A CRITICAL ASSESSMENT OF CREDIT PROVISION GOVERNANCE IN SOUTH AFRICA WITH A FOCUS ON BALANCING THE RIGHTS AND RESPONSIBILITIES OF CREDIT PROVIDERS AND CONSUMERS UNDER SECTION 129 OF THE NATIONAL CREDIT ACT 34 OF 2005

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A critical assessment of credit provision governance in South Africa with a focus on balancing the rights and responsibilities of credit providers and consumers under Section 129 of the National Credit Act 34 of 2005

A thesis submitted in fulfilment of the requirements for the award of the

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Declaration

I, the undersigned, hereby declare that except for references indicated as such in the text, and any other assistance as has been acknowledged, the work contained in this thesis for the degree of Doctor of Laws at the University of Fort Hare is my own independent study that has not been previously submitted in part or in its entirety for degree purposes or otherwise.

Signed at East London on this 6th day of May 2022

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Abstract

The National Credit Act of 2005 (the NCA), described as the fourth generation of consumer protection legislation in South Africa, is the product of an initiative by the Department of Trade and Industry to address the shortcomings of the third generation of consumer protection legislation, being the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980. The NCA seeks to unify legislation and departs radically from the old 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.

Through enactment of the NCA the government appears to have focused on the protection of consumers through pre-enforcement procedures, prohibitions on reckless lending practices, prevention of over-indebtedness, alleviation of over indebtedness, and an array of other measures. This protection is deemed necessary due to the relative unequal bargaining power between the credit provider (provider) and the consumer at the time of conclusion of an agreement. This consumer protection has, however, sometimes come at the cost of provider protection. Despite these endeavours, there is still the inevitably common occurrence of breach of the agreement by consumers and the ensuing recovery process available to providers. The relationship between the two major role players – the provider and consumer - is the epicentre of any discussion, theory or legislative enactment pertaining to credit.

This study commences with an examination of the historical background and *rationale* for the NCA, putting into context 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 NCA. The common law, which acts as a stabiliser especially when there are legislative changes, is examined in relation to pre-enforcement procedures, breach and the remedies as affected by the NCA.

The equitable balancing of the rights and responsibilities of these two major role players is essential to the continued well-being of not only the parties but also the credit industry and economy as a whole. The most common way for individuals to purchase any large asset like a home or motor vehicle is to approach a financial institution for provision of a loan or credit agreement. To protect its interest, the financial institution would normally register a mortgage

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bond over the property or hold the title of the motor vehicle until all instalments have been settled. The problem arises when the consumer defaults on repayment of the loan or credit agreement. The financial institution would then be forced to institute legal proceedings to for example foreclose on the bond and repossess the property or motor vehicle. The pre-enforcement procedure finds itself in the centre of the tug of war between the parties in that this is the area and time that both parties require their rights and interests to be protected.

The pre-enforcement procedures determine to a large extent, if properly implemented, how many agreements are seen to successful finalisation versus the alternative of those being cancelled and / or enforcement pursued through litigation by the provider. Successful implementation of agreements and repayment of debt would support a healthy credit industry and therefore, a strong economy. This is also the favoured outcome by the NCA.

Section 129 of the NCA encapsulates the pre-enforcement procedure and thus determines balancing the parties' rights and responsibilities through its interpretation and application. The section, however, would appear to fall short in that the delivery requirement of the notice is not adequately defined and has therefore resulted in many disputes, interpretations and two subsequent amendments to the section by the National Credit Amendment Act of 2014 and 2019.

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The purpose of this study is to critically analyse section 129 of the NCA and determine if the rights of both the consumer and provider have been equally protected, with particular reference to the burden of bringing the section 129 notice to the attention of the consumer. The question posed by all parties involved is always inevitably: Must the section 129 notice come to the actual knowledge of the consumer in order for it to be valid? The answer to this question has varied between two schools of thought. The first school of thought, being the pro-provider approach, answers the question in the negative and holds that as long as the provider has met certain delivery requirements their duty has been fulfilled whether or not the consumer actually receives the notice. The second school of thought, being the pro-consumer approach, answers the questions in the affirmative and requires the provider to carry the burden of ensuring the consumer actually receives the notice in order for it to be valid. There are numerous reasons in support of both schools of thought.

