the Act.

¹⁵⁴⁷ Section 86 (5)(a) of the Act.

¹⁵⁴⁸ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

¹⁵⁴⁹ Cf paragraph 3.4 *supra* for a look at the European Community credit directive history.

¹⁵⁵⁰ Including standard information to be included in advertising (article 4).

¹⁵⁵¹ Article 5 of the 2008 European Directive.

¹⁵⁵² Article 6 of the 2008 European Directive.

¹⁵⁵³ Article 7 of the 2008 European Directive.

¹⁵⁵⁴ Article 2 (2)(a) – (l) of the 2008 European Directive.

- credit agreements where the credit is granted free of interest and without any other charges and credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable;
- credit agreements where the credit is granted by an employer to his employees as a secondary activity free of interest or at annual percentage rates of charge lower than those prevailing on the market and which are not offered to the public generally;
- credit agreements which are concluded with investment firms as defined in article 4 (1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments¹⁵⁵⁵ or with credit institutions¹⁵⁵⁶ for the purposes of allowing an investor to carry out a transaction relating to one or more of the instruments listed in Section C of Annex I to Directive 2004/39/EC, where the investment firm or credit institution granting the credit is involved in such transaction;
 - credit agreements which are the outcome of a settlement reached in court or before another statutory authority;
- credit agreements which relate to the deferred payment, free of charge, of an existing debt;
- credit agreements upon the conclusion of which the consumer is requested to deposit an item as security in the creditor's safe-keeping and where the liability of the consumer is strictly limited to that pledged item;
- credit agreements which relate to loans granted to a restricted public under a statutory provision with a general interest purpose, and at lower interest rates than those prevailing on the market or free of interest or on other terms which are more favourable to the consumer than those prevailing on the market and at interest rates not higher than those prevailing on the market.¹⁵⁵⁷

Similarly to the National Credit Act, the 2008 European Directive places certain obligations on creditors to assess the creditworthiness of the consumer¹⁵⁵⁸ extending an obligation on Member States, in the case of cross-border credit transactions, to ensure access for creditors from other Member States to databases used in that Member State for assessing the creditworthiness of consumers.¹⁵⁵⁹ The Directive also regulates information to be provided to the

¹⁵⁵⁵ OJ L 145, 30.4.2004, p. 1. Directive as last amended by Directive 2008/10/EC OJ L 76, 19.3.2008, p. 33.

¹⁵⁵⁶ As defined in article 4 of Directive 2006/48/EC.

¹⁵⁵⁷ The Directive goes on to list a number of credit agreements to which only parts of the Directive apply and yet others where Member States have the authority to make certain decisions regarding the applicability of the Directive and certain thresholds (cf article 1 (3)–(6)). The European Court has held that the 2008 Directive cannot be interpreted to cover an agreement to act as guarantor for the repayment of credit (*Berliner Kindl Brauerei AG v Andreas Siepert* Case C-208/98 2000 ECR I-1741).

¹⁵⁵⁸ Article 8 of the 2008 European Directive.

¹⁵⁵⁹ Article 9 of the 2008 European Directive. Interestingly enough, Weatherhill is not convinced of the feasibility of such cross-border solutions: 'It is controversial whether this is a workable system of legal protection. It asks a great deal of effective data collection and dissemination. There may

consumer and to be incorporated in credit agreements,¹⁵⁶⁰ rights of the consumer to withdraw from credit agreements,¹⁵⁶¹ regulation over early repayment by consumers,¹⁵⁶² assignment of rights,¹⁵⁶³ the method of calculation of the annual percentage rate of charge,¹⁵⁶⁴ and alternative dispute resolution.¹⁵⁶⁵ The above list of regulations, incorporated in the Directive, is by no means a comprehensive one. It does, however, provide an overview of what may be expected from such regional policies; which, broadly speaking are concerned with (besides harmonisation) improvement of transparency so that the consumer is more fully aware of the costs of credit which he contemplates purchasing.¹⁵⁶⁶

According to the preamble or introduction of the Directive full harmonisation is necessary in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and in order to create a genuine internal market.¹⁵⁶⁷ Member states are thus not allowed to maintain or introduce national provisions other than those laid down in the Directive.¹⁵⁶⁸ However, such restriction is limited to instances where there are provisions to harmonise in the Directive.¹⁵⁶⁹ Where no harmonising provisions exist, member states remain free to maintain or introduce national legislation.¹⁵⁷⁰ Accordingly, member states may, for instance, maintain or introduce national provisions on joint and several liability of the seller or the service provider and the creditor.¹⁵⁷¹ Another example of this possibility for member states could be the maintenance or introduction of national provisions on the cancellation of a contract for the sale of goods or supply of services if the consumer exercises his right of withdrawal

also be problems associated with lacking legal competence. The contribution made by the consumer credit Directives to the effective functioning of the common or internal market has never been convincingly demonstrated and they may be thought potentially vulnerable to challenge as improperly based on the Treaty provisions governing harmonization' (Weatherhill *EU Consumer Law and Policy* 2005 92).

¹⁵⁶⁰ Article 10 and 11 of the 2008 European Directive.

¹⁵⁶¹ Article 14 of the 2008 European Directive.

¹⁵⁶² Article 16 of the 2008 European Directive.

¹⁵⁶³ Article 17 of the 2008 European Directive.

¹⁵⁶⁴ Article 19 of the 2008 European Directive.

¹⁵⁶⁵ Article 24 of the 2008 European Directive.

¹⁵⁶⁶ If Africa accedes to a similar open border concept – the European Union and its Directives will be of utmost comparative importance.

¹⁵⁶⁷ Paragraph 5 of the preamble of the 2008 European Directive.

¹⁵⁶⁸ *Ibid.*

¹⁵⁶⁹ *Ibid.*

¹⁵⁷⁰ Paragraph 5 of the preamble of the 2008 European Directive.

¹⁵⁷¹ Paragraph 10 of the preamble of the 2008 European Directive.

from the credit agreement. In this respect member states, in the case of open-end credit agreements, should be allowed to fix a minimum period that must elapse between the time when the creditor asks for reimbursement and the day on which the credit has to be reimbursed.¹⁵⁷²

The definitions contained in the Directive determine the scope of harmonisation.¹⁵⁷³ The obligation on member states to implement the provisions of the Directive are therefore limited to its scope as determined by those definitions.¹⁵⁷⁴ However, the Directive does not prevent the application by member states, in accordance with Community law, of the provisions of the Directive to areas not covered by its scope.¹⁵⁷⁵ A member state can maintain or introduce national legislation corresponding to the provisions of the Directive or certain of its provisions on credit agreements outside the scope of the Directive, for instance on credit agreements involving amounts less than € 200 or more than € 75 000.¹⁵⁷⁶ Furthermore, member states may also apply the provisions of the Directive to linked credit which does not fall within the definition of a 'linked credit agreement' as contained in the Directive.¹⁵⁷⁷ Thus, the provisions on linked credit agreements could be applied to credit agreements that serve only partially to finance a contract for the supply of goods or provision of a service.¹⁵⁷⁸

Member states are not entitled to maintain or introduce in their national law, provisions that diverge from those laid down in the Directive.¹⁵⁷⁹ They are obliged, by virtue of the Directive, to ensure that consumers may not waive the rights conferred on them by the provisions of national law implementing or corresponding to the Directive.¹⁵⁸⁰ Members must ensure that the provisions they adopt in implementing the Directive cannot be circumvented as a result of the way in which agreements are formulated.¹⁵⁸¹ They must take the necessary

¹⁵⁷² Clause 9 of the preamble or introduction of the Directive.

¹⁵⁷³ Clause 10 of the preamble or introduction of the Directive.

¹⁵⁷⁴ *Ibid.*

¹⁵⁷⁵ *Ibid.*

¹⁵⁷⁶ Clause 10 of the preamble or introduction of the Directive.

¹⁵⁷⁷ *Ibid.*

¹⁵⁷⁸ *Ibid.*

¹⁵⁷⁹ Chapter VII, article 22 (1) of the 2008 European Directive.

¹⁵⁸⁰ Chapter VII, article 22 (2) of the 2008 European Directive.

¹⁵⁸¹ Chapter VII, article 22 (3) of the 2008 European Directive.

measures to ensure that consumers do not lose the protection granted by the Directive by virtue of the choice of the law of a third country as the law applicable to the credit agreement, if the credit agreement has a close link with the territory of one or more member states.¹⁵⁸²

Accordingly and in light of the fact that the 2008 European Directive is a full harmonising Directive. The effects of the 2008 Directive can be found in a 2013 study on the impact of the implementation of the 2008 European Directive on Member States,¹⁵⁸³ more specifically on the impact of the legal choices made by the Member States on the functioning of the Consumer Credit Market. Below is an overview of the legislation which regulates the credit market in England and Italy.

4.6. England

The English credit law arena, as indicated in the previous Chapter,¹⁵⁸⁴ is largely regulated by the Consumer Credit Act 1974, which has been largely amended by the Consumer Credit Act, 2006.¹⁵⁸⁵ It also amends the Financial Services and Markets Act 2000 by applying the Financial Services Ombudsman Scheme to consumer credit agreements and consumer hire agreements. The 2006 Act introduced various conceptual changes into English consumer credit law, such as: an 'individual' no longer includes a partnership of four or more individuals; the financial limit is removed except for credit or hire for business purposes where the credit amount or total rentals respectively do not exceed £25 000; an exemption is introduced for businesses¹⁵⁸⁶ where the credit agreement or hire agreement is for credit or total rentals which exceed £25 000 and are wholly or

¹⁵⁸² Chapter VII, article 22 (4) of the 2008 European Directive.

¹⁵⁸³ Study on the Impact of the Legal Choices of the Member States and other Aspects of Implementing the Directive 2008/48/EC on the Functioning of the Consumer Credit Market in the European Union Final Report 2013 prepared for the Executive Agency of Health and consumers by Risk and Policy Analysts Limited.

¹⁵⁸⁴ More specifically paragraph 3.5.

¹⁵⁸⁵ The 2006 Act came into force in different phases between June 2006 and October 2008. For detail cf Chowdhury, Makin, Mawray and Rosenthal in Goode 2014 paragraph 21.46.

¹⁵⁸⁶ Section 16B.

predominantly for the purposes of the business of the debtor or hirer;¹⁵⁸⁷ an exemption relating to high net worth debtors and hirers¹⁵⁸⁸ where the debtor or hirer is a natural person meeting the criteria for a high net worth individual and the agreement includes the statutory declaration whereby the individual agrees to forego the protection and remedies that would otherwise be available to him under the Consumer Credit Act 1974 and a statement of high net worth is made in relation to the individual; the unfair relationships provisions under sections 140A and 140D replace the former extortionate credit bargain provisions.¹⁵⁸⁹

Furthermore, the 2006 Act introduced changes relating to obligations placed on the credit provider relating to post-contract information: annual statements under fixed-sum credit agreements must be issued; notices of sums in arrears under both fixed-sum credit agreements and running-account credit agreements, accompanied by the Office of Fair Trading Information Sheet on arrears must be issued; the period for remedy of a default, in relation to a default notice, was extended from seven to fourteen days; apart from additional prescribed information to be contained in a default notice, the notice must be accompanied by the Office of Fair Trading Information Sheet on default; a notice containing prescribed information must be issued in respect of any default sum; a default sum is a sum, other than interest, payable under the agreement in connection with a breach of the agreement; only simple interest may be charged for late payment of default sums; in order to recover post-judgment interest a notice containing the prescribed information must be given to the debtor or hirer to enable the consumer or owner respectively to recover interest at the contractual rate on the judgment debt; a debtor or hirer may also apply for a time order after receiving a notice of sums in arrears.¹⁵⁹⁰

The Consumer Credit Act 1974 has extended ancillary credit business by creating two new categories of ancillary credit business, for which a licence is

¹⁵⁸⁷ If the agreement includes the statutory declaration for business purposes it creates a rebuttable presumption that it is for business purposes.

¹⁵⁸⁸ Section 16A.

¹⁵⁸⁹ *Goode: Consumer Credit Law and Practice* Issue 33 (August 2010) paragraph 1.64A.

¹⁵⁹⁰ *Ibid.*

required, namely debt administration¹⁵⁹¹ and the provision of credit information services.¹⁵⁹² The advertising regulatory sections under the Consumer Credit Act 1974 also apply to advertisements relating to ancillary credit businesses and have been extended to cover businesses that provide credit information services.¹⁵⁹³

The 2006 Act augments the powers of the Office of Fair Trading, especially in relation to licensing. Thus an applicant must specify the businesses which it is to carry on and the Office of Fair Trading must have regard to the applicant's skills, knowledge and experience, practices and procedures before granting a licence. The Office of Fair Trading must also take into account any evidence of practices that appear to it to involve irresponsible lending.¹⁵⁹⁴ The Office of Fair Trading has powers to impose requirements on licensees, to require the provision of information and documents, access to premises, and ultimately to impose civil penalties in an amount not exceeding £50 000 for any breach of a requirement imposed on a licensee. The 2006 Act establishes the Consumer Credit Appeals and it is empowered to deal with appeals from decisions made by the Office of Fair Trading and replaces appeals to the Secretary of State. Appeals from the Tribunal lie to the Court of Appeal. The Financial Ombudsman Service scheme¹⁵⁹⁵ was extended to apply to all consumer credit and consumer hire agreements.

English consumer credit legislation has influenced other legislation, besides the Consumer Credit Act, for example, the Banking Act 1987,¹⁵⁹⁶ which abolished the recognised banks/licensed institutions dichotomy and substituted the single

¹⁵⁹¹ Which is the performance of duties under a consumer credit or hire agreement on behalf of the creditor or owner or the exercise or enforcement of rights under such agreement on behalf of the creditor or owner.

¹⁵⁹² This involves taking steps on behalf of an individual or giving advice to an individual in relation to ascertaining whether a credit information agency holds information relevant to his financial standing or the contents of such information or securing the correction of information or stopping a credit information agency from holding information.

¹⁵⁹³ Goode 2010 paragraph 1.64A.

¹⁵⁹⁴ This is concept can be likened to the National Credit Act's concept of reckless lending.

¹⁵⁹⁵ This scheme was established under Part 16 of the Financial Services and Markets Act 2000.

¹⁵⁹⁶ Goode 2010 paragraph 1.66.

category 'authorised institution'.¹⁵⁹⁷² The prudential control of banks has since been strengthened as a result of a series of EC Directives culminating in the Banking Directive 2000, and has now been transferred from the Bank of England to the Financial Services Authority,¹⁵⁹⁸ which has been given remarkably wide-ranging powers by the Financial Services and Markets Act 2000, which repealed the Banking Act 1987.¹⁵⁹⁹

The Banking Act 1987 introduced further changes to the Consumer Credit Act 1974. The most notable of these was the amendment which added authorised institutions and their wholly owned subsidiaries to the list of bodies whose consumer credit agreements are exempt from the 1974 Act,¹⁶⁰⁰ where these fall within one of the exemptions provided by the Consumer Credit Act 1974 and the Consumer Credit (Exempt Agreements) Order 1989.¹⁶⁰¹ Another provision of the Banking Act 1987² added a new section to the 1974 Act¹⁶⁰² to provide that arrangements for electronic funds transfers from a bank current account are to be disregarded in determining whether consumer credit is to be treated as entered into in accordance with prior or in contemplation of future arrangements between creditor and supplier. The effect is that EFTPOS transactions do not give rise to a debtor-creditor-supplier agreement so as to involve the bank in a potential liability under the 1974 Act¹⁶⁰³ or make the supplier the deemed agent of the bank under 1974 Act.¹⁶⁰⁴ The Banking Act 2009, according to Goode,¹⁶⁰⁵ is a product of the so-called credit crunch which followed the collapse or near collapse of several authorised institutions in the latter half of 2008. It established a special resolution regime for banks in order to address situations where all or

¹⁵⁹⁷ That is, an institution authorised to accept deposits in the course of carrying on a deposit-taking business (section 89).

¹⁵⁹⁸ Section 21 Bank of England Act 1998.

¹⁵⁹⁹ Goode 2010 paragraph 1.66. As a result, banks are essentially governed by the Financial Services and Markets Act 2000 and the FSA Handbook and the Prudential Sourcebook for Banks, Building Societies and Investment Firms (Goode 2010 paragraph 1.66B).

¹⁶⁰⁰ Section 16 (1).

¹⁶⁰¹ Sections 88 (1) and (2) of the Banking Act 1987.

¹⁶⁰² Section 187 (3A).

¹⁶⁰³ Section 75.

¹⁶⁰⁴ Section 56 (Goode 2010 paragraph 1.66A).

¹⁶⁰⁵ Goode 2010 paragraph 1.66C.

part of the business of a bank had encountered or is likely to encounter financial difficulties.¹⁶⁰⁶

The Crowther Committee had already drawn attention to the potential importance of credit unions in England.¹⁶⁰⁷ At the time the committee reported the movement was quite small; it has since grown substantially. The Credit Unions Act 1979 enabled credit unions to become registered under the Industrial and Provident Societies Act 1965. Section 25 of the Act added a new section to the Income and Corporation Taxes Act 1970¹⁶⁰⁸ by which various tax advantages were given to credit unions.¹⁶⁰⁹

The Companies Act 2006 contains complex provisions restricting the right of a company to grant loans or 'quasi-loans', or to supply land, goods or services on deferred terms, to its directors or to the directors of its holding company.¹⁶¹⁰ It is not permitted to make a loan to such a director, or to enter into a guarantee or provide security in connection with a loan by any person to the director in question, unless the transaction has been approved by a resolution of the members of the company. If the director is also a member of the holding company, the transaction must also be approved by a resolution of its members.¹⁶¹¹ Similar provisions apply to quasi-loans to directors, or persons connected with directors, of a public company or a company associated with a public company.¹⁶¹² The Companies Act 2006 also requires members' approval of a public company or a company associated with a public company entering, as

¹⁶⁰⁶ The Act enables a bank, without publicity, to sell all or part of its business to a commercial purchaser or to transfer the same to a wholly owned subsidiary of a bank or to have the bank taken into temporary public ownership (Goode 2010 paragraph 1.66C).

¹⁶⁰⁷ Goode 2010 paragraph 1.66C.

¹⁶⁰⁸ Section 340A.

¹⁶⁰⁹ Now relevant section 487 Income and Corporation Taxes Act 1988. Certain restrictions imposed by the Act have been removed or relaxed by the Deregulation (Credit Unions) Order 1996. The Credit Unions Act was also slightly amended by the Financial Services and Markets Act 2000. In July 2008 HM Treasury circulated Proposals for Reform of the Law relating to Credit Unions and Industrial and Provident Societies. The proposals involve the removal of administrative burdens, permitting the credit unions and industrial and provident societies to open their membership to a wider range of individuals, to offer a wider range of products and to merge in order to create larger credit unions (Goode 2010 paragraph 1.67).

¹⁶¹⁰ Sections 197 to 214 of the Companies Act 2006.

¹⁶¹¹ Section 197 (1) and (2) of the Companies Act 2006.

¹⁶¹² Section 198 (1) and (2) and s 200 (1) and (2) of the Companies Act 2006.

creditor, into a credit transaction or giving a guarantee or providing security in connection with a credit transaction, for the benefit of a director of the company or a director of its holding company or a person connected with such a director.¹⁶¹³ 'Credit transaction' is defined to include a hire-purchase agreement or a conditional sale agreement, a lease of land or goods or a transaction involving deferment of payment.¹⁶¹⁴

Credit Cards are specifically regulated. After a report to the then Monopolies and Mergers Commission (now the Competition Commission),¹⁶¹⁵ orders were made under the Fair Trading Act 1973 regulating certain practices in the credit card industry.¹⁶¹⁶ More recently, as a result of the Competition Commission Investigation into Store Cards, the Store Cards Market Investigation Order was made on 27 July 2006.¹⁶¹⁷ This imposes requirements in relation to Store Card statements, the display of the option to pay outstanding balances by direct debit and the separation of payment protection insurance from an insurance package comprising payment protection insurance, price protection and purchase protection.¹⁶¹⁸

Student loans are another form of credit extension which are independently regulated in England. In terms of the Teaching and Higher Education Act 1998, which repealed the Education (Student Loans) Acts, student loans are viewed as statutory rather than contractual in character and are made by the Secretary of State, who is under a statutory obligation to make such loans to eligible students applying for them. The terms of the loans are prescribed by the Secretary of State and the loans are made by the Student Loans Company Limited,¹⁶¹⁹ which acts purely as agent of the Secretary of State to disburse the loans and is not

¹⁶¹³ Section 201 (1) and (2).

¹⁶¹⁴ Section 202. 'Conditional sale agreement' means the same as in Consumer Credit Act 1974 (Goode 2014 paragraph 23.17).

¹⁶¹⁵ *Credit Card Services – A Report on the Supply of Credit Card Services in the England* (Cm 718, 1989).

¹⁶¹⁶ Credit Cards (Merchant Acquisition) Order 1990, SI 1990/2158; Credit Cards (Price Discrimination) Order 1990, SI 1990/2159.

¹⁶¹⁷ Under sections 138 and 161 and Schedule 8 of the Enterprise Act 2002.

¹⁶¹⁸ Goode 2010 paragraph 1.82.

¹⁶¹⁹ This is a company owned by the British government, to which the Secretary of State disburses the necessary funds.

itself be the creditor. Accordingly the Consumer Credit Act does not apply to such loans, since they are made under the statutory provisions, not under agreements with the Student Loans Company.¹⁶²⁰

The amendments to the Consumer Credit Act by the 2006 Act, are quite different from the changes brought in by the National Credit Act to the South African Credit landscape. For example, while both Acts distinguish the need to protect natural persons as opposed to larger businesses, the Consumer Credit Act takes it two steps further by firstly differentiating between the protection required for a normal or ordinary earning individual and one who is considered as having a high net worth. A discrepancy that the National Credit Act does not make. Furthermore, the fact that an individual, considered to have a high net worth in England, is entitled to waive certain protections and remedies of the Consumer Credit Act, is not something contemplated by the National Credit Act, which does not differentiate between individuals in this regard.

While both Acts place post-agreement disclosure obligations on the credit providers, the English credit provider must work with the Office of Fair Trading when it comes to notifying consumers of arrears, no parallel onus is placed on the South African credit provider. It is submitted that such an obligation must not only be costly and time consuming for the English credit provider, but prove to be rather burdensome for the Office of Fair Trading.

Interestingly, the Consumer Credit Act 1974 brought in what is referred to as ancillary credit business, that is debt administration and provision of credit information. While these two types of so-called credit businesses were already existent in South Africa, they were not regulated by the credit legislation, prior to the National Credit Act, not at least by the Usury or Credit Agreements Acts (albeit debt administration procedures were and are still regulated by section 74 of the Magistrates Court Act, they are capped at R50 000). It is the National

¹⁶²⁰ Goode 2010 paragraph 1.83.

Credit Act which now regulates the collection and dissemination of credit information by credit bureaux and the procedure which a consumer must follow when he declares himself over-indebted.

Unlike the Consumer Credit Act, the National Credit Act regulates student loans as well as school loans, referred to as educational loans under developmental credit. In this regard the English system specifically regulates this area of credit law with separate legislation.

The above are explicit of some of the differences in legislation and regulation between the two jurisdictions, one wants to use an old adage 'similar but different, both of which - similarities and differences - it is submitted, are caused by parallels and diversions in the economic milieus of each country, the respective legislation introduced to fill the varying needs and requirements of the two jurisdictions.

4.7. Italy

The system regulating consumer credit in Italy differs quite dramatically from the systems of England and South Africa. While neither of these two jurisdictions can be described as being regulated by a single piece of legislation, the Consumer Credit Act, 1974 as amended and the National Credit Act are wide ranging pieces of legislation. In Italy, however, there are several different sources, both on a national level and on a community level - which compose the mosaic of the discipline of consumer credit in Italy.¹⁶²¹ Thus, consumer credit is regulated by both State laws or legislation authorised by the European Union and administrative regulations.¹⁶²² Currently, consumer credit is regulated by sections 121 to 128 of Law number 385 (1) the so-called *Consolidated Text of*

¹⁶²¹ Bertuzzi and Cottarelli 2009 111.

¹⁶²² Bertuzzi and Cottarelli refer to the State laws and legislation authorised by the European Union as primary ranking codifications, whilst administrative regulations as being of secondary ranking (2009 112).

the Laws Governing Banking and Credit.¹⁶²³ As well as, sections 39 to 43 of the Consumer Code,¹⁶²⁴ which are dedicated to regulating consumer credit.¹⁶²⁵ It must, however, be pointed out that the Consumer Code deals only with granting credit in the form of a deferred payment, a loan or other similar financing in favour of a consumer.¹⁶²⁶ These sections of the Consumer Code, therefore, do not regulate financial investments but rather credit extended to support the current expenditure of families.¹⁶²⁷ Thus, it is credit implemented where payment of the price of goods or services is deferred normally, by the same sellers where the goods and services are purchased and through loans or other financial facilities, granted by financial institutions.¹⁶²⁸

Consumer credit is defined through the type of agreement concluded, for example whether agreements of loan or agreements whereby payment and fees for goods or services are deferred.¹⁶²⁹ In Italy deferment of payment can be granted by all persons (juristic or natural) that are authorised to sell goods and services.¹⁶³⁰ However, the granting of loans is only permitted by banks and financial institutions¹⁶³¹ that are specifically registered to do so.¹⁶³²

¹⁶²³ Decreto Legislativo. settembre 1, 1993 n. 385 (1) *Testo Unico Delle Leggi in Materia Bancaria e Creditizia* (own translation) (hereinafter 'D.Lgs 385/1993').

¹⁶²⁴ *Decreto Legislativo 6 settembre 2005 n 206 contenente il Codice del Consumo*.

¹⁶²⁵ Bertuzzi and Cottarelli 2009 111.

¹⁶²⁶ *Ibid.*

¹⁶²⁷ *Ibid.* It is submitted that the end-user would be a better way of explaining the concept.

¹⁶²⁸ Bertuzzi and Cottarelli 2009 111. As Alessi points out the Consumer Code does not constitute the exclusive source regulating consumer contracts, rather it picks up and regulates only certain segments of this area and leaves to the interpreter, what she refers to as the 'non facile' translated by writer to 'not easy', task of coordinating this legislation with the legislation which regulates contracts in general (In Bessone 2009 406). It is submitted that the situation is not so different in South Africa. While the National Credit Act is more comprehensive in regulating consumer credit, it is not all-encompassing and it is in fact the 'non facile' task of the jurist to understand how the common law of contract together with the National Credit Act and any other applicable legislation, for example and not limited to the Alienation of Land Act, form the matrix that regulates the full spectrum credit regime.

¹⁶²⁹ Bertuzzi and Cottarelli 2009 112.

¹⁶³⁰ *Ibid.*

¹⁶³¹ The term used in Italian is *intermediari finanziari* which, translates more directly to 'finance brokerage' (own translation). Financial institutions are authorised to grant credit in various forms, for example, consumer loans, mortgage bond finance, lease agreements. However, unlike the banks, financial institutions are not entitled to raise deposits from the consumer.

¹⁶³² They are registered in the general list of section 106 and in the special list of section 107 of D.Lgs 385/1993. Anyone who is not registered in terms of this legislation and who extends credit, irrespective of the form, to a consumer is guilty of a criminal offense in terms of section 132 of the D.Lgs. 385/1993 (Bertuzzi and Cottarelli 2009 112 fn 2). However, anyone who is not listed in the abovementioned legislation may still defer payment of the amount owed by the consumer, provided they do not levy any interest (Bertuzzi and Cottarelli 2009 113).

Credit in Italy is extended through common means, for example credit cards, deferred payment for goods or services, personal loans and debt consolidations.¹⁶³³ A varied method of credit extension, however, not common to South Africa, is the so called *cessione del quinto stipendio*¹⁶³⁴ this is when an employee in need of finance, approaches a financial institution who finances the employee with an agreement that the employee shall pay to the financial institution one-fifth of his salary until the loan together with the finance charges are repaid.¹⁶³⁵ The Consumer Code also covers what is referred to as finalized or pre-determined¹⁶³⁶ finance for example finance for the purchase of a vehicle or non-finalised or nor pre-determined funding for example personal loans.¹⁶³⁷ The Consumer Code does not regulate loans intended to satisfy the needs of a commercial character.¹⁶³⁸

The following transactions are not considered to be consumer credit agreements regulated by the *Consumer Code* and D.Lgs 385/1993:

- funding of amounts either below or above the threshold limits set by the ICRC¹⁶³⁹ (loans for an amount less than € 155 and more than € 30 987);¹⁶⁴⁰
- administrative contracts,¹⁶⁴¹ provided that they are concluded in advance in writing and a copy is provided to the consumer;

¹⁶³³ Bertuzzi and Cottarelli 2009 111 Visintini G *Trattato Della Responsabilità Contrattuale* vol II 2009 681.

¹⁶³⁴ Cession of the fifth salary (own translation).

¹⁶³⁵ *Ibid.* This is similar to a garnishee order except it is by prior arrangement and agreement (as opposed to by court order) between the parties.

¹⁶³⁶ From the Italian *finanziamenti finalizzati* (own translation). 'Finalized' is the Italian term for 'secured'.

¹⁶³⁷ That is unsecured credit.

¹⁶³⁸ Bertuzzi and Cottarelli 2009 111-2 and Visintini 2009 681-682.

¹⁶³⁹ Interministerial Committee for credit and savings (hereinafter 'ICRC'). The ICRC has the highest supervisory authority in the field of credit and savings protection and decides on matters falling within its competence determined by the consolidated law on banking (TUB) or by other laws. The ICRC is composed of the Minister of Economy and Finance, who presides over the Minister for International Trade, the Minister for Agriculture, Food and Forestry Policies, the Minister of Economic Development, the Minister for Infrastructure, the Minister for Transport and Minister for Community Policies. Meetings of the ICRC are attended by the Governor of the Bank of Italy (http://www.bancaditalia.it/servizi_pubbl/conoscere/vocabolario/C/cicr.txt) (26.05.11).

¹⁶⁴⁰ Visintini provides the following amounts € 150 and more than € 30 000 (2009 681-682).

¹⁶⁴¹ From the Italian: *Contratti di somministrazione* (own translation). These are contracts concluded by companies and labour agencies or labour brokers for the provision of personnel for either a determined or an indefinite period of time (<http://www.dplmodena.it/somministrazione.htm>) (26.05.11).

- loans repayable in a single lump sum within eighteen months, with a predetermined charge which is not in the form of running interest;
- funding of any kind without the levying of interest or other charges, except for the reimbursement of expenses incurred and documented;
- funding for the purchase or the conservation of the right to property in land or a building built or to be built or for the execution of works of restoration or improvement thereon;
- leases, provided that the agreement contains an express clause stating that the leased premises may be sold whether with or without compensation to the lessee.¹⁶⁴²

Through consumer credit agreements, the consumer assumes the obligation to pay the financing institution, on or before the deadlines set, the price of the goods or services purchased (in the case of deferment of payment) or to return, through the payment of regular instalments, the quantum loaned together with interest at a pre-determined interest rate.¹⁶⁴³ The consumer is also burdened with the expenditure and costs necessary for the conclusion of the contract.¹⁶⁴⁴

The credit provider is obliged to reduce the credit agreement to writing and to send a copy to the consumer. If the credit provider fails to reduce the contract to writing this will lead to the nullity¹⁶⁴⁵ of the contract, however only at the instance of the consumer.¹⁶⁴⁶ The credit agreement must include at least specific listed information:

- the amount and the mode of finance; the number, amounts and due date of each repayment; the TAEG;¹⁶⁴⁷
- details regarding the specific situations when the TAEG may be amended; security required and any credit insurance required by the consumer which are not incorporated in the TAEG.¹⁶⁴⁸

¹⁶⁴² Bertuzzi and Cottarelli 2009 113.

¹⁶⁴³ Bertuzzi and Cottarelli 2009 112.

¹⁶⁴⁴ *Ibid.* The rights of the consumer are discussed in great detail in Alpa G *I Diritti dei Consumatori* 3rd volume Part 1 and Part 2 2009.

¹⁶⁴⁵ The word is translated directly from the word 'nullità'. The sentence as indicated by Vistinini – means that the contract is void, however, given that this can only be at the instance of the consumer, it is submitted that the credit agreement, not reduced to written form, is voidable at the instance of the consumer. An interesting consumer right, in that at the moment that the consumer elects to render the contract void, he is liable to immediate return the finance extended by the provider (Vistinini 2009 683).

¹⁶⁴⁶ Vistinini 2009 683. De Polli M discusses the obligations of the credit provider in detail in Chapter 3 in De Cristofaro G *La Nuova Disciplina Europea del Credito al Consumo* 2009.

¹⁶⁴⁷ *Tasso Annuo Effettivo Globale* - the effective interest rate. Carriero discusses TAEG in great detail at 90 – 104 (in Bessone M *Autonomia Privata e Disciplina del Mercato il Credit Al Consumo* 2007)

The credit provider is also obliged to indicate the TAEG and other major contractual conditions which will be applicable to a credit agreement in every offer made, irrespective of the mode of advertising or publication.¹⁶⁴⁹

As mentioned in the beginning of this section, Italy's system of credit regulation differs quite substantially from the one that has been adopted in South Africa. The cultural, historical and economic differences, it is submitted, help formulate the divide. However, it is submitted that if one looks beyond the actual systemisation to the practical effects of the regulation – the fundamental philosophy behind consumer credit legislation underlies both jurisdictions, that is, the necessity of protecting the (usually) more vulnerable consumer. Perhaps, because the systems are so different or perhaps because the Italian Consumer Code only came into force in 2005 or perhaps even due to the language differences, it is submitted that it would be difficult to really gain advantages by comparing the two systems in order to gain or supplement the South African system.

¹⁶⁴⁸ Vistinini 2009 683.

¹⁶⁴⁹ Vistinini 2009 684.

CHAPTER 5: BREACH OF CONTRACT AND MANDATORY PROCEDURES BEFORE DEBT ENFORCEMENT

5.1. Introduction

The extension of credit by a credit provider to a consumer takes place by agreement. The parties conclude a contract, which has been defined as ‘an agreement giving rise to obligations which are enforced or recognised by law’.¹⁶⁵⁰ The law of contract is of fundamental importance in the modern world as ‘it is woven into and inseparable from every form of economic activity’.¹⁶⁵¹ The credit agreement is also a significant and intrinsic part of contractual activity, credit itself having become a fundamental part of modern day economic movements. The credit user obtains credit by concluding a contract, creating for himself obligations *vis-à-vis* the creditor and the creditor in turn commits to perform specific contractual obligations. Such obligations may arise *ex contractu* or *ex lege*. It is the breach in the commitment to perform these obligations or the actual lack of performance of such obligations together with the remedies for such breaches that have attracted much juristic commentary over the centuries.

In light of the above this Chapter starts with an outline of the historical background of the obligation, serving as an introduction to the discussion on the contemporary contractual obligation and breach. This examination will serve to relate the legal matrix of contractual principles with respect to breach to those of the credit regime, more especially to the legislative interference which the State has deemed necessary in this area of law. After having established the fundamental concepts of what are commonly referred to as ‘types of breach of contract,’ as they flow naturally from the common law and prior to discussing the remedies,¹⁶⁵² the discussion will turn to the legislatively mandated procedures

¹⁶⁵⁰ Christie RH and Bradfield GB *The Law of Contract in South Africa* 2011 1.

¹⁶⁵¹ Treitel G *The Law of Contract* 2003 1.

¹⁶⁵² Which are examined in Chapter 6.

required before a credit agreement may be enforced¹⁶⁵³ by a credit provider. The discussion will also incorporate what has been referred to as a statutory repudiation by the consumer, being the right bestowed on the consumer in terms of section 127 of the Act to terminate the contract and surrender the goods under certain credit agreements, even if he is not in default.¹⁶⁵⁴ First, a look at those procedures that had been directed by the Credit Agreements Act and then a look at what steps a credit provider must take, before he can enforce a credit agreement, as these have been prescribed by the National Credit Act. Finally, an examination of the required procedures before debt enforcement as mandated by the European Union and as implemented in England and Italy.

5.2. The Development of the Obligation

While the word 'obligation' has been and is used as an (sometimes) abstract metaphysical term,¹⁶⁵⁵ or in a wider sense a moral duty or a course of conduct forced on one by pressure of circumstance,¹⁶⁵⁶ beyond the conceptually abstract notion of 'obligation' underlies the legally employable connotation of the term.¹⁶⁵⁷ The understanding of the 'obligation' evolved slowly and historically over a number of years.¹⁶⁵⁸ The 'obligation' is now seen as a legal bond or tie between

¹⁶⁵³ It is submitted that the word 'enforce' means any rights that the credit provider has available to him and wishes to enforce as against the consumer, whether in terms of the contract or the common law.

¹⁶⁵⁴ Cf paragraph 5.3.4.1 *infra*.

¹⁶⁵⁵ Joubert DJ *General Principles of the Law of Contract* 1987 4. The word is derived from the Latin word *ligare* which means to bind (Christie and Bradfield 2011 3). The Italian word meaning to bind is very similar *legare*.

¹⁶⁵⁶ Christie and Bradfield 2011 3.

¹⁶⁵⁷ Joubert 1987 4 and Christie and Bradfield 2011 4; cf also Zimmerman R *The Law of Obligations – Roman Foundations of Civilian Tradition* 1990 1.

¹⁶⁵⁸ The 'obligation' has been characterized as a legal bond, as defined by Justinian in his *Institutes* - a *vinculum iuris* (Zimmerman 1990 1). Albanese attributes the definition of 'obligation' to Papinius ('Papiniano e la Definizione di 'Obligato' in J.3.13 pr' 1984 50 *SDHI* 166). Generally, Roman-Dutch writers followed the Justinianic definition (Vinius *In Quattuor Libros Institutionum Imperialium Commentarius* 3.14.3 and 3.15 *Iurisprudentiae contractae sive Partitionum Iuris Civilis Libri Quattuor* 2.1, Van Leeuwen *Censura Forensis* 1.4.1.2, Voet *Commentarius ad Pandectus* 44.1.1, Huber *Praelectionum Iuris Civilis ad I* 3.14.2 and *Heedendaegse Rechtsgeleertheit* 3.1.5). Justinian's definition of the obligation: '*obligatio est iuris vinculum, quo necessitate adstringimur alicuius rei solvendae secundum nostrae civitatis iura*', was criticised by the Pandectists as it does not accentuate both of the essential elements of an obligation, that is *schuld* or the duty of the debtor to perform and *haftung*, a right or power belonging to the creditor which entitles him to enforce the duty of the debtor (Joubert 1987 7). However, Zimmerman

two persons in terms of which the one, known as the creditor, has a right to a particular performance against the other, the debtor, while the debtor has a corresponding duty to render performance.¹⁶⁵⁹

The two main sources of obligations may be seen as delict and contract.¹⁶⁶⁰ The law of delict and contract are two distinct branches of the law of obligations; while the law of delict has an older history.¹⁶⁶¹ Older communities recognized feud or revenge as a form of justice.¹⁶⁶² That is, where a man committed a wrong against another man, it was recognised that the wrongdoer or his family could be permitted to kill the wrongdoer or one of his family.¹⁶⁶³ Obviously, this became an unacceptable state of affairs even for primitive societies and thus the State interceded.¹⁶⁶⁴ The State formalised the seizure of the wrongdoer under State supervision and reduced the powers of the victim or his family.¹⁶⁶⁵ At some point it was found that the wrongdoer or his family could prevent the exaction of revenge by buying off the wrath of the victim's family.¹⁶⁶⁶ The State later standardized the amount of the compensation for various delicts.¹⁶⁶⁷

opines that in as far as the Roman terminology, '*obligatio*' could denote the *vinculum iuris*, looked at from either end, it could refer to the creditor's right or the debtor's duty (1990 1, cf also Birks P 'Obligations: One Tier or Two' in Stein PG and Lewis ADE edition in *Studies in Justinian's Institutes in Memory of JAC Thomas* 1983 18). Justinian's definition of an obligation has also been censured as too wide (Thomas JAC *Textbook of Roman Law* 1976 214).

¹⁶⁵⁹ LAWSA 149. The word is defined in various textbooks and academic writings dealing with the topic, cf. for example, *inter alia*, Lee RW *Introduction to Roman-Dutch Law* 1953 206, Wessels JW *The Law of Contract in South Africa* 1951 paragraph 11 and Joubert 1987 8. The following is a simple understanding: '[i]n short, obligation postulates a right correlative to the duty involved. If A has to do something, it is because there is B who can demand that it be done or claim damages in default. Obligation comprises both conceptions, the duty of A and the right of B' (Thomas 1976 214).

¹⁶⁶⁰ This is the *summa divisio obligationum* (Gaius III 88). Thomas states that this suggests that 'all obligations arise either from a lawful bilateral act – connoting agreement – or from a unilateral unlawful act which causes damage' (1976 221). However, delict and contract do not exhaust the law of obligations. Also as a species or category thereof is the case of unjustified enrichment. Gaius recognised that the obligation to render restitution is not regarded as a contractual one (Gaius III 91) nor, however (it is submitted) is it of delictual nature.

¹⁶⁶¹ Joubert 1987 4, Buckland WW *Text-Book of Roman Law* 1963 405.

¹⁶⁶² *Ibid.*

¹⁶⁶³ Later the victim or his family could seize the wrongdoer and submit him to slavery (Joubert 1987 4, Buckland 1963 405).

¹⁶⁶⁴ Joubert 1987 4.

¹⁶⁶⁵ *Ibid.*

¹⁶⁶⁶ Zimmermann 1990 2.

¹⁶⁶⁷ Eventually, the right of the family to compensation was replaced by criminal penalties and in the private sphere the right to compensation became illusory and was eventually replaced by a claim for damages (Joubert 1987 4). This too was the position in many Edicts of the Germanic rulers of the Dark Ages (a period between the thirteenth and sixteenth century emphasised by cultural and economic deterioration after the decline of the Roman Empire) (Watkin TG *An*

It soon became obvious that this exertion of pressure to enforce payment of monetary compensation in the case of a delict would be equally useful in order to enforce other performances as well.¹⁶⁶⁸ Hence, from the practise of seizure over the body of the wrongdoer to execute vengeance for commission of a delict, people started subjecting themselves to the power of seizure in the event of their failure to perform an agreed upon commitment.¹⁶⁶⁹ The object of these transactions was to create the same type of liability by artificial means; that is, by asking the other party to subject himself to this power of seizure voluntarily,¹⁶⁷⁰ while this liability arose *ex lege* in the case of a delict.¹⁶⁷¹

One of the oldest of these voluntary transactions is *nexum*,¹⁶⁷² the primary purpose of which was to ensure the repayment of a loan.¹⁶⁷³ The debtor was liable to the creditor if he did not timeously settle a specific sum loaned to him.¹⁶⁷⁴ At the time of the Twelve Tables, *nexum* and *sponsio*¹⁶⁷⁵ were in existence.¹⁶⁷⁶

Historical Introduction to Modern Civil Law 1999 285). Thus we see how the concept of an instinctive, albeit feral (at least to the contemporary mind) form of justice became institutionalised to create a bond between the wrongdoer and the victim; a bond which thereafter became a legally enforceable obligation.

¹⁶⁶⁸ Zimmerman 1990 2.

¹⁶⁶⁹ *Ibid.*

¹⁶⁷⁰ Thus we see the Aristotelian distinction between voluntary and involuntary transactions employed systematically. Gaius introduced the division (*summa division obligationum*) in his *Institutes* (Gaius III 88).

¹⁶⁷¹ Zimmerman 1990 3.

¹⁶⁷² *Ibid.*

¹⁶⁷³ *Ibid.*

¹⁶⁷⁴ The *nexum* was somewhat controversial and by the time of classical law it had been taken over by the contract of *mutuum* - a loan for consumption (Zimmerman 1990 4-5).

¹⁶⁷⁵ A verbal contract giving a guarantee for the debt of another; while later in classical law it was a stipulation for the giving of something (Thomas 1976 217).

¹⁶⁷⁶ In both types of contract the debtor became *persona obligata*, that is the 'obligated person' or person under obligation (Thomas 1976 217). However, at this early stage these transactions did not yet form a law of obligations as we understand it today, because the basic constituent of the obligation was lacking; that is, the promisor did not 'owe' the payment or the performance of whatever he had promised - the payment or performance was merely a method to ward off the impending execution on his person (Zimmerman 1990 5). This is somewhat of an artificial distinction. It appears to be a 'chicken or the egg' type of conundrum. The promisor, while voluntarily promising to subject his person to the seizure of the promisee, would only foresee that he would do so if he was incapable of paying or performing as he had promised, and not the other way around. While, Zimmerman's point that the true formation of 'a law of obligations' was not yet hatched is conceded, the crude formation thereof was definitely, already, conceptualised. Borrowing and lending required some form of security and loans would involve the borrower giving either a member of his family or an item of similar value to that borrowed to the lender (Watkin 1999 286).

After Rome's victory in the First Punic War commercial needs propelled the development of the four consensual contracts¹⁶⁷⁷ and the looser form of *stipulatio*.¹⁶⁷⁸ The real contracts¹⁶⁷⁹ saw the completion of the classical development.¹⁶⁸⁰ It was these ancient transactions which formed the basis of what later were to be classified as contractual obligations.¹⁶⁸¹

The obligation which was enforceable by the creditor against the debtor by way of action was referred to as the *obligatio civilis*, in order to differentiate it from the *obligatio naturalis*.¹⁶⁸²

¹⁶⁷⁷ These were the *emptio venditio* or sale, *locatio conductio* or letting and hiring and *societas* or partnership and *mandatum* or grant or acceptance of a gratuitous commitment (Thomas 1976 279).

¹⁶⁷⁸ Thomas 1976 279.

¹⁶⁷⁹ Also referred to as contract *re*, were also four in number: *mutuum*, *comadatum*, *depositum* and *pignus*. These were agreements which became binding upon the delivery of a thing from one party to the other to be returned *in specie* or in equivalent or otherwise disposed of at the end of the transaction (Thomas 1976 271).

¹⁶⁸⁰ So the classical Roman lawyer, following Gaius' scheme, would classify the contractual obligations as arising from act (*re*), from words (*verbis*), from writing (*litteris*) or from consent (*consensu*) (G III 88 and Christie and Bradfield 2011 5).

¹⁶⁸¹ Thus developed the principle in Roman law that in terms of an obligation the debtor was directly bound to make performance, which performance could take the form of *dare*, *facere* or *praestare* (Zimmerman 1990 5). *Dare* meaning to give, *facere* to do, although this included a *dare* but also omissions, and *praestare* broadly implying a guarantee for certain results (Zimmerman 1990 6). 'Only with the coming of an increase in trade and with it greater individualism with regard to ownership of property did these arrangements gradually develop into rules of contractual engagement which were meant to facilitate commerce and not just provide security against wrongdoing. A facultative law had to replace one founded upon fear' (Watkin 1999 287). Roman law was an 'actional' law in that where there was no available procedural formula to enforce it – the agreement would not be binding. That is, only where a remedy existed, would there be a right. Here we see the birth of the conceptual division between rights *in personam* and rights *in rem*. In the case of obligations, a person enforced his rights through the action *in personam*. An action is *in personam* when a party takes action against another who is under an obligation to the former party by reason either of contract or delict, that is, when the former party contends that latter party ought to give, do, or in some other way perform (*dare, facere, praestare*) (Gaius 4 2, translation by Christie and Bradfield 2011 4).

¹⁶⁸² Cf Ulpian D 50 16 10, 44 7 fr 14, Paulus D 1 16 4. For an examination of the concept 'natural obligations' and their evolution cf Rotondi M 'Alcune Considerazioni sul Concetto di Obbligazione Naturale e Sulla sua Evoluzione' 1977 *Rivista Del Diritto Commerciale* 213. The *obligatio naturalis*, although not directly enforceable, were recognised by the law as binding in as far as they could be secured by suretyship (G 4 119a, D 46 1 16 3) and pledge, (D 12 6 13 pr) that they could be novated, (D 46 2 1 pr 1) performance could not be reclaimed (D 12 6 13 pr 1, 44 7 10, 46 1 16 4) and they could be used as set-off (D 46 1 8 3). Much debate exists around the nature of the natural obligation, some writers comparing or rather likening it to moral and social duties, while others warning against this equation (Rotondi *Rivista Del Diritto Commerciale* 1977 213 217). While throughout its historical development the Italian Civil Codes referred to the concept of natural obligation, it was not defined. There existed, however, a tendency to generalise the application of the concept with spontaneous cases of moral and social duties, not legislatively sanctified as judicial obligations. This resulted in some Italian authors conceding that the courts could admit the existence of natural obligations on a case by case basis. It was under these

By Justinian's time and for purposes of teaching the *Institutes*, the number of actionable contracts were limited to ten.¹⁶⁸³ These limited contracts were extended slightly by the *obligationes quasi ex contractu* but it was the praetors that were forced, for practical purposes, to extend the concept of contract outside the ten classes recognised in the *Institutes*. The praetors granted an action called the *actio in factuum* or *praescriptis verbis*, contemporaneously dubbed 'innominate contracts'.¹⁶⁸⁴ In these innominate contracts the defendant's promise was enforceable not because it formed part of a formal agreement but because the plaintiff had performed his part of the agreement.¹⁶⁸⁵ A further incongruity was the necessity which arose, for praetors and emperors to give actions on particular types of informal agreements that could not be classified otherwise than as *pacta*. This is because a *pactum* initially recognised only as a defence to an action was subsequently utilised to add certain terms to a recognised contract, *pacta adiectum*.¹⁶⁸⁶ In the course of time an obvious

influences that in the Italian Civil Code of 1942 article 2034, under the title 'Payment of Debts' and further under the heading 'Natural Obligations' it is stated that an obligation performed spontaneously under moral or social motivations will not be enforced unless same was carried out by a person without capacity (Rotondi *Rivista Del Diritto Commerciale* 1977 223). The term and concept 'natural obligation' has trickled down in the ages into modern South African law. The contemporary 'natural obligation' is a term used for those duties to perform which cannot be enforced in the normal way by an action for specific performance or for damages arising out of non-performance. However, the law recognizes the existence of the duty to perform in one or more of the other ways encountered in Roman and Roman-Dutch law. For example, we may refer to the fact that the performance, once rendered, may not be reclaimed (exceptions do exist) and the claim can be raised by way of set-off (Joubert 1987 4). However, as Zimmerman correctly indicates, the type of transaction falling into the category of natural obligations has changed dramatically. He uses as an example a claim which has prescribed in terms of the Prescription Act 68 of 1989: while the creditor is entitled to claim, the debtor may refuse to perform – however, once performance has been rendered, it may not be reclaimed (*Pentecost and Co. v Cape Meat Supply Co.* 1933 CPD 472, Zimmerman 1990 8). Institutional writers, such as Voet, distinguished between *naturalis obligationes plenae (efficaces)* and *naturalis obligationes minus plenae (inefficaces)*. The former being the natural obligation as described herein above which although not directly legally enforceable has certain legal consequences in particular circumstances. The latter have no legal effect and have been criticised as not being obligations proper. According to Voet (44 7 3) these types of 'obligations' rest solely on bonds of decency, an example of which is the gambling transaction (11 5 7) (LAWSA 151).

¹⁶⁸³ These were *mutuum, commodatum, depositum, pignus, stipulatio, litteris, emptio venditio, locatio conductio, societas* and *mandatum*.

¹⁶⁸⁴ The innominate contracts were thus branded not because they were not individually named (some were) but because they did not constitute a definite class, like for example real contracts or verbal contracts and so on. They were contracts because they gave rise to an action (Thomas 1976 311).

¹⁶⁸⁵ D 19 5, Christie and Bradfield 2011 4. Thomas suggests that only with the development of the innominate contract did Roman law approach something akin to the modern concept of contract (1976 215).

¹⁶⁸⁶ Christie refers to it as an 'agreement tacked on' (2011 5).

injustice would have been caused if informal agreements had remained unenforceable in the face of the *pacta adiectum*. These were known as the *pacta vestita*¹⁶⁸⁷ because, as Christie¹⁶⁸⁸ suggests, they were clothed with the action provided by the State.

While it may be patent to the modern jurist that no logical reason existed for stopping the development at this stage, the Romans did not take ‘the final step of declaring that all lawful agreements, involving as they do the consensus of the parties, give rise to a civil obligation and are consequently actionable’.¹⁶⁸⁹ Thus, under Roman law the conclusion that every serious agreement creates a contractual obligation was never reached.¹⁶⁹⁰ Roman-Dutch law, did however, take this necessary step and it treated every agreement between parties made seriously and deliberately as a contract.¹⁶⁹¹ It remained, in South Africa, to decide whether to apply Roman-Dutch or English law; it was, however, the Roman-Dutch principles that prevailed.¹⁶⁹²

The common law of contract differentiates the contract from other legal obligations in that the former is based on the agreement of the contracting parties, with a view to performance.¹⁶⁹³ Different requirements must be met. The first of these is the intention of the parties to create an obligation.¹⁶⁹⁴ After intention is established there are various other requirements that are necessary in order to create a legally binding contract. These requirements are as follows:

¹⁶⁸⁷ Zimmerman 1990 511.

¹⁶⁸⁸ Buckland 1963 529-533.

¹⁶⁸⁹ Per De Villiers AJA in *Conradie v Rossouw* 1919 AD 279 306.

¹⁶⁹⁰ Christie and Bradfield 2011 6.

¹⁶⁹¹ ‘In taking this step it was influenced by the cannon law, by the *ius gentium* (the law of mankind) and by a notion that the honouring of promises was inherent in peoples of Germanic origin’ (Christie and Bradfield 2011 6).

¹⁶⁹² Bigge and Colbrooke Report of 1826 and *Louisa and Protector of Slaves v Van den Berg* 1830 1 M 471. Although, some doctrines took some time to shed, like but not limited to, for example the English doctrine of consideration, the Roman-Dutch principles prevailed (*Rood v Wallach* 1904 TS 187; *Conradie v Rossouw supra* 320).

¹⁶⁹³ Joubert states that the agreement between the parties should envisage some form of performance because ‘[w]here two parties share the same opinion or hold the same view as to some facet of the reality of the universe there is no contract’. He uses the examples of the shared opinion between A and B that the weather is fine (1987 21).

¹⁶⁹⁴ Contracts can thus be distinguished from agreements not intended to create legally binding contracts. The latter are often referred to as ‘gentlemen’s agreements’ or moral agreements (Joubert 1987 21).

- that the parties have the necessary capacity to contract;
- that it is possible to carry out the performance which has been agreed upon;
- that the agreement is legal;
- where formalities are required, these must be satisfied; and
- foundations that affect the validity or enforceability of the agreement must be satisfied.¹⁶⁹⁵

Above is an outline of the historical development of the obligation which, with the supplement of the Dutch influence, forms the foundations of South Africa's law of contract. Contract is based on the principle of contractual autonomy.¹⁶⁹⁶ Accordingly, any person with contractual capacity is entitled to determine whether, with whom and on which terms to contract and thus create a legally enforceable relationship in terms of which performance must take place, failing which, and dependant on the nature of this failure or breach, the other party will be entitled to certain remedies.¹⁶⁹⁷ To some extent legislation, in particular the National Credit Act, alters this common law rule, as it imposes certain obligations (and rights) on the parties, which may limit the autonomy of the contracting parties. That is conditions imposed by legislation which the parties may, but for such enactment, have been able to contract out of, or legislation may, for example, modify the common law time constraints that would otherwise have been applicable in the event of breach.¹⁶⁹⁸

5.3. Breach of Contract

When two parties enter into an agreement or contract, the intended outcome is a reciprocal exchange of obligations, therefore '[w]here the intended result is not achieved as a consequence of the culpable behaviour of one of the parties, that party commits breach of contract'.¹⁶⁹⁹ Consequently, the party who has committed the breach will be liable to the non-defaulting party for damages.¹⁷⁰⁰

¹⁶⁹⁵ Joubert 1987 21.

¹⁶⁹⁶ *Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd* 1991 2 SA 754.

¹⁶⁹⁷ Jordaan DW 'The Constitution's Impact on the Law of Contract in Perspective' 2004 *De Jure* 58 59.

¹⁶⁹⁸ Cf Chapter 6 *infra* for an in-depth discussion on remedies in relation to the credit agreement.

¹⁶⁹⁹ Havenga P *et al General Principles of Commercial Law* 1995 111. 'The duty of a party to a contract is faithfully to perform his part with the care and diligence proper in the circumstances,

Two main, albeit very broad qualities or categories of breach of contract are breach according to *time* and breach according to its *nature*.¹⁷⁰¹ In essence one is breach by 'non-performance' or 'late performance' and the other is breach by 'wrong' performance. Christie¹⁷⁰² explains it in a different manner:

The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be in *mora*, and, in the last case, to be guilty of malperformance (*Ally v Courtsey Wholesalers (Pty) Ltd* 1996 3 SA 134 N 149F-150H).

The South African common law has further developed these two broad classifications of breach of contract.¹⁷⁰³ Consequently, five types of breach of

and with due regard to any rules of law or lawful customs by which the character of the performance due from him is determined' (Lee RW and Honoré AM *The South African Law of Obligations* 1978 249).

¹⁷⁰⁰ The test whether damages resulting from breach of contract are of such a nature that they can be recovered, is whether these are such as may fairly and reasonably be considered, in light of the circumstances, and the knowledge of the parties at the time of contracting, as arising according to the usual course of things from the breach itself (Wessels 1951 paragraph 3212, *Victoria Falls and Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd.* 1915 A.D. 22, *Lavery and Co. Ltd v Jungheinrich* 1931 A.D. 162 and *Broderick Properties Ltd v Rood* 1962 4 All SA 571 (T) 574). The following from Innes CJ, in *Silverton Estates Co. v Bellvue Syndicate* 1904 T.S. 462 466 is of relevance: 'The general principle is well established, that a person who has contracted to pay or deliver anything and who is in *mora*, is liable (within certain limits) for all damages caused to the other contracting party by his delay'. Finally, Pothier: 'A debtor is liable not only for the damages and interests of the creditor resulting from the absolute non-performance of his obligations, but also those which result from the delay of accomplishing it after having been judicially called upon to do so (Pothier on *Obligations* 169). The following is an interesting definition of breach of contract '[T]he expression breach of contract is something of a misnomer: it is not the contract as such which is breached, and, in fact, the conduct in question does not amount to an actual breach of something. However, 'breach of contract' may be – and generally is – used as a term of art, which expresses the concept that a contractant may act wrongfully in relation to his co-contractant' (Van der Merwe *et al Contract General Principles* 2004 237). However, it is submitted that the correct meaning of 'breach' may have been misinterpreted by the authors. 'Breach' may be described as a violation, contravention or infringement. Accordingly – a breach of contract is precisely the violation, contravention or infringement of the agreement which was reached between the parties, the terms of which the non-breaching party was reliant on. Therefore it is submitted that the term 'breach,' artistic visage aside, is far from a misnomer. The terminology is derived from the English common law, while the French Civil Code refers to non-performance or *inexécution* (article 1147) and the German Civil Code does not recognise such a single concept but only two specific forms of breach of contract, that is supervening impossibility and delay of performance (sections 280 and 325 BGB) (Zimmerman 1990 783).

¹⁷⁰¹ Kerr 2002 575.

¹⁷⁰² Christie and Bradfield 2011 515.

¹⁷⁰³ Van der Merwe *et al* expose a school of thought that expresses the view that the traditional breach of contract is described as malperformance ('wanprestasie'), which thereafter distinguishes between negative malperformance (where the debtor does not perform timeously)

contract are recognised: *mora debitoris*, *mora creditoris*, positive malperformance, repudiation and prevention of performance.¹⁷⁰⁴

A breach of contract does not discharge the contract.¹⁷⁰⁵ Thus forfeiture clauses which state that a specified breach shall ‘*ipso facto* cancel and annul’ the contract or that upon breach, the contract ‘shall lapse’ have been interpreted to give the innocent party the right to cancel or enforce the contract; this is because enforcing such clauses according to their plain meaning, would entitle the

and positive malperformance (where the debtor does not perform according to the same standard that he had originally agreed to). This view is apparently derived from Van Zijl Steyn I ‘*Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg*’ 1929 HRHR 1 3-4, where he states: ‘Die skuldeiser het reg of die behoorlik uitvoering van die verbintenis in sy gehele omvang. Elk verbintenis moet op een of ander tyd vervul, anders het dit geen waarde nie. [...] Die skuldenaar wat nie op tyd presteer nie, voldoen ewemin aan sy verpligtinge as die verkoper wat, in stryd met die terme van die kontrak, ‘n saak met gebreke lewer. [...] Wanprestasie kan dus twee vorme aanneem (i) dit kan betrekking hê op die inhoud van die verbintenis, of (ii) dit kan slegs sien op die tyd van die vervulling. In die eerste geval het ons te doen met postiewe wanprestasie, in die tweede geval met negatiewe wanprestasie of *mora debitoris*. Voortaan gebruik ons die woord wanprestasie in die betekenis van positiewe wanprestasie in teenstelling met negatiewe wanprestasie, *mora debitoris*’. Van der Merwe *et al*, do not, however, concur with Van Zijl Steyn’s view, but recognise repudiation and prevention of performance as further categories of breach (Van der Merwe *et al* Contract General Principles 2012 283). A broader approach to the concept of breach of contract, is the view that this concept entails the act of the breaching party infringing the other party’s personal right arising from the contract, and that the infringement of a right entails that the conduct which amounts to breach of contract is wrongful. However, debate exists about this (cf Van Der Merwe *et al* 2012 283). There are also differing views as to whether the concept of wrongfulness, as applied in relation to delicts, should play a role in relation to contracts. Van der Merwe *et al* state: ‘once it is accepted that breach of contract is a species of wrongful conduct it would be only natural to explore the way in which a related field of the law of obligations, namely the law of delict, employs the concept of wrongfulness. The concept of wrongfulness of the law of delict hinges on the *boni mores* – societies convictions of what is right or wrong, just or unjust. Conduct is considered wrongful if it infringes this criterion. It is an objective if flexible criterion of reasonableness.[...] In borderline cases the law of contract could benefit from adopting a flexible criterion of wrongfulness like the one applied in the law of delict in order to determine whether a breach of contract has occurred. In applying such a criterion the focus would shift from the intention of the parties to the nature and effect of the Act allegedly constituting a breach of contract’ (2012 284). Nienaber suggests that breach of contract may even be construed as a form of delict (‘Kontraktbreuk in Anticipando in Retrospek’ 1989 TSAR 5). While importing the concept of wrongfulness with the public policy standard of measure into the realm of breach of contract is both attractive and convenient – it is submitted that the blurring of the two disciplines would be an erroneous approach. Contract sets the parameters within which the parties operate in relation to each other by will – while the law of delict controls those situations where the parties have not intentionally linked their obligations, requiring two distinct policy considerations. In *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 1 SA 475 (A) 499F the court stated the following: ‘no authority in Roman or Roman Dutch Law ... [exists] for the proposition that the breach of ... a contractual duty is *per se* a wrongful act for purposes of Aquilian liability ...’.

¹⁷⁰⁴ De Wet and Yeats *Die Suid-Afrikaanse Kontrakreg en Handelsreg* 1947 61; Van der Merwe *et al* 2012 290.

¹⁷⁰⁵ P 17 2 656; C4 10 5; C4 38 8; Voet 19 1 21; *Wolff & Co v Bruce Motors & Co* 1889 7 SG 133135, *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 9 52A, Christie and Bradfield 2011 515.

wrongdoer to benefit from his own breach because his breach would then entitle him to terminate the contract.¹⁷⁰⁶

A plaintiff must allege and prove a breach of the contract¹⁷⁰⁷ and that it was committed by the defendant.¹⁷⁰⁸ Proof that a breach has occurred involves a two-step approach; firstly, there must be a factual enquiry as to what actions were done or omitted by the defendant¹⁷⁰⁹ and secondly, the contract must be interpreted in order to determine whether the act or omission was contrary to the terms of the contract.¹⁷¹⁰

The following pages embrace a discussion of the five specific categories of breach of contract. This contextualisation will allow for a better understanding of the implications of the sections in the National Credit Act relating to remedies and the procedures required to be taken by the creditor prior to enforcement. The Act also affords both the credit provider and the consumer powerful rights of rescission, found in sections 123 and 127 respectively.¹⁷¹¹ The background study of breach of contract will assist in understanding how these rights of cancellation change the dynamic of the common law pertaining to credit agreements.

¹⁷⁰⁶ *Ibid.*

¹⁷⁰⁷ *Bradley v African Boating Comp* 1889 10 NLR 69, *Strydom v Van der Merwe* 1951 3 SA 81 T and *Freelance Contracting (Pvt) Ltd v De Clerk* 1982 4 SA 296 ZS.

¹⁷⁰⁸ *Goldfields Supermarket v Calendar and Novelties (SA) (Pty) Ltd* 1966 4 SA 112 T. Interestingly enough, a majority of American jurisdictions, the Restatement (Second) Certificate of Contracts and the Uniform Commercial Code (U.C.C) recognise the duty to perform in good faith as a general principle of contract law. The conduct of a party to a contract may accordingly be vulnerable to claims for breach stemming from this obligation (Burton SJ 'Breach of Contract and the Common Law Duty to Perform in Good Faith' 1980 *Harvard Law Review* 369).

¹⁷⁰⁹ The following from Voet is relevant: 'Whether default is or is not understood to occur in each individual transaction is for a wise Judge to assess since the settling of this matter is difficult. The divine Pius gave the written answer that it can be decided by no ordinance, nor by any debate by legal writers, because it is a question rather of fact than of law' (22.1.24 Gane's Translation. Voet was quoting Pius from D 22.1.32 pr). Cf *Goldfields Supermarket v Calendar and Novelties (SA) (Pty) Ltd supra*.

¹⁷¹⁰ Christie and Bradfield 2011 516.

¹⁷¹¹ The cooling-off right of the consumer, found in section 121 of the Act, another right to unilateral cancellation has been discussed in paragraphs 6.2.1.2 and 6.5.2.1.4 *infra*.

5.3.1. Default of the Debtor or *Mora*¹⁷¹² *Debitoris*¹⁷¹³

A debtor commits breach of contract known as *mora debitoris* if he does not perform his obligation timeously.¹⁷¹⁴ The Supreme Court of Appeal has decided

¹⁷¹² The general theory of *mora* forms part of the modern law and is derived from Roman law (Wessels 2 1951 paragraph 2853). Time is an element which is common in all contracts, and thus a debtor who does not perform his obligation in time, does not fulfil his obligations in the same way as a debtor who delivers a defective article (Wessels 2 1951 paragraph 2855 and Van der Linden *Koopmans Handboek* 1.14.7). Mulligan defines *mora* as 'breach of the time factor of a promise,' and also 'delay without lawful excuse, of performance of a contractual duty; in other words *mora* is the wrongful failure to perform timeously' ('*Mora*' 1952 SALJ 276 and 278). This definition was adopted by the court in *Broderick Properties Ltd v Rood supra* 449. *Mora* occurs only in respect of positive obligations (Van der Merwe *et al* 2012 291). 'On general principle, failure to perform at the time when, or during the period within which, performance is due is, in the absence of a lawful excuse, a breach of contract because it is a failure to do what one has contracted to do' (Kerr 2002 608). Christie gives the following definition: 'Time is an element common to all contracts, and to decide the consequences of failure to perform a contractual obligation within the appropriate time our law employs the concept *mora*' (2011 519). It is submitted that Christie's definition is adept as it encompasses both the creditor and debtor facets of *mora*. *Mora* relates to the time element of a performance and accordingly can only occur where performance remains possible; otherwise a different breach of contract would occur, for example prevention of performance (Van der Merwe *et al* 2012 291 and 293). Wessels distinguishes two kinds of non-performance, one in relation to the content of the obligation and the other in relation to the time by which the obligation must be fulfilled. He states: '[t]he former is positive default or what is usually called breach of contract: the latter is negative default or *mora debitoris*' (Wessels 1951 paragraph 2855). *Mora* has been described as a form of breach of contract which is of a continuous nature, in that it may endure over a period of time – that is until the defaulting party performs or until the aggrieved party elects to take the remedy available to him by virtue of the contract or by the operation of law (Van der Merwe *et al* 2012 292). The following from Mulligan is pertinent: 'Like other breaches *mora* may, according to the circumstances, be a breach going to the root of the contract, or it may be a subsidiary breach. If it goes to the root of the contract, time is said to be of the essence of the contract, and the *mora* of the promisor, in that case, confers upon the promisee the rights and remedies which breaches of essential terms confer upon the injured party, for example discharge from performance, rescission, etc. When time is not of the essence and where, though it is of the essence, it is not treated as such by the promisee, the promisor's *mora* entitles the promisee to claim damages if damages are suffered' (1952 SALJ 288-9). Consequently, where performance consists of payment of a liquid sum of money, the debtor in *mora* is liable for interest at the current rate for the period during which he remains in *mora* (D 22 1 32 2, 46 6 10, 19 2 54 pr, *Thibart v Thibart* 1840 3 Menz 472, *Havenmann v Oldacre Bros* 1905 26 NLR 56, *Barrett v Bowden* 1908 18 CTR 884, *Becker v Strusser* 1910 CPD 289 294, *Swart v Teubes* 1916 CPD 78, *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 182 195-6 and Mulligan 1952 SALJ 289). However, with unliquidated damages, interest is not payable, as the defendant is not in *mora* until the amount is fixed, except where the amount payable might have been ascertained upon an enquiry which the debtor should reasonably have made (*Victoria Falls and Transvaal Power Co Ltd v Consolidated Lanlaagte Mines Ltd supra* 32, *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 777G and Mulligan 1952 SALJ 289).

¹⁷¹³ In 1929 Professor van Zijl Steyn wrote '[*mora debitoris* is een van die verwaarloosde onderdele van ons reg. As ons die Suid-Afrikaanse skrywers raadpleeg, vind ons baie min oor die onderwerp' (1929 HRHR 1). Since then much attention has been given to this area, perhaps in order to supplement the neglect.

¹⁷¹⁴ D 22.1.24 and D 5.3.53. The matter has been succinctly phrased as follows: 'If a party fails to perform or fails in performing what he has undertaken, either he can justify his failure or he cannot. If he can, he incurs no liability. If he cannot, he has broken his contract and must suffer the consequences' (*Alfred McAlpine and Son (Pty) Ltd Transvaal Provincial Administration* 1977

that fault is not a requirement for *mora*.¹⁷¹⁵ A debtor can commit *mora* if he delays or retards performance of his duties under the contract beyond the times fixed for performance, '[i]t is then said that he is in *mora* or guilty of *mora*'.¹⁷¹⁶ If a debtor, after having been in *mora*, renders his performance, he fulfils his duty. However, he cannot cure the breach of the past and may still be liable to the creditor for any loss that the creditor has suffered.¹⁷¹⁷

Mora debitoris is recognised as a distinct type of breach of contract and must be differentiated from other types of breach, more especially from positive malperformance and impossibility to perform.¹⁷¹⁸

Three identifying requirements for this kind of breach of contract are: the time limit for performance must have expired, the debt must be enforceable¹⁷¹⁹ and the debtor must be aware or must be deemed to be aware of the nature of the performance required of him and that such performance is due.¹⁷²⁰

4 SA 310 (T) 343, *Sweet and Ragereghara* 1978 1 SA 131 (D) 138, *C and T Products (Pty) Ltd v M H Goldschmit (Pty) Ltd* 1981 3 SA 619 (C) 631, Newman and Mcquoid Mason, Lee and Honoré 1978 260 and Van der Merwe *et al* 2004 241).

¹⁷¹⁵ *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 2 SA 118 (SCA).

¹⁷¹⁶ Joubert 1987 201. '*Mius solvit qui tardis solvi*' (he pays less than he owes who is late in his payment)' (Wessels 2 1951 paragraph 2855).

¹⁷¹⁷ Van der Merwe *et al* 2004 242. It is relevant to note the wording in these remarks. Van der Merwe *et al* assert that a debtor who has been in breach 'for some time' and who subsequently fulfils his duty cannot cure the breach of the past and accordingly attracts liability. The discussion on breach by the debtor who is a party to a credit agreement revolves largely around this factor. That is, how long the debtor remains in default and whether the breach, by way of delayed performance, grants the creditor the unchallenged right to cancellation of the contract. Interestingly enough, in a contract of sale of immovable property – the rule has been developed that if the purchaser receives possession (or transfer) of the property prior to his having paid the purchase price – he will be liable for interest on the purchase price. The residual rule is only effective if the purchaser receives possession prior the date to which he entitled to same contractually. It is, however, common practice to insert a clause, (known as the 'occupational rental clause') in an offer to purchase or deed of sale – that makes provision for situations such as these. Van der Merwe *et al* aver that the rule is not based on breach of contract in the form of *mora* but on considerations of equity (2004 242-3).

¹⁷¹⁸ Both are discussed below in greater detail at paragraphs 5.3.2 and 5.3.3 respectively.

¹⁷¹⁹ If he would have a good defence to any action that might be brought against him to enforce the obligation he is not in *mora* (D 12.1.40, D 45.1.127, D 50.17.53, D 50.17.88) (Christie and Bradfield 2011 519). The situation may arise where the creditor has a right against a debtor against which the debtor cannot raise a valid defence. *Mora debitoris* cannot occur if the time for performance has not yet arrived, or when the obligation is subject to a suspensive condition which has not yet been fulfilled, or when the obligation has become prescribed or if the creditor still has to do something from his side before the debtor need perform (De Wet and Van Wyk *Kontrakreg* 1947 162, Van Zijl Steyn 1929 *HRHR* 40-42 and LAWSA paragraph 298).

¹⁷²⁰ It is not necessary to show that his default is wilful or negligent. His ignorance will excuse him only if it is both *bona fide* and reasonable'. *Legogote Development Co (Pty) v Delta Trust and Finance Co* 1970 1 SA 584 (T) 587, Christie and Bradfield 2011 519. There is some debate with

Performance becomes due in one of three ways, either by operation of law (*mora ex lege*), according to the terms of the contract (*mora ex re*) or by demand made by the creditor (*mora ex persona*).¹⁷²¹ In all contracts, even in those contracts where no specific stipulation is made in that regard, there is a time when or a period within which performance is due.¹⁷²² The time when or within which an obligation is required to be performed is determined by the express,¹⁷²³ implied¹⁷²⁴ or residual provisions¹⁷²⁵ of the contract. If the parties agree that the contract is to take effect on a certain day or it is made subject to a suspensive condition, performance is not due until the day arrives or the condition is satisfied.¹⁷²⁶

Where the parties agree that the contract is to be performed on a fixed day, the debtor is in *mora* if he fails to perform his contract on or before the expiration of that day.¹⁷²⁷ *Mora ex re* occurs only when performance is due on or before a

regards the requirement of culpability of the debtor. Joubert opines that fault (*culpa*) is one of the requirements for *mora debitoris*, '[t]he courts, however, have some hesitation accepting this (*Algoa Milling Co. v Arkell* 1918 AD 145 158-9 and *Douglas and Levisseur and Co v Friedman* 1922 OPD 182, *Sher v Frenkel and Co* 1927 TPD 375 and *Legogote Development Co (Pty) v Delta Trust and Finance Co* 1970 1 SA 584 (T) 587). The reason is that although the debtor has no fault, in the sense that he did not contribute to the delay or to the emergence or existence of the factor that caused the delay, such factors are encountered in commercial life every day and the courts seem to prefer to place the risk for such factors on the shoulders of the debtor' (1987 205). Kerr states that it is a basic rule of contract that 'if during the currency of a contract the conditions necessary for its operation cease to exist, the change not being due to the fault of either party or to a factor for which either party bears the risk, the contract ceases to exist', he goes on to state, however, that 'if a debtor is in *mora* the risk is on him unless the *mora* has been purged or the thing would have perished even if it has been delivered timeously' (2002 554-5 and cf Wessels 1951 paragraphs 2704-2706). Mulligan, with reference to *Algoa Milling Co. v Arkell* 1918 AD 145 158-9 and *Douglas and Levisseur and Co v Friedman* 1922 OPD 182 as authorities, states that the views posited by van Zijl Steyn (1929 *HRHR* 43) and de Wet and Yeats (1947 96-7) that in order to constitute *mora*, failure to perform timeously must be accompanied by *culpa* or blame even when time is of the essence, are not part of South African law (1952 *SALJ* 288).

¹⁷²¹ Voet 22.1.24-31, Mulligan 1952 *SALJ* 276 278 and Christie and Bradfield 2011 519.

¹⁷²² 'Time is an element which is common to all contracts' (Wessels 1951 paragraph 2855, *Broderick Properties (Pty) Ltd v Rood supra*, *Stapelford Estates (Pty) Ltd and another v Wright* 1968 1 SA 1 (E) at 4D-E, Kerr AJ '*Mora Debitoris: The Rule in Broderick v Rood*' 1978 *SALJ* 143 144 and Kerr 2002 607 and 534).

¹⁷²³ The parties agree to a particular time (date) for performance.

¹⁷²⁴ The parties know that performance must be before a particular time and/or event. It is something that, had they been asked while negotiating the contract, both would have answered: 'Before X happens'.

¹⁷²⁵ These would be those provisions that the law imports into a contract, an example would be the residual rule that if no time for performance is fixed the debtor must act within a reasonable time (Kerr 2002 607 and 533).

¹⁷²⁶ Voet 46.3.12.

¹⁷²⁷ Wessels 1951 paragraph 2871.

certain date, which date may be stipulated either expressly¹⁷²⁸ or tacitly. The time or date for performance must be a *dies certus an ac quando*,¹⁷²⁹ that is, the date must be certain to arrive and there must be certainty as to when it will arrive.¹⁷³⁰

The debtor is in *mora ex lege* if the law provides at what moment performance is due and he fails to perform it at that time.¹⁷³¹ If the common law or legislation requires that an act should be performed within a certain time and a person undertakes to perform such act, the contract implies that such person will perform according to the requirements of the law.¹⁷³² If he fails to act within the time prescribed he has breached his contract and then becomes liable for damages, even though he has had no notice from the other contracting party.¹⁷³³

Even when a date for performance has been set in a contract, a court will look to the nature of the contract to determine whether time was, in fact, of the essence in that contract.¹⁷³⁴ Rather than making a judgment on the strict letter of the contract that the debtor is in *mora ex re*, a court will, firstly, determine whether

¹⁷²⁸ *Van der Merwe Gardens (Pty) Ltd v Reynolds* 1972 SA 294 (W) and *Hattingh v Pienaar* 1978 2 SA 328 (O).

¹⁷²⁹ *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1995 1 SA 585 (C).

¹⁷³⁰ *Van der Merwe Gardens (Pty) Ltd v Reynolds supra*, *LTA Construction Ltd v Minister of Public Works and Land Affairs supra* 590-1, De Wet and Van Wyk 1947 63, Van Zijl Steyn 1929 HRHR 64-7 and LAWSA paragraph 298. Mulligan states: '[i]n our law if the promisor fails without lawful excuse to perform on or before the date specified in the contract, he is in *mora* and demand is not necessary' (1952 SALJ 289, cf also *Kessel v Davis* 1905 TS 731 and *Laws v Rutherford* 1924 AD 261 at 262). This position is altered by the National Credit Act (as well as in terms of previous credit legislation). The credit consumer is entitled to be put to terms by virtue of a written notice.

¹⁷³¹ Wessels 1951 paragraph 2863.

¹⁷³² Wessels 1951 paragraph 2867. Van Zijl Steyn treats *mora ex lege* as part of *mora ex re*, but acknowledges that the majority of writers accept the division into two classes of *mora*: after demand and without demand (1929 HRHR 4, Wessels 1951 paragraph 2863, *Victoria Falls and Transvaal Power Co. Ltd v Consolidated Lanlaagte Mines Ltd* 1915 AD 1 31 and *West Rand Estates Ltd v New Zealand Insurance Co., Ltd* 1915 AD 173 195).

¹⁷³³ Wessels 1951 paragraph 2863.

¹⁷³⁴ 'As in English law the mere fact that a date for performance is specified in the contract does not make time for performance an essential term. Time is, of course, of the essence if the contract states expressly that it is. If it does not so state, then whether time is or is not is to be gathered from the terms and the nature of the contract and from the surrounding circumstances' (Mulligan 1952 SALJ 289, *Bernard v Sanderson* 1916 TPD 673, *Cowley v Estate Loumeau* 1925 AD 392, *Lewis and Co v Malkin* 1926 TPD 665, *Crook v Pederson* 1929 50 NLR 273 and *Goldstein and Wolf v Maison Blan (Pty) Ltd* 1948 4 SA 446 (C) 452-3).

time was of the essence of the contract.¹⁷³⁵ If it finds that it was not, then the examination will escalate to whether the debtor is in *mora ex lege*. That is, whether, despite the time set for performance, his delayed performance may be considered as being made within a reasonable time. Where no time for performance is fixed by the contract, the law implies an undertaking by each party to perform his part of the contract within what is reasonable time, having regard to the circumstances of each case.¹⁷³⁶

The case law has worked its way through the paradigm of *time* as a factor for *mora debitoris*. In *Bergl and Co v Trott Bros*¹⁷³⁷ the Court held, 'where the time is

¹⁷³⁵ In *Crook v Pederson Ltd* 1927 WLD 62 76 the court considered whether or not one of the parties to a contract of sale has a right to rescind because the other party has not fulfilled his part within a certain time, stipulated or otherwise. The court looked to the English courts and found that in terms of their common law 'time was always of the essence of the contract[,] [w]hen any time is fixed for the completion of it, the contract must be completed on the day specified or an action will lie for the breach of it. In equity, however, time was held to be of the essence of the contract only in cases of direct stipulation or of necessary implication. But Courts of equity made a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it found that by insisting on the form the substance would be defeated, it held it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. Where time has not been specifically contracted for, the Court then considers how far either party is injured by the delay, and will not permit one to insist upon that which it was made[,] and further at 77 '[w]here time is of the essence of the contract no difficulty arises, but where there is no stipulated time a reasonable time is allowed to the defaulting party, and what, again, is a reasonable time depends on the circumstances'. To determine when a term of a contract is of the essence the court looked to Pothier (*Sale* 476): 'In regard to all other obligations [...] we must decide according to the circumstances whether their non-execution ought to give rise to a dissolution of the contract; it ought to cause dissolution when that which is promised me is of such a nature that I should not have been willing to contract without it'. The court concluded with reference to a reasonable time for performance that Pothier's view is the correct one, however, Krause J added: 'although special circumstances might vary its application', accordingly he held: 'where time of performance is not essential, it might, in many cases, in order to ascertain what would be a reasonable time, be necessary to call upon the defaulter to perform his obligations within a certain time; in other words, to place him in *mora*'. Mulligan states: 'To ascertain whether time is of the essence is sometimes difficult. If the parties have stated explicitly that time is of the essence, or if the intention to make time of the essence is a necessary inference from the language used, no difficulty arises, but where such is not the case, the purpose of the contract and the surrounding circumstances must be regarded to determine the matter. [...] In mercantile contracts time generally is, and in sales of land generally is not, of the essence' (1952 SALJ 278-9).

¹⁷³⁶ *Crook v Pederson Ltd supra* 77 and Mulligan 1952 SALJ 288. Per Lord Romilly in *Parkin v Thorold* 51 ER 698 701: 'It is, I apprehend, on a similar principle that the Court has regarded the question of time in these matters, when it has not been specifically and precisely contracted for, as an essential clause in the contract. It then considers how far either party is injured by the delay, and will not permit one to insist upon that which, although a formal part of the contract would, in reality, defeat the object which both had in view at the time when it was made'. It is to be noted that the South African court added that the underlying principle enunciated by the English court was in effect the same as that which is mentioned by Pothier (*Crook v Pederson Ltd supra* 78).

¹⁷³⁷ 1903 24 NLR 503. The parties had contracted for the purchase and sale of mielies shipped from Argentina. The matter concerned a delay in the shipment and the court held that because of

fixed, time may be of the essence of the contract,' and consequently when a person does not provide for the delivery at a fixed time, delivery must be within a reasonable time.¹⁷³⁸ However, the party who has not fixed the time for delivery then runs a certain amount of risk, in that if he is faced with breach of non-performance he must set his own deadlines, that is, place the debtor in *mora*, and further a court may not find this deadline reasonable.¹⁷³⁹

However, the following from Lee and Honoré¹⁷⁴⁰ is a relevant qualification:

Even when a contract fixes a definite time for performance the Court will consider, in view of the circumstances of each particular case, whether the true intention of the parties at the time of contracting was to fix a reasonable time or to make time of the essence of the contract.

If taken out of context, the decision in *Mitchell v Howard Farrer and Co*¹⁷⁴¹ may appear to condone an interpretation which allows the courts, even when a contract fixes a time for performance, some sort of equitable jurisdiction to interpret this as meaning that there is no *mora ex re* and the debtor has a reasonable time within which to perform. Rather, it is suggested, the *Mitchell*

various market factors which both parties were aware of, it was important that the mielies arrive at the time appointed. The Court found that '[t]he mielies were in their nature of such fluctuating value that neither the vendor nor the purchaser can be presumed to have regarded the time agreed upon for the delivery as an unimportant ingredient on the contract' (518).

¹⁷³⁸ This matter involved two contracts, one of which was silent as to the time for delivery, accordingly the court found that the unforeseen delay by reason of quarantining of the ship was in fact a reasonable delay. In *Federal Tobacco Works v Barron and Company* 1904 TS 483, a matter involving the delivery of certain bags by the respondent to the applicant, the court held that where no special arrangement was come to regarding the time when the goods were to be delivered, it was the duty of the respondent to deliver within a reasonable time. In this case the court found that a delay of six months from date of order was not a reasonable one.

¹⁷³⁹ *Bergl and Co v Trott Bros supra* 511 and 526. The court made reference to *Laljee v Omadutt supra*. In 1916 De Villiers JP again quoted the English judge, Barry JP in *Mitchell v Howard and Co supra* 140, as had the court in the *Bergl* matter. The court in *Bergl and Co v Trott Bros supra* 520-21 went on to qualify these statements with the following (the learned judge appeared to be quoting from Straud's *Judicial Dictionary*): 'When any time is fixed for the contemplation of the contract, it must be completed on the day specified or action will lie for breach of it (*Parkin v Thorrold* 22 LJ NS 170). But the rule of equity as stated in *Mitchell v Howard Farrer and Co* 1886 5 EDC 131 is now the general rule of English Law (and I think it has always been of Roman-Dutch jurisprudence) and that is, to look at the scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract, and if it appeared (though they named a specific date for the act to be done) that what they really contemplated was that it should be done within a reasonable time, a party in default by the letter of the contract will still be able to enforce it in accordance with what the Court considers its true meaning'.

¹⁷⁴⁰ 1978 259.

¹⁷⁴¹ *Supra*.

case as well as *Bernard v Sanderson*,¹⁷⁴² are concerned, not with whether the debtor was in *mora* after the fixed time, but with the very different question of whether his *mora* disabled him from enforcing the contract. That is, whether time was of the essence of the contract.¹⁷⁴³ If a contract fixes a time for performance, it is apparent from the case law, and it is submitted nothing could be argued to the contrary, that the debtor is in *mora ex re* and accordingly must suffer to the creditor the damages for his dilatory performance. The question which the courts are here dealing with, however, is whether such dilatory performance entitles the creditor to resile from the contract. Accordingly, the courts have taken the attitude that it is important that it be established whether time is of the essence of the contract, if it is not, then damages should suffice as compensation. It is submitted further, that a credit agreement, irrespective of its form, is generally one such contract, that it is a type of agreement where time (generally) is *not* of the essence. The creditor, on a money loan, can levy arrear interest on dilatory payment, thereby recouping the value of the time 'lost' through late payment.¹⁷⁴⁴ It is further submitted that but for section 123 of the National Credit Act, in the event of *mora debitoris*, that is dilatory payment by the consumer, a court would not grant cancellation as relief but rather order specific performance together with damages, this being in line with the common authorities.¹⁷⁴⁵ Section 123 of the Act entitles the credit provider the right to cancel the credit agreement in the event of even a minor breach by the consumer. This section is fully canvassed in the following Chapter.¹⁷⁴⁶

If no time for performance is expressly or impliedly agreed to by the parties then performance is due within a reasonable time, depending on the nature of the

¹⁷⁴² *Supra*.

¹⁷⁴³ Christie fails to mention the previous South African case, which quoted the same passage from the *Mitchell* case, thirteen years prior the *Bernard v Sanderson* matter that is, *Bergl and Co v Trott Bros supra* (Christie and Bradfield 2011 519-524). This matter is dealt with above; the court was also concerned with whether the debtor's *mora* prevented it from enforcing the contract.

¹⁷⁴⁴ It must be added, however, that sometimes, time may be of the essence in a credit agreement. For example, a credit provider may specifically advise the debtor that he requires payment on or before a certain date because such repayment amount is necessary for the creditor in some other transaction. Time here is specified, in the contract, to be of the essence and therefore is of the essence.

¹⁷⁴⁵ This discussion is extended in Chapter 6, where specific remedies are discussed.

¹⁷⁴⁶ At paragraphs 6.4.2.1 and 6.4.2.2 *infra*.

contract and the surrounding circumstances.¹⁷⁴⁷ This is a residual provision of our common law.¹⁷⁴⁸ When performance is to be rendered within a reasonable time, then, what Kerr¹⁷⁴⁹ refers to as the ‘terminable point of the period’, must be ascertainable, as it is only the determination of the terminable point that allows a court to determine the expiry of the period within which the debtor must perform or, of the reasonable time for performance. The courts have looked to the nature of the transaction in order to determine whether or not a delay in performance is unreasonable.¹⁷⁵⁰ *Graf and Co., v Basa*¹⁷⁵¹ is one of many such examples, where the courts examined the nature of the contract, the sequence of events and the expectations of the parties. The court made reference to the *Federal Tobacco Works v Barron*¹⁷⁵² matter and held, further, that there is an onus on the creditor to prove, when making demand for payment, that delivery (performance) was offered within a reasonable time.¹⁷⁵³

¹⁷⁴⁷ Wessels 1951 paragraph 2870, *Dodds v Welch* 1880 OFS 19, *Bergl and Co v Trott Bros.*, 1903 24 NLR 503 and *Cronje v Standard Bank and Jooste* 1891 4 SAR 143.

¹⁷⁴⁸ D 45.1.41, Gr 3.3.51, Voet 45.1.19, Voet 46.3.8 and V.d.L 1.14.9, D 46.3.105: ‘*quod dicimus ...debere statim solvere, cum aliquot scilicet temperament temporis intellegendum ets; nec enim cum sacco adire debet*’; *Celliers v Papenfus and Rooth* 1904 TS 73 79.

¹⁷⁴⁹ Kerr 1978 SALJ 144.

¹⁷⁵⁰ Per Innes CJ in *Federal Tobacco Works v Barron and Company* 1904 TS 483 485, where the case was considered ‘on the basis that no special agreement was come to regarding the time when the goods were to be delivered, [...] [t]hat being so, it was the duty of Barron and co. to make delivery within a reasonable time’. In *Meyerowitz v Annetts* 1937 NPD 140 Hathorn J found that as the agreement did not state a date upon which the £50 was to be paid, it was payable within a reasonable time. It is notable, that in this case the reasonability of the time within which performance was to be rendered, was determined by the court according to what the court deemed was contemplated by the parties: ‘I understand it to be common cause that, as the agreement does not state a date upon which the £50 was payable it was payable within a reasonable time, and before we can dispose of the case, we must decide what a reasonable time was. I am not familiar with this kind of agreement, which seldom comes before the Courts, and I have no knowledge, personal or judicial, about the length of time which would ordinarily be regarded as reasonable time [...] both parties expressed their views indirectly and, fortunately, the views were identical’ (Lee and Honoré 1978 258). Further authorities include: *Nel v Cloete* 1972 2 SA 150 (AD) 158, *Benoni Produce and Coal Co Ltd v Natal Leather Industries* 1946 NPD 377 380, Van Zijl Steyn 1929 HRHR 1 78, Kerr 1978 SALJ 144, Domat *Droit Civil* 1.2.2.14 and *Digest* 45.1.41.1. Per Tredgold J in *Smart and Co v Rhodesian Machine Tolls Ltd* 1950 1 All SA 515 (SR) 518: ‘It seems to me that the assessment of what is reasonable time for completion of contract must be judged not only on the circumstances as they existed when the contract was made but on all the circumstances surrounding the implementation of the contract, known to and accepted by both parties. The obligation to fulfil the contract within a reasonable time is implied, and an extension of the time may be implied from the course of dealing between the parties’.

¹⁷⁵¹ 1925 46 NPD 1.

¹⁷⁵² *Supra*.

¹⁷⁵³ Doe-Wilson JP held: ‘There is nothing in the circumstances that I can see show that the defendant assented to any such delay as that. I think, therefore, that the plaintiff’s have failed in discharging the onus which lay upon them of showing that a delay of nine months, in the circumstances, was reasonable, or to prove any assent or waiver on the part of defendant on which they can rely’ (*supra* 6).

Time for performance may be fixed in the contract.¹⁷⁵⁴ Where the contract stipulates a date for performance and the debtor fails to perform on or before the specified date, then he will automatically be in *mora debitoris*.¹⁷⁵⁵ Case law has been divergent on the view of whether a demand or *interpellatio*¹⁷⁵⁶ by a creditor is necessary, specifically in situations where the creditor wishes to cancel the contract.¹⁷⁵⁷

¹⁷⁵⁴ Accordingly, the following from the Appellate Division in *Microusticos v Swart* 1949 3 SA 715 (AD) 730 is apt: 'Where a time for the performance of a vital term in a contract has been stipulated for and one party is in *mora* by reason of his failure to perform it within that time, but time is not of the essence of the contract, the other party can make it so by giving notice that, if the obligation is not complied with by a certain date, allowing a reasonable time, he will regard the contract as at an end' (*Breytenbach v Van Wijk* 1923 AD 541 549, Mulligan 1952 SALJ 291, Lee and Honoré 1978 258 and Joubert 1987 201).

¹⁷⁵⁵ Subject of course to the factors discussed in the above pages.

¹⁷⁵⁶ Demand was called '*interpellatio*'. There was a time in classical Roman law, where damages were claimed, it was necessary for the other party to make *interpellatio*, whether or not a date had been agreed upon by the parties (D 22.1.32pr). It was later recognised that situations existed where demand by the other party was not necessary. Accordingly, demand was said to be made by the law or a day, as opposed to by a party. The maxim *dies interpellatio pro homine* (instead of man the day itself makes demand) was received into Roman-Dutch law (Kerr 2002 611). The purpose of demand in Roman and Roman-Dutch law was to inform the debtor that the creditor required performance (*Venter v Venter* 1949 1 SA 768 (AD) 784). The doctrine being that failure to perform timeously did not cause *mora* unless the debtor knew or should have known what he had to perform (D50.17.99 and *Victoria Falls and Transvaal Power Co., Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 32). If, however, time for performance was stated in the contract then the necessary knowledge was imputed to the debtor and therefore demand to put him in *mora* was not needed, hence the maxim *dies interpellat pro homine* (Mulligan 1952 SALJ 287-8). The older authorities say this: 'Although no default [*mora*] is understood to take place where no claim is made, you should know that demand is not made by a human being only, but that the law also and even a day makes demand instead of a human being [*atque etiam diem, pro homine interpellare*], provided that a definite day [*dies certus*] has been attached to the obligation' (Voet 22.1.26). And Justinian: 'Desiring to elucidate the great obscurity of the ancient laws, which, up to this time, have afforded a great opportunity for the protraction of litigation, we order that where anyone stipulates that he will either do or give something at a certain time [*certus tempore*], or both, or promises what the stipulator desires, and then adds that if what was promised should not be done at the designated time, he will pay a certain penalty, the debtor is hereby advised that he cannot avoid the penalty to which he subjected himself, on the ground that no one notified him, but he will be liable to the said penalty according to the terms of the stipulation, even without any notice as he should remain in his memory what he agreed to do, and not require to be reminded of it by others'.

¹⁷⁵⁷ The following from *Concrete Products Co. (Pty) Ltd v Natal Leather Industries* 1946 NPD 377 380, is both interesting and pertinent: 'In the present case there is no specific period within which deliveries had to commence. The commencement depended upon the lapse of a reasonable time in a contract in which time was of the essence because it was an ordinary commercial contract. In such cases it must be difficult to decide the exact point of time when a reasonable period has elapsed and the right to cancel has accrued. Furthermore, it is a recognised principle of our law that the innocent party to a contract has a reasonable time within which to elect whether or not he will rescind the contract. During the time he is deliberating on this question, the other person can, of course, remedy his default, and if he does so, the right to cancel may be extinguished.' As a general rule no formalities are prescribed for a valid demand (Van Zijl Steyn 1929 HRHR 59, LAWSA paragraph 301). Demand may be contained in a summons. Summons need not be preceded by an extrajudicial demand (that is a letter of

Van Zijl Steyn¹⁷⁵⁸ expressed the view that, where no date for fulfilment is fixed the object of the demand is to inform the debtor that he must pay; the rule according to South African law is that the obligation rests on the creditor to fix when the reasonable time has elapsed. However, this principle was not supported by the Appellate Division in 1941, Tindall JA¹⁷⁵⁹ with reference to Van Zijl Steyn states:

If the passage referred to means that the creditor can only recover the debt if he has given the debtor notice calling on him to pay within a fixed time which is reasonable, I am not aware of any authority which goes so far. The authorities quoted by the author [Steyn] for the statement, namely *Celliers v Papenfus and Rooth* 1904 TS 73 and *Milner v Friedman's Trustee* 1925 OPD 296 do not support it.

demand) (*Ridley v Marais* 1939 AD 5 9, *Blundell v McCawley* 1948 4 SA 473 (W) 476-477, *Theron v Theron* 1973 3 SA 667 (C) 672-673 and *Joss v Barclays Western Bank Ltd* 1990 1 SA 575 (T) 581-582) but if the debtor duly complies with a demand contained in a summons, the creditor cannot recover the cost of summons from the debtor (*Lamprecht v Lyttleton Township (Pty) Ltd* 1948 4 SA 526 (T) 529, *Standard Finance Corporation of SA Ltd (in liquidation) v Langeberg Koopersaie Bpk* 1967 4 SA 686 (A) 691 and *Theron v Theron supra* 673). In *Federal Tobacco supra* 485 the court found that despite the fact that the appellants 'lay by and made no demand for delivery, and took no other steps to place the respondents in *mora*, they [...] were entitled to wait till the goods were offered to them, and then set up a defence that an unreasonable delay had elapsed'. In *Benoni Produce and Coal Co., Ltd v Gundelfinger* 1918 TPD 453 456, the appeal court cited *Smith v Steel Atkinson and Co.* 1 NLR 14, *Laljee v Omadutt* 4 NLR 117 and *Federal Tobacco Works supra* as authorities. The Appeal court held that if a merchant buys for goods and a delivery of these goods is not made within a reasonable time, he is entitled to refuse acceptance of them when they are tendered at a later date. Evidently, even if he has not placed the debtor in *mora*. The following comment by Tindall JA in the appellate decision of *Fluxman v Bartlett* 1941 AD 273 274 is relevant: 'In a contract in which no date of fulfilment has been fixed, the creditor can sue for fulfilment without calling on the debtor to pay within a reasonable time; in such a case it is for the debtor to plead the absence of reasonable notice by the creditor if he wishes to take the point that a reasonable time has not expired'. A very different approach was taken by the Appellate Division in 1923 in *Breytenbach v Van Wijk supra* 459 concerning the sale of two farms. Breytenbach sold two farms to Van Wijk, it was a term of the contract that the farms be transferred to the name of the purchaser 'zonder enig verzuim,' ('without delay'). The Deed of Sale was in Dutch. However, the purchaser was aware that certain delays would not permit immediate transfer of the properties. The Court held that if the purchaser desired release from the contract by reason of the delay of the seller, he, the purchaser, should have taken steps to place the defendant in *mora* by demanding transfer within a specified date, reasonable in the circumstances. *Mora autem committitur quoties debitor opportune tempore et loco interpellatus non solvit* (Bronkhorst, *de Reg. juris* ae 1.63). The Court held: 'Not having placed the appellant in *mora* the respondent was not entitled to sue for cancellation of the contract merely because in his opinion transfer was not effected within a reasonable time' (549).

¹⁷⁵⁸ Van Zijl Steyn 1929 HRHR 78.

¹⁷⁵⁹ *Fluxman v Brittan* 1941 AD 273 295.

In *Smart and Co. v Rhodesian Machine Tools Ltd*,¹⁷⁶⁰ concerning a contract where no time was fixed for the completion of the contract, the court found:

In such circumstances it is well established that a contract must be completed within a reasonable period and that if one party fails to complete within such a period the contract may be cancelled by the other party. Whether under such circumstances the latter may cancel, without putting the former in *mora* by a demand for immediate fulfilment of the contractual obligation under threat of cancellation, is an open question. My own feeling is that such demand is necessary. [...] Our own Appellate Division has decided that notice is required before a contract is terminated where a time has been stipulated for but time is not of the essence of the contract (*Microutsicos v Swart* 1949 3 SA 715 AD). This case expressly left open the position where there is no stipulation as to time. But the principle would seem to apply *a fortiori*. The principle was recognised in a decision relating to a contract in which no times was specified (*Breyetenbach v Van Wijk*).

In 1962 the Transvaal Provincial Division was again asked to consider the necessity of *interpellatio*, in *Broderick Properties Ltd v Rood*.¹⁷⁶¹ After a careful examination of the various authorities, Roberts AJ, found¹⁷⁶² that the South African courts, have, on more than one occasion held that a contract may be repudiated without *interpellatio*, even though no time for performance was mentioned in the contract, and by parity of reasoning where late performance has taken place damages may be claimed. Accordingly, the learned Judge found that the principle to be applied should in all cases be the same, *viz.* whether in

¹⁷⁶⁰ 1950 1 All SA 515 (SR) 517. The court discredited the subsequent attempts by the courts to narrow the application of the principle in the *Breyetenbach* matter, by expressing the view that such attempts were based on 'highly artificial reasoning,' accordingly the court determined that in the present case the delay was not so unreasonable as to justify cancellation. However, the court did add, in what appears to be an *obiter* comment as the circumstances of that case where not of such a nature, that where one party's delay is so unreasonable as to indicate an intention not to be bound by the contract, that it may very well be that the no demand be necessary (517-8).

¹⁷⁶¹ 1962 4 SA 447 (T). The matter involved an instruction by the plaintiff, Broderick Properties, to the defendant, Rood, an attorney and notary, to register the bond with regard an agreement the plaintiff had taken with a bank in terms of which the bank undertook to lend the plaintiff R220 000 on first mortgage bearing interest at 7,5% per annum. Two important terms of the contract were that the R220 000 would be made available by the bank only once the bond was registered and further that the interest would be payable by the plaintiff as of 16 November 1959. These terms formed part of the instruction and the defendant was accordingly aware of them. The instruction was made on the 20 October 1959, however, the bond was only registered on the 11 February 1960. The plaintiff sued the defendant for damages suffered (interest) of R3 899. Interestingly enough, defendant argued (the matter before the court was argument for defendant's exception to plaintiff's declaration) that the plaintiff's declaration did not disclose a cause of action in that there was no allegation that the defendant had been placed in *mora*, and because no specific date had been fixed for performance the maxim *dies interpellat pro homine* did not apply and accordingly there was no *mora ex re*. Further, defendant put forward the argument that there could be no *mora ex persona* where there had been no demand.

¹⁷⁶² At 576.

the absence of a specific date for performance, there has been such unreasonable delay as to constitute a breach of an essential term.¹⁷⁶³

However, in 1971, the Transvaal Provincial Division, once again upset the apple cart in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*.¹⁷⁶⁴ In this matter the court held that the general principle in South African law, in order for damages to be claimed for the debtor's non-timeous performance in a contract where no time for performance has been fixed by the parties, is that the debtor must be placed in *mora* by *interpellatio* beforehand.¹⁷⁶⁵

¹⁷⁶³ The Judge provided the following examples to explain: 'If a motorist comes to a garage, hands over the key to his motor car, saying that the car standing half a mile away at the corner of X and Y streets with a broken axle, and contracts for it to be towed and repaired, and he finds six days later that the car has not been fetched, it would be absurd to suggest that he must place the garage in *mora* by *interpellatio* before he can repudiate the contract, or if the car was fetched after six days and during that time it had been further damaged by exposure to the weather or by passers-by, that the owner of the car would not be able to institute action for damages because he had not previously placed the garage in *mora*. As a *reductio ad absurdum* of an inflexible rule that where there is no date specified in the contract there must be *interpellatio* before there can be *mora*, I put to counsel the case of [a] contract by phone for the dispatch of a fire-engine to put out a fire in a house, or the case of an undertaking by a plumber to send a man to repair a broken tap which to the knowledge of the plumber was flooding the premises. The obvious answer is that the circumstances impliedly fixed the time for performance as a reasonable time, which means immediately. In other words, if the terms of the contract and the circumstances of the case show that time was of the essence, and no date was fixed [by the parties] then, if performance is offered when what, in the particular case, is a reasonable time has elapsed, the innocent party may either refuse to accept performance and repudiate the contract, or he may accept and sue for damages due to delay. And in my view time is clearly of the essence in the cases of the motor car, the fire-engine and the plumber even though no specific time or date was mentioned' (577-8).

¹⁷⁶⁴ 1977 4 SA 310 (T). The contract in this matter was for Alfred McAlpine and Son (Pty) Ltd, to construct a road between Pretoria and Bronkhorstspuit. VKE, a firm of consulting engineers and representatives of the defendant was in charge of the execution of the contract in the issue of certain drawings and the giving of certain instructions to the plaintiff. The plaintiff claimed damages on the grounds that VKE was dilatory in performing its duties in terms of the contract (338). The defendant's plea, or part thereof, was to the effect that even if there was such an implied term (to VKE) the plaintiff was debarred from claiming damages because it failed, *inter alia*, to place the defendant in *mora* (340).

¹⁷⁶⁵ The court went on to criticise the *Broderick Properties* judgment: 'To the extent that the judgment in the *Broderick Properties* case purports to lay down the principle that where no time for performance has been stipulated *interpellatio* is not a prerequisite for *mora ex persona*, it appears to me to be out of step with the general trend of authority and it does not in my view correctly reflect the state of our law. The conclusion arrived at by Roberts AJ in the *Broderick Properties* case also seems to me to be based on a misconception of the true significance of the notion 'time is of the essence of the contract'. The significance of the notion 'time is of the essence' is that it pertains to the question of rescission and not to breach. It relates to the consequences of the breach and not to the breach itself. And the question whether a failure to perform timeously constitutes a breach of contract or not, does not depend upon whether time is of the essence of the contract' (*supra* 347).

Christie¹⁷⁶⁶ argues that a debtor can only be in *mora ex re* if he does not perform on or before a certain date, where the date for performance has been set. Accordingly, a creditor must place a debtor in *mora (mora ex persona)* by demand. The exception to this rule, it is argued, would be when it is clear that immediate performance was contemplated, and that immediacy was essential by reason of the subject matter of the contract or the relevant circumstances.¹⁷⁶⁷

However, the qualifications do not stop there, Colman J in *Louw v Trust-Administrateurs*¹⁷⁶⁸ adds another exception that is a situation where 'if the failure or delay showed, in the circumstances, an intention on the part of the seller to repudiate his obligation to deliver'. And, even Christie¹⁷⁶⁹ admits that this exception 'is almost, but not quite as free of doubt' as the other exceptions. Christie¹⁷⁷⁰ supports the view in the *Alfred McAlpine* matter¹⁷⁷¹ through a selective process, that is apparently selecting one line of cases' reasoning above another stating that '[t]he line of cases culminating in *Broderick Properties* does not, it is thought, serve a useful purpose'. Besides being selective, Christie's view is not supported. Kerr¹⁷⁷² is of the view that the decision in *Broderick Properties* is in accord with a line of cases going back to 1904,¹⁷⁷³ while the

¹⁷⁶⁶ Christie refers to this as the 'general rule,' and cites as authority *Breytenbach v Van Wijk* supra 549 (Christie and Bradfield 2011 521).

¹⁷⁶⁷ *Louw v Trust-Administrateurs Bpk* 1971 1 SA 896 (W) 903. Examples of the contracts involving the contract to tow the car that has broken down or the contract with the fire brigade to put out a fire in a burning house or with the plumber to repair a broken tap flooding the premises cited by Roberts AJ in *Broderick Properties v Rood* supra 453 provide further exceptions to the general rule. Colman J in the *Louw v Trust-Administrateurs* supra 903 matter gives a further example of an exception to the general rule: a contract to sell and deliver a ticket for admission to a theatrical performance, although no time for performance is expressly mentioned, it would clearly be an implied term that delivery be made in such time as would enable the purchaser to make use of the ticket. Accordingly, it is argued: 'In the above cases it can be said that although the time for performance is not expressly fixed by the contract it is impliedly fixed with sufficient accuracy to satisfy the principle underlying *mora ex re* - the debtor knows very well from the contract when his performance is due, without having to be told by the creditor' (Christie and Bradfield 2011 523).

¹⁷⁶⁸ *Supra*.

¹⁷⁶⁹ Christie and Bradfield 2011 523.

¹⁷⁷⁰ *Ibid*.

¹⁷⁷¹ *Supra*.

¹⁷⁷² Kerr 2002 610.

¹⁷⁷³ He cites the following: *Federal Tobacco Works v Barron and Company* supra, *Benoni Produce and Coal Co v Gundelfinger* supra, *Crook v Pederson Ltd* supra and *Hayter's Radio Exchange v Hidge* 1949 1 SA 18 (E).

decision in *Alfred McAlpine* is in line with the criticisms of the line of cases in question.¹⁷⁷⁴

It submitted, in conclusion, that non-performance within a contractual period cannot always automatically be followed by a claim for damages. When promptness in performance is not of major importance then damages are claimable only if there has been a demand or *interpellatio*.¹⁷⁷⁵ The very essence of the problem, it is submitted, is captured by Trengove J in *Alfred McAlpine*:¹⁷⁷⁶ 'mere failure to perform or mere non-performance in the absence of a fixed time for performance ... can never be a breach'.¹⁷⁷⁷ The very nature of commerce demands that courts provide for situations where time for performance was not stipulated, however, it should have been in the minds of both parties that time for performance was an important or essential term of the contract and therefore demand was not necessary. The court will then, once presented with the facts, be left to determine whether the circumstances were such that time was in fact of the essence. The final decision will, however, be left to the Supreme Court of Appeal. Christie¹⁷⁷⁸ states: 'Beyond this point the difference of judicial opinion is so marked that it can only be settled by the Supreme Court of Appeal'. And Kerr¹⁷⁷⁹ makes the point that the Appellate Division did not have an opportunity to give, and the Supreme Court of Appeal has not yet given a decision on the line

¹⁷⁷⁴ Kerr 2002 608-9: 'It is suggested, with respect, that the decision in *Broderick Properties*, is to be preferred'. The following from Trengove J in *Alfred McAlpine* (*supra* 348) is of relevance: '[I]n our law, the general principle is that, in the case of contract in which no time for performance has been fixed [by the parties], the debtor must be placed in *mora* by interpellation before damages can be claimed on the grounds of such non-timeous performance. A mere failure to perform or mere non-performance in the absence of a fixed time for performance, although it may constitute a ground for defence of *exceptio non adimpleti contractus*, cannot give rise to a claim for damages because it can never be a breach. However, even if I were wrong in coming to this conclusion, I am nevertheless of the view that the principle enunciated in the *Broderick Properties* case does not assist the plaintiff in this instance because I am not persuaded that time was of the essence of the obligations which are alleged to have been breached. And, as I have mentioned, this requirement was at the very centre of the decision in that case'.

¹⁷⁷⁵ Kerr 1978 SALJ 146.

¹⁷⁷⁶ *Supra*.

¹⁷⁷⁷ Kerr argues that if this were correct, viz. that in these instances there is no breach, then the residual rule is not that performance must be rendered within a reasonable period, it will then be that 'performance must be rendered within a period which is the sum of two reasonable periods' (1978 SALJ 145). It is submitted that Kerr is referring to a further residual rule which states that after demand the party making the demand must allow the debtor a reasonable time within which to perform (Inst 3.15.2 and 3.19.27, D 50.17.4, 45.1.60 and 73 and 45.137.3, *Mackay v Naylor* 1917 TPD 533 537-8, cf also Christie and Bradfield 2011 524).

¹⁷⁷⁸ 2011 522.

¹⁷⁷⁹ 2002 610.

of cases. The following comment is also of interest:¹⁷⁸⁰ 'So far attempts to reconcile the seemingly conflicting decisions have been unsuccessful. Much legislation today, more especially credit legislation (both in terms of the old and new dispensation) has been drafted so as to place an onus on the creditor to place the debtor in *mora*'. Section 11 of the Credit Agreements Act and section 129 of the National Credit Act, as discussed later in this Chapter, refer.¹⁷⁸¹

5.3.2. Default of the Creditor or Mora Creditoris

*Mora creditoris*¹⁷⁸² is defined as 'the culpable failure on the part of a creditor to co-operate timeously on fulfilment of the debtor's contractual duty (or duties) in circumstances where performance still remains possible in spite of such failure'.¹⁷⁸³ The basic essential of *mora creditoris*¹⁷⁸⁴ is that the creditor must cause a delay; there can be no delay if the creditor is not required to co-operate in order to enable the debtor to perform.¹⁷⁸⁵ The nature of the creditors' co-operation may also vary, the creditor may simply be required to receive the performance of the debtor or it may require some positive act to facilitate the

¹⁷⁸⁰ LAWSA paragraph 300.

¹⁷⁸¹ These are discussed in greater detail later in this Chapter at paragraphs 5.5.1 and 5.6.1 respectively.

¹⁷⁸² It has been argued that a creditor cannot commit *mora* or breach of contract in his capacity as creditor, but in as far as he, the creditor, is bound to co-operate he does so in his capacity as debtor. The following is from Van der Merwe *et al*: 'According to this argument the duty to co-operate is part of a separate, though secondary obligation in terms of which the creditor in respect of the principal obligation is a debtor. Delay in respect of the secondary obligation is therefore nothing other than *mora debitoris*. In accordance with this view the court in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration supra* treated a failure by a mandator to supply drawings to his mandator as *mora debitoris*. However, in *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W) 881 Coetzee J, while accepting that such a case could be construed as *mora debitoris*, held that it was better to regard it as delay by a creditor in his capacity as creditor' (2004 265). Van der Merwe *et al* no longer appear to postulate this view in their latest edition (2012). Cf *Erasmus v Pienaar* 1984 SA 9 (T) 20, *Pienaar v Boland Bank* 1986 4 SA 102 (O) and *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 1 SA 837 (C).

¹⁷⁸³ LAWSA paragraph 312. Cf also *Schierhout v Minister of Justice* 1926 AD 99. For example, where A and B contract that B will lay tiling in A's house, and where A therefore has to co-operate by allowing B and his workmen access to the house, if A delays he commits *mora creditoris* (Havenga 1995 *et al supra* 113). Further De Wet and Yeats state: 'Die skuldeiser verkeer in *mora* indien hy die afwikkeling van die voldoeningsproses vertraag. Dit gebeur indien die skuld vervulbaar is, die skuldenaar prestasie aanbied en die skuldeiser versuim om sy medewerking te verleen' (1947 166).

¹⁷⁸⁴ Or even just *mora*.

¹⁷⁸⁵ LAWSA paragraph 313.

performance of the debtor.¹⁷⁸⁶ *Mora creditoris* does not arise in the case where there is an *obligatio aliquid non faciendi* or where the creditor's co-operation is not required for the debtor to perform.¹⁷⁸⁷

The requirements for *mora creditoris* are: the performance must be due for fulfilment,¹⁷⁸⁸ the debtor must tender performance,¹⁷⁸⁹ the creditor must fail to give his co-operation¹⁷⁹⁰ and the default must be due to the fault¹⁷⁹¹ of the creditor.¹⁷⁹² In *Martin and Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens*¹⁷⁹³ it was found that the duty to co-operate may arise from a demand by the debtor or by lapse of the time fixed by the contract or the debtor.¹⁷⁹⁴ However, *mora creditoris* cannot arise unless there has been demand by the debtor.¹⁷⁹⁵

Where a debtor has tendered performance, his obligation is not discharged unless the creditor's refusal amounts to a repudiation of the whole contract. Accordingly, *mora creditoris* cannot preclude performance by the debtor, even if it will then be delayed.¹⁷⁹⁶

¹⁷⁸⁶ *Ibid.*

¹⁷⁸⁷ *Ibid.*

¹⁷⁸⁸ The Afrikaans word is 'vervulbaar': De Villiers *Mora Creditoris as Vorm van Kontraktbreuk* Unpublished Thesis, University of Stellenbosch 1953 51-3, De Wet and Yeats 1947 183 and LAWSA paragraph 313.

¹⁷⁸⁹ The tender must be full and complete performance and it must be unconditional. A conditional tender that would entail the creditor having to give up part of the claim or requiring that the creditor take up a duty that was not required by the contract can be rejected (Van Leeuwen *Rooms-Hollands Regt* 4.11.3, *Reid v Carnofsky's Trustee* 1910 EDL 166, *Lewis Bros v Reis* 1912 EDL 455, *Erasmus v Pienaar* 1984 SA 9 (T) 24, De Villiers 1953 111 and Joubert 1987 215). The following from *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd supra* 888 per Coetzee J is pertinent: 'There are a few simple rules which are part of this doctrine and which deal with the debtor's duty to call upon the creditor for his required assistance and co-operation as a prerequisite to a variety of remedies, including damages. The rule, for instance, which in *mora debitoris* cases is expressed by the maxim *dies interpellat pro homine* is in *mora creditoris* cases more accurately expressed by *dies offert pro homine*'. Coetzee J made reference to De Villiers 1953 149 where that author deals with the 'medewerkingsoproep'.

¹⁷⁹⁰ In other words, he must fail to receive performance (*National Bank of South Africa Ltd v Leon Levson Studios Ltd* 1913 AD 213).

¹⁷⁹¹ Can be in the form of *culpa*.

¹⁷⁹² D 45.1.23, Voet *Commentarius ad Pandectus* 22.1.24, Joubert 1987 217 and Havenga *et al* 1995.

¹⁷⁹³ 2000 3 SA 339 (A).

¹⁷⁹⁴ Christie and Bradfield 2011 533 and Van der Merwe *et al* 2012 320.

¹⁷⁹⁵ *Government of the Republic of South Africa v York Timbers Ltd* 1 2011 2 All SA SCA [60], Christie and Bradfield 2011 533.

¹⁷⁹⁶ '*Mora creditoris* presupposes that performance by the debtor remains possible in spite of the delay by the creditor. The term *mora creditoris* should not be used to denote all forms of breach

The fact that a creditor falls into *mora*, does not terminate the contract and the debtor is still duty bound to perform. However, the creditor's *mora* terminates the debtor's *mora* in respect of that obligation,¹⁷⁹⁷ this is because the creditor and debtor cannot simultaneously be in *mora*.¹⁷⁹⁸ This does not imply that the debtor's liability for *mora* prior to the termination of his delay by the creditor's *mora* falls away.¹⁷⁹⁹ A consequence of *mora creditoris* is the diminishment of the debtor's duty of care.¹⁸⁰⁰ The risk of the contract passes to the creditor.¹⁸⁰¹

If the performance becomes impossible other than through intention or gross negligence while the creditor is in *mora*, the debtor is released from his obligation to perform whilst the creditor remains liable in terms of his obligation. Accordingly, the risk of supervening impossibility of performance rests on the creditor from the moment of his *mora*.¹⁸⁰²

of contract by a creditor but should be reserved for delay by the creditor' (Van der Merwe *et al* 2012 321).

¹⁷⁹⁷ *Erasmus v Pienaar supra* 24.

¹⁷⁹⁸ D 18.6.17, D 45.1.73.2, Voet *Commentarius ad Pandectus* 46.3.28, Havenga *et al* 1995 114 and in LAWSA 313: '*Mora creditoris* and *mora debitoris* cannot exist simultaneously in regard to the same obligation, the latter being excluded as long as the former continues. If Y fails to accept delivery tendered by X, Y's *mora creditoris* excludes *mora debitoris* on X's part, even though X has not succeeded in making delivery at the appointed time. Should Y subsequently indicate his willingness to accept (for instance by demanding performance), his *mora* will be purged and X will in turn fall into *mora* if he does not comply with a valid demand'. *Meltz v Bester* 1920 OPD 98 is a good example where the purchaser delayed in taking delivery of the sheep he had purchased and time not being found to be of the essence the seller's subsequent failure to perform superseded the purchaser's *mora creditoris*. In *National Bank of South Africa Ltd v Leon Levson Studios Ltd supra* the court held: 'If the debtor is in *mora*, it is purged by the default of the creditor. Default by one party is always extinguished if the other party subsequently falls in *mora*, since these two forms of breach of contract cannot exist alongside each other in respect of the same obligation'.

¹⁷⁹⁹ Van der Merwe *et al* 2012 321.

¹⁸⁰⁰ The debtor will, post *mora creditoris*, be responsible only for intentional loss or loss occasioned by gross negligence, accordingly the debtor is only liable for *dolus* and *culpa lata* in caring for any property which the creditor ought to have accepted (D 18.6.5, D 18.6.17, D 46.3.72 *pr.*, Voet *Commentarius ad Pandectus* 18.6.2 and 4, *Wingerin v Ross* 1951 2 SA 82 (C), Mulligan 1952 SALJ 295, Christie and Bradfield 2011 533 and Havenga *et al* 1995 113) Before the onset of *mora creditoris* there is a duty on the debtor to refrain from intentional damage and to take the steps of a reasonable man to protect the object of performance (Joubert 1987 217 and Kerr 2002 617).

¹⁸⁰¹ D 18.6.5, D 19.2.36, Voet *Commentarius ad Pandectus* 22.1.28 and 18.6.2 and 22.1.30, Huber *Heedendaegse Rechtsgeleertheit* 3.43.2-3, Lee 442, Wessels 1951 paragraph 2911, *Wingerin v Ross* 1951 2 SA 82 (C), Joubert 1987 217 and Kerr 2002 617.

¹⁸⁰² An example given is where a creditor is in *mora* in terms of a building contract due to his delay in taking delivery of the completed building, and the building is subsequently swept away by a flood. In this situation the creditor would remain liable for the contract price (Van der Merwe *et al* 2012 321).

Further consequences of *mora creditoris* that require consideration are the effects of *mora creditoris* on suretyship, mortgage, pledge, lien and the duty to pay interest or other compensation. A surety is released by the delay or *mora* of a creditor in respect of a principal debt.¹⁸⁰³

It appears from the courts that the trend has been to accept that *mora creditoris*, brings about the release of the surety.¹⁸⁰⁴ There is some support for the view that when a creditor commits *mora creditoris*, the debtor becomes entitled to claim the return of a pledge or the cancellation of a bond given to secure the debt.¹⁸⁰⁵ However, it appears that the trend has been that a debtor who claims the release of his property from a mortgage, pledge or lien, must tender the outstanding amount in his pleadings before the mortgage will be cancelled, or the property which is subject to a pledge or lien will be restored to him.¹⁸⁰⁶

There are a number of different views on the effects that *mora creditoris* has on interest payable. According to Kerr¹⁸⁰⁷ when the creditor commits *mora creditoris* interest ceases to be payable. The duty to pay interest may arise as damages for *mora debitoris*. Since *mora creditoris* prevents *mora debitoris* or if *mora debitoris* has already appeared *mora creditoris* puts an end to it, no interest will have to be paid and if the duty has already arisen then the *mora creditoris* will make it come to an end.¹⁸⁰⁸ Where the debtor has the use of the property before effecting payment, it may also give rise to the duty to pay interest. This duty will

¹⁸⁰³ *St Patricks Mansions (Pty) Ltd v Grange Restaurant (Pty) Ltd* 1949 4 SA 57 (W) and Van der Merwe *et al* 2012 321.

¹⁸⁰⁴ *Arenson v Bishop* 1926 CPD 73 75. 'The underlying doctrine is that the creditor is not allowed to do anything to the prejudice of the surety and refusing performance is an act of this nature' (Joubert 1987 218).

¹⁸⁰⁵ D 13.7.9.5, D 13.7.20.2, D 20.6.6.1, C 4.31.12, C4.32.19, *Ford Agencies v Hechler* 1928 TPD 638, De Wet and Van Wyk 1947 170 and Joubert 1987 218.

¹⁸⁰⁶ *Ex parte Hollard* 1887 SAR 143, *In re Caledonia Freemasons Lod* 1890 9 CLJ 55, *Ex parte Lockyer* 199 WLD 88, *Ex parte Vogel* 1942 CPD 406, *Ex parte Coenraad* 1944 1 PH M22 (C), De Villiers *Mora Creditoris* 287-8 and LAWSA 317. Per Van der Merwe *et al*: 'The position in respect of mortgaged or pledged property is not clear, but it may be argued that *mora creditoris* should result in a duty to cancel the mortgage or return the pledged property, although the debtor should not be released' (2012 321).

¹⁸⁰⁷ Whom cites Lee (1953 257 and 270) as authority therefore (Kerr 2002 617).

¹⁸⁰⁸ This view is expressed by Joubert, who expresses the view that the Roman texts in this regard are not very clear, however, he refers to D 26.7.28.1, and for the Roman-Dutch authorities: Voet *Commentarius ad Pandectus* 22.1.17 and Huber *Heedendaegse Rechtsgeleertheyt* 3.42.2 (1987 218).

fall away if the creditor commits *mora creditoris*.¹⁸⁰⁹ Joubert,¹⁸¹⁰ emphasises that this duty to pay interest, is not based on *mora debitoris* but rather on principles of equity. He states: 'it applied where the debtor had possession of the money and the goods and therefore the fruits of both. But if the seller fell in *mora creditoris* then it might be that the buyer had the money without being able to enjoy the fruits thereof. It is therefore equitable that his duty to pay interest falls away'. De Wet and Van Wyk¹⁸¹¹ state that 'presumably the debtor will remain liable to pay interest or compensation if he or she derives benefit from the continued custody of the property whose payment or delivery is frustrated by the creditor'.

The courts have held that a debtor is entitled to an order for specific performance¹⁸¹² compelling the creditor to accept or receive performance and a creditor will be liable for damages, such as wasted costs, suffered by the debtor as a result of the creditor's *mora*.¹⁸¹³

5.3.3. Positive Malperformance¹⁸¹⁴

Positive malperformance is that form of breach of contract which occurs when the debtor¹⁸¹⁵ commits an act contrary to the terms of the contract.¹⁸¹⁶ The duty

¹⁸⁰⁹ *Hanekom v Bosman* 194 CPD 327.

¹⁸¹⁰ 1987 219.

¹⁸¹¹ 1947 188. Cf also LAWSA 317.

¹⁸¹² *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd supra* 186.

¹⁸¹³ *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 1 SA 837 (C) and *Van der Merwe et al* 2012 322.

¹⁸¹⁴ *Van der Merwe et al* classify negative malperformance as a form of *mora debitoris* (cf 2012 291 for a discussion).

¹⁸¹⁵ The question whether the creditor may commit positive malperformance has not been dealt with by the courts. *Van Der Merwe et al* suggest that indeed a creditor may commit positive malperformance, albeit in limited circumstances, such as where in a contract of *locatio conductio operas* the creditor is required to supply drawings, specifications, materials or tools and he supplies a defective item (2012 322). Kerr places under the heading 'Incomplete or Defective Performance', sub headings which discuss 'Performance which is Incomplete Owing to the Fault of the Party to whom Performance is Due' and 'Performance which is Incomplete Owing to the Fault of the Party Obligated to Perform' and does not differentiate between creditor or debtor in such instances (2002 687-8). Christie discusses incomplete performance by a party and does not specify whether debtor or creditor (2007 492). An example of incomplete or defective performance owing to the fault of the party to whom performance is due is that of an owner of a house who refuses the building contractor access to the site after the house is half built (D 19.2.38, *Wessels* 1951 paragraph 3499, *Hitchins v Breslin* 1939 TPD 677 682; and *BK Tooling (Edms) Bpk v Scope Engineering (Edms) Bpk* 1979 1 SA 391 (A) 413-4).

to act or not to act may arise from the agreement¹⁸¹⁷ or by operation of law.¹⁸¹⁸ Two situations are identified with regard to this form of breach: the first is where the debtor tenders defective or improper performance¹⁸¹⁹ and the second is where the debtor does something he may not do¹⁸²⁰ in terms of the contract.¹⁸²¹ In *Sweet v Ragerghara*¹⁸²² the court held:

Defective performance [...] relates to timeous performance not in accordance with the terms of the agreement.

If the debtor is first in *mora* and then renders performance, which performance is defective, his breach of positive malperformance terminates his breach of *mora debitoris*. This does not, however, mean that the debtor will not be liable for his *mora* up to date of performance, however, he will thereafter incur liability for his malperformance.¹⁸²³

If a debtor tenders incomplete or defective performance, whether the tender is in full performance or not, the tender will not cancel the existence of his breach.¹⁸²⁴ The reasoning is that he has not strictly complied with the contract.¹⁸²⁵ Whether the parties, thereafter agree that the debtor be given the opportunity to make good the defective performance, allows him the opportunity to do so, but the fact

¹⁸¹⁶ The duty of a party to a contract is faithfully to perform his part with care and diligence proper in the circumstances, and with due regard to any rules of law or lawful customs by which the character of the performance due from him is determined' (Lee and Honoré 1978 249).

¹⁸¹⁷ *Ex consensu* (*Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A)).

¹⁸¹⁸ *Ex lege* (*Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster and Staal Industriële Korporaise Bpk* 1987 2 SA 932 (A)).

¹⁸¹⁹ This duty stems from an *obligatio faciendi* that is the duty to do something (LAWSA paragraph 18).

¹⁸²⁰ This duty stems from an *obligatio non faciendi* that is the duty not to do something (LAWSA paragraph 18).

¹⁸²¹ *Havenga et al* 1995 114. Lee and Honoré state: 'All contracts are commonly referred to one or other of two classes: viz. (a) contracts to give, (b) contracts to do or to abstain from doing (Grotius 3.39.8, Van der Linde 1.14.6 and Pothier *Triaté des Obligations* sec 53). But it is evident that both of these duties may be incumbent upon the same person under the same contract. Thus, if I agree to make a cabinet according to specifications and to deliver it when made to a purchaser, I incur an obligation first to do and then to give. The distinction is of no great importance. The substantial thing is that, whatever the nature of the contract, I must carry it out according to its terms (Voet 46.3.1)' (1978 250). A good example of an undertaking *not* to do something is when a seller of a business undertakes not to compete with the purchaser within a particular area and for a particular time and subsequently commences to run a business contrary to the terms of the restraint of trade (Joubert 1987 207).

¹⁸²² 1978 1 SA 131 (D) 138.

¹⁸²³ Van der Merwe *et al* 2004 242 and 251.

¹⁸²⁴ Van der Merwe *et al* 2004 251.

¹⁸²⁵ *Ibid.*

that he tenders complete or correct performance does not erase the breach, nor can he himself claim that the creditor has breached the contract.¹⁸²⁶ A tacit term that the debtor will be entitled to a reasonable opportunity to rectify his performance is not easily inferred by the courts from the contract. However, there are examples where the nature of the performance, trade custom or, it is submitted logic, inherently involve allowances to make adjustments and or amendments to the performance rendered.¹⁸²⁷

5.3.4. Repudiation

Repudiation, a form of anticipatory breach,¹⁸²⁸ occurs when a party indicates by words or positive conduct that he does not intend to perform or fully perform, be bound or be fully bound by the contract.¹⁸²⁹

¹⁸²⁶ *Holz v Thurston and Co* 1980 TS 158, *Wessels and Kemp* 1921 OPD 58, *Reid v Spring Motor Metal Works (Pty) Ltd* 1943 TPD 154 158 and *Joubert* 1987 207.

¹⁸²⁷ *Van der Merwe et al* 2004 251. The question arises, where a debtor who has borrowed money from a creditor pays a due instalment on the correct date but does not pay it in full, would the courts consider this as positive malperformance or *mora debitoris*? Christie poses the problem (albeit on a broader scale) as follows: 'Contracts which provide for performance, whether in the form of payment, delivery or rendering of services, in instalments, do not always fit neatly into the pattern formed by the rules concerning *mora*, material breach of an essential term and repudiation. By agreeing to spread performance over a period the parties often unwittingly introduce difficulties caused by fluctuating markets, changes in surrounding and personal circumstances and the ever-present problem of how to relate the part to the whole' (2006 540). The answer is not simple and solutions have been developed on a case by case basis, including the use and application of acceleration and forfeiture clauses. This is discussed in detail in Chapter 6.

¹⁸²⁸ Or breach of contract *in anticipando*. The other form is prevention of performance, discussed below at paragraph 5.3.4 In *Tuckers Land and Development Corporation v Hovis* 1980 1 SA 645 (A), the court identified repudiation as the most typical but not only form of anticipatory breach: 'It should therefore be accepted that in our law anticipatory breach is constituted by the violation of an obligation *ex lege*, flowing from the requirement of *bona fide* which underlies our law of contract' (652). For a full discussion of Christie and Bradfield 2011 538 ff.

¹⁸²⁹ Repudiation may occur prior to performance being due but may also take place where performance is due, for example by insistence on the fulfilment of a term that does not form part of the contract (Christie and Bradfield 2011 539) Interestingly, repudiation was a form of breach of contract, received by South African law through English Law (its *locus classicus* being the 1853 case of *Albert Holcheste v Edward Frederick de la Tour* 1853 2 EI and BI 678) as Roman-Dutch Law did not recognise it as a form of breach of contract. The creditor would have to rely on remedies for *mora* or positive malperformance. Accordingly, if the debtor repudiated prior the date for performance the creditor had to wait for that date to arrive and either claim performance or cancellation and damages (*Joubert* 1987 210). The following from *Nash v Golden Dumps (Pty) Ltd* 1985 3 SA 1 (A) 22 is an apt description: 'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to 'repudiate' the contract [...] Where that happens, the other party to the contract may elect to accept the repudiation and rescind the

The fact that repudiation entails positive conduct distinguishes it from *mora*.¹⁸³⁰ Further, the courts have held that a requirement for repudiation is wrongful conduct.¹⁸³¹ The test for wrongfulness is objective and the enquiry would be whether it is reasonable to conclude that performance will not take place or defective performance will take place in the future. The courts have repeatedly stated that the test for repudiation is not subjective but objective.¹⁸³²

Repudiation is demonstrated by a party indicating by words or by conduct that he does not intend to honour all his obligations in terms of the contract, for example he may deny the existence of the contract,¹⁸³³ or he may try without justification to withdraw from the contract¹⁸³⁴ or he gives notice that he cannot or will not perform;¹⁸³⁵ or he may indicate he does not intend to honour all of the

contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated’.

¹⁸³⁰ LAWSA paragraph 322.

¹⁸³¹ *Culverwell v Brown* 1988 2 SA 468 (C) 477A and *Van der Merwe et al* 2012 308.

¹⁸³² In *Schlinkman v Van der Walt* 1947 2 SA 900 (E) the court held that the debtor must have the intention to repudiate, the courts have held that the debtor’s real or subjective intention is not relevant to the question of wrongfulness. Cf also *Ponisammy and another v Versailles Estates (Pty) Ltd* 1973 1 SA 372 (A) 387, *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (A) 953, *Van Rooyen v Minster van Openbare Werke en Gemeenskapsbou* 1978 2 SA 835 (A) 845-6, *Tuckers Land and Development v Hovis* 1980 1 SA 645 (A) 653, *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and another* 1993 3 SA 471 (A) 480-1, *Highveld 7 Properties (Pty) Ltd and other v Bailes* 1999 4 SA 107 (A) 1315ffn and *Metamil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 3 SA 673 (A) 684-5. Per Nienaber JA in *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 1 ALL SA 581 (A) 591: ‘Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intention at the time. The emphasis is not on the repudiating party’s state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach’.

¹⁸³³ *Wood v Oxendale and Co* 1906 23 SC 674, *Machanick v Bernstein* 1920 CPD 380, *Cohen v Orlowski* 1930 SWA 125 and *Strachan and Co Ltd v Natal Milling Co (Pty) Ltd* 1936 NPD 327.

¹⁸³⁴ *Dettmann v Goldfain* 1975 3 SA 385 (A) and *Walker v Minier and Cie (Pty) Ltd* 1979 2 SA 474 (W).

¹⁸³⁵ *Ullman Bros Ltd v Kroonstad Produce Co* 1923 AD 449 at 449: ‘Where a contract for the sale of goods has been entered into between two parties the seller may, although the sale be on credit, protect himself where before delivery the buyer has manifested an inability to pay’. Cf the comments of Lord Esher, in *Johnstone v Milling* 55 LJQB 162: ‘When one party refuses by anticipation to perform the contract, that is equivalent to a declaration by him, that he thereby rescinds the contract as far as he can. But he cannot rescind it by himself. He says, I will not

obligations, for example by tendering defective or incomplete performance as proper performance.¹⁸³⁶

Repudiation was traditionally accepted to consist of two parts: the act of repudiation by the guilty party, demonstrating a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of the other contracting party of 'accepting' and thus completing the breach. However, the 'better view' has been held in the courts¹⁸³⁷ to be that repudiation is a breach in itself¹⁸³⁸ and that the intention does not in truth have to be either deliberate or subjective¹⁸³⁹ but simply descriptive of conduct heralding non-performance on the part of the repudiator; and that the so-called acceptance does not complete the breach but is simply the exercise by the aggrieved party of his right to terminate the agreement.¹⁸⁴⁰

Repudiation, however, will not necessarily entitle the aggrieved party to rescind, and this right will depend on the seriousness of the breach which the repudiation

perform the contract; but that is not a rescission of the contract. By doing that wrongfully, he entitles the other party, if he pleases, to agree to its rescission, subject to this that at the same time he can bring an action for the wrongful rescission. The other party may elect to adopt it as a rescission, by acting upon it, and by treating the contract as at an end, except for the purposes of bringing an action upon it as if it has been rescinded.'

¹⁸³⁶ *Cilliers v Papenfus and Rooth* 1904 TS 7, *Tuckers Land and Development Corporation (Pty) Ltd v Aleco Investments* 1981 1 SA 852 (T), *Janowsky v Payne* 1989 2 SA 562 (C) and *Havenga et al* 1995 114. In *Executors of Alfred Winter Evans v John William Stranack* 1890 11 NLR 12, the court held that the attempt to add conditions to a contract, which had previously not been contemplated by the parties, amounted to repudiation of the contract: '[When] one party to a contract, endeavour[s] to force upon the other party a term not compromised in the contract. There, I should say, that though the other side may have a right to insist on the contract's being performed according to its terms, yet that he has also a right to say to the other side, as you refuse to perform the contract without addition material in its nature, I elect to rescind the contract; I am not obliged either to submit to your terms, or to bring an action to compel you to submit to mine; and I elect to break off from the contract, and to be done, with you. [...] If a party to a contract insists on a new term's being added to the contract, the case, is analogous to a repudiating or abandoning by such party of the original contract, as he will not abide by it.'

¹⁸³⁷ *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd supra* 584 and Nienaber PM 'The Effect of Anticipatory Repudiation: Principle and Policy' 1962 *Cambridge LJ* 213 222.

¹⁸³⁸ *Tuckers Land and Development v Hovis supra* 653.

¹⁸³⁹ *Van Rooyen v Minster van Openbare Werke en Gemeenskapsbou supra* 845-6: 'Om 'n ooreenkoms te repudieer, hoef daar nie, [...] 'n subjektiewe bedoeling te wees om 'n einde aan die ooreenkoms te maak nie. Waar 'n party, bv, weier om 'n belangrike bepaling van 'n ooreenkoms na te kom, sou sy optrede regtens op 'n repudiering van die ooreenkoms kon neerkom, al sou hy ook meen dat hy verpligtine behoorlik nakom (De Wet en Yeats 1947 117).'

¹⁸⁴⁰ *Stewart Wrightson (Pty) Ltd v Thorpe supra* 953, this view was supported by the court in *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd supra* 584.

heralds.¹⁸⁴¹ If the debtor conveys the intention not to perform only a minor part of the obligation, it may amount to malperformance; and, this form of breach, will then only entitle the aggrieved party to the remedies available in such instances.¹⁸⁴²

5.3.4.1. Section 127 of the National Credit Act as a form of Statutory Repudiation

Section 127 of the National Credit Act gives a consumer the right¹⁸⁴³ to terminate the agreement and to surrender the goods to the credit provider by giving written notice to the credit provider whether or not he is in default, under an instalment, secured loan or lease agreement.¹⁸⁴⁴ This is not a common law right that is

¹⁸⁴¹ 'The conduct from which the inference of impending non- or malperformance is to be drawn must be clear cut and unequivocal, i.e. not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is a 'serious matter' requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed' (*Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd supra* 591, cf *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 2 SA 863 (Nienaber PM 'Enkele Beskouinge oor Kontrakbreuk in Anticipando' 1963 *THRHR* 1963 19 34; De Wet and Van Wyk 1947 171 and LAWSA paragraph 5 324). Joubert, drawing from *Tuckers Land and Development v Hovis supra*, states that the reason for allowing the aggrieved party to cancel the contract before the date fixed for performance is that a repudiation 'undermines the confidence of the creditor in the promise of the debtor and brings with it an element of uncertainty which is too dangerous to allow to continue inevitably'. He goes on to say: 'A prudent man cannot be expected to wait for the day of performance and then discover that he will not get performance as promised. Nor can a prudent man be expected to make only tentative alternative arrangements to cater for this possibility. The sensible course for a prudent man to take may be to take the debtor at his word, cancel the contract and make other firm arrangements or, if so inclined, take the risk that the debtor will yet perform and insist on performance' (1987 210-11). While the court in the *Datacolour supra* matter did not note the test formulated in *Street v Dublin* 1961 2 SA 4 (A) the words by Williamson J could amount to an echo of the phrasing in that matter: 'The test as to whether the conduct amounts to such a repudiation [as justifies cancellation] is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound'.

¹⁸⁴² McCardie J's comments in *Re Rubel Bronze and Metal Co and Vos* 1918 1 KB 315 22 are apt: '[T]he question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intentions indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case'. This matter was cited with approval in *Sclinkmann v Van der Walt and others* 1947 2 SA 900 (E) 922, *Van Rooyen v Minster van Openbarewerke en Gemeenskapbou* 1978 2 SA 85 (A) 845 and *Inrybelange (Eiendoms) Bpk v Pretorius en 'n ander* 1966 2 SA 416 (A) 427.

¹⁸⁴³ Otto and Otto refer to it as an 'extraordinary right' (2013 75).

¹⁸⁴⁴ Section 127 (1). In *Cattigen and Another v Firstrand Bank Ltd a Division of First National Bank* 2011 ZANCT 4, the consumers brought an application requesting the Tribunal to review the sale of goods as provided for in section 128 (2) of the Act, the 'goods' in question involved immovable property which had been owned by the consumers and had been sold at a sale in execution. The Tribunal found that sections 127 and 128 only apply to the sale of movable property (31).

ordinarily available to a credit consumer – unilateral termination of a contract by one party in the absence of breach by the other is a form of anticipatory breach, namely repudiation, and is usually followed by a claim for damages by the other party.¹⁸⁴⁵ It is submitted that section 127 entitles the consumer to repudiate certain credit agreements without the presence of the element of wrongfulness normally associated with anticipatory breach. It is further submitted that section 127 entitles consumers to statutorily repudiate instalment agreements, secured loans and lease agreements at any stage and for any reason. This is a dramatic alteration of common law principles which state that the obligations imposed by the terms of an agreement must be honoured and if they are not the person who has the duty to perform is said to have committed breach of contract.¹⁸⁴⁶ Furthermore, if the consumer exercises his right of repudiation in terms of section 127, the credit provider is not entitled to be put in the position it would have been in had the contract been performed. This is in contrast to the common law rule for damages, which states that the innocent party (here the credit provider) must be placed in as good a position financially had the breach not occurred.¹⁸⁴⁷

A consumer exercises his right of voluntary surrender by notifying the credit provider in writing to terminate the agreement¹⁸⁴⁸ and if the goods are already in the credit provider's possession, the consumer must instruct the provider to sell the goods.¹⁸⁴⁹ If the goods that are subject of the credit agreement¹⁸⁵⁰ are not in

¹⁸⁴⁵ However, this is not the first time that South African statutes have reflected such a consumer right. In terms of section 14 of the repealed Hire-Purchase Act, the consumer was empowered to terminate the agreement, at any time, and return the goods or tender their return. The buyer could claim a refund of a portion of the payments that he had made. The onus was then on the seller to establish the value of the goods at the time of their return. The seller could also prove any other rights it wished to claim under the Hire-Purchase Act (section 15 (1) of the Hire-Purchase Act; *Parow Motorhandelas (Edms) Bpk v Hansen* 1976 3 SA 146 (C)). It is also interesting to note that this consumer right is incorporated in the English Consumer Credit Act, albeit limited to open-ended credit agreements. The relevant sections of the Consumer Credit Act read: '(1) The debtor under a regulated open-end consumer credit agreement, other than an excluded agreement, may by notice terminate the agreement, free of charge, at any time, subject to any period of notice not exceeding one month provided for by the agreement. (2) Notice under subsection (1) need not be in writing unless the creditor so requires (sections 98A (1) and (2)).

¹⁸⁴⁶ See discussion of obligations and breach above.

¹⁸⁴⁷ *Versveld v South African Citrus Farms Ltd* 1930 AD 452. A discussion on damages can be found at paragraph 6.5 *infra*.

¹⁸⁴⁸ Section 127 (1)(a) of the Act.

¹⁸⁴⁹ Section 127 (1)(b)(i) of the Act. The provider would be in possession of the goods if they had been pledged to him in terms of a secured loan agreement, for example.

¹⁸⁵⁰ Coetzee submits that the phrase 'goods that are subject of that agreement' encompasses two instances, namely (1) where moveable goods are financed under a credit agreement irrespective

the credit provider's possession then the consumer must return the goods to the credit provider's place of business during ordinary offices hours within five business days after the date on the notice to terminate.¹⁸⁵¹ Otherwise the credit consumer may make such an arrangement with regards the period within which and the place where the goods are to be handed over to the credit provider with the provider.¹⁸⁵²

Within ten business days after receiving the notice from the consumer to sell the goods which are in the provider's possession or within ten business days of receiving the goods tendered, the credit provider must give the consumer written notice setting out the estimated value of the goods.¹⁸⁵³

Within ten business days after having received the notice of valuation of the goods from the provider, the consumer has the right to unconditionally withdraw the notice to terminate the agreement and thereafter resume possession of the goods which may be in the possession of the provider.¹⁸⁵⁴ The consumer may only exercise such right if, at that time he is not in default under that credit agreement.¹⁸⁵⁵ There is no limit to how many times a consumer, who is not in default, may do this under a credit agreement.

of whether ownership passed or had been retained, and (2) where movable goods are used as security for payment of amounts due under a credit agreement ('Voluntary Surrender, Repossession and Reinstatement' 2010 73 *THRHR* 569 575). The phrase 'goods that are subject of that agreement' is used only in section 127 (1)(b)(ii) and not in section 127 (1)(b)(i) – it is assumed that this was a legislative oversight and that both subsections refer to the goods that are the subject of the agreement.

¹⁸⁵¹ Section 127 (1)(b)(ii) of the Act.

¹⁸⁵² *Ibid.*

¹⁸⁵³ Section 127 (2) of the Act.

¹⁸⁵⁴ Section 127 (3) of the Act. Conceptually, this is a reverse form of a cooling-off right.

¹⁸⁵⁵ Coetzee submits that the words 'unless the consumer is in default' in section 127 (3) do not mean that such consumer can only exercise such right of reinstatement if he had never been in default under that agreement. She suggests that section 127 (3) should be interpreted to mean that if such consumer remedied the default he would so be entitled (2010 *THRHR* 569 574). The view is concurred with, it may be very likely that the consumer defaults, for example, shortly after giving notice of his intention to cancel. One may use the following scenario as an example: Mr X, a credit consumer under an instalment credit agreement, realises that due to the global recession he may not be able to afford the leather lounge suite he has purchased from ABC Suppliers on credit. The lounge suite instalments are due on or before the 29th of every month. On the 25th, Mr X sends a notice in terms of section 127 (1) ABC Suppliers and tenders return of the goods. On the 29th of that month he 'defaults' on his payment. On the 1st of the following month, Mr X is offered a promotion with a salary increase by his employer. Mr X accepts the offer and now reconsiders his financial commitments. On the 3rd of that month he receives the notice from ABC Suppliers in terms of section 127 (2) which sets out the prescribed information. Mr X immediately

If the credit provider receives a notice from the credit consumer advising of the withdrawal of the termination, then the provider must return the goods to the consumer.¹⁸⁵⁶ The credit provider is only obliged to do so if the credit consumer is not in default.¹⁸⁵⁷ Where the credit consumer does not respond to the credit provider's valuation notice then the provider must sell the goods as soon as practicable for the best price reasonably obtainable.¹⁸⁵⁸ It has been suggested that what is to be regarded as a practicable time and best price reasonably

settles his arrears with ABC Suppliers and sends them a notice in terms of section 127 (3) unconditionally withdrawing the notice to terminate the agreement. It is submitted that after curing his arrears he may legitimately use his right in terms of section 127 (3), and resume possession of the goods. However, using the above example, if Mr X was already in default at the time of sending the section 127 (1)(a) notice but soon after was in a position to settle all the arrears interest, would section 127 (3) prevent him from withdrawing his repudiation? It is submitted that the legislature simply intended to empower the credit provider to be able to prevent the consumer from reinstating the agreement and regaining possession of the goods where he was in arrears, however, where the consumer tenders the outstanding amount the consumer should be entitled to reinstatement and return of the goods. It is further submitted that the consumer would then, however, also have to tender (and pay) any expenses that the credit provider may have incurred (in both scenarios discussed above) from the date of receipt of the notice in terms of section 127 (1)(a), for example, costs of a valuator it may have employed to evaluate the goods or for collection or storage of the goods, if these had already been returned. Otto states that section 127 of the Act 'stands in stark contrast to section 12 of the Credit Agreements Act' (Scholtz 2014 paragraph 9.5.4.3). In terms of the former section 12 of the Credit Agreements Act the credit receiver was entitled to be reinstated in his contract if the goods had been returned to the credit grantor provided that the credit receiver had not himself cancelled the contract and had paid the arrears amount within thirty days, 'this last proviso implies that he had indeed been in default' (*ibid*). In terms of section 12 of the Credit Agreements Act the consumer was entitled to be reinstated in his contract if the goods had been returned to the credit grantor provided that, among other things, the credit receiver had not himself cancelled the contract and had paid the arrears amount within thirty days. This last proviso implies that he had indeed been in default. Otto is of the view that in terms of section 127 (3) of the Act a consumer may cancel the contract, return the goods and thereafter void his cancellation and reinstate the contract (*ibid*). Coetzee argues that section 127 (3) can be construed to resemble section 12 of the Credit Agreements Act as the agreement, she submits, is not terminated upon provision of the consumer's initial written notice, as sections 127 (6)(b) and 127 (8)(b) provide that the agreement is only terminated upon remittance of a surplus amount to the consumer in the case where section 127 (6)(b) is applicable or when the consumer remits the shortfall to the credit provider in circumstances to which section 127 (8)(b) applies (2010 *THRHR* 569 574). There does appear to be some confusion as to when the contract is terminated in terms of section 127. Section 127 (1) provides that the consumer gives written notice to the credit provider 'to terminate the agreement' – seemingly the consumer is giving notice that by virtue of such notice he has terminated the agreement. This interpretation poses a problem due to the conflict with sections 127 (6)(b) and 127 (8)(b) which provide that the agreement is only terminated by the remittance of the surplus of the sale by the credit provider to the consumer or remittance of the deficit by the consumer to the provider. Accordingly, it is submitted that the consumer by exercising his right in terms of section 127 (1) is requesting the credit provider to terminate the agreement. The wording of section 127 (1)(a) appears to fall in line with this interpretation that is the consumer 'may give written notice to the credit provider to terminate the agreement'.

¹⁸⁵⁶ The Act does not stipulate a time within which the goods need be returned, accordingly it would be expected that same be done within a reasonable time.

¹⁸⁵⁷ Section 127 (4)(a) of the Act.

¹⁸⁵⁸ Section 127 (4)(b) of the Act.

obtainable will depend on the facts of each case, being influenced by the types of goods, their marketability, their condition and the trend in the industry.¹⁸⁵⁹

Once the goods are sold the credit provider must credit or debit the consumer with either a payment or a charge equivalent to the proceeds of the sale less any expenses which the provider may have reasonably incurred in connection with the sale of the goods.¹⁸⁶⁰ The provider must then give the consumer a written notice advising of the settlement value of the credit agreement immediately before the sale, the gross amount realised on the sale, the net proceeds of the sale¹⁸⁶¹ and the amount credited or debited to the consumer's account.¹⁸⁶²

If the amount credited to the consumer's account exceeds the settlement value immediately before the sale and another credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the Tribunal, which may make an order for the distribution of the amount in a manner that is just and reasonable.¹⁸⁶³ Where no other credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit the excess amount to the consumer and the agreement is thereby terminated.¹⁸⁶⁴

Where the amount rendered by the sale of the goods, less the expenses incurred, is less than the settlement value of the agreement immediately before the sale, the credit provider may in terms of section 127 (7) simultaneously

¹⁸⁵⁹ Van Heerden CM and Otto JM 'Debt Enforcement in terms of the National Credit Act 34 of 2005' *TSAR* 655 657.

¹⁸⁶⁰ Section 127 (5)(a) of the Act.

¹⁸⁶¹ This would be the gross proceeds less the reasonable expenses incurred in connection with the sale and the provider's permitted default charges. Cf section 100 of the Act with reference to prohibited charges.

¹⁸⁶² Section 127 (5)(b) of the Act.

¹⁸⁶³ Section 127 (6)(a) of the Act. This section appears to place a responsibility on the first credit provider to 'hunt down' the consumer's alternative commitment relating to those goods. This is an onerous task for the credit provider, especially in light of section 127 (10) which exposes the credit provider to an offence if he acts contrary to section 127. Furthermore, the wording 'registered credit agreement' is strange in that credit agreements per se are not registered but it is credit providers that are registered. It is submitted that a credit provider would meet its obligations in terms of this section by advising the consumer of this statutory obligation and requesting information from the consumer with reference to other commitments in relation to credit agreements. It would then be up to the consumer to provide the requisite information.

¹⁸⁶⁴ Section 127 (6)(b) of the Act.

demand payment from the consumer of the remaining settlement value when he issues the notice to the consumer advising of the results of the sale.¹⁸⁶⁵ This leaves open the question whether a credit provider may approach a court if he has made demand in terms of section 127 (7) or whether he is subsequently obliged to follow the procedure as prescribed in section 129.¹⁸⁶⁶ Boraine and Renke¹⁸⁶⁷ submit that a section 129 (1)(a) demand notice is not required where the credit provider approaches the court for an order enforcing the remaining obligations of the consumer as section 129 (1)(b) provides that the requirement of issuing such a notice is subject to section 130 (2). Section 130 (2) states that in addition to the circumstances contemplated in section 130 (1), in the case of an instalment agreement, secured loan or lease a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if all the relevant property has been sold pursuant to a surrender of property in terms of section 127¹⁸⁶⁸ and the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.¹⁸⁶⁹ Van Heerden¹⁸⁷⁰ posits a different view, indicating that amongst the allegations which a credit provider must make in his pleadings when he seeks to enforce the remaining obligations in terms of a credit agreement, he must allege that he sent the consumer a notice in terms of section 129(1)(a). She submits that before a credit provider can enforce payment of an outstanding balance demanded in accordance with section 127 (7), he first has to notify the consumer of the latter's rights in terms of section 129 (1)(a).¹⁸⁷¹ The reason she provides for this submission is that compliance with section 129 (1)(a) is a required procedure before debt enforcement and the consumer cannot be deprived of, for instance, his right to be notified that he can consult a debt

¹⁸⁶⁵ That is a notice in terms of section 127 (5)(b) of the Act.

¹⁸⁶⁶ Section 129 of the Act is discussed in greater detail in paragraph 5.6.1 below.

¹⁸⁶⁷ Boraine A and Renke S '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* 1 6 fn 160.

¹⁸⁶⁸ Section 130 (2)(a)(ii) of the Act. Section 130 (2)(a)(i) makes reference to attachment orders which are not being discussed here.

¹⁸⁶⁹ Section 130 (2)(b) of the Act.

¹⁸⁷⁰ Scholtz 2014 paragraph 12.8.3.1.

¹⁸⁷¹ Scholtz 2014 paragraph 12.8.3.1 fn 335 and *MFC (A Division of Nedbank Ltd) v Botha* 2013 ZAWCHC 107).

counsellor, by the fact that he decided to terminate the agreement voluntarily.¹⁸⁷² It is submitted that the purpose of a section 129 notice is intended to have 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. It is submitted that a section 127 (7) notice serves a different purpose. A section 127 (7) notice requires the consumer to settle the difference between the settlement value and the amount outstanding on the consumer's account prior to the sale. The credit agreement between the parties has terminated. It is submitted that while both interpretations are resounding, Boraine and Renke's¹⁸⁷³ view is the preferred one; not only due to the wording of section 130 (2) but also the wording of section 130 (1) which states that it is subject to subsection (2). While section 130 (1) states that a credit provider may approach the court for an order to enforce a credit agreement only if it has complied with section 130 which includes a notice being sent out in terms of section 129 (1) by the credit provider to the consumer in the event of default, it is submitted that the purpose and thus the legislature's intention of subjecting section 130 (1) to 130 (2) was to make an exception of section 127.¹⁸⁷⁴ In *Roussouw v Firstrand Bank Ltd*¹⁸⁷⁵ the Supreme Court of Appeal held that in the three types of credit agreements mentioned (i.e. an instalment agreement, a secured loan and a lease), if the further requirements of the section are satisfied (i.e. all the relevant property has been sold, pursuant to an attachment order or the surrender of property in terms of section 127 and the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement) then the credit provider is excused from complying with section 130 (1), that is the credit provider does not have to send a notice and wait for the specified days to elapse.¹⁸⁷⁶ Furthermore, section 130 (3) specifically differentiates sections 127, 129 and 131 of the Act, providing that despite any provision of law or contract to the contrary, in any proceedings

¹⁸⁷² *Ibid.* Coetzee suggests that 'until a clear practise has emerged or case law has clarified the position, litigants should rather combine the two notices under these circumstances by including the prescribed content of the section 129 (1)(a) notice, and especially the consumer's rights contained therein, in a section 127 (7) notice (2010 *THRHR* 569 575).

¹⁸⁷³ Boraine and Renke (Part 2) 2008 *De Jure* 1 6 fn 160.

¹⁸⁷⁴ And attachment orders.

¹⁸⁷⁵ 2010 6 SA 439 (SCA) at paragraph 41.

¹⁸⁷⁶ However, see the submission made in paragraph 6.4.3.2 *infra*, where it is suggested that the court was referring specially to a section 129 (1)(a) notice and that in fact by virtue of section 127 (7) as read with section 127 (8) the credit provider is obliged to send a notice to the consumer to demand the outstanding balance prior to commencing further proceedings.

commenced in a court in respect of a credit agreement to which the Act applies, the court may determine the matter only if the court is satisfied that in the case of proceedings to which sections 127, 129 and 131 apply, the procedures required by those sections have been complied with. These three sections are clearly differentiated and, it is submitted, so too are the required procedures. Additionally, the wording in section 127 (8) indicates that ten days after the consumer has received a section 127 (7) notice and has failed to pay the amount demanded within ten business days the provider may commence proceeding in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement. It is submitted that if the legislature had intended the credit provider to be obliged to then proceed with a section 129 (1) notice it would have specifically stated so. While the drafting of the Act leaves much to be desired and makes no easy task for those having to apply and interpret the Act, it cannot be that the wording of section 127 (8) of the Act be ignored. Furthermore, the credit provider will carry the evidentiary burden of proving that the consumer has received the section 127 (7) notice, this a greater burden than is required in terms of section 129 (1)(a),¹⁸⁷⁷ which section requires the credit provider to simply deliver the notice. In writer's view, it is not reconcilable to oblige the credit provider to ensure that a consumer has received the section 127 (7) notice and thereafter have to issue a section 129 (1)(a) notice.

If the consumer pays the amount demanded in terms of section 127 (7) at any time before judgment then the agreement is terminated upon remittance of that amount.¹⁸⁷⁸ In either event interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider from the date of demand to the date of payment.¹⁸⁷⁹

¹⁸⁷⁷ In terms of the National Credit Amendment Act 19 of 2014 3 new subsections have been added to section 129 and which read as follows: '(5) The notice contemplated in subsection (1)(a) must be delivered to the consumer – (a) by registered mail; or (b) to an adult person at the location designated by the consumer. (6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5). (7) Proof of a delivery contemplated in subsection (5) is satisfied by – (a) written confirmation by the postal service or its authorized agent, of delivery to the relevant post office or postal agency; or (b) the signature or identifying mark of the recipient contemplated in subsection (5)(b)'.

¹⁸⁷⁸ Section 127 (8)(b) of the Act.

¹⁸⁷⁹ Section 127 (9) of the Act. Coetzee submits that by implication the credit provider's right to interest is suspended prior to such demand (2010 *THRHR* 569 572). It is submitted that this view

Section 127 (8)(a) entitles a credit provider to pursue the credit consumer in the courts for any outstanding amounts in terms of the credit agreement where the proceeds of the sale of the goods do not exterminate the entire debt. The section provides that the credit provider may commence proceedings in terms of the Magistrates Court Act for judgment¹⁸⁸⁰ enforcing the credit agreement ten business days after receiving demand.¹⁸⁸¹

Section 128 provides a process whereby a consumer who disputes a sale and has been unable to resolve the disputed sale in terms of section 127 directly with the credit provider or through an alternative dispute resolution under Part A of Chapter 7, may apply to the tribunal to review the sale.¹⁸⁸² The Tribunal is approached on application and where it is not satisfied that the credit provider sold the goods as soon as reasonably practicable or for the best price reasonably obtainable it may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of sale.¹⁸⁸³ A decision by the Tribunal which is made in terms of section 128 is subject to appeal or review by

is correct, as up until demand the consumer cannot be aware of whether there is any amount outstanding and what that amount is.

¹⁸⁸⁰ It has been held that this section does not give exclusive jurisdiction to Magistrates Courts in these matters and a credit provider may approach a High Court. It has been held that this section has the effect of creating additional jurisdiction for Magistrates Courts with regard these claims and not in any way ousting the jurisdiction of the High Court (*Nedbank Ltd v Mateman and another; Nedbank Ltd v Stringer and another* 2008 JOL 21191 (T) and Otto in Scholtz 2014 paragraph 9.5.4.5 fn 146). The *Mateman* matter *supra* expressed a different view to the matter of *Absa Bank Ltd v Myburgh* unreported case no 31827/2007 – where Bertlesman J declared that the proceedings in terms of section 127 (8) to recover any outstanding amounts were stated to be ‘significantly, especially decreed to be instituted in the lower court, regardless of any jurisdictional limitation regarding the sum involved’.

¹⁸⁸¹ This section refers to ‘receipt’ as opposed to ‘delivery’, the latter being the terms used in relation to the section 129 notice. It is submitted that this places a greater onus on the credit provider who may very well have to prove that the consumer has received the section 127 (7) notice.

¹⁸⁸² Section 128 (1) of the Act. In *Methethwa v Absa Bank Ltd* 2013 ZANCT 50, the consumer made application to the Tribunal, in terms of sections 128 (1) and (2) of the Act, on the grounds that Absa did not sell the goods in question, here a vehicle, as soon as reasonably practical, alternatively did not sell the goods at the best price reasonably obtainable. The Tribunal found that because the consumer had not attempted to resolve the disputed sale of goods directly with the credit provider, Absa, or through an alternative dispute resolution agent, the matter was not properly before the Tribunal, it refused to hear the merits of the matter and dismissed it (20 and 21).

¹⁸⁸³ Section 128 (2) of the Act.

the High Court.¹⁸⁸⁴ If a credit provider acts in a manner contrary to section 127 it will be guilty of an offence.¹⁸⁸⁵

Section 127 of the Act forces the consumer to practise economic discipline. A consumer who is conscious of his finances and realises that his pecuniary situation is such that he will not be able to meet his debts or debt repayments, may circumvent defaulting and having civil action taken against him, by returning the goods which were purchased on credit to the credit provider and having them sold.¹⁸⁸⁶ The procedure in terms of section 127 does not prevent the credit provider from obtaining his settlement value and the provider is assured of recovering any costs that it may incur by on-selling the goods.¹⁸⁸⁷ This assists consumers, if as stated above, they are fiscally disciplined and act timeously, in maintaining a 'clean' credit record and to avoid what can be expensive legal procedures.¹⁸⁸⁸

While section 127 gives consumers an opportunity to 'unburden' themselves by making use of the procedures prescribed by the section, it places credit providers in a precarious position in that it becomes difficult to make accurate financial forecasts based on future income, especially if there are grave shifts in interest

¹⁸⁸⁴ The appeal and review of an order by the Tribunal in terms of this section is subject to section 148 which permits a participant in a hearing before a single member of the Tribunal to appeal a decision by that member to a full panel of the Tribunal. Whereas a participant in a hearing before a full panel of the Tribunal may apply to the High Court to either have the decision reviewed or appeal to the High Court against the decision. Both review and appeal procedures are subject to the rules of the High Court.

¹⁸⁸⁵ Section 127 (10) of the Act.

¹⁸⁸⁶ By exercising this right he can also circumvent adverse credit information being placed on his credit record.

¹⁸⁸⁷ The following paragraph was reasoning provided for the implementation of a similar section in the Hire-Purchase Act, however, it is submitted that such justification is relevant in terms of section 127 of the National Credit Act: 'Viewed against the economic policy deducible from the Act as a whole, the legislature's purpose in enacting section 14 (a) is plain. It wished to enable a buyer who experienced difficulty in fulfilling his part of the bargain to resile from the agreement and return the goods, so reducing the amount that would have been payable by him if the agreement had run its course. The adoption of this course also makes it possible for the buyer to avoid legal proceedings being taken against him by the seller for the costs of which he, the buyer, would be liable' (Diemont and Aronstam 1982 56-7).

¹⁸⁸⁸ It is submitted that while this amounts to early settlement of a credit agreement, the consumer would not, if it concerned a large agreement, incur penalties for early settlement as contemplated in section 125 of the Act. No penalty is allowed for early settlement of small and intermediate agreements (section 125 of the Act). Cf paragraph 4.4.4.1 *supra* for a discussion on small, large and intermediate agreements and paragraph 6.5.2.1.3 and 6.5.2.1.4 *infra*, for a discussion on penalties stipulated by the Act for early settlement by consumers.

rates or economic downturns prompting consumer withdrawal from credit. The solution would be for credit providers to ‘hedge’ against risk of cancellations by downloading the ‘risk’ costs onto the consumer by imposing higher interest rates, for example. Credit providers are prohibited from utilising contractual safeguards in this regard, as the Act renders any provision purporting to defeat the purposes of the Act or directly or indirectly waiving or depriving a consumer of a right as set out in the Act unlawful.¹⁸⁸⁹ Section 127 may also potentially force a credit provider to become a reseller of used goods, where otherwise it would only trade in new goods. This may have financial implications for the credit provider as they would require to set up administrative machinery to manage such returns on a practical level, financially and from a legal perspective. Once again, the costs of which would be downloaded onto the consumers.

5.3.5. Prevention of Performance

Prevention of performance is a form of breach of contract that may be committed by a debtor or a creditor. A debtor commits this type of breach when he culpably renders his own performance impossible after the conclusion of the contract.¹⁸⁹⁰ Accordingly, the debtor is not released from his obligation to perform.¹⁸⁹¹ A creditor commits this type of breach when he renders his or the debtor’s performance impossible.¹⁸⁹² This type of breach by the creditor must be differentiated from *mora creditoris*; because in the case of *mora creditoris* the creditor merely causes a delay in the debtor’s performance but does not render it impossible.¹⁸⁹³ In the event of the creditor’s prevention of the debtor’s performance, the debtor will be deemed to have discharged his obligation but will

¹⁸⁸⁹ Section 90 (2)(a)(i) and (b)(i) of the Act. For example credit providers would not be able to incorporate a waiver of the rights of the consumer in terms of section 127 of the Act, or fix the price of the goods in the event of a statutory repudiation by the consumer in terms of section 127.

¹⁸⁹⁰ The conduct may consist of a positive act (*commissio*) or failure to act (*omissio*) (LAWSA paragraph 327).

¹⁸⁹¹ Pothier *Obligations* paragraph 625 and Kerr 2002 553.

¹⁸⁹² An example would be where the creditor hires someone to paint his house, but then sets the house on fire before the debtor may perform, or where a creditor hires a person to repair a certain item, but before handing the item over to the would-be repairer – hands it to someone else who repairs it (De Wet and Van Wyk 1947 175 and Van der Merwe *et al* 2012 308).

¹⁸⁹³ Havenga *et al* 1995 114.

still be entitled to the creditor's performance, albeit bringing into account any expenses he has saved by not having to perform.¹⁸⁹⁴

Prevention of performance has been dubbed a juristic concept that includes instances of physical impossibility and instances where performance, whilst still physically possible, is for all reasonable and objective purposes impossible.¹⁸⁹⁵ Prevention of performance is a form of anticipatory breach and can - provided it occurs prior to the actual performance - take place before, on or after the date set for performance.¹⁸⁹⁶

There is ample authority for the requirement of fault¹⁸⁹⁷ for breach by prevention of performance, and that the onus of proving absence of fault falls on the party who has prevented performance.¹⁸⁹⁸ A debtor who is in *mora*, however, cannot then rely on the absence of fault if performance becomes impossible after his *mora*.¹⁸⁹⁹

¹⁸⁹⁴ Havenga *et al* 1995 115. Joubert explains: 'Where the creditor who has made performance impossible does not bear the risk [for example by agreement] in respect of the counter-performance, he is liable for damages, which can be calculated as the value of the counter-performance less anything that has been saved by the other party due to not having to render performance or to having to receive counter-performance specifically (1987 209).

¹⁸⁹⁵ Van der Merwe *et al* 2012 314.

¹⁸⁹⁶ Nienaber 1963 *THRHR* 19 29-30, LAWSA paragraph 327. However, cf *Commercial Union Assurance Company of South Africa Ltd v Golden Era Printers and Stationers (B) (Pty) Ltd* 1997 3 All SA 165(B) and the comments of Van der Merwe *et al* 2012 315 at fn 254 on this matter.

¹⁸⁹⁷ Intentional or negligent, or through the fault of someone for whose actions the contractant is responsible (De Groot *Inleidinge* 3.47.1, Van Leeuwen *Censura Forensis* 1.4.39.1, Voet *Commentarius ad Pandectus* 45.1.24, *Mposelo v Banks* 1902 19 SC 370, *Marshall v LMM Investments (Pty) Ltd* 1977 3 SA 55 (W) and Joubert 1987 209).

¹⁸⁹⁸ *Medallie and Schiff v Roux* 1903 20 SC 438 440, *Pama v Freemantle* 1905 19 EDC 141 147, *Parsons v MacDonald* 1908 TS 809 810, *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 962-5, *Lituli v Omar* 1909 TS 192 194, *Nyabele v Pieterse* 1914 TPD 516 518-9, *Groenewald v Duvenhage* 1915 OPD 25 29-31, *Daly v Chrisholm and Co Ltd* 1916 CPD 562 566-8, *Boshoff v McDonald* 1916 NPD 414 416, *Eeensaam Syndicate v Moore* 1920 AD 457 458, *Enslin v Meyer* 1925 OPD 125 10-1, *Marks v Model Hire Motor Service Ltd* 1928 CPD 476 478, *Van der Wiener v Calderbank* 1929 TPD 654 662-665, *Van der Merwe v Scribante* 1940 GWL 36 41-2, *Joubert Street Investments (Pty) Ltd v Roberts* 1943 TPD 141 143, *Rosenthal v Marks* 1944 TPD 12 176, *Brand v Kotze* 1948 3 SA 769 (C) 770-1, *Pretoria Light Aircraft Co Ltd v Midland Aviation Co (Pty) Ltd* 1950 2 SA 656 (N) 657-8, *Challinger v Speedy Motors* 1951 1 SA 340 (C) 347-8, *Kealey v Landsberg* 1953 4 SA 605 610 -1, *Daniel (Pty) Ltd v Camps Bay Service Station* 1954 3 SA 309 (C) 313, *Strelitz (Pty) Ltd v Siegers and Co (Pty) Ltd* 1959 3 SA 917 (E) 919 and *Nel v Dobie* 1966 3 SA 352 (N) 357-9. O'Hagan J said in *Grobbelaar v Bosch* 1964 3 SA 687 (E) 691: '[T]he debtor is released only if the destruction or loss is not due to his own act or negligence'.

¹⁸⁹⁹ Wessels 1951 paragraphs 2704-6, Huber 3.42.7 and Kerr 2002 555.

Prevention of performance must also be distinguished from supervening impossibility. Supervening impossibility occurs when after conclusion of a contract performance of an obligation arising from the contract becomes objectively and permanently impossible through no fault of either of the parties.¹⁹⁰⁰ The effect is that the obligations of both parties are thereby extinguished.¹⁹⁰¹

5.4. Procedures Required before Debt Enforcement in Court

It is submitted that each part of the credit relationship has been carefully regulated through various sections of the Act and the sections dealing with enforcement of the credit agreement are no different. A dispute with reference to a credit agreement can, however, be handled in one of two ways, that is, through alternative dispute resolution or through enforcement through litigation. The Act dedicates a whole chapter to dispute settlement other than through debt enforcement at court level.¹⁹⁰² A person may submit a complaint concerning an alleged contravention of the Act to the National Credit Regulator.¹⁹⁰³ As an alternative to filing a complaint with the National Credit Regulator a financial institution¹⁹⁰⁴ may refer a matter to the ombud with jurisdiction.¹⁹⁰⁵ If the credit provider is not a financial institution, the matter may be referred to either a consumer court for resolution in accordance with the National Credit Act and any

¹⁹⁰⁰ Examples are *vis maior* and *casus fortuitus*. Accordingly, the following from Solomon ACJ in *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427 is apt: '[T]he authorities are clear that if a person is prevented from performing his contract by *vis maior* or *casus fortuitus*, under which would be included such an act of State as we are concerned with in this appeal, he is discharged from his liability'. The authorities that the court referred to are: D 45.1.140.2, Grotius 3.47.1, Van Leeuwen *Censura Forensia* 1.4.39.1 and Van der Linden 1.18.6.

¹⁹⁰¹ Although, it has been submitted that at times a party may be held liable for prevention of performance even if the performance was impossible *ab initio* or became impossible through an act of nature or an independent third person, in the first instance the party would be liable for prevention of performance if they guaranteed that performance would be or would remain possible. In the last two instances the party would be liable for prevention of performance where he had stepped into *mora*, so to speak, prior the performance becoming impossible (LAWSA paragraph 328).

¹⁹⁰² Chapter 7 of the National Credit Act.

¹⁹⁰³ Section 136 of the Act.

¹⁹⁰⁴ As defined in the Financial Services Ombud Schemes Act 37 of 2004 (section 134 (1)(a)).

¹⁹⁰⁵ The ombud must have the jurisdiction to resolve a complaint or settle a matter involving that credit provider in terms of section 13 and 14 of the Financial Services Ombud Schemes Act (section 134 (1)(a)(i)). Usually this will be the Credit Ombud or the Ombudsman for Banking Services (www.banking.org.za/index.php/consumer-centre/national-credit-act (6.10.14)).

provincial legislation establishing that consumer court¹⁹⁰⁶ or an alternative dispute resolution agent, for resolution by conciliation, mediation or arbitration.¹⁹⁰⁷ The responding party may object to the referral to an alternative dispute resolution agent, in which event the National Credit Regulator or the National Consumer Tribunal must deal with the matter provided the matter is the proper subject of a complaint or application, respectively to one of the two bodies.¹⁹⁰⁸ If the ombud, consumer court or alternative dispute resolution agent are successful in resolving the dispute, the ombud, court or agent, as the case may be, may record the settlement which, with the consent of the parties, may be made an order of court or of the Tribunal.¹⁹⁰⁹

¹⁹⁰⁶ Section 134 (2)(b)(i) of the Act.

¹⁹⁰⁷ Section 134 (2)(b)(ii) of the Act.

¹⁹⁰⁸ Section 134 (2) of the Act. Cf Otto and Otto 2013 105.