It is hoped that this study will make a helpful contribution to the balanced interpretation of section 129. The study aims to provide a consistent interpretation of the section whilst balancing the rights of the consumer and provider respectively.

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Any shortcomings in this study are entirely my own.

The study covers the law as at the end of April 2022.

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Dedication

I dedicate this study first and foremost to my Heavenly Father without whom this study would never have been accomplished; and secondly, to my parents who ensured that I obtained the education I desired. This dedication is a mere symbol of my gratitude where mere words seem inadequate to express the foundational and unwavering support I received. Your love is unconditional and has allowed the accomplishment of many wonderful achievements.

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Glossary of Terms and Keywords

This study makes use of many key phrases and terms.

Definitions will be provided throughout this study as and when required in the individual chapters. However, some fundamental definitions are provided here from the outset for ease of reading and understanding. These initial definitions are as derived from section 1 of the National Credit Act 34 of 2005.

"**Agreement**" means an arrangement or understanding between two or more parties, which purports to establish a relationship in law between those parties.

"**Consumer**" with respect to a credit agreement to which the Act is applicable, means

(a) the party who buys goods or services under a discount transaction, an instalment agreement or an incidental credit agreement;
(b) the party who receives money or credit under a pawn transaction, or a party who receives credit under a credit facility;
(c) the mortgagor under a mortgage agreement;
(d) the borrower under a secured loan;
(e) the lessee of a lease agreement;
(f) the guarantor of a credit guarantee;
(g) the party whom credit is provided to under any credit agreement.

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Wherever possible this study will make use of the word "consumer" as opposed to credit receiver or debtor.

"**Credit**", when used as a noun, means

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

"**Credit agreement**" means an agreement that meets all the criteria set out in section 8 of the Act.

"**Credit provider**", with respect to a credit agreement to which the Act applies, means

(a) the party responsible for the provision of goods or services under a discount transaction, an instalment agreement or an incidental credit agreement; or
(b) the party that advances money or credit for a pawn transaction;
(c) the party that provides credit under a credit facility;
(d) the mortgagee in terms of a mortgage agreement;
(e) the lender under a secured loan;
(f) the lessor for a lease agreement;
(g) the party in whose favour the promise or assurance is made in a credit facility agreement;
(h) the party that makes available money or credit in terms of any other credit agreement;
(i) any person who obtains the right of a credit provider after entering into a credit agreement.

Throughout this study the word "provider" has been utilized for ease of reading when referring to credit provider as defined above.

"His" or "her" is treated the same in reference to a person in general unless that specific person is a "he" or "she". Reference is made to "the writer" in some statements and represents the researcher and writer of this study.

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LIST OF ABBREVIATIONS

(A)	Appellate Division (SA)
AC	Appeal Court
Acta Juridica	Annual thematic journal published under the auspices of the Faculty of Law, University of Cape Town
AD	Appellate Division Reports (SA)
AJ	Acting Judge
AJA	Acting Judge of Appeal
All SA	All South African Law Reports
ASSAL	Annual Survey of South African Law
BASA	The Banking Association of South Africa
BCLR	Butterworths Constitutional Law Reports
CC / ZACC / CCT	Constitutional Court
CJ	Chief Justice
CLR	California Law Review
CPD	Cape Provincial Division
(D)	Decision of the KwaZulu-Natal High Court, Durban
DCJ	Deputy Chief Justice
De Jure	General law journal, accredited by the Department of Higher Education and Training
De Rebus	The South African attorneys' journal, which is published monthly
Domicilium	*Domicilium citandi et executandi* address
Ed/s	editor/s
etc	*etcetera*
ECD	Eastern Cape Division
ECG	Eastern Cape Division, Grahamstown
ECP	Eastern Cape Local Division, Port Elizabeth
FB	Free State Division, Bloemfontein
fn	foot note