¹⁹⁰⁹ Section 135 (1) of the Act. There are some amendments made by the National Credit Amendment Act in relation to the alternate dispute resolution sections Part A of Chapter 7 of the National Credit Act. The Amendment Act inserts the words 'or a dispute following an allegation of a reckless credit agreement' to section 134 (1) (cf section 34 of the Amendment Act). It is submitted that this widens the scope of what issues may be resolved by alternate dispute resolution methods, and bringing reckless credit allegations under this umbrella. Furthermore, the National Credit Amendment Act inserts sections 134A and 134B (section 35 of the Amendment Act). Section 134A obliges the National Credit Regulator to register and accredit alternative dispute agents. The Amendment Act does not define who should be or is entitled to be registered as an alternative dispute resolution agent, nor does it provide for any system or guidelines for their accreditation. It is submitted that the legislature should have either incorporated these criteria in the Amendment Act or imposed a duty on the Minister to do so by regulation. Section 134B reads as follows: '(1) Subject to subsection (2), registration and accreditation in terms of section 134A may be cancelled by the Tribunal on application by the National Credit Regulator, if an alternative dispute resolution agent— (a) fails to comply with any condition of its registration and accreditation; or (b) contravenes this Act. (2) If an alternative dispute resolution agent fails to comply with any condition of its registration or accreditation or contravenes this Act, and such alternative dispute resolution agent is also licensed by another regulatory authority, the National Credit Regulator may— (a) impose conditions on the registration of such alternative dispute resolution agent consistent with its licence, if any; (b) refer the matter to the regulatory authority that licensed such alternative dispute resolution agent, with a request that the regulatory authority review that licence in the circumstances; or (c) at the request, or with the consent, of the regulatory authority that licensed that alternative dispute resolution agent, apply to the Tribunal for cancellation of the registration and accreditation. (3) A regulatory authority to whom a matter has been referred to in terms of subsection (2)(b)— (a) must conduct a formal review of the alternative dispute resolution agent's licence; (b) to the extent permitted by the legislation in terms of which the alternative dispute resolution agent is licensed, may suspend that licence pending the outcome of that review; or (c) may request, or consent to, the National Credit Regulator lodging an application with the Tribunal for cancellation of the registration. (4) The National Credit Regulator must attempt to reach an agreement as contemplated in section 17(4) with any regulatory authority that issued a licence to an alternative dispute resolution agent that is registered in terms of section 134A, to co-ordinate the procedures to be followed in taking any action in terms of subsections (2) and (3). (5) The registration of an alternative dispute resolution agent is cancelled as of— (a) the date on which the Tribunal issues an order; or (b) in the case of a voluntary cancellation, the date specified by the said alternative dispute resolution agent in the notice of voluntary cancellation. (6) An alternative dispute resolution agent whose registration has

Other than the above outline, the alternative dispute resolution methods provisioned for by the Act will not be discussed further. This work focuses on the conventional remedies¹⁹¹⁰ available to a credit provider upon breach of the agreement by a consumer and these are discussed in Chapter 6 *infra*. The following sections examine what procedures must be taken by a credit provider upon breach of the agreement by the consumer before the credit provider may approach a court for relief, with an initial look at what was required in terms of the Credit Agreements Act. It is submitted that previous deliberations and conclusions by the Courts on similar subject matter, despite applying to previous credit legislation, are appropriate and germane to interpretations of the current credit legislation.

5.5. The Credit Agreements Act

5.5.1. Section 11

Section 11 of the Credit Agreements Act regulated the rights of the credit grantor to cancel the contract and claim return of the goods.¹⁹¹¹ The section was entitled 'Limitation of Right of Credit Grantor to Enforce Certain Provisions of Credit Agreements' and stipulated that a credit grantor had to notify the credit receiver of his failure to comply with his obligations and require his compliance within thirty days, before the credit grantor could claim that the goods be returned. The notice had to be in writing¹⁹¹² and handed to the credit receiver¹⁹¹³ or sent by

been cancelled must not engage in any formerly registered activities after the date on which the cancellation takes effect (section 35 of the National Credit Amendment Act).

¹⁹¹⁰ That is demand, issue of summons, settlement, trial or application for default judgment and satisfaction of judgment or attachment.

¹⁹¹¹ The requirement that a credit grantor give notice prior to approaching a court for enforcement of the credit receiver's obligations in terms of the credit agreement was only required by the Credit Agreements Act, no such requirement was stipulated by the Usury Act. The scope of these two Acts was in any event much more limited than the scope of the National Credit Act which is much broader and its effect extends to all credit agreements including mortgage agreements, subject to certain specified limitations. Cf paragraph 4.4.3 *supra* for a discussion on the application of the Act as well as transactions which are excluded therefrom.

¹⁹¹² Diemont and Aronstam 1982 162-4, Grové and Jacobs 1993 37 and Otto *Credit Law Service* 1991 paragraph 29.

prepaid registered post at the address indicated in the credit agreement.¹⁹¹⁴ The notice had to inform the debtor of his failure and require him to comply within a stated period that was not less than thirty days after the handing over or posting of such notice.¹⁹¹⁵ Thereafter and only if the debtor's failure continued, could the credit grantor claim the return of the goods.¹⁹¹⁶ Section 11 had a proviso, in that if the credit receiver failed to comply with his obligations on two or more occasions and the credit grantor had sent him a section 11 notice on such previous occasions, the period within which the receiver had to comply after handing over or posting of the letter of demand was shortened to fourteen days.¹⁹¹⁷

5.5.1.1. When a Section 11 Notice was Deemed Necessary

Section 11 required the credit grantor to give notice of breach in the event of the receiver's failure to comply with any obligation in terms of the credit agreement, only if the credit grantor sought to obtain the return of the goods. Accordingly, the notice requirement in terms of section 11 was not necessitated where specific performance was claimed,¹⁹¹⁸ or where acceleration clauses or penalty clauses were sought to be enforced.¹⁹¹⁹ Where the credit grantor cancelled the agreement on a different ground, for example misrepresentation by the receiver, the section 11 notice was not required.¹⁹²⁰

¹⁹¹³ In which event an acknowledgment of receipt had to be obtained (Otto 1991 paragraph 29). The situation where a credit receiver refused to give an acknowledgement of receipt remained unclear, Flemming suggested that the credit grantor would, upon the receiver's refusal, be obliged to send the letter of demand by registered post (1982 *Krediettransaksies* 318).

¹⁹¹⁴ That is the *domicilium citandi et executandi* of the credit receiver (section 5 (1)(b) of the Credit Agreements Act). Either party to the agreement could change the address by giving notice in writing, which notice was to be delivered by hand or sent by registered mail (section 5 (4) of the Credit Agreements Act).

¹⁹¹⁵ Section 11 of the Credit Agreements Act.

¹⁹¹⁶ *Ibid.*

¹⁹¹⁷ *Ibid.*

¹⁹¹⁸ *Santam Bank Bpk v Dempers* 1987 4 SA 639 (O) 642f.

¹⁹¹⁹ *Ibid.*

¹⁹²⁰ Grové and Otto 2002 45. This view was drawn from a similar perspective expressed by the court with regards the Hire-Purchase Act (*Roderick Motor's Ltd v Viljoen* 1958 3 SA 575 (O) and Otto 1991 paragraph 29).

While restitution is viewed as the normal result flowing from cancellation,¹⁹²¹ it is to be noted that section 11 did not specifically refer to cancellation.¹⁹²² Otto¹⁹²³ concluded that following cancellation, the credit grantor would, in the normal course of events, claim the goods with the resultant effect that section 11 was deemed to apply to cancellation. In the event that the goods were not claimed, for example where they had been destroyed, section 11 would not be applicable and the cancellation would take effect immediately without thirty days' notice, in accordance with the common law and the provisions of the contract. Following from the fact that section 11 was not limited to cases of cancellation – a claim for temporary possession following breach of contract would have been treated as subject to section 11.¹⁹²⁴ Where, the goods were already in possession of the credit grantor, the Courts held that a section 11 notice was not necessary, as section 12 of the Credit Agreements made provision for the situation where the credit grantor came into possession of the goods other than by way of court order.¹⁹²⁵ Accordingly, where a credit receiver voluntarily returned the goods section 11 would not be applicable, provided that the whole scheme amounted to a genuine voluntary return of the goods and not a disguised claim for return.¹⁹²⁶ In *Trust Bank van Suid Afrika Bpk v Eales en Andere*¹⁹²⁷ the court held that in certain circumstances, where the credit grantor obtained possession of the goods without adhering to the section 11 requirements, the credit receiver would be entitled to institute spoliation proceedings against him.¹⁹²⁸

¹⁹²¹ Joubert 1987 245.

¹⁹²² Otto JM 'Onregmatige Terugname van Koop – of Huursake by Kredietooreenkomste' 1999 TSAR 163.

¹⁹²³ Otto 1991 paragraph 29.

¹⁹²⁴ As an example of such a situation was where a leasing contract provided that a lessee was obliged to maintain the goods and that the lessor, in case of failure, was entitled to make repairs himself for the account of the lessee (Otto 1991 paragraph 29). Interim attachment, pending a claim by the credit grantor for the return of the goods is discussed in detail in paragraph 6.3.1 *infra*.

¹⁹²⁵ *Trust Bank van Suid Afrika Bpk v Eales en Andere* 1989 4 All SA 575 (T), *Eerste Nasionale Western Bank Bpk v Van De Schyff* 1993 1 SA 230, *Mdakane v Standard Bank of South Africa Ltd* 1999 1 SA 127 and cf Kerr AJ 'The Warranty against Eviction in Contracts of Sale' 1999 SALJ 455.

¹⁹²⁶ Otto 1991 paragraph 29.

¹⁹²⁷ *Supra*.

¹⁹²⁸ This would be so even where the intention of the parties was for the credit grantor to retain the goods until such time as the arrears were paid by the receiver. An example of such an arrangement, or 'custody surrender agreement' can be found in *Standard Credit Corporation Ltd v Laycock* 1988 2 SA 679 (N).

A credit grantor under the Credit Agreements Act could cancel according to his common law right or by invoking an incorporated *lex commissoria*.¹⁹²⁹ If the grantor elected to invoke the *lex commissoria*, he would still have to give notice in terms of section 11.¹⁹³⁰ The requirements mandated by this section could not be waived¹⁹³¹ and a construction to the contrary would have rendered section 11 nugatory.¹⁹³²

The section 11 notice applied to all credit agreements governed by the Credit Agreements Act, which included credit transactions and leasing transactions or any transaction which had the same import of the above two transactions irrespective of the form of the transaction or whether these were subject to any resolutive or suspensive conditions.¹⁹³³

5.5.1.2. Contents of Notice

Section 11 did not prescribe the contents of the notice in detail. The notice did, however, have to inform the receiver that he had committed a breach and that he should rectify the breach within the stated period.¹⁹³⁴ The section 11 notice also had to notify the consumer that failing performance the credit grantor would be entitled to cancel the agreement.¹⁹³⁵

In *Ex parte Thorrold*,¹⁹³⁶ the court, albeit looking at the contents of a similar notice in terms of the Hire-Purchase Act, held that a notice reminding a debtor

¹⁹²⁹ Otto 1991 paragraph 29. *Lex Commissoria* are discussed in paragraph 6.4.1.3 *infra*.

¹⁹³⁰ *Ibid*.

¹⁹³¹ Section 22 of the Credit Agreements Act prohibited the waiver of any rights granted under the Act.

¹⁹³² Otto 1991 paragraph 29.

¹⁹³³ Otto 1991 paragraph 29.

¹⁹³⁴ Thirty or fourteen days depending on whether it was the first default notice issued or a subsequent one. The view taken by many jurists was that the notice should have contained the following information: the nature of the credit receiver's breach of contract or the defect which may have given rise to a cancellation, the steps the receiver should have taken to remedy the breach, the period within which these steps were to be taken and if the contract did not contain a *lex commissoria* – notification that the credit grantor would be entitled to cancel the contract in the event of non-rectification of the breach (Grové and Otto 2002 43-4, Diemont and Aronstam 1982 162-4 and Flemming 198 315-6).

¹⁹³⁵ Grové and Otto 2002 44, Diemont and Aronstam 1982 and Flemming *Credit Agreements and Finance Charges* 1981 316.

¹⁹³⁶ 1954 2 All SA 126 (D).

that he should in future strictly comply with the terms of the agreement was a failure by the grantor to establish that the debtor had failed to remedy the breach of the agreement in question pursuant to a written demand as required by the Act, which, the court held, 'is a condition precedent to an action for cancellation and the return of the motorcar'.¹⁹³⁷ The court held, further, that a specific notice must direct a debtor to remedy a specific breach.¹⁹³⁸ It is submitted, albeit given its repeal it is now academic, that same would have been applicable in terms of the section 11 notice and breach of a credit agreement as per the Credit Agreements Act.

5.5.1.3. Calculation of Thirty Days, Delivery and Receipt of the Notice

When time periods are specified in legislation requiring notification before enforcement and/or cancellation, the relevant legislation must be the first authority on the procedure and time restrictions. Failing clarity by the legislative enactment, the courts will have to be reverted to for lucidity.

In relation to the section 11 notice under the Credit Agreements Act, the courts decided that the notice did not necessarily have to come to the attention of the debtor.¹⁹³⁹ De Jager¹⁹⁴⁰ was of the view that the notice need not reach the debtor, provided it had been sent in the prescribed manner, while Flemming¹⁹⁴¹ expressed the view that non-receipt of the notice should only be excused where it had been impossible for the credit grantor to effect receipt of the notice. Otto¹⁹⁴² argued that it could not be laid down as an absolute rule that notice had

¹⁹³⁷ *Ibid* 128. The application was for the repossession of a motor-vehicle *pendente lite*.

¹⁹³⁸ The credit provider had approached the court for a court order based on a demand it had made to the Respondent on a previous defaulted payment which the Respondent had subsequently (and prior to the institution of the application) settled.

¹⁹³⁹ *Marques v Unibank Ltd* 2001 1 SA 145 (W), *Mercedes Benz Finance (Pty) Ltd* case no AR 521/99 (N) and Otto JM 'Die Konsensuele Terugtreddingsreg (*Lex Commissoria*): Breidelloos Afdwingbaar' 2001 TSAR 2003. Under the Hire-Purchase Act, which was replaced by the Credit Agreements Act, the court decided that a notice that did not reach the debtor was still effective if it had been sent in accordance with the Hire-Purchase Act (*Fitzgerald v Western Agencies* 1968 1 SA 288 (T)). The matter concerned a letter of demand sent to the defendant's last known residential address by registered post by the plaintiff and which could not be delivered by the post office because the defendant had not informed the plaintiff of his new address and thus the letter was returned to the plaintiff endorsed 'vertrek-onbekend'.

¹⁹⁴⁰ *Credit Agreements and Finance Charges* 1981 72.

¹⁹⁴¹ *Supra* 318.

¹⁹⁴² Otto 1991 29 and LAWSA paragraph 29.

to, under all circumstances, reach the credit receiver and suggested that a better view would be that where the credit grantor had followed the prescribed steps to effect notice and the notice did not reach the debtor, the creditor should not have been penalised, unless he had been aware of the notice not reaching the debtor. In the latter instance, he suggested that the credit grantor should then take reasonable steps to bring the notice to the debtor's attention and concluded, with reference to the credit grantor, that the credit grantor should not be penalised if the credit receiver had not collected his mail, or had provided a wrong address or had not given notice of a change of address.¹⁹⁴³ Cloete J in *Marques v Unibank Ltd*¹⁹⁴⁴ expressed the following:

Two methods of giving the notice are prescribed in section 11. The fact that the one must result in the notice coming to the attention of the credit receiver does not, to my mind, necessarily imply that the other must have the same result to be effective. Whether it does depends primarily on the wording of the Act which [...] is not beyond doubt.

As far as the calculation of the thirty day period was concerned, with the Credit Agreements Act, the date of posting was viewed as the crucial moment on which such period started to run and not the date of receipt by the debtor. Section 11 of the Credit Agreements Act provided that thirty days had to elapse from the

¹⁹⁴³ The judgment of *Maron v Mulbarton Gardens (Pty) Ltd* 1975 4 SA 123 (W) 125D was based on the interpretation of the word 'inform' in section 13 (1) of the Sale of Land on Instalments Act and understood to imply that the notice had to reach the purchaser. Section 13 prevented a seller when faced with breach of contract by the purchaser to terminate the contract or institute action for damages unless he had by letter handed over to the purchaser and for which acknowledgment of receipt had been obtained or sent by registered post (it had to be sent to the purchaser's last known residential or business address (section 13 (1) of the Sale of Land and Instalments Act), informed the purchaser of the failure in question and made demand to the purchaser to carry out the obligation in question within a period stated in such demand being not less than thirty days and the purchaser failed to comply with such demand. The court in *Maharaj v Tongaat Development Corporation (Pty) Ltd* followed the view of the court in the *Maron v Mulbarton* matter *supra*, however, the Appellate Division, in *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 4 SA 994 (A), found that the notice must reach the purchaser. The issue of whether the notice must be received by the purchaser and/or debtor once again came before the court with the successor to the Sale of Land on Instalments Act, namely the Alienation of Land Act, in the matter of *Holme v Bardsley* 1984 1 SA 429 (W) where the court followed the Appellate Division's decision in *Maharaj v Tongaat Development Corp (Pty) Ltd supra*. The word 'inform' was also used in section 19 of the Alienation of Land Act (by virtue of the Alienation of Land Amendment Act 51 of 1983). However, a subsequent amendment to the Alienation of Land Act resulted in the word 'inform' being replaced by the word 'notify' in what was alleged to be an attempt to make receipt of the notice unnecessary (Van Rensburg ADJ and Treisman SH *The Practitioner's Guide to the Alienation of Land Act* 1984 205 and Otto 2006 90).

¹⁹⁴⁴ 2001 1 SA 145.

date of handing over of the section 11 notice¹⁹⁴⁵ or of posting.¹⁹⁴⁶ Otto,¹⁹⁴⁷ however, submitted that although section 11 prescribed the date of posting of the letter as the relevant date, it would seem that a notice allowing the credit receiver thirty days from receipt thereof would be in order, as this would give him a longer period to rectify his breach and was, according to the author, in accordance with the spirit of the Credit Agreements Act.

¹⁹⁴⁵ For which an acknowledgement of receipt had to be obtained (section 11 of the Credit Agreement Act).

¹⁹⁴⁶ The notice had to be posted by prepaid registered mail (section 11 of the Credit Agreements Act). The wording of the Act read 'from the date of such posting' and the Alienation of Land Act read 'from the date on which the notice was handed to the purchaser or sent to him by registered post'. It is interesting to note, however, that in *Sher v Crook* (11 June 1984 WLD 7183/84 – unreported) a case dealing with the notice period in the Alienation of Land Act, the court decided against such views. Grové and Otto were of the view that the beginning of the running of the notice period depended on the manner in which the notice was brought to the credit grantor's attention. If the notice was sent by registered post then, writers submitted, the period should be reckoned from the day following the day of posting; and if the notice was hand delivered the period should be reckoned from the day following the day of delivery (2002 44). The issue of the calculation of time periods in relation to a section 13 (1) notice of the Sale of Land on Instalments Act, the predecessor to the Alienation of Land Act, was canvassed in *Maharaj v Tongaat Development Corp (Pty) Ltd* 1976 4 All SA 618 (A). The Appellate Division found, that the period mentioned in the letter of demand began to run from the date on which it was received by the purchaser. The court held that it was always open to the party who posted the letter by registered post to take steps to verify whether delivery had been effected and, if it had, the date thereof. The court looked to the intention of the Legislature and held: 'In enacting section 13 (1), the overall intention of the Legislature was to afford reasonable protection to a purchaser who, by reason of failure on his part to fulfil an obligation under a contract, faces a threat by the seller to terminate it or to institute an action for damages. In prescribing a method whereby the seller is required to send a letter to the purchaser by registered post, the Legislature no doubt accepted that the method is almost invariably employed where important letters or other documents are sent to an addressee through the post. Whilst registered letters no doubt do go astray, there is, at least, a high degree of probability that most of them are delivered. The date of posting and the date of delivery can readily be established. If [...] the period [...] begins to run from the date of posting, an element of uncertainty, affecting the purchaser's protection, is introduced. The date of the letter would not necessarily be a reliable guide as to the date of posting. [...] it was suggested that the postmark would proclaim the date of posting. As to that, one knows from experience that postmarks are not always clearly decipherable. For various reasons, there is at times a not inconsiderable delay between the date of posting and the date of delivery. It is obviously important for a defaulting purchaser to know with certainty within what time the default is to be remedied by him. He would ordinarily have certainty if the period mentioned in the letter begins to run from the date of delivery thereof to him' (*Maharaj v Tongaat supra* at 622). The court in the *Marques* matter *supra* at 151. found that section 11 of the Credit Agreements Act differed fundamentally from section 13 (1) of the Sale of Land on Instalments due to its wording. Section 11 expressly provided that the thirty day period was to run from the date of handing over or posting. The court, rather, aligned itself with the reasoning in *Maron v Mulbarton Gardens (Pty) Ltd supra*. Here, that court, interpreting a clause in a contract which provided that the seller would be entitled to cancel the contract should the purchaser fail to pay an instalment timeously and further fail to make payment within seven days of the posting of a written notice sent to the purchaser by registered post requiring the purchaser to do so, found 'that the period of seven days is to be calculated from the date of posting and not from the day when the credit provider receives the notice, which seems to indicate that the parties did not intend to burden the Respondent with having to show that the credit provider received the notice' (333D).

¹⁹⁴⁷ Otto 1991 paragraph 29, cf by the same author 2001 TSAR 203.

5.5.1.4. Completing the Cause of Action

Strict compliance with the provisions of the Credit Agreements Act, more specifically section 11, was required by the courts for, *inter alia*, cancellation of the contract and recovery of the goods.¹⁹⁴⁸ The importance of a notice of demand has been held to be necessary to complete the cause of action of the plaintiff credit grantor.¹⁹⁴⁹ In *Credit Corporation of SA Ltd v Swart*,¹⁹⁵⁰ the court held that it had to be an averment by the credit grantor in its pleadings and had to form part of the *facta probanda* in an action for the return of goods. Even where the credit receiver was in *mora* and the credit agreement contained a *lex commissoria* that entitled the grantor to cancel the contract immediately, summons issued without the section 11 notice and the expiry of the period elapsing in terms of such notice would be excipiable. Accordingly, the following from Grové and Otto¹⁹⁵¹ is relevant:

The credit grantor will have to aver in his summons (and subsequently prove) that a notice of the correct tenor was supplied to the credit receiver in the prescribed manner. If the credit receiver rectifies his breach of contract within the prescribed period, the credit grantor's potential cause of action will be extinguished.

It appears that the courts insisted on a negative allegation as well. Where a creditor claimed cancellation of an agreement that fell outside the scope of the Credit Agreements Act¹⁹⁵² the court held that if it was not alleged in the summons that the Acts did not apply, the summons did not disclose a cause of action.¹⁹⁵³

¹⁹⁴⁸ Grové and Otto 2002 45.

¹⁹⁴⁹ *Fil Investments (Pty) Ltd v Levinson* 1949 4 SA 482 (W) 486. The court held at 486 that '[a] written demand is, therefore, a condition precedent to a right of action for recovery of possession of the car, and unless demand is made in terms of this section there is no right of action'. Cf also *Ex Parte Thorrold and Another supra*, De Jager 1981 72 and Otto 1991 paragraph 29.

¹⁹⁵⁰ 1959 1 SA 555 (O).

¹⁹⁵¹ 2002 45.

¹⁹⁵² And its predecessor the Hire-Purchase Act.

¹⁹⁵³ *Credit Corporation of SA Ltd v Swart* 1959 1 SA 555 (O), *Botha v Potch Motors (Eiendoms) Bpk* 1963 1 SA 279 (T) and Diemont and Aronstam 1982 189.

5.6. The National Credit Act

The trend in credit legislation globally is to curtail or essentially control creditors' rights and remedies when they seek recourse against debtors for breach of contract. One way of doing this is to ensure that creditors advise debtors of their default prior to being permitted to institute action against them. South Africa has been no exception. Usually, and in order to initiate the recovery process the creditor is required to notify and grant the debtor time to remedy the breach within a stated period.¹⁹⁵⁴ It is submitted that while the Act has 'refreshed' the procedures to be followed by credit providers upon breach by consumers, by, *inter alia*, placing the onus on credit providers to give notice of the consumers' breach to the consumers, such requirements are familiar to credit legislation in South Africa, as seen in the discussion to section 11 and section 12 of the Credit Agreements Act above¹⁹⁵⁵ and are not novel in our law.¹⁹⁵⁶

The National Credit Act however, also, imposes an obligation on the provider to draw the consumer's attention to the fact that he has a right to make use of certain alternative dispute resolution mechanisms.¹⁹⁵⁷ The consumer, if he reacts quickly to the notice and takes appropriate action can resolve or at least initiate dispute resolution proceedings to the over-indebtedness problems he may be experiencing.¹⁹⁵⁸ Failing which, however, the credit provider's remedies, once

¹⁹⁵⁴ Kelly-Louw 'Default Notices as required by the National Credit Act 34 of 2007' 2010 *SA Merc LJ* 568.

¹⁹⁵⁵ At paragraph 5.5.1.

¹⁹⁵⁶ Otto JM 'Notices in Terms of the National Credit Act: Wholesale National Confusion. *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors, Munich v BMW Financial Services, Starita v Absa Bank Ltd, First Rand Bank Ltd v Dhlamini*' 2010 *SA Merc LJ* 595.

¹⁹⁵⁷ Section 129, cf Kelly-Louw 2010 *SA Merc LJ* 568. For a discussion on dispute settlement other than debt enforcement cf Scholtz 2014 Chapter 13.

¹⁹⁵⁸ However, the words of Malan JA in *Nedbank Ltd and Others v The National Credit Regulator and Another* 2011 ZASCA 35 at paragraph 14 must be taken into account: 'One of the objects of the NCA is the provision of a consistent and accessible system of consensual dispute resolution. A notice in terms of s 129(1)(a), however, does not exclude the resolution of a dispute relating to a specific credit agreement in this manner. The purpose of a s 129(1)(a) notice is the resolution of a dispute and the bringing up to date of payments under a specific credit agreement. While it is a 'step' prior to the commencement of legal proceedings it is also the first 'step' the credit provider 'has proceeded to take ... to enforce that agreement' (s 86(2)). It does not exclude a debt review save in so far as it relates to the particular credit agreement under consideration. Nor does it exclude a general debt review pursuant to ss 83 and 85. Key to the construction of s 86(2) are the words 'has proceeded to take the steps' used in s 86(2). A 'step', amongst its meanings, includes 'an action or movement which leads to a result; one of a series of proceedings or measures' (*The Oxford Universal Dictionary Illustrated* (1965) sv 'step'). To 'proceed' means 'to go on with an action' and also 'with stress on the progress or continuance of the action' to 'go on or continue

the period indicated in the notice has elapsed and the consumer has not reacted, are much the same as they were in the previous credit legislative dispensation, supported, as always, by the common law backdrop.¹⁹⁵⁹

While debt review is not examined in this thesis, a discussion on remedies cannot be complete without at least acknowledging that besides the conventional methods of enforcement: namely, making demand, issuing summons, obtaining judgment and where necessary attaching and selling property of the consumer, the Act has provided the consumer with a procedure to circumvent a complete deterioration of his financial affairs by managing it through the process of debt review, by declaring himself over-indebted and thus availing himself of the sections in the Act dealing with his rights in this regard. Otto and Otto¹⁹⁶⁰ state that there is a certain amount of interplay between the Act's provisions regarding applications for debt review and proceedings towards enforcement of the consumer's contractual obligations.¹⁹⁶¹

Where a credit provider has proceeded with enforcement of the agreement, that is by the issue of a section 129 (1)(a) notice, due to a consumer's default, the Supreme Court of Appeal in *Nedbank v National Credit Regulator*¹⁹⁶² declared that a consumer may not apply for debt review in respect of that agreement.¹⁹⁶³ This does not prevent a consumer for applying for debt review under other credit agreements and a court may still refer the matter relating to that particular credit

what one has begun; to advance from the point already reached' (*The Oxford Universal Dictionary Illustrated* (1965) sv 'proceed'). By the use of the words 'has proceeded' and 'steps' an ongoing process is indicated of which the s 129(1)(a) notice is the first 'step' (Flemming 143). It is the only step expressly mentioned in s 129 although the other 'steps' or requirements referred to in s 130 are incorporated by reference (*Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) paras 29-31). Section 129(1)(b)(i) makes it clear that the notice in terms of s 129(1)(a) is a necessary 'step' before legal proceedings may be commenced. It follows that by giving the notice envisaged by s 129(1)(a) the credit provider 'has proceeded to take the steps contemplated in section 129 to enforce that agreement': a debt review relating to that specific agreement is thereafter excluded'.

¹⁹⁵⁹ The remedies are discussed in detail in Chapter 6 *infra*.

¹⁹⁶⁰ 2013 217.

¹⁹⁶¹ *BMW Financial Services, South Africa (Pty) Ltd v Donkin* 2009 6 SA 6 3 (KZD), Stadlers 'Under Debt Review and Sued: To Defend or not to Defend?' Jan/Feb 2010 DR 48 and Roestoff M 'Enforcement of a Credit Agreement where the Consumer has Applied for Debt Review in terms of the National Credit Act 34 of 2005' 2009 *Obiter* 430.

¹⁹⁶² 2011 3 SA 581 (SCA).

¹⁹⁶³ Section 86 (2) of the Act. Cf Van Heerden in Scholtz 2014 paragraph 12.4.11/ Van Heerden and Otto 2007 *TSAR* 667, Van Heerden and Coetzee *Obiter* 756 and Otto 2012 *TSAR* 133.

agreement to a debt counsellor¹⁹⁶⁴ or to declare the credit provider reckless.¹⁹⁶⁵ It must be noted, however, that the National Credit Amendment Act has reversed the finding of the Supreme Court of Appeal by providing for an amendment to section 86 (2) that delivery of a section 129 (1)(a) notice will not serve to exclude the specific credit agreement in respect of which it was delivered, from debt review but only if in the event that the credit provider has proceeded to take the steps contemplated in section 130.¹⁹⁶⁶

In addition thereto, where a credit provider receives a notice of court proceedings in connection with the suspension of an agreement on the ground of over-indebtedness¹⁹⁶⁷ or where a credit provider receives a notice from a debt counsellor with whom a consumer has lodged an application for debt review, or reckless credit,¹⁹⁶⁸ the credit provider may not litigate to enforce the agreement¹⁹⁶⁹ or any security thereunder until the consumer is in default under that particular agreement and one of the following has occurred:¹⁹⁷⁰

- (i) The debt counsellor has rejected the application for debt review;
- (ii) the court has determined that the consumer is not over indebted;
- (iii) a court has indeed made an order of rearrangement, or the consumer and credit provider have come to an agreement where rearranging the consumers obligations and all of the consumer's obligations under the credit agreements rearranged as such have been fulfilled; or
- (iv) the consumer defaults in terms of the rearrangement itself.

If a consumer defaults in terms of the rearrangement a credit provider does not need to apply to court to have the rearrangement order set aside but may enforce his rights in terms of the agreement or security in terms of section 88 (3).¹⁹⁷¹

¹⁹⁶⁴ Section 85 of the Act.

¹⁹⁶⁵ Section 83 of the Act and cf Otto and Otto 2013 108.

¹⁹⁶⁶ Section 26 of the National Credit Amendment Act.

¹⁹⁶⁷ In terms of section 85 of the Act.

¹⁹⁶⁸ In terms of section 83 of the Act.

¹⁹⁶⁹ Debt review applications are not terminated by the effluxion of time. Even where a debt counsellor has been inactive for a long period of time, a credit provider may not enforce an agreement until he has terminated the debt review by means of a section 86 (10) notice. Cf *Coetzee v Nedbank Ltd* 2011 2 SA 372 (KZD).

¹⁹⁷⁰ Otto and Otto 2013 108.

¹⁹⁷¹ *Firstrand Bank Ltd v Fillis* 2010 ZAECPHC 50.

Where a consumer under debt review defaults under an agreement which is under debt review, this entitles the credit provider to give notice to terminate the review, however, he must wait at least sixty business days.¹⁹⁷² The section 86 (10) notice must be given to the consumer, the debt counselor and the National Credit Regulator.¹⁹⁷³ The credit provider may then proceed with litigation against the consumer, subject to the magistrates' court or high court¹⁹⁷⁴ hearing the matter, having a discretion to order resumption of the debt review.¹⁹⁷⁵

5.6.1. Section 129

The National Credit Act provides considerably greater consumer protection than that afforded by its predecessors, the Credit Agreements Act and the Usury Act.¹⁹⁷⁶ Van Heerden¹⁹⁷⁷ posits that it is inevitable that such protection is secured procedurally and it is therefore not surprising that the Act deals extensively with debt enforcement on a procedural level.

Consumer protection provisioned for by the Act incorporates debt relief measures aimed at preventing over-indebtedness and reckless credit.¹⁹⁷⁸ However, these topics are not dealt with in this thesis and the consumer protection measures that will be discussed in the following pages are the required procedures that a credit provider must abide by before it may institute proceedings against the consumer in the event of breach in respect of a consumer who is not subject to debt review. That is by taking statutorily compelled procedural steps in the form of advance notice in an attempt to encourage parties to iron out their differences before seeking court intervention.¹⁹⁷⁹

¹⁹⁷² Otto and Otto 2013 109.

¹⁹⁷³ For a full discussion of Roestoff 2009 *Obiter* 430.

¹⁹⁷⁴ *Collette v Firstrand Bank Ltd* 2011 4 SA 508 (SCA) paragraph 17.

¹⁹⁷⁵ Section 86 (11) of the Act. For a full discussion on the section 86 (11) notice please see Otto and Otto 2013 109 – 111, Van Heerden C and Coetzee H 'Perspectives on the Termination of Debt Review in terms of the National Credit Act 34 of 2005' 2011 *PER* 37 and generally for a discussion of over indebtedness and reckless credit Van Heerden in Scholtz 2014 Chapter 11.

¹⁹⁷⁶ Van Heerden in Scholtz 2014 paragraph 12.1.

¹⁹⁷⁷ *Ibid.*

¹⁹⁷⁸ *Ibid.*

¹⁹⁷⁹ The idea was largely drawn from Van Heerden in Scholtz 2014 paragraph 12-1.

It is submitted that there are three ways in which a credit provider may satisfy the requirement for notification of default by the consumer. The first is through section 129 (1)(a) notice which is discussed extensively below. The second is through a notice in terms of section 86 (10),¹⁹⁸⁰ which notice relates to debt review. While debt review is not examined in this thesis, a brief look at section 86 (10) is taken in the paragraph below, in order to differentiate this notice from the section 129 notification procedure and to place the section 86 (10) notice in context as a pre-enforcement notice in respect of a consumer who is under debt review. Thirdly, as has previously been submitted,¹⁹⁸¹ a credit provider may issue a section 127 (7) default notice when faced with non-payment by the consumer in relation to the outstanding amount post a sale of surrendered goods as contemplated in section 127, in relation to secured loans, instalment and lease agreements. It must be pointed out that not all three notices relate to default of a consumer under all credit agreements as defined by the Act. This is because a section 86 (10) notice is a specific notice to be used only when a consumer is in default under a credit agreement that is under debt review in terms of the Act and section 127 (7) is a notice to be used only in relation to a notice requesting the balance of payment under an already repudiated agreement. So it is only a section 129 (1)(a) notice which is the default notice required to be issued by a credit provider when a consumer is in breach of a credit agreement and in order to enforce the agreement through the litigation process, whether by way of cancellation or otherwise.

Where a consumer is in default under a credit agreement that is being reviewed in terms of the Act, the credit provider in respect of that agreement may give notice in terms of section 86 (10) to terminate the review in the prescribed manner¹⁹⁸² to the consumer, the debt counsellor and the National Credit Regulator.¹⁹⁸³ The credit provider may give this notice at any time but at least

¹⁹⁸⁰ The Act refers to section 86 (9), however, this is an obvious typing error and in fact the National Credit Amendment Act proposes to amend this error (cf section 33 of the National Credit Amendment Act).

¹⁹⁸¹ Cf paragraph 5.3.4.1 *supra*.

¹⁹⁸² It is submitted that the prescribed manner would be in terms of section 129 read with section 130.

¹⁹⁸³ Section 86 (10). Some detail has been provided in the previous paragraph in relation to the section 86 (10) notice, cf paragraph 5.6 *supra*.

sixty business days must have passed after the date on which the consumer applied for debt review.¹⁹⁸⁴ Thus where a consumer's debt is being reviewed a credit provider will have to wait seventy business days¹⁹⁸⁵ before it may terminate the credit agreement. This would be sixty days from the date application is made for debt review and ten days after a notice is sent. It is submitted that the provider may circumvent the last ten working days (of the seventy) by issuing the notice ten days before the sixty day period, thereby reducing the days to sixty *in toto*.¹⁹⁸⁶ The National Credit Amendment Act amends section 86 (10) of the Act and provides that a credit provider may not terminate an application for debt review if such application has already been filed in a court or in a Tribunal.¹⁹⁸⁷

In terms of section 129 (1)(a) of the Act, when a consumer is in default under a credit agreement, the credit provider may¹⁹⁸⁸ 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.¹⁹⁸⁹ Section 129 does not distinguish between credit agreements and it is submitted that all credit agreements, that fall under the auspices of the Act, except where section 86 (10) and section 127 (7) are applicable, require a section 129 (1)(a) notice to be issued by the credit provider upon default by the consumer.¹⁹⁹⁰ A notice contemplated in terms of section 129 or 86 (10) is obligatory if a credit provider wishes to commence any legal

¹⁹⁸⁴ Section 86 (10).

¹⁹⁸⁵ Between 3 and 3 ½ months.

¹⁹⁸⁶ It is important to note that a magistrates' court or a high court may order that the debt review resume on any conditions which the court considers just and equitable in the circumstances. This means that the credit provider may thus be deprived of its right to terminate the agreement despite it having taken the correct procedural steps to do so (section 86 (11)).

¹⁹⁸⁷ Section 26 of the National Credit Amendment Act.

¹⁹⁸⁸ The word 'may' is rather misleading as the notice is a requirement for enforcement. The legislature has not taken the opportunity to amend the word 'must' in the National Credit Amendment Act, however, cf also Van Heerden's similar comments in Scholtz 2014 12.4.2 and Otto and Otto 2013 112 – 3 in this regard. Cf the discussion on the possible significance of the use of the word 'may' in paragraph 5.6.1.25.5.1.1 *infra*.

¹⁹⁸⁹ Section 129 (1)(a).

¹⁹⁹⁰ Van Heerden refers to section 129 as a 'gateway' to debt enforcement (in Scholtz 2014 paragraph 12.4.2).

proceedings to enforce the agreement, whether in terms of specific performance or cancellation.¹⁹⁹¹

Where a credit agreement has been made subject to a debt restructuring order or to proceedings in court which may result in a debt restructuring order, the notice in terms of section 129 (1)(a) is not necessary. The provisions of section 129 (1) are, in this regard, expressly qualified by the provisions of section 129 (2), as the latter section specifically excludes the application of section 129 (1) to a credit agreement that is subject to a debt restructuring order or to proceedings in a court that could result in such an order.¹⁹⁹²

¹⁹⁹¹ Section 129 (1)(b) and *Standard Bank of South Africa Ltd v Van Vuuren* 2009 5 557 (T) 560, *ABSA Bank Ltd v De Villiers* 2009 3 SA 421 (SEC), *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) and *Munien v BMW Financial Services (SA) (Pty) Ltd* 2009 ZAKZDHC 6. For a discussion on this case cf Van Heerden CM and Coetzee H 'Marimuthu Munien v BMW Financial Services (SA) (Pty) Ltd' unreported case no 16103/08 (KZD) *PER* 12 4 Potchefstroom 2009. Application for sequestration does not constitute enforcement of a debt in terms of the Act (*Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (GSJ)). Cf *Naidoo v ABSA Bank Ltd* 2010 4 SA (SCA) where the court held that a credit provider need not comply with the procedure provided for in section 129 (1)(a) before instituting sequestration proceedings against a consumer because such proceedings are not to enforce a credit agreement. Where a credit provider has not cancelled the agreement, then a consumer who is in default under that credit agreement may reinstate the credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement (section 129 (3)(a)). The National Credit Amendment Act, removes the words 'of re-instatement' and changes this section to state 'up to the time the default was remedied'. This appears to be a fair change in that the consumer cannot be charged with default charges until such time as his credit facilities or agreement have been reinstated on the credit provider's system, for example, but only until such time as he has remedied his default (this is as opposed to the old section 12 of the Credit Agreements Act, which entitled the credit grantor to re-instate the contract where the grantor had cancelled). After he has paid these amounts, he may take possession of the property if it had been repossessed by the credit provider pursuant to an attachment order (section 129 (3)(b)). The only type of attachment order that could be implied is an interim attachment order. The very important judgment of *Abisa Bank v De Villiers supra* is of bearing here. A consumer is, however, prevented from re-instating a credit agreement where the property has been sold pursuant to an attachment order (section 129 (4)(a)(i)); where the consumer has surrendered the property in terms of section 127 (section 129 (4)(a)(ii)); where a court order enforcing the agreement has been executed (section 129 (4)(b)) or where the credit agreement has been terminated in terms of section 123 (section 129 (4)(c)).

¹⁹⁹² Section 129 (2). Cf *Standard Bank of South Africa Ltd v Kruger* 2010 ZAGPJHC 28 at paragraph 26, *Standard Bank of South Africa Ltd v Pretorius* 2010 4 SA 635 (GSJ), *Firststrand Bank Ltd v Evans* 2010 ZAECPHC 55, *Firststrand Bank Ltd v Collett* 2010 6 SA 351 (ECG) and *SA Taxi Securitisation (Pty) Ltd v Nako and Others* 2010 ZAECBHC 4.

5.6.1.1. Purpose of the Section 129 (1)(a) Notice

The Constitutional Court in *Kubiyana v Standard Bank of South Africa (Pty) Ltd*¹⁹⁹³ stated that the purpose of section 129 is two-fold, firstly it serves to ensure the attention of the consumer is sufficiently drawn to his default and secondly it enables the consumer to be empowered with knowledge of the variety of options he may utilise in order to remedy the default. The section 129 (1)(a) notice also places a duty on the credit provider to inform the consumer of the possible assistance that there is at his disposal before legal action will be instituted and to encourage consumers to approach debt counsellors as soon as possible in order to assist them to develop and agree on a plan to bring their arrear payments under their credit agreements up to date.¹⁹⁹⁴ It is also an attempt by the legislature to provide for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.¹⁹⁹⁵ Section 129 (1)(a) deals with one particular credit agreement only and seeks to bring about a resolution to that agreement.¹⁹⁹⁶ It does not deal with a general restructuring of the debts of the consumer as envisioned in sections 86 and 87 of the Act.¹⁹⁹⁷

It is submitted that it is not only section 129 but the structure of the Act as a whole, which demonstrates the inclination of the legislature to have the credit relationship prevented from immediately plunging into a debt collection scenario and rather attempting to cure the problem prior the litigation stage, by providing the consumer with opportunities to help himself to meet his obligations prior to

¹⁹⁹³ 2014 ZACC 1 at paragraph 22.

¹⁹⁹⁴ Kelly-Louw 2010 SA Merc LJ 570.

¹⁹⁹⁵ Section 3 (i), Kelly-Louw 2010 SA Merc LJ 570, cf also *Nedbank Ltd and Others v The National Credit Regulator* 2011 3 SA 881 SCA, *Dwenga v Firstrand Bank Ltd and Another* 2011 ZAECELLC 13 paragraph 26 and Van Heerden in Scholtz 2014 12.4.2.

¹⁹⁹⁶ *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 5 SA 618 (KZD) paragraph 12, *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD) paragraph 10 and *National Credit Regulator v Nedbank Ltd and Others* 2009 6 SA 295 (GNP) 319A.

¹⁹⁹⁷ *BMW Financial Services (SA) (Pty) Ltd v Mudaly supra*, *BMW Financial Services (SA) (Pty) Ltd v Donkin supra*, *Nedbank Ltd and Others v The National Credit Regulator* 2011 3 SA 581 (SCA), *Van Zyl v ABSA Bank Ltd* 2013 ZAGPPHC 357 and *Firstrand Bank Ltd v Govender* 2013 ZAECPHC 21 at paragraph 15.

the issue of summons.¹⁹⁹⁸ The aim of the provision is to facilitate the consensual resolution of credit agreement disputes.¹⁹⁹⁹

5.6.1.2. When a Section 129 (1)(a) Notice is Deemed Necessary

Section 129 (1)(a) makes use of the word ‘may’ as opposed to the word ‘must’. It is submitted that the dispatch of a notice by the credit provider is not obligatory in every instance of default by the consumer, in other words, there is no compulsion on the credit provider to chase up on a dilatory credit consumer; rather the credit provider *may* do so by choice.²⁰⁰⁰ However, should the provider wish to commence legal proceedings against the consumer for his default – the credit provider is then obliged by virtue of section 130 (1)(a) as read with section 129 (1)(b) to send out a notice in terms of section 129 (1)(a), thus providing an opportunity to the consumer to agree on a plan to bring the payments under the agreement up to date or provide the necessary period within which the parties resolve any dispute under the agreement.²⁰⁰¹ The Supreme Court of Appeal has

¹⁹⁹⁸ Whether the Act has succeeded in so doing, remains questionable. Many practical problems have arisen in implementing the Act. For example, due to the restrictions on fees that debt counselors may charge, many companies have set up advisory bodies akin to debt counseling but which are not debt counselors in terms of the Act. Consumers are ‘duped’ into thinking they are with a debt counselor but in fact are not. Secondly, debt counselors are not sufficiently trained to assist consumers, sometimes with sophisticated financial problems and furthermore consumers are not fully conversant with their rights. To advise an uneducated consumer in a default notice, that he is entitled to go to a debt counselor, alternative dispute resolution agent, consumer court or ombudsman with jurisdiction does not really assist a consumer who, for example, has no access to the internet or must attend work from eight to five daily and is involved with manual labour as opposed to being office/computer bound. The onus here would be on the National Credit Regulator to develop an ‘outreach’ programme and bring trained debt counselors to the consumer. Furthermore, it is submitted that twenty days from date of posting is an insufficient period within which a consumer can react to such notice.

¹⁹⁹⁹ Per Cameron J in *Sebola v Standard Bank of South Africa Ltd* 2012 ZACC 11 paragraph 46.

²⁰⁰⁰ While at first blush this may sound odd, in practise a credit provider may not react with a section 129 (1)(a) notice at every delay in payment by the consumer. Of course a credit provider would be advised not to delay in enforcing a credit agreement as his fiscal indiscipline may lead to him eventually not being capable of recouping the debt, for example due to prescription, the running of the *in duplum* rule and insolvency or liquidation. It is interesting to note that the English legislature has taken the opposite stance and in fact obliges the creditor, by virtue of the Consumer Credit Act, to serve a default notice on the debtor almost as soon as the debtor falls into arrears. Cf paragraph 6.8 *infra* for a more detailed discussion.

²⁰⁰¹ *Munien v BMW Financial Services (SA) (Pty) Ltd supra*, *Beets v Swanepoel* 2010 JOL 26422 (NC), *ABSA Bank Ltd v Magiet NO* 2013 ZAWCHC 7, *Buys v Changing Tides 17 (Pty) Ltd* 2013 ZAWCHC 150 and *SA Taxi Development Finance (Pty) Ltd v Makhangi* 2013 ZA GPJHC 195.

held that delivery of a section 129 (1)(a) notice is a mandatory requirement prior to litigation to enforce a credit agreement.²⁰⁰²

While the word ‘may’ might suggest that the credit provider, when faced with a defaulting debtor is not obliged to send a section 129 notice, it *is* so obliged if it intends to pursue the enforcement of the contract, due to the use of the word ‘and’ at the end of section 129 (1)(a), which introduces section 129 (1)(b). Without the notice, section 129 prohibits the credit provider from commencing legal proceedings, without which it may not be able to enforce the credit agreement, whether by specific performance or cancellation.²⁰⁰³ Section 130 (3) states, *inter alia*, that where a credit consumer is in default, despite any provision of law or contract to the contrary in any proceedings commenced in court in respect of a credit agreement which falls under the Act, the court may only determine a matter if it is satisfied that the procedure required by section 129 – namely a notice in writing, is complied with.²⁰⁰⁴ Visagie²⁰⁰⁵ states that section 129 ‘obliges a credit provider to send a written notice’. The following view from Otto²⁰⁰⁶ is also relevant: ‘The word ‘may’ in section 129 (1) is misleading, because the credit provider may not commence any legal proceedings to ‘enforce’ the agreement unless the notice referred to has been provided.²⁰⁰⁷ Accordingly, it is submitted that the notice is compulsory for enforcement of the agreement, but the section does not statutorily compel a credit provider to pursue a defaulting consumer. Effectively the legislature has added a pre-litigation layer to the enforcement process.²⁰⁰⁸

In *African Bank Ltd v Myambo*²⁰⁰⁹ the court held that ‘by virtue of section 129 (1)(b)(i) the credit provider’s cause of action is not complete unless the section

²⁰⁰² *Nedbank Ltd v The National Credit Regulator and Another* 2011 3 SA 581 (SCA) paragraph 8.

²⁰⁰³ *Rossouw and Another v Firststrand Bank Limited and Another* 2010 ZASCA 130 and *Investec Bank v Ramurunzi* 2014 ZASCA 67. See, however, the exceptions discussed in paragraph 5.3.4.1 *supra*.

²⁰⁰⁴ Section 130 (1)(a) of the National Credit Act.

²⁰⁰⁵ ‘Collecting your Debt against the Odds?’ 2006 *De Rebus* 20 21.

²⁰⁰⁶ 2010 103.

²⁰⁰⁷ Section 129 (1)(b).

²⁰⁰⁸ Van Heerden in Scholtz 2014 12.4.2.

²⁰⁰⁹ 2010 6 SA 298 GNP at paragraph 20.

129 notice [...] has been given'. In *Beets v Swanepoel*²⁰¹⁰ the court distinguished between a peremptory notice-to-sue requirement and a statutory pre-enforcement notice. The court held that with respect to a statutory pre-enforcement notice (such as the section 129 (1)(a) notice) which forms part of the cause of action, condonation of non-compliance is not competent. However, it is submitted that these statements, in light of the effects of section 130 (4)(b) of the Act cannot be viewed as entirely correct, as section 130 (4)(b) allows the non-compliance with section 129 (1)(a) to be cured. Section 130 (4)(b) is discussed in detail below.²⁰¹¹

5.6.1.3. The Effects of Section 130 (4)(b)

In *Standard Bank of South Africa Ltd v Rockhill*²⁰¹² the court was forced to consider the effects of section 130 (4)(b) on non-compliance by the credit provider of the section 129 (1)(a) notice. In this matter, the defendants, faced with a summary judgment application, disputed compliance with section 129 (1)(a) by the provider on the basis that they had not received the notices that were sent by registered post.²⁰¹³ They agreed that in terms of the mortgage bond agreement, letters and notices posted by the provider would be regarded as having been received within fourteen days after posting and that the provider had therefore approached the court prematurely.²⁰¹⁴ The court held that section 129 (1)(a) is an impediment to commencing any legal proceedings to enforce a credit agreement and in the event of non-compliance with the subsection, 'the court's hands are tied and it must act in accordance with section 130 (4)(b)'.²⁰¹⁵

Thus in spite of the mandatory wording of section 129 (1), whether it involves the section 129 (1)(a) notice not having been sent at all or whether it has, for instance, been sent to an incorrect address, non-compliance is not fatally

²⁰¹⁰ 2010 JOL 26422 NC at paragraph 8, 18 and 19.

²⁰¹¹ Paragraph 5.6.1.35.5.1.2 *infra*.

²⁰¹² 2010 5 SA 252 (GSJ).

²⁰¹³ Paragraph 4.

²⁰¹⁴ Paragraphs 6 and 7.

²⁰¹⁵ Paragraphs 17 and 18.

defective to a credit provider's pleadings.²⁰¹⁶ That is so due to the statutory obligation on the court to make an order in terms of section 130 (4)(b) which allows for the matter to be adjourned and *resumed* after the steps ordered by the court, have been taken.²⁰¹⁷

Van Heerden and Boraine²⁰¹⁸ examine some of the practical effects of section 130 (4)(b) in detail. The authors²⁰¹⁹ submit that where a section 129 (1)(a) notice was not sent at all prior to commencement of legal proceedings and no allegation appears in the particulars of claim that such notice was sent, there will be no ground for any amendment of the particulars of claim to the effect that the notice had been sent.

When the matter is undefended, they submit that a court will not be able to dismiss the application for default judgment on the basis of non-compliance with section 129 (1)(a) but will rather be obliged to make an order in terms of section 130 (4)(b).²⁰²⁰ In the Magistrates' Court, the authors continue, the application for default judgment will most likely be returned with a query indicating that the plaintiff must complete the steps in terms of section 129 (1)(a) before the court will consider the matter.²⁰²¹ Where, however, default judgment is applied for in the High Court, the application will be postponed, most likely they suggest, *sine die*, and the plaintiff will be ordered to complete the steps set out in section 129 (1)(a).²⁰²² Practically, this means that the plaintiff will have to deliver a section 129 (1)(a) notice to the defendant and that after compliance with the court's order, the application for default judgment may (depending on whether it is a Magistrates' Court or High Court matter) be re-submitted or re-enrolled and resumed.²⁰²³ The credit provider's particulars of claim will then have to be amended prior to re-applying for default judgment to reflect the delivery of a

²⁰¹⁶ Van Heerden C and Boraine A 'The Conundrum of the Non-Compulsory Compulsory Notice in terms of Section 129 (1)(a) of the National Credit Act' 2011 *SA Merc LJ* 54.

²⁰¹⁷ *Ibid.*

²⁰¹⁸ 2011 *SA Merc LJ* 54.

²⁰¹⁹ 2011 *SA Merc LJ* 56.

²⁰²⁰ 2011 *SA Merc LJ* 56.

²⁰²¹ *Ibid.*

²⁰²² *Ibid.*

²⁰²³ *Ibid.*

section 129 (1)(a) notice as ordered.²⁰²⁴ In *Absa Bank Ltd v Mkhize*²⁰²⁵ the court found that the adjournment contemplated by section 130 (4)(b) of the Act is one which takes place because the court has found that there has not been compliance with section 129 or that the court is not satisfied that there has been such compliance.²⁰²⁶ The matter was heard on appeal in *Absa Bank Ltd v Mkhize*²⁰²⁷ and the court upheld Olsen AJ's view in the court *a quo*, that where a court is faced with allegations that the notice was not brought to the attention of the consumer, it must adjourn the proceedings in terms of section 130 (4)(b).²⁰²⁸

Where the section 129 (1)(a) notice had indeed been sent but the credit provider has failed to allege that fact in its particulars of claim, Van Heerden and Boraine²⁰²⁹, suggest that the problem may be addressed by an amendment of the particulars of claim once the plaintiff realises its mistake. Where the matter is undefended and the particulars of claim contain no allegation regarding compliance with section 129 (1)(a) at the time that the plaintiff applies for default judgment, the court will be obliged to act in accordance with section 130 (4)(b).²⁰³⁰ A court will, in such instance, not dismiss the application for default judgment, but if it is a Magistrates' Court matter, most likely return the request for default judgment with a query requiring the plaintiff to first complete the steps as prescribed by section 129 (1)(a) before it may consider the application for default judgment.²⁰³¹ If it is a High Court matter the court will have no option other than to adjourn the application for default judgment, mostly likely *sine die* and direct the plaintiff to complete the steps set out in section 129 (1)(a).²⁰³² Due to the fact that in the latter instance the plaintiff had actually sent the notice (and thus complied with section 129 (1)(a)) but merely failed to make the appropriate allegation in its particulars of claim, it will not be necessary to re-deliver such a notice and the plaintiff will then merely have to effect an amendment to the

²⁰²⁴ SA Merc LJ 57.

²⁰²⁵ 2013 ZASCA 139.

²⁰²⁶ *Absa Bank Ltd v Mkhize* at paragraph 59. The court was faced with three applications for default judgment, the tract and trace report revealed that the registered letters had been returned unclaimed (at paragraph 2).

²⁰²⁷ 2014 1 All SA 1 (SCA).

²⁰²⁸ See paragraph 48.

²⁰²⁹ 2011 SA Merc LJ 57.

²⁰³⁰ *Ibid.*

²⁰³¹ *Ibid.*

²⁰³² Van Heerden and Boraine 2011 SA Merc LJ 58.

particulars of claim indicating its compliance, before it will be able to re-submit or re-enrol the application for default judgment.²⁰³³

In the event that the matter becomes defended and where the plaintiff failed to make an allegation that there was compliance in terms of section 129 (1)(a), either because it simply did not comply or because it forgot to make the necessary allegation despite it actually having delivered a section 129 (1)(a) notice, and the defendant disputes such compliance, Van Heerden and Borraine²⁰³⁴ submit that in application proceedings the issue of non-compliance, whether it is raised as a result of the absence of an allegation of compliance or to dispute an allegation of compliance, will usually be raised by means of a point *in limine* in accordance with Magistrates' Court rule 29 (4).²⁰³⁵ The authors go on to submit that where no allegation regarding compliance of section 129 (1)(a) is made in the founding affidavit, a court will be obliged to uphold the point *in limine*, but will be restricted to the provisions of section 130 (4)(b) as regards the order that it may make and where it transpires that no section 129 (1)(a) notice had been delivered, a court will have no discretion but will have to order that the matter be adjourned and that the plaintiff complete the steps in terms of section 129 (1)(a).²⁰³⁶ In which event the credit provider will have to deliver a section 129 (1)(a) notice to the respondent and the matter may resume after expiry of the relevant number of days after delivery.²⁰³⁷ Assuming the consumer does not respond to the proposals in the notice or responds by rejecting them, the credit provider will then, most likely, have to file a supplementary affidavit indicating its compliance with section 129 (1)(a).²⁰³⁸

²⁰³³ *Ibid.*

²⁰³⁴ 2011 SA Merc LJ 56-7.

²⁰³⁵ After section 33 (4) the rules provided that if in any pending action it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before the evidence is led or separately from any other question, the court may make an order directing the disposal of such question and such manner as it may deem fit and it may order that all further proceedings be stayed until such question has been disposed of. The court must, at the request of any party, make such order unless it appears that the questions cannot conveniently be decided separately.

²⁰³⁶ Van Heerden and Borraine 2011 SA Merc LJ 59.

²⁰³⁷ *Ibid.*

²⁰³⁸ *Ibid.*

If the section 129 (1)(a) notice was in fact delivered but the necessary allegation was not made in the pleadings and the credit provider draws the court's attention to the fact that a section 129 (1)(a) notice had in fact been delivered prior to the initiation of the enforcement proceedings, then in such instances, the authors²⁰³⁹ suggest that because actual compliance with section 129 (1)(a) did occur, a court will not be obliged to make an order in terms of section 130 (4)(b) and it will not be necessary to re-deliver the section 129 (1)(a) notice, but the court will most likely require a supplementary affidavit by the credit provider dealing with the fact that the section 129 (1)(a) notice was duly delivered prior to enforcement.²⁰⁴⁰

Where the necessary allegation of compliance with section 129 (1)(a) is made in the founding papers but such compliance is disputed by the consumer because, for example, it is alleged that the notice was sent to the incorrect address, the court may either find that there was due compliance or, if the court finds that despite the allegation of compliance there was indeed not proper compliance with section 129 (1)(a) the only order that it is empowered to make, submit Van Heerden and Borraine,²⁰⁴¹ is in terms of section 130 (4)(b) and that is to adjourn the matter and indicate the steps to be completed by the credit provider before the matter may be resumed. The credit provider will then be obliged to deliver a section 129 (1)(a) notice to the correct address and the matter will resume once the relevant time limit has expired and the consumer has failed to respond to the proposals in the notice or has rejected same.²⁰⁴² Supplementary papers would have to be submitted dealing with the issues of compliance with section 129 (1)(a) pursuant to the section 130 (4)(b) order before the matter may resume.²⁰⁴³

²⁰³⁹ 2011 SA Merc LJ 57.

²⁰⁴⁰ It is submitted that evidence may be led or an amendment to the particulars of claim or declaration may suffice.

²⁰⁴¹ 2011 SA Merc LJ 60.

²⁰⁴² *Ibid.*

²⁰⁴³ Van Heerden and Borraine examine the issue of a section 130 (4)(b) notice when the parties deal with an exception and in the event of summary judgment. They argue, in the event of an exception that where there has been non-compliance with section 129 (1)(a), the consumer would be able to demonstrate prejudice by, for instance, arguing that section 129 (1)(a) affords him certain rights that may have the effect of resolving the dispute between the parties and that he was not offered the opportunity to exercise those rights, due to the fact that an exception based on a mere technical ground would not otherwise succeed unless the excipient can show prejudice (*Lobo Properties (Pty) Ltd v Express Lift CO (SA) (Pty) Ltd* 1961 1 SA 704(C)). It was held in *Beets v Swanepoel* 2010 JOL 2642 22 (NC) that compliance with section 129 (1)(a), which requires the statutory pre-enforcement notice, forms part of the cause of action and that in the

As correctly pointed out by Van Heerden and Borraine,²⁰⁴⁴ when a consumer receives a section 129 (1)(a) notice pursuant to a section 130 (4)(b) order and takes up the proposals which must be mentioned in such a notice, the cost and delay of non-compliance with section 129 (1)(a) prior to enforcement are the side-effects and obvious deterrent which a credit provider would consider rather than instituting action prior to delivering a section 129 (1)(a) notice. The fact, is, that section 130 (4)(b) together with the new line of cases in this regard changes the dynamic of the pre-notification compliance, which was necessary to complete the cause of action, as with the section 11 of the Credit Agreements Act. Section 130 (4)(b) would greatly assist a credit provider who is facing prescription and requires speedy issue and service of summons in order to prevent same.²⁰⁴⁵

It is submitted that the operation of section 130 (4)(b) and its consequences are not 'absurd',²⁰⁴⁶ and that same do not defeat the objectives of section 129 (1)(a), being the avoidance of costly litigation by resolving the dispute by bringing payments under the credit agreement up to date, but prevents unfairness to the credit provider whose rights also need to be protected by virtue of credit

absence of such a legal notice, no enforcement is possible. The lack of an averment of compliance with section 129 renders a particular set of particulars of claim *excipiable* (paragraph 13, Van Heerden and Borraine 2011 SA Merc LJ 59) With regards summary judgment application, in the court in *Standard Bank of South Africa Ltd v Van Vuuren* 2009 5 SA 557 (T) held that the respondent in an application for summary judgment raises a *bona fide* defense to the plaintiff's claim where it alleges that there was no proper service of the mandatory notice in terms of section 129 of the National Credit Act prior to the institution of proceedings (paragraph 11) Evidently the notice had been served on an address by attaching same to the main gate of a property which address was incorrect and unknown to the Defendant (paragraph 6). In *Standard Bank of South Africa Ltd v Rockhill supra* the court referred to the Van Vuuren matter but disagreed with the decision and held that the court in the Van Vuuren matter did not deal with the provisions of sections 130 (3) and 130 (4) of the Act (paragraph 16). The court in Rockhill indicated that while non-compliance with section 129 is an impediment to commencing any legal proceedings to enforce the credit agreement, it does not constitute a *bone fide* defense of the nature envisaged by rule 32 (3)(b) and held: '[T]he fact that section 130 (4)(b) envisages the resumption of the proceedings following the court had he made an appropriate order, illustrates that non-compliance with section 129 (1)(a) does not constitute a *bone fide* defense for summary judgment purposes' (paragraph 17).

²⁰⁴⁴ 2011 SA Merc LJ 62.

²⁰⁴⁵ This view is aligned with the decision of the Supreme Court of Appeal in *Investec Bank Limited t/a Investec Private Bank v Ramurunzi* 2014 ZASCA 67 which provides that where a credit provider institutes action to enforce payment of a debt arising from a credit agreement, the running of prescription in respect of the debt is interpreted by service of the summons even though a notice in terms of section 129 (1) of the National Credit Act is delivered to the consumer only after the prescription has lapsed (26). Cf paragraph 5.6.1.7 *infra* for a discussion on the section 129 (1)(a) notice and prescription.

²⁰⁴⁶ As suggested by Van Heerden and Borraine 2011 SA Merc LJ 62.

legislation. Section 130 (4)(b) assists the credit provider who has issued summons without, for instance, serving a section 129 (1)(a) notice on a correct address or a credit provider who has, for instance, served their section 129 (1)(a) notice without the necessary content as prescribed by the section. In such event, the costs of initiating the litigation (even punitive costs) can be awarded in favor of the consumer and prevent the withdrawal and re-issue of summons by the credit provider. Thus, it is submitted, that section 130 (4)(b) is a curative and cost-saving section in favor of both parties. The following views submitted by Van Heerden and Boraine²⁰⁴⁷ are, with respect, not concurred with, in fact it is posited that these views are too strongly worded and unnecessary, section 130 (4)(b) is not therefore viewed as a ‘catalyst for a series of unfortunately absurd consequences’ and it does not ‘make a mockery of the apparently mandatory pre-litigation nature of section 129 (1)(a)’. The section, in fact, streamlines the process and prevents withdrawal and re-issue of summons by the credit provider in instances where there has been a mistake and/or error and/or omission. The consumer’s rights are preserved by the fact that the court is obliged to suspend proceedings until such time as the section 129 (1)(a) notice is served and the consumer has contemplated its options. It is submitted, contra to the submissions of Van Heerden and Boraine²⁰⁴⁸ that the section should not be deleted and/or amended, but rather left in its entirety to perform the function for which it was drafted.

5.6.1.4. Contents and Format of Notice

A section 129 (1)(a) notice must be in writing and should be in plain and understandable language.²⁰⁴⁹ Furthermore, the notice should draw the default of the consumer to the notice of the consumer and advise him that he may refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction.²⁰⁵⁰ The notice must propose that the

²⁰⁴⁷ 2011 SA Merc LJ 63.

²⁰⁴⁸ *Supra*.

²⁰⁴⁹ Where no form has been prescribed in the Act for a document to be delivered to a consumer, then in terms of section 64, such document must be in plain and understandable language (cf also *Dwenga v Firstrand Bank Ltd and Another* 2011 ZAECELLC 13 at paragraph 28.

²⁰⁵⁰ Section 129 (1)(a) of the Act.

intent is that the parties resolve the dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.²⁰⁵¹ This much is patent from the wording of the section. Where a section 129 (1)(a) notice does not contain sufficient information it will have no effect.²⁰⁵²

It is submitted, that the section 129 (1)(a) should also incorporate in it a demand by the credit provider and further the choice of remedy the credit provider intends to pursue in the event that the consumer does not react to the section 129 (1)(a) notice within the provided time limit, even if specific performance or cancellation are indicated in the alternative.²⁰⁵³ The specific content of the notice, what is compelled by the Act aside, will also be determined by the contract between the parties. If the contract contains a *lex commissoria*, for example, the wording of same will influence how the section 129 (1)(a) notice is phrased. A *lex commissoria* may require a cancellation notice to be provided by the credit provider and may indicate its own time periods within which the consumer may rectify his breach, in which event provided the time period indicated in the contract is not shorter than that allowed in the Act (if it is, the minimum time period indicated in the Act will have to expire before cancellation may be effected) the credit provider may want to incorporate its cancellation notice in the section 129 (1)(a) notice.²⁰⁵⁴ Accordingly, the following view is endorsed:²⁰⁵⁵

²⁰⁵¹ Section 129 (1)(a) of the Act.

²⁰⁵² *Absa Bank Limited v Johnson* 2009 ZAGPPHC III.

²⁰⁵³ This is indeed a requirement in terms of default notices issued under the Consumer Credit Act in England (cf paragraph 5.8 for further comparison).

²⁰⁵⁴ In *Standard Bank of South Africa Ltd v Rockhill supra*, for example, the credit agreement between the parties contained a clause which stated that any letters and notices posted to the consumer's postal address would be regarded as having been received within fourteen days after posting. The defendant contended that by virtue of such clause in the mortgage bond and the ten business days provided for in section 130 (1)(a) of the Act, such period would only commence after the fourteen days from the date of posting of the section 129 (1)(a) notice. The court held that the Act does not prevent or prohibit parties from incorporating into their agreements additional protection for the consumer and thus gave effect to the time period provided for in the agreement. Accordingly, it was found that the summons had been issued prematurely. The court appeared to take a different view in *SA Taxi Securitisation v Albert Campher* 2012 ZAEHC 9, stating that the period provided for contractually by the credit agreement in terms of which receipt of a notice is deemed to have occurred three days after posting does not change the legislative requirement relating to the delivery of notices in terms of the Act (paragraph 6). It is submitted that the contract between the parties should be respected by the courts, provided the contract is not contrary to legislation. Accordingly, extended time limits in terms of contractual provisions, especially those that provide the consumer with better or more extended protection or relief, should be respected and upheld.

²⁰⁵⁵ Van Heerden and Otto 2007 TSAR 666. Cf Van Heerden in Scholtz 2014 12.4.9 where she provides a suggested format for the content of a section 129 (1)(a) notice.

It is submitted that merely dealing with the default and proposal components in the section 129 (1)(a) notice is not sufficient. The purpose of the section 129 (1)(a) notice is to comply with the procedure prescribed in section 129 (1)(a) as part of the required procedures before debt enforcement. If a consumer who receives a section 129 (1)(a) notice fails to react thereto, the credit provider will, subject to meeting any further requirements as set out in section 130, be entitled to proceed with debt enforcement. Although the section 129 (1)(a) notice is not a demand in the nature of the section 11 letter in terms of the repealed Credit Agreements Act, it is submitted that it should indicate to the consumer that debt enforcement will follow should he fail to respond to the section 129 (1)(a) notice.

Section 11 of the Credit Agreements Act required the credit provider to advise the consumer of his failure in terms of the obligations of the agreement entered into by the parties and required him to comply with the obligation in question within the period therein mentioned.²⁰⁵⁶ In other words section 11 of the Credit Agreements Act effectively required the credit provider to make demand.²⁰⁵⁷ This demand is not so incorporated or cannot as easily be inferred from the wording of section 129 (1)(a), however, it is submitted that Van Heerden and Otto²⁰⁵⁸ are correct in their submission that merely dealing with the default and proposal components is not sufficient and that the section 129 (1)(a) notice should indicate to the consumer that debt enforcement will follow should he fail to respond to the notice.

In *BMW Financial Services (SA) (Pty) Ltd v DR MB Mulaudzi Inc*²⁰⁵⁹ Mogoeng JP²⁰⁶⁰ posited the view that credit providers tend to adopt a cold, mechanical and disinterested approach in the course of purporting to comply with section 129 (1)(a) and that they merely reproduce the provisions of the subsection without adding 'flesh or substance' to them to bring them alive and make them understandable to clients. Otto and Otto,²⁰⁶¹ however, state that while the court's

²⁰⁵⁶ Cf paragraph 5.5.1 above for a discussion on the section 11 notice.

²⁰⁵⁷ This section addressed and cured the situation which had occurred under the Hire-Purchase Act in the *Thorrold* matter *supra* where the credit provider attempted to obtain an order for the repossession of a motor-vehicle by relying on a previous demand made to the debtor which had subsequently been settled. Section 11 prevented this by ensuring that if the credit consumer had failed on two or more occasions to comply with the obligations in terms of any credit agreement and the credit provider had given the requisite thirty days notice the said period (of thirty days) should be reduced by fourteen days. By implication, fresh notices were required upon 'fresh' defaults by the consumer, prior to enforcement.

²⁰⁵⁸ Van Heerden and Otto 2007 TSAR 666 668.

²⁰⁵⁹ 2009 3 SA 348 (B) 351A-B.

²⁰⁶⁰ As he then was.

²⁰⁶¹ 2013 112.

view is laudable, they (the courts) should not expect too much from credit providers in this regard. They state that the Act is a comprehensive piece of legislation with detailed regulations and if the legislature had wanted to put ‘flesh or substance’²⁰⁶² to section 129 (1)(a) it could have done so through the Act or the regulations. This latter view is, with respect, not concurred with. While the credit providers may not be expected to do so, if we did not rely on our courts to add ‘flesh or substance’ while interpreting legislation, then the role of the courts would become semi redundant. We would have robotic institutions implementing legislation as opposed to learned jurists interpreting legislation, aligning it with the common law and ensuring that simple justice is carried out between man and man. Unfortunately, some judges remain conservative in their approach and in *Standard Bank of South Africa v Maharaj t/a Sanrow Transport*²⁰⁶³ the court held that while it may be laudable or even desirable for credit providers to provide more information in the section 129 (1)(a) notice than strictly indicated in the Act – this could not be elevated to a legal requirement.²⁰⁶⁴ However, in *Firstrand Bank Ltd v Maleke and Three Similar Cases*²⁰⁶⁵ the court held that a section 129 (1)(a) notice must contain a warning that the consumer may end up losing his home by way of a sale in execution.²⁰⁶⁶ In *African Bank Ltd v Myambo NO and Others*²⁰⁶⁷ the court held that it would be helpful if the section 129 (1)(a) notice

²⁰⁶² The words used by the court in the *Mulaudzi* matter at 351.

²⁰⁶³ 2010 5 SA 518 (KZP).

²⁰⁶⁴ Swain J stated: ‘[W]hat is intended in section 129 (1)(a) is that the first objective is to bring to the attention of the consumer the default complained of. The second objective is to propose to the consumer that the consumer seeks the assistance of one of the entities enumerated in the section, in order to attain the third objective, being a resolution of the dispute under the agreement, or the development and agreement of a plan to bring the payments under the agreement up to date [...]’ ‘It is clear that the ‘proposal’ envisaged in the section is to engage the services of one of the named entities ‘with the intent’ to achieve a resolution of the dispute. The fact that section 130 (1)(b)(ii) be something more than is expressly provided for in section 129 (1)(a) of the Act.’

²⁰⁶⁵ The court was of the view that if the defendants had been aware of the consequences of not responding to the notice of default, they might have made use of the opportunity to apply for debt review and saved their homes in this way (at paragraph 6.2). For a full discussion of the *Maleke* matter cf Brits R *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* Doctoral Dissertation Stellenbosch University 2012.

²⁰⁶⁶ The Act was aimed at consumer protection and was particularly designed to protect previously disadvantaged persons who wished to enter the property market. Kelly-Louw suggests that on the basis of the *Maleke* case *supra* a consumer should also be informed in the section 129 (1)(a) notice and not only in the summons, that he had a right of access to adequate housing as set out in section 26 of the Constitution (2010 SA *Merc LJ* 568 and 575), cf also *Dwenga v Firstrand Bank Ltd supra* at paragraph 28 and *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi* 2009 2 SA 348 (B) at 351B.

²⁰⁶⁷ 2010 6 SA 298 (GNP).

contained the names and contact details of persons that the consumer could contact to discuss the proposal therein. The court in *Firstrand Bank Ltd v Folscher*²⁰⁶⁸ issued a practise directive to the effect that if the issue of summons is preceded by a notice in terms of section 129 of the Act, such notice is to include a notification to the consumer that, should action be instituted and judgment be obtained against him, execution against the consumer's primary residence will ordinarily follow and will usually lead to the consumer's eviction from such home.²⁰⁶⁹

Section 129 does not require that a notice in terms of this section inform the consumer of the time limit within which he has to respond to the section 129 (1)(a) notice.²⁰⁷⁰ However, such a notice should certainly, it is submitted, contain such time constraints as the consumer must be aware of the imminence of the possible consequences if he does not react to the notice.²⁰⁷¹

It is therefore submitted that the courts should interpret section 129 (1)(a) with careful scrutiny and force the credit provider to make the consumer well aware of the possible consequences of the notice;²⁰⁷² thereby developing, through interpretation, the section 129 (1)(a) notice to be: firstly, a notice advising of the default and the options available to the consumer as prescribed; secondly, a demand for payment; thirdly, a warning of the consequences which will follow upon non-payment or non-action by the consumer and lastly advise the consumer of the time constraints he must respect.

²⁰⁶⁸ 2011 ZAGPPHC.

²⁰⁶⁹ at paragraph 53

²⁰⁷⁰ This, it is submitted, is a fundamental flaw on the part of the legislature; a notice stating 'you have defaulted and these are your options' is not as effective if it stated 'you have defaulted, these are your options, if you do not act upon one of these options by such a date these are the consequences'. The reason why it is fundamental for the options and timeframes to be explicated in a section 129 (1)(a) notice is because the consumer's options after the issue of summons become severely narrowed, coupled with the fact that the consumer will have to draw on the services of an attorney to assist with the matter after summons has been served and obviously carry the costs thereof.

²⁰⁷¹ Cf Kelly-Louw where she states that inclusion of time limits in the notice are advisable (2010 SA Merc LJ 573).

²⁰⁷² Not only if the consumer may stand to lose his primary residence if judgment is granted and a sale in execution effected.

5.6.1.5. Calculation of Time Periods

Section 7 of the Interpretation Act²⁰⁷³ states that where a statute requires or authorises service by post, a document contained in a registered letter, properly addressed and with the postage pre-paid, is deemed to have been served at the time that the letter would have been delivered in the ordinary course of post. The Constitutional Court in *Sebola v Standard Bank of South Africa Ltd*²⁰⁷⁴ found that section 7 of the Interpretation Act was of no help because the Interpretation Act applies only ‘unless the contrary intention appears’ in any statute²⁰⁷⁵ and this means that the court was thus driven to establish the meaning in the National Credit Act.²⁰⁷⁶ Furthermore, the National Credit Act makes no reference to its effect on the Interpretation Act, that is whether it should take priority or whether the National Credit Act should.

While section 129 does not specify the time which the credit provider need wait before it may proceed with legal proceedings against the consumer, it is read in tandem with section 130 which does specify these time limits.²⁰⁷⁷ The latter section states that the credit provider may only approach a court for an order to enforce a credit agreement if, at the time it does so, the consumer is in default or has been in default under the credit agreement for at least twenty business days and at least ten business days have elapsed since the credit provider delivered a notice to the consumer and the consumer has either not responded to the notice or responded to it by rejecting the credit provider’s proposals.²⁰⁷⁸

Otto²⁰⁷⁹ suggests that there is thus nothing prohibiting the credit provider from instituting court action within twenty business days from the date of default of the

²⁰⁷³ Act 33 of 1957.

²⁰⁷⁴ 2012 5 SA 142 (CC).

²⁰⁷⁵ Section 1 of the Interpretation Act.

²⁰⁷⁶ At paragraph 64 footnote 71.

²⁰⁷⁷ See the comments of Cameron J in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 5 SA 142 (CC) where he states that the notice requirement in section 129 cannot be understood in isolation from section 130 (at paragraph 52).

²⁰⁷⁸ *Firststrand Bank Ltd v Govender* 2013 ZAECPHC 21.

²⁰⁷⁹ 2006 91. A similar view was taken by Roestoff C, Haupt F, Coetzee H and Erasmus F in ‘The Debt Counselling Process – Closing the Loopholes in the National Credit Act 34 of 2005’ Potchefstroom Electronic Law Journal 2009 12 41. The view was endorsed by the North Gauteng High Court in *Wesbank Ltd v Maake* 2013 ZAGPPHC 460 at paragraph 23.

consumer; he puts forward the view that the twenty business days and ten business days may run concurrently. He argues that if the legislature had intended these periods to run consecutively it could have provided that enforcement should only occur ten days after the notice had been delivered, which should only be twenty days after the consumer had been in default.²⁰⁸⁰ It is submitted that it would not make sense for legislation to force a credit provider to advise the credit consumer of his default only after he had been in default for twenty business days, but makes logical sense that a provider be allowed to advise the consumer of his default even the day after the default has occurred, provided he allows the requisite twenty business days to lapse before instituting action. Accordingly, it is submitted that the purpose of the section is to allow the consumer not less than twenty business days after default and not less than ten days after the notice to respond to the section 129 (1)(a) notice.

The interpretation section of the National Credit Act, namely section 2 explains how the business days should be calculated when referred to in the Act:²⁰⁸¹

- When a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by-
- (a) excluding the day on which the first such event occurs;
 - (b) including the day on or by which the second event is to occur; and
 - (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively

It is submitted that this is effectively in line with the normal computation of delivery for court notices and pleadings.²⁰⁸² The court has held²⁰⁸³ that if a consumer does not respond to a section 129 (1)(a) notice within the time limits prescribed by the Act there is no obligation on the credit provider to accept a response from the consumer which is out of time nor is the credit provider prevented from exercising its right to cancel an agreement once it is lawfully entitled to do so by the mere fact that there has been reference to an alternative dispute resolution agency.²⁰⁸⁴ It is simply unfortunate that not adhering to the

²⁰⁸⁰ *Ibid.*

²⁰⁸¹ Section 2 (5) of the Act. Cf also *Wesbank Ltd v Maake supra*.

²⁰⁸² That is the 'first-day-out-last-day-in' principle used in practice for delivery of court notices and pleadings.

²⁰⁸³ *BMW Financial Services (SA) (Pty) Ltd v Forefront Trading CC* 2010 JOC 25191 (KZD).

²⁰⁸⁴ At paragraph 10.

time limits disempowers the consumer in this way, yet no obligation has been placed on the credit provider to make the consumer aware of such time constraints.

5.6.1.6. Method of Delivery and Actual Receipt

While section 129 specifies that the credit provider must draw the default to the notice of the consumer it does not stipulate by what method.²⁰⁸⁵ However, section 130 (1) of the Act states that a court may not be approached by a credit provider until such time as, *inter alia*, the credit provider has ‘delivered’ a notice to the consumer.²⁰⁸⁶ The words ‘deliver’, ‘delivered’ or ‘delivery’ are not defined in the Act.

Section 65 of the Act which falls under Part A of Chapter 4, deals with the right of the consumer to receive documents and reads as follows:

Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must

- (a) make the document available to the consumer through one or more of the following mechanisms-
 - (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer’s expense, or by ordinary mail;
 - (ii) by fax;
by email; or
by printable web-page; and
- (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

The word ‘prescribed’ is defined in section 1 of the Act as ‘prescribed by regulation’.

The word ‘delivered’ is defined in regulation 1 of the Act:

²⁰⁸⁵ Section 129 (1)(a). This is very different from the approach taken by the legislature in section 11 of the Credit Agreements Act, where the section directed that such notice had to be handed to the credit consumer and if so handed an acknowledgment of receipt had to be obtained, alternatively the notice had to be sent by registered post. For a more detailed discussion of section 11 see paragraph 5.3.1.4 above.

²⁰⁸⁶ This is so whether such notice was delivered in terms of section 129 or section 86 (10).

Unless otherwise provided for, means sending a document by hand, by fax, by email, 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. [...]

The effect of these sections and the regulations as well as what steps a credit provider must take in order to ensure that a notice of default reaches a consumer before it may commence litigation and what it must prove in order to satisfy a court that it has discharged its obligation to effect proper delivery of the statutory notice are issues that have been visited by the High Court²⁰⁸⁷ on a number of occasions, twice by the Supreme Court of Appeal²⁰⁸⁸ and twice by the Constitutional Court.²⁰⁸⁹

Initially in *Munien v BMW Financial Services (SA) (Pty) Ltd*,²⁰⁹⁰ the court considered both the definition of 'delivery' in the regulations and the effects of

²⁰⁸⁷ *Firststrand Bank Limited v Ngcobo and Another* 2009 ZAGPPHC 112, *Absa Bank v Prochaska t/a Branca Cara Interiors* 2009 2 SA 512 (D), *Firststrand Bank Ltd v Dhlamini* 2010 4 SA 531 GNP, *Imperial Bank v Khubeka* 2010 ZAGPPHC 3, *Starita v Absa Bank Ltd* 2010 2 SA 443 (GSJ), *Absa Bank Ltd v Mkhize* 2102 ZAKZDHC 38, in *Firststrand Bank Ltd v Bernardo and Another* ZAECPEHC 19, *Standard Bank of South Africa Ltd v Badenhorst* 2013 ZANWHC 50, *Dales NO v Herd and Others* 2013 ZAKZDHC 54, *Magoo v Firststrand Ltd* 2013 ZAGPJHC 127, *Mofuta v SA Taxi Securitisation (Pty) Ltd* 2013 ZAFSHC 95 and.

²⁰⁸⁸ *Rossouw and Another v Firststrand Bank Ltd and Another t/a FNB Homeloans* 2010 6 SA 439 (SCA) and *Absa Bank Ltd v Mkhize* 2014 1 All SA 1 (SCA).

²⁰⁸⁹ *Sebola v Standard Bank Ltd* 2012 5 SA 142 (CC) and *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC). While the long line of high court matters preceding the Supreme Court of Appeal and Constitutional Court judgments will not be discussed, Van Heerden has carried on a very extensive discussion of this topic in Scholtz 2014 12.4.4, some of the High Court matters post the Sebola judgment but prior the Kubyana one will be touched on.

²⁰⁹⁰ 2009 ZAKZDHC 6. Here the credit provider addressed a section 129 (1)(a) notice by registered post to the consumer at his chosen *domicilium*. The consumer contended that there was no street delivery of mail at all in the area and accordingly that any notices sent by registered mail to his chosen *domicilium* would not have been delivered by postal service. In *Firststrand Bank Limited v Ngcobo and Another supra* the court found that if all previous written communication between consumer and provider had occurred by email, then it was not appropriate to send the section 129 notice via registered post to the chosen *domicilium* address but rather the notice should have been sent by email. In this matter the court stressed that there was a duty on a credit provider, by virtue of section 129 (1), to bring to the attention of the consumer the fact that he was in arrears and the rights that he had to try and resolve any dispute or to bring the arrear payments up to date (paragraph 22). In *Absa Bank v Prochaska t/a Branca Cara Interiors supra* the court found that the words 'draw the default to the notice of the consumer', 'providing notice' and 'delivered a notice' cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires much more than the mere despatching of the notice contemplated by section 129 (1)(a) of the Act, to the consumer in the manner prescribed in the Act and Regulations. The credit provider, held the court, was required to bring the default to the attention of the consumer in a way which provides an assurance to a court considering whether or not there has been proper compliance with the procedural requirements of section 129 and 130 of the Act, that the default has indeed been drawn to the notice of the consumer (paragraph 55). Kelly-Louw comments that '[r]egrettably, the court did not stipulate what was in reality required practically from credit providers in delivering the section 129 (1)(a) notices' (2010

section 65, and concluded that the Minister having prescribed the manner of delivering documents to a consumer in terms of the Act, the method of delivery must be in accordance with the provisions of 'delivered' in the regulations rather than in terms of section 65 (2).²⁰⁹¹

However, the Supreme Court of Appeal in *Rossouw and Another v Firstrand Bank Limited and Another*²⁰⁹² stated that it is generally impermissible to use regulations created by a Minister as an aid to interpret the intention of the legislature in an act of parliament²⁰⁹³ and furthermore that the use of the expression 'in these regulations' indicated that the definitions in regulation 1 of the Act are operative only for purposes of the regulations,²⁰⁹⁴ and therefore the court found that no regard should be had to the definition of the word 'delivered' in the regulations in interpreting sections 129 (1)(a) and 130 (1), as the definition does not purport to contain a prescribed manner for delivery and the answer must lie in the provisions of the Act itself.²⁰⁹⁵

A Merc LJ 580). In *Firstrand Bank Ltd v Dhlamini supra*, the court concurred with the view postulated in the Prochaska case *supra* and found that with section 129 (1)(a) the legislature did not only require that the credit provider deliver or serve the notice in the technical sense of dispatching it to the consumer, but also required that the credit provider bring the notice to the actual attention of the consumer. Failure by the provider to do so would bar it from instituting legal action, and any such action instituted before the provider had done so would be deemed premature (paragraphs 27 and 31). A similar view was adopted in *Imperial Bank v Khubeka supra*. However, in *Firstrand Bank Ltd v Bernardo and Another supra* the court differed from such stringent views and as Kelly-Louw states, took a more sensible and balanced approach to interpreting section 129 (*supra* 582). Here, the court found that the credit provider had complied with the notice requirement in section 129 (1)(a) by sending it by registered mail and that proof of delivery of the section 129 (1)(a) notice to the actual residential address of the consumer was sufficient (paragraphs 15 and 16). Similarly, in *Starita v Absa Bank Ltd supra* the court held that the credit provider did not need to bring the default notice to the actual notice of the consumer. The court asserted that there was no imperative that credit providers should be put to the trouble and expense of ensuring actual receipt by consumers (paragraph 18.2). It violated no purpose of the Act to permit a credit provider to send a section 129 (1)(a) notice by registered mail, requiring of it only that it should prove, if necessary, that it properly sent the notice in that manner, and that it sent it to the exact address chosen by the consumer for that purpose. To have required more placed far too heavy a burden on the credit provider, which was not required by the Act. This was even more so where the consumer had chosen a *domicilium* address. According to the very purpose of choosing a *domicilium* address for the giving of a prescribed notice under a contract, which was the same as it was for the service of process, was to relieve the party giving the notice of the burden of proving actual receipt of the notice (at paragraph 18.3).

²⁰⁹¹ *Supra* at paragraph 12. It must be noted that Wallis J continued that sentence with: 'Although, as I will explain later, I do not think that the result would alter if the latter section applied'.

²⁰⁹² 2010 ZASCA 130.

²⁰⁹³ At paragraph 24.

²⁰⁹⁴ At paragraph 26.

²⁰⁹⁵ *Ibid*. The Court referred to the following line of cases: *Clinch v Lieb* 1939 TPD 118 AT 125, *Hamilton-Brown v Chief Registrar of Deeds* 1968 4 SA 735 (T) 737 C-D, *Moodley and others v Minister of Education and Culture, House of Delegates, and another* 1989 3 SA 221 (A) at 233E-F

This finding led the Supreme Court to examine section 65 (2) of the Act. This section sets out six methods by which a document may be delivered. Thus, the document may be made available to a consumer, ‘in person’, at the credit provider’s premises or at any other location he chooses, in which event, the consumer bears the expenses of the exercise. The document may also be delivered by ordinary mail, fax, email or printable web-page. The manner of such delivery is chosen from these options by the consumer. The court also considered section 96 of the Act,²⁰⁹⁶ which deals with the address for delivery of legal notices, and held that a section 129 (1)(a) notice, by its very nature, fell in this category to be relevant and must be read with section 65 (2).²⁰⁹⁷

The court in the *Roussouw* matter²⁰⁹⁸ also looked at, what it dubbed, the catch-all provisions of section 168 of the Act dealing with service of documents, which in the legal context is synonymous to ‘delivery of documents’. This section deems sending a document by registered mail to a person’s last known address proper service, unless otherwise provided for in the Act. The court was persuaded by these provisions that the legislature was satisfied that sending a document by registered mail is proper delivery. The court also examined what ‘send’ according to *The Shorter Oxford English Dictionary* means, which is ‘to despatch (a message, letter, telegram etc.) by messenger, post etc.’, which definition, does not include ‘receipt’ of the sent item.²⁰⁹⁹ The court, per Maya JA, concluded:²¹⁰⁰

and *National Lotteries Board v Bruss* NO 2009 4 SA 362 (SCA). The same finding was made by the Constitutional Court in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 ZACC 11 at paragraph 61.

²⁰⁹⁶ It provides: ‘(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at– (a) the address of that party as set out in the agreement, unless paragraph (b) applies; or (b) the address most recently provided by the recipient in accordance with subsection (2). (2) A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address’.

²⁰⁹⁷ *Supra* at paragraph 27.

²⁰⁹⁸ *Supra*.

²⁰⁹⁹ *Supra* at paragraph 30.

²¹⁰⁰ *Supra* at paragraph 31. With respect, the court neglected to consider that credit agreements are often standard-form contracts which are usually long and complicated, leaving a space where a consumer is to manually fill in his address or where a bank official does so and the consumer is left to sign a document which may indicate he chose a specific method of delivery when in fact one was imposed on him.

It appears to me that the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders. With every choice lies a responsibility and it is after all within a consumer's sole knowledge which means of communication will reasonably ensure delivery to him. It is entirely fair in the circumstances to conclude from the legislature's express language in section 65 (2) that it considered despatch of a notice in the manner chosen by the appellants in this matter sufficient for purposes of section 129 (1)(a) and that actual receipt is the consumer's responsibility.

The outcome of the *Roussouw* judgment prompted Kelly-Louw²¹⁰¹ to state that a credit provider meets the requirements of the Act if it has meticulously followed the technical requirements as specified in section 65 (2). The position, however, has since the judgment of the Constitutional Court in *Sebola v Standard Bank of South Africa Ltd*²¹⁰² changed. The Constitutional Court contemplated the same sections of the Act examined by the Supreme Court of Appeal in the *Roussouw* matter.²¹⁰³ It found that none of these provisions were made applicable to section 130 in express terms,²¹⁰⁴ and indicated that while this matter was one for regret it nevertheless found that each of the provisions appears to have some bearing on the meaning to be given to the word 'delivered' in section 130.²¹⁰⁵ The court's reasoning was that section 65 (2) is applicable where 'no method has been prescribed for the delivery of a particular document to a consumer' and

²¹⁰¹ Kelly-Louw 2010 SA Merc LJ 578.

²¹⁰² *Supra*. The main issue before the Constitutional Court in *Sebola v Standard Bank of South Africa Ltd and Another supra* was whether the provisions of the National Credit Act that entitle a debtor to written notice before a credit provider may institute action require that the debtor actually receive that notice. It was accepted that the Sebolas did not receive the notice the banks sent to them (paragraph 2). The High Court and the Full Bench of the High Court, relying on the decision of the Supreme Court of Appeal in *Roussouw supra* held that proof by the bank that it had dispatched the notice was sufficient, even if the notice did reach the debtor and therefore that the action against the Sebolas was competent. The effect of these judgments was that the sale in execution of the Sebolas' property could go ahead. The Constitutional Court was faced with an application against the interpretation by the High Court and Full Bench of the High Court, in that they stated that the interpretation failed to give effect to sections 8 (3) and 39 (2) of the Constitution. Section 8 (3) provides: 'when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1). Section 8 (3) of the Constitution has been discussed in paragraph 3.2.3 *supra*. Section 39 (2) of the Constitution provides: 'when interpreting any legislation and when developing the common law customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Section 39 (2) of the Constitution has been discussed in paragraph 3.2.3 *supra*.

²¹⁰³ *Supra*.

²¹⁰⁴ At paragraph 66.

²¹⁰⁵ *Ibid*.

none had been so prescribed for section 130.²¹⁰⁶ Section 96 (1) was found by the court to apply because the notice envisaged in section 130 is a ‘legal notice’ for a purpose contemplated in the credit agreement,²¹⁰⁷ and section 168 was found by the court to be pertinent because it is titled ‘Serving Documents’.²¹⁰⁸

Despite these conclusions the Constitutional Court in the *Sebola* matter²¹⁰⁹ explicitly stated that the fact that there is no practical means of proving that a notice sent by ordinary mail reaches the addressee suggests that, for section 130 ‘delivery’ to be achieved, more is needed and that at the very least, dispatch of the section 129 (1)(a) notice must be effected by registered mail.²¹¹⁰ However, the court found that proof of registered despatch by itself is not enough as the Act requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer and make averments that will satisfy a court that the notice probably reached the consumer as required by section 129 (1).²¹¹¹ This, the court held, would ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.²¹¹² In practical terms this means that the credit provider must obtain a post-despatch ‘track-and-trace’ print-out from the website of the South African Post Office.²¹¹³

However, the issue which remained unsettled after the *Sebola* matter was what would happen, if despite a positive ‘track-and-trace’ report the court was faced with conclusive evidence that the notice did not come to the attention of the consumer. The courts were completely divided on the matter²¹¹⁴ and eventually this issue wound its way back to the Supreme Court of Appeal in *Absa Bank Ltd*

²¹⁰⁶ *Ibid.*

²¹⁰⁷ At paragraph 66.

²¹⁰⁸ *Ibid.*

²¹⁰⁹ *Supra* at paragraph 68.

²¹¹⁰ The court found that even though registered letters may go astray – at least there is a high degree of probability that most of them are delivered (at 75). Cameron J was referring to the matter of *Maharaj v Tongaat Development Corporation (Pty) Ltd supra*, cited also by Cloete JA in the *Roussouw* matter *supra* at paragraph 57.

²¹¹¹ *Supra* at paragraph 75.

²¹¹² *Ibid.*

²¹¹³ *Supra* at paragraph 76.

²¹¹⁴ *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 5 SA 569 (WCC), *Absa Bank Ltd v Mkhize* 2012 5 SA 374 (KZD), *Absa Bank Ltd v Petersen* 2012 4 All SA 642 (WCC), *Balkind v Absa Bank Ltd* 2013 2 SA 486 (ECC), *Absa Bank Ltd v Kritzing* 2014 ZAPPHC 41, *Standard Bank of South Africa Ltd v Van Vuuren and Several Other Matters* 2013 ZAGPJHC 16, *Magoo v Firstrand Bank Ltd* 2013 ZAGPJHC 217 and *Mofuta v SA Taxi Securitisation (Pty) Ltd* 2013 ZAFSHC 95.

v Mkhize.²¹¹⁵ Here the court held that although a credit provider has only to prove on a balance of probabilities that notice has been provided, there was a qualification to the usual standard: proof of the fact that the notice did not reach the consumer trumps any conclusion which may be drawn from the facts which suggest that the notice ought to have reached the consumer²¹¹⁶ and if the court is faced with allegations that the notice was not brought to the attention of the consumer, it must adjourn the proceedings in terms of section 130 (4)(b).²¹¹⁷

Shortly thereafter the Constitutional Court in *Kubiyana v Standard Bank of South Africa Ltd*²¹¹⁸ added that where a consumer has elected to receive notices by way of post, the credit provider's obligation to deliver this ordinarily consists of (a) respecting the consumers election; (b) undertaking the additional expense of sending notices by way of registered rather than ordinary mail and (c) ensuring that any notice is sent to the correct branch of the post office for the consumers collection.²¹¹⁹

The courts have held, in relation to the previous credit legislation, that, while a presumption existed in favour of the credit provider, the credit consumer could bring evidence to show that the letter did not reach its destination.²¹²⁰ Similar evidentiary issues came up before the Constitutional Court in *Kubiyana v Standard Bank of South Africa Ltd*.²¹²¹ The Constitutional Court in the *Kubiyana* matter held that there is no general requirement that the notice be brought to the consumer's subjective attention by the credit provider,²¹²² or the personal service on the consumer is necessary for valid delivery under the Act²¹²³ and that, had the legislature meant either of these aspects to be a necessary condition for

²¹¹⁵ 2014 1 All SA 1 (SCA).

²¹¹⁶ *Supra* at paragraph 46.

²¹¹⁷ *Supra* at paragraph 48.

²¹¹⁸ 2014 3 SA 56 (CC).

²¹¹⁹ *Supra* at paragraph 32.

²¹²⁰ *Absa Bank v Corredeira* case no 1020/96 (W) 1997. This is a very interesting case with regards to the *Marques* decision – as there was definite evidence that the consumer had in fact not received the registered letter. The court there, it is submitted, should accordingly not have allowed the order for cancellation in the latter instance.

²¹²¹ *Supra*.

²¹²² Cf *Sebola supra* at paragraph 74 and case law pertaining to section 11 of the Credit Agreements Act, *Marques v Unibank supra* and *Mercedes Benz Finance (Pty) Ltd supra*.

²¹²³ *Supra* at paragraph 31.

delivery, express provision would have been made for them.²¹²⁴ Accordingly, the court held that if a credit provider complies and draws the default to the notice of the consumer in writing by using one of the acceptable modes of delivery as contemplated in the Act and supplemented by the case law and that the steps that a credit provider must take in order to effect delivery are those that would bring the section 129 (1)(a) notice to the attention of a reasonable consumer²¹²⁵ and thereafter the credit provider receives no response from the consumer within the period designated by the Act, no more can be expected of the credit provider.²¹²⁶ The court held that the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement.²¹²⁷ Accordingly, the court found that if the credit provider has complied with the requirements as set out above, it would be up to the consumer to show that the notice did not come to his attention and the reasons why it did not.²¹²⁸ It is interesting to note that the *Kubyana* matter²¹²⁹ aligns the current legislation as interpreted, with the previous legislation in terms of enabling the consumer to bring evidence to show the reasons why a notice did not reach its destination. It is submitted that in some instances a consumer, having acted reasonably, may have a valid defense as to why, for example, it may not have been able to collect a registered mail from the relevant Post Office.²¹³⁰

The Constitutional Court further emphasized the notion of the obligations of a reasonable consumer and found that the roots thereof lie in section 3 of the Act, which emphasize the importance of ‘responsible borrowing’, the ‘fulfillment of financial obligations by consumers’, ‘discouraging ... contractual default by consumers’ and the ‘satisfaction of all responsible consumer obligations’.²¹³¹ The court found that in empowering a consumer to decide on the manner in which he receives notices, sections 65 (2) and 96 impose a corollary obligation on the consumer to do what is necessary in order to take receipt of those notices

²¹²⁴ *Ibid.*

²¹²⁵ *Supra* at paragraph 33 with references to paragraphs 70 and 73 of the *Sebola* matter *supra*.

²¹²⁶ *Supra* at paragraphs 31 through to 35.

²¹²⁷ *Supra* at paragraph 35.

²¹²⁸ *Supra* at paragraph 36.

²¹²⁹ *Supra*.

²¹³⁰ For example, he was hospitalized at the time.

²¹³¹ *Supra* at paragraph 37.

in accordance with the manner of delivery he has chosen. The court held that put simply, if the consumer has elected to receive notices by way of registered mail, he must respond to notifications from the Post Office requesting him to collect registered items unless, in the circumstances, a reasonable person would not have responded.²¹³² The court in the *Sebola* matter also made several references to the 'reasonable consumer' or the consumer being expected to act reasonably.²¹³³

An invaluable milestone which can be drawn from the *Sebola*²¹³⁴ and *Kubyana*²¹³⁵ matters is the fact that the Constitutional Court has, via these matters, introduced the concept of the 'reasonable consumer'.²¹³⁶ Again the Constitutional Court in the *Kubyana* matter²¹³⁷ indicated that while one of the main aims of the Act is to enable previously marginalized people to enter the credit market and access much needed credit, credit being an invaluable tool in our economy, such tools should be used wisely, ethically and responsibly.²¹³⁸ The court went on to state that just as these obligations of ethical and responsible behavior apply to providers of credit, so to consumers and while a credit provider would only have discharged its obligations to effect delivery of a section 129 (1)(a) notice, if such delivery would have resulted in the notice being drawn to the attention of a reasonable consumer, it is also the case that a consumer will not be entitled to rely on a credit provider's alleged non-compliance with section 129 if the consumer has been unreasonably remiss in

²¹³² *Ibid.*

²¹³³ At paragraphs 25, 49, 58 and 77.

²¹³⁴ *Supra.*

²¹³⁵ *Supra.*

²¹³⁶ It is most interesting to note that the concept of the 'reasonable consumer' appears not to be a novel one and not confined to South African borders. In a recent development in its insurance legislation, the United Kingdom passed the Consumer Insurance (Disclosure and Representations) Act 2012. This Act makes marked changes to the law on misrepresentation and disclosure in the context of consumer insurance, however, the more obvious changes are a reduction of the duty of disclosure to a duty not to simply make misrepresentations, with the standard of care required of the consumer in this process being that of the 'reasonable consumer' (a presumption found in section 5 (5) of the United Kingdom's new Consumer Insurance Act). For a detailed discussion cf Hutchinson A and Stoop M 'Misrepresentation in Consumer Insurance: The United Kingdom Legislature Opts for a 'Reasonable Consumer Standard' 2013 130 SALJ 705.

²¹³⁷ *Supra.*

²¹³⁸ *Kubyana supra* at paragraph 38.

failing to engage with the notice.²¹³⁹ The court held that the notion of a reasonable consumer implies obligations for both credit providers and consumers.²¹⁴⁰ This obligation, imposed by the Constitutional Court, now placed on the consumer, to act reasonably, is a concept to be welcomed. Such a concept acts as a balancing mechanism in the credit relationship and aids with equity considerations when interpreting imprecise sections of the National Credit Act.²¹⁴¹ With the plethora of consumer protection legislation entering, not only the local but international sphere, to craft such an expectation of the consumer, it is submitted, is a necessary step. However, the meaning and implementation of the concept of the 'reasonable consumer' will have to be defined and refined as more matters come before the courts.

Section 32 of the National Credit Amendment Act which, as mentioned previously has not at the time of writing come into force, proposes the addition of sections 129 (5), 129 (6) and 129 (7) to the Act which sections read as follows:-

- (5) the notice contemplated in subsection (1)(a) must be delivered to the consumer –
 - (a) by registered mail; or
 - (b) to an adult person at the location designated by the consumer.
- (6) the consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).
- (7) proof of delivery contemplated in subsection (5) is satisfied by –
 - (a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
 - (b) the signature or identifying mark of the recipient contemplated in subsection (5)(b).

The Act now definitively prescribes the acceptable methods of delivery of a section 129 (1)(a) notice and what constitutes proof of delivery. The proposed sections seem to be a response by the legislature to the obvious interpretive difficulties experienced by the parties to the agreements, those attempting to protect their interest and the courts in enforcing sections 129 and 130.²¹⁴²

²¹³⁹ *Ibid.*

²¹⁴⁰ *Ibid.*

²¹⁴¹ Or the Consumer Protection Act.

²¹⁴² The amendments narrow the manner in which a section 129 (1)(a) notice must be delivered. The National Credit Amendment Act does not, however, deal with the method of delivery of the section 86 (10) notice, which as Van Heerden points out, like a section 129 (1)(a) notice is a statutory pre-enforcement notice (in Scholtz 2014 12.4.4.). While this amendment narrows down

5.6.1.7. The Section 129 (1)(a) Notice and Prescription

The Supreme Court of Appeal in *Investec Bank v Ramarunzi*²¹⁴³ held that where a credit provider institutes action to enforce payment of a debt arising from a credit agreement, the running of prescription in respect of the debt is interrupted by service of the summons even though a notice in terms of section 129 (1)(a) is delivered to the consumer only after the prescription period has elapsed. The court was dealing specifically with a situation where, although summons was issued and served on the consumer prior to the elapse of three years from the debt becoming due in terms of the Prescription Act 68 of 1969 the credit provider had complied with the provisions of section 129 (1)(a) only after the proceedings had been adjourned by a court in terms of section 130 (4)(a) to enable the credit provider to send the requisite notice, which was done more than three years after the debt became due. The Supreme Court judgment overturned the Western Cape High Court²¹⁴⁴ finding which held that service of summons without first having served a notice under section 129 (1)(a) did not interrupt the running of prescription.

The former view is in line with the principles expressed by Cameron J in *Sebola and Another v Standard Bank of South Africa Ltd and Another*.²¹⁴⁵ The Constitutional Court considered that where an action is instituted without prior compliance with section 129 of the Act the summons is not void: the bar on obtaining judgment is not absolute but only dilatory and leads for pause in the proceedings until there is compliance.²¹⁴⁶

It is submitted that the Supreme Court's decision is to be welcomed. On a practical level, when a practitioner, representing a credit provider is faced with a debt that is close to prescription, he needs to interrupt prescription immediately and the quickest most reliable remedy for that is service of summons by sheriff.

the methods of delivery of a section 129 notice, the same changes have not been effected to the methods to be adopted in the event of a section 86 (10) in the Amendment Act.

²¹⁴³ 2014 ZASCA 67.

²¹⁴⁴ Cf *Investec Bank t/a Investec Private Bank v Ramarunzi* 2013 ZAWCHC 52.

²¹⁴⁵ *Supra*.

²¹⁴⁶ It appears that the court in *Ramarunzi* was of the *obiter* view that a section 129 notice would not itself interrupt prescription if delivered before the summons was served (paragraph 25).

If he was forced to post a section 129 (1)(a) notice and wait for the time for delivery of the notice to lapse and then wait for the notice to be delivered by the postal service it would leave the credit provider in an invidious position, as the interruption of prescription would be placed beyond its control.

5.6.1.8. Section 19 of the Alienation of Land Act and Section 129 and 130 of the National Credit Act

Schedule 1 of the National Credit Act, which schedule deals with the rules concerning conflict in legislation under section 172 (1), states that the provisions of the National Credit Act prevail to the extent of any conflict with Chapter 2 of the Alienation of Land Act.²¹⁴⁷ The relevant section that will be discussed here is section 19 of the Alienation of Land Act which section deals with the limitation of a right of a seller to take action against a breach by a purchaser. Section 19 falls under Chapter 2 of the Alienation of Land Act thus in the event of conflict between section 19 of the Alienation of Land Act and section 129 and 130 of the National Credit Act, the National Credit Act would prevail.

Section 19 provides that a seller may not, when faced with a breach of contract on the part of a purchaser, be entitled to –

- enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalties stipulated in the contract;²¹⁴⁸
- terminate the contract;²¹⁴⁹ or
- institute an action for damages²¹⁵⁰

unless the seller has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question and the purchaser has failed to comply with such demand.²¹⁵¹ Such notice is to be handed to the purchaser or sent to him by registered post to his

²¹⁴⁷ Act 68 of 1981 (hereinafter 'the Alienation of Land Act').

²¹⁴⁸ Section 19 (1)(a) of the Alienation of Land Act.

²¹⁴⁹ Section 19 (1)(b) of the Alienation of Land Act.

²¹⁵⁰ Section 19 (1)(c) of the Alienation of Land Act.

²¹⁵¹ Section 19 (1) of the Alienation of Land Act.

chosen *domicilium citandi et executandi*. This is in terms of section 23 of the Alienation of Land Act which provides that addresses stated in any contract shall serve as *domicilium citandi et executandi* of the parties for all purposes of the contract and notice of a change of such an address shall be given in writing and shall be delivered or sent by registered post by one party to the other, in which case such changed address shall serve as such *domicilium citandi et executandi* of the party who has given such notice.

Section 129 of the National Credit Act does not state to which address the notice must be delivered, however, section 96 (1) of the Act contains general provisions regarding the address to be used to give legal notice to the other party for any purpose contemplated in the agreement, the National Credit Act or any other law and the party giving notice must deliver that notice to the other party at (a) the address of the other party as set out in the agreement or the address most recently provided by the recipient, in the event that the recipient has changed its address.²¹⁵² A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail or electronic mail if that other party has provided an email address.²¹⁵³ Accordingly, it is submitted that the requirements placed on the party changing their address are stricter in the Alienation of Land Act, in that the Alienation of Land Act does not make provision for change of address by email. It is submitted that a party to an agreement pertaining to the sale of land which falls under both the Alienation of Land Act and the National Credit Act, who wishes to change his *domicilium citandi et executandi* would be able to do so by giving notice of such change in writing but such notice must be delivered or sent by registered post. It is submitted that there exists no conflict between section 23 of the Alienation of Land Act and section 96 (1) of the National Credit Act. The Alienation of Land Act does not, for example, stipulate that notice of a change of a person's *domicilium* may not be delivered by email. It merely states that if a change of *domicilium* is to be effected to an agreement that falls under the Alienation of Land Act, same should be done by registered post. Accordingly, this, it is submitted, is not a conflict but merely a stricter requirement that should

²¹⁵² Section 96 (1).

²¹⁵³ Section 96 (2).

be respected, especially in light of the fact that the matter involves immovable property. If a court should find, however, that service of such notice may be effected by email, it should stipulate that at least a read-receipt must be attached as evidentiary proof of delivery of same to the other party.

As far as receipt is concerned, it is doubtful whether the same requirement imposed by the Constitutional Court in the *Sebola* and *Kubyana* judgments²¹⁵⁴ would be applicable to a change of address notice in terms of section 23 of the Alienation of Land Act or section 96 (2) of the National Credit Act. That is whether a court must be satisfied that the notice was received at the stipulated address and that the requirement would be satisfied by appropriate averments made by the credit provider/seller or consumer/purchaser, as the case may be, in the summons that the letter was sent by registered post on a specific date, delivered to the appropriate post office on a specific date (which can be shown using the post office's tracking technology) and was not returned to the sender and furthermore, that the credit provider or consumer knows of no other circumstances to indicate that the recipient did not actually receive the notice.²¹⁵⁵ This is submitted because the section 129 (1)(a) notice has been referred to as being one of 'especial importance' and of 'pivotal significance', as understood in light of the Act's objectives regarding consumer protection. Accordingly, the Constitutional Court found that in order to give effect to that importance and achieve those objectives, the legislature has elected to impose on credit provider's obligations that would not otherwise arise.²¹⁵⁶ It is submitted that notices in terms of section 23 of the Alienation of Land Act or section 96 (2) of the National Credit Act relating to change in *domicilium* are not of the same especial importance or pivotal significance as a section 129 (1)(a) notice.²¹⁵⁷

However, it is submitted that a section 19 (1) notice in terms of the Alienation of Land Act, where the transaction or agreement also falls under the auspices of the

²¹⁵⁴ *Supra*.

²¹⁵⁵ See *Sebola* judgment *supra* at paragraph 27. Cf paragraph 5.6.1.6 *supra* for a discussion on method of delivery and receipt of the section 129 (1)(a) notice in the National Credit Act.

²¹⁵⁶ *Kubyana* judgment *supra* at paragraph 33.

²¹⁵⁷ Cf *Balkind v Absa Bank Ltd* 2013 2 SA 486 (ECG) and Van Heerden in Scholtz 2014 paragraph 12.4.6 regarding change of *domicilium* by a party to a credit agreement that falls under the auspices of the National Credit Act.

National Credit Act, is of the same especial importance and pivotal significance as a section 129 (1)(a) notice, and accordingly, the same obligations would be imposed on credit providers/sellers who wish to send a section 19 (1) notice to consumers in terms of the Alienation of Land Act. Section 19 (2) of the Alienation of Land Act provides that a section 19 (1) notice must contain the following:-

- a description of the purchaser's alleged breach of contract;
- a demand that the purchaser rectify the alleged breach within a stated period, which, shall not be less than thirty days calculated from the date on which the notice was handed to the purchaser or was sent to him by registered post, as the case may be; and
- an indication of the steps that the seller intends to take if the alleged breach of contract is not rectified.

It is submitted, however, that the section 19 (2) notice must be supplemented by the requirements laid out by section 129 (1)(a) and that added to the content mentioned from (a) to (c) above a seller/credit provider must also propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with 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.²¹⁵⁸ Thus a credit provider would send a combined 'Section 19 (2) Notice in terms of the Alienation of Land Act and Section 129 (1)(a) Notice in terms of the National Credit Act'.

The time periods indicated in section 19 of the Alienation of Land Act, are longer than those required in terms of the National Credit Act and it is submitted that the benefit should accrue to the consumer and the longer time period as prescribed by the Alienation of Land Act should be allowed, accordingly, thirty days as opposed to the ten days provided by the National Credit Act.²¹⁵⁹ However, section 19 (3) of the Alienation of Land Act provides that if the seller in the same calendar year has handed or sent to the purchaser two notices at intervals of more than thirty days he may in any subsequent notice so handed or sent to the

²¹⁵⁸ Section 129 (1)(a) of the National Credit Act.

²¹⁵⁹ Cf paragraph 5.6.1.5 *supra* for a discussion on time periods of the section 129 (1)(a) notice in the National Credit Act.

purchaser in such calendar year make demand to the purchaser to carry out his obligation within a period of not less than seven days calculated from the date on which the notice was so handed or sent to the purchaser, as the case may be. It is submitted that such shortened period would not be allowed if the agreement also fell under the National Credit Act and the purchaser/consumer would be entitled to at least ten business days to have elapsed since the seller/credit provider delivered a notice to the consumer prior to taking action, irrespective of how many notices the seller/credit provider had sent to the same purchaser/consumer during any one calendar year, as no provision for a shortened period is made in the National Credit Act.

It is submitted that by the style of amendment the legislature has not made an easy task of marrying the section 129 (1)(a) notice to the section 19 (1) notice and a 'patching' of the two Acts will have to be attempted by the courts.

5.7. European Union

The European Union Directive,²¹⁶⁰ requires that a credit agreement specifies in a clear and concise manner, *inter alia*,²¹⁶¹ 'a warning regarding the consequences of missing payments'. While the Directive²¹⁶² requires that the credit agreement specify the identities and geographical addresses of the contracting parties, it does not specifically compel the credit provider to notify the consumer upon a breach of contract of the impending consequences of his breach. The Directive appears only to require that a credit provider incorporate the nature of the consequences by breach of the consumer in the agreement.²¹⁶³ Nor does the Directive compel the credit provider to provide the consumer with choices available to him in order to resolve any dispute between the parties. However, the Directive does compel member states to ensure that adequate and effective out-of-court dispute resolution procedures for the settlement of consumer

²¹⁶⁰ 2008/48/EL (hereinafter the "2008 European Union Directive").

²¹⁶¹ Article 10 lists 34 requirements for various agreements.

²¹⁶² Article 10.

²¹⁶³ Article 10.

disputes concerning credit agreements are put in place, using existing bodies where appropriate.²¹⁶⁴

The Directive is a broad piece of legislation, which attempts to harmonise the credit laws of a region with varied sources and types of law, without offending the particular codes or common law in member states.²¹⁶⁵ It thus does not detail the exact procedures which credit providers must follow when faced with breach of contract by a consumer, these are left, it appears, to the member states to determine. As shall become evident in the following sections, both England and Italy have 'governed' such situations, through legislation.

5.8. English Law

Part VII of the Consumer Credit Act 1974, is entitled 'Default Notices and Termination'. This part has been largely amended by the Consumer Credit Act 1974. The discussion which follows addresses the legislation as it has been amended.

Section 87 of the Consumer Credit Act states that it is necessary for a creditor or owner to serve a default notice on the debtor or hirer²¹⁶⁶ before such creditor or owner can become entitled by reason of any breach by the debtor of a regulated agreement to terminate the agreement, demand earlier payment of any sum, recover possession of any goods or land, treat any right conferred on the debtor by agreement as terminated, restricted or deferred or to enforce any security.²¹⁶⁷

The default notice must be in the prescribed form and must specify the nature of the alleged breach, if the breach is capable of remedy, what action is required to

²¹⁶⁴ Chapter VII, Article 24.

²¹⁶⁵ The harmonization policy regarding the European Consumer Credit Directive (87/102/EEC) and its amendment in 1990 by Directive 90/88/EEC are discussed in greater detail at paragraph 3.4 *supra*.

²¹⁶⁶ Hereinafter in this section the term 'debtor' will be used to connote both debtors and hirers.

²¹⁶⁷ Section 87 was amended by the Consumer Credit EU Directive Regulations 2010 (2010/1010) regulation 37, 99 (1) as read with regulation 100 and 101.

remedy it, the date before which that action is to be taken and if the breach is not capable of remedy, the sum, if any, required to be paid as compensation for the breach and the date before which it is to be paid.²¹⁶⁸ If the breach is capable of remedy, the date before which the action required to remedy same must not be less than fourteen days after the date of service of the default notice and the creditor or owner is prohibited from taking any action as provided for in section 87 (1) of the Consumer Credit Act before the date so specified or, if no requirement is made under subsection 1, before those fourteen days have elapsed.²¹⁶⁹ The default notice must not treat as a breach failure to comply with a provision of the agreement which becomes operative only on breach of some other provision, but if the breach of that other provision is not duly remedied or compensation demanded not duly paid, or, where no requirement is made in the notice, if the fourteen days have elapsed, the creditor or owner may treat the failure as a breach and section 87 (1) shall not apply to it.²¹⁷⁰ The default notice must contain information about the consequences of failure to comply with it.²¹⁷¹ A default notice may include a provision for the taking of action such as is mentioned in section 87 (1), that is at any time after the time restriction imposed has elapsed, together with the statement that the provision will be ineffective if the breach is duly remedied or the compensation duly paid.²¹⁷²

If, before the date specified for that purpose in the default notice, the debtor takes the action specified in the notice to remedy the breach or to pay the sum required as compensation for the breach, the breach shall be treated as not

²¹⁶⁸ Section 88 (1) of the Consumer Credit Act 1974. The details of the form and content of default notices are prescribed by the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983, regulation 2 and schedule 2 SI 1983/1561, which were amended in 2004 under the Consumer Credit (Enforcement, default and Termination Notices)(Amendment) Regulations 2004 SI 2004/3237, which came into force on the 31 December 2005. Furthermore, section 14 (2) of the 2006 Act empowered the Secretary of State to make regulations in order to prescribe further matters that must be included in default notices and this was done under the Consumer Credit (Information Requirements and Duration of Licenses and Charges) Regulations 2007 SI 2007/1167. Cf Goode *Consumer Credit Law and Practice* 2014 paragraph 45.139 for a detailed exposition of what should be contained in a default notice under section 87 of the Consumer Credit Act.

²¹⁶⁹ Section 88 (2) of the Consumer Credit Act 1974.

²¹⁷⁰ Section 88 (3) of the Consumer Credit Act 1974.

²¹⁷¹ Section 88 (4) of the Consumer Credit Act 1974.

²¹⁷² Section 88 (5) of the Consumer Credit Act 1974.

having occurred.²¹⁷³ Notices of sums and arrears under fixed-sum agreements²¹⁷⁴ must be delivered only when the following conditions are satisfied:

- when the debtor under a fixed-sum agreement is required to have made at least two payments under the agreements before this time;
- the total sum paid under the agreement by him is less than the total sum which he is required to have paid before that time;
- that the amount of the shortfall is no less than the sum of the last two payments which he is required to have made before that time;
- that the creditor or owner is not already under a duty to give them notices under section 86 or 87 in relation to the agreement; and
- if a judgment has been given in relation to the agreement before that time, that there is no sum still to be paid under the judgment by the debtor or hirer.²¹⁷⁵

The creditor or owner shall, within the period of fourteen days beginning with the day on which the conditions mentioned are satisfied, give the debtor notice and after the giving of that notice, shall give him further notices at intervals of not more than six months.²¹⁷⁶ The duty of the creditor or owner to give the debtor notices with regards the applicable agreements shall cease when the debtor ceases to be in arrears²¹⁷⁷ or a judgment is given in relation to the agreement under which a sum is required to be paid by the debtor, but if either of these

²¹⁷³ Section 89 Consumer Credit Act 1974.

²¹⁷⁴ This is a regulated agreement for fixed-sum credit or a regulated consumer hire agreement and is neither a non-commercial agreement nor a small agreement (section 86 (B)(12) Consumer Credit Act 1974).

²¹⁷⁵ Section 86 (B)(1) Consumer Credit Act 1974.

²¹⁷⁶ Section 86 (B)(2) Consumer Credit Act 1974.

²¹⁷⁷ The debtor ceases to be in arrears when no sum, which he has ever failed to pay under the agreement when required, is still owing; no default sum, which has ever become payable under the agreement in connection his failure to pay any sum under the agreement when required, is still owing; no sum of interest, which has ever become payable under the agreement in connection with such a default sum, is still owing; and no other sum of interest, which has ever become payable under the agreement in connection with his failure to pay any sum under agreement when required, is still owing (section 86 (B)(5) Consumer Credit Act 1974).

conditions is satisfied before the notice is given, the duty shall not cease until that notice is given.²¹⁷⁸

Section 86 (C), inserted by the Consumer Credit Act 1974, regulates notices of sums and arrears under 'running account' credit agreements.²¹⁷⁹ Such notices are necessary at any time when the debtor under such an agreement is required to have made at least two payments under the agreement before that time, the last two payments which he is required to have made before that time has not been made, the creditor has not already been required to give a notice under this section in relation to either of those payments and if a judgment has been given in relation to the agreement before that time, that there is no sum still to be paid under the judgment by the debtor.²¹⁸⁰ The creditor is obliged by no later than the end of the period within which he is next required to give a statement in terms of the Consumer Credit Act 1974, in relation to the agreement, to give the debtor a notice in terms of section 86 (C).²¹⁸¹ The notice must include a copy of the current arrears information²¹⁸² and the notice may be incorporated in the statement or other notice which the creditor gives the debtor in relation to the agreement by virtue of another provision of the Act.²¹⁸³ The debtor shall have no liability to pay any sum in connection with the preparation or the giving to him of the notice.²¹⁸⁴

Where a creditor or owner under a fixed-sum or running account credit agreement fails to give a debtor a notice as required by the relevant sections

²¹⁷⁸ Section 86 (B)(3) and (4) Consumer Credit Act 1974.

²¹⁷⁹ Such agreements include regulated agreements for running account credit and neither non-commercial agreements nor small agreements (section 86 (C)(7) Consumer Credit Act 1974). Section 10 of the Consumer Credit Act defines 'running-account credit'. Running-account credit, such as bank overdrafts and credit cards, is defined as 'a facility under a consumer credit agreement whereby the debtor is enabled to receive from time to time (whether in his own person, or by another person) from the creditor or a third party cash, goods and services (or any of them) to an amount or value such that, taking into account payments made by or to the credit of the debtor, the credit limit (if any) is not at any time exceeded' (section 10(1)(a)). In this context 'credit limit' means, with respect to any period, the maximum debit balance which, under the credit agreement, is allowed to stand on the account during that period, disregarding any term of the agreement allowing that maximum to be exceeded merely temporarily (section 10(2)).

²¹⁸⁰ Section 86 (C)(1) of the Consumer Credit Act 1974.

²¹⁸¹ Section 86 (C)(2) of the Consumer Credit Act 1974.

²¹⁸² Section 86 (C)(3) of the Consumer Credit Act 1974.

²¹⁸³ Section 86 (C)(4) of the Consumer Credit Act 1974.

²¹⁸⁴ Section 86 (C)(5) of the Consumer Credit Act 1974.

within the fourteen day period as prescribed or within the period of six months beginning with the day after the day on which such a notice was last given to him, then in such event the creditor or owner shall not be entitled to enforce the agreement during the period of non-compliance.²¹⁸⁵ The debtor shall have no liability to pay any sum of interest to the extent calculated by reference to the period of non-compliance or to any part of it or any default sum which would have become payable during the period of non-compliance or would have become payable after the end of that period in connection with a breach of the agreement which occurs during that period, whether or not the breach continues after the end of that period.²¹⁸⁶

A creditor or owner is not entitled to enforce a term of a regulated agreement by demanding earlier payment of any sum, or recovering possession of any goods or land, or treating any right conferred on the debtor by the agreement as terminated, restricted or deferred except by or after giving the debtor not less than seven days' notice of intention to do so.²¹⁸⁷ This section, that is section 76 (1), does not apply to a right of enforcement arising by reason of any breach by the debtor of a regulated agreement. The creditor will have to follow the notice requirements in terms of section 87, 88 and 89 in the event of such breach. Section 76 (1) applies only where a period for the duration of the agreement is specified in the agreement and that period has not ended when the creditor or owner demands earlier payment, recovers possession of any goods or land or treats any right conferred on the debtor by the agreement as terminated, restricted or deferred.²¹⁸⁸

Where a default sum becomes payable under a regulated agreement by the debtor, the creditor or owner shall, within the prescribed period after the default sum becomes payable, give the debtor notice under section 86 (E). The notice under this section may be incorporated in the statement or other notice which the creditor or owner gives the debtor or hirer in relation to the agreement by virtue of

²¹⁸⁵ Section 86 (D)(1), (2) and (3) of the Consumer Credit Act 1974.

²¹⁸⁶ Section 86 (D)(4) of the Consumer Credit Act 1974.

²¹⁸⁷ Section 76 (1) of the Consumer Credit Act 1974.

²¹⁸⁸ Section 76 (2) of the Consumer Credit Act 1974.

another provision of the Act.²¹⁸⁹ The debtor shall have no liability to pay interest in connection with the default sum to the extent that the interest is calculated by reference to a period occurring before the 29th day after the day on which the debtor is given the notice under section 86 (E).²¹⁹⁰ If the creditor or owner fails to give the debtor the notice under section 86 (E) within the period mentioned, he shall not be entitled to enforce the agreement until the notice is given to the debtor.²¹⁹¹ The debtor shall have no liability to pay any sum in connection with the preparation or the giving to him of the notice under section 86 (E). This section does not apply in relation to a non-commercial agreement or to a small agreement.²¹⁹²

It is evident that the Consumer Credit Act 1974, as amplified by the Consumer Credit Act 1974, was drafted to compel creditors or hirers in England to give notice, either of termination or of breach and the remedies and time limits available to the consumer or debtor, as the case may be.²¹⁹³ A major change to the 1974 default notice provisions was made by section 14 of the Consumer Credit Act 1974.²¹⁹⁴ A default notice was, in terms of the 1974 Act, required to contain information ‘in the prescribed terms about the consequences of failure to comply with it’ and was amended to provide that the notice must also contain ‘any other prescribed matters relating to the agreement’. The time limit and consequences are requirements which are omitted from the prescribed content of a section 129 (1)(a) notice in terms of the National Credit Act and which, as earlier submitted, is a fairly important requirement – because such notices should press upon a consumer not only the serious consequences of his breach if not remedied, but the time constraints within which he should elect to use the options available to him in an attempt to remedy the breach or attempt to cure his situation.

²¹⁸⁹ Section 86 (E)(1), (2) and (3) of the Consumer Credit Act 1974.

²¹⁹⁰ Section 86 (E)(4) of the Consumer Credit Act 1974.

²¹⁹¹ Section 86 (E)(5) of the Consumer Credit Act 1974.

²¹⁹² Section 86 (E)(8) Consumer Credit Act 1974.

²¹⁹³ The Scheme of the Consumer Credit Act 1974 [...] as always been that the debtor or hirer should be given a detailed notice of any event which might trigger termination or the operation of any other right of the creditor or owner against the debtor or, in the case of credit involving the supply of good, against the goods themselves’ (Mawrey and Tobias 2006 67).

²¹⁹⁴ Which came into force on 1 October 2006.

Of further interest is the fact that if a consumer in England receives a default notice in terms of section 87 and he remedies his default within the prescribed fourteen day period, the breach shall be treated as not having occurred.²¹⁹⁵ No such provision exists in the National Credit Act, however, due to the detrimental effects of negative credit listings,²¹⁹⁶ the legislature effected the Removal of Adverse Consumer Credit Information and Information Relating to Paid Up Judgment Regulations,²¹⁹⁷ commonly referred to as the ‘credit amnesty’ which required all registered credit bureaus to remove adverse consumer credit information²¹⁹⁸ listed before 1 April 2014 as well as paid up judgments,²¹⁹⁹ including default judgment.²²⁰⁰ Despite the credit amnesty and despite that a consumer may respond to a section 129 (1)(a) notice by remedying the breach within the stipulated time period, it may still be recorded, post the amnesty period, on his credit record that he is a ‘slow-payer’. It is submitted that a section similar to section 87 of the Consumer Credit Act should be considered by our legislature or at least regulations which protect consumers who react to notices (and not just pay up judgments) and remedy same, from negative credit listings.

²¹⁹⁵ Section 89 of the Consumer Credit Act 1974. Furthermore, in terms of section 93 of the Consumer Credit Act, a debtor under a regulated consumer credit agreement shall not be obliged to pay interest on sums which, in breach of the agreement, are unpaid by him at a rate where the total charge for credit includes an item in respect of interest, exceeding the rate of that interest, or in any other case, exceeding what would be the rate of the total charge for credit if any items included in the total charge for credit by virtue of section 20 (2) were disregarded and the debtor or hirer shall only be liable to pay interest in connection with the default sum if the interest is simple interest (section 86F).

²¹⁹⁶ Consumers not being granted credit.

²¹⁹⁷ Government Notice 144 Government Gazette 37386 26 February 2014.

²¹⁹⁸ ‘Adverse consumer credit information’ is defined in regulation 1 as: (a) adverse classification of consumer behaviour are subjective classifications of consumer behaviour and include classifications such as ‘delinquent’, ‘default’, ‘slow paying’, ‘absconded’ or ‘not contactable’; (b) adverse classifications of enforcement action, which are classifications related to enforcement action taken by the credit provider, including classifications such as ‘handed over for collection or recovery’, ‘legal action’ or ‘write-off’; (c) details and results of disputes lodged by consumers irrespective of the outcome of such disputes; (d) adverse consumer credit information contained in the payment profile represented by means of any mark, symbol, sign or in any manner or form.

²¹⁹⁹ ‘Paid up judgments’ is defined in regulation 1 as civil court judgment debts, including default judgments, where the consumer has settled the capital amount under the judgment(s).

²²⁰⁰ The regulations provide that after the amnesty period (two months from the effective date of the regulations, being 1 April 2014) credit bureaus are obliged to continue removing information relating to paid up judgments, within seven days after receiving proof of such payments.

5.9. Italian Law

Italy's methods of collecting debt are quite different to the South African or even English methods. There is somewhat of a reversal of onus in the whole debt enforcement process. First and foremost the Italians do not differentiate between debt collection between natural persons and juristic entities. Furthermore, the 2008 European Union Directive did not impact the way in which unpaid or arrear debt is pursued in Italy.

Similarly to South African Law, *mora* of the debtor is the delay in settlement of the debtors' contractual obligations.²²⁰¹ The debtor must, formally be placed in *mora* by the creditor.²²⁰² A formal written notice must be made by the creditor, which explicitly states that the debtor must perform immediately.²²⁰³ The written demand must advise the debtor that he has a fixed amount of time, usually fifteen days, in order to perform the obligations required of him in terms of the agreement.²²⁰⁴

There are some instances where formal notice or placing the debtor in *mora* occur automatically, that is without having to place the debtor in *mora* by written notice, by the very fact that the debtor has delayed in his performance.²²⁰⁵ In terms of article 1219 of the Civil Code, these instances are²²⁰⁶:-

- when the debt arises from an unlawful circumstances/fact;

²²⁰¹ www.doc.studenti.it/podcast/mora-del-debitore-e-del-creditore.html (11.09.2014).

²²⁰² This is *mora ex persona* (cf comments to the article 1219 of the Civil Code by Mazzitelli M Esplicato Codice Civile v1 ed 2013 446). The act of writing a letter of demand, referred to by the Italians as 'putting in *mora*' is referred to as an extra-judicial act (translated from the Italian 'stragiudiziale'). Despite this 'extra judicial' labelling, in terms of article 2943 of the Civil Code a letter of demand can interrupt prescription, provided the letter of demand specifically requests the debtor to perform in terms of his obligations and makes reference to the interpretation of prescription by virtue of article 2943 (Spagnuoli G *I1 Recupero del Credito Questioni Processuali* 2007 2). Cf also <http://www.paolonesta.it/informazioni-di-contenuto-legale/1845-la-costituzione-in-mora-del-debitore-insolvente-marco-faccioli.html> (11.09.2014) and <http://www.paolonesta.it/informazioni-di-contenuto-legale/3875/-L-inadempimento-e-la-mora-del-debitore.html> (11.09.2014).

²²⁰³ Spagnuoli 2007 2.

²²⁰⁴ www.paolonesta.it/informazioni-di-contenuto-legale/1845-la-costituzione-in-mora-dl-debitore-insolvente-marco-faccioli.html (11.09.2014).

²²⁰⁵ www.doc.studenti.it/podcast/mora-del-debitore-e-del-creditore.html (11.09.2014).

²²⁰⁶ www.iusreporter.it/testi/vanacore6-constituzionemora.html (11.09.2014).

- when the debtor has declared in writing that he refuses or will not honour his obligations; or
- when the time for the obligation to be performed has passed and the obligation had to be performed at the creditor's domicile.

Once the debtor has been placed in *mora* the effects of such notice are as follows:-

- from the date of the notice to the debtor, the debtor is liable to the creditor for any damages caused to the creditor from the breach or delay (including damages and loss of profits);
- if, after formal notice, the performance becomes impossible for reasons not attributable to the debtor, the debtor would still be liable for damages in the event where the obligation is to pay a sum of money the performance can never become impossible and the debtor, even after the formal notice, remains obliged to perform and over and above the amount due, the debtor must also pay *mora* interest.

Once the registered slip is received²²⁰⁷ and once the requisite amount of time has lapsed, the creditor (or his legal representative) can proceed with the next most appropriate legal step. There are two choices available at this point, the first is what appears to be a type of provisional application for an injunction or mandatory interdict,²²⁰⁸ and the second is by issue of a summons and trial procedure.²²⁰⁹ The latter is a very similar process to the South African system of summons, plea and trial process.²²¹⁰ The appeal for an injunction decree is favoured as it is a quicker procedure and tends to yield better and less expensive results. However, a decree of injunction may only be applied for and granted under certain circumstances. Application for an injunction may be made when a creditor is owed a liquid sum of money, a determined quantity of fungibles²²¹¹ or for delivery of a specified moveable.²²¹²

²²⁰⁷ In Italy post can be lodged electronically online with the post office and the registered slip received electronically from the post office.

²²⁰⁸ The word 'injunction' has been used as it is translated from the Italian 'ingiunzione'. 'Ricorso per decreto ingiuntivo' can be translated to appeal or application for an injunctive decree (author's own translation). It is interesting to note Christie and Bradfield's comments regarding the decree, albeit in relation to English law: 'A less important, but perhaps confusing, result of the influence of English equity is the habit of talking about a "decree".... [o]ur courts do not issue decrees, they issue orders' (2011 521).

²²⁰⁹ 'Cittare in giudizio' is the Italian terminology for this process.

²²¹⁰ Cf *Part II: Civil Matters* of the Magistrates Court Act 32 of 1944 and the Rules of the Superior Court Act 10 of 2013 more particularly Rules 17 and 39 respectively.

²²¹¹ When application is made regarding the return of a determined quantity of fungibles the applicant must declare the sum of money which he is prepared to accept in *lieu* of the

Application for an injunction is made *ex parte*.²²¹³ The procedure for the injunction application is regulated by article 633 of the Civil Procedure Code.²²¹⁴ The judge who is hearing the matter may grant the injunction if the debt is proved in writing²²¹⁵ or if the debt is one for legal fees, reimbursement of costs expended by attorneys, officials of the court (registrars and clerks) and judicial officers²²¹⁶ or if the debt is in relation to notaries who have rendered services or other service providers whose services are regulated by statutory tariffs.²²¹⁷ The injunction may be granted even if the right depends on the applicant's counter performance or condition, provided the applicant tenders same.²²¹⁸

If the judge is of the view that the applicant has not provided sufficient information he may request that the registrar or clerk²²¹⁹ notify the applicant or his attorney and invite him to provide the necessary.²²²⁰ If the applicant does not respond and/or does not collect the application the judge may refuse the application with written reasons for such refusal.²²²¹ Such decree (of refusal) does not prevent the applicant from instituting a fresh application.²²²²

performance and release of the other party from further obligation. If the judge is of the view that the requested amount is not proportional he may request the applicant to provide a certificate confirming the quantum from the Chamber of Commerce, Industry, Handicraft or Agriculture (article 639 Civil Procedure Code).

²²¹² Article 633 comma I Civil Procedure Code. One could compare the Italian injunction to the South African application for summary judgment, in that the prerequisites for both procedures are similar. Where the defendant has delivered notice of intention to defend, the plaintiff may apply for summary judgment only on claims based on a liquid document, for a liquidated amount in money, for delivery of a specified moveable property or for ejection (*Erasmus: Superior Court Practice* B1 – 204E Rule 32).

²²¹³ Article 633 and 641 of the Codice di Procedura Civile, approvato con regio decreto 28 Ottobre 1940, n.443 (hereinafter 'Civil Procedure Code').

²²¹⁴ This article is found in the fourth book which is entitled 'Special Proceedings' and under the first title which is entitled 'Summary Proceedings'. The contents of the application is regulated by article 125 of the Civil Procedure Code (Pertile *R Il Recupero del Credito Percorsi Giurisprudenziali* 2009 89).

²²¹⁵ Acceptable written proof are unilateral promises to pay and telegrams (article 634 comma I Civil Procedure Code).

²²¹⁶ Article 633 comma I as read with article 636 comma I of the Civil Procedure Code. The Civil Procedure Code refers to this office as 'giudiziario' which directly translates to 'judicial' thus the translation to 'judicial officer' or 'official'. It is submitted that this is the equivalent of the sheriff's office in South Africa.

²²¹⁷ Article 622 comma I as read with article 636 comma I of the Civil Procedure Code.

²²¹⁸ Article 633 comma II of the Civil Procedure Code as read with article 1353 and 1359 of the Civil Code and Spagnuoli 2007 5.

²²¹⁹ In Italian 'cancelliere'. There appears to be no distinction made in Italy between registrars and clerks of the courts.

²²²⁰ Article 640 comma I of the Civil Procedure Code and Pertile 2009 103.

²²²¹ Article 640 comma II of the Civil Procedure Code.

²²²² Article 640 comma II of the Civil Procedure Code.

If the judge grants the injunction he must provide a written decree (order) within thirty days from the date that the application is lodged.²²²³ The decree enjoins the respondent²²²⁴ to pay the sum of money, deliver the thing or the quantity of fungibles requested within forty days from the date that the respondent is notified of the decree²²²⁵ and warn the respondent that in the absence of payment or opposition the applicant will proceed with execution.²²²⁶ The respondent may within this period, either make payment as per the decree, deliver the thing or oppose the injunction.²²²⁷ The judge also gives an order as regards costs enjoining and warning the respondent in relation thereto.²²²⁸ Notice of opposition is lodged by the respondent with the relevant registrar or clerk of the court.²²²⁹

The original application together with the original decree remains with the registrar or clerk of the court and the respondent is notified with an authenticated copy by the judicial officer of the court.²²³⁰ If the injunction decree is not served within sixty days from the day it is granted it becomes ineffective or lapses if it must be served within Italy, alternatively within ninety days if outside of Italy.²²³¹

If the respondent does not make payment or return what he has been enjoined by the injunctive decree to return or does not lodge opposition within the allocated time, upon application by the applicant (verbal application may also be made), the judge may declare the injunction decree executable.²²³² The judge can order that the decree be re-served if it appears or is probable that the respondent has not been notified.²²³³ Once the decree is declared executable, the respondent can no

²²²³ Article 641 comma I of the Civil Procedure Code and Pertile 2009 131.

²²²⁴ The term used in the Civil Procedure Code is not respondent but 'the enjoined'. The terms 'applicant' and 'respondent', however, have been used in the text for ease of reading.

²²²⁵ Article 641 comma I of the Civil Procedure Code and Pertile 2009 131.

²²²⁶ Referred to as 'forced execution' – 'esecuzione forzata' (own translation).

²²²⁷ Article 641 comma I of the Civil Procedure Code.

²²²⁸ Article 641 comma II of the Civil Procedure Code, Spagnuoli 2007 5 and Pertile 2009 131.

²²²⁹ Article 645 of the Civil Procedure Code.

²²³⁰ As per article 137 of the Civil Procedure Code. The attorney representing the applicant keeps abreast of the progress of the application by enquiring with the registrar or clerk or following the case number on the court website - 'polisweb'. The attorney uplifts the authenticated copies and requests the judicial officer to notify the respondent (Spagnuoli 2007 5).

²²³¹ However, despite lapsing, the application can be re-lodged (article 644 of the Civil Procedure Code).

²²³² Article 647 comma I of the Civil Procedure Code.

²²³³ *Ibid.*

longer lodge his opposition, subject to article 650 of the Civil Procedure Code.²²³⁴ The respondent may file a late opposition to the injunctive decree only if he can prove that he was not notified of the decree owing to an irregularity in the notification process, *causa fortuita* or *vis maior*, in which event the executionability of the decree will be 'suspended'.²²³⁵

Once the order for the execution of the injunction decree has been granted the debtor must be informed formally by what is known as an 'atto di precetto' which is a further formal warning to the debtor to perform his obligations or meet his debt. This is a formal court notice which precedes attachment of goods. It is a court decree which advises the debtor that the creditor now holds an executory title²²³⁶ and once again enjoins the debtor to pay within the allocated time for performance, which time may not be less than ten days, and warns him that failure to perform will mean that formal forced execution of his property will occur.²²³⁷ The 'atto di precetto' must be served on the consumer personally. The notification of the 'atto di precetto' is distinct from the notification of the executory title; the notification of the executory title must either occur prior to the notification of the 'atto di precetto' or the debtor must be notified simultaneously of the two.²²³⁸ The procedure for execution, that is attachment of goods, may not occur until the time indicated in the 'atto di precetto' has lapsed, that is ten days from the date that the debtor was notified.²²³⁹ Further, failure by the debtor will result in the attachment and sale in execution of his goods.²²⁴⁰ The same procedure for obtaining the right to proceed with a sale in execution is followed if the creditor

²²³⁴ Article 647 comma II of the Civil Procedure Code. <http://www.paolonesta.it/informazioni-dicontensto-legale/1392-esecuzione-delledecisioniudiziarie.html> (1.09.2014).

²²³⁵ Article 650 of the Civil Procedure Code and Pertile 2009 185 and 205.

²²³⁶ Translated from the Italian 'titolo esecutivo' which is the right provided to the creditor by injunctive decree or judgment after ordinary issue of summons and judgment, for example.

²²³⁷ Article 480 of the Civil Procedure Code, Spagnuoli 2007 56 and <http://www.paolonesta.it/informazioni-di-contenuto-legale/3506-il-procedimento-esecutivo-e-pignoramento.html/> (1.09.2013).

²²³⁸ Article 479 of the Civil Procedure Code, Spagnuoli 2007 56 and <http://www.paolonesta.it/informazioni-di-contenuto-legale/3506-il-procedimento-esecutivo-e-pignoramento.html/> (1.09.2013).

²²³⁹ Article 482 of the Civil Procedure Code, Spagnuoli 2007 56 and <http://www.paolonesta.it/informazioni-di-contenuto-legale/3506-il-procedimento-esecutivo-e-pignoramento.html/> (1.09.2013).

²²⁴⁰ *Ibid.*

cannot apply for an injunction and must proceed by way of summons, trial and judgment.

The Italian process of collecting debt is starkly different from the South African method. What is notable is that the debtor, despite his absence in the initial application of the injunction, is continuously notified and enjoined to meet his obligations and make payment, alternatively to oppose the process if he has a valid defence. This can be viewed as a form of inadvertent or rather indirect consumer protection which warns the consumer to perform or at least act in the protection of his own rights or interests. The injunction procedure is such a foreign procedure to the South African method of enforcing debt that it is difficult to conceive how one could begin to draw from such a system. It appears that the onus of proof is reversed in such instances: the debtor is ordered to pay (and pay the costs) unless he has a valid defence and if he does, he is obliged to action his defence or risk execution and attachment of his property.²²⁴¹ It is further surprising that with so much consumer protection awareness being raised in Europe that Italy's methods of collecting debt have not been affected.

²²⁴¹ This is different to the accepted rule in South Africa, where he who alleges must prove. Albeit, the applicant in an injunction does have certain burdens of proof to satisfy before same is granted.

CHAPTER 6: REMEDIES FOR BREACH OF THE CREDIT AGREEMENT

6.1. Remedies for Breach of Contract

The effective regulation of production and allocation of resources is fundamental to the well-being of any society.²²⁴² In a contemporary economy it is the necessary co-operation and co-ordination of natural and juristic persons, which persons of their own accord make decisions regarding the use and allocation of resource, and through the exchange of promises arrived at by a process of negotiation, achieve their economic and social purposes.²²⁴³ In a present-day, capitalist and free-enterprise society, substantive decisions relating to the production and distribution of goods and services, as far as is reasonable and possible, should be regulated by private decision makers, that is the active role-players, rather than being mandatory and collective, that is through government intervention.²²⁴⁴ However, in order to have successful social and economic franchising progress in the private sphere, it is essential that rules are put into place in order to prevent one individual from interfering with the estate of another and secondly to enable private individuals to independently co-operate in the transfer of resources from the private sphere of one individual to that of another.²²⁴⁵ The first set of rules will have to govern situations where one individual damages the estate of another.²²⁴⁶ The obligations attaching to such rules as a result of such damage arise *ex delicto*.²²⁴⁷ The second set of rules enables private individuals to enter into planned relationships for the use of their separate resources.²²⁴⁸ The obligations resulting from these relationships arise

²²⁴² Harker JR 'The Role of Contract and the Objects of Remedies for Breach of Contract in Contemporary Western Society' 1984 101 *SALJ* 121 135.

²²⁴³ Harker dubs this 'autonomous ordering'. He also refers to 'collective ordering' which places the responsibility of making such decisions in the hands of an agency or agencies of society. Here, natural and juristic persons involved in the production and distribution make no significant decisions regarding the utilization and allocation of resources, such social purposes are achieved by public officials charged with social and economic planning by means of a planned economy (Harker 1984 *SALJ* 121 136).

²²⁴⁴ Harker 1984 *SALJ* 121 136.

²²⁴⁵ *Ibid.*

²²⁴⁶ *Ibid.*

²²⁴⁷ Harker 1984 *SALJ* 121 136.

²²⁴⁸ *Ibid.*

ex contractu.²²⁴⁹ It is submitted that of specific importance is the knowledge of private individuals that their estates will be protected by rules and laws. Harker²²⁵⁰ submits that such rules are 'essential to facilitate private, autonomous ordering, for without them each individual's use of his resources would be autarchic and individuals would be unable to co-operate for the common good in a complex and modern society.

A discussion on rules regulating delictual infractions is beyond the scope of this work and to a certain extent a discussion on the rules regulating contract law generally is as well. What can be discerned from the introductory paragraph is that of vital importance to the management of the contractual relationship is the contracting parties' knowledge that in the event of breach of agreement by a party there exist established consequences that will assist them in recovering their loss. In *Nedbank v Fraser*²²⁵¹ Peter AJ placed emphasis on the compelling social value of enforcing contracts and requiring the discharge of debts, by stating:²²⁵²

In order to promote this social value, court structures exist and this social value finds its expression in section 34 of the Constitution.²²⁵³ Judgments are given to enforce the payments of debts to promote this social value. The process of execution is essential to give content and effect to judgments of the courts. It is for this reason, to promote this social value and as a reasonable alternative to self-help that the courts and their execution machinery exist and are available to be utilised by judgment creditors.

The sanctions imposed on the debtor when he does not meet his obligations in terms of the contract and more particularly the credit agreement are examined in light of how these infractions impact on the remedies available to the creditor.

²²⁴⁹ *Ibid.*.

²²⁵⁰ *Ibid.*

²²⁵¹ 2011 4 SA 363 (GSJ) at paragraph 17.

²²⁵² At paragraph 17.

²²⁵³ Section 34 of the Constitution states: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum'.

Contract theorists have over the years devoted particular attention to the issue of redress for breach of contract.²²⁵⁴ Remedial issues have not only contributed to the development of the common law of contract, but they are of decisive importance to the contracting parties. Parties contract in order to gain something, and while contracting they are mindful of two things: the first is that they will receive something in return for their performance or payment and the second is that if the other party fails to meet his obligations in terms of the contract, the injured party is secure in the knowledge that the law will protect his rights as established by virtue of the agreement entered and the law pertaining to such contracts.²²⁵⁵ The following paragraph places emphasis on the significance of the availability of remedies to an injured contractant:²²⁵⁶

The important thing about an agreement being enforceable at law is that an injured party will be able to take advantage of the armoury of weapons provided by the law to secure redress for him.

²²⁵⁴ Some writers have taken the view that remedies for breach of contract are not part of the law of contract, as they argue that contract law, properly understood, is limited to the rules that govern the creation and content of contractual issues (in particular cf Smith SA *Contract Theory* 2004 389). While the point may be, strictly speaking, theoretically correct, writer neither proposes nor supports such technical divide. The word 'remedy' in ordinary meaning is something that is designed to cure or heal. The *Oxford Dictionary and Thesaurus* provides the following: '1. Medicine or treatment for a disease or injury. 2. A way of setting right or improving an undesirable situation. 3 A means of gaining legal amends for a wrong' (Waite 2007). The *Oxford Pocket Dictionary* provides very interesting meanings for the word 'remedy': 'means of counteracting or removing anything undesirable' and 'redress; legal or other reparation' (Thompson 1992). The word 'reparation' is of key importance, it implies fixing or mending. So when deciding whether or not 'remedies' are to be incorporated into the law of contract it is submitted that because remedies for breach provide a method of repairing the 'broken' contract, these should be a class to be enlisted in the law of contract. The remedies for breach of contract are the 'cures' or 'reparatory tools' for breach of the agreement and cannot, therefore, be separated from contract law, rather they form an intrinsic part of this area of law, both in theory and in practice. The remedy of specific performance is a perfect example of a remedy for breach which sustains the contract between the parties. Penalty clauses are an example of how the contracting parties incorporate in their agreement terms that have the effect of dissuading a breach of contract or if a breach occurs by punishing the breaching party for breaking his word, whether written or verbal. The source of the penalty remedy, however, firstly emanates from the contract and secondly has the effect of healing the wounds (damages) of the aggrieved party.

²²⁵⁵ Adams and Brownsword *Understanding Contract Law* 2007 153. Furthermore, it is submitted that the security created by legal machinery to ensure a creditor's right to enforce an agreement not only impacts social values as contemplated above, but affects considerations on a macro economic level beyond the parochial concerns of individual litigants. To fail to ensure that credit consumers honour their obligations would sterilise the commerce of credit. This freeze would have a knock-on effect on consumers by inhibiting their access to credit. Much needed, credit is used to buy homes and finance business activities, which in turn further stimulates the economy (the ideas for these submissions have largely been drawn from Peter AJ's judgment in *Nedbank Limited v Fraser and Another* 2011 4 SA 363 (GSJ) at paragraph 21).

²²⁵⁶ *Ibid.*

When two parties enter into an agreement, they do so on the expectation that certain commitments will be carried out.²²⁵⁷ When one of them fails to perform as per the commitments made or commits 'a breach of contract' and the other's expectations are not fulfilled, the law provides remedies to which the aggrieved party may turn to in order to seek redress.²²⁵⁸

Where there has been a breach of the agreement by one party the common law allows the other party to take various steps to obtain legal redress. The remedies available to the injured party at common law are: specific performance, interdict, cancellation, damages and declaratory orders.²²⁵⁹

Credit legislation has, over the years, evolved its own regulations alongside the common law, pertaining to the remedies available to the creditor upon breach of contract by the consumer. While the common law remedies are not ousted completely by credit legislation, due to the particular nature of the credit agreement and the sensitivity surrounding the credit relationship, specific remedies have evolved through legislative enactments. Interim attachment of movable goods is one such example. This order, if granted, provides the credit

²²⁵⁷ Taken from an American study on the theory of contracts, the following analysis breaks down into a simple example, what the law 'does' to assist the aggrieved party: 'The law can say that if, in return for A's giving B a cow, B promises to give A 20 bushels of wheat next month, mechanisms will be available to make life unpleasant for B if he does not perform his promise. Or it might be able to do even more and make devices available to accomplish the promised transfer, e.g. court officers will seize the wheat (if there is any) from B and turn it over to A. Or it might allow A to go after B's property to recoup losses A has suffered because of the breach of the promise' (Campbell and MacNeil *The Relational Theory of Contract: Selected Works of Ian Macneil* 2001 265-6).

²²⁵⁸ *Ibid.*

²²⁵⁹ Christie regards the first three, here listed, as methods of enforcement and the last two as recompenses for non-performance (Christie and Bradfield 2011 543). Kerr also refers to five remedies, however, he does not recognise declaration of rights and gives restitution as a fifth remedy (2002 669). It is submitted that, broadly speaking, the solutions available to a creditor are either to enforce the contract (that is that the debtor must specifically perform in terms of the contract, whether this is enforced by an order for specific performance or for example, an interdict, or whether there are further performances required by the debtor in terms of the contract due to his breach, for example, performing in terms of an acceleration clause) or to cancel the contract. Both specific performance and cancellation may be accompanied by an order for damages. It must be noted that the implications of the word 'enforce' in light of the National Credit Act have been examined more than once. Otto referred to the word 'enforce' in the National Credit Act as having been used 'inelegantly' and in a 'very wide and technically wrong sense' (Otto and Otto 2013 113). However, the courts have interpreted it to refer to a credit provider exercising any of its remedies (*Absa Bank Ltd v De Villers* 2009 5 SA 40 (C)), the view was endorsed in *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA). It is interesting that the English had a similar issue in determining what exactly the word 'enforce entailed' for a comparison.

provider with an opportunity to protect the goods until he has obtained full payment of the purchase price as well as his opportunity cost²²⁶⁰ by securing the goods through temporary attachment and removal. In the event of default, the credit provider will want to safeguard the goods pending the outcome of an action or application to court by attaching them temporarily. The interim attachment of movable property subject of a credit agreement is not a novel safeguard but has been available to credit providers prior 2006 through previous legislative enactments.²²⁶¹ The common law made provision for interim attachment of goods.²²⁶² Its history, however, does not make this type of relief any easier to categorise. Strictly speaking, interim attachment of movable goods is not a final remedy but rather a type of interim-remedy. It entitles the credit provider to exercise certain actions *vis-à-vis* the consumer in the protection of the provider's rights within the credit relationship. It provides a solution and relief, albeit temporary, for the credit provider. It is submitted that it would fall under the *specie* interdict as it prevents the consumer from utilising the goods pending a resolution. It is under such heading that this form of provisional relief has been dealt with in this work.²²⁶³

This chapter deals with the various remedies available to the credit provider for breach of contract by the consumer that have been developed over the years in the common law but which, when dealing with a credit agreement that falls under the auspices of the National Credit Act, are regulated, tempered and at times ousted by this legislation, as well as the *other* remedies that are unique to the credit agreement.

²²⁶⁰ Usually represented in the form of interest.

²²⁶¹ Interim attachments of goods (as well as whether such remedy is available to the credit provider in terms of the National Credit Act) is discussed in paragraph 6.3.2 *infra*.

²²⁶² *Morrison v African Guarantee and Indemnity Co. Ltd* 1947 SA 87 (W), *Loader v De Beer* 1947 1 SA 87 (W) and *Van Rhyn v Reef Developments (Pty) Ltd* 1973 1 SA 488 (W).

²²⁶³ Interim attachment of goods as a *specie* of interdict has been discussed in greater detail in clause 6.3.1 and 6.3.2.

6.1.1. Choice of Remedies

Where there is a breach of the agreement by one of the parties in a contractual relationship the other party may elect various palliatives available to him at common law to obtain legal redress. As pointed out in the previous paragraph, there are a number of remedies that the court may grant to the aggrieved party in such event, however, two main or most commonly elected remedies are: an order for performance (including an interdict)²²⁶⁴ and an order rescinding the contract,²²⁶⁵ either of which may be accompanied by an order for damages. The first two may be used in the alternative, as they are mutually exclusive, and each of these remedies may be supplemented by the third remedy - damages.²²⁶⁶

There is an assumption in law that the parties to a contract intend to carry out their commitments.²²⁶⁷ Accordingly, the first port of call would be for the

²²⁶⁴ Execution of the contract may be prayed for in terms of specific performance, a reduced performance or where there is an impending breach of contract - an interdict.

²²⁶⁵ 'The two most important remedies which our law gives to the injured party when the contract has been broken are specific performance and an action for damages. The one compels the defaulting party to fulfil his promise, the other compensates the injured party for the loss to his estate caused by the breach. In addition to these, the aggrieved party may restrain the other from doing acts contrary to the contract by an interdict or he may obtain from the court an order rescinding or cancelling the contract' (Wessels *Law of Contract in South Africa* vol 2 1951 paragraph 3086).

²²⁶⁶ Wessels states: 'The aggrieved party can elect which of the two actions he wishes to bring. He may, if he chooses, claim specific performance and, alternatively, cancellation of the contract and damages, or if there has been a delay in the performance, he may claim both specific performance and damages for the delay' (1951 paragraph 3088).

²²⁶⁷ In a theoretical analysis on relational contract law the authors point out that despite what is perceived as the limitation of private remedies in essentially fully achieving the putative results enshrined in substantive rules, there exists many 'nonlegal' enforcement mechanisms within society which ultimately save these remedial limitations from completely eroding the contract system. One of their arguments is that parties perform most contracts for the same reason they made them in the first place, that is because they *want* to make the exchanges initially contemplated. This, the authors argue, is true even when one party has performed and the other's performance is still due. For a number of reasons, people want to pay their credit bills, and these reasons have little or nothing to do with the threat of suit if they do not. Rather, it is argued the reasons involve more 'fundamental contract enforcement mechanisms', namely nonlegal sanctions for breach of promises. Accordingly, the consequences of not paying bills, would have the effect that no one will trust the non-payer in the future, and he shall have to pay cash for everything. This cash induced existence, it is argued, would be of major disaster in the credit-prone society (Campbell and MacNeil 2001 268). While the argument appears to be theoretically sound, it is submitted that it is precisely the legal sanction which attaches to an attitude or inability of non-payment which the average person in society avoids. The score-keeping of the credit consumer, or perhaps more correctly labelled the credit record of the credit consumer which is kept by the credit bureaus, both in the old dispensation and in the new one (section 70 of the National Credit Act) as well as in other jurisdictions, is relational to legal sanctions. In terms of legislation or law, the credit bureaus maintain a record of a consumer's credit history: that is, whether he is a punctual payer, whether there are judgments against his name, whether he has

aggrieved party to ask the court that the party whom has breached the contract be ordered to perform according to what he had committed to perform in terms of the contract. Cancellation of a contract is viewed as an extraordinary remedy and contrary to the assumption that the parties intend to carry out their contract.²²⁶⁸ Accordingly, this remedy is usually only granted in extreme cases, that is, when the breach is a major one.²²⁶⁹

These remedies and the means by which a credit provider may avail itself of these remedies when a consumer is in breach of the credit agreement, are regulated by the National Credit Act, the common law and other legislation of general application. Despite the effect the Act has on the nature of the remedies, the procedure that the provider must follow in order to obtain its elected relief has also been dramatically affected.²²⁷⁰ That is, the credit provider is not deprived of its common law remedies, for example, cancellation and damages, but the Act may direct the creditor's course of action before it may cancel and curtail its damages.²²⁷¹ The Act is, however, limited in scope,²²⁷² and therefore the common law rules will unaffectedly apply when a credit agreement falls beyond the application of the Act.

Furthermore, while parties may not resort to self-help when faced with a breach or impending breach of contract, they may, when contracting, include terms that will assist them in the protection of their rights in the event of the other party's

been liquidated, a summary of which leads to the construction of a 'credit history' which history may have an adverse effect on the consumer's capacity to contract further credit. It is submitted that it is these, very much legal consequences, which induce payment. Without these legally prescribed methods of judgment taking and record keeping, society in this day and age provides so many available resources that a bad faith consumer (or 'con artist') would be able to hop from credit provider to credit provider without having to risk losing the relationship of 'trust' or 'earning' a bad reputation. This expectation to receive performance appears to transcend more than one jurisdiction - United States Professor Burton states the following: 'The contractual expectation interest traditionally is conceived in terms of a promisee's expectation of receiving the promised benefit of the contract' (Burton SJ 'Breach of Contract and the Common Law Duty to Perform in Good Faith' 1980 *Harvard Law Review* 369).

²²⁶⁸ In terms of English Law cancellation is the natural remedy, whereas in South African law the natural remedy is specific performance (Christie and Bradfield 2011 543 and Van der Merwe *et al* 2012 330).

²²⁶⁹ Cancellation of contract is discussed in greater detail in clause 6.4 *infra*.

²²⁷⁰ Cf paragraph 5.6 *supra* for a detailed discussion.

²²⁷¹ Such as the pre-litigation notice required in terms of section 129 (1)(a) of the National Credit Act (cf paragraph 5.6.1 *supra* for a discussion).

²²⁷² Cf paragraph 4.4.3. *supra* for a discussion on the limitations of the Act.

breach. These contractual remedies may supplement or replace the common law remedies and include such things as: penalty clauses, acceleration clauses and cancellation clauses.²²⁷³

6.1.2. Curtailment and Supplementation of Remedies

The aggrieved or 'injured' party to a contract may, once breach is committed or he becomes aware of an impending breach, choose which of the remedies he will avail himself of.²²⁷⁴ He may choose more than one of the remedies available,²²⁷⁵ together or in the alternative.²²⁷⁶ This is subject, however, to the overriding principle that he may not claim inconsistent remedies and he may not be overcompensated.²²⁷⁷ For example, if a debtor commits *mora debitoris*, or fails to pay his debt, the creditor has a choice whether to enforce the debt or cancel the contract.²²⁷⁸ In both instances the aggrieved party, the party who has suffered a loss, is entitled to claim damages so that he may be placed in the position he would have been in had the breach not been committed.²²⁷⁹ He may

²²⁷³ Lambiris *Orders for Specific Performance and Restitutio in Integrum in South African Law* 1989, Du Plessis 1988 *THRHR* 349 and Van der Merwe *et al* 2004 273. These contractual statutory remedies are discussed in greater detail in the following pages.

²²⁷⁴ Cf paragraph 6.1.1 *supra*.

²²⁷⁵ For example cancellation and damages.

²²⁷⁶ A plaintiff may ask for specific performance, failing which, that the contract be cancelled and he be compensated for the damages suffered.

²²⁷⁷ Christie and Bradfield 2011 543. In *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO* 1965 4 SA 373 (A) the aggrieved party chose not to avail himself of a specific remedy provided in the contract, but decided to rely on the common law claim for damages. Beyers JA stated: 'I am not aware of any general proposition that a plaintiff who has two or more remedies at his disposal must elect at a given point of time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others. Such a situation might well arise where the choice lies between two inconsistent remedies and the plaintiff commits himself unequivocally to the one or the other of them. But that is not the case here'.

²²⁷⁸ Joubert 1987 222, Van der Merwe *et al* 2012 327, Nagel *et al* 2006, Christie and Bradfield 2011 543, Grové and Otto 2002 41 and Otto and Otto 2013 106.

²²⁷⁹ Grové and Otto 2002 41.

enforce his rights through an interdict²²⁸⁰ or claim for specific performance²²⁸¹ or he may claim for damages and cancellation of the contract.²²⁸²

The remedies available to creditors have also been curtailed and regulated by various legislative enactments; including, but not limited to, the National Credit Act, the Consumer Protection Act, the Conventional Penalties Act and to a lesser degree the Prescribed Rate of Interest Act.²²⁸³ The reasoning behind placing limitations on credit providers is patent: the imbalance of power in the credit relationship is most often skewed in favour of the credit provider. The consumer is, by the very fact that he needs to borrow money, in a weaker bargaining position than the provider, the latter often a large financial institution. Most legislatures, including the South African legislature, have recognised this inequity and have accordingly restricted, in varying degrees, the remedies that are available to credit providers when a consumer has breached an agreement. Although the authors²²⁸⁴ were here referring to the Credit Agreements Act, the following statement is undoubtedly valid when contemplating the limitations placed on a credit provider in any credit legislation and especially true with reference to the National Credit Act:

In order to restore the balance between the interest of both the credit grantor and credit receiver, the Credit Agreements Act contains numerous provisions limiting the rights of the credit grantor where there has been a breach of contract by the credit receiver.

The nature of breach of contract and subsequent remedies available to the creditor, are founded on basic traditional common law tenets. In order to establish what changes and/or limitations the National Credit Act brings to the rules relating to breach of a credit agreement and recovery by the injured party

²²⁸⁰ To prevent impending or further breach of contract (Van der Merwe *et al* 2012 327 and Otto and Otto 2013 106).

²²⁸¹ An example is a claim for instalments due and payable (Otto and Otto 2013 106, *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A), *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) and *Benson v SA Mutual and Life Assurance Society* 1986 1 SA 776 (A)).

²²⁸² Christie adds declaration of rights as an enforcement remedy (Christie and Bradfield 2011 543).

²²⁸³ Examples in the previous dispensation are section 5 (2) of the Usury Act which placed a limit on claims of creditors in respect of certain damages and section 6 (1)(d) of the Credit Agreements Act which prevented the seller's implied warranty from being ousted by a *voetstoots* clause.

²²⁸⁴ Grové and Otto 2002 41.

both the common law and the Act must be examined in tandem. The Act, like its predecessors, covers, broadly speaking four types of credit contracts, namely: money-lending, purchase and sale on credit, credit leases and rendering of services on credit. Every contract, albeit regulated legislatively, has its own specific *naturalia*.²²⁸⁵ In the absence of specific contractual exclusion (if such exclusion is permitted) the *naturalia* regulate some aspects with regard to the contracting parties' rights and obligations towards each other. Parties to a contract are normally able to vary or exclude the *naturalia* applicable to their specific contract by agreement. However, at times the legislature steps into the contractual arena and may exclude, vary or supplement through legislation, *naturalia* based on common law, trade usages and precedent.²²⁸⁶

The remedies available to a party aggrieved by breach of contract may also be excluded or amplified by agreement, this is so even where the particular breach of contract should take a very serious form.²²⁸⁷ More often than not credit providers, not content with the remedies provided *ex lege* supplement the contract with certain clauses in order to protect their interests further. These contractually included remedies, often referred to as penalty clauses, make it easier for credit providers to obtain certain relief. Some examples of these are:

²²⁸⁵ *Naturalia* are terms or legal rules implied by law (*ex lege*) which impose a legal duty on a party and give rise to correlative rights to the other party, unless they are specifically excluded by the parties contractually. *Naturalia* of specific contracts are derived from common law, trade usage, precedent or statute (*Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531-533, *Videlsky v Liberty Life Insurance Association of Africa Ltd* 1990 1 SA 386 (W), *Schoeman v Constantia Insurance Co Ltd* 2003 6 SA 313 (SCA), *Grové and Otto* 2002 8 and *Van der Merwe et al* 2012 246).

²²⁸⁶ Section 103 (5) of the Act is a good example where a common law rule, the *in duplum* rule, is supplemented by legislation. Prior to the Act coming into force, the common law *in duplum* rule prevented only arrear but unpaid interest to accrue to more than double of the outstanding capital, however, with section 103 (5) the rule now prevents interest, initiation fees, service fees, cost of credit insurance, default administration charges and collections costs in the aggregate from accruing to more than double of the unpaid capital amount. The rule is now in two different forms: the statutory rule and the common law rule and these rules have dramatically different effects, which rules apply is dependent on whether the agreement under consideration falls within or outside of the auspices of the Act (cf fn 104 for a brief discussion).

²²⁸⁷ *Elgin Brown and Hamer v Industrial Machinery Supplies (Pty) Ltd* 1993 3 SA 424 (A) and *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 4 SA 91 (W). A court will generally place a restrictive interpretation on exception clauses (*Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds* 1998 4 SA 466 (C), *Van der Merwe et al* 2012 327). Cf also section 51 as read with section 54 of the Consumer Protection Act which sections offer consumer protection in agreements that fall under the Act.

acceleration clauses,²²⁸⁸ *lex commissoria*²²⁸⁹ and penalty stipulations. Historically, South African credit legislation has provided for some control over the practice of enforcing *lex commissoria* and acceleration clauses.²²⁹⁰ The old Hire-Purchase Act²²⁹¹ contained provisions in this regard, as did the Credit Agreements Act²²⁹² which required the creditor to give a thirty day notice period before he could claim the return of the goods.²²⁹³ Section 19 of the Alienation of Land Act²²⁹⁴ similarly provides that a notice must be sent to the purchaser prior to enforcement of an acceleration clause or cancellation.

The National Credit Act provides for strict control of credit providers' rights when exercising their available remedies against consumers; the following remarks are pertinent:²²⁹⁵

The remedies are not absolutely forbidden; their implementation is merely curtailed. It must be said that the Act's provisions are far more complicated than those of its predecessor, the Credit Agreements Act, [...]

What follows is an examination of the remedies which are available to an aggrieved party to a contract that has been breached. The discussion is an analysis of how the common law *status quo* is affected by the National Credit Act. Given that the Act is a relatively new piece of legislation, comparisons of

²²⁸⁸ Otto 1986 *De Jure* 33, Diemont and Aronstam 1982 180, Otto and Otto 2013 106. The inclusion of an acceleration clause in a contract has the effect of, once breach by the debtor has occurred, authorizing the creditor to claim the whole outstanding balance. Thus, upon breach, future payments become payable immediately by the defaulting debtor (Otto 2006 84). It must be noted that the so-called acceleration clause is not generally accepted as a penalty clause. Cf paragraph 6.5.2 *infra* for a detailed discussion.

²²⁸⁹ Joubert 1987 237, Otto 2001 *TSAR* 203, Otto and Otto 2013 106. A *lex commissoria* on the other hand, allows a creditor to cancel a contract upon breach by the debtor, even though the breach may be minor (*Oatarian Properties (Pty) Ltd v Maroun* 1973 3 SA 779 (A), Otto 2001 *TSAR* 203 and Boraine and Renke 'Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act' *De Jure* 2007). A provider would only be able to cancel the contract in terms of *mora debitoris* if time was of the essence or if he had acquired the right to cancel, which right may be obtained in one of two ways. Firstly, by delivering a notice to the defaulting debtor allowing him another opportunity to perform, or by inserting a *lex commissoria* into the contract providing for the cancellation in case of breach of contract (Otto and Otto 2013 106).

²²⁹⁰ Penalty clauses have been regulated by the Conventional Penalties Act, prior to which they were unenforceable. Paragraph 6.5.2 *infra* provides a more extensive exposition on penalty clauses.

²²⁹¹ Section 12. This Act was repealed when the Credit Agreements Act 1980 came into operation by proclamation 30 GG 7414 20 February 1981.

²²⁹² Section 11 of the Credit Agreements Act.

²²⁹³ The Credit Agreements Act provided for no limitation with regards acceleration clauses.

²²⁹⁴ Section 19.

²²⁹⁵ Otto and Otto 2013 107.

previous interpretations by the court of analogous sections in previous legislation in this area of law, namely the Credit Agreements and Usury Acts, have been conducted.

Besides what may be dubbed conventional curtailment of remedies available to the credit provider, such as the legislation mentioned above and the relevant common law contractions discussed in this chapter so far, there are other perhaps less orthodox limitations which are developed by the courts or added by the legislature. One example is the constitutional imperative which respects the consumer's right to housing in terms of section 26 of the Constitution as understood in light of the *Firststrand Bank Ltd v Maleke and Three Similar Cases*.²²⁹⁶ Limitations on the rights of creditors to exercise their remedies cannot be a *numerus clausus* and as legislation is interpreted and developed by the courts more will surely arise.²²⁹⁷

6.2. Specific Performance

Specific performance is regarded as a natural remedy available to a contracting party who has been aggrieved by the breach of his co-contractant.²²⁹⁸ A contract is specifically performed when:²²⁹⁹

[E]ach of the parties to it does the very thing or things which he contracted to do, and when, accordingly, each party gets in specie what he by the contract bargained for.

The following distinguishes specific performance from other forms of relief.²³⁰⁰

²²⁹⁶ *Supra* as read with *Gundwana v Steko Development CC and Others* 2011 ZACC 14, *Jaftha v Schoeman and Others*, *Van Rooyen v Stolz and Others* 2005 2 SA 140 (CC) and *Nedbank v Fraser supra*. Cf paragraph 5.6.1.4 *supra* for a brief discussion of this constitutional imperative.

²²⁹⁷ It is thus impossible to discuss all possible limitations.

²²⁹⁸ *Van der Merwe et al* 2012 327. In *The Farmer's Co-operative Society v Berry supra* 343 the court held: '*Prima facie* every party to a binding contract who is ready to carry out his own obligation under it, has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract'.

²²⁹⁹ Gross P 'Specific Performance of Contracts in SA' 1934 SALJ 347.

²³⁰⁰ Fry A *Treatise on the Specific Performance of Contracts* 2001 section 3.

The specific performance of a contract is its actual execution according to its stipulations and terms, and is contrasted with damages or compensation for the non-execution of the contract.

These two definitions of specific performance of a contract also known as an order for *executio in forma specifica*, provide a comprehensive description of the remedy of specific performance and also what this remedy does not entail, for example, a claim for damages or a quantum for compensation.²³⁰¹

Roman law allowed a claim for damages as a sole right resulting from default in performance of a contract and did not enforce specific performance directly or in any other manner.²³⁰² Thus, Roman law did not compel a defaulting party to carry out his obligations in terms of a contract, specifically, but allowed such party to remedy his breach by payment of *id quod interesse* that is, payment of the damages sustained.²³⁰³

The Roman-Dutch law of Holland distinguished between specific performance of a contract *ad faciendum* (to do something) and specific performance of a contract *ad dandum* (to give something).²³⁰⁴ While there were some early conflicting opinions on whether specific performance formed part of the law of Holland,²³⁰⁵ it can now safely be submitted that the Roman-Dutch law gave a creditor the right to claim specific performance of an obligation in terms of a contract where the debtor was in default in both the contract *ad faciendum* and the contract *ad*

²³⁰¹ *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A). This case was criticized in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 SCA 186. Cf also *Deloitte Haskins and Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Peutsch (Pty) Ltd* 1991 1 SA 525 A and Van der Merwe *et al* for a discussion on how damages in lieu of compensation may be a valid alternative to performance in *forma specifica* (2014 328 – 9).

²³⁰² D 42 1 13 1, 45 1 11 2 1, 45 1 113 1 and 39 1 21 4.

²³⁰³ Gross 1934 SALJ 347.

²³⁰⁴ Gross 1934 SALJ 349.