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Fundamina	Journal of Legal History
GG	Government Gazette
GN	Government Notice
GNP	North Gauteng High Court, Pretoria
GSJ	South Gauteng High Court, Johannesburg
HC	High Court
Ibid	Ibidem
Id	Idem
i.e	that is
IIR	International Insolvency Review
J	Judge
JA	Judge of Appeal
JCP	Journal of Consumer Policy
JBL	Juta Business Law
JEFS	Journal of Economic and Financial Sciences
KZD / ZAKZDHC/	KwaZulu-Natal Local Division, Durban
KZP	KwaZulu-Natal Local Division, Pietermaritzburg
LAWSA	Law of South Africa
LJ	Law Journal
LR	Law Review
Ltd	Limited
LSSA	Law Society of South Africa
MEC	Member of Executive Council
NCA	National Credit Act 34 of 2005
NCK	Northern Cape Division, Kimberley
NCR	National Credit Regulator
No	Number
NO	*Nomine Officio*
NPD / (N)	Natal Provincial Division
Obiter	House Journal of the Nelson Mandela Metropolitan University, Law Faculty
P / pp	page /s
Para / s	paragraph /s
PELJ / *PER*	Potchefstroom Electronic Law Journal

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Pty	Proprietary
R	Rand
R	Regulations
RAU	Rand Afrikaans University
s / ss	section / s
SA	South Africa Law Reports
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAMLJ	South African Mercantile Law Journal
SCA / ZASCA	Supreme Court of Appeal
SERI	Socio-Economic Rights Institute of South Africa
SE	South Eastern Cape Local Division, Port Elizabeth
SLR	Stellenbosch Law Review
Speculum Juris	Accredited Law Journal of the Faculty of Law, University of Fort Hare
Supra	Refers to the note above
(T)	Transvaal Provincial Division
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
TPD	Transvaal Provincial Division
TS	Transvaal Supreme Court
TSAR	*Tydskrif vir Suid-Afrikaanse Reg*
UK	United Kingdom
US	United States of America
v / vol	volume
(W) / WLD	Witwatersrand Local Division
WCC	Western Cape Division, Cape Town
ZAKZPHC	High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg
ZAECELLC	Eastern Cape Circuit Court, East London
ZAECGHC	Eastern Cape High Court, Grahamstown
ZAECPEHC	Eastern Cape High Court, Port Elizabeth
ZAWCHC	Western Cape High Court, Cape Town

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ZAGPJHC	Gauteng Local Division, Johannesburg
ZAGPPHC	North Gauteng High Court, Pretoria
ZANCHC	High Court Northern Cape Division

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Chapter 1

Introduction and brief overview of the study

1 1 INTRODUCTION AND CONTEXTUAL BACKGROUND

Most individuals would not be able to purchase a home, motor vehicle or many other large costly items without credit.[1] Credit makes it convenient to make spontaneous purchases or allows consumers to acquire items they need or want now without necessarily having the capital available in order to attend to payment. Credit also allows a consumer to spend more than they have but is also useful in cases of sudden emergencies.

"Credit" is known as a deferral or delay of payment of a sum of money to another person, or a promise to pay money. A credit provider is the party who supplies goods or services (in terms of an instalment sale agreement, for example), or who pays money (under, for example, a secured or unsecured money loan, overdraft facility, pawn transaction or mortgage loan). A consumer is the party to whom goods or services are sold, or to whom money is loaned in any of the examples referred to above.

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A problem arises, however, if the consumer defaults on repayment of the loan, instalment sale agreement etc. The provider would then be forced to institute legal proceedings to recover the outstanding debt and mitigate their losses. To proceed in this manner, the National Credit Act of 2005[2] (hereinafter referred to as "the NCA" or "the Act") requires that certain requirements should first be satisfied.[3]

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1 *Absa Bank Limited v Mokebe* 2018 6 SA 492 (GJ), 2018 ZAGPJHC 485 (12 September 2018) para 1 the Court held: "It is an economic reality that most citizens who acquire immovable property are unable to afford to pay the cash price of such property due to the marked difference in the property prices and the wealth, or lack thereof, of ordinary citizens. The mechanism, developed over many centuries, to assist the man in the street to acquire property is by way of a loan (home loan) from lenders, usually banks, who grant a loan to the homeowner and then register a bond over the property purchased by the homeowner. Bond finance is consequently an important socio-economic toll, which enables individuals to acquire a home. The corollary of this is the security given to lenders against the finance afforded to borrowers by way of mortgage bond." Palmer and Malan "Foreclosures – A welcome new approach" ttps://withoutprejudice.co.za/fee/article/6658/view# (accessed 15-10-2020). *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC), 2019 2 SA 620 (WCC), 2018 ZAWCHC 175 (14 December 2018).