²³⁰⁵ Wessels *History of the Roman-Dutch Law* 612. It must be added that the dispute was largely over the performance of the contract *ad faciendum* (Gross 1934 SALJ 349).

andum.²³⁰⁶ Subsequently, the remedy of specific performance was fully accepted and integrated into South African common law.²³⁰⁷

A party who has defaulted on a contract does not have a right of election as to whether he will perform the obligations of his contract or only pay damages for the breach of it.²³⁰⁸ This election lies with the aggrieved party subject to the discretion of the court.²³⁰⁹

There is not a closed list of all the grounds on which the courts will refuse to grant an order for specific performance and each individual case must be considered according to its merits.²³¹⁰ An aggrieved party is entitled to an order for specific performance unless specific performance is impossible or if the debtor is insolvent.²³¹¹ Where performance is no longer possible it is obvious

²³⁰⁶ De Groot *Inleidinge* 3.15.6, 3.31.9, Vinnius *Institutionum Commentarius ad* 3.24 pr nn 3-7, Van Leeuwen *Roman-Dutch Law* 4 2 13, and *Censura Forensis* 1.4.19.10, Groenewegen *De Legibus Abrogatis ad* D 42.1.13.1 and ad C 4.14.3, Schorer *Aantekeningen ad* Gr 3.3.41, Van der Keessel *Theses Selectae* 512, Van Bynkershoek *Observationes Tumultuariarum* 1.44, 227 and 704 and 2.1085 and 1420, Huber *Praelectiones ad*. Bk. 3, tit. 16, Scheltinga *ad*. Gr. 3 3 41; Van der Linden 1 14 7, Pothier on *Obligations* sec 157 and Zimmerman 1990 770.

²³⁰⁷ The comments of Kotze J in *Cohen v Shires* 1882 1 S.A.R 41 45 refer: 'By the well established practise of South-Africa, agreeing with the Roman-Dutch law, suits for specific performance are matters of daily occurrence'. Kotze CJ enforced this view in *Thompson v Pullinger* 1894 1 O.R 301 where he stated: '*Prima facie*, every party to a binding agreement who is ready to carry out his own obligation under it, has a right to demand from the other party, so far as it is possible, a performance undertaking in terms of a contract' (*Norden v Rennie* 1879 9 B 155, *Cohen v Shires*, *McHattie and King* 1882 1 SAR 41, *Kettles v Bennett* 1893 8 EDC 82, *Van der Westhuizen v Velenski* 1898 15 SC 237, *Smiles v Friedberg*, *Cohen and Co* 1904 21 SC 305, *The Rhodesian Cold Storage and Trading Co Ltd v The Liquidator, Beira Cold Storage Ltd* 1905 2 BAC 253, *Joseph v Parks* 1906 EDC 213, *The Farmer's Co-operative Society v Berry* 1912 AD 343, *R v Milne and Erleigh (7)* 1951 1 SA 791 (A), *Haynes v King William's Town Municipality* 1951 2 SA 371 (A), *Industrial and Mercantile Corporation v Anastasiou Bros* 1973 2 SA 60 (W), *Sandton Town Council v Original Homes (Pty) Ltd* 1975 4 SA 150 (W) and *Associated South African Bakeries (Pty) Ltd v Oryx and Vereingte Backverein (Pty) Ltd* 1982 3 SA 892 (A)).

²³⁰⁸ *Thompson v Pullinger* 1894 1 O.R 350, *Manasewitz v Oosthuizen* 1914 CPD 328, *Shill v Milner* 1937 AD 101, *Robertson Municipality v Jansen* 1944 CPD 526 543, *R v Milne and Erleigh (7) supra*, *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A), Wessels 1951 paragraph 3103 and Joubert 1987 224.

²³⁰⁹ The court in *Haynes v King Williamstown Municipality supra* 378 held: 'The discretion which the court enjoys, although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in light of its own circumstances'. Also of relevance is *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) where the courts discretion was extended to allow or refuse a contract to be enforced in part or in whole if the court considers the enforcement of the contract will be against public policy at the time the enforcement is sought.

²³¹⁰ Gross 1934 SALJ 364.

²³¹¹ *Benson v SA Mutual Life Assurance Society supra* 783. As soon as the estate of a debtor has been sequestrated the courts refuse specific performance and the creditor must rely on other remedies (Van Bynkershoek *Observationes Tumultuariarum* 1.810, *Hewlett v Adie NO* 1976 1 SA

that an order for specific performance cannot be granted as the law cannot order anybody to do the impossible.²³¹² Except in the event that the order is for payment of money, as one is always entitled to payment and where a judgment debtor is unable to pay there are procedures by which the judgment debt may be realised, for example attachment and execution.²³¹³

Where performance is possible the court has a discretion whether to grant an order for specific performance and in so doing the court will consider the facts and evidence taking into account equity²³¹⁴ between the parties.²³¹⁵ Furthermore the court will exercise its discretion in accordance with public policy so as to bring about a just result.²³¹⁶

When an aggrieved party (plaintiff) seeks to enforce the contract by compelling the debtor to make payment or performance of any obligation, the onus is on the aggrieved party to allege (or tender) and prove that he has performed his part of

166 (R), *Rampathy v Krumm* NO 1978 4 SA 935 (D) and *International Shipping Company (Pty) Ltd v Affinity (Pty) Ltd* 1983 1 SA 79 (C)). Other instances where specific performance is unlikely to be granted by the court are where the performance entails the rendering of services of a personal nature; the cost of performance considerably exceeds the benefit or where performance would severely prejudice third parties (LAWSA paragraph 337).

²³¹² Van Leeuwen *Rooms-Hollands Regt* 4.18.1, Van Bynkershoek *Observationes Tumultuariarum* 1.704, *Shakinovsky v Lawson and Smulowitz* 1904 TS 326, *Rissik v Pretoria Municipal Council* 1907 TS 1024, *Wheeldon v Modlenhauer* 1910 EDL 97, *Fick v Woolcott and Ohlssons Cape Breweries Ltd*, *Van Wyk v Joubert* 1947 1 SA 285 (T), *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 1 SA 398 (A) and *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A).

²³¹³ *Ibid.*

²³¹⁴ *R v Milne and Erleigh* (7) *supra*, *Haynes v King Williamstown Municipality* *supra*, *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A), *Barclays v National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd* 1982 4 SA 650 (D), *Benson v SA Mutual Life Assurance Society* *supra* and *Dithaba Platinum (Pty) Ltd v Erconvaal Ltd* 1985 4 SA 615 (T). The word 'equity' here is used to describe fairness between the parties that is, the court must decide that the remedy of specific performance, if ordered, will not prejudice the defendant unreasonably in favour of the plaintiff. There is a differentiation between the English doctrine of specific performance, which is granted if the courts find some equitable reason for granting such a decree as the creditor is primarily only entitled to damages, and the Roman-Dutch doctrine, where the creditor is entitled to specific performance unless there is some equitable reason disqualifying him from obtaining such relief. In the *Benson* case *supra* the court made it clear that the English approach was not part of South African law (*Joubert* 1987 224-5 and *Christie and Bradfield* 2011 543).

²³¹⁵ *Havenga et al* 1995 118. Of relevance are the remarks of Innes CJ, that while the right of a plaintiff to specific performance of a contract where the defendant is in a position to do so is beyond all doubt, the court will exercise a discretion and the decrees of specific performance will not be issued where it is impossible for the defendant to comply with them.

²³¹⁶ *Haynes v King Williamstown Municipality* *supra* and *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* *supra*. For further elaboration cf *Van der Merwe et al* 2012 330.

the contract – that is, that he has made delivery of the goods in terms of the contract, or where there has been no delivery that he is willing and able to carry out his obligations,²³¹⁷ or that he was prevented by the other party from doing so.²³¹⁸ Prior demand, save where a contract stipulates for same, it is not necessary to complete the cause of action of the plaintiff who claims specific performance.²³¹⁹ It is submitted, however, that when dealing with a credit agreement in terms of the National Credit Act, a section 129 (1)(a) notice will indeed have to be dispatched, before a credit provider may enforce the agreement.²³²⁰

Specific performance may be granted for part only of a divisible contract and damages may be awarded in respect of another part.²³²¹ If a defendant fails to comply with an order for specific performance the plaintiff is not obliged to institute proceedings for contempt.²³²² He may bring an action for cancellation and damages, the order made in the second action would then be independent of the first order – which must be altered.²³²³ Accordingly, it has become customary for the plaintiff to include an alternative claim for cancellation and damages (or cancellation and return of property delivered under the contract) in the action in

²³¹⁷ Voet *Commentarius* 19 1 18, *Bergh and Co. v Trott Bros* 24 N.L.R 503, *Farmer's Co-operative Society v Berry* 1912 AD 343 350, *Ambrose and Aitken v Johnson and Fictcher* 1917 A.D, *Wolpert v Steenkamp* 1917 AD 493, *Heywood and Son v Chapman* 1927 NPD 164, *ESE Financial Services (Pty) Ltd v Cramer* 1973 2 SA 805 (C) 808-9, *Mackeurtan Sale of Goods* 304-5 and *Diemont and Aronstam* 1982 178. The former allegation, that is, that the plaintiff may only claim a counter-performance if he himself has performed or if he tenders performance is in line with the general contractual principle of reciprocity (*BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 415H). In terms of this principle the performance or a tender therefore is a requirement for the enforceability of his claim for counter-performance. The converse of which, is the *exceptio non adimpleti contractus* which entitles the defendant to withhold his performance in order to secure counter-performance (*Van der Merwe et al* 2012 334-5, *Joubert* 1987 229, *De Wet and Van Wyk* 1978 196 and *Van der Merwe* 1980 TSAR 75).

²³¹⁸ *Kimberley Water Works Co., Ltd v Bisset* 9 H.C.G 128 and *Pienaar v Van Zyl* 16 S.C. 260.

²³¹⁹ *Joss v Barclays Bank Ltd* 1990 1 SA 575 (T).

²³²⁰ Refer to Chapter 5 paragraph 5.6.1 *supra* for a discussion on section 129. There are other procedural constraints on enforcement of credit agreements, contained in the National Credit Act, such as those contained in section 123 (discussed at paragraph 6.4.2.1 *infra*) and the alternative dispute resolution mechanisms contained in Chapter 7 of the Act (discussed briefly in paragraph 5.4 *supra*) and the debt review process Chapter 4 Part D of the Act (discussed briefly at paragraph 5.6 *supra*).

²³²¹ *Kettles v Bennett* 1893 8 EDC 82 and *Ariefden v Soeker* 1982 2 SA 570 (C) 578-80.

²³²² *Christie and Bradfield* 2011 554.

²³²³ *Schein and Sliom v Joubert* 190 TS 428, *Ras v Simpson* 1904 TS 254 256, *Evans v Hart* 1949 4 SA 30 (C), *Papenfus v Luiken* 1950 2 SA 508 (O) and *Christie and Bradfield* 2011 554.

which he claims specific performance.²³²⁴ This is a 'double-barrelled' procedure, where the plaintiff may claim specific performance and in the alternative an order cancelling the agreement if the debtor should fail to comply with the order for performance within the time allowed by the order.²³²⁵

6.2.1. The Order of Specific Performance when dealing with National Credit Act

When looking at the remedy of specific performance where a debtor has breached a credit agreement, the creditor may compel the debtor to:

- pay the purchase price or interest;²³²⁶
- take delivery of the goods; or
- fulfil any other obligations undertaken by him.²³²⁷

These three forms of specific performance, in relation to credit agreements, are examined below with particular focus on the effects of the National Credit Act in such instances.

²³²⁴ The alternative claims may be asked for under the prayer for further and/or alternative relief (*Norden v Rennie* 1979 9 Buch 155, *Cohen v Shires, McHattie and King* 1882 1 K 41, *Jacobson v Edwards and Ehrlich* 1897 4 OR 264, *Ras v Simpson* 1904 TS 254 256, *Shakinosky v Lawson and Smulowitz* 1904 TS 326 330, *Dennill v Aitkins and Co* 1905 TS 282 287, *Du Pisani v Watson* 1914 EDL 242, *Hertzog v Wessles' Estate* 1925 OPD 141, *Lubbe v Shein, Shein and Michelow* 1930 GWL 42, *Duckett v Ochberg* 1931 CPD 493, *Walters v Andre* 1934 TPD 341 and *Clark v Cloete* 1944 WLD 134).

²³²⁵ *Custom Credit Corp (Pty) Ltd v Shembe* 1972 3 SA 462 (A) 470. The following from Van Winsen AJA is thus relevant: 'It is open to a plaintiff-seller to pursue his remedy for the implementation of the agreement in an action, and, should defendant fail to comply with the Court's order, to institute a second action claiming rescission of the agreement and damages. A procedural practice has, however, grown up in our Courts which permits a plaintiff-seller to elect to pursue the first of these rights, i.e., to demand implementation of the agreement and obtain judgment therefore, but further permits him in the same action to ask the Court, should the defendant fail to comply with the Court's judgment for implementation of the agreement, to set aside the agreement and grant consequential relief. This has been described in the Courts as the double-barrelled remedy. This form of procedure would appear to have its origin in the case of *Ras and Others v Simpson* 1904 TS 254'.

²³²⁶ *Smith and Warren v Harris* (1888) 5 HCG 193 and *Diemont and Aronstam* 1982 178.

²³²⁷ *Vorster Bros v Louw* 1910 TPD 1099 and *Diemont and Aronstam* 1982 178. Where an acceleration clause has been incorporated in the contract, the creditor can compel the debtor to pay the whole balance outstanding together with interest from the time of *mora*. It is submitted that acceleration clauses will in all likelihood be more frequent occurrences in loan agreements especially with unsecured loans. The acceleration clause is discussed in greater detail at paragraph 6.2.2 *infra*.

6.2.1.1. Payment of the Purchase Price as Specific Performance

It is an accepted principle of South African law that a court can make an order in terms of which the defendant is ordered to pay a sum of money.²³²⁸ This may be in settlement of a claim for damages or for claims for the payment of a sum promised in terms of the contract.²³²⁹ Consequently a court may order, *inter alia*, that a debtor repay money that was lent to him, to pay interest on a loan or to pay the purchase price and interest for goods sold and delivered or services rendered.²³³⁰ Accordingly, an order for the payment of the sum of money due in terms of the contract is the enforcement of the contract or an order for specific performance.²³³¹ This type of order amounts to nothing more than an order obligating the party to perform in terms of the contract.²³³²

When a debtor is in arrears with his instalments the creditor can issue summons against him for all overdue instalments.²³³³ The dates upon which the instalments are to be paid are incorporated in credit agreements and the debtor will not be in arrears until he has failed to pay by midnight on the date in question.²³³⁴ The creditor will be entitled to the interest at the rate agreed upon in the contract, failing specific agreement of such rate, the rate of interest will be as per the Prescribed Rate of Interest Act,²³³⁵ subject to the interest rate ceilings imposed by the National Credit Act when a credit agreement falls under its

²³²⁸ Christie and Bradfield 2011 544-5.

²³²⁹ Christie and Bradfield 2011 545.

²³³⁰ *Ibid.*

²³³¹ *Ibid.*

²³³² Conversely, Joubert points out that it is usual to reserve the term 'specific performance' where the order is to perform obligations which involve something other than the payment of money. The author distinguishes these two forms of specific performance, because he argues, while the court has a discretion to grant an order for specific performance of obligations other than the payment of money promised, the court does not have a discretion to grant an order to pay a specific sum. As authority for this view he provides: *Smith and Warren v Harris* 1888 5 HCG 193 and *Industrial and Mercantile Corporation v Anastasiou Bros* 1973 2 SA 601 (W) (1987 222).

²³³³ *Zeederberg's Trustees v Zeederberg* (1886) 4 SC 353 and *Diemont and Aronstam* 1982 179.

²³³⁴ *Ibid.*

²³³⁵ Act 55 of 1975.

auspices,²³³⁶ on each instalment from the day such instalment becomes due. There can be no claim for interest on an instalment which is not yet due.²³³⁷

The Credit Agreements Act did not contain any terms that prevented a credit provider from demanding that a credit consumer specifically perform his contractual obligations.²³³⁸ Where a creditor was in arrears with one or more payments the credit grantor was entitled to claim payment of the arrear amount only by way of specific performance.²³³⁹ The creditor is not entitled *ex lege* to claim payment of all future instalments as well,²³⁴⁰ unless the contract contains an acceleration clause²³⁴¹ or the contract is an agreement to re-pay money loaned.²³⁴² It is submitted that the situation is not altered by the National Credit Act.²³⁴³

In terms of the common law the principle of reciprocity in relation to specific performance must be respected, that is a claim for specific performance is only competent if the plaintiff has performed or is ready to perform his obligations which are due in terms of the contract.²³⁴⁴ A party claiming specific performance of contractual obligations must therefore allege, or tender performance of such reciprocal contractual obligations.²³⁴⁵ In *Absa Bank Ltd v De Villiers and Another*²³⁴⁶ the court considered the principle of reciprocity in light of credit agreements, more particularly instalment agreements falling under the National Credit Act. The court held that when considering the credit agreement and in

²³³⁶ Cf section 101 (d) as read with section 105 and Chapter 5 of the regulations published in GN R289 in Government Gazette 28864 of 31 May 2006.

²³³⁷ *Zeederberg's Trustees v Zeederberg* (1886) 4 SC 353 and Diemont and Aronstam 1982 179.

²³³⁸ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk supra, Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd supra, Benson v SA Mutual Life Assurance Society supra* and Grové and Otto 2002 41.

²³³⁹ Grové and Otto 2002 41.

²³⁴⁰ *Hiddingh v Von Shade* 1899 16 SC 128 131, *Elgin Engineering Co (Pty) Ltd v Hillview Motor Transport* 1961 4 SA 450 (D) and *Rylil (Edms) Bpk v Gibbon* 1966 3 SA 150 (O) 154.

²³⁴¹ *Ex Parte Minister of Justice* 1978 2 SA 572 (A) 594.

²³⁴² See the discussion below on acceleration clauses (paragraph 6.2.2) for an explanation as to why an acceleration clause may be implied in such circumstances.

²³⁴³ *Nedbank v Fraser and another and four other cases* 2011 4 SA 363 GSJ must, however, be noted here. The effects of this matter are examined in the discussion on acceleration clauses at paragraph 6.2.2 *infra*.

²³⁴⁴ *Farmers' Co-operative Society v Berry* 1912 AD 343 350, *Ese Financial Services (Pty) Ltd v Cramer* 1973 2 SA 805 (C) 808-9 and cf *Van der Merwe et al* 2012 334ff for a discussion on the principle of reciprocity.

²³⁴⁵ *Absa Bank Ltd v De Villiers and Another* 2008 JOL 22874 (C) paragraph 16.

²³⁴⁶ *Ibid.*

particular the instalment agreement the reciprocal obligation of the credit provider is to provide the credit consumer with the goods which are the subject of the agreement.²³⁴⁷ The court held that the principles of the common law of contract dictate that if a credit provider wishes to institute a claim for specific performance, that is for payment of the monthly instalments due in terms of the instalment agreement, the particulars of claim will have to allege that the goods have been delivered to the consumer or tender delivery thereof.²³⁴⁸ The court also held, that a claim for the repossession of goods is therefore inconsistent with an order for specific performance, when dealing with a claim for a final order authorising the attachment of the goods.²³⁴⁹

6.2.1.2. To Compel Acceptance of Delivery

This form of specific performance can only relate to credit agreements which incorporate the purchase or lease of goods.²³⁵⁰ In such instances it becomes the consumer's duty to accept delivery of the goods.²³⁵¹ If the consumer fails to remove or accept the goods from or at the agreed place he may be compelled to do so by the credit provider.²³⁵² The provider must allege and prove that he tendered the goods at the time and place agreed on and that the goods so tendered were those actually sold or let, as the case may be.²³⁵³ In 1910 the Cape High Court held that a consumer may not accept only some of the goods and reject part of the goods tendered.²³⁵⁴ It is submitted that the situation is now affected by section 19 of the Consumer Protection Act,²³⁵⁵ which states that if a credit provider delivers to the consumer a larger quantity of goods than the consumer agreed to buy, the consumer may either reject all of the delivered goods or accept delivery of the goods and pay for the agreed quantity at the

²³⁴⁷ At paragraph 17.

²³⁴⁸ *Ibid.*

²³⁴⁹ *Ibid.*

²³⁵⁰ Mackeurten HG and Hackwill GRJ *Sale of Goods* 1984 283 and Diemont and Aronstam 1982 183.

²³⁵¹ *Ibid.*

²³⁵² Grotius *Inleidinge* 3.15.1.

²³⁵³ *Ibid.*

²³⁵⁴ *Joachinson v Ingle* 1910 CPD 132.

²³⁵⁵ Where the credit provider contracts with a natural person, consumer or small juristic person.

agreed rate and treat the excess quantity as unsolicited goods.²³⁵⁶ If the credit provider delivers to the consumer some of the goods the provider agreed to supply mixed with goods of a different description not contemplated in the agreement, then the consumer may accept delivery of the goods that are in accordance with the agreement and reject the rest or reject all of the delivered goods.²³⁵⁷

Diemont and Aronstam²³⁵⁸ stated that if the consumer has not taken delivery on the agreed date or where no date was agreed on within a reasonable time, the credit provider may also claim necessary expenses incurred in connection with the care and custody of the goods. However, the Consumer Protection Act has now regulated the aspect of delivery and the consumer's reasonable expectations and rights in this regard. Section 19 states that unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that the credit provider is responsible to deliver the goods or perform the services on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement, at the agreed place of delivery or performance and at the cost of the provider, in the case of delivery of goods; or the agreed place of delivery of goods or performance of services is the provider's place of business, if the provider has one, and if not, the provider's residence. Goods to be delivered remain at the credit provider's risk until the consumer has accepted delivery of them.²³⁵⁹ The Act further states that if an agreement does not provide a specific date or time for delivery of any goods or performance of any services, the credit provider must not require that the consumer accept delivery or performance of the services at an unreasonable time.²³⁶⁰ The consumer is regarded to have accepted delivery of any goods on the earliest of expressly or implicitly communicating to the credit provider that he has accepted delivery or when the goods have been delivered to the consumer and the consumer does

²³⁵⁶ Section 19 (7) of the Consumer Protection Act and cf Van Eeden E '*Consumer Protection Law in South Africa*' 2013 343-4. Cf also section 121 of the Consumer Protection Act which makes provision for situations where unsolicited goods are delivered.

²³⁵⁷ Section 19 (8) of the Consumer Protection Act and cf Van Eeden 2013 343.

²³⁵⁸ Diemont and Aronstam 1982 183.

²³⁵⁹ Section 19 (2) of the Consumer Protection Act and Van Eeden 2013 342.

²³⁶⁰ Section 19 (3) of the Consumer Protection Act and Van Eeden 2013 342.

anything in relation to the goods that would be inconsistent with the credit provider's ownership of them or after the lapse of a reasonable time, the consumer retains the goods without intimating to the provider that the consumer has rejected delivery of such goods.²³⁶¹ When a credit provider tenders delivery to a consumer of any goods, the credit provider must, on request, allow the consumer a reasonable opportunity to examine those goods for the purpose of ascertaining whether the consumer is satisfied that the goods are of a type and quality reasonably contemplated in the agreement and in the case of a special-order agreement, reasonably conform to the material specifications of the special order.²³⁶²

A further exception of the right of a credit provider to compel the consumer to accept delivery of goods is when a consumer has exercised his right in terms of section 121 of the National Credit Act. Section 121 is the so-called cooling-off right,²³⁶³ which right changes the basic principle of the law of contract that a person who has entered into a contract may not unilaterally terminate that contract simply because he wishes to do so.²³⁶⁴ The cooling-off is not a novel concept and was introduced into South Africa in 1980 by section 13 of the Credit Agreements Act and was later extended to loans and sales of land on instalments.²³⁶⁵ This section applies in respect of lease or instalment agreements entered into at any location other than the registered business premises²³⁶⁶ of the credit provider.²³⁶⁷ Section 121 does not confer the same

²³⁶¹ Section 19 (4) of the Consumer Protection Act and Van Eeden 2013 342.

²³⁶² Section 19 (5) of the Consumer Protection Act and Van Eeden 2013 341.

²³⁶³ For a discussion on the history and nature of the right cf Van Eeden EP 'Rescission of Consumer Contracts' 1976 *THRHR* 315 and Otto JM 'Die Beginsel van "Cooling-off" by Kredietooreenkomste' 1981 *De Jure* 101 259. Cf *Standard Bank of South Africa Ltd v Dlamini* 2012 ZAKZDHC 64 for the obligational requirements placed on the credit provider to inform the consumer of the cooling-off right.

²³⁶⁴ Otto in Scholtz 2014 paragraph 9.5.2.1.

²³⁶⁵ Otto JM 'Die Afkoelreg vir Kopers, Huurders en Geldleners Word Stelselmatig Uitgebrei' 2003 *TSAR* 332.

²³⁶⁶ It is strange that the words 'registered business premises' are used and it is submitted that the definition should include the main place of business of the credit provider or any shops or sales points of the credit provider. That is any fixed place of business where the credit provider offers its credit facilities to the general public, which may not necessarily be its registered place of business – especially given the fact that a registered address may even be an accountants, auditor's or attorney's offices. It is submitted that any other interpretation would be unfair to the credit provider. This right should be granted to the consumer where he has entered the agreement through some form of direct marketing, for example telesales or door-to-door sales.

²³⁶⁷ Section 121 as read with regulation 37 of the Act.

right on a consumer if he is entering a money loan or mortgage agreement.²³⁶⁸ It provides that a consumer may terminate a credit agreement within five business days after the date on which the agreement was signed by the consumer by delivering a notice to the credit provider and tendering the return of any money or goods or paying in full any services received by the consumer in respect of the agreement.²³⁶⁹ The credit provider must refund the consumer within seven days of delivery of the termination notice.²³⁷⁰ It is submitted that by virtue of section 121, a consumer who intends to terminate a lease or instalment agreement may refuse to accept delivery of an item or credit as the case may be, and not be in breach of the credit agreement and accordingly not be compelled to accept delivery in such instances.²³⁷¹

6.2.1.3. To Compel Other Obligations

When goods are sold on credit or leased on credit, the credit provider protects its rights by requesting that the consumer insures the goods and keeps them in good condition. If the consumer fails to abide by any obligations placed on him contractually the credit provider may compel him to abide by his obligations.²³⁷² The fact that a credit provider sues for specific performance does not prevent him from claiming damages in addition thereto²³⁷³ or he may claim damages as an alternative thereto.²³⁷⁴

²³⁶⁸ Section 121 (1) of the Act and cf Otto in Scholtz 2014 paragraph 9.5.2.1.

²³⁶⁹ Section 121 (2) of the Act.

²³⁷⁰ Section 121 (3) of the Act.

²³⁷¹ For a full discussion cf Otto in Scholtz 2014 paragraph 9.5.2. A similar cooling-off right is contained in section 16 of the Consumer Protection Act. For a comparison of the provisions of the National Credit Act and the Consumer Protection Act cf Otto JM 'LitNet Akademies 30 March 2012 at <http://www.litnet.co.za/Article/die-afkoelreg-in-die-nasionale-kredietwet-en-die-wet-op-verbruikerskerming>.

²³⁷² *Vorster Bros v Louw* 1910 TPD 1099. However, a court is not obliged to grant an order for specific performance and where it deems an award for damages more appropriate it may make such an order (*Farmer's Co-operative Society (Reg) v Berry* 1912 AD 343 and *Diemont and Aronstam* 1982 183).

²³⁷³ *Silverton Estates Co v Bellvue Syndicate* 1904 TS 462.

²³⁷⁴ *Duckett v Ochberg* 1931 CPD 493. Where a Plaintiff does not claim damages as an alternative the court is still empowered to grant damages under the prayer for further or alternative relief (*Norden v Rennie* 1879 Buch 155) provided that the damages are ascertainable from the facts before the court, failing which it may order a nominal sum of damages (*Diemont and Aronstam* 1982 183).

In terms of section 14 of the Credit Agreements Act, the credit receiver or lessee was prevented from being forced to perform to an extent that such performance would place the credit grantor in a better financial position than that in which he would have been had the credit receiver performed in terms of the agreement. Section 14 had to be read with sections 4 and 5 of the Usury Act which determined the precise amount that could have been recovered from the debtor in such instances. The effect of section 14 was effectively that if a credit grantor claimed specific performance it could only recover from the grantor the amount of its actual loss and nothing more.²³⁷⁵ The National Credit Act does not have a similar protective clause in favour of the consumer. Part C of Chapter 5 of the Act regulates and limits the consumer's liability, interest, charges and fees quite extensively and section 127 ensures that when a consumer elects to repudiate that any amount in excess of what he owed the credit provider which may be realised from the sale of the goods is returned to him.²³⁷⁶ While the Act authorises a credit provider to compel a consumer to maintain insurance cover during the term of the credit agreement,²³⁷⁷ such insurance may not be of an unreasonable cost to the consumer.²³⁷⁸ Furthermore, the National Credit Amendment Act, provides that the Minister may, in consultation with the Minister of Finance, prescribe the limit in respect of the cost of insurance that a credit provider may charge.²³⁷⁹ Such an agreement would in theory entitle a credit provider to approach a court and compel the consumer to pay the insurance or provide proof of payment to a third party for such cover. It is submitted that in practice, the credit provider would simply stipulate same in the agreement and add the premiums to the account of the consumer and charge interest on dilatory payments. It is submitted that the remedy to compel other obligations in a creditor-debtor scenario, while available, is unlikely to be used very often.

²³⁷⁵ Diemont and Aronstam 1982 208 and Grové and Otto 2002 50.

²³⁷⁶ Section 127 of the Act and its implications are examined in paragraph 5.3.4.1 *supra*.

²³⁷⁷ Section 106 (1)(a) and (b) of the Act.

²³⁷⁸ Section 106 (2) of the Act.

²³⁷⁹ Section 30 of the National Credit Amendment Act.

6.2.2. Acceleration Clauses

An acceleration clause is a clause that may be incorporated in a contract which provides that in the event of a debtor's failure to meet any obligation under the contract, the creditor shall be entitled to claim immediate payment of all the remaining instalments.²³⁸⁰ In other words, an acceleration clause entitles the aggrieved party or credit provider to claim, upon breach of contract, the outstanding balance in terms of the contract in one single amount from the defaulting party. Acceleration clauses are discussed under the topic 'specific performance' as it is submitted that a credit provider or aggrieved party will not cancel an agreement in order to enforce an acceleration clause but will ask the court to enforce the contract. Therefore the enforcement of an acceleration clause can be seen as a *specie* of specific performance.

It is submitted that two types or species of acceleration clause exist: firstly what can be referred to as the 'pure acceleration clause' and secondly, what shall be referred to as a 'penalty acceleration clause'.²³⁸¹ The acceleration clause in its true sense is not a penalty clause.²³⁸² Parties who incorporate an acceleration clause proper or 'pure acceleration clause' in a contract are agreeing that the one party will allow deferment of payment (usually) if he is entitled to charge interest and to receive regular payments of the amount owed together with interest. If the other party breaches the agreement then the aggrieved party reserves the right to no longer defer the payment, and if he exercises this right not to defer then he must forgo his right to future profits by way of interest. While the other party loses his entitlement to repay the outstanding amount in instalments, he simultaneously gains the right to be protected from paying the interest on the deferred amount which is no longer, by virtue of the acceleration clause, deferred.

²³⁸⁰ Diemont and Aronstam 1982 180 and Otto and Otto 2013 106.

²³⁸¹ The second being a hybrid between a pure acceleration clause and a penalty clause. Penalty clauses are discussed in paragraph 6.5.2 *infra*.

²³⁸² Grové and Otto 2002 49 fn 164. Whether an acceleration clause is a penalty clause or not has been the subject of debate. The following comment is of interest: 'This clause, generally known as an acceleration clause, is in a sense a penalty but cannot be brought under the class of conventional penalties' (Diemont and Aronstam 1982 180).

A pure acceleration clause in this sense would thus not be subject to the Conventional Penalties Act.²³⁸³ The credit provider would only be demanding that amount which was borrowed from him or deferred by him by the consumer in the first place.

Thus, if an acceleration clause contains the attributes of a penalty clause, it can, and it is submitted it should, be viewed as a penalty acceleration clause. An acceleration clause may be considered a 'penalty acceleration clause', in the following situation: where a credit provider will not, if an acceleration clause is put into operation, be obliged to recalculate the finance charges payable by the credit consumer and the credit consumer will still have to pay the total amount of finance charges as if the transaction were to have come to an end through performance in the normal manner.²³⁸⁴ This is a penalty because the aggrieved party would not be losing the opportunity cost if the outstanding amount was accelerated and made payable immediately and the breaching party would have to pay the accelerated instalments together with interest charges for money deferred.

Thus acceleration clauses must be closely examined to determine whether they are pure acceleration clauses or penalty acceleration clauses.²³⁸⁵ The distinction is important because of the Conventional Penalties Act and the effects of this Act on penalty clauses. Where an acceleration clause is in its true form the Conventional Penalties Act would not be applicable, however, where an acceleration clause is in the form of a penalty acceleration clause the courts should consider the effect of the Conventional Penalties Act on the penalty part of such clauses. The following qualification on penalty clauses that are subject to moderation by the courts in terms of the Conventional Penalties Act is relevant:²³⁸⁶

²³⁸³ Act 15 of 1962 (hereinafter the 'Conventional Penalties Act'). The Conventional Penalties Act is examined in paragraph 6.5.2.1 *infra*.

²³⁸⁴ Grové and Otto 2002 49.

²³⁸⁵ Where the credit agreement contains an acceleration clause entitling the creditor to payment in full if the consumer falls in arrears with an instalment, then prescription in respect of the balance commences as soon as the balance can be claimed (Joubert 1987 307).

²³⁸⁶ Joubert 1987 268.

The clause must refer to some right to which the person is not entitled as of right, such as a right to claim some fixed amount as damages, or some forfeiture which does not follow as a matter of course.

A court may order the consumer, who has breached the contract, to pay the outstanding capital amount but reduce the penalty part of the penalty acceleration clause and order that the consumer pay the reduced amount.²³⁸⁷

Penalty acceleration clauses will be regulated by the Conventional Penalties Act as acceleration clauses are not prohibited or in any way regulated by the National Credit Act.²³⁸⁸

Whether acceleration clauses are subject to the Conventional Penalties Act is a matter of construction after careful examination of the facts by the courts.²³⁸⁹

If a contract contains an acceleration clause it will be necessary to examine the clause carefully in order to see whether anything in addition to the debtor's default, such as written demand, is required to bring it into operation.²³⁹⁰

Normally an acceleration clause does not itself make the balance of the debt

²³⁸⁷ Joubert 1987 269. In *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1982 3 SA 618 (D), the court held: 'The common law read with the Act shows that in order to constitute a penalty there must be something added to a debtor's obligation to pay his debt. Furthermore, a stipulation which ensures that a debtor pays no more than he owes cannot in my view be regarded as being *in terrorem*, i.e. forcing the debtor to comply with the terms of his contract by means of onbilige dwang', and further '[b]ut in the present case respondents had only one obligation to the applicant, i.e. to pay the instalments, and the applicant had only one obligation to the respondents: not to claim payment of the full amount of the re-existing debt provided that the instalment were paid. If the obligation was breached nothing accrued to the applicant which was not already owing to him' (707 and 709).

²³⁸⁸ Thus Christie's comment that the Conventional Penalties Act 'is no longer of great importance [...] is not, with respect, concurred with (Christie and Bradfield 2011 584).

²³⁸⁹ *De Pinto and another v Rensea Investments* 1977 2 (AD) 1000. In *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) the court was faced with a penalty acceleration clause where the defendant (lessee of the equipment) had leased two photocopier machines from the plaintiff (lessor) and subsequently defaulted. The plaintiff sought to enforce a clause in the lease agreement which stipulated that in the event of payments not being made punctually, the lessor would be entitled to payment of not only arrear rentals but also the aggregate of the future rentals over the period of the lease agreement, which amounts incorporated the interest component. While the claim for arrear rental was not viewed as a penalty by the court, the bulk of the claim comprising future accelerated payments and interest on arrear and future rentals at a rate equal to 6% per annum above the prevailing prime overdraft rate was viewed by the court as clauses which operated *in terrorem* of the offending party and therefore penalty stipulations. The court thus reduced the penalty to what it determined equitable in the circumstances.

²³⁹⁰ *SA Bank of Athens Ltd v Solea* 1977 2 SA 612 (W).

payable *in toto*, but gives the creditor the option to demand it.²³⁹¹ This means that prescription runs from his demand, not from the debtor's failure to pay the instalment.²³⁹²

Where payments are specified to be made by instalments in a contract, an acceleration clause will not be implied by law.²³⁹³ The exception to this rule is that such implication will be allowed where an agreement is made to re-pay borrowed money by instalments, and the debtor breaks that agreement by leaving a number of instalments unpaid.²³⁹⁴ In *Scott v Holmes*²³⁹⁵ a son-in-law borrowed money from his father-in-law and it was agreed between the two that the repayment of the borrowed money would be by way of instalments. For various reasons, here insignificant, the son-in-law subsequently stopped paying the instalments. The court found that if an agreement is made to re-pay borrowed money by instalments, and the debtor breaks that agreement by leaving a number of instalments unpaid, the creditor can proceed to recover the whole amount unpaid.²³⁹⁶ Dove-Wilson J explained the position as follows: 'The simple position is that he has failed to implement the condition upon which he received the loan and having done so he cannot claim to obtain any further benefit from the transaction'.²³⁹⁷ This is a very important case with regards loan agreements, as it essentially provides that an acceleration clause is implied where a loan agreement stipulates that the money lent is to be re-paid in instalments. It is submitted that this common law implication will not preclude demand by the credit provider and it is further submitted that where the credit provider intends to accelerate payment of a loan agreement due to the consumer's default, the credit provider should be obliged to advise the consumer of this intention in the notice.

²³⁹¹ In *Stadler v Hamilton Plase (Edms) Bpk* 1977 1 SA 211 (NC) the court suggested that there is always an election whether to enforce an acceleration clause (Cf Joubert 1987 269).

²³⁹² *Stadler v Hamilton Plase (Edms) Bpk* 1977 1 SA 211 (NC) and Christie 2006 420.

²³⁹³ *Hiddingh v Von Schade* 1899 16 SC 128.

²³⁹⁴ *Scott v Holmes* 1916 37 NPD 33.

²³⁹⁵ *Ibid.*

²³⁹⁶ *Ibid.*

²³⁹⁷ *Scott v Holmes supra* 40.

In all other contracts where payment is made in instalments, the provider is entitled to request that the consumer pay the arrears by means of a claim for specific performance.²³⁹⁸ What the credit provider is not entitled to do, *ex lege*, is to demand future instalments as well. This may be done only if the contract contains an acceleration clause.²³⁹⁹ The following from De Villiers CJ is thus apt:²⁴⁰⁰

[I]t is by no means an unusual clause in contracts for the sale of land for a price payable in instalments that on failure of the purchaser to pay one of the instalments the whole amount shall be immediately claimable. Where such a condition is not inserted the court cannot import it without some other indication of the intention of the parties to modify the agreement that the price is to be payable in instalments.

The courts have put a stop to the enforcement of clauses that purport to allow the credit provider to accelerate and claim payment of the full price and at the same time to cancel the contract and reclaim the goods.²⁴⁰¹

An important aspect of the acceleration clause is the issue of finance charges or interest payable. In *Ex Parte Minister of Justice*²⁴⁰² the court held that in terms of section 5 (1)(c) of the Usury Act the creditor was liable for ordinary finance charges until the date upon which the acceleration clause was put into operation.²⁴⁰³ A creditor who invoked an acceleration clause could not claim finance charges for the entire contractual period but only up to the accelerated date of payment.²⁴⁰⁴ In other words the creditor could not claim future interest. If, however, the debtor, failed to pay on the date established for payment the creditor could then claim additional finance charges thereafter. It is submitted that the same principle should apply when an acceleration clause is invoked

²³⁹⁸ *Elgin Engineering Co (Pty) Ltd v Hillview Motor Transport* 1961 4 SA 450 (D) and *Rylil (Edms) Bpk v Gibbon* 1966 3 SA 150 (O) 154.

²³⁹⁹ *Ex Parte Minister of Justice* 1978 2 SA 572 (A) 594 and *Grové and Jacobs* 1993 35.

²⁴⁰⁰ *Hiddingh v Van Schade* 1899 16 SC 128 130, cf also *Grobbelaar v Van Rensburg* 1927 CPD 129 and *Meyerowitz v Kurensky* 1929 WLD 106.

²⁴⁰¹ *Hall v Cox* 1926 CPD 228 233, *Barenblatt v Dixon* 1917 CPD 319 and *Diemont and Aronstam* 1982 180. This line of reasoning is not only fair, but logical in order for a creditor to avail himself of the remedies reserved by him *ex contractu*, he cannot cancel the contract but must abide by it. See the discussion on mutually exclusive choice of remedies in paragraph 6.1.1 *supra*.

²⁴⁰² *Supra*.

²⁴⁰³ *Ex Parte Minister of Justice* 1978 2 SA 572 (A) 594, *Grové and Jacobs* 1993 36 and *Grové and Otto* 2002 42.

²⁴⁰⁴ *Otto Credit Law Service* 1991 paragraph 54.

under a credit agreement that falls under the auspices of the National Credit Act. If a tender to pay is made by the consumer after the designated period has elapsed²⁴⁰⁵ the credit provider is, it is submitted, within his rights to refuse to accept the offer and put the acceleration clause into operation.²⁴⁰⁶ The actual interest rate payable and the manner of calculation that may be charged by the credit provider will be regulated by section 101 of the National Credit Act and Regulations 40, 42 and 44²⁴⁰⁷ thereof. It is submitted that the principles developed by the courts prior to the National Credit Act regarding the time up to which interest may be levied when an acceleration clause is enforced will apply to agreements that are regulated by the Act and that have an acceleration clause incorporated.

Under the Credit Agreements Act and the Usury Act, acceleration clauses were freely enforceable where such clauses were provided for in the agreement. The Credit Agreements Act was tellingly criticised for its lack of statutory protection in the area of acceleration clauses; such lack of protection was described as one of its most serious shortcomings.²⁴⁰⁸ It is submitted that this view was derived from the fact that protection was provided by the predecessor to the Credit Agreements Act – the Hire-Purchase Act – which laid down certain requirements that had to be met before an acceleration clause could be enforced.²⁴⁰⁹

Ironically, the National Credit Act appears to suffer from the same short-comings, in that, as mentioned above, it does not expressly regulate acceleration clauses.

²⁴⁰⁵ It must be noted that this period will not be the due date of payment but the days as contemplated in the Act in terms of section 86 (10), 129 and 130 of the Act.

²⁴⁰⁶ *Boland Bank v Pienaar* 1988 3 SA 618 (A).

²⁴⁰⁷ GN R489 of 31 May 2006. Regulation 40 directs how interest should be calculated on deferred amounts. It is submitted that a penalty acceleration clause should follow the same method of calculation, however, such penalty (future interest) would in any event be subject to the Conventional Penalties Act. regulation 42 deals with the maximum prescribed interest and initiation fees. It is submitted that a penalty acceleration clause will have to be undertaken with such maximum rates respected, again, subject to a court's discretion in terms of the Conventional Penalties Act. Regulation 44 prescribes the maximum service fees which may be levied. It is submitted that a penalty acceleration clause may very well incorporate the addition of service fees (monthly, yearly and/or transactional). Such calculation would also, it is submitted, be subject to regulation 44 and the courts discretion in terms of the Conventional Penalties Act.

²⁴⁰⁸ *Grové and Otto* 2002 42.

²⁴⁰⁹ Section 12 of the Hire-Purchase Act stipulated that a certain number and percentage of instalments had to be due and unpaid before an acceleration clause became operative and enforceable. Furthermore, the seller had to make written demand for payment warning the purchaser that the acceleration clause could come into effect.

While the credit provider will have to follow all the debt enforcement procedures required by the Act, it is not prevented from incorporating acceleration clauses in its agreements. It is submitted therefore, that an acceleration clause incorporated in a contract, that states that if the credit consumer defaults in terms of the agreement he will become liable for the full capital amount, will be enforceable. However, the same view is not maintained where the acceleration clause states that in the event of breach by the consumer the credit provider will not be obliged to recalculate the finance charges payable by the credit consumer and such consumer will have to pay the total amount of finance charges as if the agreement had not been breached. This type of acceleration clause would, it is submitted, amount to a penalty acceleration clause and be subject to the Conventional Penalties Act. It is further submitted that the common law regulations of such clauses that have developed over the years, will come to the fore when a court has to decide on whether to enforce an acceleration clause that has been incorporated in a credit agreement that falls under the National Credit Act, alongside the limitations imposed by the Act. It is submitted that a penalty acceleration clause will be subject to the interest and charges calculations as contemplated in the Act, as well as the statutory *in duplum* rule²⁴¹⁰ and thus penalty acceleration interest and charges in such circumstances may not exceed the unpaid capital.

6.3. Interdict

This is a remedy aimed at preventing a breach or threatened breach of contract. A party may commit a breach of contract by doing something expressly or impliedly forbidden by the contract or which is inconsistent with the obligations imposed by the contract.²⁴¹¹ In such an event, a party may approach the court asking for an order prohibiting the other party from doing what would amount to a

²⁴¹⁰ Cf fn 104 for a brief discussion on the *in duplum* rule.

²⁴¹¹ An interdict is an order of court in terms of which a person is ordered to refrain from performing a certain act or to perform such act (Erasmus *Supreme Court Practice* E8-1, Paterson *Eckard's Principles of Civil Procedure in the Magistrate's Courts* 2005 59, *Setlogelo v Setlogelo* 1914 AD 221, section 30 of the Magistrates' Court Act, Van der Merwe *et al* 2012 554 – 555 and *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A)).

breach; this remedy is known as an interdict.²⁴¹² An interdict would be the appropriate remedy where there is an impending breach which will, if the act is carried out, have the effect of making performance impossible.²⁴¹³ An interdict is an application by a party who seeks an order to prohibit a breach, 'in reality asking for specific performance in the negative form of non-performance of the forbidden or inconsistent act to ensure performance of the contract'.²⁴¹⁴

While the reasons for bringing an interdict application are varied, often the applicant will seek such relief in order to maintain the *status quo* by preventing a continuing or threatened breach, which if persisted would deprive him of the benefits for which he contracted for.²⁴¹⁵

Where an applicant seeks an interdict in order to enforce a promise not to do something, the applicant would only have to prove that the defendant is committing or is threatening to commit a breach of the contract, or that he is intentionally assisting another person to breach the contract.²⁴¹⁶ While in the event of an interdict which seeks to protect other rights, an applicant would have to prove that he would suffer injury or loss if the interdict were not granted.²⁴¹⁷

A creditor may also seek an interdict to prevent the other party from disposing of the property which is the subject matter of the dispute. The granting of an interim interdict pending an action is an extra-ordinary remedy within the discretion of the Court.²⁴¹⁸ Where the right which is sought to be protected is not clear, the courts require for the existence of a clear right which, is *prima facie* established is open

²⁴¹² *Willet v Blake* 1848 3 M 343, *Edgecombe v Hodgson* 1902 19 SC 224, *Ohlsson's Cape Breweries Ltd v Cossey* 1905 TH 16, *Hildson and Hilldson* 1908 18 CTR 471, *Federal Insurance Corporation of SA Ltd v Van Almelo* 1908 25 SC 940, *African Theatres Ltd v Jewell* 1918 NPD 1 and *Henriques v Lopes* 1978 3 SA 356 (W).

²⁴¹³ *Ferguson v De Roos* 1889 3 SAR 15, *Burmeister v MacColl* 1902 TH 42 and *Kohling v McKenzie* 1902 19 SC 287.

²⁴¹⁴ *Christie and Bradfield* 2011 555. The normal requirements for an interdict will have to be met, namely a clear right, a threat of some interference with that right and the possibility of irreparable harm if that interference is not interdicted (Van der Linde 3.4.1.7, *Schierhout v Minister of Justice* 1926 AD 99 109, *Joubert* 1987 223 and *Kerr* 2002 671).

²⁴¹⁵ *Christie and Bradfield* 2011 557.

²⁴¹⁶ As was the case in *Genwest Batteries (Pty) Ltd v Van der Heyden* 1991 1 SA 727 (T).

²⁴¹⁷ *Christie and Bradfield* 2011 558, *Van der Linden* 3 1 4 6, 3 1 4 7 and 3 1 4 10 and *Setlogelo v Setlogelo supra* 227.

²⁴¹⁸ *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 4 All SA 116 (A) 117.

to some doubt,²⁴¹⁹ then a well-grounded apprehension of irreparable injury and the absence of an ordinary remedy.²⁴²⁰ In exercising its discretion the court must weigh, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted.²⁴²¹

It has been stated earlier in the thesis that interim attachment of goods is a form of interdict.²⁴²² Having the goods removed to a place of custody for safe keeping in order to protect them against deterioration and damage is a way of preventing a further breach of the contract by frustrating the consumer's possession.²⁴²³

The following sections deal with the interim attachment of goods both as dealt with by the National Credit Act and by its predecessor the Credit Agreements Act.

6.3.1. Interim Attachment of Goods in terms of the Credit Agreements Act

There are a number of rulings relating to previous, now repealed legislation,²⁴²⁴ on interim attachment of goods and it is submitted that each case before a court has to be considered in light of its particular facts. Thus when contemplating the granting of an interim attachment order a court may well have recourse to

²⁴¹⁹ In this regard the court explained: 'The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him. [...] Viewed in that light, the reference to a right which, "though *prima facie* established, is open to some doubt" is apt, flexible and practical, and needs no further elaboration' (*Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another supra* 117).

²⁴²⁰ *Setlogelo v Setlogelo supra* 227, *Hydro Holdings (Edms) Bpk v Minister of Public Works* 1977 2 SA 778 (T) 785 – 786, *Inter Industria Bpk v Nedbank Bpk* 1989 3 SA 33 (NC), *London and SA Exploration Co Ltd v Crewell & Co* (1883) 2 HGG 35, *Walker v Cordeaux and Farrow* (1906) 23 SG 13, *Dold v Bester* 1984 1 SA 365 (D) 371C – G and *GS George Consultants and Investment (Pty) Ltd v Datasys (Pty) Ltd* 1988 3 SA 726 (W).

²⁴²¹ This is sometimes called the balance of convenience (*Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another supra* 117).

²⁴²² Paragraph 6.1 *supra*.

²⁴²³ Cf the comments of Paterson: 'In actions for the payment of a sum of money or actions in which relief in regard to property is sought, the plaintiff may have the property in the defendant's possession attached in order to obtain security for his claim. [...] The usual requirements for the granting of an interdict apply (*Eckard's Principles of Civil Procedure in the Magistrate's Courts* 2005 59).

²⁴²⁴ Namely the Hire-Purchase and Credit Agreements Acts.

judgments handed down with reference to the previous credit dispensation, as the interim attachment order requires a fine balancing between the rights of the credit provider and the interests of the consumer. The jurisprudential reasoning for allowing or not allowing such an order reaches beyond the procedural aspects. Accordingly, some judgments relating to previous credit legislation are examined in this section.

When goods were sold or leased in terms of an instalment sale or leasing transaction under the Credit Agreements Act and the credit receiver defaulted in his payments, the credit grantor was only entitled to claim the return of the goods to which the credit agreement related when it had given the credit receiver thirty days' written notice, as prescribed by section 11 of the Credit Agreements Act, requiring the debtor to remedy the default. There was some discrepancy as to when the credit grantor could request an order for the attachment of goods.²⁴²⁵ The position was clear once the credit grantor had issued summons against the receiver, as section 17 (2) of the Credit Agreements Act provided that the court had the power, after the institution of any proceedings by a credit grantor for the return of goods, and pending the termination thereof, upon the application by the credit grantor, to make an order for the goods to be valued or protected from damage or depreciation, including an order restricting or prohibiting the use of such goods or an order relating to the custody of such goods. Section 18 (1) of the Credit Agreements Act further authorised a credit grantor to include in a summons issued in connection with or arising from any credit agreement a notice prohibiting any person from using the goods or removing them from the place where they were when the summons was served. This notice had the effect of an interdict.²⁴²⁶

However, it remained a contentious issue, right until the repeal of the Credit Agreements Act, as to whether a credit grantor was entitled, before the issue of summons, that is before the issue of the expiry of the obligatory thirty day period after delivery of the section 11 notice, to an order of attachment, *pendente*

²⁴²⁵ Otto 1991 5-5 paragraph 29(g).

²⁴²⁶ Section 18 (2) of the Credit Agreements Act.

lite.²⁴²⁷ In *Fil Investments (Pty) Ltd v Levinson*²⁴²⁸ the court held that this could not be done. However, this matter dealt with section 12(b) of the Hire-Purchase Act and the notice period that had to lapse before a seller could enforce any provision in the agreement for the payment of any amount as damages or for any forfeiture or penalty or for the acceleration of the payment of any instalment in that Act, was a ten day period.²⁴²⁹ This period was considerably shorter than the thirty day period required by section 11 of the Credit Agreements Act. The court interpreted 'forfeiture' to include loss of possession and therefore denied the interim attachment before the ten day period had expired.²⁴³⁰ In *Santam Bank v Dempers*,²⁴³¹ the court took a different view to the wording of section 11 of the Credit Agreements Act and decided that the word 'forfeiture' used in section 12(b) of the Hire-Purchase Act was not the same as the wording in section 11 of the Credit Agreements Act which read 'to claim the return of the goods' and, thus, when the credit grantor asked for an interim attachment of the goods – he would not be claiming return of the goods. The requirement was that the application for an interim attachment of the goods be followed immediately by an action for the return of the goods and that the goods remain in the possession of the sheriff and not the credit grantor, until finalisation of the matter.²⁴³² Furthermore, the credit grantor had to provide good reasons for wanting to obtain an interim attachment order, for example that the goods were of a fast depreciating nature.²⁴³³ The *Dempers* matter²⁴³⁴ was rejected by the

²⁴²⁷ Steyn posited that the contention ran across the board that is, in terms of the Credit Agreements Act, the common law and the Magistrates' Court Act ('Interim Attachment of Goods Sold in Terms of a Credit Agreement: Has the Issue been Resolved?' SALJ 2000). An attachment *pendente lite* is carried out in terms of section 30 of the Magistrates Court Act. In terms of the Magistrates Court Act this property is to be attached by order of court and be held to secure the claim of the creditor. The property is attached by the Sheriff, inventoried and held in safety until final judgment is handed down, unless the Sheriff on adequate security being given releases it.

²⁴²⁸ 1949 4 All SA 296 W.

²⁴²⁹ *Supra* 299-300.

²⁴³⁰ *Supra* 299.

²⁴³¹ *Supra*.

²⁴³² Otto suggested that the 'safe way' would have been to send the section 11 notice at the same time that the application for interim attachment was launched and to mention this fact in the application. It is submitted that such actions would have been contrary to the purport of section 11, that is, to notify the credit receiver of his default and allow sufficient time for him to correct his default. If the debtor found himself not only in arrears but having to hire the services of an attorney in order to prevent the attachment of his goods, this would be financially (and psychologically) onerous on a debtor, more especially in the case of a debtor who was using such goods to earn a living.

²⁴³³ Otto *Credit Law Service* paragraph 29.

²⁴³⁴ *Supra*.

Witwatersrand Local Division in *First Consolidated Leasing and Finance Corporation Ltd v NM Plant Hire (Pty) Ltd*²⁴³⁵ where the court aligned itself with the *Fil Investment* judgment²⁴³⁶ and held that the words ‘the return of goods’ in section 11 of the Credit Agreements Act incorporated loss of possession much like forfeiture did in the Hire-Purchase Act.

Eleven years later, the Witwatersrand Local Division changed its mind yet again, and the court in *BMW Financial Services (Pty) Ltd v Mogotsi*²⁴³⁷ rejected the decision in *First Consolidated Leasing and Finance Corporation Ltd v NM Plant Hire (Pty) Ltd*²⁴³⁸ and relied on the *Dempers* decision,²⁴³⁹ allowing interim attachment of goods pending an action to be initiated by the credit grantor for cancellation and return of the goods.²⁴⁴⁰ In *BMW Financial Services (Pty) Ltd v Mogotsi*²⁴⁴¹ an application for such an order succeeded. The court in this matter distinguished it from the *Fil Investment* matter,²⁴⁴² overruled an earlier decision of the Witwatersrand Local Division²⁴⁴³ and approved and applied the reasoning in the *Dempers* matter.²⁴⁴⁴ The court granted an order authorizing the sheriff to attach the motor vehicle and to keep it in his possession for safekeeping pending the payment of all money due to the applicant in respect of the lease of the vehicle, failing which pending the outcome of an action to be instituted by the applicant for return of the vehicle. The applicant was required to institute an

²⁴³⁵ 1988 4 SA 924 (W).

²⁴³⁶ *Supra*.

²⁴³⁷ 1999 3 SA 384 (W).

²⁴³⁸ *Supra*.

²⁴³⁹ *Supra*.

²⁴⁴⁰ The matter was not, however, settled by the Supreme Court and as Otto correctly stated ‘this is one of those cases where a definite answer is not that easy’ (Otto *Credit Law Service* paragraph 29). He was of the view that the *Dempers* decision was correct, given that the word ‘forfeiture’ was not used in section 11 and that the words in this section, ‘claim for the return of the goods’, appeared to refer to the permanent return of the goods and not to a temporary custody order (2000 *De Jure* 181). Other authors, however, differed in view: Van Eck (1989 *SA Merc LJ* 416) and Eiselen (1990 *De Jure* 98) were both in support of the decision made in the *First Consolidated Leasing and Finance Corporation Ltd v NM Plant Hire (Pty) Ltd supra*, Sharrock, however, expressed the view that the credit grantor had no *prima facie* right as of common law and therefore was not entitled to an interim attachment order (1989 *De Rebus* 446).

²⁴⁴¹ 1999 3 SA 384 (W).

²⁴⁴² *Supra*.

²⁴⁴³ *First Consolidated Leasing and Finance Corporation Ltd v NM Plant Hire (Pty) Ltd supra*.

²⁴⁴⁴ *Supra*.

action for the return of the vehicle within thirty days of the granting of the attachment order.²⁴⁴⁵

The matter of *BMW Financial Services (SA) (Pty) Ltd v Rathebe*²⁴⁴⁶ involved an appeal by the credit grantor against a magistrate's refusal to grant an order for the attachment of a vehicle pending an action to be brought for the return of the goods. The court held that an interdict and attachment is a matter of discretion and that it depends on the particular circumstances of each case.²⁴⁴⁷ Relevant factors to be considered are the parties, their circumstances, their intentions and their behaviour.²⁴⁴⁸ The credit grantor argued that the consumer had failed to exercise a degree of care with regard to the vehicle. The court held:²⁴⁴⁹

Exceeding agreed use may justify an interdict even if the contract is not cancelled. But, obviously, not every excess of contemplated use justifies an interdict. If use as contemplated by the parties is all that is taking place an applicant for an interdict must prove something more. Sufficiently serious harm with adequate reason to fear imminence of actually setting in, as contrasted with proof of the (notional) possibility or some risk of such a development, must be apparent from the evidence. Also the absence of alternative remedies for the harm which is *proved* to be imminent. If not, the seller will be well advised to bring his action to completion without interlocutory play.

Steyn²⁴⁵⁰ posed the following questions:

One of the requirements for an interim attachment order to be granted is that the applicant must establish a well-grounded apprehension of irreparable injury. What facts will be sufficient to meet this requirement, in these circumstances? It is necessary, as was held in *Rathebe*, to establish that the goods sold or leased are likely to suffer damage or depreciation beyond that involved in the use contemplated in the agreement? Or, on the other hand, is the correct approach that which was adopted in *Mogotsi*, following *Santambank Bpk v Dempers (supra* at 647E0648B), that, as owner, a credit grantor has a *prima facie* right to protection of its goods from wear and tear and depreciation and undoubtedly will suffer loss in if the lessee continues to utilise them, without paying for them, until the credit grantor can claim the return of such goods? [...] What would justify a courts interference with the credit receiver's rights, in these circumstances? In other words, what nature, or measure, of injury to the credit grantor ought to be apprehended in order to justify the granting of an interim attachment order?

²⁴⁴⁵ At 388C-E.

²⁴⁴⁶ 2002 2 All SA 571 (W).

²⁴⁴⁷ *Supra* 574.

²⁴⁴⁸ *Ibid.*

²⁴⁴⁹ *BMW Financial Services (SA) (Pty) Ltd v Rathebe supra* 574.

²⁴⁵⁰ 'Interim Attachment of Goods Sold in a Credit Agreement: More clarity Required' 2004 16 SA *Merc LJ* 77 82-3.

It is submitted that the courts have already answered the question that Steyn poses above, albeit indirectly, by directing that judicial discretion will be exercised according to the facts of each matter.²⁴⁵¹ The court in *Rathebe*,²⁴⁵² was clearly not persuaded that an interim interdict was justified in the circumstances in that two years had elapsed between the credit receiver's default and the application.²⁴⁵³ Whereas in the *Mogotsi* matter,²⁴⁵⁴ at the time of application, the instalments were in arrears in respect of about two months. The credit grantor in the *Mogotsi* matter acted with expedience and its intention to minimise the exposure to risk was evident by such swift action. The delayed action of the credit grantor in the *Rathebe* matter had the effect of maximising or enhancing the exposure to risk and this diminished the importance of interference with the receiver's use, this view was supported by Steyn.²⁴⁵⁵

The above cannot be a closed rule and as Flemming DJP in *BMW Financial Services (SA) (Pty) Ltd v Rathebe*²⁴⁵⁶ went to great lengths to explain, the facts of each case must be examined to draw a conclusion with regards interim attachment orders. It is submitted that where a credit provider can show the court that in the event that the interim order is not granted there is a well-grounded apprehension of irreparable harm to the goods that the court may, in its discretion in such extraordinary circumstances, grant such an order.

²⁴⁵¹ Per Flemming DJP in *Rathebe*: 'An interdict and attachment is a matter of discretion. It is dependent on the facts of each particular case' (*supra* 573).

²⁴⁵² *Supra*.

²⁴⁵³ Flemming DJP commented: 'For two years after payments ceased, applicant did nothing as far as is known. Then, when summons was issued, real risks allegedly arise and, although the action could be disposed of within a month, interfering with respondent's use became of (alleged) importance to applicant' (*supra* 574).

²⁴⁵⁴ *Supra*.

²⁴⁵⁵ 2004 16 SA Merc LJ 77 82. The very pertinent statements of Flemming DJP in the *BMW Financial Services (SA) (Pty) Ltd v Rathebe supra* 576 bear reference: 'It was argued that because applicant is the owner, prejudice is presumed. There are judicial dicta similar to the dictum which was relied upon from *Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 382F–G. Legal learning in later decades has made it necessary to realise that the 'presumption' mentioned by courts is mostly nothing other than an inference (a 'factual presumption') It depends on logic. It is only a factor in weighing the balance of injustice. It cannot limit the magisterial discretion by arguing that because use of a motorised vehicle is bound to affect value therefore in every action in which cancellation of the lease is purportedly made or is claimed an interdict or attachment is appropriate. In the 1960's there was a phase in which courts were swayed by such logic until the courts pierced the veil and realised that in practice there were not routine injustices – only a fee-earning opportunity and a method to needle the consumer into a response or into acquiescence. The stream of litigation dried up but the business world and in particular the motor trade continued unabated'.

²⁴⁵⁶ *Supra* 574.

6.3.2. Interim Attachment of Goods in terms of the National Credit Act

It has been mentioned, at the inception of this Chapter, that interim attachment of goods can be classified as an interim-remedy.²⁴⁵⁷ It is enforcement of an *ex lege* right which arises by virtue of the contract. It provides a temporary remedial solution for the credit provider. Where such an order is granted, it provides the credit provider with an opportunity to protect the goods which are the subject matter of the credit agreement, at least temporarily, until finalisation of the main proceedings. The interim attachment order provides the credit provider, faced with a consumer that is in breach of the credit agreement, with some relief, by safeguarding the only real security²⁴⁵⁸ that it has, namely the goods that are the subject of the credit agreement, *pendente lite*.²⁴⁵⁹ This safeguard is of particular importance when the goods, by their very nature and by virtue of the use that they are put to, are at risk.²⁴⁶⁰

At common law the interim attachment of goods pending the outcome of a vindicatory or quasi-vindicatory action was declared by the court in *SA Taxi Securitisation v Chesane*²⁴⁶¹ well-established.²⁴⁶² While sections 129 (3)(b), 129 (4)(a) and 130 (2)(a)(ii) of the National Credit Act make express references to attachment orders, it is unclear whether these include orders for the interim attachment of goods pending the outcome of vindicatory or quasi-vindicatory proceedings and the Act is also silent as to whether a credit provider may obtain an order for interim attachment of goods.²⁴⁶³ The court in the *Chesane* matter stated that:²⁴⁶⁴

²⁴⁵⁷ Cf paragraph 6.1 *supra*.

²⁴⁵⁸ However, it must be pointed out that it is within the credit provider's power to contract with the consumer to insure the goods or the credit advanced at its own expense or to authorise the credit provider to obtain insurance for the consumer at the consumer's cost (cf section 106 of the Act).

²⁴⁵⁹ While credit agreements of this nature usually contain clauses reserving the credit provider's ownership and *lex commissoria*, which entitle the credit provider to cancel upon breach of the credit agreement and reclaim the goods, it is submitted that neither clause is necessary in order for the credit provider to make application for an interim interdict.

²⁴⁶⁰ Otto and Otto 2013 122.

²⁴⁶¹ 2010 6 SA GSJ 557 at paragraph 6.

²⁴⁶² *Morrison v African Guarantee and Indemnity Co Ltd* 1947 a SA 87 (W), *Loader v De Beer supra*, *Van Rooyen v Reef Development (Pty) Ltd supra* and *SA Taxi Securitisation v Chesane* 2010 6 SA 557 (GSJ).

²⁴⁶³ *Supra* at paragraphs 7 and 8. It is submitted that sections 129 (3)(b), 129 (4)(a) and 130 (2)(a)(ii) are indeed equivocal. Borraine and Renke posit that the Act does not directly provide for any kind of interim interdict or attachment order but it does not prohibit the granting of such order

The question falls to be resolved by applying general interpretative principles. Where provisions of a statute are of doubtful meaning there is a presumption against an alteration in the common law. A statute must be construed in conformity with the common law rather than against it, except where the statute is clearly intended to alter the common law.

The court in *Chesane*²⁴⁶⁵ observed that there is no express indication in the Act that the common law remedy has been abrogated. Further, that the function and purpose of an interim attachment order is to protect the goods that are the subject of a credit agreement against deterioration and damage²⁴⁶⁶ and to keep them in safekeeping until the case between the parties has been finalised, and therefore, the purpose of the interim attachment order is not to enforce remedies or obligations under the credit agreement. The court accordingly concluded that

(‘Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005’ Part 1 *De Jure* 2007 paragraph 4.6.1). Conversely and more convincingly, Van Heerden submits that section 129 (3)(b) might be construed as indicating that the Act allows the granting of interim attachment orders, as it entitles the consumer, after meeting the requirements laid out in section 129 (3)(a), to resume possession of any property that had been repossessed pursuant to an attachment order. She posits that read together with section 129 (4)(a) one could infer that section 129 (3)(b) refers to an interim attachment order, whereas section 129 (4)(a) appears to refer to a final attachment order (where after the credit provider is entitled to sell the goods) (in Scholtz 2014 paragraph 12.8.4.1). Otto states that the Act provides no clear answer to the question as to whether an interim custody order may be granted (‘Attachment of Goods Sold in Terms of Instalment Agreement without Cancellation of Contract – Sanctioned by the National Credit Act?’ 2009 72 *THRHR* 473 478).

²⁴⁶⁴ *Supra* at paragraph 8.

²⁴⁶⁵ *Supra* at paragraph 9.

²⁴⁶⁶ The words ‘damage’ and ‘depreciation’ (and similarly, it is submitted, ‘deterioration’) are particularly associated with the Credit Agreements Act, as the words were used in section 17 (2) of that Act. It is submitted, that when considering an application for interim attachment, the court will indeed and in any event make such an order as it deems just, in order to have the goods in question valued or protected from damage or depreciation. Jordaan J in *Mercedes-Benz Finance (Pty) Ltd v Winston Bashi Motlako* (case no A3015/2000, WLD), albeit with reference to the Credit Agreements Act, stated in this regard: ‘It is neither necessary nor desirable for me to attempt (to define) what such ‘damage’ or ‘depreciation’ must entail in order to qualify for the exercise of the court’s protective powers: suffice it to say that the mere fact that the credit receiver is in possession of the property and continues to use it in the manner envisaged in the credit agreement in question will not be sufficient; were it otherwise a credit grantor would be entitled to approach the court as a matter of right on each occasion that it institutes proceedings for the return of the goods. In short, I am of the view that an application for relief in terms of section 17 (2) has to establish facts which show that the goods in question are likely to suffer damage or depreciation beyond that involved in the use contemplated in the agreement. In the instant case the subject matter of the agreement is a motor vehicle and it follows that I am of the view that the mere use by the Respondent of the motor vehicle in the ordinary course will not be sufficient grounds to entitle the Appellant to the interim order sought by it’. The facts of each case, however, have to be examined in order for the court to derive a conclusion as to whether to allow or disallow interim attachment.

the remedy does not form part and parcel of the debt enforcement procedures as envisaged by the Act.²⁴⁶⁷

The Act in section 129 (3)(b) refers to attachment orders but does not specifically refer to interim attachment orders and the section is so confusing that one understands why the court in the *Chesane*²⁴⁶⁸ matter, without attempting to decipher the meaning of this section, opted to declare that the common law applied. The court in *Chesane*²⁴⁶⁹ stated that a prerequisite for the grant of an interim attachment order is that the agreement, under which the respondent has the right to possess the goods, first be cancelled. Section 123 directs when and how a credit provider may terminate a credit agreement.²⁴⁷⁰ In terms of this section a credit provider may only cancel an agreement prior to the time provided in the agreement if the consumer is in default under the credit agreement and if the credit provider has taken the steps as set out in Part C of Chapter 6 of the Act. This section is entitled 'Debt Enforcement by Repossession or Judgment' and deals with the notices to be sent out to the consumer, prior enforcement. It is submitted that it was not the intention of the legislature to allow a consumer to be pulled into court proceedings, whether final or interim, without first putting the consumer on notice. In *Absa Bank v Havenga*²⁴⁷¹ the court stated that the rights to cancel an agreement arise out of an application of the rules of law of contract. Horwitz J²⁴⁷² stated that section 123 and 129 of the Act were procedural in nature and prescribe the procedure that the credit provider must follow in those instances in which the latter enjoys a right of cancellation, no matter how that right arises. Accordingly, it is submitted that in order to exercise the interim attachment remedy right, a credit provider would have to have attached the agreement and communicated the termination event to the consumer, whether through correspondence or through summons. In order for a credit provider to be

²⁴⁶⁷ *Supra* at paragraph 10. Otto also submits that interim attachment orders do not form part of the enforcement of the agreement (Otto 2010 113 and Otto *THRHR* 2009 473 478). The same view is expressed by Van Loggerenberg, Dicker and Malan in 'Aspects of Debt Enforcement under the National Credit Act' *De Rebus* January/February 2008 40 42.

²⁴⁶⁸ *Supra*.

²⁴⁶⁹ The court referred to *Steyns Foundry (Pty) Ltd v Peacock* 1965 4 SA 549 (T) and *First Consolidated Leasing and Finance Corporation Ltd v N M Plant Hire (Pty) Ltd* 1998 4 SA 924 (W), as authority therefore.

²⁴⁷⁰ Section 123 has been discussed in detail at paragraph 6.4.2.1 *infra*.

²⁴⁷¹ 2010 5 SA 533 GNP.

²⁴⁷² *Ibid*.

entitled to cancel a credit agreement prior to the time provided in that agreement it is obliged to follow the procedures set out in Part C of Chapter 6 of the National Credit Act.²⁴⁷³

It is submitted that in the event of cancellation of the credit agreement by the credit provider section 129 (3) would not be applicable. It is further submitted that section 129 (3)(a) and (b), as read together, indicate that the consumer can re-instate a credit agreement, however, before the credit provider has cancelled the contract. Section 129 (4) prohibits a consumer from re-instating a credit agreement after the termination thereof in accordance with section 123. It is submitted that these sections, as well as the common law remedy of interim attachments are intertwined. It is further submitted that without sending the section 129 (1)(a) notice the provider cannot terminate or apply for interim attachment. The period required by the notice, allows the consumer a 'gap', in order to become aware that he is in default, assuming he is not so aware, and pay to the provider all amounts that are overdue, that is an opportunity within which to cure his default.²⁴⁷⁴

Section 131 of the Act authorises repossession of goods, however, this section is not specific and merely states that if a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127 (2) to (9)²⁴⁷⁵ and section 128, read with the changes required by the context, apply with respect to any goods in terms of that order. It is submitted, therefore, that this section does not take the interpretation of sections 129 (3) and (4) any further.

²⁴⁷³ Cf section 123 (2) of the Act. This section and cancellation are discussed in detail in paragraph 6.4.2.1 *infra*.

²⁴⁷⁴ In Scholtz 2014 paragraph 12.8.4.2. The National Credit Amendment Act has amended section 129 (4) by changing the word 'consumer' to credit provider and adding the words 'or revive' before credit agreement. Accordingly, the section will read as follows: 'A credit provider may not re-instate or revive a credit agreement after (a) the sale of any property pursuant to – (i) an attachment order; or (ii) surrender of property in terms of section 127; (b) the execution of any other court order entering that agreement; or (c) the termination thereof in accordance with section 123. The effect of this change is that the credit provider is explicitly prohibited from re-instating or reviving credit agreements in such instances. Cf comments by Brits R in a paper given at the International Consumer Law Conference (25-27 September 2014), entitled '*The reinstatement of credit agreements: Remarks in Response to the 2014 Amendment of Section 129(3)-(4) of the National Credit Act*'

²⁴⁷⁵ Section 127 is not discussed in detail here, but in paragraph 5.3.4.1 *supra*.

The question therefore, that needs to be canvassed, is not *if*, as this has already been established by the *Chesane*²⁴⁷⁶ matter, but rather *when* a credit provider is entitled to an interim attachment order. In search of a satisfactory answer, the cases handed down relating to the previous acts are important. The very issue before the court in *BMW Financial Services SA (Pty) Ltd v Mogotsi*²⁴⁷⁷ was whether the applicant credit provider, was entitled to an order authorising the sheriff to attach the goods by reason of the credit receiver's default.²⁴⁷⁸ At the time of the application by the credit provider, the notice in terms of section 11 of the Credit Agreements Act²⁴⁷⁹ claiming the return of the vehicle had been sent by registered post but the thirty day period required by section 11 had not yet elapsed.²⁴⁸⁰ The court granted the interim attachment of the vehicle in question on the basis that such an order would not have the consequence that the vehicle be returned to the credit grantor but rather that it would be kept safe pending the resolution of the dispute between the parties.²⁴⁸¹

Conversely the court did not grant an interim attachment order in the *Rathebe*²⁴⁸² matter, were the summons had already been issued. The court found that the unopposed application had only the supporting affidavit as a source of information and that beyond identifying the contract and proving breach of the obligation to pay instalments which gave rise to a right to cancel, the founding affidavit contained practically no factual information relating to the specific

²⁴⁷⁶ *Supra* paragraphs 7 and 8.

²⁴⁷⁷ 1999 3 SA 384 (W).

²⁴⁷⁸ *Supra* 416.

²⁴⁷⁹ Section 11 of the Credit Agreements Act provided that a credit grantor could not claim the return of the goods to which the contract related, in the event of a breach by the credit receiver, unless it had notified the receiver of his breach and had demanded performance.

²⁴⁸⁰ The credit provider alleged urgency for what the court referred to as 'the usual reasons', namely that the motor vehicle was at that time the only security which the credit provider held for the consumer's indebtedness; that the consumer was using the vehicle without paying for it; that the vehicle was a depreciating asset and that it was depreciating in accordance with the number of kilometres travelled and thereby, with the passage of time and with increase in travel, the security which the credit provider held was reduced exponentially as the consumer failed to effect the payments. The credit provider also alleged that there was a danger that the vehicle could be seriously damaged, or even wrecked in a collision, or that it may have been stolen. The credit provider alleged that if the vehicle was attached both it and its asset value would be safeguarded. The credit provider also pointed out in the application that the consumer could easily obtain possession of the vehicle by paying the arrear rentals (*BMW Financial Services SA (Pty) Ltd v Mogotsi supra* 417).

²⁴⁸¹ *BMW Financial Services SA (Pty) Ltd v Mogotsi supra* 419.

²⁴⁸² *Supra*.

consumer.²⁴⁸³ The court found that the paucity of pertinent facts became important when considering the reasons why there should be any relief pending finalisation (which, the court held, could be expected soon) of the action for cancellation and ancillary relief.²⁴⁸⁴ The extent to which the court in this matter attended to each averment made by the credit grantor is indicative of how the facts of the matter reveal the necessity (or lack thereof) for granting an interim order. Having posited this view, it is submitted that the National Credit Act, brings with it a new set of game rules that need to be applied. As stated by Otto²⁴⁸⁵ the Act does not use the same expressions as those in section 11 of the Credit Agreements Act. The Act's consumer protective stance has been canvassed in this thesis before, but more particularly the nature and content of section 129 must be canvassed here, once more and in relation to the interim attachment order.

The section 129 notice has, it is submitted, four broad purposes, the first is to alert the consumer of his breach, the second is to advise the consumer of the options available to him, the third is to advise the consumer of the consequences of his continued breach and or lack of initiative to resolve the dispute between the parties and finally, as per the Supreme Court in *Nedbank and Three Others v National Credit Regulator*,²⁴⁸⁶ the purpose of a section 129 notice is a step devised by the legislature in an attempt to encourage the parties to iron out their differences before seeking court intervention. As such this was viewed to give effect to the object of the National Credit Act as set out in section 3(h) by encouraging a consistent and accessible system of consensual resolution of disputes arising from credit agreements and therefor also consistent with section 3(i)²⁴⁸⁷ of the Act.²⁴⁸⁸ Van Heerden²⁴⁸⁹ submits that when applying for an interim

²⁴⁸³ *Rathebe supra* 572.

²⁴⁸⁴ *Rathebe supra* 573.

²⁴⁸⁵ 2009 72 *THRHR* 473 478.

²⁴⁸⁶ 2011 3 SA 581 SCA 583.

²⁴⁸⁷ Section sets out the purposes of this Act which 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. Section 3 (h) and (i) set out, *inter alia*, how the consumers are to be protected, which is by providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements and providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

attachment order, compliance with sections 129 and 130 of the Act need not be alleged. It is submitted that the notice period given in the Act should, except in extreme cases,²⁴⁹⁰ be respected, as the consumer must have time to reconcile. Allowing the attachment of the goods, subject of the credit agreement, would frustrate the intended purpose of the notice – which is to reconcile any dispute between the parties or provide the consumer some time to bring the payments under the agreement up to date. It is submitted that if the courts were to grant interim attachment of goods prior to the credit consumer having instituted legal proceedings and prior to the twenty-day period having expired it would interfere with the purpose of the section 129 (1)(a) notice and with the intention and purport of the Act. Van Loggerenberg, Dicker and Malan,²⁴⁹¹ like Otto²⁴⁹² and

²⁴⁸⁸ The Supreme Court in *Nedbank v National Credit Regulator supra* was quoting the court in *Firststrand Bank Ltd v Olivier* 2009 3 SA 353 SE paragraph 18.

²⁴⁸⁹ In Scholtz 12-37 paragraph 12.8.4.1.

²⁴⁹⁰ The only time a credit provider would be in a position to apply section 129 (3)(b), without first having cancelled the contract, is where a credit provider approached a court, perhaps on an urgent basis, requesting an interim attachment order and affirming that due to time constraints caused by an imminent risk to the goods, for example, the consumer was leaving the country with the goods, the credit provider would immediately (post attachment) launch proceedings for cancellation. (The obligation would likely form part of the order, like in the *BMW Financial Services SA (Pty) Ltd v Mogotsi supra*, where the court ordered the credit grantor to institute proceedings within thirty days of the granting of the attachment order) The consumer would then have from the time the order was granted, but prior to cancellation, to repay any arrear amounts, re-instate the agreement and resume possession, as envisaged by section 129 (3). The scenario depicted above is not likely to be very common and it would have been expected that a legislature make provision for the more 'usual' type of interim attachment order. Unfortunately, this does not appear to be the case and the words of Scholtz with regard the drafting of the Act, resound, 'the National Credit Act is not a model of legal accuracy or elegance'. (Guide to the National Credit Act 2-2 paragraph 2.1) This statement was repeated and endorsed by the Magistrate's Court, the High Court and the Supreme Court of Appeal hearing the matter of *Absa Bank Ltd v De Villiers and Two Others* is pertinent 2008 JOL 22874 C paragraph 14. A similar criticism was levelled at the Act by the court in *Nedbank v The National Credit Regulator* 2011 ZASCA 25 paragraph 8, where the court stated: 'Unfortunately the NCA cannot be described as 'the best drafted Act of Parliament which was ever passed'. Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise'. Hanie and Quick commented as follows: 'It falls on legal advisers to interpret the National Credit Act and advise clients accordingly. This is not always easy, especially where the precise scope of the Act is not clear from its wording' and '[m]uch of this confusion could have been avoided had the drafters exercised a greater degree of precision in drafting so as not to obscure the actual intention or indeed introduce ambiguity' ('The National Credit Act: Another Example of Slipshod Drafting' *Without Prejudice* August 2007 4 4-5). The Supreme Court of Appeal made similar observations in *Nedbank Ltd and Others v The National Credit Regulator* 2011 3 SA 581 SCA at paragraph 2.

²⁴⁹¹ *De Rebus* January/February 2008 42. The following comments pertain: 'If an application for interim relief in the form of an interdict of attachment is to be regarded as a legal proceeding to enforce the agreement, such relief could not be considered before the requirements as stated in section 129 (1)(b) have been met. A wide reading of the terms "legal proceedings to enforce" will probably include such interim relief, whilst a narrow reading based on the argument that the credit provider is not purporting to do debt enforcement will not deem such a request for interim relief to be part of the enforcement'. Borraine and Renke express the view that a wide reading of the

Van Heerden,²⁴⁹³ submit that because an attachment *pendente lite* does not form part of the enforcement of the agreement, such an order may be obtained without having to comply with section 130 of the Act.²⁴⁹⁴ They submit that in the magistrates' court the credit provider would have to comply with section 30 of the Magistrate's Court Act²⁴⁹⁵ read with rule 56 thereof.²⁴⁹⁶ While in the High Court they concur with the views of Otto²⁴⁹⁷ that the courts would probably follow the practice in their divisions.²⁴⁹⁸ However, it is submitted, that a section 129 (1)(a) notice and the necessary time periods stipulated in section 130 should elapse before a credit provider may approach a court for an interim attachment order. A converse interpretation would have unjust results for the consumer, who is often in the weaker financial position. The alternative would be that upon a consumer missing a payment, the credit provider without taking enforcement proceedings that is, without issuing a section 129 (1)(a) notice could simply approach the court for an interim attachment order. It is submitted that the consumer would have to obtain a legal representative in order to defend himself against the interim attachment, when the matter may have been resolved prior to court proceedings.²⁴⁹⁹ This, it is submitted, would result in unjust procedure as a

phrase 'legal proceedings to enforce' per section 129 (1)(b) would probably include such interim relief, whilst a narrow reading, based on the argument that the credit provider is not purporting to enforce the credit agreement, would not deem an application for interim relief to be part of the enforcement. They submit that because the rights of the credit provider are to be infringed since the consumer is in the process of, or about to alienate, damage or destroy the goods, the credit provider is merely attempting to protect its rights and interest in such goods and such relief should therefore be distinguished from the debt enforcement proceedings ('Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005' Part 1 *De Jure* 2007 paragraph 4.6.1).

²⁴⁹² 2010 113.

²⁴⁹³ In Scholtz 12-37 paragraph 12.8.4.1 and Van Heerden and Otto 'Debt Enforcement in terms of the National Credit Act 34 of 2005' *TSAR* 2007 4 655 679.

²⁴⁹⁴ Van Heerden endorses this view, cf fn 2406 from Scholtz 12-66 paragraph 12.8.4.1.

²⁴⁹⁵ This section states that *subject to the limits of jurisdiction prescribed by this Act*, the court may grant against persons and things orders for, *inter alia*, attachments and interdicts. Section 29, the section dealing with jurisdiction in respect of causes of action, states that it is subject to the provisions of the Magistrates' Court Act and the National Credit Act. Section 30 goes on to state that confirmation by the court of any such attachment or interdict in the judgment in the action shall operate as an extension of the attachment or interdict until execution or further order of the court.

²⁴⁹⁶ Section 56 deals with the procedural aspects of bringing an application for, *inter alia*, attachments to secure claims.

²⁴⁹⁷ 2006 95.

²⁴⁹⁸ *De Rebus* January/February 2008 42.

²⁴⁹⁹ This view is supported by the words of Wallis J in *BMW Financial Services (SA) Pty Ltd v Mudalay* 2010 5 SA 618 KZD paragraph 11: '[A] notice under s 129 (1)(a) affords the consumer the opportunity of referring the particular agreement in respect of which such notice is given to a debt counsellor 'with the intent that the parties resolve any dispute under the agreement or

consumer would be taken by surprise by court action and same would be contrary to the intention and purpose of the Act.

6.4. Cancellation²⁵⁰⁰

Parties enter contracts with a specific objective in mind, that is they wish to exchange obligations in order to enrich their estate or obtain some gain from the transaction. When the obligations are not performed the parties may claim performance in order to obtain the initially expected results. Cancellation of the contract is, therefore, contrary to the assumed founding intention of the parties:²⁵⁰¹ that is, that the parties should be bound by their obligations and that they intend to be bound by them. Therefore cancellation of a contract is an extraordinary remedy for breach and is available only in certain circumstances.²⁵⁰² Diemont and Aronstam state:²⁵⁰³

develop and agree on a plan to bring the payments under the agreement up to date'. The proposal is directed at achieving a situation where the consumer and the credit provider, through the agency of the debt counsellor, negotiate a resolution to the consumer's particular difficulties under a particular credit agreement. It is a consensual process the success or failure of which will depend upon whether the parties can arrive at a workable basis upon which to resolve the issues caused by the consumer's default'.

²⁵⁰⁰ Some authors refer to this remedy as 'rescission', however the following reasoning, for (rather) using the term cancellation is convincing: 'It is better to describe the remedy as cancellation than as rescission and to reserve the word rescission for cases where, typically because of a misrepresentation inducing the contract, it is desired to set it aside *ab initio*. This is not the object of cancellation in the present context, which is intended to terminate the primary obligations of the contract there and then, but not retrospectively. Restitution by either or both parties should therefore be ordered only to the extent necessary to avoid unjust enrichment' (Christie and Bradfield 2011 561. Cf also Kerr 2002 575, Van der Merwe *et al* 2012 343, *Spencer v Goldstein* 1920 AD 617, *Radiotronics (Pty) Ltd v Scott Lindberg and Co Ltd* 1951 1 SA 312 (C), *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 4 SA 818 (D), *Bonne Fortune Beleggings Ltd v Kalahari Salt Works (Pty) Ltd* 1974 1 SA 414 (NC), *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*; *Mulder v Combined Motor Finance (Pty) Ltd* 1981 1 SA 428 (W), *Probert v Baker* 1983 3 SA 229 (D) and *Inzalo Communications and Event Management (Pty) Ltd v Economic Value Accelerators (Pty) Ltd* 2008 6 SA 87 (W)).

²⁵⁰¹ Wessels 1951 paragraph 1625, Diemont and Aronstam 1982 186 and Fouché 2005 118. The South African view is jurisprudentially opposite to English law, which looks to cancellation as a first and natural remedy, rather than specific performance, once there has been a breach of the agreement by one of the contracting parties.

²⁵⁰² Roman-Dutch law did not provide a general right of cancellation on the ground of breach of contract. In the event of *mora debitoris* the creditor was entitled to cancel the contract only where the contract contained a cancellation clause or *lex commissoria* (Van Zijl Steyn *HRHR* 1929 94-7, *Nel v Cloete* 1972 2 SA (A) 160 and Van der Merwe *et al* 2012 229). A *lex commissoria* could be incorporated into a contract whether a date for performance had been set or not. However, where a date had not been set, the creditor had to put the debtor in *mora* by *interpellatio* before he could exercise his right to cancel.

It is not every breach of contract that will, in the absence of a cancellation clause, justify cancellation at common law. Unless there is a failure that goes to the root of the contract the creditor will not be entitled to cancel.

The following sections contain an examination of when a party may cancel a contract, namely when a *lex commissoria* has been incorporated in a contract; where, upon notice, a creditor may acquire a right to cancel; where there is an implied right to cancellation and the right to cancel is derived from statutory intervention.

The National Credit Act regulates the cancellation of credit agreements in the event of breach of contract by one of the parties. Section 123 of the Act entitles a credit provider to terminate a credit agreement before the time provided in that agreement if the consumer is in default.²⁵⁰⁴ However, as discussed above, not all credit agreements fall under the auspices of the Act and therefore a brief examination of the common law relating to cancellation is important, not only for purposes of identifying the rights of the parties in a credit agreement which are not regulated by the Act when cancellation is contemplated, but also in order to guide the development of the Act and to integrate it with the common law by virtue of the process of interpretation of the statute. The following from *Absa Bank Ltd v Havenga*²⁵⁰⁵ is pertinent and emphasises the point:

[T]he fact that an agreement does not contain an express cancellation provision is not to say that cancellation is therefore never possible: the common law may well avail the credit provider. But in that instance, the appropriate allegations must be made in the founding papers' and further '[t]he right to cancel an agreement arises out of an application of the rules of the law of contract.

²⁵⁰³ Diemont and Aronstam 1982 185.

²⁵⁰⁴ Section 123 is discussed in greater detail in paragraph 6.4.2.1 *infra*.

²⁵⁰⁵ 2010 5 SA 533 (GNP).

6.4.1. Common Law

6.4.1.1. Generally

Cancellation of a contract may be effected by the aggrieved party without the assistance of the court.²⁵⁰⁶ However, approaching the court for confirmation of the cancellation and the desirability of having the status of the cancellation of the contract confirmed is common.²⁵⁰⁷

Cancellation due to breach of contract does not, as in the cancellation of a contract due to fraud, refer back to the date when the contract came into being: the period during which the contract has existed is recognised and not nullified.²⁵⁰⁸

Where the aggrieved party obtains the right to cancel the contract, he in fact has a choice whether to cancel or whether to enforce the contract, he is not compelled to cancel merely because he has a right to do so.²⁵⁰⁹ However, once he has made his election he is bound by it.²⁵¹⁰ The right of cancellation should be exercised within a reasonable time after the aggrieved party has become aware of the breach, otherwise it may be deduced by the other party that the aggrieved party has waived his right of cancellation.²⁵¹¹ However, the right of cancellation does not lapse by mere unreasonable delay and the aggrieved party will be entitled to explain his delay in cancellation.²⁵¹²

²⁵⁰⁶ *Lebedina v Schechter and Haskell* 191 WLD 247 252, *Horsler and another v Zorro* 1975 1 All ER 584 ChD 590 and *Woods v Walters* 1921 AD 303 309.

²⁵⁰⁷ *Sonia (Pty) Ltd v Wheeler* 1958 1 SA 555 (A) 561, *Christie and Bradfield* 2011 and *Kerr* 2002 727.

²⁵⁰⁸ *Salzwedel v Raath* 1956 2 SA 160 (E) 163 and *Kerr* 2002 732.

²⁵⁰⁹ *Grotius Inleiding* 3 14 32, *Van Leeuwen RHR* 4 20 2, *Schuurman v Davey* 1908 TS 664, *Sidubulekana v Peverett* 1916 CPD 369 374, *Segal v Mazzur* 1920 CPD 634 644, *Meyers v Abrahamson* 1952 3 SA 121 (C) 123, *Grové and Otto* 2002 43 and *Van der Merwe et al* 2012 344.

²⁵¹⁰ *D 18 3 4 2*, *Voet Commentarius* 18 3 2, *Port Elizabeth Town Council v Rigg* 1903 20 SC 252 256, *Schuurman v Davey supra* 670, *Bloch v Michal* 1924 TPD 54 57, *Jowell v Behr* 1940 WLD 144 146, *Chesterfield Investments (Pty) Ltd v Venter* 1972 2 SA 19 (W) 26, *Walker v Minier et Cie (Pty) Ltd* 1979 2 SA 474 (W) and *Thomas v Henry* 1985 3 SA 889 (A) 895-6.

²⁵¹¹ *North Vaal Mineral Co. Ltd v Lovasz* 1961 3 SA 604 (T) and *Christie and Bradfield* 2011 564.

²⁵¹² The following passage from *Nedcor Bank Ltd Trading inter alia as Nedbank v Mooipan Voer and Graanverspreiders CC supra* 483 is relevant: 'It has frequently been said that election must be made within a reasonable time, but it does not follow that, if the election to cancel is not

No person is presumed to waive his rights, therefore the onus of proving waiver is on the party alleging it.²⁵¹³ Consequently, it will be for the defendant to prove that the plaintiff's delay has amounted to a waiver of his right to cancel the contract or that it has induced the defendant to commit himself to further performance, thus raising estoppel.²⁵¹⁴ Pending his decision on whether to cancel or not, an aggrieved party is entitled to refuse to accept performance rendered in order to avoid his actions being construed as a waiver of his right to cancel the agreement.²⁵¹⁵ Where a loan agreement is entered into and the debtor defaults on one or two (or more) instalments and while the creditor does not exercise his right to cancel the debtor resumes payments of the loan the debtor would then be entitled to assume that the creditor has waived his right of cancellation. The matter is rendered more complex by the fact that the debtor would be liable for arrear or *mora* interest. The arrears may be claimed but the payment-over or recommencement of payment by the debtor precludes the creditor from entitlement to cancel, unless the contract stipulates otherwise, that is that no waiver shall be implied from the creditor's conduct and that no relaxation or indulgence by the creditor or acceptance of any instalments after due date shall be construed as a waiver.²⁵¹⁶ In the absence of such a provision or similar provision the creditor may be held to have waived his rights either expressly or impliedly.²⁵¹⁷ An aggrieved party exercises his right of waiver when, with full knowledge of the existence of the right, he abandons it either expressly or tacitly by conduct which is inconsistent with an intention to enforce the

exercised within a reasonable time, the right to elect is lost without more'. And also the comments of Hefer JA in *Mahabeer v Sharma NO and Another* 1985 3 SA 729 (A) 736, 'Apart from the law relating to prescription, there is no principle of South African law of which I am aware that justifies a conclusion that a right may be lost through mere delay to enforce it and no reason exists for holding otherwise in the case of the right to cancel an agreement'.

²⁵¹³ *Ellis v Laubscher* 1956 4 SA 692 (A) 702, *North Vaal Mineral Co Ltd v Lovasz supra* 612-3, *Gouws v Montesse Township and Investment Corporation (Pty) Ltd v Standard Bank of SA Ltd* 1964 3 SA 221 (T) 229, *Dale v Fun Furs (Pty) Ltd* 1968 3 SA 264 (O) 266 and LAWSA paragraph 255.

²⁵¹⁴ *Usakos Recreation Club v Slaney* 1950 3 SA 121 (SWA) and *Christie and Bradfield* 2011 564 2006 541.

²⁵¹⁵ *St Patrick's Mansions (Pty) Ltd v Grange Restaurant (Pty) Ltd* 1949 4 SA 57 (W) 63 and LAWSA paragraph 254.

²⁵¹⁶ *Diemont and Aronstam* 1982 189.

²⁵¹⁷ *Ibid.*

contract.²⁵¹⁸ Examples of an implied waiver of the right to cancel are where the creditor delays cancelling for an unreasonable time after breach or where the creditor commits an act after the breach that is not consistent with an intention to cancel.²⁵¹⁹ A further consideration is case law which has established that a defaulting party cannot deprive the aggrieved party of his election to cancel the contract by tendering performance while the aggrieved party is considering the matter.²⁵²⁰

While the act of cancellation may consist of notification it may also be deduced from the aggrieved party's conduct.²⁵²¹ Where the aggrieved party, for example accepts, retains or uses the defective performance it will be deemed that he has elected to enforce the contract.²⁵²² The aggrieved party may give the party who has breached the contract the opportunity of fixing the defective performance, however, it should be made clear that the opportunity to rectify is conditional and he thus retains the right to cancel the contract.

6.4.1.2. Effects of Cancellation of the Contract

Kerr²⁵²³ describes cancellation of a contract as having a major change in the history of the parties' contractual relationship,²⁵²⁴ however, certain adjustments

²⁵¹⁸ *Laws v Rutherford* 1924 AD 261 263, *Martin v De Kock* 1948 2 SA 719 (A) 732-3, *Feinstein v Niggli* 1981 2 SA 684 (A) 698-9, *Road Accident Fund v Mothupi* 2000 3 All SA 181 (SCA), 2000 4 SA 38 (SCA) 50, *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 436, *Linton v Corser* 1952 3 SA 685 (A) 436, *Palmer v Poulter* 1983 4 SA 11 (T) 20 and *Xenopoulos v Standard Bank of SA Ltd* 2000 2 All SA 494 (W). The test to determine the intention of the aggrieved party is objective, the court will have regard to the outer manifestations of the intention of the aggrieved party and any mental reservations that were not communicated to the defaulting party would be ignored (*Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 2 SA 537 (C) 543-4, *Traub v Barclays National Bank Ltd, Kalk v Barclays National Bank Ltd* 1983 3 SA 619, *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) 792 and LAWSA paragraph 255).

²⁵¹⁹ *Diemont and Aronstam* 1982 190.

²⁵²⁰ *Boland Bank v Pienaar and another* 1988 3 SA 618 (A). Cf also *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd supra* 302. If the aggrieved party takes too long to make up his mind, however, the usual questions of apparent election, estoppel and waiver may arise (Kerr 2002 704).

²⁵²¹ *Havenga et al* 1995 121.

²⁵²² *Ibid.*

²⁵²³ *Supra* 703.

²⁵²⁴ *Shongwe J in Nedcor Bank Ltd Trading inter alia as Nedbank v Mooipan Voer and Graanverspreiders* CC 2002 3 All SA 477 (T), albeit considering communication of cancellation made this point on the effects of it on the parties: 'I endorse the proposition that the general

may still have to be effected between them.²⁵²⁵ The obvious consequence and intended object of the cancellation of a contract is the termination of the obligations between the parties.²⁵²⁶ An aggrieved party may claim cancellation and restitution or cancellation, restitution and damages,²⁵²⁷ provided the claims are made in the same action.²⁵²⁸ If he claims restitution and there is no agreement to the contrary in the contract, he is bound to restore²⁵²⁹ and in his pleadings must tender to restore what he has received.²⁵³⁰

In a credit agreement that has been partly performed and where cancellation and return of the article sold are claimed, the creditor, in its particulars of claim, must either tender repayment of the amount already paid by the debtor or include a prayer for the forfeiture of such amount, if the creditor is entitled to it in terms of the agreement.²⁵³¹ This was the *status quo* under the Hire-Purchase and Credit Agreements Acts as determined by the courts and it is submitted this procedural requirement will be the situation where a plaintiff creditor claims cancellation of a credit agreement that falls outside the scope of the National Credit Act and of those that fall under its auspices. The Act does give specific direction with regard the procedures that must be followed when cancelling a credit agreement governed by it and allegations regarding compliance with such procedures will also have to be made in the plaintiff-credit provider's particulars of claim.²⁵³²

consideration that an election to cancel the contract is important not only for the aggrieved party but also for the defaulting party. His contractual position is to be affected as much as that of the aggrieved party, although the consequences will differ' (481).

²⁵²⁵ Kerr 2002 703. Cf also Harker 1981 475, Lambiris 325-7 and Joubert 1987 236.

²⁵²⁶ Ibid.

²⁵²⁷ *Radiotronics (Pty) Ltd v Scott, Lindenberg and Co Ltd* 1951 1 SA 12 (C). However, because the claim for damages is not a liquidated claim the party is still bound to restore that which he has received, as set-off cannot apply (*Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd and others* 1974 1 SA 414 (NC) 427).

²⁵²⁸ *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 3 SA 462 (A). A party who sues for cancellation due to breach, but is concerned that the court may find that the breach is a minor one (for example non-payment of an instalment due) may claim cancellation failing which specific performance of that part of the defendant's obligation which is due (*Jardin v Agrela* 1952 1 SA 256 (T) and Kerr 2002 735).

²⁵²⁹ *Geldenhuys v Maree* 1962 2 SA 511 (O), *Coetzee v Impala Motors (Edms) Bpk* 1961 3 SA 539 (T) 541 and *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd and others supra* 424.

²⁵³⁰ *Custom Credit Corporation (Pty) Ltd v Shembe supra* 470, *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd and others supra* 424 and Kerr 2002 733.

²⁵³¹ Diemont and Aronstam 1982 189.

²⁵³² Cf also Van Heerden in Scholtz 2014 paragraph 12.8.2 for a discussion on the allegations to be made when approaching a court for an order of cancellation and return of the goods.

If neither has performed, both parties are relieved from the obligation to perform, whereas if one of the parties has performed or both of the parties have performed then whatever has been performed must be returned to the party that performed it.²⁵³³ If restitution has become impossible, the party who is cancelling the contract is relieved of the duty to return the performance he has received, provided that the impossibility was not created by his fault.²⁵³⁴ Where restitution becomes partly impossible he is obliged to return that which is left.²⁵³⁵ While cancellation terminates the main or primary obligations to perform, it does not terminate the secondary obligations, for example the obligation to pay damages for breach or an obligation to abide by an arbitration clause in the contract.²⁵³⁶

6.4.1.3. *Lex Commissoria* or the Cancellation Clause

Where the parties expressly agree in their contract to cancellation as a remedy for breach they do so in what is known as a cancellation clause or *lex commissoria*. The term or expression '*lex commissoria*' is often used, in a wide sense, to describe or incorporate a term in a contract which confers a right to cancel on one of the contracting parties on the ground of any form of breach of the contract by the other party.²⁵³⁷

²⁵³³ Havenga *et al* 1995 121.

²⁵³⁴ *Ibid.*

²⁵³⁵ *Ibid.*

²⁵³⁶ *Atteridgeville Town Council v Livanos* 1992 1 SA (A) 303-6, Harker 1981 477 and Christie and Bradfield 2011 562. There is nothing precluding an aggrieved party from cancelling a partly executory contract and also claiming any amounts which have already accrued and are due and enforceable in a separate cause of action (*Walker's Fruit Farms Ltd v Sumner* 1930 TPD 394, *Crest Enterprises Ltd v Rycklof Beleggings Bpk* 1972 2 SA 86 (A) 869-70, *Edebegeorge (Pty) Ltd v Chamomu Property Investments (Pty) Ltd supra*, *Nash v Golden Dumps supra* 22-23 and *Thomas Construction (Pty) Ltd v Grafton Construction Furniture Manufacturers (Pty) Ltd* 1988 2SA 318 (W)). Interestingly enough, it has been held that the aggrieved party need not identify the breach of the grounds on which it relies for cancellation. It is settled law that the aggrieved party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after the time (*Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd supra* 595, *Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd supra* 832 and *Telecordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) at 166). Furthermore, where a party who claims cancellation and alleges a number of facts justifying the cancellation is not required to expressly state that he is cancelling on each of the possible grounds in the event that he may be precluded from relying on them (*Beck v Du Toit* 1975 1 SA 366 (O) and Christie and Bradfield 2011 565).

²⁵³⁷ This expression was primarily used to denote a term or clause in a contract which empowered a contracting party to cancel upon delay by the other party (Van der Merwe *et al*

Cancellation clauses or *lex commissoriae* are enforceable in South African law.²⁵³⁸ Subject to statutory controls, parties may arrange their contract or more particularly their right to cancel a contract according to their unfettered choice or upon the happening of certain events.²⁵³⁹ The fact that a credit agreement contains a *lex commissoria* does not oblige the aggrieved party from exercising this right, he may still choose to enforce the contract by means of specific performance.²⁵⁴⁰

Lex commissoriae are common in most commercial contracts and are usually made enforceable with all types of breaches of contract.²⁵⁴¹ Frequently, cancellation clauses justify cancellation not only for breach of the contract but also if some contingency beyond the debtor's control occurs, for example his death.²⁵⁴² Some cancellation clauses provide that the creditor may have the right to cancel immediately upon the surrender or sequestration of the debtor's estate, such clauses are, however, regulated by section 84 of the Insolvency Act.²⁵⁴³

2012 fn 126). Diemont and Aronstam refer to 'cancellation clauses' as 'forfeiture clauses', having the view that the latter were wider than the term '*lex commissoria*' which clauses entitled the creditor to rescind only in the event of an instalment not being paid (1982 186 fn 64). It is submitted, however, that the term *lex commissoria* through trade usage has become the preferred term for an all-encompassing cancellation clause, with the use of the word 'forfeiture' reserved for certain types of clauses relating to the specific forfeiture of payments for breach, in other words relating to penalty for breach of contract. In *North Vaal Mineral Co. Ltd v Lovasz* 1961 3 SA 604 (T) 606 the Court referred to a *lex commissoria* in the wide sense as 'a stipulation conferring a right to cancel upon a breach of the contract to which it is appended, whether it is a contract of sale or any other contract'.

²⁵³⁸ *Hiddingh v Von Schade* 1899 16 SC 128 133, *Murphy v Labuchagne and the Central Coronation Syndicate Ltd* 1903 TS 393, *Bland and Son v Peinke and De Villiers* 1945 EDL 26 35, *Gordon v Tarnow* 1947 3 SA 525 A 530 & 533, *Mine Worker's Union v Prinsloo* 1948 3 SA 831 A, *Venter v Venter* 1949 1 SA 768 A 778-9 and *Meyer v Hessling* 1992 2 SA 851 Nm 863A-868B.

²⁵³⁹ Joubert 1987 236.

²⁵⁴⁰ *Schuurman v Davey* 1908 TS 664, Grové and Otto 2002 43 and Van der Merwe *et al* 2012 357.

²⁵⁴¹ Joubert 1987 236.

²⁵⁴² Diemont and Aronstam 1982 185.

²⁵⁴³ Act 24 of 1936. Section 84 now reads: 'Special provisions in case of goods delivered to a debtor in terms of an instalment agreement.—(1) If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction that is an instalment agreement contemplated in paragraph (a), (b), and (c)(i) of the definition of 'instalment agreement' set out in section 1 of the National Credit Act, 2005, such a transaction shall be regarded on the sequestration of the debtor's estate as creating in favour of the other party to the transaction (hereinafter referred to as the 'creditor') a hypothec over that property whereby the amount still due to him under the transaction is secured. The trustee of the debtor's insolvent estate shall, if required by the creditor, deliver the property to him, and thereupon the creditor shall be deemed to be holding that property as security for his claim and the provisions of section 83 shall apply. (2) If the debtor returned the property to the creditor within a period of one month prior to the

Similarly, where the debtor is a limited company, the parties may not agree that the creditor may cancel the contract if the company is wound up compulsorily or goes into voluntary liquidation due to section 339 of the old Companies Act²⁵⁴⁴ which provides that in the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by the old Companies Act. A clause that provides for cancellation in the event of execution or threatened execution on the goods or where the goods are attached for arrear rental or where the debtor allows any judgment taken against him to remain unsatisfied is valid.²⁵⁴⁵ Cancellation in the event of the debtor selling or transferring any interest in the contract while it remains unperformed is allowed.²⁵⁴⁶ Removal of goods from the district, province or other contractually designated area in which they are kept in violation of the contract also entitles enforcement of a cancellation clause.²⁵⁴⁷ It remains in the discretion of the

sequestration of the debtor's estate, the trustee may demand that the creditor deliver to him that property or the value thereof at the date when it was so returned to the creditor, subject to payment to the creditor by the trustee or to deduction from the value (as the case may be) of the difference between the total amount payable under the said transaction and the total amount actually paid thereunder. If the property is delivered to the trustee the provisions of subsection (1) shall apply'. Section 84 was amended by section 172 (2) of the National Credit Act. Though the parties' may agree that the creditor may cancel the contract in the event of the debtor committing an act of insolvency – such cancellation cannot defeat the trustee's rights under section 84 (2) of the Insolvency Act should the debtor be sequestrated within one month after the debtor has returned the property to the creditor (Diemont and Aronstam 1982 185).

²⁵⁴⁴ Act 61 of 1973 (hereinafter the 'Companies Act 1973'). This section of the old Companies Act has remained in force, despite the promulgation of the new Companies Act. The implementation date of the Companies Act 71 of 2008 (hereinafter the 'new Companies Act') was 1 May 2011. In terms of regulation 41 of the new Companies Act, which is entitled 'Transitional Effect of Previous Regulations Concerning Insolvent Companies', despite the repeal of the Companies Act, 1973, the regulation for the Winding-Up and Judicial Management of Companies as promulgated under Government Notice R2490 of 28 December 1973, and as subsequently amended from time to time, continues to apply to any matter to which Chapter 14 of the Companies Act, 1973 continues to apply in terms of Item 9 (1) to (3) of Schedule 5 of the new Companies Act, until the date to be determined as contemplated in Item 9 (4) of Schedule 5. Item 9 (4) states that the Minister, by notice in the *Gazette*, may determine a date on which item 9 ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and may prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated. Delport suggests that this will remain the practise until such time as the Bankruptcy Act comes into force (*The New Companies Act Manual* 2009 127).

²⁵⁴⁴ Diemont and Aronstam 1982 186.

²⁵⁴⁵ *Ibid.*

²⁵⁴⁶ *Ibid.*

²⁵⁴⁷ Diemont and Aronstam 1982 186

courts to decide whether a particular act or breach justifies the cancellation of the contract.²⁵⁴⁸

Usually a *lex commissoria* will outline the circumstances under which the aggrieved party will be entitled to cancel the contract.²⁵⁴⁹ Often and, it is submitted logically so, the *lex commissoria* entitles the aggrieved party to cancel the contract for less serious breaches of contract,²⁵⁵⁰ even, as seen above, where an act is committed or an event takes place which does not amount to a conventional breach of contract.²⁵⁵¹

With credit agreements the usual form of breach of contract is failing to pay instalments timeously. If a *lex commissoria* is incorporated in the credit agreement, the credit provider would be entitled, depending on the wording of the clause, to cancel the contract even if the instalment was late by a single day.²⁵⁵² In order to protect credit consumers from the prejudicial consequences of *lex commissoriae*, credit legislation usually lays down certain criteria before the contract may be cancelled. The Hire-Purchase Act had a provision²⁵⁵³ that regulated the matter of cancellation. Section 19 of the Alienation of Land Act provides the same protection to purchasers who are in breach of a sale of immovable property agreement²⁵⁵⁴ and the Credit Agreements Act was no

²⁵⁴⁸ *Schnehage v Bezuidenhout* 1977 1 SA 362 (O), *Regering van die RSA v SGC Elektriese Kontrakteurs and Ingenieurs (Edms) Bpk* 1977 4 SA 652 (T), *Fouriesburg Hotel (Edms) Bpk v Van Rensburg* 1979 2 SA 1065 (O) and Joubert 1987 237.

²⁵⁴⁹ *Fouriesburg Hotel (Edms) Bpk v Van Rensburg* 1979 2 SA 1065 (O).

²⁵⁵⁰ *Lex commissoria* are not confined to a particular type of breach but give the creditor the power to cancel for any specified breach, this may include instances of very minor breaches of contract (Christie 2006 513, Joubert 1987 237). Cf *Oatarian Properties (Pty) Ltd v Maroun* 1973 3 SA 779 (A) 785, where the court quoted Jansen J in *North Vaal Mineral Co. Ltd v Lovasz* 1961 3 SA 604 (T) 606: 'a *lex commissoria* [...] confers a right (viz. to cancel) upon fulfilment of a condition. The investigation whether the right to cancel came into existence is purely an investigation whether the condition, as emerging from the language of the contract (a question of interpretation), has in fact been fulfilled'[,] stated: '[o]nce there is such a breach, the materiality of the breach is irrelevant and the Court will not enquire into the conscionableness or unconscionableness thereof' (7).

²⁵⁵¹ Such as death or insolvency (Eiselen 'Teruggawe en Besallegging by Kredietooreenkomste' 1990 *De Jure* 98 101-2 and Grové and Jacobs 1993 36).

²⁵⁵² Otto 1991 paragraph 28.

²⁵⁵³ Section 12 (b).

²⁵⁵⁴ As did its predecessor the Sale of Land on Instalments Act.

exception.²⁵⁵⁵ Now, section 123 of the National Credit Act regulates the termination of credit agreements before the agreement reaches a natural end, that is, where the debtor is in default.²⁵⁵⁶ Section 123 entitles the credit provider to terminate the credit agreement upon default by the consumer while placing certain procedural responsibilities on the credit provider and it is submitted that a credit provider need not incorporate a *lex commissoria* in order to exercise his right of cancellation. Therefore, it is submitted, that the right of the credit provider to cancel a credit agreement is obtained *ex lege* and not *ex contractu*. It is further submitted that section 123 would preclude a credit provider from enforcing a *lex commissoria* when faced with default by the consumer with reference to payment of any instalment or deferred amount, if such a termination clause did not conform to the procedure stipulated in section 123 as read with Part C of Chapter 6 of the Act. Despite this statutory right, it is submitted that credit providers may still wish to incorporate *lex commissoriae* in their agreements in order to enhance their rights of cancellation and extend same beyond the consumer's default to entitle them to cancel the contract in the event of other occurrences, such as death, acts of insolvency or where a consumer fails to abide by a term of the agreement, such as not insuring a house which is providing security under a mortgage bond, for example.

6.4.1.4. Notice: Unilateral Acquisition of Cancellation

A creditor may acquire a right of cancellation by sending a notice to the debtor of his intention to cancel, if the debtor's breach is of a serious or vital nature.²⁵⁵⁷ By giving such notice the creditor acquires the right to cancel in the same way he would, had a cancellation clause been incorporated in the contract.²⁵⁵⁸ In such circumstances, this right is acquired unilaterally and not by agreement between

²⁵⁵⁵ Section 11, although this section did not refer to cancellation *per se* – restitution was assumed the normal result flowing from cancellation. Cf Otto 1999 *TSAR* 163 and Otto 1991 paragraph 29 for a full discussion on the matter.

²⁵⁵⁶ Section 123 is discussed in detail in paragraph 6.4.2.1 *infra*.

²⁵⁵⁷ Van der Merwe *et al* 2012 343.

²⁵⁵⁸ *Edengeorge (Pty) Ltd v Chamomu Property Investments (Pty) Ltd* 1981 3 SA 460 (T), *Vromolimnos (Pty) Ltd v Weichbold* 1991 2 SA 157 (C) 163, *Taggart v Greene* 1991 4 SA 121 (W) 124 and *Christie and Bradfield* 2011 561 2002 626.

the parties. Furthermore, it has been held that a notice of cancellation can only be given in respect of a breach relating to a material breach of contract.²⁵⁵⁹

When a creditor gives notice of intention to cancel he must give the debtor a reasonable time within which to perform, if the debtor fails to perform by the stipulated date the creditor must inform the debtor that he will avail himself of the right to cancel the contract. If there is no stipulated time for performance *ab initio* and the creditor must make demand *ex persona*, he may make such demand and at the same time combine the demand with the notice of intention of cancellation. A notice stating that the debtor should perform within a certain time or be faced with cancellation of the contract may not amount to notice of cancellation but a warning of an impending cancellation.²⁵⁶⁰ To cancel the contract a further juristic act would then be required, that is delivery of a notice of intention to cancel.²⁵⁶¹ However, summons has been held to be an acceptably implied form of notice.²⁵⁶² A threat to cancel does not amount to cancellation. The requirements for cancellation are succinctly set out by Nienaber JA in *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd*:²⁵⁶³

The innocent party to a breach of contract justifying cancellation exercises his right to cancel it (a) by words or conduct manifesting a clear election to do so (b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement.

²⁵⁵⁹ *Nel v Cloete* 1972 2 SA 150 (A) 173 and *Sweet v Regeguhara NO* 1978 1 SA 131 (D).

²⁵⁶⁰ LAWSA paragraph 222 and *Kragga Kamma Estates CC v Flanagan* 1995 2 SA 367 (A) 375C.

²⁵⁶¹ See Van der Merwe *et al* where it is suggested that it would 'make for greater clarity if one were to rather speak of a notice of intention to cancel. In the notice of intention to cancel itself the creditor may include a conditional notice of cancellation, by informing the debtor that cancellation of the contract will take effect if and when the debtor fails to perform' (2012). Similar reasoning, regarding the content of notices but with reference to a section 129 (1)(a) notice in terms of the National Credit Act, has been expounded by the courts in *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi* 2009 2 SA 348 (B) 351 and *Dwenga v First Rand Bank Ltd and Others* 2011 ZAECELLC 13 paragraph 28. A comprehensive discussion with regards the content of a section 129 (1)(a) notice can be found at paragraph 5.6.1 *supra*.

²⁵⁶² *Shongwe J in Nedcor Bank Ltd Trading inter alia as Nedbank v Mooipan Voer and Graanverspreiders CC* 2002 3 All SA 477 (T) 481: 'An aggrieved party, however, has a right to approach the court, and if he does so without previously giving notice of his election to cancel the contract, service of his summons is in itself an announcement of his election to cancel. His act, in taking proceedings, is an election, an announcement of an election is unmistakable'. Cf also *Noble v Laubscher* 1905 TS 125, *Ernett v Darter and Sons* 1920 EDL 74, *Jowell v Behr* 1940 WLD 144 146, *Du Plessis v Government of the Republic of Namibia* 1994 NR 227 229 and *Diemont and Aronstam* 1982 188.

²⁵⁶³ 2001 2 SA 284 (SCA).

It is submitted that to accurately reflect the *status quo*, to the above statement should be added the words 'or statute', so that the sentence reads 'except where the contract itself *or statute* otherwise provide[...]'. Often legislation sets out certain procedures which must be taken by the aggrieved party before legal action may be taken. The National Credit Act is one such example; the formalities of the notices required prior enforcement have been discussed above.²⁵⁶⁴

If the cancellation is not communicated it takes effect from service of an application or summons,²⁵⁶⁵ unless the contract specifically prescribes a procedure for cancellation, for example on notice.²⁵⁶⁶

A notice of cancellation may be oral or in writing, provided it is clear and unequivocal,²⁵⁶⁷ and it takes effect from the time it is communicated to the other party.²⁵⁶⁸ The comments of Herbstain J²⁵⁶⁹ are pertinent in this regard, as they

²⁵⁶⁴ At paragraph 5.6.1 *supra*.

²⁵⁶⁵ *Bhagwantha v Tarr and Co* 1964 2 SA 586 (N), *Middleburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk* 1987 2 SA 244 (T) 249 and *Du Plessis v Government of the Republic of Namibia* 1995 1 SA 603 (Nm) 605. However, where the aggrieved party has given extra judicial notice, if he approaches the court by way of application he is effectively asking the court to confirm that the contract is cancelled and further to confirm the date upon which cancellation became effective which is the date upon which the cancellation was communicated extra-judicially (Kerr 2002 728).

²⁵⁶⁶ *Shosbree v Simon* 1999 2 SA 488 (SE) 492.

²⁵⁶⁷ *Truter v Smith* 1971 1 SA 453 (E): 'The Court requires the act of cancellation of an otherwise valid agreement to be clear and unambiguous'; cf also *Watts v Goodman* 1929 WLD 199, *Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd* 1985 4 SA 809 (A) 830, *Kragga Kamma Estates CC v Flanagan* 1995 2 SA 367 (A) 375 and Diemont and Aronstam 1982 188.

²⁵⁶⁸ *Swart v Vosloo* 1965 1 SA 100 (A) 105, *Phone-a-copy Worldwide (Pty) Ltd v Orkin* 1995 3 SA 729 (A) 751 and *Longhorn Group (Pty) Ltd v Fedics Group (Pty) Ltd* 1995 3 SA 836 (W) 841. The importance of communicating the cancellation of a contract was evident from the dicta of Flemming DJP in *BMW Financial Services (SA) (Pty) Ltd v Rathebe supra*: 'Whether the contract in this case is a sale or a lease, the known fact is that respondent at the time of the application had acquired a right to possess the vehicle and to use it and the claim that the right to terminate (not yet actually communicated to the lessee) had not yet been established by due process. A balance had to be struck between the rights of each party. That would be different only when it became established (by a magisterial finding or by the fact becoming common cause) that the contract is at an end' (575).

²⁵⁶⁹ *Jaffer v Falante* 1959 4 SA 360 (C) 362, this passage was cited with approval in *Swart v Vosloo* 1965 1 SA 100 (AD) 105, *Nedcor Bank Ltd Trading inter alia as Nedbank v Mooipan Voer and Graanverspreiders CC* 2002 3 All SA 477 (T) 481 and *TG Bradfield Coastal Properties (Pty) Ltd and another v Toogood* 1977 2 SA 724. However, the contract may make provision for a form of constructive notice of cancellation. Thus the parties may agree that a notice sent in the agreed manner will be deemed to have been received by the other party (Joubert 1987 244 and Grové and Jacobs 1993 39).

outline the dubious position that the defaulting party would find himself in, if there were doubt with regard the aggrieved party's election to cancel:

Communication to the defaulting party of the aggrieved party's election would appear desirable so as to crystallize the rights and position of the parties to the contract. For it to suffice for the aggrieved party merely to decide to cancel the contract without notifying his decision would leave the defaulting party in an invidious position.

In contracts that contain a *lex commissoria* entitling the aggrieved party to cancel for failure to perform within a specified period the common law does not require the aggrieved party to give such notice before cancelling for repudiation.²⁵⁷⁰ The situation differs where there is legislative intervention that is where an act of Parliament requires a creditor to send a notice, as is required of a credit provider in terms of the National Credit Act.²⁵⁷¹

It has been suggested that in effect a creditor's entitlement to cancel the contract is a tacit²⁵⁷² or inferred term of the contract.²⁵⁷³ A creditor may, by implication in a contract, cancel the contract if there is a material breach of the contract.²⁵⁷⁴ The test is subjective from the point of view of the creditor, though the court will look to see if the reasonable man in the shoes of the creditor would have acted

²⁵⁷⁰ Cancellation, if not previously communicated takes effect from the service of the summons or notice of motion (*Middleburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk* 1987 2 SA 244 (T), *Du Plessis v Government of the Republic of Namibia* 1995 1 SA 603 (Nm), *Win Twice Properties (Pty) Ltd v Bionos* 2004 4 SA 436 and *Christie and Bradfield* 2011 562).

²⁵⁷¹ The matter is discussed at paragraph 5.6.1 *supra*.

²⁵⁷² A tacit term or a term implied from the facts was described in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* as follows: '[A]n unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties' (1974 3 SA 606 A 531-2). Cf also *Marais v Van Niekerk* 1991 3 SA 724 (E) 728-9.

²⁵⁷³ *Van Zijl Steyn 'Mora Debitoris' THRHR* 1929 1 5, *Havenga et al* 1995 120. Cf *Van der Merwe et al* 2004 319 fn 134, whom suggest that such a tacit term will probably take the form of a so-called imputed tacit term. The court differentiated between 'actual' and 'imputed' tacit terms in *Wilkins v Vogel*: 'A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about the matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such matter if only they had thought about it – which they did not because they overlooked a present fact or failed to anticipate a future one.' Cf also *Botha v Swanepoel* 2002 4 SA 577 (T).

²⁵⁷⁴ *Solomon and Co v Stefani* 1879 B 183, *Bouwer v Ferguson* 1884 4 EDC 90, *Wiese v Mayhew* 1980 4 SA 380 (O), *Erasmus v Pienaar* 1984 4 SA 9 (T), *Sibanyoni v University of Fort Hare* 1985 1 SA 19 (Ck), *De Vries v Wholesale Cars* 1986 2 SA 22 (O) and *Joubert* 1987 238.

accordingly²⁵⁷⁵ and will 'not take into account the personal foibles of the creditor'.²⁵⁷⁶ It is submitted that the National Credit Act automatically imputes a right of cancellation and this statutory right of cancellation is procedurally regulated by section 123 of the Act.²⁵⁷⁷

6.4.1.5. Implied Terms

The courts have recognised an implied term of cancellation in a contract when there is a particular breach of contract.²⁵⁷⁸ Such a term may be implied in two instances, where time for performance is of the essence and the debtor fails to perform on or before such time and where there is a material breach of the contract.²⁵⁷⁹ In other words where the breach 'goes to the root of the contract'.²⁵⁸⁰

While delay in itself does not allow the aggrieved party to imply a right to cancel, similarly to English courts, South African courts have accepted that in certain circumstances where the delay is material a right to rescind the contract because of the delay can be implied.²⁵⁸¹ Thus where time is of the essence the creditor may rescind the contract. However, merely because time for performance has been stipulated does not make time of the essence of the contract. Something

²⁵⁷⁵ *Trinder v Taylor* 1921 TPD 517, *Gounder v Saunders* 1935 NPD 219 and *De Vries v Wholesale Cars supra* at fn 21.

²⁵⁷⁶ Joubert 1987 238.

²⁵⁷⁷ At paragraph 6.4.2.1 *infra*.

²⁵⁷⁸ *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 2 SA 565 (A) and Joubert 1987 237.

²⁵⁷⁹ *Ibid*.

²⁵⁸⁰ *MacDonald, tutor dative of Paterson and Hume* 1875 B 8. The following is explanatory: 'The breach of contract will go to the root of the contract when the breach is a material breach of a material term' (Joubert 1987 238).

²⁵⁸¹ *Mitchell v Howard Farrar and Co* 1886 5 EDC 131, *Adler v De Waal* 1886 8 NLR 87 (Privy Council), *Bernard v Sanderson* 1916 TPD 673 and Joubert 1987 237.

more is required and this is gauged on a case by case basis.²⁵⁸² The same principles apply for *mora creditoris*.²⁵⁸³

6.4.2. Statutory Rule

It is not uncommon for statutes to confer the right to cancel an agreement, upon a party. Whether this right hinges on the precondition of breach or in the absence of breach, the method by which such rights may be exercised are set out and regulated in the empowering legislation.

An example of a statutory rule empowering a credit provider to terminate the contract in the absence of breach was section 13 of the Credit Agreements Act. Section 13 was the so-called cooling-off right which granted the credit consumer the right to terminate the contract when the initiative for the conclusion of the credit agreement emanated from the credit provider and where such agreement was signed by the credit consumer other than at the business premises of the credit provider. Such right had to be exercised within five days from the day upon which the agreement was entered into. Section 29A of the Alienation of Land Act provides another example of a cooling off right, in terms whereof the purchaser may revoke an offer to purchase or may terminate the deed of alienation by written notice within five days. A similar cooling-off right exists in the National Credit Act.²⁵⁸⁴

The Credit Agreements Act did not prescribe the manner in which a credit agreement had to be cancelled. Cancellation under the old system could thus be effected orally or in writing, *inter iudicialis* or *extra iudicialis*.²⁵⁸⁵ The National

²⁵⁸² *Stewart v Ryll* 1887 5 SC 146, *Bergl and Co v Trott Bros* 1903 24 NLR 503, *Mayne v Wattle Extract Co Ltd* 1920 41 NLR 89, *Goldstein and Wolff v Maison Blanc (Pty) Ltd* 1948 4 SA 446 (C), *Durr v Buxton White Lime Co* 1909 TS 876, *Cowley v Estate Lumeau* 1925 AD 392, *Olivier v Paschke* 1928 SWA 116, *Bland and Son v Peinke and De Villiers* 1945 EDL 26, *Bernard v Sanderson* 1916 TPD 673 and *Joubert* 1987 237-8.

²⁵⁸³ *Leviseur v A Rosin and Co* 1921 OPD 52, *Leviseur v Frankfort Boere Ko-operatiewe Vereeniging* 1921 OPD 80, *Gibson Bros Abrahamson and Son* 1921 CPD 622 and *Joubert* 1987 328.

²⁵⁸⁴ Section 21 of the Act and in the Consumer Protection Act – section 16. Cf for a discussion on section 121 of the Act paragraph 6.2.1.2 *supra*.

²⁵⁸⁵ *Joubert* 1987 242 and *Grové and Otto* 2002 46.

Credit Act differs in this respect as it provides the credit provider with a right of cancellation where a consumer has defaulted under a credit agreement.²⁵⁸⁶ However, not all credit agreements fall under the auspices of the Act,²⁵⁸⁷ the common law is therefore important in this aspect as it will have to be reverted to in all instances where credit agreements fall outside the scope of the Act. A creditor wishing to cancel a credit agreement falling outside the auspices of the Act would only be entitled to do so under occurrence of one of the instances discussed above.

Section 12 of the Credit Agreements Act made it possible for a credit consumer to unilaterally demand that a cancelled contract be reinstated and that the goods that had been recovered by the credit provider be returned to him.²⁵⁸⁸ While the Credit Agreements Act provided for re-instatement after breach by the consumer and cancellation by the provider, section 127 of the National Credit Act provides for surrender of goods and a withdrawal of such surrender under certain conditions. While section 127 is discussed in greater detail below,²⁵⁸⁹ it can here be noted that the philosophy behind the two sections is similar, albeit the source and effect very different.

6.4.2.1. Cancellation by the Credit Provider: Section 123

One of the obvious duties of the credit consumer is to service his debt by payment of regular instalments.²⁵⁹⁰ However, non-payment or delay is typically the most common form of breach of contract committed by consumers.²⁵⁹¹ Because cancellation is an extraordinary remedy, allowed only in certain circumstances, credit providers often do not rely only on their *ex lege* remedies

²⁵⁸⁶ Section 123. This section is discussed in greater details at paragraph 6.4.2.1 *infra*.

²⁵⁸⁷ Cf Paragraph 4.4.3 *supra* for a discussion on the application and limitations of the Act.

²⁵⁸⁸ Cf paragraph 4.2.6.1.3 *supra* for a discussion.

²⁵⁸⁹ At paragraph 5.3.4.1.

²⁵⁹⁰ Diemont and Aronstam 1982 134.

²⁵⁹¹ Boraine and Renke *De Jure* 2007 222.

but frequently insert remedy clauses in credit contracts.²⁵⁹² The following is pertinent.²⁵⁹³

It is not every breach of a contract that will, in the absence of a cancellation clause, justify cancellation at common law. [...] Thus if there is a failure in the payment of an instalment the creditor may sue for a declaration that the contract is rescinded only as an alternative to or failing payment, unless the creditor has expressly or by his conduct repudiated the contract (Wessels *Law of Contract I* para 1625). Accordingly, the creditor in the instalment trade takes the precaution of making every duty of the debtor 'of the essence of the contract'.

Normally these clauses make it easier for the credit provider to cancel the contract. In order to protect credit consumers from too harsh contractual terms, credit legislation contains various provisions which temper the rights of credit providers once there has been a breach of the credit agreement. Usually the procedures oblige the creditor to provide written notice to the debtor and then prescribe a certain time period that must elapse before the creditor may institute proceedings.²⁵⁹⁴

As we have seen in preceding sections, the credit provider may terminate the credit agreement by virtue of its common law rights where the breach is sufficiently material to warrant cancellation or if a *lex commissoria* is incorporated in the agreement between the parties. Section 123 of the Act concretises the credit provider's right to cancel the contract upon default by the consumer. In *Absa Bank Ltd v Havenga*²⁵⁹⁵ Horwitz AJ stated that the right to cancel an agreement arises out of an application of the rules of the law of contract and that section 123²⁵⁹⁶ was procedural in nature, merely prescribing the procedure that the credit provider must follow in those instances in which the latter enjoys a right of cancellation, no matter how that right arises. With respect this view is not concurred with. Section 123 (1) of the National Credit Act supplements the common law relating to cancellation of credit agreements and affords credit

²⁵⁹² Grové and Otto 2002 41. The *ex contractu* remedy clauses are not limited to credit agreements, but are used by drafters across all transactions.

²⁵⁹³ Diemont and Aronstam 1982 185-6.

²⁵⁹⁴ It must be noted that the concept, of providing a consumer with set time periods within which to rectify the breach, has been common to all the credit legislation in South Africa for the last seventy years. The National Credit Act is no exception. These time periods have varied according to the regulating legislation.

²⁵⁹⁵ 2010 ZAGPPHC 147 at paragraph 10.

²⁵⁹⁶ He also referred to section 129.

providers the right to cancel a contract once a consumer defaults, provided the provider has followed the procedures required in terms of the Act.

Section 123 provides that a credit provider may terminate a credit agreement before the time provided in that agreement only if the agreement is terminated in accordance with section 123.²⁵⁹⁷ This section directs that a credit provider needs to take certain necessary steps, as set out in the Act,²⁵⁹⁸ in order to enforce and terminate a credit agreement, more particularly those laid out in sections 129 to 133.²⁵⁹⁹ Section 123 differentiates between the termination of credit agreements generally and the suspension or closure of credit facilities.

²⁵⁹⁷ Section 123 (1).

²⁵⁹⁸ Part C Chapter 6.

²⁵⁹⁹ Section 123 (2). The word 'and' used between the words 'enforce' and 'terminate' is somewhat confusing. It would appear that a credit provider would either want to enforce the contract – that is force the consumer to abide by his obligations or, if the consumer is in default, then the provider may choose to terminate the contract. The word 'and', however, suggests that the terms are not used as mutually exclusive concepts. The word 'enforce' has not been defined in the Act, and Van Heerden and Otto argue, that the word 'enforce' would suggest enforcement of payment or of another obligation – but that in the context of the Act, the word enforce in fact means 'enforcement' in the sense of the credit provider using any of his remedies. It is further suggested and submitted that this 'enforcement' may even include the implementation of a *lex commissoria*. Thus, the word 'enforce' in this section would mean the enforcement of the credit provider's remedies by means of legal proceedings (2007 TSAR 655, Van Heerden in Scholtz 2014 paragraph 12.1 and Otto and Otto 2013 112 - 113). An alternative option would be that the section should be read 'enforcement or termination' – however, this would not be in line with the title of the section which is 'Termination of agreement by credit provider' – rather this heading aligns itself with the suggested meaning of Van Heerden and Otto *supra*, that is that the enforcement refers to the credit providers right to enforce his remedies. A further suggestion is that the word simply means that where a credit consumer is in default under a credit agreement, and in order to terminate a credit agreement a provider need first follow the steps as set out in Part C of Chapter 6 which would include the written notice. This written notice gives the credit consumer a 'gap time' or 'grace period' within which he may correct his default and make payment to the provider - thereby preventing, it is submitted, the provider from terminating the agreement. This would be how the credit provider would be 'enforcing' the credit agreement before 'terminating' it. Interestingly enough, England also had a forsenic examination of the word 'enforcement'. The English interpretation of the word is discussed at paragraph 6.8 *infra*. The use of the word 'may' used in this section, is bizarre. Having the effect of giving the impression that a credit provider wishing to terminate a credit agreement because the consumer is in default 'may take the steps set out in Part C of Chapter 6' – the alternative would be that the provider *not* take the steps set out in Part C. It is submitted that the use of the word 'may' here is incorrect. Surely the legislature intended the Act to regulate the procedure for cancelling a credit agreement to ensure that a consumer's rights are adequately protected and not provide the credit provider with an option of whether to follow these procedures when enforcing and terminating the agreement. Consequently, it is further submitted that the credit provider is compelled to give notice in writing to a consumer that it intends to cancel the agreement due to the consumer's default and of the options available to the consumer.

A credit provider is entitled to suspend a credit facility²⁶⁰⁰ at any time when the consumer is in default under the credit agreement.²⁶⁰¹ The credit provider, is further entitled to close a credit facility it appears, without good cause,²⁶⁰² simply by giving to the consumer written notice at least ten business days before the credit facility will be closed.²⁶⁰³ It is submitted that this is not the intention of the legislature and the grammatical inaccuracy of the section should be interpreted to imply that a credit provider may close a credit facility in accordance with section 123 (3)(b) if the consumer is in default under the agreement.²⁶⁰⁴ The consumer will remain liable for any amounts under the credit agreements, whether suspended or terminated and accordingly the credit agreement will remain in effect until such payments have been finalised.²⁶⁰⁵

Whilst the Act appears to (unintentionally) give *carte blanche* to the credit provider in terms of reasons for closing a credit facility, it does lay out instances where a credit provider may not close or terminate a credit facility.²⁶⁰⁶ A provider may not close or terminate²⁶⁰⁷ a credit facility where the provider has declined a consumer's request to increase the credit facility;²⁶⁰⁸ where the consumer

²⁶⁰⁰ See paragraph 4.4.4 *supra* for a discussion on credit facilities.

²⁶⁰¹ Section 123 (3)(a). For example, if he exceeds his credit limit or neglects to make payment, the provider will be entitled to cancel (Otto in Scholtz 2014 paragraph 9.5.5.2). The section does not specify whether, in the event that if, upon suspension the consumer remedies his default, the provider is obliged to restore the facility. It is submitted that if an account is merely suspended and the consumer remedies his default upon notice by the provider, the credit provider would be obliged to restore the facility. This, however, will not remove the credit providers rights in terms of section 123 (3)(b), that is to terminate the facility.

²⁶⁰² Unlike its counterpart section 123 (3)(a) which states that a credit provider may suspend a credit facility when the consumer is in default, section 123 (3)(b) does not carry the same proviso and thus appears to permit the credit provider to close such facility even though the consumer is not in default. The only other explanation would be a typing error, which does not appear likely. However, the section does lay out instances where the credit provider may not close or terminate a credit facility, these are discussed in the subsequent paragraph.

²⁶⁰³ Section 123 (3)(b) of the Act.

²⁶⁰⁴ In *Absa Bank Ltd v De Villiers Fourie J* pointed out that when interpreting the relevant provisions of the National Credit Act, 'one should remind oneself that a purposive construction is called for' and further on he states 'it is necessary that the provisions of the [Act] should be read in the light of the subject matter with which they are concerned' (27).

²⁶⁰⁵ Section 123 (4) of the Act.

²⁶⁰⁶ Section 123 (5) of the Act.

²⁶⁰⁷ The phrase 'close or terminate' has been quoted directly from the Act, the following observations are thus relevant: 'It is not clear why the legislature used both of these terms in section 123 (5) whereas only 'close' is used in section 123 (3)(b). Section 123 (6) in turn uses 'termination' instead of 'closure'. It is submitted that nothing turns on this inconsistency and that it is merely an example of untidy drafting' (Otto in Scholtz 2014 paragraph 9.5.5.2 fn 155).

²⁶⁰⁸ Section 123 (5)(a) of the Act.

declines the provider's offer to increase the facility;²⁶⁰⁹ the consumer requests a reduction in the credit limit, unless that reduction would reduce the credit limit to a level which the provider does not usually offer²⁶¹⁰ and finally a credit provider may not terminate or suspend a credit facility where the card, or any personal identification device used by the consumer to access the facility has expired.²⁶¹¹ The credit provider will still be bound to honour any residual obligations after the credit facility has been terminated.²⁶¹² These residual obligations will be determined by the terms and conditions of the agreement between the parties and any other sections of the Act which may apply.²⁶¹³

It is submitted that a cancellation effected by a credit provider in terms of section 123 need not be confirmed by a court.²⁶¹⁴ The right to cancel a credit agreement must be exercised by the credit provider within a reasonable time,²⁶¹⁵ although the credit provider will be entitled to explain the delay in cancellation.²⁶¹⁶ However, if a credit provider does not exercise his right to cancel and a consumer resumes payment of the instalments or deferred amounts, the consumer is entitled to assume that the credit provider has waived his rights in terms of section 123.²⁶¹⁷ Unless and to the extent that a clause in the credit agreement specifically stipulates that no waiver shall be implied from the credit provider's conduct and that no relaxation or indulgence by the credit provider or acceptance of any payments after the due date shall be construed as a waiver of the credit provider's rights.²⁶¹⁸

²⁶⁰⁹ Section 123 (5)(b) of the Act.

²⁶¹⁰ Section 123 (5)(c) of the Act.

²⁶¹¹ Section 123 (5)(d) of the Act.

²⁶¹² Section 126 (6) of the Act.

²⁶¹³ Otto in Scholtz 2014 paragraph 9.5.5.2.

²⁶¹⁴ *Lebedina v Schechter and Haskell* 191 WLD 247, *Horsler and another v Zorro* 1975 1 All ER 584 ChD, *Woods v Walters* 1921 AD 303, *Sonia (Pty) Ltd v Wheeler* 1958 1 SA 555 (A), Christie and Bradfield 2011 and Kerr 2002 727.

²⁶¹⁵ *North Vaal Mineral Co. Ltd v Lovasz* 1961 3 SA 604 (T) and Christie and Bradfield 2011 564.

²⁶¹⁶ *Nedcor Bank Ltd Trading inter alia as Nedbank v Mooipan Voer and Graanverspreiders CC and Mahabeer v Sharma NO and Another* 1985 3 SA 729 (A).

²⁶¹⁷ Diemont and Aronstam 1982 189 and cf discussion *supra* at paragraph 6.4.2.1.

²⁶¹⁸ *Ibid.* It must be noted that such clauses are very commonly found in credit agreements by commercial credit providers like banks.

6.4.2.2. Section 123 and the use of the Word 'Enforce' by the Legislature

The word 'enforce' in this section and in the Act, it is submitted, has been somewhat overanalysed. Otto²⁶¹⁹ expresses the view that it is not clear what is meant by the word 'enforce' as used in section 129 (1). The following comments, by this author, have reference:

The ordinary meaning in legal parlance would be enforcement of payment or of another obligation; but in the context of the Act, it may well include enforcement in the sense of the credit provider using any of his remedies. In other words, enforcement of the agreement means the exercise of his remedies by a credit provider. This would include the implementation of a *lex commissoria*. To an academic who believes in sound legal theory, this unscientific construction of section 129 is not palatable or attractive at all, but it seems inevitable. The only other alternative is for a court to accept the legislature's ill-chosen terminology and to leave the consumer without protection against cancellation by the credit provider. This would mean that a credit provider need only send a default notice if he chooses to claim payment of the amount due, but not where he cancels the contract, claims return of any goods involved and claims damages instead of performance.

The word 'enforce' in terms of the Oxford Dictionary²⁶²⁰ is to 'compel observance of (a law etc.)'. The ordinary meaning of the word 'enforce' is very useful, the word merely means that where a law or rule exists (irrespective of what kind of law or rule) then the enforcement thereof means that the person will be compelled to observe that law or rule. In some instances enforcement of a section of the Act may mean that the credit provider may wish to terminate the agreement, in other instances it may mean that the credit provider may wish to compel specific performance and yet in other instances it may mean that the credit provider wishes to enforce the contractual terms, or for sake of complicity to the dictionary meaning, the terms which have become the 'rules' of that contract. Even rules which are derived from the common law. The word 'enforce', it is submitted, is not used and may never be by its very nature, used as a scientific term. It is a verb, and means merely to compel the observance of a law, that law or section of law may vary and accordingly the effect that such enforcement entails may, according to its context, vary. Interestingly enough, if one looks at synonyms for the word 'enforce' in England English as well as the

²⁶¹⁹ 2013 113, cf also Van Heerden in Scholtz 2014 paragraph 12.1.

²⁶²⁰ *The Pocket Oxford Dictionary of Current English* 8th ed D Thompson Clarendon Press Oxford 1992.

United State English,²⁶²¹ the first synonyms provided in both is ‘to put into effect, implement or put into force’. Accordingly, it is submitted, it is these meanings that is, the credit provider’s right to put into effect the terms of the credit agreement or his rights in terms of the Act or the common law, which the legislature intended when using the word ‘enforce’. It is further submitted that the view that the word ‘enforcement’ in terms of the Act ‘may well include enforcement in the sense of the credit provider using any of his remedies’ is unproblematically correct. It is further submitted that the word ‘enforcement’ does not have a static meaning. It is not understood how Otto²⁶²² arrives at the conclusion that the ‘ill chosen’ word ‘enforce’ if interpreted in a certain way would leave the consumer without protection against cancellation by the credit provider, as, it is submitted, section 123 of the Act prevents this situation.²⁶²³

In *Absa Bank v De Villiers*,²⁶²⁴ Fourie J, makes reference to the views posited by Otto and Van Heerden,²⁶²⁵ and states that the use of the words ‘enforce’ and ‘terminate’ in section 123 is unfortunate. He states that the words are not defined in the Act and that their simultaneous use may be confusing and further that the ordinary meaning of ‘enforce’, in legal parlance, particularly in a contractual setting, would be enforcement of an obligation. It is submitted that the meaning of the word ‘enforce’ in legal language in a contract would also mean ‘to enforce a right’. The following statement from Kerr²⁶²⁶ is pertinent to the meaning of the word ‘enforce’ and shows that its intended meaning in a legal context extends to much more than merely forcing the performance of an obligation:

In the case of cancellation the major change is that no further performance by either party is due; obligations to perform in future are terminated, brought to an end, no longer exist; but rights already accrued, due and *enforceable*, can be pursued and whatever adjustments the law allows in respect of the default by the one party can be *enforced*.²⁶²⁷

²⁶²¹ The synonym function was utilised in Microsoft Word® 2007.

²⁶²² 2010 103.

²⁶²³ Boraine and Renke express the same view (*De Jure* 2007 paragraph 4.1).

²⁶²⁴ 2009 3 SA 421 (SEC) paragraph 11.

²⁶²⁵ 2007 TSAR 655.

²⁶²⁶ Kerr 2002 703.

²⁶²⁷ Own emphasis.

Despite the academic debate regarding the natural meaning of the word ‘enforce’ – Otto,²⁶²⁸ Van Heerden²⁶²⁹ and the court in the *De Villers*²⁶³⁰ matter conclude that it appears that the legislature used the word ‘enforce’ in a wide sense, that is the exercising by a credit provider of any of the remedies available to it.²⁶³¹ What is important to note is that in order to and before having the right to cancel, repossess or take court action against a consumer a credit provider must firstly make use of the section 129 (1)(a) notice²⁶³² and allow the prescribed time for the consumer to bring any arrear payments under the agreement up to date or to allow the parties to resolve any dispute they may have under the credit agreement.

6.4.2.3. Cancellation in terms of the Credit Agreements Act

Unlike the National Credit Act, the Credit Agreements Act did not contain a section that entitled a credit grantor to cancel the contract upon breach by the credit receiver. Thus the issue of cancellation was greatly reliant on the common law and the content of the agreement between the parties, for example the inclusion of a *lex commissoria* in order to entitle the credit grantor to cancel the contract irrespective of the seriousness or immateriality of the breach.²⁶³³ In terms of section 11 of the Credit Agreements Act, upon breach by the credit receiver, the credit provider was obliged to provide written notice to the credit receiver and allow him a prescribed period within which to rectify his default.

²⁶²⁸ 2010 103.

²⁶²⁹ In Otto and Van Heerden 2007 TSAR 655.

²⁶³⁰ *Supra* paragraph 13. The court goes on to state that there are other *indicia* of this intention by the legislature, namely the use of the word ‘enforce’ and ‘terminate’ in section 123 (2), in describing steps which the provider may take in terms of Part C of Chapter 6 of the Act. The court states further, that section 129 (3), which forms part of Part C of Chapter 6, provides that a consumer may at any time before the provider has cancelled the agreement, rectify his breach and resume possession of the goods which have been attached.

²⁶³¹ It is pointed out by the Court in the *De Villers* matter that if the word enforcement were to be given a restricted meaning, it would mean that where a consumer is in default and the credit provider wishes to invoke the more serious remedy of cancellation, it would not be necessary for the credit provider to comply with the notice provision and other requirements in sections 129 (1)(a) and 130, and this would go against the grain of the Act, one of the declared purposes of which is to protect consumers (*supra* at paragraph 12; the court was largely drawing from the views expressed by Otto (2010 104).

²⁶³² Cf paragraph 5.6.1 *infra* for a discussion.

²⁶³³ *Oatarion Properties (Pty) Ltd v Maroun* 1973 3 SA 779 (A) 785 and Otto *Credit Law Service* 1991 paragraph 28.

Section 12 of the Credit Agreements Act, which was applicable to both credit and leasing transactions, allowed the credit receiver to demand that a cancelled credit agreement be reinstated and that goods, recovered by the credit grantor be returned to the credit receiver.²⁶³⁴ From section 12 (2) it is evident that this was a unilateral right of the credit receiver as the credit grantor had no choice in the matter. Accordingly, where a credit receiver had not reacted to a section 11 notice, he could still rely on section 12 where the credit grantor had cancelled the contract. The receiver's right depended on the fact that the credit grantor had recovered possession of the goods, other than by way of order of court.²⁶³⁵ The receiver could not himself have cancelled the agreement and the credit receiver was compelled within thirty days from reinstatement of the goods to him, to pay all amounts claimable and unpaid as well as any reasonable costs incurred by the credit grantor in connection with the return of the goods.²⁶³⁶ Section 12 did not have the effect of validating an otherwise unlawful repossession of goods by the credit grantor, in the event that the receiver did not make use of his right to reinstate and where the agreement had not been lawfully cancelled.²⁶³⁷

As stated above, the credit grantor was obliged to return the goods to the receiver after demand; failure or refusal to accept payment tendered or to return the goods would have put the grantor in breach of his statutory duties and he

²⁶³⁴ Section 12 read as follows: '(1) If the credit grantor, otherwise than by order of court, has recovered possession of any goods to which any credit agreement relates, the credit receiver, except where he has himself terminated the credit agreement, shall be entitled, against payment within a period of thirty days after the credit grantor recovered possession of such goods of the amounts, if any, which are then claimable and unpaid in terms of the credit agreement and of the reasonable costs incurred by the credit grantor in connection with the return of those goods, to the return of those goods at the place of business of the credit grantor or, if the credit receiver so requests or the credit grantor has no place of business, at the premises on which those goods are kept, and to be reinstated in his rights and obligations in terms of the credit agreement. (2) No credit grantor shall fail to return the goods in question to the credit receiver in accordance with subsection (1). (3) No credit grantor shall require or induce any credit receiver to sign any document in terms of which the credit receiver terminates a credit agreement and agrees to return to the credit grantor the goods to which such credit agreement relates before expiry of the period of thirty days referred to in section 11' (Grové and Otto 2002 46). The same rights were provided to the buyer in a hire-purchase agreement by virtue of the Hire-Purchase Act (Otto 'Right of a Credit Receiver to Reinstatement after Return of the Goods to the Credit Grantor' 1981 SALJ 516).

²⁶³⁵ *Trust Bank van Afrika v Eales supra*.

²⁶³⁶ Grové and Otto 2002 47.

²⁶³⁷ *Maswanganyi v First National Western Bank Ltd* 2002 3 SA 365 (W).

would accordingly have been liable for damages.²⁶³⁸ Furthermore, such failure would have amounted to an offence in terms of section 23 of the Credit Agreements Act.

6.4.3. Attachment of Goods in terms of the National Credit Act

The provisions of the National Credit Act which deal with repossession of goods following an attachment order are contained in section 131 of the National Credit Act. Section 131 provides that where a court makes an attachment order with respect to the property that is the subject of a credit agreement, section 127 (2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order.²⁶³⁹ Section 131 is not limited to instalment agreements, secured loans or leases as is specifically done in section 127.²⁶⁴⁰

The issue of attachment of goods that are sold in terms of an instalment agreement, as defined by the Act, came before the Supreme Court of Appeal in *ABSA Bank v De Villiers and Another*.²⁶⁴¹ The court *a quo's* reasoning is followed below, prior to looking at the ruling of the Supreme Court of Appeal on this matter.

The facts are, briefly, as follows: the first respondent and consumer, De Villiers concluded an instalment agreement in terms of which he purchased a motor vehicle on certain conditions, from a close corporation. All the rights arising out of the instalment agreement, including ownership of the vehicle were ceded and transferred to the applicant and credit provider, Absa Bank. Subsequent to the cession, the consumer breached the credit agreement by failing to make

²⁶³⁸ *Da Silva v Coutinho* 1971 3 SA 123 (A) and *Otto* 1981 SALJ 516.

²⁶³⁹ As Van Heerden points out, section 131 does not elaborate much on the topic (in Scholtz 2014 at paragraph 12.8.4) in fact the clause is but one paragraph in length.

²⁶⁴⁰ *McKeen v First National Bank* 2012 ZANCT 2 paragraph 27. Section 127 deals with processes which a credit provider must follow when property which has been sold to a consumer is returned to the provider because the consumer is unable to meet his obligations under the credit agreement; that is, because the consumer surrenders the goods or because a court has issued a writ of attachment. Section 127 is analysed in greater detail in paragraph 5.3.4.1 *supra*.

²⁶⁴¹ 2009 ZASCA 140.

payment of the monthly instalments due to the credit provider. The provider then brought an urgent *ex parte* application in terms of section 130 (1) of the Act, for an order authorising the sheriff to attach the vehicle. The magistrate and second respondent dismissed the application²⁶⁴² and thus the application for reviewing, setting aside and correcting that decision was made to the High Court. It is important to note that the credit provider sought a final order authorising the attachment of the vehicle and not one for interim repossession pending the institution of a claim for cancellation of the agreement and damages.²⁶⁴³

The High Court stated that in terms of the general principles of the law of contract, an order authorising the attachment of goods that are the subject of an instalment agreement would be granted by the court as a claim ancillary to the cancellation of the instalment agreement.²⁶⁴⁴ The court held that the view posited by the magistrate, that absent a claim for cancellation of the instalment agreement the credit provider was not legally entitled to a final order for the attachment of the vehicle, was in accordance with the principles of the common law.²⁶⁴⁵ The question the court had to then answer, was whether Part C of Chapter 6 of the Act introduced a procedure at variance with the common law which would then entitle providers to repossess goods in the absence of the cancellation of the instalment agreement.²⁶⁴⁶

The credit provider in this matter contended that Part C of Chapter 6 of the Act allowed for the repossession of the goods that are subject of an instalment agreement, as a means of debt enforcement, without the prior contemporaneous

²⁶⁴² The magistrate was of the view that a final order for the attachment of the vehicle could not be granted in the absence of an action for cancellation of the instalment agreement by the provider. The magistrate was of the view that applicant's interpretation of the provisions of the Act would lead to an unacceptable result, in that it would place the applicant in final and permanent possession of the vehicle while maintaining the agreement, thereby absolving applicant from performance in terms of the agreement but requiring performance from the consumer while at the same time depriving him permanently of possession (*Absa Bank v De Villiers* 2008 JOL 22 874(C) at paragraph 5).

²⁶⁴³ *Absa Bank v De Villiers supra* at paragraph 17.

²⁶⁴⁴ *Absa Bank v De Villiers supra* at paragraph 19.

²⁶⁴⁵ *Ibid.* In *Absa Bank v Havenga* 2010 ZAGPPHC the court added that an obvious rider is that before one can cancel an agreement, there has to be a right vesting in the credit provider to do so (at paragraph 4).

²⁶⁴⁶ *Ibid.*

cancellation of the agreement.²⁶⁴⁷ For this contention the consumer relied specifically on the provisions of section 131 as read with section 127 of the Act.

Section 127 gives the consumer what the court referred to as ‘an extraordinary right’,²⁶⁴⁸ whereby he can rid himself of an instalment agreement by returning the goods which are the subject matter of the agreement, to the credit provider.²⁶⁴⁹ Counsel for the credit provider submitted that by virtue of the incorporation of the provisions of section 127 (2) to (9) in section 131, the Legislature intended to create a procedure for the attachment of goods where the consumer is in breach of his contractual obligations in terms of an instalment agreement, while the agreement remains in existence.²⁶⁵⁰ Counsel argued that the credit provider was precluded from cancelling the instalment agreement, as the legislature intended to keep the agreement alive, to enable the parties to deal with the repossessed goods in accordance with the provisions of section 127 (2) to (9).²⁶⁵¹ He submitted that the Act introduced a procedure at variance with the common law concept of the cancellation of an instalment agreement, upon breach thereof by the consumer.²⁶⁵² He contended that it is evident from section 127, that the relevant instalment agreement is only terminated in accordance with the provisions of section 127 (6)(b) or 127 (8)(b).²⁶⁵³ Thus, counsel for the credit provider concluded that the repossession of goods that are subject of an instalment agreement is no longer dependent on a cancellation of the instalment agreement.²⁶⁵⁴

The court did not concur with these submissions and held that the interpretation of the relevant sections of the Act, specifically sections 131 and 127 (2) to (9), supplied on behalf of the credit provider did not take proper account of the purpose for which the provisions of section 127 (2) to (9) were incorporated in

²⁶⁴⁷ *Absa Bank v De Villiers supra* at paragraph 20.

²⁶⁴⁸ *Absa Bank v De Villiers supra* at paragraph 22.

²⁶⁴⁹ Cf paragraph 5.3.4.1 *supra* for a discussion on this section.

²⁶⁵⁰ *Absa Bank v De Villiers supra* at paragraph 24.

²⁶⁵¹ *Ibid.*

²⁶⁵² *Ibid.*

²⁶⁵³ *Absa Bank v De Villiers supra* at paragraph 24.

²⁶⁵⁴ *Ibid.*

section 131.²⁶⁵⁵ It held that upon a proper construction of the Act, all that the legislature intended was to prescribe with reference to section 127 (2) to (9), the execution and realisation process of goods attached by the credit provider in terms of a court order.²⁶⁵⁶ The relevant court order would be obtained upon cancellation of the agreement by the credit provider, pursuant to the breach thereof by the consumer, which cancellation terminates the respective obligations of the parties.²⁶⁵⁷ Thereafter the execution and realisation procedure prescribed by section 127 (2) to (9), is to be followed.²⁶⁵⁸

The court held that the submission on behalf of the credit provider, that the legislature intended, by incorporating section 127 (2) to (9) in section 131, to change the common law by doing away with the requirement of the cancellation of an instalment agreement prior repossession of the goods, was incorrect. The court found that if that had been the intention of the Legislature such would have 'been conveyed in clear and certain terms and not by means of a process of inferential reasoning'.²⁶⁵⁹ This is a clear example of how the courts, when interpreting legislation, especially new and/or equivocal legislation depend on the common law milieu, which setting precludes a more stable environment within which the ever-changing legislative field can bloom.

²⁶⁵⁵ *Absa Bank v De Villiers supra* at paragraphs 28, 29, 31 and 32.

²⁶⁵⁶ *Absa Bank v De Villiers supra* at paragraph 32.

²⁶⁵⁷ *Absa Bank v De Villiers supra* at paragraph 28.

²⁶⁵⁸ *Ibid.*

²⁶⁵⁹ *Ibid.* Fourie J commented 'I do not believe, having regard to the objects of the [National Credit Act], the legislature intended to allow a credit provider to repossess the goods without showing that it is entitled to the cancellation of the instalment agreement, by virtue of a material breach, or at least a breach which the parties have considered to be material in terms of a *lex commissoria* incorporated in the instalment agreement. I also share the concern of second respondent, that applicant's interpretation will lead to an unfair result. On this interpretation the consumer is finally and permanently dispossessed of the goods, thereby absolving applicant from performance in terms of the agreement. However, in view of the extant agreement, the consumer, while having been deprived of the goods, remains liable to pay the instalments due in terms of the agreement. It should be borne in mind, that in terms of section 127 (5)(b)(i) of the [National Credit Act], the settlement value of the agreement for purposes of the realisation process is determined immediately before the date of the sale of the goods by the credit provider. Although section 127 (4)(b) provides that the goods are to be sold as soon as practicable, such a sale may, especially in difficult financial times, take some time to eventuate. This would mean that the consumer, although having being dispossessed of the goods, will remain liable for payment of the instalments which have fallen due since the date of the repossession of the goods. Once again, it seems to me that the Legislature, which, by means of this legislation, intended to promote and advance the social and economic welfare of South Africans, would not have intended the consumer to be prejudiced in this manner' (*supra* at paragraph 32 – 3).

Otto²⁶⁶⁰ expresses logical reasoning in support of the Court's view:

Section 127 was introduced into our law as an extraordinary measure to assist debtors in need. The cross-reference thereto, and incorporation thereof, by section 131 merely serves to make the realisation process of selling the goods, accounting of the proceeds and expenses and settling of the debt applicable to all attachment of goods.

It must be noted that while this case specifically considered instalment agreements, counsel for the credit provider was constrained to concede that it is only in the case of instalment agreements that the Legislature introduced this procedure and submitted that the Legislature did not intend to tamper with the common law remedy of cancellation with regard the other credit agreements as defined by the Act.²⁶⁶¹ The court used this submission to further advance the point that if the Legislature intended to single out instalment agreements for this drastic departure from the normal principles of the law of contract, it would have been done in clear and unambiguous language, however, it had not done so.²⁶⁶²

The matter then came before the Supreme Court of Appeal in *Absa Bank v De Villiers*.²⁶⁶³ This was an application for review of the decision by the magistrate on the basis of gross irregularity in the proceedings.²⁶⁶⁴ The contention, made by the applicant, was that the Magistrate's mistaken view of the law constituted a gross irregularity.²⁶⁶⁵ The Court held that, whether the Magistrate was correct in his view of the relevant provisions of the Act was, at the very least, arguable.²⁶⁶⁶ The Supreme Court found that the Magistrate was concerned that the credit provider's submissions in relation to the provisions of the Act militated against fundamental contractual principles and after having considered the relevant provisions of the Act closely he had come to the conclusion that these did not provide a basis for the applicant to reclaim possession of the goods.²⁶⁶⁷ The Court found that, even if it was to assume, in the Applicant's favour, that the Magistrate's view of the law was incorrect, it was not a case where a judicial

²⁶⁶⁰ Otto *THRHR* 2009 476.

²⁶⁶¹ *Absa Bank v De Villiers supra* at paragraph 34.

²⁶⁶² *Ibid.*

²⁶⁶³ *Supra.*

²⁶⁶⁴ *Absa Bank v De Villiers SCA supra* at paragraph 13.

²⁶⁶⁵ *Absa Bank v De Villiers SCA supra* at paragraph 15.

²⁶⁶⁶ *Absa Bank v De Villiers SCA supra* at paragraph 30.

²⁶⁶⁷ *Ibid.*

officer's view of the law could amount to a gross irregularity.²⁶⁶⁸ It found that even more fundamentally, the Magistrate had been entitled to refuse the relief sought on the basis that final relief was being sought without the knowledge of the respondent.²⁶⁶⁹ Finally, the Supreme Court held that no sustainable basis had been provided for a review on grounds of a gross irregularity in the proceedings.²⁶⁷⁰ It is submitted that this Supreme Court ruling cannot be said to be the final ruling on this matter, as the court was ruling on whether the Magistrate's view of the law amounted to, if assumed mistaken, a gross irregularity and not on the intricacies of section 131. It is doubtful, however, whether another court will find a different interpretation to section 131 of the Act, as such an interpretation will imply a drastic and unnecessary departure from the normal principles of contract law relating to attachment of goods and lead to an unfair result in respect of the consumer who would under such interpretation simultaneously be deprived of the use of the property as well as be bound by the credit agreement.

6.4.3.1. Attachment of Immovables in terms of the National Credit Act

In *Mckeen v First National Bank*²⁶⁷¹ the National Consumer Tribunal gave a ruling on whether section 131 applies when immovable property is attached by a court in order that it may be sold to satisfy a judgment debt. The court examined section 127 (2) to (9) with reference to section 131, stating that the former sections deal with the processes which a credit provider must follow when property, which has been sold to a consumer, is returned to the provider because the consumer is unable to meet his obligations under the credit agreement.²⁶⁷² This property is returned to the provider either because the consumer surrenders the goods or because a court has issued a writ of attachment.²⁶⁷³ However, the Tribunal pointed out that a different process is followed when a creditor seeks to

²⁶⁶⁸ *Ibid.*

²⁶⁶⁹ *Absa Bank v De Villiers SCA supra* at paragraph 31.

²⁶⁷⁰ *Absa Bank v De Villiers SCA supra* at paragraph 32.

²⁶⁷¹ NCT/943/2010/149(1) (P).

²⁶⁷² *Mckeen v First National Bank supra* at paragraph 30.

²⁶⁷³ *Mckeen v First National Bank supra* at paragraph 31.

enforce a judgment debt.²⁶⁷⁴ The Tribunal held that in order to enforce a judgment debt, one may issue a writ of execution (in the High Court) or a warrant of execution (in the Magistrate's Court) and in both these scenarios, the effect of the writ or warrant is to instruct the sheriff of the court to attach the property of the judgment debtor so that if the judgment remains unpaid after the attachment, the attached property can be sold at a public auction and the proceeds used to pay the money owed to the judgment creditor.²⁶⁷⁵ The Tribunal referred to the particular matter under adjudication, which involved a loan granted by the Respondent to the Applicant, whereby the Applicant granted the Respondent a mortgage bond over the property in order to secure the loan.²⁶⁷⁶ When the Applicant defaulted on the loan repayments, the full amount became due and payable and judgment was taken against her for the full amount. The property which was security for the loan, rather than, as the Tribunal held, the 'subject of the loan agreement' was attached so that the sale proceeds could be used to settle the judgment debt or the portion of the judgment debt outstanding.²⁶⁷⁷ The Tribunal pointed out that at no time did the Respondent ever have possession of the immovable property, nor did the Respondent repossess the property.²⁶⁷⁸ The property was attached by the sheriff pursuant to a writ of attachment issued by the High Court.²⁶⁷⁹

The Tribunal was of the view that section 131 is not intended to govern the process in the circumstances as outlined above.²⁶⁸⁰ But that such process is governed, instead, by High Court Rule 46 which deals with execution against immovable property when property is sold to satisfy a judgment debt.²⁶⁸¹ The Tribunal posited that sections 127 to 131 are intended to deal with the situation where the credit provider initially had possession of the property, either actual physical possession or ownership was transferred to it, the property was then given to the consumer under a credit agreement and then the property was finally

²⁶⁷⁴ *Mckeen v First National Bank supra* at paragraph 33.

²⁶⁷⁵ *Ibid.*

²⁶⁷⁶ *Mckeen v First National Bank supra* at paragraph 34.

²⁶⁷⁷ *Ibid.*

²⁶⁷⁸ *Ibid.*

²⁶⁷⁹ *Mckeen v First National Bank supra* at paragraph 34.

²⁶⁸⁰ *Mckeen v First National Bank supra* at paragraph 35.

²⁶⁸¹ *Ibid.*

returned to the credit provider (which must assume responsibility for disposing of the property) because the consumer was unable to meet his obligations under the credit agreement.²⁶⁸² The Tribunal noted that the heading of section 131 refers to the ‘repossession of goods’ and that ‘repossession’ is defined as the retaking of possession when a buyer defaults on payments.²⁶⁸³ It posited the view that in the present instance the Respondent had never been in possession of the immovable property and was merely the grantor of a loan which was secured by way of a mortgage bond.²⁶⁸⁴ The Tribunal stated that if the property is sold and the proceeds of the sale cover the full amount of the debt, or the consumer is able to pay off the outstanding amount after the sale, there will be no judgment debt.²⁶⁸⁵

If one looks at the wording of section 131, it is submitted that the Tribunal’s interpretation in this regard appears correct. Section 131 deals with the repossession of property that is the *subject* of the credit agreement. Without entering a too technical linguistic exploration, one can conclude that, in a loan agreement, property that is used to secure the loan amount borrowed cannot said to be the subject of a credit agreement. The subject here would be the finance granted, the property - security as opposed to an instalment agreement, where the basis of the transaction is the obtaining of a good, for example a vehicle. The use of word ‘goods’ in section 131 also lends to the interpretation that the Legislature intended section 131 and by incorporation section 127 (2) – (a) and 128 to apply to movable goods and not immovable property which is referred to in the Act as such.²⁶⁸⁶

²⁶⁸² *Ibid.*

²⁶⁸³ *Mckeen v First National Bank supra* at paragraph 35.

²⁶⁸⁴ *Ibid.*

²⁶⁸⁵ *Ibid.*

²⁶⁸⁶ Whereas ‘goods’ and ‘movable property’ are referred to interchangeably in the Act. Coetzee argues that the rules relating to the surrender of goods should be applied to the attachment and execution of immovable property as well (‘The Impact of the National Credit Act on Civil Procedural Aspects Relating to Debt Enforcement’ 2010 *THRHR* 569 577).

6.4.3.2. Enforcement of Remaining Obligations after Attachment and Sale of Goods

Section 130 (2) of the Act provides that in the case of an instalment agreement, secured loan or lease, a credit provider may approach a court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if all the relevant property²⁶⁸⁷ has been sold pursuant to an attachment order or surrender of property in terms of section 127 and the net proceeds of such sale were insufficient to discharge all the consumer's financial obligations under the agreement. It is submitted that the section implies that, as opposed to starting a case *de novo*, the credit provider under such circumstances, would be able to make application, on notice to the consumer, to the court for the payment by the consumer of the outstanding balance. It is further submitted that in order to justify a favourable order for costs, the credit provider would be advised to make demand for the outstanding amount in writing to the consumer and provide the consumer with time within which to satisfy same, failing which advise him of the consequences of not doing so. The Supreme Court of Appeal in *Rossouw v Firstrand Bank Ltd*²⁶⁸⁸ relying on the words in subsection (2): which state 'in addition to the circumstances contemplated in subsection (1)',²⁶⁸⁹ concluded that the credit provider does not have to send a notice and wait for the days to elapse. It is, however, submitted that the court was referring to a section 129 (1)(a) notice as is contemplated in section 130 (1). It is further submitted that section 127 (7) as read with section 127 (5)(b) states that the credit provider may make demand for payment from the consumer of the remaining balance and section 127 (8) obliges the credit provider to wait ten business days prior to commencing proceedings. Accordingly, a notice in terms of section 127 (7) must be sent and not a section 129 (1)(a) notice. It is further submitted that the word 'may' in section 127 (7) implies simply that a credit provider is not obliged to

²⁶⁸⁷ Otto and Otto submit that because of the words 'relevant property' were used and not for example 'property attached' or 'property capable of being attached and sold in execution' or words to a similar effect, 'relevant property' can only refer to the property that formed the subject of an instalment agreement, lease or secured loan (2013 123 fn 160).

²⁶⁸⁸ 2010 6 SA 439 (SCA).

²⁶⁸⁹ *Supra* at paragraph 41.

enforce the remaining obligations in relation to the outstanding balance, however, if it does decide to do so, it must proceed in terms of section 127 of the Act.²⁶⁹⁰

Also in the matter of *Roussouw v Firstrand Bank Ltd*²⁶⁹¹ the Supreme Court held that section 130 (2) does not apply to claims of mortgages for any outstanding amounts after a sale in execution and that the common law applies to such claims.²⁶⁹² The court held that despite the exclusion of mortgage agreements in section 130 (2) (and thus non applicability to such agreements) does not mean that to the extent that the debt is not satisfied by execution against the mortgaged property, that part of the debt is unenforceable.²⁶⁹³ The court was of the view that such a construction would pose serious inroads into the rights of the mortgagee, which would probably be constitutionally unjustified.²⁶⁹⁴ The court held that it cannot have been the intention of the legislature that to the extent that execution against property mortgaged does not cover the mortgaged debt, there would be automatic forfeiture of the balance.

6.5. Damages

When a party to a contract suffers loss through breach of contract by the other party he, the aggrieved party, will be entitled to damages as a remedy.²⁶⁹⁵ The breach in itself is not sufficient to merit an award for damages - it must be shown that loss has in fact been suffered,²⁶⁹⁶ and the onus is on the plaintiff to prove

²⁶⁹⁰ As Otto and Otto submit some creditors, especially large institutions may treat an outstanding balance, after property has been realized for example, as the end of the matter and close the account (2013 123) and it is submitted write same off as bad or unrecovered debt.

²⁶⁹¹ *Supra*.

²⁶⁹² Cf Otto and Otto 2010 at paragraph 44.5 for remarks on this exclusion.

²⁶⁹³ *Supra* at paragraph 42.

²⁶⁹⁴ *Ibid*.

²⁶⁹⁵ Kerr 2002 737.

²⁶⁹⁶ *Swart v Van der Vyver* 1970 1 SA 633 (A) 643, *Everett and another v Marion Heights (Pty) Ltd* 1970 1 SA 198 (C) 240, *Sommer v Wilding* 1984 3 SA 647 (A) 656, *Visagie v Gerrys and another* 2000 3 SA 670 (C) 682 and Kerr 2002 737.

such damage,²⁶⁹⁷ as this will not be presumed.²⁶⁹⁸ Breach of contract by one of the contracting parties does not *ipso facto* entitle the other party to damages. Before the other party is entitled to claim damages it must be clear that the damage is patrimonial loss, in other words the breach of contract must have affected the value of the innocent's party's patrimony adversely.²⁶⁹⁹

The fundamental rule with regard to the award of damages for breach of contract was outlined by Corbett JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*:²⁷⁰⁰

[T]he sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party.

Accordingly, the aggrieved party is not entitled to be put in a better position than he would have been in had the contract been performed.²⁷⁰¹ The rule in *Holmdene Brickworks*²⁷⁰² must be applied in such a way so that the defaulting party does not suffer 'undue hardship',²⁷⁰³ that is in order to recover the loss

²⁶⁹⁷ *Rhodesia Gold Storage and Trading Co Ltd v Liquidation Beira Cold Storage Ltd* 1905 2 BAC 253 and *SM Goldstein and Co (Pty) Ltd v Gerber* 1979 4 SA 930 (A) 937.

²⁶⁹⁸ Christie and Bradfield 2011 566 2006 543. The defendant can avoid liability in part or even entirely by proving that the plaintiff failed to take reasonable steps to litigate the loss (Van der Merwe *et al* 2012 357). It must be noted that under the common law contributory negligence is not a defence in the context of contract and thus the Apportionment of Damages Act 35 of 1956 does not apply to contractual claims bred (through *Breeders Association v Price Waterhouse* 2001 4 SA 551 SCA 588 590 and Van der Merwe *et al* 2012 361).

²⁶⁹⁹ Havenga *et al* 1995 122. It has been held that it is only for patrimonial loss that damages can be claimed with regard to breach of contract, accordingly loss resulting from humiliation or injured feelings, physical inconvenience, mental discomfort and pain and suffering are excluded (*Administrator, Natal v Edouard* 1990 3 SA 581, 593-7). However, it is to be noted that patrimonial loss may include management time; that is the loss of managerial time which otherwise would have been engaged in the trading activities of a concern and which had to be deployed in managing the consequences of a wrongful act can be claimed (*AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 1 SA 639 (SCA)).

²⁷⁰⁰ 1977 3 SA 670 (A) 687. The view was reaffirmed in *Katzenellenbogen Ltd v Mullin* 1977 4 SA 855 (A) 875, *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22, *Novick v Benjamin* 1972 2 SA 842 (A) 857, *Bellairs v Hodnett and another* 1978 1 SA 1109 (A), *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A), *Aaron's Whale Rock Trust v Murray and Robert's Ltd and another* 1992 1 SA 652 (C) 655 and *Rens v Coltman* 1996 1 SA 452 458.

²⁷⁰¹ *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd and Others* 1973 3 SA 739 (NC) 744.

²⁷⁰² *Supra*.

²⁷⁰³ *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd supra* 25.

suffered it must be of such a kind and extent which the parties might have contemplated or foreseen when they entered the contract.²⁷⁰⁴

The damages which an aggrieved party may suffer are the amount by which the value of his estate (patrimony) would have increased if the contract had been properly or completely performed²⁷⁰⁵ or the amount by which his estate decreased because proper or complete performance did not take place.²⁷⁰⁶

A causal connection between the breach of contract and the damage must exist.²⁷⁰⁷ However, the defendant's liability is further limited to those damages which flow naturally from the kind of breach committed or where the damage was

²⁷⁰⁴ *Dennill v Atkins and Co* 1905 TS 282 288-9. Kerr discusses the principles in this regard in great detail (2002 799ff).

²⁷⁰⁵ For example, the aggrieved party may claim the profit he would have made had the contract been performed, this concept is referred to as positive interest or *interesse* (*Van der Merwe et al* 2012 358).

²⁷⁰⁶ *Havenga et al* 1995 122 and Kerr 2002 836. Christie has this to say: 'Unlike damages for delict, damages for breach of contract are normally (and this word must be emphasised) not intended to recompense the innocent party for his loss, but to put him in a position he would have been in if the contract had been properly performed' (2011 566). In *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 2 SA 468 the court differentiated the damages for breach as those protecting an aggrieved party's expectation interest, those protecting his reliance interest and those protecting his restitution interest. The expectation interest is that interest which is protected by putting the aggrieved party in the position he would have been in had the contract been properly performed. The reliance interest is that interest which is protected by putting him in the same position he would have been in had he never entered into the contract. Finally, the restitutionary interest is that interest which is protected by the aggrieved party's cancellation and claim and offer of restitution. Accordingly, the following quotations are pertinent, in *Trotman v Edwick* 1951 1 SA 443 (A) 449, Van den Heever JA succinctly stated: 'A litigant who sues on contract sues to have his bargain or its equivalent in money or money and kind'. And Innes CJ in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd supra* 22: '[W]e must apply the general principles which govern the investigation of that most difficult question of fact – the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party'. However, the same act may amount to a breach of contract and a delict and because the courts have held that contractual damages must be confined strictly to patrimonial loss, (*Jockie v Meyer* 1945 AD 354) it is necessary for an aggrieved party to claim under both heads for damages in the same action. He must, however, indicate clearly what damages he claims under delict and which he claims under breach of contract (*Bull v Taylor* 1965 4 SA 29 (A) 38). For a discussion on the limit which the courts have placed on the ability to claim more than mere patrimonial loss in a claim for breach of damages cf Taitz 1991 54 *THRHR* 138 142 and for a discussion on the effects of section 9 of the Bill of Rights in the Constitution 1996 together with section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Christie and Bradfield 2011 570, as well as *Bill of Rights Compendium paragraph* 3 H10.