2 It is cited as the "NCA" to avoid overuse of the full title "The National Credit Act" in a manner that results in tautology.

3 The requirement for commencement of institution of proceedings against a consumer, which will be made clear in this study, by a provider is the same irrespective of the type of credit agreement. The cases of *Absa*

The granting of credit to consumers in South Africa is governed by the NCA, which has a profound impact on the consumer credit and legal backdrop due to the introduction of extensive consumer protection measures. The NCA represents a clean break from the past, shows very little similarity to its predecessors, and introduces new concepts and mechanisms of protecting consumers in South African law.[4] The NCA's significance is prevalent when viewed from the perspective of the ever exponentially expanding credit industry. The credit industry is an important sector of the economy and directly impacts upon the nation's economic well-being.[5] Therefore, careful regulation of this industry is critical to ensure a growing and productive economy.[6]

The balancing of provider and consumer rights has been at the forefront of the consumer credit industry since the inception of the concept of credit into the South African economy.[7] The balancing of the respective rights and interests of the parties has been necessitated by the reality of the often unequal bargaining power between the parties. In most cases, the provider was viewed as being in a position of power whereas the consumer was the powerless party who was potentially susceptible to abuse or economic mistreatment by the provider.[8] This abuse was often due to the consumer's general and relative lack of information (non-disclosure), economic vulnerability and limited education.

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The charging of interest was the initial area in the credit industry that was susceptible to abuse as unscrupulous providers could charge vulnerable consumers exorbitant interest rates.

Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick 2018 ZAGPJHC 485 (12 September 2018), 2018 6 SA 492 (GJ) highlight the effect of foreclosure of immovable property in Chapter 7.

4 Otto *The National Credit Act Explained* 4 ed (2017) 2.

5 Otto *Guide to the National Credit Act* (2008) 1. LexisNexis and Laws "The Future of Reputation" https://www.lexisnexis.co.za/__data/assets/pdf_file/0007/663793/LN_Future_Of_Rep_17.pdf (accessed 30-03-2020) 21. Otto "National Credit Act. *Vanwaar Gehási? Quo Vadit Lex*? And Some Reflections on the National Credit Amendment Act 2014 (Part 2)" 2015 *TSAR* 756. Goodwin-Groen and Kelly-Louw "The National Credit Act and its regulations in the context of access to finance in South Africa" http://www.finmark.org.za/wpcontent/uploads/2016/01/Rep_NCA_AccesstoFinance_2006.pdf (accessed 30-03-2020) 1.

6 LexisNexis and Laws "The Future of Reputation" https://www.lexisnexis.co.za/__data/assets/pdf_file/0007/663793/LN_Future_Of_Rep_17.pdf (accessed 30-03-2020) 21.

7 Schraten "The Transformation of the South African Credit Market" 2014 *Transformation Journal* 2. The writer makes this assessment due to the plethora of case law that has emerged indicating the tension of balancing of rights between provider and consumer. These cases will be identified and discussed in this study.

8 Kelly-Louw and Stoop "Prescription of Debt in the Consumer-Credit Industry" 2019 *PER* 1.

Thus, the balancing and protecting of rights was initially conceived through the debate around the charging of interest on capital amounts lent and the regulation thereof.[9]

As the credit industry became more regulated due to the evolving needs of society the areas of necessitated protection expanded and began to include that of disclosure to ensure that consumers were fully aware of their rights, responsibilities, associated costs, risks and benefits of the anticipated credit agreement. This requirement for information and disclosure infiltrated the area of pre-enforcement procedures of debt collection or foreclosure in the event of a breach of contract by the consumer. The pre-enforcement procedures developed through the common law (Roman Dutch and English law), subsequent fragmented legislation (first, second and third generation consumer protection legislation)[10] to the fourth generation of consumer protection legislation in South Africa, being the NCA.