²⁷⁰⁷ *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700-1, *Vision Projects (Pty) Ltd v Cooper Conroy Bell and Richards Inc* 1998 4 SA 1182 (A) 1191, *Primesite Outdoor Advertising (Pty) Ltd v Salviati and Santori (Pty) Ltd* 1999 1 SA 868 (W) 881-2, *Combined Business Solutions CC v Courier and Freight Group (Pty) Ltd t/a XPS* 2011 1 All SA 10 (SCA) and cf Christie and Bradfield 2011 566.

foreseen by the parties or may have reasonably been contemplated by the parties as a probable consequence of breach of contract.²⁷⁰⁸ In order to establish these factors the court will have regard to the subject-matter and terms of the contract or any special circumstances known to the parties at the time of contracting.²⁷⁰⁹ There is a duty on the aggrieved party to mitigate his damages by exercising reasonable care.²⁷¹⁰

At common law the creditor's right to damages will be dependent on the other claims he makes against the debtor.²⁷¹¹ Where he claims cancellation, the return of the goods and forfeiture, he cannot also claim damages for breach and instalments not yet due if the combination of these remedies would result in a penalty.²⁷¹² A creditor's failure to indicate whether or not he has cancelled the contract may jeopardize his claim for damages since the amount of the damages will depend on whether he has elected to enforce the contract or to terminate it.²⁷¹³

The National Credit Act does not address the issue of damages *per se*, this is a long and studied area of law with its roots embedded in the common law. However, section 127 of the Act does establish a specific procedure which regulates the proceeds of a sale of goods under an instalment agreement,

²⁷⁰⁸ In the words of Pothier: 'Sometimes the debtor is liable for the damages and interests of the creditor, although extrinsic; which is the case when it appears that they were contemplated in the contract, and that the debtor submitted to them either expressly or tacitly, in case of the non-performance of his obligation' (*Obligations* paragraph 162). Kerr explains that by 'extrinsic' Pothier envisages damages foreign to the obligation (2002 798). Pothier was quoted with approval in *Lavery and Co Ltd v Jungheinrich* 1931 AD 156 166-7, and at 169 Curlewis JA enunciated the rule to state that damages are not too remote if 'at the time when the contract was made, such damage can fairly be said to have been in the actual contemplation of the parties [...] as a probable consequence of a breach of the contract or may reasonably be supposed to have been in their contemplation'. Cf also *Poort Sugar Planters (Pty) Ltd v Minister of Lands* 1963 3 SA 352 (A) 364 and *Everett and Another v Marian Heights (Pty) Ltd* 1970 1 SA 198 (C) 201. De Wet and Van Wyk (*Kontraktereg* 226) have criticized the courts for judging foreseeability at the time of the contract rather than at the time of the breach. The authors are of the view that the person who breaches the contract should be liable for the damages or loss foreseeable at the time of breach and not at the time the contract was entered into (cf also Van der Merwe *et al* 2012 370 and Kerr 2002 801).

²⁷⁰⁹ *Havenga et al* 1995 123.

²⁷¹⁰ *Ibid.*

²⁷¹¹ *Diemont and Aronstam* 1982 210.

²⁷¹² *Baines Motors v Piek* 1955 1 SA 534 (A).

²⁷¹³ *Williams, Hunt and Co (Natal) (Pty) Ltd v Christie* 1935 NPD 453.

secured loan or lease.²⁷¹⁴ This section deals with how the proceeds of the sale must cover the credit provider's direct damages, inclusive of interest and has been examined in greater detail in Chapter 5.²⁷¹⁵ When the courts must make a finding with regards to damages in respect of a credit agreement, they will have to look to the terms and conditions of the contract and the already established principles of the common law.

Often, contracting parties incorporate penalty stipulations in their contract terms. The sections that follow examine how penalty stipulations are regulated and the effects of the Act thereon. The interplay between these penalty clauses and the National Credit Act and Conventional Penalties Act²⁷¹⁶ are also discussed.

6.5.1. Recovery of Interest as Damages

When a party to a contract has an obligation to pay money and he is in mora, the damages that flow naturally from this breach of contract will be interest a tempore morae.²⁷¹⁷ The creditor suffers damage in that the money is not available to him for the duration of the delay of payment.²⁷¹⁸ While the debtor's *mora*²⁷¹⁹ must be proved, it is not necessary to prove culpa.²⁷²⁰ Because *mora* interest is considered general damages it need not be specifically pleaded and can be recovered on a claim for interest or a general claim for damages.²⁷²¹ For purposes of prescription the claim for interest has a different cause of action from the claim for the capital sum.²⁷²²

²⁷¹⁴ Cf paragraph 5.3.4.1 *supra* for a discussion on section 127 of the Act.

²⁷¹⁵ At paragraph 5.3.4.1 *supra*.

²⁷¹⁶ Act 15 of 1962, hereinafter the 'Conventional Penalties Act'.

²⁷¹⁷ *Bellairs v Hodnett* 1978 1 SA 1109 A 1145, *Sasria Ltd v Certain Underwriters at Lloyds* 2002 4 SA 474 (SCA) 7, Otto and Grové 'Berekening van Moratorie Rente Ingevolge die Woekerwet 73 van 1968' 1990 *De Jure* 248 and Christie and Bradfield 2011 530.

²⁷¹⁸ Van der Merwe *et al* 2012 377.

²⁷¹⁹ *Gluckmann v National Mutual Life Assn of Australasia Ltd* 1928 WLD 35 41-42, *RB Ranchers (Pvt) Ltd v McLean's Estate* 1986 4 SA 271 (ZS), *Commissioner for Inland Revenue v First National Bank Ltd* 1990 2 SA 641 (A) 652I-653B and *Schenk v Schenk* 1993 2 SA 346 (E) 351B.

²⁷²⁰ *Linton v Corser* 1952 3 SA 685 (A) 694-696 and *Legogote Development Co (Pty) Ltd v Delta Trust and Finance Co* 1970 1 SA 584 (T).

²⁷²¹ *Estate Kriessbach v Van Zitterts* 1925 SWA 113 and Christie and Bradfield 2011 530.

²⁷²² *Suid-Afrikaanse Nasionale Lewenassuransiematskappy v Rainbow Diamonds (Edms) Bpk* 1982 4 SA 633 (C).

Where compound interest is provisioned in a contract, its payment is enforceable.²⁷²³ The courts have found no reason as to why *mora* interest should not run on unpaid interest that is due and payable.²⁷²⁴ The *in duplum* rule, both common and statutory would, however, apply.

The rate of *mora* interest is governed by the Prescribed Rate of Interest Act²⁷²⁵ and the National Credit Act. The Prescribed Rate of Interest Act provides for a prescribed rate of interest in respect of a debt that bears interest and where the rate has not been fixed by the parties, where same is not fixed by another Act, by custom or in any other manner.²⁷²⁶ While *mora* interest is calculated according to the prescribed rate of interest, the National Credit Act provides that interest applicable to an amount in default or an overdue payment under a credit agreement that is governed by the Act may not exceed the highest interest rate applicable to any part of the principal debt under that agreement.²⁷²⁷ Thus where a credit agreement is subject to the National Credit Act, it is submitted that *mora* interest cannot be levied in terms of the prescribed rate of interest as per the Prescribed Rate of Interest Act if such prescribed rate is higher than the highest interest rate applicable to any part of the principal debt under that agreement.²⁷²⁸

6.5.2. Penalty Clauses

Due to the fact that it is often difficult for a plaintiff to prove the extent of the damages he has suffered due to breach, it is not uncommon for parties to a contract to incorporate a term or clause in their agreement providing for some form of penalty²⁷²⁹ or forfeiture²⁷³⁰ which in the event of a party's breach,²⁷³¹

²⁷²³ *Boland Bank Ltd v The Master* 1991 3 SA 387 (A) 388F-I and *Christie and Bradfield* 2011 532.

²⁷²⁴ *Davehill (Pty) Ltd v Community Development Board* 1988 1 SA 290 (A) 298-299 and *Christie and Bradfield* 2011 532.

²⁷²⁵ Act 55 of 1975 (hereinafter the 'Prescribed Rate of Interest Act').

²⁷²⁶ Section 1 of the Prescribed Rate of Interest Act.

²⁷²⁷ Section 103 (1) of the National Credit Act as read with regulation 42 GN R489 of 31 May 2006.

²⁷²⁸ It must be noted that the Act makes provision for default administration charges and collection costs (cf regulations 46 and 47 GN R489 of 31 May 2006 of the Act).

²⁷²⁹ In *Parekh v Shah Jehan Cinemas (Pty) Ltd and others supra* the court examined the common law authorities to better understand what entailed a penalty. The court quoted Pothier: 'A penal obligation, as we have already seen, is that which arises from the clause in an agreement by which a person, in order to ensure the execution of a primary engagement, obliges himself by

whether specific or of a general nature, the defaulting party will be bound to pay a fixed sum of money or return the property and forfeit the instalments already paid or due, which benefit the injured party would otherwise not have been entitled to.²⁷³² The amount or other benefit may be considerably higher or have greater value than the actual patrimonial loss suffered by the injured party.²⁷³³ The benefit for the aggrieved party is that he may claim the penalty without the need to prove that he has suffered damages and the extent of those

way of penalty to some other thing in case of the non-performance of such engagement. But, if you lend me a horse for a journey and I engage to return him safe and sound and to pay you fifty pistoles if I do not do so, this obligation to pay you fifty pistoles in case I do not return him, is a penal obligation' (*Obligations* paragraph 337) and Voet: 'Hence it is prudent for a penal stipulation to be attached to stipulations for an act, so that, if the act has not been duly performed, a definite thing or amount may be paid by way of penalty, or may not be collected at all if perhaps it was already previously due on some other cause to him who put himself under obligation to do the act' (45.1.12 Gane's translation vol 6 634-635). The court went on to state that other authorities adopted the view that a penalty stipulation involves an additional payment, such as Van der Linden (*Institutes* 1.9.9); Schroere (Notes on Grotius 238); Maasdorp (*The Introduction to Dutch Jurisprudence of Hugo Grotius* 523-6) and Lee (1953 272). Accordingly, Leon J in the *Parekh* matter concluded that in his opinion 'the common law read with the [Conventional Penalties] Act shows that in order to constitute a penalty there must be something added to a debtor's obligation to pay his debt'. Furthermore, the court concluded 'a stipulation which ensures that a debtor pays no more than he owes cannot in my view be regarded as being *in terrorem*, i.e. forcing the debtor to comply with the terms of his contract by means of 'onbillike dwang''.

²⁷³⁰ A forfeiture clause would include a clause whereby the parties agree that in the event of cancellation due to breach of the contract by the credit consumer, the credit provider may recover the item sold and keep all the amounts that have already been paid while the consumer remains liable for all the remaining instalments that would have been payable in the future (Grové and Otto 2002 51). A forfeiture clause may refer to an obligation to perform or to the loss of a right to reclaim something to which the forfeiting party would normally be entitled on the happening of an event outlined, usually the termination of the contract (Joubert 1987 268). In *Fil Investments (Pty) Ltd v Levinson* 1949 4 SA 482 (W) counsel for the applicant argued that the word 'forfeiture' meant a forfeiture of money, for example, of instalments on the purchase price and therefore that recovery of the goods (in that matter a vehicle) was not forfeiture. The court did not agree with this contention and found that 'forfeiture may mean loss of possession of property or of the right to possess property, and the property may be other than money'. The court then looked at the meaning of forfeiture in terms of the Oxford English Dictionary and found it to mean: 'the fact of losing or becoming liable to deprivation of an estate, goods, life, an office, right, etc, in consequence of a crime, offence or breach of engagement'. The court also looked at the English courts' view on the meaning of forfeiture and took from the words of Mr Justice Eve in the matter of *In re Summer's Settled Estates* 1911 1 Ch. 319: 'I think that the word here used with the meaning assigned to it in the Imperial Dictionary, where it is said 'in regard to property 'forfeiture' is a loss of the right to possess'; and that it includes cesser, or determination on bankruptcy, alienation, remarriage, or any other event'. The court in *Fil Investments* accordingly concluded that 'the word is wide enough to cover the loss of any right or privilege by reason of a breach of covenant [...]' (485).

²⁷³¹ A breach of contract is an essential condition for the enforceability of a penalty stipulation (*Baines Motors v Piek* 1955 1 SA 534 (A) and Grové and Otto 2002 48 fn 157).

²⁷³² Grové and Otto 2002 48.

²⁷³³ *Die Meester v Protea Assuransmaatskaappy Bpk* 1981 4 SA 685 (T) 687C-688A and Grové and Otto 2002 48.

damages.²⁷³⁴ These types of clauses are commonly known as ‘penalty clauses’; ‘penalty stipulations’ or ‘forfeiture clauses’.²⁷³⁵

Penalty stipulations are valid and a common reason for incorporating a penalty clause in a contract, *inter alia*, is to dissuade or discourage a breach of contract occurring in the first place- the penalty clause is said to be inserted *in terrorem*.²⁷³⁶ It may be agreed that these penalties be undertaken together with performance or in place of performance. These remedies must be specifically provided for in the contract.²⁷³⁷ Ultimately, the purpose for which the penalty or forfeiture clause is incorporated into a contract does not detract from its enforceability. There is particular legislation, which governs such clauses, that is the Conventional Penalties Act. However, in terms of credit agreements, where the Conventional Penalties Act and National Credit Act cross paths, the relevant sections in the National Credit Act prevail.²⁷³⁸

According to Roman law penalty clauses were accepted as enforceable.²⁷³⁹ Usually the penalty would be in place of performance although agreements for

²⁷³⁴ Van der Merwe *et al* 2012 379.

²⁷³⁵ A penalty stipulation is an *incidentale* of the contract (Grové and Otto 2002 48). A distinction must be drawn between a penalty stipulation and a ‘rouwkoop’ clause. The ‘rouwkoop’ clause entitles a contracting party to pay a sum of money in lieu of his performance or in order to be able to withdraw from the contract. Because he acts in terms of the contract, he is not in breach of the contract and therefore cannot be affected by a penalty stipulation (*Baines Motors v Piek supra* and Van der Merwe *et al* 2012 381).

²⁷³⁶ *BN Aitken (Pty) Ltd v Tamarillo (Pty) Ltd* 1979 4 SA 1063 (N) and Joubert 1987 265.

²⁷³⁷ The parties may have various reasons in mind as to why they wish to include such extra terms. It is often the case that proving damages may be difficult, thus the parties may agree contractually on the amount of damages which may be expected on any one of a number of breaches of contract. The idea here is to prevent the debtor from attacking the amount of damages (agreed upon and) claimed. Litigation may often be expensive and prolix, making a fixed-amount of damages an attractive option for the creditor in the event of breach by the debtor. The same ideology underlies the second motive, that is to prevent the debtor from questioning the quantum agreed to as damages given that this amount was calculated to reflect the expected damages for breach. A creditor is limited to recover the amount of damages to what was foreseeable by the parties at time of contracting and to the amount which the creditor could not avoid had he exercised reasonable care. The parties may, accordingly exercise their contractual rights by agreeing to increase the damages quantum, in the event of breach, to something more than would otherwise have been recoverable in terms of the common law.

²⁷³⁸ Section 172 (1) of the National Credit Act.

²⁷³⁹ I 3 15 7, D 2 15 16, 17 2 41, 19 1 28 and 44, 45 1 115 2, C 7 47, 8 37 12 and 8 38 12. It was accepted commercial practise that the creditor could incorporate in the contract an arbitrary sum or multiple of what was otherwise due for damages upon breach. Later however, the penalty was limited to twice the value of the performance promised (D 19 1 44 and C 7 47).

penalties in the event of late performance were enforceable.²⁷⁴⁰ Further, it was also possible to agree that the creditor could claim either the penalty or his damages.²⁷⁴¹ Penalty clauses were also accepted in Roman-Dutch law, without the limitation of the penalty to twice the value of performance.²⁷⁴² However, the Roman-Dutch law empowered the courts to moderate or limit excessive penalties.²⁷⁴³ Roman-Dutch law recognised the forfeiture penalty; that is, the forfeiture of payments already made by a buyer after cancellation of the contract by the seller due to the buyer's *mora*.²⁷⁴⁴

Early South African case law accepted the penalty clause, but not the courts' jurisdiction to moderate excessive penalties. Clauses for forfeiture of payments already made by the buyer were accepted²⁷⁴⁵ and so were clauses for payments in addition to amounts due in terms of the contract. Prior to the promulgation of the Conventional Penalties Act, penalty stipulations were regarded as being contrary to public policy and accordingly invalid and void.²⁷⁴⁶

²⁷⁴⁰ C 8 37 12, 8 38 12 and D 2 15 16.

²⁷⁴¹ D 19 1 28 and Joubert 1987 266.

²⁷⁴² Groenewegen *De Legibus ad C 7 47*, Van Leeuwen *Censura Forensis* 1 4 15 2 and Voet *Commentarius ad Pandectus* 45 1 12.

²⁷⁴³ Groenewegen *De Legibus ad C 7 47*, Van Leeuwen *Censura Forensis* 1 4 15 2, Vinnius *Institutionum Commentarius ad I 3 15 7*, Van der Keessel *Theses Selectae* 481 and 467, Voet *Commentarius ad Pandectus* 45 1 12, Van der Linden 1 14 9 9 and *Both v Piek* 1955 2 All SA 130 (A).

²⁷⁴⁴ De Groot *Inleidinge* 3 14 32, Groenewegen *De Legibus Abrogatis ad D 18 3 6*, Voet *Commentarius ad Pandectus* 18 3 3 and Joubert 1987 266.

²⁷⁴⁵ *Smuts v Neethling* 1844 3 M 283, *Mangold Bros v Greyling's Trustee* 1910 EDL 471, *Barenblatt v Dixon* 1917 CPD 319, *Moll v Pretoria Tyre Depot and Vulcanising Works* 1923 TPD 465, *Cluley v Muller* 1924 TPD 720, *Rossiter v Vos* 1924 NPD 266; *Arbor Properties v Bailey* 1937 WLD 116, *Jonker v Yzelle* 1948 2 SA 942 (T), *Baines Motors v Piek* 1955 1 SA 534 (A), *Du Toit v Kruger* 1958 1 SA 127 (O), *Rosenstein v Botha* 1965 4 SA 195 (C) and *Sher v Steede* 1965 4 SA 197 (C).

²⁷⁴⁶ Per Corbett J in *Cape Town Municipality v F Robb and Co Ltd* 1966 4 SA 345 (C) 318-9. At common law a distinction was drawn between a genuine pre-estimation of damages and a penalty. The Appellate Division held that if the sum claimed was a genuine pre-estimate of damage it could be recovered on proof of breach of contract without proof of damage and could not be reduced, but that if it fell into the second category it was a penalty and actual proved damage (but not exceeding the amount of the 'penalty') could be recovered (*Pearl Assurance Co. Ltd v Union Government supra* 568). The two categories of legal concept were imported from English law (Van der Merwe *et al* 2012 379). The *Pearl Assurance* decision was not supported by the Appellate Division and in 1953, Van Den Heever JA, after careful examination of the authorities, both Roman-Dutch and English, was compelled to refuse an enforcement of a penalty stipulation, but concluded his judgment with the following: 'We have here a conventional penalty pure and simple, unrelated to damages. In other words it is a conditional promise to pay, made seriously by persons intending to be bound. But since the *'old poena'* was entirely swept away in the *Pearl Assurance* case, the appellants cannot recover. It is a blemish in our legal system which militates against good faith, trust and business morality. Reluctantly, I have to agree that the appeal be dismissed with costs'.

Forfeiture clauses were an exception to this and the courts, relying on Voet²⁷⁴⁷ as authority, held that forfeiture clauses included in contracts were of a special category and that the courts did not have the same jurisdiction to decline to enforce forfeitures as they could in the case of penalty clauses.²⁷⁴⁸

The common law, prior statutory intervention, therefore allowed for the recovery of genuine pre-estimation of damages and forfeitures but not penalties. The situation was patently confusing and eventually in 1962 the Conventional Penalties Act abrogated the *Pearl Assurance*²⁷⁴⁹ case and made penalties, both pre-estimates of damages and conventional penalties alike, enforceable.²⁷⁵⁰

6.5.2.1. The Conventional Penalties Act²⁷⁵¹

Broadly speaking, the Conventional Penalties Act had three main objects to cover when it was enacted, namely: to abolish the previous common law distinction between pre-estimates of damages and penalty clauses;²⁷⁵² to make

²⁷⁴⁷ *Commentarius ad Pandectus* 18 3 3.

²⁷⁴⁸ *Pearl Assurance Co. Ltd v Union Government* 1933 AD 560, *The Mine Worker's Union v J.P. Prinsloo and Greyling* 1948 3 SA 831 AD 838 and *Baines Motors v Piek supra*. The following from Joubert is relevant: 'Since the authority of Voet extended only to forfeiture clauses following on a cancellation because of a failure to pay instalments of the price promptly, it meant that forfeiture clauses which followed a cancellation based on a failure to perform some other term of the contract were not covered by the exception and that they were unenforceable, and since the contract often had one forfeiture clause covering all cases it meant that the courts were often called upon to decide whether the clause was severable or not and then, if it was severable, whether the portion in question was enforceable on the authority of Voet or whether it was unenforceable because it fell outside Voet' (Joubert 1987 267).

²⁷⁴⁹ *Supra*.

²⁷⁵⁰ Hunt 'General Principles of Contract' *Annual Survey of South Africa* 1962 94 95: '[T]o hold that the parties had either a penalty or else liquidated damages in mind, may be somewhat artificial construction of their agreement. Frequently they had elements of both in mind'; see also Christie and Bradfield 2011 585. The Act was not retrospective and accordingly did not apply to contracts entered into before 16 March 1962 (*Van Rensburg v Van Rensburg* 1962 3 SA 646 (O), *Rosentein v Botha* 1965 4 SA 195 (C) and *Cape Town Municipality v F Robb and Co Ltd supra* 345).

²⁷⁵¹ Act 15 of 1962.

²⁷⁵² In *Western Credit Bank Ltd v Kajee* 1967 4 All SA 228 (N), the effect of the Conventional Penalties Act on contracts was described to be the displacement of the law as it formerly was in relation to penalties and liquidated damages for breach of contractual obligations in its entirety. 'The broad effect of the Conventional Penalties Act 15 of 1962, is to supplant the English law penalty-liquidated damages rules in our law with the Romanistic *jus commune* judicial discretion to reduce an excessive penalty' (Hunt *Annual Survey of South African Law* 1962 94).

all penalty stipulations covered by the Conventional Penalties Act enforceable²⁷⁵³ and to make these clauses subject to moderation where necessary.²⁷⁵⁴ Penalty stipulations for purposes of the Conventional Penalties Act include forfeiture clauses,²⁷⁵⁵ which are viewed as a species of penalty clauses.²⁷⁵⁶

In terms of the Conventional Penalties Act,²⁷⁵⁷ terms incorporated in a contract shall be deemed penalty stipulations, when the clause provides that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, either by way of penalty or as liquidated damages.²⁷⁵⁸

²⁷⁵³ Section 1 of the Conventional Penalties Act.

²⁷⁵⁴ Section 3 of the Conventional Penalties Act and Joubert 1987 268. Belcher submitted that the elements of a 'penalty', as defined in the Penalties Act, are the stipulation or provision in a contract for payment of a sum of money (*dare*), or delivery of a res (*facere*) or performance of an obligation (*praestare*) on a breach thereof by the debtor. This author further submitted that this was so, whether it is unconscionable, out of proportion, '*in terrorem*' of the debtor or not, further whether it is termed a penalty, liquidated damages or pre-estimate of damage; and howsoever, the wording ('The Conventional Penalties Act, 1962' SALJ 1964 80 84 and *cf also Van Staden v Central SA Lands and Mines* 1969 4 SA 349 (W) 351).

²⁷⁵⁵ Section 4. *Cf also Matthews v Pretorius* 1984 3 SA 547 (W).

²⁷⁵⁶ Hunt *Annual Survey of South African Law* 1962 96. It is to be noted that the court in *Cohen v Cohen* 1980 1 SA 561 (ZR) 564-5, quoted with approval in *Classen v Ann Fenwick Einedomme Bpk* 1996 2 SA 99 (O) 104-106, held that a forfeiture of a right to payment of an amount does not fall within either of these definitions. However, Kerr submits that the language used by some authorities (and he specifically refers to the *Cohen* and *Classen* cases *supra*) goes too far in indicating that forfeiture clauses as a class, irrespective of their effect, do not fall within section 1 of the Act, and he makes reference to the following wording of section 1 of the Conventional Penalties Act: 'be liable to ... perform anything'. It is submitted that Kerr's view is the correct one. A penalty stipulation, need only, in terms of the Act, be a stipulation whereby a party who has breached the contract is liable in terms of the contract to 'pay a sum of money or deliver or perform anything for the benefit of the other person' (*supra* 790). Accordingly, it appears that forfeiture of an asset would fall under the meaning of section 1, depending on the wording of the contract and the import of the stipulation, it is for the court to find as a matter of construction that the forfeiture would have the effect of a penalty (*cf Da Mata v Otto NO* 1972 4 All SA 33 (A) 43). More especially, because if interpreted otherwise, the courts would then not have the power to ensure that the forfeiture is in proportion to the prejudice suffered by the creditor. This is especially germane with regard to forfeiture clauses incorporated in credit agreements.

²⁷⁵⁷ Section 1 of the Conventional Penalties Act.

²⁷⁵⁸ Attention must be drawn to the words of De Villers JA in *De Pinto and Another v Rensea Investments (Pty) Ltd supra*: 'A stipulation is not a penalty stipulation merely because the parties give it that name. It is for the court to find, as a matter of construction, whether it is indeed intended as a penalty'. It has been held that if the object of the term is to act *in terrorem* and dissuade the other party from committing a breach for fear of the consequences the stipulation can then be described as a penalty clause (Christie and Bradfield 2011 585 and *cf also* Kerr 'Penalties Under the Conventional Penalties Act' SALJ 1977 379). However, it is to be noted that Christie submits that when interpreting whether a provision in a contract is to be understood as a penalty it is the 'intention of the parties as thus ascertained and not the description the parties have given to the provision nor the effect it might have had or did in fact have,' he adds '[t]he numerous cases in which a provision in a contract has been held to be a penalty or not to be a penalty illustrate the application of this principle of interpretation to particular contracts' (2011 585-586). It is submitted, that while the intention of the parties is important when looking at

whether a penalty stipulation was intended as such and should thus be moderated accordingly, this should not be a criterion the courts use to the exclusion of the effect the penalty might have had or did in fact have. If one examines the line of cases provided by Christie as authority for his conclusion, it will be noted that at times the net commercial effect of the penalty is considered and at other times the intention of the parties ignored. In *Du Plessis v Oribi Estates (Pty) Ltd and Others* 1972 3 All SA 8 (N), the court first found that the condition in the agreement clearly provided for payment of a penalty and then proceeded to apply the Conventional Penalties Act. However, the court here was faced with an application for provisional sentence and while it found that only for purposes of the judgment under discussion provisional sentence was not an inappropriate or impermissible procedure for the enforcement of a penalty, it held that it would be impossible, without hearing evidence, to determine in the proceedings precisely to what extent the penalty should be reduced. The court was not here looking at the intention of the parties when it established whether the clause amounted to a penalty or not – it (the court) very much applied itself to the question of fact and the commercial effects of the penalty stipulation. In *Union and South-West Africa Insurance Co Ltd v Hull and Another* 1972 4 All SA 297 (D) the court was faced with two documents signed by the respondent and its surety, one it identified as a guarantee (annexure 'B') and the other as an 'indemnity' (inverted commas as indicated in the reported judgment at 299) The court conducted a very thorough examination of these documents and their purport, subsequently finding that the annexure 'B' would be subject to the Conventional Penalties Act because it was clear to the court that this document was 'not an unconditional undertaking to pay', but 'it [was] a condition of the applicant's liability there under that there shall have been a default by the building contractor. The words 'of all or either of the same' in annexure 'B' must [...] be read as meaning 'all or any of the same'. Again, this case is evident of the courts looking at the actual commercial effect of the clauses to determine their construct as penalty clauses. In *De Pinto and Another v Rensea Investments supra* the parties entered a lease agreement for a period of nine years and eleven months, in terms of which the lessor agreed to charge a considerably reduced lease for the 'first period' of the lease due to the fact that the lessee was not able to meet the requested rental amount. However, in the event of the lease terminating prematurely the parties agreed that the lessor would be entitled to recoup the difference in rental charged in the first period to such rental charged after the first period. The court found that in light of the history of the letting of the premises the clause stipulating for the forfeiture of the initial rental discount was not intended as a penalty, and held 'it was rather inserted, as conferring a discount in favour of appellants on the admitted current market rental, on condition that the contract was not terminated prematurely at any time or for any reason, including e.g. termination by mutual consent or termination as a result of destruction or serious damage of the premises as provided [...] [in] the original lease. The fact that it might also become operative, as happened in the instant case, upon a breach of contract is not sufficient to constitute it a penalty stipulation'. It is respectfully submitted that the Court erred in its finding that the penalty was not a penalty for purposes of the Conventional Penalties Act. The 'penalty' clause did not specify as to the method of termination, it simply stated 'in the event of the lease terminating at any time after the effective date'. The court decided that the clause was not intended to add an *in terrorem* element but that it was merely an indication of the concession that the lessor was prepared to make. It is submitted that the clause had the effect of adding the *in terrorem* element to the lease. The effect of the clause and it is submitted, so too the intention of the parties, was to say: the lessor gives the lessee the benefit of a lower rent for the initial period of the lease. Should the lease in any way whatsoever be terminated (not excluding by way of breach) then as penalty for such termination the lessee forfeits the rent discount benefit previously conferred on it. It appears a simple case of -if I give you x and you breach the contract then I will be entitled to retrieve x as punishment for your breach. It appears to writer for all intents and purposes to be a penalty clause. The parties themselves labelled it a penalty clause, despite it being held that a stipulation is not a penalty stipulation merely because the parties give it that name (*Dunlop Pneumatic Tyre Co. Ltd v New Garage and Motor Co. Ltd* 1915 A.C. 79 86) the wording should at the very least be indicative of the intention of the parties. It also, it is submitted, appears to be a fair penalty clause which the courts could quite simply have refused to reduce in terms of section 3 of the Conventional Penalties Act, in that it was in proportion to the prejudice suffered by the lessor. After all, the wording of section 3 says that the court 'may' and not 'must', reduce the penalty.

The purpose of section 1 of the Conventional Penalties Act is to make all penalty stipulations, regardless of their wording, *prima facie* enforceable once the existence of a contract, valid and enforceable is established, and a penalty stipulation is contained therein and there is a breach of the contract.²⁷⁵⁹

If a term in a contract provides for a penalty, the aggrieved party (creditor) may not recover damages in addition to the penalty or *in lieu* of such penalty unless same is expressly provided in the contract.²⁷⁶⁰ Hunt²⁷⁶¹ suggests that the existence of a penalty clause would not prevent the creditor from enforcing specific performance of the contract, though, if he does, he cannot in addition get the penalty unless it was expressly so stipulated for in respect of the defect or delay of which he complains.²⁷⁶²

²⁷⁵⁹ Belcher SALJ 1964 84.

²⁷⁶⁰ Section 2 (1) of the Conventional Penalties Act. Cf *Labuschagne v Northmead Investments Ltd* 1966 4 SA 120 (W) and *Custom Credit Corporation (Pty) Ltd v Shembe supra*. Kerr, however, submits that the sub-section does not preclude a claim for the remaining damage when there has been a genuine covenanted pre-estimation of part of the damage. As authority he refers to *De Pinto and Another v Rensea Investments (Pty) Ltd* 1977 2 SA 1000 (A) (2002 792 and 1977 SALJ 381-2).

²⁷⁶¹ Hunt *Annual Survey of South African Law* 1962 96.

²⁷⁶² Section 2 (2) of the Conventional Penalties Act. The author states that an expressly stipulated moratory penalty – as those commonly found in building contracts – is recoverable together with performance. ‘Moratory penalty’ refers to a penalty for delay in performance. For a further discussion see Belcher SALJ 1964 89. The court in *De Lange v Deeb* 1970 1 All SA 234 (O) 236, cited with approval in *Botha (Now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 3 SA 773, after careful examination of section 2 has interpreted it as follows: ‘The Act provides [...] for the enforcement of penalty stipulations in contracts. It does not deprive the creditor of his right to claim damages in respect of the act or omission which is the subject of the penalty stipulation but prescribes that right: thus he is not entitled to recover both the penalty and damages. His right to recover is accordingly in the alternative – he can only recover either the penalty or damages. That means that he can only recover either the penalty ‘in lieu of damages’ or damages ‘in lieu of the penalty’. But the section prescribes this right to recover ‘damages in lieu of the penalty’ still further, by providing that he can only recover such damages where the contract expressly provides. In my opinion a contract does so provide where it expressly reserves to the creditor the right to recover damages even where the words ‘in lieu of the penalty’ are not added. This is necessarily so because the only right to recover damages which the creditor has in ‘lieu of the penalty.’ The express addition of those words is of no consequence. What is necessary is that the choice to recover damages be expressly provided for. There is no merit in adding the words ‘in lieu of the penalty’ because the creditor can get no damages other than in lieu of the penalty and is in any case not bound to sue for damages rather than claim the penalty. He has a choice whether to do so or not’. However, once a court has decreed forfeiture it is prohibited by section 2 (1) from granting an award for damages, this provision may not be circumvented by the plaintiff tendering to return the instalments forfeited or to give defendant credit therefore. Accordingly, once one court has decreed forfeiture another court cannot be asked to abrogate the order and award damages (*Custom Credit Corporation (Pty) Ltd v Shembe supra*).

Section 3 empowers the courts, if upon hearing a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor due to the breach by the debtor, to reduce a penalty to such an extent that the court may consider equitable in the circumstances.²⁷⁶³ The reduced penalty may still exceed the patrimonial loss actually suffered by the creditor.²⁷⁶⁴ Section 3 of the Conventional Penalties Act has essentially been modified by the court in *Matthews v Pretorius*²⁷⁶⁵ where it held:

Insofar as section 3 of the Act in its wording - 'If upon the hearing of a claim for a penalty,...' – is unclear whether a claim for restitution of what has been forfeited under a contract on rescission is also included, the Court must endeavour to interpret section 3 in such a manner as to give effect to the intention of the Legislature as expressed in the whole of the Act and more specifically in section 4 of the Act.

It must also be borne in mind in interpreting section 3 that the Legislature is presumed not to have intended an inequitable, unreasonable or unjust result.

If these precepts are heeded then the words in section 3 – 'If upon the hearing of a claim for a penalty, it appears to the court...' – should be interpreted to mean "if in the course of a hearing before a court a party seeks to enforce a claim for a penalty". An alternative manner in arriving at a similar interpretation would be if the particular phrase in section 3 is read as follows: 'If upon the hearing of a claim for a penalty or the return of a penalty'. This interpretation would give full effect to the intention of the legislature as expressed in the Act and specifically section 4.

Had the court not made this modification the right of equitable reduction would only have been available to the creditor, who in some cases will already have the monies paid and forfeited in his possession and would therefore have no need to claim its payment by way of action. However, the interpretation, now allows a party to a cancelled contract to reclaim a sum forfeited in terms of a penalty situation.²⁷⁶⁶

²⁷⁶³ The court in *Western Credit Bank Ltd v Kajee supra* 233, stated that the purpose of the provisions of section 3 were to 'ameliorate to an equitable extent the effects of the penalty; although the debtor is not expressly mentioned in this respect, it appears to me, on the one hand, that the intention is to soften the blow for him, on the other hand, to assure that the creditor is not prejudiced'.

²⁷⁶⁴ Grové and Jacobs 1993 41. In English law penalty stipulations are limited in the same manner by common law, as opposed to statute. Cf paragraph 6.8.1 *infra* for a discussion.

²⁷⁶⁵ 1984 4 All SA 224 (W).

²⁷⁶⁶ In the *Matthews* case the defendant (creditor) had excepted to the plaintiff's (debtor's) summons as disclosing no cause of action, in that the plaintiff was relying on section 3 of the Conventional Penalties Act. Cf also *Portwig v Deputation Street Investments (Pty) Ltd* 1985 1 All SA 104 (D). The following from *Western Credit Bank Ltd v Kajee supra* 233-4 is a very interesting

In a number of cases the courts have held that a court has the power to act *mero motu*, it does not have to wait for one of the parties to raise the issue of a reduction of the penalty in terms of the Conventional Penalties Act,²⁷⁶⁷ and accordingly the court may raise the issue where the debtor is in default of appearance.²⁷⁶⁸

In *Western Credit Bank Ltd v Kajee*²⁷⁶⁹ the court examined what was intended by the phrase 'out of proportion' and held, per Caney JA the following:

and important observation by the court: 'The legislature has had regard for the fact that the debtor is not infrequently a person who is not in a position to bargain with the creditor with equal strength, at the time of the making of the agreement and so, whilst having regard to the sanctity of contract and setting aside the law as it was, it sees fair play for the debtor; this, however not to be at the expense of the creditor-he is not to suffer prejudice. It is noticeable that the word 'prejudice' is used, not loss or damage. The Legislature has not limited the creditor to what would have been his normal measure of damages had the law been as it was in the past'.

²⁷⁶⁷ *Ephron Bros Holdings (Pty) Ltd v Foutzitoglou* 1968 3 All SA 30 (W) 34, *Du Plessis v Oribi Estates (Pty) Ltd and others* 1972 3 All SA 8 (N). Cf *Western Bank v Meyer*, *Western Bank v De Waal*, *Western Bank v Swart and Another* 1973 4 All SA 328 (T), where the court held: 'The word "may" in section 3 does not merely confer a discretion, but a power coupled with a duty. The court must apply the provisions of section 3 where it appears to it that there is a disproportion such as is visualised by that section' (330). These findings concur with the old authorities with regards the courts duty to raise questions of law relevant to the matter before it. Accordingly, the following from Grotius is relevant: 'A judge who decides contrary to laws which it has a duty to know or grants an adjournment contrary to law, a land surveyor who makes a wrong survey, a notary who makes an instrument not in accordance with the laws, though they may have acted in ignorance, are liable for any damage which any one may incur in consequence', (*Inleidinge to de Hollandsche Rechtsgeleertheid* 3.37.9 Lee's Translation) and Voet: 'But if matter of law have been overlooked by parties or their advocates, the judge will rightly make them good. The reason is that things which are wont to be stated before a judge ought yet to be known to him even if they have not been stated. It follows that he is bound to take account in judging even of sure rules of law, however much is left unstated' (5.1.49 Gane's translation). However, the court in *Bank of Lisbon International v Venter en 'n Ander* 1990 4 SA 463 (A) placed doubt on the ability of a court to raise the issue of the applicability of section 2 (1) of the Conventional Penalties Act *mero motu*. However, cf Kerr 'The Role of the Court in Civil Cases. The Conventional Penalties Act' SALJ 108 1991 245, where he discusses and criticises the court's comments in the *Lisbon* case. Kerr's view, it is submitted, appears the correct one. See also Hunt where he points out that in the final draft of the Conventional Penalties Act the words 'it appears to the court' (section 3) were substituted with the words 'it is proved', the author concludes that the words favoured by the legislature suggest that section 3 is intended to allow the court *mero motu* to reduce a penalty (*Annual Survey of South African Law* 1962 96). The matter appears to have been accepted as trite in the recent judgment of *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance supra*, where the court of its own accord raised the question whether the Conventional Penalties Act came into play as the issue had not been raised in the pleadings.

²⁷⁶⁸ *Ephron Bros Holdings (Pty) Ltd v Foutzitoglou supra*, *Western Bank v Meyer*, *Western Bank v De Waal* and *Western Bank v Swart and Another supra*. In *Premier Finance Corporation (Pty) Ltd v Steenkamp and Another* 1974 3 All SA 271 (O) 275 the court held that summary judgment proceedings are inappropriate for deciding whether a penalty is out of proportion to the prejudice suffered or for determining the extent to which a penalty should be reduced. This view was supported in *Peters v Janda NO* 1981 2 SA 39 (Z) 343.

²⁷⁶⁹ *Supra* 391.

[T]he words 'out of proportion' do not postulate that the penalty must be outrageously excessive in relation to the prejudice for the Court to intervene. If that had been intended, the Legislature would have said so. What is contemplated, it seems to me, is that the penalty is to be reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the prejudice is such that it would be unfair to the debtor not to reduce the penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be awarded.

Accordingly, in order to determine the proportion of the actual prejudice, the amount of the actual or potential prejudice need be determined.²⁷⁷⁰ The amount which the court will consider to be *in* proportion to the prejudice suffered by the creditor will depend on various factors. Snymans J in *Van Staden v Central South African Lands and Mines*²⁷⁷¹ set the stage for this enquiry by the courts:²⁷⁷²

[E]verything that can reasonably be required to harm or hurt, or be calculated to harm or hurt a creditor in his property, his person, his reputation, his work, his activities, his convenience, his mind, or in any way whatever interferes with his rightful interests as a result of the act or omission of the debtor, must, if it is brought to the notice of the court, be taken into account by the Court in deciding whether the penalty is out of proportion to the prejudice suffered by the creditor as a result of the act or omission of the debtor.

In *Western Bank Ltd v Meyer et al*²⁷⁷³ the court made the following comments, regarding the issue of proportional penalties:

In this regard the Legislature has not provided any yardstick by which the 'proportion' is to be measured, or to be determined. It is a matter left entirely to the discretion of the Court which, so it seems to us, should only interfere if, bearing in mind that an object of a penalty clause is to compel the debtor to implement his obligations under the contract by providing harsh consequences

²⁷⁷⁰ *Maiden v David Jones (Pty) Ltd* 1969 1 SA 59 (N). 'One cannot form an opinion about the relationship between a known figure (the penalty) and a quantity neither known, nor estimated, nor conjectured' (Kerr 2002 794).

²⁷⁷¹ 1969 4 SA 349 (W) 352.

²⁷⁷² The 'prejudice' referred to in the Conventional Penalties Act is a much wider concept than 'patrimonial loss' and therefore when the court has to determine what prejudice has been suffered by the creditor, 'not only his proprietary interest is considered, but also every other rightful interest that may be affected by the commission of an act or the omission in question'. The court in *Western Credit Bank v Kajee supra* at 237 stated that the full extent of the prejudice may be difficult to ascertain in any particular case but that 'prejudice' includes 'far more than pecuniary loss and may, according to the circumstances, include impairment of reputation or personal dignity and possibly cover any substantial inconvenience. If the plaintiff contends for any prejudice in a wider sense than damages suffered by it, it will be for it to produce evidence to establish this'. For its understanding of 'prejudice' the court looked at *Rex v Dhlamini* 1943 TPD 20 23 cited with approval in *Rex v Williams* 1943 CPD 206 208. Cf also Grové and Jacobs 1993 40.

²⁷⁷³ *Supra* 330-1.

should he default, it nevertheless is of the opinion that the penalty is unduly severe to an extent that it offends against one's sense of justice and equity. Naturally each case depends on its own circumstances and no hard and fast rules to cover all cases are capable of being formulated.

Penalty and forfeiture clauses are not an uncommon sight in credit agreements. The effects of the Conventional Penalties Act on credit agreements and its co-operation (or lack thereof) to the National Credit Act is of relevance and is discussed below, after a brief overview of the effects of the Conventional Penalties Act on the Credit Agreements Act.

6.5.2.1.1. The Credit Agreements Act and the Conventional Penalties Act

Section 14 of the Credit Agreements Act prevented the credit grantor, in the event of a breach or other contingency which allowed the credit grantor to take action against the credit receiver, and where the credit agreement was not terminated or rescinded, from eliciting the credit receiver to make payment or to perform any other act which would place the credit receiver in a better financial position than that he would have been in if no breach or other contingency had occurred. Accordingly, where a credit grantor claimed specific performance he would be able to recover only the amount of his actual loss and nothing else.²⁷⁷⁴

Furthermore, section 15 of the Credit Agreements Act stipulated that if goods to which an instalment sale transaction related, were returned to the credit grantor (usually after cancellation) and their value at the time of the agreement (calculated in accordance with the provisions of the Usury Act) exceeded the amount still owing on the agreement then the credit grantor had to pay the difference to the receiver. Both section 14 and 15 had to be read with certain provisions of the Usury Act, namely sections 4 and 5.²⁷⁷⁵

The references to sections 4 and 5 of the to the Usury Act placed stringent limitations on the amounts that creditors could recover from their debtors and this sometimes meant that the credit grantor could not recover the full amount of his

²⁷⁷⁴ Diemont and Aronstam 1982 208.

²⁷⁷⁵ Grové and Jacobs 1993 42 and Grové and Otto 2002 50.

loss. In the instance of cancellation, the ordinary finance charges had to be recalculated up to the date of the cancellation of the agreement.²⁷⁷⁶

6.5.2.1.2. Effects of the National Credit Act on the Conventional Penalties Act

Section 5 of the Conventional Penalties Act has been repealed by the National Credit Act. This section previously exempted hire-purchase contracts that were governed by the Hire-Purchase Act²⁷⁷⁷ from operation of the Conventional Penalties Act,²⁷⁷⁸ and later when the Hire-Purchase Act was repealed, section 5 was amended to exempt credit agreements in terms of the Credit Agreements Act where the provisions in question would be in conflict with the Credit Agreements Act; furthermore, the Conventional Penalties Act was not applicable to money-lending transactions to which the Usury Act²⁷⁷⁹ applied.

While the Act repeals section 5 of the Conventional Penalties Act,²⁷⁸⁰ section 172 (1) read with Schedule 1 of the Act provides a very similar function to the old section 5 of the Conventional Penalties Act. The effect of the section read with Schedule 1 is to make any provision of the National Credit Act which is in conflict with the Conventional Penalties Act prevail to the extent of the conflict. The ensuing discussion examines how the National Credit Act has approached the issue of penalties in credit agreements.

²⁷⁷⁶ Grové and Jacobs 1993 50-1 and Grové and Otto 2002 50.

²⁷⁷⁷ However, the Conventional Penalties Act was fully applicable to any hire-purchase agreement that did not fall under the Hire-Purchase Act (*Bestway Agencies (Pty) Ltd v Western Credit Bank Ltd* 1968 3 SA 400 (T)). The Hire-Purchase Act prevailed over the Conventional Penalties Act in respect of a contract to which both Acts applied (section 5 of the Conventional Penalties Act).

²⁷⁷⁸ Hunt submitted that the Hire-Purchase Act adequately protected parties who bought on hire-purchase, and accordingly was of the view that it was not advisable to give the sellers of such goods freedom to stipulate penalties which other creditors enjoyed (*Annual Survey of South Africa Law* 1962 96).

²⁷⁷⁹ *Western Bank Ltd v Rautenbach* 1974 4 SA 960 (E) 964-5 and *Western Bank Ltd v Van der Merwe* 1976 4 SA 119 (SWA) 122-3.

²⁷⁸⁰ Section 171 (2) read with Schedule 2 of the Act.

6.5.2.1.3. Indirect Regulation of Penalty Stipulations by the Act

The situation in terms of penalty clauses appears to be, somewhat indirectly regulated by the National Credit Act. The Act does not prohibit the inclusion of penalty or forfeiture clauses in credit agreements. However, it is submitted that when faced with a claim for the enforcement of a penalty a court will not be able to make an order, in relation to penalty clauses, without reverting to the Act, if the agreement falls under the auspices of the Act. If it does not, then the Conventional Penalties Act will apply, although as will be seen from the subsequent discussion the Conventional Penalties Act may be applicable in certain instances even when the agreement is regulated by the Act.

As discussed above, the two key remedies available to the credit provider upon breach of the agreement by the consumer are specific performance or cancellation. The question then to be posed is, if the credit agreement contains a penalty clause or forfeiture clause or both, does the Act prevent the credit provider from enforcing such clauses, either when the credit provider seeks specific performance or cancellation.

It is submitted that, with respect to specific performance of the credit agreement, the existence of a penalty provision would not prevent a credit provider from enforcing specific performance of the contract, though the credit provider may be prevented from claiming the penalty in addition thereto – unless the penalty provision was specifically drafted to envision penalty consequences for the defect or delay experienced by the credit provider. Neither the section in the Act dealing with unlawful provisions of credit agreements,²⁷⁸¹ nor any of the debt enforcement provisions in Part C of Chapter 6 of the Act appear to affect such situations. It is submitted therefore that the Conventional Penalties Act would become effective if the penalty were to be found to be out of proportion to the prejudice suffered by the credit provider. The court, whether by application or *mero motu*,²⁷⁸² would be entitled to reduce the penalty to such an extent as it may consider equitable in the circumstances. The provision would have to be

²⁷⁸¹ Section 90 of the National Credit Act.

²⁷⁸² *Ephron Bros Holdings (Pty) Ltd v Foutzitoglou supra*.

carefully drafted and the drafter as well as the court would have to take cognisance of the limitations provided for by the regulations on default interest²⁷⁸³ and default administration charges and collection costs.²⁷⁸⁴

The situation is different when looking at cancellation of a contract. If the credit provider, upon breach by the consumer, elects to cancel the contract it is obliged to proceed in terms of section 123 of the Act.²⁷⁸⁵ The credit provider may only terminate the agreement in strict compliance with the said section. And the section directs that the provider may only terminate a credit agreement, upon breach by the consumer, if the provider takes the steps as set out in Part C of Chapter 6. Part C of Chapter 6 deals with debt enforcement, more specifically with the required procedures before debt enforcement,²⁷⁸⁶ debt procedures in court,²⁷⁸⁷ repossession of goods,²⁷⁸⁸ compensation for the credit provider²⁷⁸⁹ and prohibited collection and enforcement practices.²⁷⁹⁰

When approaching a court for cancellation, the credit provider will most often request attachment of the goods that are subject of the credit agreement. Section 131²⁷⁹¹ regulates the procedure when the relief sought is the repossession of goods. It directs that if a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127 (2) to (9) and section 128 read with the changes required by the context will apply in respect to any goods attached in terms thereof. In terms of section 127 the credit provider in possession of the goods must notify the consumer of the value of the goods surrendered or repossessed and other prescribed information, allow time for the consumer to respond to such notice and if the consumer is still in default under the credit agreement, the credit provider may sell the goods surrendered and credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit

²⁷⁸³ Section 103 (1) of the Act as read with regulation 42 GN R489 of 31 May 2006.

²⁷⁸⁴ Regulations 46 and 47 GN R489 of 31 May 2006.

²⁷⁸⁵ Section 123 of the Act is discussed in detail in paragraph 6.4.2.1 *supra*.

²⁷⁸⁶ Section 129 of the Act.

²⁷⁸⁷ Section 130 of the Act.

²⁷⁸⁸ Section 131 of the Act.

²⁷⁸⁹ Section 132 of the Act.

²⁷⁹⁰ Section 133 of the Act.

²⁷⁹¹ See paragraph 6.4.3 *supra* for a detailed discussion of this section.

provider in connection with the sale of the goods.²⁷⁹² The Act also prescribes what the credit provider should do in the event of the sale value of the goods exceeding the settlement value and in the event of the sale value of the goods being less than the settlement value immediately preceding the sale. Section 127 directs further that if an amount is credited to the consumer's account and it exceeds the settlement value immediately before the sale, and another credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the Tribunal, which may make an order for the distribution of the amount in a manner that is just and reasonable; or where no other credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the consumer with notice and the agreement is terminated upon remittance of that amount.²⁷⁹³ It is submitted that in light of the regimented procedures prescribed by section 127 when dealing with movables, a penalty stipulation would not survive the scrutiny of the court and would be unenforceable, if the credit provider claimed attachment of the goods.

The same would not be true if the credit provider sought cancellation without requesting repossession but the enforcement of a penalty clause. It is submitted that in such instances the court would be obliged to respect the agreement between the parties and enforce the penalty clause, subject to its being in proportion to the prejudice suffered by the credit provider. The same would be true of a forfeiture clause, provided however, that the forfeiture was not forfeiture of the goods but of money (a deposit, for example, or paid instalments) as this would involve an attachment and in turn be subject to sections 131 and 127 of the Act.

The courts have disallowed clauses that purport to give the creditor the right to cancel the contract, claim the return of the goods, retain the instalments already paid, claim payment of all instalments unpaid at the date of cancellation and

²⁷⁹² Section 127 is discussed in paragraph 5.3.4.1 *supra*.

²⁷⁹³ Section 127 (6) of the Act.

recover damages, unless the clause is severable. The authority for this statement rests in the Appellate Division case of *Botha v Piek*.²⁷⁹⁴

Upon the enforcement of a penalty stipulation and judgment granted by the court and the consumer not being able to meet its payment in terms of the court order and the credit provider subsequently attaching the goods, it is submitted that the tentacles of section 131 would affect attachment and execution and the proceeds would have to be defrayed as directed by section 131 and 127, with the quantum being amplified by the amount stipulated in the penalty clause.

The situation is admittedly not ideal and somewhat convoluted; however such an interpretation ensures that the proceeds of the sale of any goods whether precipitated by claims for cancellation and repossession or enforcement of forfeiture of the goods must still yield to the repossession provisions of the Act. Following such an interpretation ensures that the credit provider is not placed in a better financial position he would have been in had the contract not been breached. It also ensures protection of an already fiscally pressurised consumer in line with the purposes of the Act.²⁷⁹⁵

6.5.2.1.4. Direct Regulation of Penalty Stipulations by the Act

The Act prohibits certain provisions in a credit agreement.²⁷⁹⁶ A provision found to be unlawful in terms of the Act will be deemed void as from the date that the provision purported to take effect.²⁷⁹⁷ Section 90 (2) lists no less than fifteen categories of unlawful provisions, most of which contain a number of sub-categories. The scope of this discussion is not to look at unlawful stipulations *per se*, but rather to examine whether, through any of these provisions, the Act prohibits penalty or forfeiture clauses.

²⁷⁹⁴ 1955 2 All SA 130 (A).

²⁷⁹⁵ Section 3 of the Act.

²⁷⁹⁶ Section 90 of the Act.

²⁷⁹⁷ Section 90 (3) of the Act.

Section 90 (2)(i)(i) prohibits a provision whereby a consumer agrees to forfeit any money to the credit provider if the consumer either exercises the right of rescission in terms of section 121, except to the extent contemplated in section 121 (3)(b)²⁷⁹⁸ or if the consumer fails to comply with a provision of the agreement before the consumer receives any goods or services in terms of that agreement.²⁷⁹⁹ Section 121 refers only to lease agreements and instalment agreements and allows a consumer to terminate a credit agreement within five business days after the date on which the agreement was signed by the consumer if such agreement was entered into at any location other than the registered business premises of the credit provider. This is commonly referred to as a cooling-off right. Section 121 provides that when a consumer exercises his right in terms of section 121 the credit provider must refund the money the consumer has paid within seven business days after the delivery of the notice to terminate,²⁸⁰⁰ but the credit provider may require payment from the consumer for the reasonable cost of having any goods returned to the credit provider and restored to a saleable condition and a reasonable rent for the use of those goods for the time that the goods were in the consumer's possession, unless the goods had not been removed from their original packaging and it is evident that they have remained unused. The section thus prohibits a penalty clause in terms of which a consumer will have to forfeit money where he has exercised his cooling-off right. A credit receiver may, however, recoup any expenses it incurred through the terminated transaction.²⁸⁰¹

²⁷⁹⁸ Section 90 (2)(i) of the Act.

²⁷⁹⁹ Section 90 (2)(i) of the Act. Section 121 is discussed briefly in paragraph 6.2.1.2 *supra*.

²⁸⁰⁰ Section 121 (3)(a) of the Act.

²⁸⁰¹ Section 121 (3)(b)(i) and (ii) of the Act. Section 64 of the Italian Consumer Code stipulates that in the event of a contract concluded outside of the credit provider's commercial premises and long distance contracts, the consumer has the right to terminate the contract without providing a reason and without suffering a penalty within ten days from the date the goods were ordered or where the contract concerns a service then from the date the information was received or from the date that the goods were received (Bessone 2009 407). A long distance contract is defined in section 50 of the Consumer Code as a contract between a supplier and consumer, where goods or services are supplied to the consumer and which contract is concluded with the assistance of a system of sale or of performance of services which are arranged at a distance by the supplier and which exclusively utilise one or more methods of distance communication. The same section defines 'methods of distance of communication' as any method of communication which does not include the physical presence, of either the supplier or the consumer (Bertuzzi and Cottarelli 2009 133 and fn 7). Alessi gives as examples of these methods: telephone, fax and television sales (in Bessone 2009 406). Interestingly enough, Alessi describes this cooling-off right as a new and unprecedented introduction to Italian law by the European Directive (*ibid*).

The second part of section 90 (2)(i)(ii) prevents a credit consumer from having to forfeit any money where the consumer fails to comply with a provision of the agreement before the consumer receives any goods or services in terms of that agreement. Where a consumer breaches the contract prior delivery of the goods, it would be unlawful for the credit provider, in terms of this section, to demand, collect or keep any funds from the credit consumer. In other words a credit provider will not be able to levy a penalty on a consumer who has failed to comply with any provisions of the agreement before receiving the goods or services. This applies to all credit agreements.²⁸⁰² It is submitted that the credit provider may be entitled to retain part of the monies paid over by the consumer to cover any reasonable disbursements incurred by the credit provider.

It is submitted that in the event of breach by the consumer, after delivery of the goods,²⁸⁰³ the consumer would be liable for the contracted penalty and such penalty clause would then become subject to the Conventional Penalties Act, not being otherwise regulated by the National Credit Act and therefore not subject to section 172 (1) of the Act.

Further clauses or terms in a credit agreement prohibited by the Act are consent clauses to pay a pre-estimation of legal costs.²⁸⁰⁴ A credit provider and consumer may not include in their agreement a provision which purports to give the consumer's consent to pay a pre-determined value of costs relating to enforcement of the agreement, except in certain circumstances, which are consistent with Chapter 6 of the Act. Furthermore, a credit provider may not limit its liability for an action taken in the enforcement of a credit agreement.²⁸⁰⁵ In other words, it is submitted, that the credit provider would be prohibited from incorporating a clause to the effect that in the event of the credit provider initiating action against a consumer in an attempt to enforce a credit agreement and in the event of the credit provider not succeeding in such action, the credit provider's liability is limited to the value of the goods or credit advanced or that

²⁸⁰² This submission is made on the basis of the word 'or' separating sections 90 (2)(i)(i) and 90 (2)(i)(ii) of the Act.

²⁸⁰³ In instances where section 121 does not apply,

²⁸⁰⁴ Section 90 (2)(k)(iv) of the Act.

²⁸⁰⁵ Section 90 (2)(k)(v) of the Act.

the provider only need cover costs of its own attorneys and not those of the consumer, irrespective of the outcome.²⁸⁰⁶ It is submitted that if the clauses contemplated in sections 90 (2)(k)(iv) and 90 (2)(k)(v), had been allowed to be included in a credit agreements, these would be a species of penalty clause. In other words clauses such as these could be contemplated by the parties *in terrorem* of the consumer, that is to dissuade a breach and it is submitted, but for the inclusion of these sections in the Act these clauses would have fallen under scrutiny of the courts in terms of the Conventional Penalties Act. That is, but for section 172 (1) of the Act, the courts would have been in a position to determine whether penalties, such as these, were excessive. The courts will still have to determine same when such clauses are included in credit agreements that fall outside the scope of the National Credit Act.

The Conventional Penalties Act is to a large extent less intrusive in terms of what the parties may or may not include as penalty stipulations; the National Credit Act being the initial regulating force and therefore the point of departure for any practitioner scrutinising a penalty stipulation in a credit agreement. The necessity to regulate penalty stipulations is patent especially when taking into consideration the often unequal bargaining power between a credit consumer and a credit provider. One of the purposes of the Act is to protect consumers by, *inter alia*, promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers and addressing and correcting imbalances in negotiating power between consumers and credit providers.²⁸⁰⁷ Having sections in the Act regulating the administration of penalty stipulations goes a long way to achieving this balance. Consumers would otherwise be vulnerable to hefty penalty clauses without being able to resort to specific restrictions in the Act and either facing expensive court action to argue that such penalties fall foul of the Conventional Penalties Act or forego this option (due to dissuasive costs of litigation) and simply pay the penalty.

²⁸⁰⁶ Where such a clause or a similar clause attempting to limit the credit provider's liability is incorporated in the credit agreement, then such clause, it is submitted, would be severable from the rest of the agreement.

²⁸⁰⁷ Section 3.

6.5.2.1.5. Early Settlement and Prepayments

While a penalty stipulation is understood to be a clause in a contract, that would be activated upon breach by the consumer, in credit agreements the parties may agree that upon early settlement of the debt *in toto* or upon the consumer paying an unexpected sum(s) to extinguish part of the debt, that the consumer will suffer a penalty. In terms of the common law a debtor is entitled to settle a debt in advance if the payment was deferred in his interest.²⁸⁰⁸ If the date for payment was set in the interest of the creditor or in the interest of both parties, the debtor may not prepay his debt without the creditor's consent.²⁸⁰⁹ Thus, according to general principles, a debtor may only settle an interest bearing debt if he pays all future interest as well.²⁸¹⁰

Early settlement of credit agreements or early payments of amounts in terms of a credit agreement are governed by the National Credit Act. In the previous dispensation, the Usury Act²⁸¹¹ entitled a consumer to prepay the outstanding debt at any time. Where revolving credit was involved, finance charges were, in terms of the Usury Act, calculated on the outstanding balance of the principal debt from time to time,²⁸¹² thus prepayment would automatically reduce the finance charges payable. Where fixed-sum contracts were concerned, that is where finance charges were pre-computed, the consumer was bound to allow a maximum of ninety days to elapse from the date of the transaction before he was entitled to give notice of his wishing to redeem his settled debt, and furthermore the consumer had to allow a period for the notice itself to elapse (a maximum of ninety days) before he was entitled to settle his outstanding debt.²⁸¹³ Essentially, after concluding the agreement the consumer was 'locked-in' to the credit

²⁸⁰⁸ Otto in Scholtz 2014 at paragraph 9.5.3.1.

²⁸⁰⁹ *Ibid.*

²⁸¹⁰ Voet *Commentarius ad Pandectas* 12 1 20, Van Leeuwen *Het Rooms-Hollands-Regt* 4 40 5, Van der Linden *Regtsgeleerd, Practicaal en Koopmans Handboek* 1 14 9 3, Van der Keessel, *Theses Selectae* n 542, Huber *Heedendaegse Rechtsgeleertheit* 3 38 14, 3 38 15, *Kelly v Holmes Bros* 1927 OPD 29, *McCabe v Burisch* 1930 TPD 261, *Bernitz v Euvard* 1943 AD 595, *Dold v Bester* 1984 1 SA 365 (D), Otto and Otto 2013 74, Otto JM 'Vervroegde Betaling van 'n Kontraktuele Skuld' 2006 *THRHR* 175, and Otto JM 'Vervroegde Betaling van Skulde van Verbruikerskredietkontrakte' 2006 *THRHR* 349.

²⁸¹¹ More specifically in terms of section 6A of the Usury Act.

²⁸¹² Section 2 (5) of the Usury Act.

²⁸¹³ Section 3A (1) of the Usury Act; cf also Grové and Otto 2002 90.

agreement for up to one hundred and eighty days. This had the effect of a penalty stipulation, albeit it could not be tempered by the Conventional Penalties Act as by settling his debt early the consumer was not in breach of the agreement.

In terms of section 125 (1) of the National Credit Act²⁸¹⁴ a consumer or guarantor is entitled to settle a credit agreement at any time, with or without advance notice to the credit provider. Section 125 (2) of the Act sets out that the amount required to settle a credit agreement must include the unpaid balance of the principal debt at the time of settlement plus the unpaid interest and all other fees or charges due by the consumer up to the date of settlement.²⁸¹⁵ The requirements for settlement listed in section 125 (2) appear to be a closed list. This submission is based on the wording of the section which states: '[t]he amount required to settle a credit agreement is the total of the following amounts' where after the unpaid balance of the principal debt and the unpaid interest charges, fees and other charges up to the date of settlement are listed. While the section does not specifically oust the charging of a penalty in the event of early settlement, it is submitted that such penalty will not be permitted, given the phrasing of this subsection as well as the phrasing of the following subsection which deals with early settlement of large agreements²⁸¹⁶ by the consumer or guarantor.²⁸¹⁷

The situation is different in terms of large agreements, here one can draw a likeness to the situation under the Usury Act. The National Credit Act, more specifically section 125 (2)(c) differentiates between credit agreements with a fixed rate of interest and those with variable interest rates.

²⁸¹⁴ As read with section 122 (1) of the Act.

²⁸¹⁵ Section 125 (2)(a) and (b).

²⁸¹⁶ A credit agreement is a large agreement if it is a mortgage agreement or if the principal debt under that transaction or guarantee falls at or above the higher of the thresholds determined by the Minister by notice in the Gazette. Presently these are agreements where the principal debt exceeds R250 000 (GN 713 1 June 2006). Pawn transactions and credit guarantees are not large agreements regardless of thresholds (section 9 (4) read with section 7 (1)(b)).

²⁸¹⁷ *Unius inclusio est alterius exclusio* – 'inclusion of the one is exclusion of the other'.

Where a large agreement is entered into at a fixed rate of interest, the credit provider is entitled to levy an early termination charge which amounts to no more than a prescribed charge²⁸¹⁸ or where there is no prescribed charge, a charge which is equal to but not more than, the interest that would have been payable under the agreement for a period equal to the difference between three months and the period of notice of settlement if any given by the consumer. In other words the credit provider is entitled to charge a maximum of three months of interest as an early termination fee in the case of larger agreements.²⁸¹⁹

Where the parties enter into a large agreement where the rate of interest is not fixed, the credit provider is entitled to charge an early termination charge equal to no more than the interest that would have been payable under the agreement for a period equal to the difference between three months and the period of notice of settlement if any, given by the consumer.²⁸²⁰

Pre-settlement of an entire debt is treated differently to early payments made by the consumer to decrease the principal debt outstanding. A consumer is entitled to prepay any amount to a credit provider under a credit agreement at any time and without notice or penalty,²⁸²¹ and a credit provider is obliged to accept such payment.²⁸²² The Act further directs that the credit provider must credit each payment first to any due but unpaid interest or charges and finally to reduce the amount of the principal debt.²⁸²³ No distinction is made between the size of agreements in terms of early payments. Otto²⁸²⁴ submits that upon early payments or payments greater than the required amount, interest payable ought to be reduced accordingly and proportionately upon such payment, due to the regulations dealing with the calculation of interest. In terms of the regulations interest is calculated by multiplying the deferred amount for the day by the interest rate and dividing the result by the number of days in the year.²⁸²⁵

²⁸¹⁸ No charge has been prescribed.

²⁸¹⁹ Section 125 (2)(c)(i) of the Act.

²⁸²⁰ Section 125 (2)(c)(ii) of the Act.

²⁸²¹ Section 126 (1) of the Act.

²⁸²² Section 126 (2) of the Act.

²⁸²³ Section 126 (3) of the Act.

²⁸²⁴ Otto in Scholtz 2014 paragraph 9.5.3.3.

²⁸²⁵ Regulation 40 (2)(a) GN R489 of 31 May 2006.

6.6. Declaratory Order

An available remedy is a declaratory order. Courts are, by virtue of section 19 (1)(a)(iii) of the Superior Court Act,²⁸²⁶ empowered in this regard:²⁸²⁷

[I]n its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

To qualify as an 'interested person' the applicant must have a real and not merely an abstract or intellectual interest in the right or obligation. Accordingly, a declaratory order may be made to resolve a pertinent dispute on liability based on certain assumed facts. The court must clearly be presented with the interested parties to be bound by the order and therefore it will be necessary to join the interested parties to the proceedings, thereby providing them an opportunity to be heard. A person who is not a party to a contract will have to be joined if he will be affected by the outcome of the declaratory order. Accordingly, section 19 has abrogated the common law rule that there be an existing dispute between the parties.²⁸²⁸

An important consideration for a court when deciding whether to exercise its discretion is the undesirability to hearing disputes piecemeal – thus where the matter involves a breach of contract or some other invasion of rights which would entitle the aggrieved party to claim consequential relief – *prima facie*, the case would not be one for a declaratory order.²⁸²⁹ The following are examples of where a declaratory order would be considered:²⁸³⁰

[I]f, for example, a declaratory order would bring the matter to finality more quickly than an action for consequential relief that would require a long period of notice, (*Standard Bank of SA Ltd v Trust Bank of SA Ltd* 1968 1 SA 102 (T)) or if a declaratory order would prevent possibly abortive proceedings (*Turner and Co (Pvt) Ltd v Arcturus Road Council* 1958 1 SA 409 (SR) 410 E-F) or a potential

²⁸²⁶ Act 10 of 2013.

²⁸²⁷ Act 59 of 1959. Previously courts were guided by the common law power to issue declaratory orders.

²⁸²⁸ Christie and Bradfield 2011 559.

²⁸²⁹ Christie and Bradfield 2011 560-561.

²⁸³⁰ *Ibid.*

multiplicity of future proceedings, it may be a proper case for the exercise of the court's discretion. (*African Bank v Weiner* 2004 6 SA 570 (C) 583)

Declaratory orders are often sought in order to resolve interpretational difficulties or ambiguities, particularly of new legislation. The National Credit Act has required this attention. The Act empowers the National Credit Regulator to make application to court for a declaratory order on the interpretation or application of any provision of the Act.²⁸³¹ The Court in *African Bank Limited v Additional Magistrate Mayambo N.O and Two Others*²⁸³² found that the court's power to grant declaratory relief on application by the Regulator is much wider than to do so under the Supreme Court Act or the common law.

6.7. European Union

The issue of legal redress when dealing with cross-border trade has obviously required attention in the European Union. The efforts to harmonise the different systems are very interesting, mostly because it is largely consumer orientated.²⁸³³ The European Commission views adequate means of redress for consumers as a matter both of effective competition and of increasing consumer confidence in cross-border sales.²⁸³⁴ Industry as well as consumer groups, have been prompted to set up schemes to deal adequately with consumer complaints and for co-operation between different ombudsman schemes.²⁸³⁵ In addition, the European Commission is seeking to find ways of encouraging Member States to

²⁸³¹ Section 16 (1)(b)(ii).

²⁸³² 2010 ZAGPPHG 60.

²⁸³³ The issue was considered as early as 1992 in the Sutherland Report *The Internal Market After 1992 – Meeting the Challenge*, Report to the EC Commission by the High Level Group. Since the coming into force of the Amsterdam Treaty, jurisdiction and recognition of enforcement of judgments in civil matters in the Member States has been high on the agenda and a number of important legislative initiatives have resulted in order to handle the main problems in the practical operation of cross-border litigation such as cost, delay, lack of transparency in relation to legal procedures and substantial differences between national legal systems. However, a discussion on this topic is beyond the scope of this work. For further reading cf Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.147 and for a general discussion cf Howells and Weatherill 2005 Chapter 2.

²⁸³⁴ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 121.30.

²⁸³⁵ Commission Communication 'Financial Services: Enhancing Consumer Confidence' COM (97) 309 7.

facilitate legal redress for consumers by simplifying procedures, extending legal aid and by granting access to the courts for consumer organisations with a legitimate interest in protecting consumer rights.²⁸³⁶ A Green Paper and a Communication on these issues were issued by the Commission in the 1990s,²⁸³⁷ and in 2009, the Commission communicated the enforcement dates.²⁸³⁸ The issue of legal redress has also been reflected in a number of Directives, such as the Unfair Contract Terms Directive.²⁸³⁹ The European Commission has placed great emphasis on alternative methods of relief to court litigation.

To address the issue of legal redress the Court of Justice began to develop a theory of effective remedies which is having a significant impact on domestic law.²⁸⁴⁰ Presently, it is not possible for aggrieved individuals to bring an action against a Member State (or another private party) directly in the European Court; the choice is between relying on the Commission to act and taking action at national level.²⁸⁴¹ While remedies at national level have always been held by the court to be a matter for national law, the court has formulated some ground rules which should apply:²⁸⁴²

- the conditions attaching to the availability of remedies must be no less favourable than those governing the same right of action in an internal matter (principle of equivalence);
- national rules must not make it impossible or excessively difficult to exercise European Union law rights: if necessary national rules may have to be set aside (principle of effectiveness);
- interim relief should be available pending the establishment of European Union law rights.²⁸⁴³

²⁸³⁶ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 121.30.

²⁸³⁷ Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market, COM (93) 576; Commission Communication on the Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market, COM (96) 13 final. Cf also Commission Communication 'Financial Services: Enhancing Consumer Confidence', COM (97) 309 6.

²⁸³⁸ Commission Communication on the Enforcement of the Consumer Acquis, COM (2009) 330.

²⁸³⁹ Directive 93/13/EEC OJ L95 21.4.1993 29.

²⁸⁴⁰ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 121.31.

²⁸⁴¹ *Ibid.*

²⁸⁴² *Ibid.*

²⁸⁴³ *Comet v Produktschap* Case 45/76 1976 ECR 2043, ECJ, *R v Secretary of State for Transport, ex parte Factortame* Case C-213/89 1990 ECR I-2433, ECJ.

The court has sought to maintain a balance between national procedural autonomy and the need for effective remedies.²⁸⁴⁴

This has required some practical innovations, for example, national limitation periods may not start to run until the Member State concerned has properly implemented the Directive on which the rights are based,²⁸⁴⁵ national rules relating to financial compensation in respect of breach of European Union-based rights must result in adequate compensation for loss actually suffered by the individual²⁸⁴⁶ and a national procedural rule which prevents a national court from considering of its own motion whether a measure of domestic law is compatible with European Union law may have to be set aside.²⁸⁴⁷ Together with these general principles developed by the Court of Justice, the legislative institutions have taken initiatives relating to legal redress and the settlement of consumer disputes.²⁸⁴⁸ These range from non-binding Recommendations,²⁸⁴⁹ to Directives²⁸⁵⁰ and include Regulations.²⁸⁵¹ The Court of Justice has also allowed damages claims in the event where a loss is caused to a consumer due to breach of European Union law by a Member State.²⁸⁵²

²⁸⁴⁴ The following from *Peterbroeck, Van Campenhout & Cie SCS v Belgium* Case C-312/93 1995 ECR I-4599, 1996 1 CMLR 793, ECJ at paragraph 14 is of relevance: 'Each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration'.

²⁸⁴⁵ *Emmott* 1991 Case C-208/90 ECR I-4269, 1991 3 CMLR 894, ECJ.

²⁸⁴⁶ *Marshall v Southampton and South-West Hampshire Area Health Authority* Case C-271/91 (No 2) 1994 QB 126, 1993 3 All ER 586, ECJ.

²⁸⁴⁷ *Peterbroeck, Van Campenhout & Cie SCS v Belgium* Case C-312/93 1995 ECR I-4599, 1996 1 CMLR 793, ECJ, *Van Schijndel and Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* Cases C-430 and 431/93 1995 ECR I-4705, 1996 1 CMLR 801, ECJ. Cf Rott in *Goode Consumer Credit Law and Practice* 2014 paragraph 121.33.

²⁸⁴⁸ Rott in *Goode Consumer Credit Law and Practice* 2014 paragraph 121.34.

²⁸⁴⁹ Such as the Recommendation on out-of-court settlement of disputes.

²⁸⁵⁰ Such as the Directive on injunctions for the protection of consumer interests.

²⁸⁵¹ Such as the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

²⁸⁵² 'This principle applies to loss caused by breach of directly effective Treaty rules as well as to a failure to implement a Directive correctly and within the implementation period. In consumer law, it was applied, for example, in the package travel case of *Dillenkofer (Erich Dillenkofer and others v Federal Republic of Germany)* Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 1996 ECR I-4845, ECJ.' (Rott in *Goode Consumer Credit Law and Practice* 2014 paragraph 121.35-50).

A Directive on Injunctions for the Protection of Consumers' Interests²⁸⁵³ was designed to operate in combination with a number of other consumer protection Directives, such as for example, the Unfair Contract Terms,²⁸⁵⁴ Distance Marketing of Financial Services²⁸⁵⁵ and the Unfair Commercial Practices Directives.²⁸⁵⁶ In 2009, the Injunctions Directive was replaced by a consolidated version, Directive 2009/22/EC on Injunctions for the Protection of Consumers' Interests.²⁸⁵⁷ These Directives require that the Member State ensure effective remedies against infringements.²⁸⁵⁸ 'Infringements' are stated to cover any act contrary to one of the Directives listed in an annexure to the Directives as transposed into the legal order of the Member States and which harms the collective interests of consumers.²⁸⁵⁹ The 1987 Consumer Credit Directive was one of the directives that were included in the annexure to the old 1998 Directive 98/27/EC and it is now included in annexure I to Directive 2009/22/EC.²⁸⁶⁰ The preamble to the Injunctions Directive explains the concept of 'collective interests' as 'interests which do not include the accumulation of interests of individuals who have been harmed by an infringement without prejudice to individual actions brought by individuals who have been harmed by an infringement'. The injunctive procedure is therefore designed to protect collective consumer interests rather than to provide individual remedies.²⁸⁶¹ Actions may be brought

²⁸⁵³ Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests OJ L166 11.6.1998 51 (hereinafter the 'Injunctions Directive'). This Directive was implemented in England by the Stop Now Orders (EC Directive) Regulations 2001 SI 2001/1422, which were replaced by Part 8 of the Enterprise Act 2002 Ch. 40.

²⁸⁵⁴ Directive 93/13/EEC OJ L95 21.4.93 29.

²⁸⁵⁵ Directive 2002/65/EC OJ L271 9.10.2002 16.

²⁸⁵⁶ Directive 2005/29/EC OJ L376 27.12.2006 21. Cf Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.141.

²⁸⁵⁷ OJ L110 1.5.2009 30 (hereinafter also referred to as the 'Injunctions Directive'). In 2004, the Injunctions Directive was supplemented by the Regulation on Consumer Protection Co-operation (Regulation 2006/2004/EC on Co-operation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws, which Regulation was recently updated by Regulation 954/2011/EU. The Regulations' aims' are to facilitate co-operation between public authorities responsible for enforcement of the laws that protect consumers' interests in dealing with intra-European Union infringements and to contribute to the smooth functioning of the internal market, the quality and consistency of enforcement of the laws that protect consumers' interests and the monitoring of the protection of consumers' economic interests.

²⁸⁵⁸ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.141.

²⁸⁵⁹ Article 1 of Directive 2009/22/EC OJ L110 1.5.2009 30.

²⁸⁶⁰ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.141.

²⁸⁶¹ Remedies available must include an injunction (including a summary interim injunction), the publication of the decision and/or publication of a corrective statement where appropriate, and ('in so far as the legal system of the Member State concerned so permits' penalties for failure to comply with the injunction (article 2(1)(c)) of Directive 2009/22/EC OJ L110 1.5.2009 30).

in the courts of other Member States where the infringement has a cross-border element, without prejudice to the rules of private international law with respect to the applicable law.²⁸⁶² In such instances the law applicable will be either the law of the Member State where the infringement originated or the law of the Member State where it has its effects.²⁸⁶³

Collective redress mechanisms have also been a focus of the European Commission, with a variety of mechanisms having been developed in recent years in the Member States.²⁸⁶⁴ The Commission published a Green Paper on collective redress mechanisms in November 2008²⁸⁶⁵ in which European Union legislation in this field was proposed.²⁸⁶⁶ The Green Paper was followed by a consultation paper in May 2009.²⁸⁶⁷ The Commission launched another public consultation on collective redress in 2011.²⁸⁶⁸ Resistance by industry was strong and some Member States, in particular Germany, vigorously opposed European Union legislation in this area as well.²⁸⁶⁹ Accordingly, Member States have not yet agreed on binding legislation.²⁸⁷⁰ However, in 2013, the Commission published a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning

Member States are to designate the entities qualified to bring an action; these may be either independent public bodies responsible for protecting consumer interests, or organisations whose purpose is to protect consumers' interests or both (article 3(a) and (b) of Directive 2009/22/EC OJ L110 1.5.2009 30). A list of such 'qualified entities' in each Member State is regularly published by the Commission. The Injunctions Directive thus requires the introduction of a limited form of representative action, albeit allowing substantial discretion to the Member States in designating the entities qualified to act.

²⁸⁶² Article 2(2) of Directive 2009/22/EC OJ L110 1.5.2009 30.

²⁸⁶³ Article 4 of Directive 2009/22/EC OJ L110 1.5.2009 30. However, it appears that the Directive has rarely been used (cf Micklitz, Rott, Docekal and Kolba, *Verbraucherschutz durch Unterlassungsklagen*, Nomos 2007 taken from Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.141).

²⁸⁶⁴ Cf Civic Consulting, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union*, 2008

(ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf)(14.02.2015).

²⁸⁶⁵ COM (2008) 794.

²⁸⁶⁶ Centre for Consumer Law of the *Katholieke Universiteit Leuven*, An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, 2007, available at ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf.

²⁸⁶⁷ Available at ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf.

²⁸⁶⁸ Commission Staff Working Paper *Towards a Coherent European Approach to Collective Redress* SEC 2011 173.

²⁸⁶⁹ *Ibid.*

²⁸⁷⁰ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.143.

violations of rights granted under Union Law,²⁸⁷¹ recommending generally that Member States should have collective redress mechanisms for both injunctive and compensatory relief and that the collective redress procedures should be fair, equitable, timely and not prohibitively expensive, while it at the same time respects that Member States have developed different types of collective redress mechanisms.²⁸⁷²

A further alternative method of redress identified by the Commission is the out-of-court settlement of consumer disputes.²⁸⁷³ The Commission has made a Recommendation on the principles applicable to bodies responsible for such out-of-court settlements.²⁸⁷⁴ Out-of-court procedures have been developed in many Member States in order to tackle the issues associated with court-based dispute settlement in consumer disputes, such as problems of costs, delay and formalities associated therewith.²⁸⁷⁵ These factors are more prominent when dealing with cross-border disputes and Member States have provided considerable variations in the systems available as well as with regards the status and binding nature of the decisions taken.²⁸⁷⁶

The European Commission has also initiated the creation of a European Extra-Judicial Network which has established national contact points or 'Clearing

²⁸⁷¹ Commission's Communication *Reinforcing Sanctioning Regimes in the Financial Services Sector* COM 2010 716 4.

²⁸⁷² The following from Rott is of relevance and interest with reference to the Commission's Recommendation: 'The Recommendation shows clear preferences for certain features of collective redress mechanisms, not least in order to distinguish them from the US American model of class actions that meets general distrust by European businesses and governments alike. Thus, the Recommendation shows a certain preference for representative (rather than group) action. A gate-keeper procedure, the loser pays principle and opt-in procedures are recommended. Lawyers' fees shall be regulated in such a way that they do not set an incentive for unnecessary collective actions, and punitive damages prohibited. Third party funding shall be admissible but safeguards are recommended against conflicts of interest and against undue influence by the third party, as well as against excessive interest on the funds that are made available. Given the experience with the use of recommendations by the European Commission, the Recommendation on collective redress mechanisms may well be only the first step, and in the event of insufficient compliance by Member States with the principles, legislative action may follow' (Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.143).

²⁸⁷³ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.144.

²⁸⁷⁴ Commission Communication and Commission Recommendation 98/257/EC on Principles Applicable to Bodies Responsible for Out-of-Court Settlement of Consumer Disputes OJ L115 17.4.1998 31 see X[4.111]

²⁸⁷⁵ *Ibid.*

²⁸⁷⁶ *Ibid.*

Houses' in each of the Member States.²⁸⁷⁷ A specific network for disputes involving financial services has also been established, known as FIN-NET or Financial Services Complaints Network, which body links alternative dispute resolution schemes for financial services in each Member State.²⁸⁷⁸ Other forms of alternative dispute resolution such as, for example, mediation, have also been the subject of Commission initiatives, including a second Recommendation²⁸⁷⁹ on the principles applicable to the extra-judicial bodies charged with the consensual resolution of consumer disputes. In 2008, the Mediation Directive²⁸⁸⁰ was adopted, which promotes the amicable settlement of cross-border disputes by encouraging the use of mediation and by ensuring a sound relationship between the mediation process and judicial proceedings.²⁸⁸¹ The 2008 Credit Agreements Directive, more particularly article 24, directs Member States to ensure that adequate and effective out-of-court dispute resolution procedures for the settlement of consumer disputes concerning credit agreement are put into place. Member States are entitled to use existing bodies where applicable²⁸⁸² and are also directed to encourage those bodies to cooperate in order to also resolve disputes concerning cross-border credit agreements.²⁸⁸³

²⁸⁷⁷ Cf Council Decision 2001/470/EC establishing a European Judicial Network in Civil and Commercial Matters OJ L174 27.6.2001 25 amended by Council Decision 568/2009/EC OJ L168 30.6.2009 35 and Council Resolution on a Community-wide Network of National Bodies for the Extra-judicial Settlement of Consumer Disputes OJ C155 6.6.2000 1.

²⁸⁷⁸ Participating schemes are expected to apply Recommendation 98/257/EC. This Recommendation deals with seven broad principles, namely, the principle of independence; the principle of transparency; the adversarial principle; the principle of effectiveness; the principle of legality; the principle of liberty and the principle of representation.

²⁸⁷⁹ Commission Communication on Widening Consumer Access to Alternative Dispute Resolution COM 2001 161, Commission Recommendation 2001/310/EC on the Principles Applicable to the Extra-judicial Bodies Charged with the Consensual Resolution of Consumer Disputes OJ L109 19.4.2001 56 and cf also the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law COM 2002 196.

²⁸⁸⁰ 2008/52/EC OJ L136 24.5.2008 3.

²⁸⁸¹ The mediation process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It excludes attempts made by the court to settle a dispute in the course of judicial proceedings concerning the dispute in question (Directive 2008/52/EC (article 3(a) OJ L136 24.5.2008 3). The Directive allows a court before which an action is brought, where appropriate and having regard to all the circumstances of the case, to invite the parties to use mediation in order to settle the dispute (article 5 of Directive 2008/52/EC OJ L136 24.5.2008 3). The Directive also aims to ensure that mediation agreements can be made enforceable through by a court (article 6 of Directive 2008/52/EC OJ L136 24.5.2008 3). Parties who engage in mediation procedures shall not be subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry prescription periods during the mediation process (article 8 of Directive 2008/52/EC OJ L136 24.5.2008 3).

²⁸⁸² Article 24 (1) of the 2008 Credit Agreements Directive.

²⁸⁸³ Article 24 (2) of the 2008 Credit Agreements Directive.

Despite the frequent mention of alternative dispute resolution methods in policy documents and in various directives, the availability of alternative dispute systems and their efficiency varies greatly between the individual Member States.²⁸⁸⁴ The Commission thus tabled the proposal for a Directive on alternative dispute resolution for consumer disputes,²⁸⁸⁵ which led to the adoption of Directive 2013/11/EU²⁸⁸⁶ in May 2013. This Directive requires Member States to provide for alternative dispute resolution methods in all sectors of business to consumers relations and to ensure that consumers can find information about the relevant alternative dispute resolution system(s) easily.²⁸⁸⁷

The above is a general overview of the lengths that the European Commission has gone through in order to regulate cross-border legal redress. It is interesting to note that the greater part of the Directives, Communications and Regulations focus on protecting the consumer and avoiding litigation. The reasons for this may very well be that the discrepancy in the litigation procedure in different Member States is too diverse to synchronise completely. Just comparing

²⁸⁸⁴ Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.146.

²⁸⁸⁵ COM (2011) 793. Hereinafter the 'Alternative Dispute Resolution Directive'.

²⁸⁸⁶ Directive 2013/11/EU OJ L165 18.6.2013 63.

²⁸⁸⁷ Article 5 (1) and (2) of Directive 2013/11/EU OJ L165 18.6.2013 63. The following from Rott is relevant: 'Member States can, however, allow ADR entities to adopt procedural rules that enable them to refuse to deal with a given dispute in certain situations; although that liberty is again restricted, as far as monetary thresholds are concerned, by the general requirement that consumers' access to ADR must not be significantly impaired (Directive 2013/11/EU (OJ L165 18.6.2013 p 63), art 5(4) and (5)). The Directive makes the ADR principles of expertise, independence and impartiality, transparency, effectiveness and fairness (as laid down in the above-mentioned Recommendations 98/257/EC and 2001/310/EC) legally binding, adds the principles of liberty and legality and establishes in great detail what these principles entail (Directive 2013/11/EU (OJ L165 18.6.2013 p 63), arts 6 to 11). The principle of effectiveness requires, amongst others, that ADR procedures should be free of charge or available at a nominal fee for consumers, and disputes should be resolved within 90 days (Directive 2013/11/EU (OJ L165 18.6.2013 p 63), art 6(c) and (e)). Importantly, Member States must ensure that recourse to ADR procedures does not result in the expiry of limitation or prescription periods for judicial proceedings (Directive 2013/11/EU (OJ L165 18.6.2013 p 63), art 12) (in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.146). The Alternative Dispute Resolution Directive has also been complimented by Regulations on 'Consumer Online Dispute Resolution Regulation (Regulation on consumer ADR) (Regulation 254/2013/EU (OJ L165 18.6.2013 1)'. This allows consumers who are cross-border shopping online to place a complaint on a single platform which then sends the complaint to the competent national alternative dispute resolution entity and is aimed to facilitate the resolution of the dispute within thirty days, for example by providing a uniform complaint form that will be available in all the official languages of the European Union. The whole dispute settlement procedure will be conducted online (article 9 and 10 (a) of Regulation 254/2013/EU OJ L165 18.6.2013 1) (Rott in Goode *Consumer Credit Law and Practice* 2014 paragraph 124.146).

England and Italy's methods of enforcing the rights of the credit provider in the event of breach of contract by the consumer corroborates this point.²⁸⁸⁸

The consumer protection orientated stance is patent when considering the 2008 Credit Agreements Directive. Protection of the credit consumer is found in the form of, for example and not limited to, adequate dissemination of information,²⁸⁸⁹ assessing the consumer's credit worthiness,²⁸⁹⁰ cooling-off rights of the consumer,²⁸⁹¹ allowing early repayment of debt with limits on penalties therefore,²⁸⁹² calculation of annual interest rate charges²⁸⁹³ and encouragement of alternative dispute resolution methods in order to avoid court-based litigation.²⁸⁹⁴ It is submitted that very little is incorporated in the 2008 Credit Agreements Directive with reference to the remedies available to the credit provider in the event of breach of contract by the consumer. There are only two articles in this Directive which refer directly to the credit provider's rights in the event of breach, that is sub-articles 2 (3) and (6). Where the consumer is in default and the credit provider and consumer enter into an arrangement in respect of deferred payment or repayment methods and such arrangements would most likely avert the possibility of legal proceedings concerning such default and the consumer would thereby be subject to terms less favourable than those laid down in the initial credit agreement, sub-article (2) 6 allows Member States to determine that only articles 1 to 4, 6, 7, 10 (1)(a) – (i), 10 (2)(l) – (r), 10 (4), 11, 13, 16 and 18 – 22 shall apply to such credit agreements. In the event that the credit agreement falls within the scope of sub-article 2 (3), which deals with overdraft facilities and credit agreements where the credit has to be repaid on demand or within three months, then only articles 1 to 3, 4 (1), 4 (2)(a) – (c), 4 (4), 6 – 9, 10 (1), 10 (4), 10 (5), 12, 15, 17 and 19 – 32, shall apply.

²⁸⁸⁸ Cf paragraphs 6.7 and 6.8 *infra* in this regard.

²⁸⁸⁹ Cf Chapter II and III of the 2008 Credit Agreements Directive.

²⁸⁹⁰ Cf article 8 of the 2008 Credit Agreements Directive. In a sense this is an indirect protection of the consumer, that is, protecting the consumer against his own (potentially harmful) decision making.

²⁸⁹¹ Cf article 14 of the 2008 Credit Agreements Directive.

²⁸⁹² Cf article 16 of the 2008 Credit Agreements Directive.

²⁸⁹³ Cf article 19 of the 2008 Credit Agreements Directive.

²⁸⁹⁴ Cf article 24 of the 2008 Credit Agreements Directive.

It is submitted that attempting to regulate, through the Credit Agreements Directive, Member States' national laws on remedies available to credit providers in the event of breach by consumers would involve an immense exercise, as all the jurisdictions and their methods would have to be analysed and one singular method would have to be suggested. This is a very invasive method of legislating even at European community level. A plausible alternative would be to legislate remedies for credit providers when confronted with breach by consumers for cross border transactions, this too, however, would involve a great deal of cost as attorneys, jurists and industry would have to familiarise and adapt to a new method of recovery when dealing with the enforcement of a cross-border credit agreement.

6.8. English Law

The English Consumer Credit Act of 1974, while detailed, is not a complete code in the continental sense and except where otherwise provided by the Act, the rights and obligations of the parties, like the remedies, are governed by the common law, by other legislation, by the terms of the agreement between the parties and by the terms of any security instrument made in connection with it.²⁸⁹⁵ Some of the common law rules relating to breach and remedies which are of particular relevance to consumer credit will be examined, before looking at the effects of the Consumer Credit Act.

Characterisation of credit agreements is important in English law as different agreements are regulated differently. For example, a sharp division is drawn between sale credit and loan credit and between reservation of the same title and the grant of security.²⁸⁹⁶ For example, the rights of sellers and buyers which are governed by the Sale of Goods Act, do not apply to loan contracts or to hire-

²⁸⁹⁵ Goode *Consumer Credit Law* 1989 46 and Goode *Consumer Credit Law and Practice* 2014 paragraph 45.5.

²⁸⁹⁶ Cf the Report of the Committee on Consumer Credit (Cmnd 4596) ch 4.2 and Goode *Consumer Credit Law* paragraph 2014 11.6.1.

purchase agreements.²⁸⁹⁷ The classification of a contract depends on the terms of the agreement between the parties.²⁸⁹⁸ *Prima facie* the name which the parties themselves attach to the transaction establishes its legal character, and if the contract document truly records the agreement between the parties, the fact that they may have chosen a type of agreement which has the effect of bypassing protective legislation is not a ground for rendering the transaction void or unenforceable.²⁸⁹⁹ The English courts will not allow evasion of a statute, avoidance of one is entirely legitimate.²⁹⁰⁰ So for example, if A and B agree that instead of A mortgaging his goods to B to secure a loan, A will sell the goods to B and take them back under a hire-purchase or conditional sale agreement, thus avoiding the Bills of Sale Acts, this would be considered a legitimate transaction.²⁹⁰¹ Thus if the parties genuinely intend that B shall become the owner of the goods and let them back to A as hirer, the courts will give effect to that intention.²⁹⁰² However, the name which the parties attach to the agreement is not conclusive and if the evidence shows that the document does not truly record the nature of the agreement between the parties, the courts can and will go behind the document to ascertain the true agreement of the parties²⁹⁰³; and if in light of this, the document that the parties have used does not conform to statutory requirements, the appropriate consequences will follow.

A brief look at some categories of credit agreements is necessary in order to understand what common law remedies are available for such contracts and how the Consumer Credit Act affects them.

A loan contract is an agreement by which one party, the lender, for the purpose of giving financial accommodation to another party, the debtor, pays money to that party or to a third party at the latter's request upon the terms, express or

²⁸⁹⁷ Goode *Consumer Credit Law* paragraph 2014 11.6.1.

²⁸⁹⁸ Goode *Consumer Credit Law* paragraph 2014 11.6.2.

²⁸⁹⁹ Goode *Consumer Credit Law and Practice* paragraph 2014 11.6.3.

²⁹⁰⁰ *Ibid.*

²⁹⁰¹ Goode *Consumer Credit Law and Practice* paragraph 2014 11.6.4.

²⁹⁰² *Yorkshire Railway Wagon Co v Maclure* 1882 21 Ch D 309, CA, 1999 *GCCR 1*, *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* 1934 2 KB 305 and Goode *Consumer Credit Law and Practice* paragraph 11.6.5.

²⁹⁰³ *Re Watson, ex p Official Receiver in Bankruptcy* 1890 5 QBD 27, *Polsky v S & A Services* 1951 1 All ER 1062n, Cf generally Goode *Hire-Purchase Law and Practice* 2nd edn, 1970 ch 4 and Goode *Consumer Credit Law and Practice* paragraph 2014 11.6.6.

implied, that the debtor is to repay the sum in question with any stipulated interest.²⁹⁰⁴ A transaction is not a loan transaction unless the payment by the lender is made with a view to giving the debtor financial accommodation.²⁹⁰⁵ The fact that, in pursuance of an entirely different transaction, money on behalf of another which is to be recouped from him later does not make such outlay of money a loan, if the purpose was not to provide financial assistance.²⁹⁰⁶ This point is important as it is material in considering what constitutes an agreement for the provision of credit for the purpose of the Consumer Credit Act.²⁹⁰⁷ So, for example, a bank that honours a cheque drawn on it by a customer whose account is not sufficiently in funds to meet the cheque, lends money to the customer.²⁹⁰⁸ This is because the whole purpose of the transaction is to provide financial accommodation in the same way as on an ordinary loan.²⁹⁰⁹ The fact that a customer is not in need of an overdraft facility and overdrew on his account by inadvertence does not alter the fact that, by issuing his cheque he impliedly requests, and by its honour receives, accommodation.²⁹¹⁰

A non-recourse loan, is an agreement where one party loans money to another and the latter does not incur a personal obligation to repay the loan and interest

²⁹⁰⁴ Goode *Consumer Credit Law and Practice* paragraph 2014 11.71.

²⁹⁰⁵ The same principle applies in relation to the definition of 'credit' for the purpose of the Consumer Credit Act 1974 (Goode *Consumer Credit Law and Practice* paragraph 11.71). Section 9 (1) of the Consumer Credit Act provides that 'credit' includes a cash loan and any other form of financial accommodation (cf also sections 9 (3) and (4)), however, the concept of credit has been described as 'peculiarly elusive' and Goode devotes a whole chapter to its elaboration (Goode *Consumer Credit Law and Practice* paragraph 23.61 chapter 24).

²⁹⁰⁶ Goode *Consumer Credit Law and Practice* paragraph 20104 11.72.

²⁹⁰⁷ *Potts' Executors v IRC* 1951 AC 443, *Potts' Executors v IRC, Re HPC Productions Ltd* 1962 Ch 466, 1962 ALL ER 37 and Goode *Consumer Credit Law and Practice* paragraph 2014 11.171.

²⁹⁰⁸ *Blackburn Building Society v Cunliffe Brooks & Co* 1882 22 Ch D 61, *CA, Cuthbert v Robarts, Lubbock & Co* 1909 2 Ch 226, CA.

²⁹⁰⁹ Goode *Consumer Credit Law and Practice* paragraph 2014 11.72.

²⁹¹⁰ Cf *The Office of Fair Trading v Abbey National plc* 2007 GCCR 7001 at 7021 for an analysis of 'unarranged overdrafts', 2008 EWHC 875 (Comm), *Barclays Bank v WJ Simms & Cooke (Southern) Ltd* 1980 1 QB 677 at 699 C-H. The Consumer Credit Act differentiates between such overdrafts, cf the definitions of 'authorised business overdraft agreement' and 'authorised non-business overdraft agreement' in s 189(1) introduced by SI 2010/1010 with effect from 30 April 2010 and Goode *Consumer Credit Law and Practice* paragraph 2014 11.72. The National Credit Act also differentiates between different credit agreements, however, the overdrawn cheque account is differentiated from the normal loan, the latter is classified as a credit transaction while the former as a credit facility. For a discussion on the classifications and categories of credit agreements which are regulated by the National Credit Act cf paragraph 4.4.4 *supra*. What is interesting is that both jurisdictions categorise credit agreements in order to apply different rules to them, be it through the common law or statutes.

out of his own moneys.²⁹¹¹ Rather, it is agreed that payment will be made from a designated fund or from the proceeds of a specified asset.²⁹¹² These agreements are known as non-recourse financing because the lender has no recourse to the borrower but only to the fund or asset charged or designated as the source of payment.²⁹¹³ However, discounting transactions,²⁹¹⁴ instalment sales²⁹¹⁵ and revolving charge accounts²⁹¹⁶ do not constitute loan agreements.

It is common to incorporate acceleration clauses²⁹¹⁷ in loan agreements under which the loan is repayable by instalments.²⁹¹⁸ Acceleration clauses allow the lender to call up the full outstanding balance of the loan if the borrower defaults in payment of any instalment.²⁹¹⁹ As long as the acceleration clause only provides for payment of the outstanding balance of the capital and does not require payment of pre-computed but not yet accrued interest, it will be valid and enforceable.²⁹²⁰ Otherwise, such a clause will be viewed as a penalty and struck down and held to be unenforceable.²⁹²¹

²⁹¹¹ Goode *Consumer Credit Law and Practice* paragraph 2014 11.73.

²⁹¹² *Mathew v Blackmore* 1857 1 H & N 762, *De Vigier v IRC* 1964 2 All ER 907, 1964 1 WLR 1073 and Goode *Consumer Credit Law and Practice* paragraph 2014 11.73.

²⁹¹³ Goode *Consumer Credit Law and Practice* paragraph 2014 11.73.

²⁹¹⁴ A discounting transaction is the raising of money by discounting a bill of exchange or sale of a debt (*IRC v Rowntree & Co Ltd* 1948 1 All ER 482, CA, *Chow Yoong Hong v Choong Fah Rubber Manufactory* 1962 AC 209, 1961 3 All ER 1163, PC, *Re George Inglefield Ltd* 1933 Ch 1, CA, *Olds Discount Co Ltd v John Playfair Ltd* 1938 3 All ER 275, *Lloyds and Scottish Finance Ltd v Cyril Lord Carpet Sales Ltd* 1979 129 NLJ 366). This is due to the fact that in such transactions the money is raised by way of sale, not by way of loan, and the seller is not obliged to repay. With such arrangement, the seller's liability is not for *repayment* of a loan but for *payment* in discharge of a recourse or guarantee obligation. Furthermore, a feature of a discounting transaction, by contrast with a loan is that the discount, unlike interest, is calculated and deducted at the outset (*Chow Yoong Hong v Choong Fah Rubber Manufactory* 1962 AC 209). Albeit, this is regarded as a description of the typical discounting operation, not as an essential prerequisite as there is no reason why the parties should not be free to agree that the discount charge shall be calculated retrospectively. This is a common method of computing the discount charge in factoring transactions (Goode *Consumer Credit Law and Practice* paragraph 2014 11.76).

²⁹¹⁵ Installment sale (or hire-purchase) agreements are not considered to be loan transactions but merely agreements to defer payment of the price.

²⁹¹⁶ Revolving charge accounts are when buyers are given the facility of purchasing goods or services on credit up to an agreed limit, purchases being debited and repayments credited to a current account, so that the buyer's obligation is to discharge an aggregate balance on a running account rather than a series of distinct obligations (*N G Napier Ltd v Patterson* 1959 JC 48).

²⁹¹⁷ Cf R M Goode *Payment Obligations in Commercial and Financial Transactions* 2009 2-36, 'Acceleration Clauses' 1982 JBL 148.

²⁹¹⁸ Goode *Consumer Credit Law and Practice* paragraph 2014 11.94.

²⁹¹⁹ Goode *Consumer Credit Law and Practice* paragraph 2014 11.95.

²⁹²⁰ Goode *Consumer Credit Law and Practice* paragraph 2014 11.96.

²⁹²¹ Goode *Consumer Credit Law and Practice* paragraph 2014 11.97. The acceleration clause, as regulated in South Africa is discussed in paragraph 6.2.2 *supra*.

England also recognises two categories of instalment sale transactions, namely the credit instalment sale and the conditional instalment sale.²⁹²² In a credit sale agreement there is no provision for retention of ownership by the seller until payment has been made in full.²⁹²³ Ownership transfers to the buyer immediately and thus his rights and duties are governed by the Sale of Goods Act 1979.²⁹²⁴ In a conditional sale agreement ownership of the goods is reserved by the seller until payment of the price or performance of other items of the agreement.²⁹²⁵ In such instances, the agreement usually empowers the seller to terminate the contract and repossess the goods in the event of default.²⁹²⁶ However, even under a conditional sale, the parties are exercising the right enshrined in section 17 of the Sale of Goods Act, that is, to decide at what time and in what conditions the property in the goods is to pass to the buyer.²⁹²⁷ In fact, the Sale of Goods Act regulates the rights and duties of the parties as well as the default remedies available to the seller of goods.²⁹²⁸ Thus where a seller exercises his right to terminate the agreement in the event of the buyer's default, he is precluded from suing for the balance of the price as such, but he may pursue an action for damages or to enforce a liquidated damages provision in the agreement so far as this does not contravene the rule against penalties.²⁹²⁹ Where the resale of the repossessed goods produces a surplus, the seller is entitled to retain this for his own benefit, for it represents the proceeds of his own goods.²⁹³⁰

The hire-purchase agreement is distinguished from the conditional sale agreement in that the latter obliges the seller to sell and commits the buyer to

²⁹²² Goode *Consumer Credit Law and Practice* paragraph 2014 11.101.

²⁹²³ Goode *Consumer Credit Law and Practice* paragraph 2014 11.102.

²⁹²⁴ *Ibid.*

²⁹²⁵ Goode *Consumer Credit Law and Practice* paragraph 2014 11.103.

²⁹²⁶ *Ibid.*

²⁹²⁷ *Ibid.*

²⁹²⁸ Goode *Consumer Credit Law and Practice* paragraph 2014 11.103.

²⁹²⁹ If after termination, the seller incurs a loss of profit, such loss can be laid at the buyer's door but only if the buyer's breach was repudiatory in nature (*Financings Ltd v Baldock* 1963 2 QB 104, 1963 1 All 443, CA),

²⁹³⁰ This can be contrasted to the strict procedure put in place in the South African arena, where if goods are returned to or repossessed by the credit provider, any surplus (after deductions) must be refunded to the consumer (cf paragraph 5.3.4.1 *supra* for details).

buy, while the former is a contract of hire under which the hirer has an option, but not an obligation, to buy.²⁹³¹ The Sale of Goods Act does not apply to the hire-purchase agreement.²⁹³² However, the fact that the buyer under a conditional sale agreement, which falls under the auspices of the Consumer Credit Act, is given the right to terminate the agreement, does not convert it into a hire-purchase agreement.²⁹³³ Where the hirer defaults, the owner can recover any sums accrued under the agreement, together with stipulated interest, as a debt, and, if the breach has caused additional loss, the owner may obtain damages for the breach.²⁹³⁴ The owner is also entitled to invoke any contractual provision accelerating liability, though as with conditional sales, this remedy is alternative to damage and ceases to be exercisable once the agreement has come to an end.²⁹³⁵ The hirer's breach entitles the owner to terminate the agreement if it so provides or where the breach is so grave or persistent as to be repudiatory, then on termination the owner can repossess the goods and claim liquidated or unliquidated damages.²⁹³⁶ If the owner terminates the agreement, he can recover the arrears as well as interest on those arrears, together with damages for any specific breach of the agreement.²⁹³⁷ This may, however, not necessarily compensate the owner, for although he may have the goods returned, there is no certainty that he will be able to realise them for a sum sufficient to recoup the outstanding balance of the hire-purchase price.²⁹³⁸ Thus it has become common practice for the parties to insert a minimum payment clause in a hire-purchase agreement requiring the hirer to pay a further sum in the event of the owner's termination for default.²⁹³⁹ However, excessive minimum payment stipulations have led the English courts to strike these down as penalties.²⁹⁴⁰ It was decided that even a clause providing for full credit for the proceeds of sale is penal in

²⁹³¹ *Helby v Matthews* 1895 AG 471 1895 – 9 *All ER Rep*821 1999 *GCCR* 21 and Goode *Consumer Credit Law and Practice* paragraph 11.121.

²⁹³² *Ibid.*

²⁹³³ The Consumer Credit Act distinguishes between the two types of agreements (Goode *Consumer Credit Law and Practice* paragraph 2014 11.123 and cf also Goode *Consumer Credit Law and Practice* Chapter 33 for a detailed discussion of the hire-purchase agreement).

²⁹³⁴ Goode *Consumer Credit Law and Practice* paragraph 2014 1.125.

²⁹³⁵ *Ibid.*

²⁹³⁶ *Ibid.*

²⁹³⁷ For example – failure to repair the goods (Goode *Consumer Credit Law and Practice* paragraph 2014 11.126).

²⁹³⁸ *Ibid.*

²⁹³⁹ *Ibid.*

²⁹⁴⁰ Goode *Consumer Credit Law and Practice* paragraph 2014 11.126.

nature, partly because its intended effect was to put the owner in the same position as if the agreement had run its full course, an objective considered inconsistent with the right to terminate given to the hirer by the agreement.²⁹⁴¹ However, the Court of Appeal²⁹⁴² has somewhat ameliorated the matter by declaring that penalty clauses remain enforceable but only in so far as the claim is for the amount of the loss suffered by the plaintiff. Recovery of the discounted balance of the hire-purchase price, less the proceeds of sale of the repossessed goods, is allowed where the hirer's breach is repudiatory in nature.²⁹⁴³ The rule against penalties does not apply where the event that makes the minimum sum payable is the hirer's voluntary termination of the agreement or when the contract stipulated that the term breached, was a condition of the agreement, for example, compliance with a term making 'time of the essence'.²⁹⁴⁴

Section 90 of the Consumer Credit Act prevents a creditor from taking possession of goods which are let on hire-purchase or sold in terms of a conditional sales agreement if the debtor has, at the time of default, paid one-third or more of the total price of the goods and ownership of the goods remains with the creditor. The penalty for a creditor in the event of contravention of section 90 is severe. Under section 91 if a creditor repossesses in contravention of section 90, the agreement is automatically terminated and the debtor is released from all future liability under the agreement but may even recover from the creditor all sums already paid under the agreement.²⁹⁴⁵ Section 90 presents a very interesting consumer protection mechanism, as it protects a consumer whom, having paid one-third or more of the price of goods, from having the goods repossessed. This forces the credit provider to enforce the agreement

²⁹⁴¹ *Anglo-Auto Finance Co Ltd v James* 1963 3 All ER 566, 1963 1 WLR 1042, CA.

²⁹⁴² In *Jobson v Johnson* 1989 1 All ER 621 1989 1 WLR 1026.

²⁹⁴³ *Yeoman Credit Ltd v Waraowski* 1961 3 All ER 145, 1961 1 WLR 1124; *Financings Ltd v Baldock* 1963 2 QB 104, 1963 1 All ER 443, 1999 GCCR 175, CA. Effectively if the agreement makes time of payment of the essence, then a default in payment is viewed as repudiatory in nature for this purpose even if it would not otherwise have been so (*Lombard North Central plc v Butterworth* 1987 QB 527, 1999 GCCR 1025, 1987 1 All ER 267, 1999 GCCR 1025, CA and *Goode Consumer Credit Law and Practice* 2014 paragraph 11.127).

²⁹⁴⁴ Cf RM Goode *Hire-Purchase Law and Practice* 2nd edn 1970, *Chitty on Contracts Vol 1 General Principles* 30th ed paragraphs 26 – 141 and *Goode Consumer Credit Law and Practice* 2014 paragraph 11.127.

²⁹⁴⁵ Mawrey and Riley-Smith *Blackstone's Guide to the Consumer Credit Act 1974* 69.

through payment rather than leaving the consumer without the goods as well as a net loss (what he had already paid for the goods). This is, however, somewhat of an invidious situation for the credit provider as, it is submitted, one-third of the price, in all probability, does not cover the cost of the goods. However, the credit provider can still recoup his payment, thus section 90 presents, as stated, a very interesting consumer protection device. This would certainly be useful in the South African Credit Agreements Act, however, it is submitted, it would better balance the position between the parties if perhaps a higher cut-off point was set, for example when at least one-half of the purchase price has been paid for the goods. It is submitted further however, that a section similar to section 90 of the Consumer Credit Act, could not now be introduced by the South African legislature; the concept and practical implications would just be too far reaching, but may perhaps be considered for future generation credit legislation.

Before turning to the effects of the Consumer Credit Act on these remedies, one must look at how English law has interpreted or understood what 'enforcement' entails in light of the Consumer Credit Act. 'Enforcement' of a regulated agreement has been used in two senses, the first in a technical sense and the second in a general sense. In the more general sense, 'enforcement' includes any action taken by the creditor or owner designed to secure performance of a contractual obligation where the debtor or hirer is in breach of that obligation.²⁹⁴⁶ This would be in relation to creditors or owners using irresponsible practices of enforcement in order to secure performance of a contractual obligation. As far as the technical meaning of 'enforcement' is concerned, this has come to the fore due to much litigation based on technical arguments which in turn, was based on the idea that the provisions of the Consumer Credit Act concerning the form of agreements or concerning the supply of copies of documents and statements can be manipulated so as to exonerate the consumer from debt, as the sanction for breach of several of the obligations imposed by the Act is that the agreement

²⁹⁴⁶ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.1. It is interesting that the same debate was had in terms of the use of the word 'enforce' in the National Credit Act, cf paragraph 6.4.2.2 *supra* for a discussion on how a similar broad interpretation has been given to the term in the South African statute.

is 'unenforceable', whether permanently, temporarily or subject to court order.²⁹⁴⁷ This has led to much forensic argument as to what constitutes 'enforcement' for such purposes.²⁹⁴⁸

The matter was discussed by Flaux J in *McGuffick v Royal Bank of Scotland plc*.²⁹⁴⁹ Flaux J ruled out of the definition of enforcement, the following:-

- reporting the debtor's default to a credit reference agency (whether or not also reporting that the agreement might be unenforceable);
- disseminating or threatening to disseminate the debtor's personal data in respect of the agreement to any third party;
- demanding payment from the debtor;
- issuing a default notice to the debtor;
- threatening legal action; and
- instructing a third party to demand payment or otherwise to seek to procure payment.²⁹⁵⁰

It was also held in *Rankine v American Express Services Europe Ltd*²⁹⁵¹ that commencing proceedings was not actual enforcement but merely 'a step taken with a view to enforcement'. It must also be noted that section 65 (2) of the Consumer Credit Act provides that retaking possession of goods or immovable property amounts to enforcement.²⁹⁵²

The Consumer Credit Act imposes severe restrictions on contractual remedies, the principal heads of restriction can be summarised as follows:-²⁹⁵³

²⁹⁴⁷ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.2.

²⁹⁴⁸ *Ibid.*

²⁹⁴⁹ 2009 EWHC 2386 (Comm).

²⁹⁵⁰ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.3.

²⁹⁵¹ 2009 CCLR 3, 2008 GCCR 7701.

²⁹⁵² In comparison to the South African interpretation of the word 'enforce' as used in the National Credit Act, it is submitted, that all points listed by Flaux J, save the fourth point in the above list would likewise be ruled out of the definition or understanding of enforcement. However, the Supreme Court of Appeal in *Nedbank Ltd v The National Credit Regulator*, (2011 ZASCA 35) has ruled that issuing a default notice (section 129 (1)(a) notice), is a step prior to commencement of legal proceedings, it is also the first step the credit provider has proceeded to take to enforce that agreement (paragraph 14).

²⁹⁵³ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.30.

- requiring at least seven days' notice of an intention by the creditor or owner to invoke (otherwise than on the ground of a breach) an acceleration clause or to recover possession of goods or land or treat any rights conferred on the debtor or hirer by the agreement as terminated, restricted or deferred;²⁹⁵⁴
- under sections 86A-86F²⁹⁵⁵ requiring creditors to serve arrears notices and arrears information sheets as a condition precedent to any subsequent enforcement;
- requiring the creditor or owner to serve at least seven days' notice of default and (since 1 October 2006) at least fourteen days' notice of default before exercising, by reason of a breach on the part of the debtor or hirer, any of the above rights or enforcing any security, so as to give the debtor an opportunity to remedy the breach if it is remediable²⁹⁵⁶ or to apply to the court for a time order under section 129 of the Consumer Credit Act or for equitable relief against forfeiture;
- requiring the creditor or owner to serve a default notice in a prescribed and largely immutable form and under section 88 (4A) of the Consumer Credit Act, a default information sheet as well;²⁹⁵⁷
- requiring the creditor or owner to give at least seven days' notice before terminating a regulated agreement otherwise than by reason of a breach by the debtor or hirer;²⁹⁵⁸
- prohibiting enforcement of a right to recover possession of protected goods except on an order of the court;²⁹⁵⁹
- restricting the exercise of contractual rights that would otherwise be exercisable by reason of the death of the debtor or hirer;²⁹⁶⁰
- under sections 86A–86F of the Consumer Credit Act, restricting the right of the creditor or owner to recover 'default sums' or interest on such sums;

²⁹⁵⁴ Section 76 (1) of the Consumer Credit Act.

²⁹⁵⁵ Consumer Credit Act section 86A came into force on 31 January 2007 and sections 86B to 86F on 1 October 2008.

²⁹⁵⁶ Sections 87–89 of the Consumer Credit Act. The increase of 7 to 14 days was effected by section 14(1) of the Consumer Credit Act 1974 which came into force on 1 October 2006.

²⁹⁵⁷ Cf paragraph 45.36 ff, section 88(4A) of the Consumer Credit Act in force from 1 October 2008.

²⁹⁵⁸ Section 98 of the Consumer Credit Act.

²⁹⁵⁹ Section 90 (1) of the Consumer Credit Act.

²⁹⁶⁰ Section 86 of the Consumer Credit Act.

- nullifying a contractual provision purporting to make the debtor liable to pay default interest at a rate exceeding the contract rate;²⁹⁶¹
- limiting the liability of a hirer under a regulated hire-purchase or conditional sale agreement who, pursuant to section 99 of the Consumer Credit Act terminates the agreement;²⁹⁶²
- prohibiting enforcement of an improperly executed agreement or security without an order of court;²⁹⁶³
- regulating the redemption and realisation of pawned items;²⁹⁶⁴
- prohibiting, except on an order of court, enforcement of a regulated agreement or security in respect of which a negotiable instrument has been taken or negotiated in contravention of section 123 of the Consumer Credit Act;
- prohibiting enforcement of a land mortgage otherwise than on an order of court;²⁹⁶⁵
- conferring wide powers on the court to give relief to a defaulting debtor or hirer by orders under Pt IX of the Consumer Credit Act in proceedings brought in respect of a consumer credit or consumer hire agreement or security;
- empowering the court to re-open a credit agreement with an individual (whether a regulated agreement or not and whether a consumer-credit agreement or not) where the credit bargain is extortionate or where there has been an 'unfair relationship';²⁹⁶⁶
- nullifying contractual provisions inconsistent with a provision for the protection of the debtor or hirer or his relative or any surety contained in the Consumer Credit Act or in any regulation made under the Consumer Credit Act or imposing on any such party a liability greater than that specified in such provision;²⁹⁶⁷

²⁹⁶¹ Section 93 of the Consumer Credit Act.

²⁹⁶² Section 100 of the Consumer Credit Act.

²⁹⁶³ Sections 65 (1), 105 (6) of the Consumer Credit Act.

²⁹⁶⁴ Sections 116 – 121 of the Consumer Credit Act.

²⁹⁶⁵ Section 126 of the Consumer Credit Act

²⁹⁶⁶ Sections 137 – 140 of the Consumer Credit Act (extortionate credit bargains) and Consumer Credit Act 1974, sections 140A–140D (unfair relationships) in force from 6 April 2007 which replaced sections 137–140.

²⁹⁶⁷ Section 173 of the Consumer Credit Act.

- restricting the right to recover interest on judgment debts.²⁹⁶⁸

Interestingly enough, the amendments brought about by the Consumer Credit Act, 2006 now compel creditors to inform debtors and hirers as soon as the arrears start to accrue.²⁹⁶⁹ This amendment came about due to the fact that creditors and owners were dilatory in enforcing agreements when debtors fell into arrears and thus the debtors fell more and more into debt, often becoming too much for them to recover from.²⁹⁷⁰ Sections 86A–86F²⁹⁷¹ now oblige creditors and owners to serve notices of arrears and default sums both in fixed-sum credit agreements and running account agreements. The Consumer Credit Act, differentiates between notices required for fixed-sum credit agreements and hire agreements, running-account agreements and default sums.²⁹⁷² Sections 86B–86E²⁹⁷³ of the Consumer Credit Act, are very strict and the consequences of non-compliance are drastic.²⁹⁷⁴ Section 86B refers to ‘applicable agreements’, defined by section 86B (12) as ‘agreements which are regulated fixed-sum credit or consumer hire agreements and are neither non-commercial agreements nor small agreements’. In terms of section 86B (1) a notice is required:

where at any time the following conditions are satisfied–

- that the debtor or hirer under an applicable agreement is required to have made at least two payments²⁹⁷⁵ under the agreement before that time;

²⁹⁶⁸ Section 130A of the Consumer Credit Act, in force from 1 October 2008.

²⁹⁶⁹ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.31.

²⁹⁷⁰ *Ibid.*

²⁹⁷¹ Section 86A came into force on 31 January 2007 and sections 86B to 86F on 1 October 2008.

²⁹⁷² The Act defines ‘default sums’ as: ‘a sum (other than a sum of interest) which is payable by him under the agreement in connection with a breach of the agreement by him’ (section 187A). The definition incorporates a wide range of default payments, including ‘administrative charges’ when default occurs. However, the definition excludes a sum which is payable only because, as a consequence of breach, the debtor or hirer is required to pay it earlier than he would otherwise have had to, that is accelerated payment on default is not considered ‘default sum’ (Goode *Consumer Credit Law and Practice* 2014 paragraph 45.9). The Act provides that a debtor or hirer will only be liable to pay interest in connection with a default sum if it is simple interest and any contractual requirement to pay compound interest on default sums will be automatically converted into a requirement to pay simple interest (section 86F of the Consumer Credit Act which came into force on 1 October 2008).

²⁹⁷³ Sections 86B and 86C were amended by the Legislative Reform (Consumer Credit) Order 2008, SI 2008/2826.

²⁹⁷⁴ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.39.

²⁹⁷⁵ ‘Payments’ are specifically defined in section 86B (13) (this section was added by the Legislative Reform (Consumer Credit) Order 2008, SI 2008/2826): (a) ‘payments’ in relation to an applicable agreement which is a regulated agreement for fixed-sum credit means payments to be

- that the total sum paid under the agreement by him is less than the total sum which he is required to have paid before that time;
- that the amount of the shortfall is no less than the sum of the last two payments which he is required to have made before that time;
- that the creditor or owner is not already under a duty to give him notices under this section in relation to the agreement; and
- if a judgment has been given in relation to the agreement before that time, that there is no sum still to be paid under the judgment by the debtor or hirer.

If an applicable agreement obliges the debtor or hirer to make all payments at intervals of one week or less, then the ‘two-payment arrears’ trigger for serving a notice in terms of section 86B (1)(a) and (c), is changed to a ‘four-payment arrears’ trigger by section 86B (9). If, however, such an agreement was made twenty weeks or more before the date on which the most recent payment fell due, the only failures to make payment that count for the purposes of section 86B (1)(c) are those which have occurred within the twenty weeks.²⁹⁷⁶ Section 89B applies to agreements ‘whenever made’, but the conditions for the notice will only be met if the two or four payments, as the case may be, due under section 86B (1)(c) fell due after the date when the section came into force.²⁹⁷⁷ There are, however, transitional provisions which apply until 30 September 2018.²⁹⁷⁸

Section 86C refers to ‘applicable agreements’, which are defined in section 86C (7) as regulated agreements for running-account credit which are neither non-commercial agreements nor small agreements’. The provisions are slightly less onerous than those imposed by section 86B.²⁹⁷⁹ A creditor is obliged to serve a default notice where, at any time, the following conditions are satisfied:²⁹⁸⁰

made at predetermined intervals provided for under the terms of the agreement and (b) ‘payments’ in relation to an applicable agreement which is a regulated consumer hire agreement means any payments to be made by the hirer in relation to any period in consideration of the bailment or hiring to him of goods under the agreement’.

²⁹⁷⁶ Section 86B (10) and (11) of the Consumer Credit Act. Cf Goode *Consumer Credit Law and Practice* 2014 paragraph 45.41 for examples.

²⁹⁷⁷ Cf fn 2971.

²⁹⁷⁸ Cf Regulation 49 of the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, SI 2007/1167; Goode *Consumer Credit Law and Practice* 2014 paragraph 45.60,

²⁹⁷⁹ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.62.

²⁹⁸⁰ *Ibid.*

- the debtor is required to have made at least two payments²⁹⁸¹ under the agreement before that time;
- the last two payments which the debtor is required to have paid before that time have not been made;
- the creditor has not already been required to give a notice under this section in relation to either of those payments;
- if a judgment has been given in relation to the agreement before that time, there is no sum still to be paid under the judgment by the debtor; and
- there is no equivalent of the provisions relating to agreements with weekly payments found in section 86B.

In terms of section 86E, creditors must give notice to debtors or hirers. This section does not apply to non-commercial or small agreements.²⁹⁸² This section applies to agreements ‘whenever made’ but only in respect of default sums which become due after 1 October 2008.²⁹⁸³ The debtor or hirer’s liability to pay interest on the default sum only arises on the 29th day after service of the notice, in other words he has a 28 day interest free period.²⁹⁸⁴ Obliging creditors to send default notices to debtors, while the arrears are still manageable is an interesting consumer protection device, which, it is submitted, can be described as a ‘soft’ form of consumer protection as it does not directly protect a consumer, like for example, an interest rate cap.²⁹⁸⁵ It is further submitted that this not only instils fiscal discipline on the creditor but prevents the debtor from falling, into a ‘bottomless-pit’ of arrears and interest – or at least is an attempt to prevent this. This obligation placed on creditors does, however, seem rather drastic, removing the creditor’s choice of not only whether to react but whether to react to default

²⁹⁸¹ Section 86C has its own definition of ‘payments’ as follows: In this section “payments” means payments to be made at predetermined intervals provided for under the terms of the agreement’ (this section was added by the Legislative Reform (Consumer Credit) Order 2008, SI 2008/2826).

²⁹⁸² Section 86E (8) of the Consumer Credit Act.

²⁹⁸³ Consumer Credit Act 1974 Schedule 3 paragraph 8.

²⁹⁸⁴ Section 86E (4) of the Consumer Credit Act. These are, what are referred to as, Information Regulations in the Consumer Credit Act, which contain the rules about legibility and form which notices under the Act must take, these will not be discussed in any detail here (cf Regulations 39 – 41).

²⁹⁸⁵ Refer to fn 2987.

by the debtor, with mistiming of a default notice having serious consequences.²⁹⁸⁶

Another 'soft'²⁹⁸⁷ form of consumer protection adopted by the English legislature is to inform the consumer of his arrears or default through information sheets prepared and publicised by the FCA.²⁹⁸⁸ The reasoning behind implementation of these information sheets was that it was believed that the reasons for high levels of debt and for unsustainable arrears are the ignorance and lack of information of debtors and hirers and if they were better informed about the consequences of debt, they would be more hesitant to rush into it and if they were better informed as to the evils of being financially over-extended and as to the availability of help when over-extended, default could be reduced and more effectively managed.²⁹⁸⁹ There are two types of information sheets: arrears information sheet and default information sheet.²⁹⁹⁰ Arrears information sheets include 'information to help debtors and hirers who receive notices under section 86B or 86C'.²⁹⁹¹ Default information sheets will include 'information to help debtors and hirers who receive default notices'.²⁹⁹² Although the information to be given in these sheets was intended to be prescribed in regulations to be made under section 86A (4), these have not been published, however, the OFT and FCA are still issuing the information sheets.²⁹⁹³

²⁹⁸⁶ This is very different to the stance taken by the South African legislature – the point has been made earlier in this work²⁹⁸⁶ that the word 'may' indicates that the credit provider is not obliged to dispatch a default notice to a consumer when he falls into arrears (at paragraph 5.6.1.2 *supra*).

²⁹⁸⁷ The word 'soft' has been used to describe these types of consumer protection devices (obligation to send notices and regulated information sheets) as they do not directly assist the consumer – debtor in that they do not prevent him from becoming over-indebted or from defaulting on an agreement. These devices are merely attempts by the legislature to 'warn' and make the consumer aware of the perils of credit, or at least of taking out too much credit. They do not constitute direct or 'hard' consumer protection devices, such as for example interest rate caps which directly protect consumers.

²⁹⁸⁸ This is in terms of section 86A of the Consumer Credit Act, which section came into force on 31 January 2007. As from 13 April 2014, FCA took over regulation of consumer credit matters from the OFT (Office of Fair Trading) (Goode *Consumer Credit Law and Practice* 2014 paragraph 45.134). The FCA is the Financial Conduct Authority which is a financial regulatory body in the United Kingdom that operates independently of the government and is charging fees to members of the financial services industry (Cf ca.org.uk (22.04.2015)).

²⁹⁸⁹ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.101.

²⁹⁹⁰ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.103.

²⁹⁹¹ Section 86A (2) of the Consumer Credit Act.

²⁹⁹² Section 86A (3) of the Consumer Credit Act.

²⁹⁹³ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.105. This is interesting in that it is not a pre-agreement statement and quotation as prescribed by the National Credit Act in the South African arena, but rather information provided to the consumer at what one could describe

The way default interest is handled in England is noteworthy. Section 93 of the Consumer Credit Act provides that the debtor under a regulated consumer credit agreement shall not be obliged to pay interest on sums which, in breach of the agreement, are unpaid by him, at a rate more than the rate of interest stipulated in the contract.²⁹⁹⁴ If the agreement does not stipulate interest, then the debtor cannot be made to pay default interest and the court's power to award interest²⁹⁹⁵ is excluded.²⁹⁹⁶ In hire-purchase contracts, upon termination the owner of the goods (or credit provider) can recover the arrear instalments and interest together with interest on any specific breach of the agreement.²⁹⁹⁷ No

as a more crucial time – that is when his debt has gone into arrears. Furthermore, the National Credit Act, places no similar obligation on the National Credit Regulator, that is to issue and/or publicise any kind of information sheet pertaining to the arrears or default of consumers. The infrastructure to maintain such a system of data would not be small, indeed it would require relatively sophisticated information system infrastructure and large numbers of personnel to run and maintain same. It is submitted that while it might possibly be effective to have such notices issued by the Regulator - notices that could possibly appear to be more 'official', perhaps prompting the consumer into action, the changes that would have to be made and infrastructure which would have to be established is not, in writer's view, sufficiently motivated by the end-effect. That is simply informing consumers of what they probably already know or could be otherwise informed by a default notice emanating from the credit provider (section 92 of the National Credit Act, cf paragraph 4.4.7.2 *supra* for further detail).

²⁹⁹⁴ Mawrey R and Riley-Smith T *Blackstone's Guide to the Consumer Credit Act 1974* 69 and Goode *Consumer Credit Law and Practice* 2014 paragraph 45.188. It is interesting to note that South Africa in terms of regulations of the National Credit Act has placed a similar limitation on *mora* interest. Both legislations finding it wise to limit the default interest rate, in it is submitted, an attempt to cap the penalty interest which the already 'plagued' debtor will have to face (for the South African position under the National Credit Act cf paragraph 6.5.1 *supra*).

²⁹⁹⁵ In terms of section 35A of the Supreme Court Act 1981.

²⁹⁹⁶ Goode *Consumer Credit Law and Practice* 2014 paragraph 45.188.

²⁹⁹⁷ It became common practice in England to insert a minimum payment clause in hire-purchase agreements requiring the hirer of the property to pay a further sum in the event of termination based on default (Goode *Consumer Credit Law* 1979 35). The advantage to the creditor in such instances is that damages may normally not be claimed where the termination has occurred not as a result of the debtor's breach of contract but as a result of some other event for example, the debtor terminates under a right to do so. A minimum payment clause will provide for a fixed sum, whereas in a claim for damages there is likely to be a dispute over the creditor's actual loss. Consequently, the minimum payment clause may provide for payment of a larger sum than the amount which the creditor could claim for damages. Parliament and the courts in England have thus narrowed the scope of minimum payment clauses. Accordingly minimum payment clauses may be void because of the common law doctrine of penalties or ineffective due to the provisions in the Consumer Credit Act relating to unfair relationships or be ineffective by virtue of the Unfair Terms in Consumer Contracts Regulations 1999 (Dobson and Stokes *Commercial Law* 2008 403). A discussion on the common law doctrine of penalties in England may be found in paragraph 6.8.1 *infra*.

general prohibition of compound interest exists in England,²⁹⁹⁸ save the exception when dealing with default sums.²⁹⁹⁹

6.8.1. Penalties

In England, the common law doctrine of penalties stipulates that in the event that the parties incorporate a penalty clause in their agreement and upon breach by the one party of the contract the creditor becomes entitled to invoke the clause and does – such a clause is void if it amounts to a penalty and may only be enforced if it amounts to liquidated damages.³⁰⁰⁰ The terminology used to refer to these clauses is a minimum payment clause.³⁰⁰¹ The clause will not be considered a penalty by the courts if it is found that the stipulation was a genuine attempt by the parties to pre-estimate the likely damages in the event of breach. It will, however, be considered a penalty if the stipulated minimum payment is out of all proportion to the damages.³⁰⁰² The English court in *Dunlop Pneumatic Tyre Co v New Garage Motor Co*³⁰⁰³ held:

It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

It appears to be settled, that the doctrine of penalties authorises the court to void the penalty and where appropriate award damages instead.³⁰⁰⁴ However, termination of a contract may occur where there is no breach of contract, for example where the debtor exercises a contractual right of termination or where the contract terminates upon a specified event such as the insolvency of the debtor. The Court of Appeal has held that in such instances the doctrine of penalties is not applicable and the creditor is entitled to sue for the stipulated

²⁹⁹⁸ This is unlike the position under the Money Lenders Act (Goode *Consumer Credit Law and Practice* 2014 paragraph 45.189).

²⁹⁹⁹ Cf previous discussion *supra*.

³⁰⁰⁰ Dobson and Stokes *Commercial Law* 2008 404.

³⁰⁰¹ *Ibid*.

³⁰⁰² *Ibid*. South African law restricts penalty stipulations in the same manner, however, it does so by virtue of the Conventional Penalties Act, as opposed to common laws, cf paragraph 6.5.2.1 *supra* for a discussion on the South African position.

³⁰⁰³ 1915 AC 79. Cf *Bridge v Campbell Discount Co* 1962 AC 600.

³⁰⁰⁴ *Anglo Auto Finance Co v James* 1963 All ER 566.

amount upon termination irrespective of the quantum.³⁰⁰⁵ The situation proved controversial and created an evenly split bench in 1962 in the matter of *Bridge v Campbell Discount Co.*³⁰⁰⁶ The earlier decision leads to the situation where the debtor who terminates may find himself in a worse position in terms of the penalty stipulation, than if he merely breached the contract.³⁰⁰⁷ It is for these reasons that the courts in England will not hold that a debtor has exercised his right of termination unless he did so fully aware of the consequences.³⁰⁰⁸ It is submitted that this is a somewhat artificially constructed and awkward solution and does not attend to the situation where the debtor is insolvent.

However, it is now possible in terms of the Unfair Terms in Consumer Contracts Regulations 1999, to render ineffective a clause providing for an excessive amount to be payable upon termination of an agreement in the absence of breach by the debtor.³⁰⁰⁹

6.9. Italian Law

A party to a contract that is faced with a breach of contract by the other contracting party has available to him three choices: he may elect to request specific performance³⁰¹⁰ by the other party, he may elect to cancel³⁰¹¹ the contract or he may elect to take exception to the breach.³⁰¹²

The afflicted party may sue the party that has committed the breach for specific performance in terms of section 1453 comma 1 of the Civil Code. Thus the aggrieved party will request the court to order the other party to perform or specifically perform his obligations in terms of the contract, for example to pay

³⁰⁰⁵ *Associated Distributors v Hall* 1938 2 K.B. 83.

³⁰⁰⁶ 1962 A.C. 600.

³⁰⁰⁷ Dobson and Stokes 2008 500.

³⁰⁰⁸ *United Dominions Trust v Ennis* 1968 Q.B. 54 and Dobson and Stokes 2008 405.

³⁰⁰⁹ Dobson and Stokes 2008 405.

³⁰¹⁰ Translated from the Italian '*manutenzione*' (own translation).

³⁰¹¹ Translated from the Italian '*Risoluzione*' (own translation).

³⁰¹² Translated from the Italian '*Eccezione d'inadempimento*' (own translation) (Carnevali in Bessone 2009 500).

the price or deliver a thing. Furthermore, the aggrieved party is entitled to request compensation for damages³⁰¹³ derived from the delay in the performance by the other party. In the alternative and under the same section of the Civil Code, the aggrieved party may request cancellation of the contract and once again compensation for damages.³⁰¹⁴

From the date of issue of summons for cancellation, the party that has breached the contract cannot tender his performance in order to avoid cancellation³⁰¹⁵ and the aggrieved party may refuse to accept late performance without falling into *mora creditoris*. A party who has approached the court for an order for specific performance is entitled, during the course of the proceedings, to change his prayer to that of cancellation of the contract. However, a party who has approached the court with an initial prayer of cancellation cannot change his prayer to an order for specific performance.³⁰¹⁶ The reasons provided are that the aggrieved party, when requesting cancellation, has shown that he no longer has an interest in receiving performance, therefore it is seen as reasonable that the other party does not remain ready to perform and may even use that obligation (goods or services) for another contractual purpose.³⁰¹⁷

Cancellation of the contract may not be requested or granted in instances where the breach is of scant importance,³⁰¹⁸ having regard to the interests of the other contracting party.³⁰¹⁹ Thus the following breaches do not justify cancellation: small delay in performance, non-performance of a secondary obligation, or a modest qualitative or quantitative inexactness.³⁰²⁰ In such instances, cancellation is seen as a drastic remedy and even unfair³⁰²¹ towards the other

³⁰¹³ Translated from the Italian '*risarcimento del danno*' (own translation).

³⁰¹⁴ Direct damage or what is referred to as 'emergent damage' (*danno emergente*) and loss of earnings (own translation).

³⁰¹⁵ Section 1453 comma 3 Civil Code.

³⁰¹⁶ Section 1453 comma 2 Civil Code.

³⁰¹⁷ Carnevali in Bessone 2009 500.

³⁰¹⁸ Translated from the Italian '*scarsa importanza*' (own translation).

³⁰¹⁹ Section 1455 Civil Code.

³⁰²⁰ Carnevali in Bessone 2009 500.

³⁰²¹ The word used here is '*vessatorio*' which directly translated means 'oppressive' or 'vexatious', however, in Italian law vexatious clauses in contracts are prohibited, these being clauses that are unfair towards the consumer or too much in favour of the provider and accordingly the word 'unfair' has been used as it assimilates to the concept of unfair or unreasonable contract terms.

party and the fairest remedy in such instances and in order to protect the interests of the creditor would be to award him the damages incurred for the minor breach. A plaintiff creditor may thus find that his request for cancellation is denied on the basis that the court finds that the breach was of minor importance.³⁰²²

The aggrieved party may cancel the contract in three instances, without approaching the court for an order, in what are referred to as extra-judicial cancellations.³⁰²³ An aggrieved party may send a written notice to the defaulting party requesting him to perform within fifteen days, failing which the contract will be automatically cancelled.³⁰²⁴ A written notice to perform, failing which automatic cancellation of the contract will ensue, does not derogate from the requirement that the breach must not be of minor import.³⁰²⁵

The parties may include in their contract a clause that resolves that in the event that the obligation is not performed or the obligation is not performed in the manner prescribed in the contract, then in such event or lack of event the contract will be cancelled.³⁰²⁶ The clause must be specific as to the type of breach and cannot refer to any breach in general, if it so drafted, then it will be void and in order to obtain cancellation of the contract the aggrieved party will have to approach the court.³⁰²⁷ Where the contract contains such resolute clauses, which specifically define the specific breach which will result in cancellation, these (defined) breaches are automatically considered important or major and thus a court will not have a discretion in this regard.³⁰²⁸ The cancellation becomes effective when the aggrieved party declares to the other party that he wishes to rely on the resolute clause and terminate the contract.³⁰²⁹

³⁰²² Carnevali in Bessone 501.

³⁰²³ '*Risoluzione stragiudiziale*'.

³⁰²⁴ This is called the '*diffida ad adempiere*' or 'warning to perform'.

³⁰²⁵ Section 1455 Civil Code (Carnevali in Bessone 501).

³⁰²⁶ Section 1456 Civil Code. This is called the '*clausola resolutiva espressa*' or 'express resolute clause' (own translation).

³⁰²⁷ *Ibid.*

³⁰²⁸ Carnevali in Bessone 501.

³⁰²⁹ *Ibid.*

Usually a clause in a contract should indicate the date on or before which performance must be rendered, penalties for *mora* and compensation of damages for delayed performance.³⁰³⁰ However, a term may be of an essential nature when its lapse (without performance) renders the performance completely futile for the creditor.³⁰³¹ The essentiality of the term is determined from the circumstances of the case, the example given by Carnevali³⁰³² is that of when an advertiser is commissioned to publish a certain advert which relates to a certain sporting event, should the sporting event take place and the advert is not published, then the commissioning party will have no interest or benefit if same is published *ex post facto*. In such instances the contract will be automatically cancelled if at the lapse of the date for performance the essential term has not been performed.³⁰³³ However, if for some reason the afflicted party still retains an interest in having the obligation performed late, he has the right to request performance from the dilatory party provided he communicates his option to the other party within three days from the date when performance was initially due.³⁰³⁴

In the above three instances the contract is cancelled by law, that is automatically upon the occurrence of the determined events.³⁰³⁵ The defaulting party may challenge the cancellation in court on the basis that there was never a breach or that the requirements for cancellation were never met, for example contesting that enough detail existed in the resolute clause or by challenging the essentiality of the term.³⁰³⁶

An aggrieved party may have an interest in receiving a performance which is not forthcoming and may wish to wait when faced with a breach of contract and employ 'pressure tactics' in order to elicit performance from the defaulting

³⁰³⁰ Carnevali in Bessone 2009 501.

³⁰³¹ *Ibid.*

³⁰³² in Bessone 2009 501.

³⁰³³ *Ibid.*

³⁰³⁴ Section 1457 Civil Code (Carnevali in Bessone 2009 501). Again, similar remedies across this jurisdiction too – the right of the creditor to demand specific performance of the contract. Cf paragraph 6.2 *supra* for a detailed discussion of the South African remedy of specific performance.

³⁰³⁵ Carnevali in Bessone 2009 502.

³⁰³⁶ *Ibid.*

party.³⁰³⁷ This is what the Italians refer to as the exception to the breach, otherwise known as the *exceptio non adimpleti contractus*.³⁰³⁸ The aggrieved party may legitimately refuse to perform his own obligation in terms of the contract if the other party does not offer to simultaneously perform his obligation or if the latter has not performed his obligation correctly or fully.³⁰³⁹ This exception is not available to a contracting party who is, in terms of the contract, obliged to render his performance first. However, such party may suspend his performance if it becomes patent that the financial situation of the contractant, whom is to counter-perform, is such that the counter-performance is placed in danger of being carried out, unless the latter party provides a suitable guarantee.³⁰⁴⁰ Sometimes the contracting parties include a clause in their contract which excludes this right, applying the principle *solve et repete*.³⁰⁴¹

The contract of loan or as referred to in the Civil Code, the *mutuo*, is defined as:³⁰⁴²

It is the contract where one party delivers to the other a determined amount of money or other fungible and the other party is obliged to return things that are the same in kind and quality.

When the repayment of money is to be carried out in instalments, a non-payment of one of the instalments may entitle the creditor to request the return of the entire amount loaned.³⁰⁴³ Unless otherwise agreed, the consumer or debtor

³⁰³⁷ Gazzoni 2009 1018.

³⁰³⁸ Cf Gazzoni where the Latin is used '*in adimplenti non est adimplendum*' (2009 1018). Although not discussed in this work the defence of *exceptio non adimpleti contractus* exists in South African common law.

³⁰³⁹ Section 1460 Civil Code.

³⁰⁴⁰ Section 1461 Civil Code. This is a very interesting dynamic and a parallel can be drawn to similar principles in South African law, though the puzzle pieces are put together differently in each of the jurisdictions. Allowing the creditor to suspend his performance if it is obvious that the debtor's financial situation is precarious can be likened to a form of indirect repudiation. By virtue of his incapacity to perform (pay) and to provide a suitable guarantee, the debtor is effectively seen to repudiate the agreement allowing the creditor to suspend his performance.

³⁰⁴¹ First perform and then if you are entitled, request restitution (own translation) (Carnevali in Bessone 2009 502).

³⁰⁴² Section 1813 Civil Code. Translated from the Italian: '*Il mutuo è il contratto con il quale una parte consegna all'altra una determinata quantità di denaro o di altre cose fungibili, e l'altra si obbliga a restituire cose della stessa specie e qualità*' (own translation).

³⁰⁴³ Section 1819 Civil Code. This is a form of legislated acceleration clause, a term which in South Africa can only be relied on if incorporated into the contract. Cf paragraph 6.2.2 *supra* for a discussion on acceleration clauses in South Africa.

must pay to the creditor, an interest component.³⁰⁴⁴ If the interest rate intended to be levied on the loan is greater than that allowed by law,³⁰⁴⁵ then the rate must be reduced to writing.³⁰⁴⁶ In the event that the interest levied is found to be usurious the clause will be considered void and the creditor, as a sanction, will not be entitled to charge any interest whatsoever.³⁰⁴⁷ This is a drastic measure and extends even further, allowing the debtor to claim the restitution of the interest already paid to the usurer.³⁰⁴⁸

Italy has enacted law 3/2012, modified by decree-law 179/2012, tellingly entitled 'Disposizioni in materia di Composizione Delle Crisi da Sovraindebitamento del Consumatore'³⁰⁴⁹. This law intervenes from a general preventive perspective by empowering consumers which are excluded from liquidation proceedings to utilise a procedure that facilitates the restructuring of their debt if they find themselves over-indebted.³⁰⁵⁰ The measure outlines a sort of insolvency procedure, applicable to entities other than commercial entrepreneurs with the frequent inability to satisfy creditors, with the aim of avoiding unnecessary economic shocks.³⁰⁵¹

A person³⁰⁵² that is over-indebted may apply to an appropriate licensed professional (accountants, lawyers, notaries) and then to the court with a repayment plan³⁰⁵³ that, if successful, will become binding on creditors.³⁰⁵⁴ The legislation defines the procedure to be followed to arrange the agreement that

³⁰⁴⁴ Section 1815 Civil Code. This is different to South African law where an interest charge would not be *ex lege* but *ex contractu*.

³⁰⁴⁵ Interest rates are determined in terms of the average interest rate levied by the banks for those types of contracts and are published in the Government Gazette every three months by the Minister of Treasury. An agreed interest rate is usurious if it is in excess of the prescribed interest rate by more than half. Thus, for example, if the prescribed interest rate is 6% the parties may not agree to levy interest at a rate more than 9% (Carnevali in Bessone 2009 498).

³⁰⁴⁶ Section 1284 Civil Code.

³⁰⁴⁷ Section 1815 Civil Code.

³⁰⁴⁸ Carnevali in Bessone 2009 498.

³⁰⁴⁹ Rules on the Composition of the Crisis of Over-indebtedness of the Consumer (own translation).

³⁰⁵⁰ 'Over-indebtedness' is defined as the persistent imbalance between a person's obligations and their funds on hand or assets that could easily be liquidated and the definitive inability to regularly fulfill their obligations (article 6 (2)(a)).

³⁰⁵¹ <http://leg16.camera.it/561?appro=553> (12.07.2015).

³⁰⁵² The procedure is available only to natural persons that have debts that are not related to their commercial or professional endeavours (article 6 (2)(b)).

³⁰⁵³ Article 7.

³⁰⁵⁴ Article 12.

must be approved by the court but that requires acceptance by creditors representing at least sixty percent of claims.

An over-indebted consumer may propose to his creditors a restructuring plan which will ensure deadlines for payments of creditors and if necessary the eventual liquidation of assets in order to meet the debt obligations. It is possible that debts that are secured by pledge or hypothec may be extinguished even if not paid in their entirety but paid in the amount which would be achieved on the asset (as security) at market value. The plan may also suggest a deferment of payments. The plan may even suggest that the liquidation of the consumer's estate be managed by an authorized person, which person must be appointed by the court.³⁰⁵⁵ The proposal envisioned by this legislation is not available to a consumer who is already subject to insolvency procedures or has availed himself of the relief contemplated in this legislation within the previous five years.³⁰⁵⁶

The proposal may include satisfaction of the debts even through cession of future credit.³⁰⁵⁷ In the event that the consumer's assets or income are insufficient to guarantee the feasibility of the plan then the plan must be endorsed by one or more third parties which consent to the bestowal of sufficient assets or income to ensure the feasibility of the plan.³⁰⁵⁸

The plan must also indicate the limitation which will be placed on the consumer in terms of access to credit, use of electronic instruments of payment methods on credit and signature of credit and other financial instruments.³⁰⁵⁹

The plan must be submitted to the court which has jurisdiction over the consumer. The plan must, amongst other things,³⁰⁶⁰ be accompanied by the list of all the consumer's creditors, the amounts owed to each creditor³⁰⁶¹ as well as

³⁰⁵⁵ Article 7(1).

³⁰⁵⁶ Other exceptions may be found in article 7(2).

³⁰⁵⁷ Article 8(1).

³⁰⁵⁸ Article 8(2).

³⁰⁵⁹ Article 8(3).

³⁰⁶⁰ There are a lot of other details that must be incorporated in the proposal, for example but not limited to, the causes of the consumer's over-indebtedness.

³⁰⁶¹ Article 9(1).

a list of the expenses of the consumer which are necessary to sustain himself and his family.³⁰⁶²

Article 10 sets out the procedure for the plan to then be approved by a judge. Creditors are advised by the court with thirty days' notice of the intention of the court to consider the plan.³⁰⁶³ Creditors are required to communicate³⁰⁶⁴ their consent to the court at least ten days prior to the hearing, failing which consent will be assumed.³⁰⁶⁵ Once reached, the agreement is presented to all creditors whom have a further ten days to consent the plan, the judge then takes the agreement together with any obligations submitted and makes a final determination. The court must publish the approved plan, and from date of publication all creditors whose credits preceded the publication are bound by the plan and any subsequent creditors are prevented from executing against any of the consumers assets which form part of the plan.³⁰⁶⁶

Judicial endorsement must occur within six months of the plan having being submitted to the court by the consumer.³⁰⁶⁷ The repayment of secured creditors may be suspended for up to a year from the date that it is approved.³⁰⁶⁸

The procedure differs from that envisioned by the National Credit Act, in that as opposed to being handled by debt collectors, the plan is prepared by the consumer himself, avoiding further costs which he can ill-afford thereafter managed and controlled by the courts. Possibly a more convincing and reliable solution for consumers.

If the plan is not possible or is rejected by the judge, the consumer may still access the procedure for liquidation of his assets. Once successfully completed,

³⁰⁶² Article 9(2).

³⁰⁶³ It is interesting the at the communication to creditors (which even contemplates telegram communications) is managed by the court and thus the expense is not downloaded onto the already financially strained consumer.

³⁰⁶⁴ They can do this through telegram, registered post, fax or by certified email.

³⁰⁶⁵ Article 11(1).

³⁰⁶⁶ Article 12(3).

³⁰⁶⁷ Article 12(3)

³⁰⁶⁸ Article 8(4).

the debtor will be 'esdebitato',³⁰⁶⁹ or will be free from any debt still not honored. He will thus, in a sense, have a 'fresh start', or new beginning.³⁰⁷⁰

6.9.1. Penalties

In Italy the parties may include in their contract a clause that states that in the event of non-performance or late performance by the consumer, the credit provider may be entitled to certain pecuniary benefits, irrespective of the materiality of the term breached and without having to prove the seriousness of same.³⁰⁷¹

A penalty stipulation must be contracted for a specific breach and if the consumer commits a different type of breach other than the one foreseen in the contract, the credit provider will not be entitled to have recourse to the penalty.³⁰⁷² Thus, if the penalty stipulation is for breach due to *mora* and the debtor after breach tenders performance, albeit late, and the creditor accepts such performance the creditor will be prevented from relying on the penalty clause.³⁰⁷³ Furthermore, a credit provider is prevented from claiming specific performance and the penalty, unless the penalty clause specifically envisioned *mora debitoris*.³⁰⁷⁴ Thus a creditor may claim the penalty and *mora* interest, provided this is specifically stipulated in the contract.³⁰⁷⁵

The penalty must not be trivial and on the other hand it must not be manifestly excessive.³⁰⁷⁶ In the latter instance a court may lower the penalty to an equitable amount in the circumstances.³⁰⁷⁷

³⁰⁶⁹ This word appears to mean 'unindebted' (own translation).

³⁰⁷⁰ http://sostonline.aduc.it/scheda/sovraindebitamento+nuovo+procedimento_20038.php (12.07.2015). Fabiano posits that this legislation is presented as a tool to rid consumers of debt as opposed to creating a negotiation tool (http://www.ilsovraindebitamento.it/wp-content/uploads/2013/09/Unione-nazionale-giovani-dottori-commercialisti-Procedura_composizione_crisi_da_sovraindebitamento.pdf) (12.07.2015).

³⁰⁷¹ Gazzoni 2009 648.

³⁰⁷² *Ibid.*

³⁰⁷³ *Ibid.*

³⁰⁷⁴ Gazzoni 2009 648.

³⁰⁷⁵ *Ibid.*

³⁰⁷⁶ *Ibid.*

³⁰⁷⁷ Gazzoni 2009 648.

Like in South African law, the function of the penalty stipulation is to act *in terrorem* or to push the consumer to perform. However, some authors are of the view that it is more correct to state that the function of the penalty stipulation is to have a pre-estimation of damages and thus avoid lengthy procedures to prove same.³⁰⁷⁸

³⁰⁷⁸ Gazzoni 2009 648-9.

7 CONCLUDING REMARKS

The evolution of contemporary society and industry progress require continual upgrades to consumer laws, not least of all credit legislation, in order that such rules remain current and therefore relevant to modern advances, ensuring that the consumer is duly protected, while at the same time that the relationship between provider and consumer remains in balance. The credit legislation in South Africa, has in the last nine years been almost completely revamped. The National Credit Act has brought with it a set of rules by which consumers and providers must abide by when contracting. It is my submission that this revamp is not sufficient and that the legislature and the courts must persist in a perpetual restyling of credit regulation until the restoration of the numbers of over-indebted consumers is reached.

The rationale motivating change in consumer policies and legislation were fostered on past experiences. Some of the chief rationale for consumer policy are the inherent inequality in bargaining power between consumers and suppliers of goods, services or credit and the need to protect the imperfectly informed and often uneducated consumer *vis-à-vis* the credit provider who has the buying power to manipulate enticing marketing practices. The new rationale motivating change should be the difficult realities of over-indebtedness which consumers are faced with.

The study on the foreign jurisdictions was noteworthy. The world is becoming increasingly globalised, cross-border trade and payments are now becoming the norm and the example that the European Union has provided to the world, more specifically Africa, in harmonisation of laws is invaluable. Africa can certainly use the method of issuing directives and having minimum and full harmonisation directives to facilitate harmonisation. Such a system would start to eliminate the differences in national laws which are inimical to the efficient conduct of cross-border business in Africa. Fostering this kind of trade is vital to stimulate African economies, not least of all South Africa's and barriers, like lack of regulation,

should be abolished in order to provide trading environments within which people and companies feel legally (and therefore commercially) safeguarded.

The fragile expectation that money lent will be returned has over the years compelled the legislature to put plain and unambiguous rules into place which regulate the procedures relating to remedies available to the credit provider once there has been a breach of the credit agreement. The very fundamental of any contract is the unwavering trust that the parties have when entering it; that is that their pact will be kept and, where one of the parties fails to honor his obligations, that the courts will enforce the terms of their agreement. The efficiency of the judicial system and reliable procedures, including debt enforcement, are necessary prerequisites for a functioning credit market that sustains economic growth. South Africa in particular maintains a stabilizing ingredient in the form of the common law within which the National Credit Act comes into and in terms of which, through interpretation and application, will be further developed. However and irrespective of the laudability of the legislation or the stability of the ensconcing common law, it is an inevitable truth that consumers will breach their agreements, often times due to extenuating circumstances, for example job loss or illness. Thus, it is my submission, that today's consumer legislation must consider alternative measures to assist consumers thereby avoiding or limiting the debt collection cycle. There will always be a need to revert to remedies in order to recover from errant debtors, and it is then that such remedies must ensure fair procedure in the recovery process. The staggering global statistics of consumers' over-indebtedness are, however, begging for substitute solutions to litigation.

The importance of accessible and efficient courts to sustained and widely shared economic growth, the fact that contracts must be enforced, property rights must be protected and foreign and domestic investors must have confidence in the legal security of their investments has long been recognized by policy makers and has already been emphasised in this work. A major requirement in order to achieve a stable contracting environment is that performance must be certain. While legislative intervention ensures this stability, a balance must be sought

between the protection of consumers and ensuring credit providers' rights to enforce a contract. South Africa has not abandoned the consumer protection responsibility to the market economy nor taken a neo-liberalist policy stance to legislating the credit regime, rather, the consumer-oriented National Credit Act (as well as the Consumer Protection Act) evidence a more regulated market approach. What becomes of concern in a regulated market economy, as it has been in Europe, is the risk of financial exclusion, which is symptomatic of consumer weighted policies. Thus, where legislation is over-protective of consumers and becomes zealous in its recriminations of credit providers and where credit providers face risks such as suspension of credit agreements with consumers if found to be reckless lenders, then credit providers may rebuff credit applications. This phenomenon, however, in this credit based global economy is something that credit providers will have to learn to overcome and adapt with changing policies.

The security created by legal machinery to ensure a creditor's right to enforce an agreement, not only impacts social values but often considerations on a macroeconomic level beyond the parochial concerns of individual litigants. Failure to ensure that credit consumers honor their obligations would in other times sterilize the commerce of credit and such freezes would have had a knock-on effect on consumers by inhibiting their access to credit. This is much needed credit which is used to purchase homes and finance business activities, which in turn further stimulates the economy. It is my submission, however, that the world of consumer credit is changing. Credit providers (or at the very least governments) the world over are being forced to realize and compensate for the fact that many consumers need assistance in meeting their obligations in the life-cycle of one or many debt agreements. And while South African audiences may be slow to the party they will eventually have to succumb to this reality, requiring huge elasticity from credit providers and policy makers.

As stipulated above, too much consumer protection and not enough credit provider protection may fetter the credit market and send 'uncreditworthy' consumers scampering to elicit underground loans. This is why the reckless

credit solution as presented in the National Credit Act is still not the correct mechanism. To be prudent credit providers are erring on the side of caution, inadvertently creating a credit vacuum, which can end in social calamities like the Marikana incidence of 2012 and the pressures facing the striking National Health Laboratory Service employees, today.

There is no doubt that remedies available to credit providers are one of the most controversial areas in consumer credit. Discussions on whether modifications to or removal of certain creditor's rights and remedies should be carried out almost always create polarized views for or against such changes. This is the conundrum of the legislature when dealing with consumer credit legislation. Which legislation has to encapsulate a diversity of matters such as the content of contracts, interest calculations, economic considerations, mercantile notions such as credit cards, overdrawn cheque accounts, home loans, hire-purchase and letting and hiring of work. Legislation that inevitably involves conflicting interests between credit providers and credit consumers and that is, by its very nature, intended to achieve a compromise between these two factions.

These complexities were the starting point of the thesis, and the common law remedies were the matrix within which the examination of the influence of the National Credit Act was conducted. Where a jurist finds a gap in the codified source, here in particular, the National Credit Act, he will look to the common law, even that part of the common law which was an interpretative development by the courts for a previous legislative regime. Without the common law background the Act would not completely regulate the credit relationship. The common law acts as a normative device for interpretive issues, be it in relation to contextual or substantive matters. For example, where the attempt was made to construe the wording of section 131 as read with section 127 of the Act, to mean that repossession of goods that are subject of an instalment agreement is no longer dependant on cancellation of the instalment agreement. The courts found that such a construction was at variance with the common law and if the legislature had so wanted to vary the common law it would have conveyed its intention in clear and unambiguous language.

The credit provider must also abide by the legislatively imposed procedures required before a credit agreement may be enforced. There are three ways in which a credit provider may satisfy the requirement for notification of default by the consumer. The first is through a section 129 (1)(a) notice, the second is through a notice in terms of section 86 (10), which notice relates to debt review. And thirdly, a credit provider may issue a section 127 (7) default notice when faced with non-payment by the consumer in relation to the outstanding amount post a sale of surrendered goods as contemplated in section 127, in relation to secured loans, instalment and lease agreements. It must be pointed out that not all three notices relate to default of a consumer under all credit agreements as defined by the Act. This is because a section 86 (10) notice is a specific notice to be used only when a consumer is in default under a credit agreement that is under debt review in terms of the Act and section 127 (7) is a notice to be used only in relation to a notice requesting the balance of payment under an already repudiated agreement. So it is only a section 129 (1)(a) notice which is the default notice required to be issued by a credit provider when a consumer is in breach of a credit agreement and in order to enforce the agreement through the litigation process, whether by way of cancellation or otherwise. A section 129 (1)(a) notice also serves another function which is an attempt by the legislature to have the credit relationship prevented from immediately plunging into a debt collection situation. However, it is not section 129 (1)(a) alone but the Act as a whole which demonstrates the legislature's inclination to avoid litigation by providing the consumer with opportunities to help himself to meet his obligations prior to the issue of summons.

What is of comparative interest is the manner in which the default notice in England has been used as a soft method of consumer protection, in that the credit provider that is faced with a consumer that has breached the contract must issue a default notice, this is to prevent the consumer's indebtedness from becoming overwhelming for him. The wording in the section 129 (1)(a) notice, however, does not place a similar obligation on the credit provider, thus the use of the word 'may'. Dispatch of the notice is not obligatory in every instance of default as it is in England, however, where the South African credit provider

wishes to commence legal proceedings against the consumer for his default – the provider is then obliged to issue a section 129 (1)(a) notice of default. Making it compulsory to warn the consumer of his default as soon as he defaults, whether or not the credit provider intends to pursue the consumer for the arrears at that stage, is something that should be considered by the legislature.

A section 129 (1)(a) notice places no obligation on the credit provider to incorporate a demand and it has been submitted that this should be incorporated as well as the choice of remedy the credit provider intends to pursue in the event that the consumer does not react to the section 129 (1)(a) notice within the provided time limit, even if specific performance or cancellation are indicated in the alternative, as is the requirement for default notices in England. Similarly section 11 of the Credit Agreements Act required the credit provider to advise the consumer of his failure in terms of the obligations of the agreement entered into by the parties and required him to comply with the obligation in question within the period therein mentioned. Section 129 (1)(a) notice should also advise the consumer of the time constraints in order to make the consumer aware of the imminence of the possible consequences should he not react to the notice. The fact that the Act does not oblige the credit provider to advise the consumer of the time constraints, that debt enforcement (as well as what type of debt enforcement) may ensue and to make demand are definite shortcomings in the Act, which the courts should actively endeavour to cure.

It is interesting to note that the European Union Credit Directive does not especially compel the credit provider to notify the consumer upon breach of contract of the impending consequences of breach but does require that the credit provider incorporate the nature of the consequences by breach of the consumer in the credit agreement.

The National Credit Act does not specifically list the remedies available for breach of the agreement, these must be drawn from the common law of contract. The sections of the Act that do set out the remedies available to the credit provider upon breach by the credit consumer are not, it is submitted, a massive

novation to either the common law remedies normally available to the aggrieved party or those remedies that had been established through previous legislation and the interpretation thereof by the courts. While the Act has only supplemented the common law and contractual remedies available to a credit provider upon breach by the consumer and consolidated the vendor aspects with the lender aspects of the credit relationship, previously regulated by two separate acts, it has introduced powerful rights of rescission by the credit provider and consumer, found in sections 123 and 127 of the Act.

It is not every breach of a contract that will, in the absence of a cancellation clause, justify cancellation at common law. Thus if there is a failure in the payment of an instalment the creditor may sue for cancellation only as an alternative to or failing payment. Section 123 of the Act has changed this landscape, no longer does a credit provider have to contractually ensure that it is entitled to terminate a credit agreement upon default by the consumer but by virtue of section 123 the credit provider's right to cancel the contract upon default by the consumer has been concretised. While a credit agreement, irrespective of its form, is generally a type of agreement where time is not of the essence (unless this is specified in the agreement) as the creditor on a money loan can levy arrear interest on dilatory payment thereby recouping the value of the time lost through late payment, in the event of *mora debitoris* a court must grant cancellation as relief rather than an order for specific performance as would naturally follow under the common law, due to section 123.

Section 127 on the other hand removes repudiation of a credit agreement as a breach of agreement in certain circumstances, by allowing the consumer the right to terminate instalment, secured loan and lease agreements as defined by the Act and to surrender the goods to the credit provider by way of notice, whether or not there is default. Entitling the consumer to repudiate and thereby removing the element of wrongfulness normally associated with anticipatory breach. The consumer under the instalment, secured loan and lease agreement can now terminate the agreement at any stage and for any reason. This is a dramatic alteration of common law principles which state that the obligations imposed by

the terms of an agreement must be honoured and if they are not the person who has the duty to perform is said to have committed breach of contract. Furthermore, if the consumer exercises his right of repudiation in terms of section 127, the credit provider is not entitled to be put in the position it would have been in had the contract been performed. This is in contrast to the common law rule for damages, which states that the innocent party (here the credit provider) must be placed in the same position financially had the breach not occurred. Both sections 123 and 127 of the Act have made dynamic changes to the landscape of rights and limitations of rights in terms of the exercise of remedies by credit providers.

A remedy which is not directly addressed by the National Credit Act is that of damages. However, section 127 of the Act does establish a specific procedure that regulates the proceeds of a sale of goods under an instalment agreement, secured loan or lease and the Act does regulate the rate of *mora* interest together with the Prescribed Rate of Interest Act. There is an interesting dynamic between these two pieces of legislation in that while *mora* interest is calculated according to the prescribed rate, the National Credit Act provides that interest applicable to an amount in default or an overdue payment under a credit agreement that is governed by the Act may not exceed the highest interest rate applicable to any part of the principle debt under that agreement, thus *mora* interest cannot be levied in accordance with the prescribed rate of interest in terms of the Prescribed Rate of Interest Act if such prescribed interest is higher than the highest interest rate applicable to any part of the principal debt under that agreement. It is interesting to note that England tempers the situation of *mora* interest by only allowing such interest to be simple and not compounded, perhaps another form of soft consumer protection to be taken under consideration by the South African legislature.

The Conventional Penalties Act is another act that is affected and works in tandem with the National Credit Act. With respect to specific performance of the credit agreement, the existence of a penalty provision would not prevent a credit provider from enforcing specific performance of the contract, though the credit

provider may be prevented from claiming the penalty in addition thereto – unless the penalty provision was specifically drafted to envision penalty consequences for the defect or delay experienced by the credit provider. The Conventional Penalties Act would become effective if the penalty were to be found to be out of proportion to the prejudice suffered by the credit provider. The situation is different when looking at cancellation of a contract in terms of section 123 of the Act because a credit provider may only terminate an agreement in strict compliance with this section. When seeking the attachment of goods that are subject of a credit agreement, the regimented procedures prescribed by section 127 when dealing with movables, would not allow a penalty stipulation to survive the scrutiny of the court and would be unenforceable. The same would not be true if the credit provider sought cancellation without requesting repossession but only the enforcement of a penalty clause. Here a court would be obliged to respect the agreement between the parties and enforce the penalty clause, subject to its being in proportion to the prejudice suffered by the credit provider. The same would be true of a forfeiture clause, provided however, that the forfeiture was not forfeiture of the goods but of money (a deposit, for example, or paid instalments) as this would involve an attachment and in turn be subject to sections 131 and 127 of the Act. The National Credit Act would be the initial regulating force for penalty stipulations and the point of departure while the Conventional Penalties Act would be relied upon in the event that a penalty stipulation is not directly prohibited by the Act.

The Act has been drafted in such a way as to advocate responsible lending and penalize reckless lending, with debt re-organization and where necessary suspension of consumer obligations, as consequences therefor. The legislature has certainly made a giant leap in attempting to recognize the inherently weaker position of the consumer and providing the consumer with alternative solutions to mend his plight prior to retribution. Yet nine years after the Act came into force, we see that of the nineteen million credit-active consumers in South Africa, fifty percent have impaired credit records of more than three months in arrears, with

fifteen more percent being indebted one to two months in arrears.³⁰⁷⁹ As a result, more than eleven million of South Africa's credit active consumers are over-indebted.³⁰⁸⁰ This high level of indebtedness is compounded by South Africa's low level of savings,³⁰⁸¹ which means microloans are being used for consumption, a phenomenon which has been recognised in other jurisdictions like England.³⁰⁸² From 2007 to 2012, in South Africa, outstanding unsecured credit increased from forty one billion rand to one hundred and fifty nine billion, that is a massive sixty percent growth.³⁰⁸³ With a faltering economy, cash-strapped consumers are struggling to pay back loans, and getting entombed in a poverty cycle and debt trap. In 2009 forty percent of the money from micro finance was used to buy food, with many consumers obtaining further credit in order to pay old debts. Unsecured lending and microloan schemes were identified as major problems that plagued Marikana during the labour unrest in August 2012.³⁰⁸⁴ Only 21c in every rand is available to the average South African household to pay for living expenses. The rest is used to pay debt, despite measures in the last two decades to curb levels of household indebtedness.³⁰⁸⁵ Three of the chief measures taken to try to better the financial position of the South African consumer, include the enactment of the National Credit Act, which was intended to protect consumers and make credit and banking services more accessible, the second was a consistent lowering of interest rates over the last seven years (with two small exceptions in 2008 and 2014 when it rose by 0.25%), and the third a credit amnesty, which in effect wiped the slate clean for 3.1 million South African consumers with poor credit records.³⁰⁸⁶

³⁰⁷⁹ <http://citizen.co.za/342065/sa-consumers-burdened-with-debt-sahrc/> (6.7.2015), or had judgments against them, or had negative ratings on their credit record <http://www.sabc.co.za/news/a/2a1f9e80487dac238a93de2edf086e8a/SAundefineddebtundefinedmeasuresundefinedbackfire-20152405> (6.7.2015).

³⁰⁸⁰ *ibid.*eing

³⁰⁸¹ *ibid.*

³⁰⁸² <http://www.iol.co.za/business/news/half-of-sa-is-over-indebted-sahrc-1.1830518#.VaLBwaQaLml> (6.7.2015).

³⁰⁸³ *ibid.*

³⁰⁸⁴ <http://citizen.co.za/342065/sa-consumers-burdened-with-debt-sahrc/> (6.7.2015).

³⁰⁸⁵

<http://www.sabc.co.za/news/a/2a1f9e80487dac238a93de2edf086e8a/SAundefineddebtundefinedmeasuresundefinedbackfire-20152405> (6.7.2015).

³⁰⁸⁶ *ibid.*

So while the National Credit Act was an attempt by the legislature to monitor and prevent reckless lending, provide guidelines about interest rates and fees, and introduce debt counselling to over-indebted consumers, the resultant effect of making credit from financial institutions harder for already financially pressurised consumers to access, is that it has forced many people with irregular incomes or bad credit records to make use of the services of unscrupulous lending agencies.³⁰⁸⁷ The so-called 'loan sharks', which operate outside the law, charging crippling interest rates (often calculated per day and not per week or per month) to desperate consumers, far in excess of that stipulated by the Act.³⁰⁸⁸ Thus vulnerable and poverty-stricken people are ruthlessly exploited and are seldom in a position to take legal action. With loan sharks notorious for confiscating the identity books and bank cards (with PIN number) of their clients until the loan is fully paid up.³⁰⁸⁹ A throw back from the old system, which the National Credit Act was intended to address.³⁰⁹⁰ Many consumers use about seventy six percent of their income to repay debt, and when debt catches up with them, they resolve this issue by taking out more credit, to pay off old debt.³⁰⁹¹ While the reserve bank lending rate has been on the decrease over the last seven years, once it increases, as it started doing in August of this year, and as it has been predicted to by 1.5% by the end of 2016 this will put more pressure on salaries leaving consumers with little disposable income at the end of each month.

The credit amnesty may have given people a cosmetic sigh of relief but in effect it simply cleared records of people who should in fact not obtain more credit given their inability to afford and maintain payments, a simple postponement of the inevitable, if not a worsening of the position of already over-indebted consumers – by allowing them to become more over-indebted. The amnesty merely removed evidence of the ailment but has not treated the causes.

³⁰⁸⁷ *Ibid.*

³⁰⁸⁸

<http://www.sabc.co.za/news/a/2a1f9e80487dac238a93de2edf086e8a/SAundefineddebtundefinedmeasuresundefinedbackfire-20152405> (6.7.2015).

³⁰⁸⁹ *Ibid.*

³⁰⁹⁰ *Ibid.*

³⁰⁹¹ <http://www.enca.com/south-africa-money/south-africans-living-pay-debt>

England is faced with similar statistics. The average English household is set to owe close to £10 000 in unsecured debt by the end of 2016.³⁰⁹² While borrowers sought to reduce their debts in the years following the financial crisis, this period of credit prudence has now ended.³⁰⁹³ Unsecured debt in England reached an all-time high, in cash terms, of nearly £9 000 per household by the end of 2014.³⁰⁹⁴ Credit cards are starting to be used again and newer forms of borrowing such as peer-to-peer lending are starting to gain ground.³⁰⁹⁵ The total household debt to income ratio is projected to reach around 172% by 2020.³⁰⁹⁶ A two percentage point increase in the cost of servicing consumer's debt would see households needing to find an extra £1 000 a year, just to cover the additional interest costs.³⁰⁹⁷ It seems that England's upgrades to its credit regime have also not assisted in curbing over-indebtedness.

Italy has a diverse method of pre-enforcement and enforcement procedures; what is of notable interest is Italy's law pertaining to the provisions regarding arrangement of the problem of over-indebtedness of consumers. The similarity between Italy's system of trying to reach a compromise or arrangement between debtor and creditor are similar to the concepts which the National Credit Act has attempted to infuse the credit collection system with, through the ability to declare oneself over-indebted and with wide, legislative intent behind a section 129 (1)(a) notice 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. The decision made by the Supreme Court in *Nedbank Ltd and Others v The National Credit Regulator* to bar a consumer from applying for a debt review once a section 129 (1)(a) notice had been issued in respect of that specific agreement is not supported. It is often the receiving of a section 129 (1)(a) notice that catapults the consumer into action. The National Credit Amendment Act has now reversed the position by providing an amendment to section 86 (2) to the effect that the mere delivery of a section 129 (1)(a) notice will not serve to

³⁰⁹² 'Precious Plastic 2015: How Britons fell back in love with Borrowing' Report by PWC 2015 <http://www.pwc.co.uk/financial-services/publications/precious-plastic-2015.jhtml> (5.7.2015) 1.

³⁰⁹³ *Ibid.*

³⁰⁹⁴ *Ibid.*

³⁰⁹⁵ Report by PWC 2015 1.

³⁰⁹⁶ *Ibid.*

³⁰⁹⁷ *Ibid.*

exclude a specific credit agreement in respect of which it was delivered from debt review.

It is submitted that South Africa, and more specifically, the South African legislature and courts need to take this a step further. In so far as the legislature is concerned, the Italian procedure in relation to debt rearrangement, and actual debt cut-offs by judges should be seriously considered as an option, the latter (obviously) only in extreme situations. If the bank lending rate does indeed continue to increase, already debt-strapped consumers are going to sink deeper into debt and will need dynamic assistance in their plight. The courts too should reconsider the general attitude taken towards over-indebted consumers. No longer is the harsh judicial attitude towards the 'bad' debtor acceptable. There are the 'rotten' few who attempt to 'cheat' the system, but like bad lawyers, these few should not be allowed to worsen an already delicate situation. Magistrates and judges need to consider that indebtedness and over-indebtedness are uncomfortable situations for even the most thick-skinned of individuals and that within this consumer-based society credit and continual inflation make it difficult for people to stay out of debt and sometimes out of 'over debt'. The Italians have taken a much more sturdy approach in attempting to assist the over-indebted consumer. For one, the arrangement is always, in the end, decided by a judge once he has considered all the evidence and he has the authority to amend the agreements reached between creditor and consumer. Furthermore, the consumer may look to a suitably qualified person (such as a qualified accountant or attorney) for assistance in such a procedure and not to an unqualified individual, as is the case with the debt counsellors in South Africa. The magistrates and judges should make use of the tools that the National Credit Act has provided for them to assist over-indebted consumers by seriously and more often contemplating debt re-arrangement orders or suspension orders. It is my submission that the legislature should take this a step further and develop a more structured approach, something akin to a compulsory negotiation and mediation procedure where extension of debt repayments and restructuring of debt can be discussed, arranged and agreed between the parties to the credit relationship. This will need to be facilitated by sturdy policy. Out-of-court or pre-litigation

settlement is being encouraged across the board, the pilot project of court annexed mediation is a good contemporary example.

So is the revolution of the National Credit Act in its remedies? In all honesty, no, it is not. The remedies are what remain when the system has failed. When the consumer has not acted responsibly, when the creditor has not acted reasonably and when a judicial officer has not extended himself to assist over-indebted consumers in managing, by re-arranging or suspending their aggregate debt whether partially or wholly. Unfortunately (or fortunately) it is the wisdom of the law makers and the law implementers that must be cultivated for the system to adequately protect the susceptible consumer. The global 'debt-crisis' demands such adaptation.

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