Section 129 of the NCA encapsulates disclosure and pre-enforcement procedures and therefore became the point where the tension between consumer and provider rights and responsibilities was most evident. The section is titled "Debt enforcement by repossession or judgment - Required procedures before debt enforcement" and prior to its amendments provided as follows:

> "(1) If the consumer is in default under a credit agreement, the credit provider-
> (a) *may draw* the default to the *notice* of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
> (ii) meeting any further requirements set out in section 130.
> (2) Subsection (1) does not apply 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.
> (3) Subject to subsection (4), a consumer may -
> (a) *at any time before the credit provider has cancelled the agreement re-instate* a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and-

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9 Kelly-Louw "Debt Relief and Insolvency: Better Consumer Protection under the Statutory 'In Duplum' Rule" in Kelly Louw, Nehf and Rott (eds) *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (2008) 155 – 164.

10 First Generation consumer protection legislation was legislation fragmented between the colonies with each colony in control of its own legislation. Second Generation consumer protection legislation was the commencement of national legislation, including the Usury Act of 1926 and 1968, the Hire-Purchase Act of 1942 and the Sale of Land on Instalments Act of 1971. Third Generation consumer protection legislation saw the legislature attempting to unify the protection under the Usury Act of 1968, the Credit Agreements Act of 1980 and the Alienation of Land Act of 1981. This issue will be discussed at length in Chapter 2 below.

(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.
(4) a consumer may not re-instate 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 enforcing that agreement; or
(c) the termination thereof in accordance with section 123."[11]

Section 129 was amended by section 32 of the National Credit Amendment Act of 2014[12] to read as follows -

"(a) by the substitution for subsection (3) of the following subsection:
(3) Subject to subsection (4), a consumer may at any time *before the credit provider has cancelled* the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.''
(b) by the substitution in subsection (4) for the words preceding paragraph (a) of the following word:
''A [consumer] credit provider may not re-instate or revive a credit agreement after-''; and
(c) by the addition of the following subsections:
''(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).''[13]

Section 129 was further amended by section 20 of the National Credit Amendment Act of 2019[14] to read as:

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"(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
''(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to the National Credit Regulator for debt intervention, a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and''; (b) by the substitution in subsection (4) for paragraphs (b) and (c) of the following paragraphs:
''(b) the execution of any other court order or order of the Tribunal enforcing that agreement; [or]
(c) the termination thereof in accordance with section 123[.]; or''; and (c) by the addition in subsection (4) after paragraph (c) of the following paragraph:
''(d) the Tribunal ordered that the debt that underlies a credit agreement is extinguished: Provided that where only a portion of the debt due under a credit agreement was extinguished, this subsection applies only in respect of the portion so extinguished.''

Section 129 is imperative to the health of the credit industry as it encapsulates the pre-enforcement procedures, reinstatement terms and requirements. The pre-enforcement

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11 Own emphasis.
12 Act 14 of 2014.
13 The italicised words are the words scrutinized in this study.
14 Act 7 of 2019.

procedures determine to a large extent, if properly implemented, how many agreements are seen to successful finalisation versus the alternative of those being cancelled and or enforcement pursued through litigation by the provider. Successful implementation of agreements and repayment of debt would support a healthy credit industry and therefore, a strong economy. This is also the outcome favoured by the NCA.[15]

Section 129 is imperative too in the balancing of provider and consumer rights in the pre-enforcement process. The provider, after all, requires payment of the debt and the right to obtain repayment timeously. The consumer, in a pre-enforcement environment, desires flexibility and adequate notification of his or her rights. These rights come with the associated opportunity to exercise available alternatives to possibly see the agreement to successful finalisation and accordingly avoid unnecessary and costly litigation. Herein lies the crux of the tension between the parties.

Section 129 is not only important to the health of the credit industry but is also at the epicenter of the tension between the parties in a pre-enforcement environment. Thus, the section is significant in ensuring the protection of the rights of both parties. Protecting the rights of both parties requires a careful balancing thereof in order that neither party is favoured over the other as doing so would have negative consequences for the credit industry and in turn the economy.

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This study is about section 129 in light of consumer protection in South Africa, the evolution of the section and analysis of this area of contention. To protect its interest, a provider would normally register a mortgage bond or conclude a credit agreement with the consumer. The problem starts, however, if the consumer defaults on repayment of the loan or credit agreement. The provider would then be forced to institute legal proceedings to foreclose on the bond and repossess the asset.[16]

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15 Section 3(c)(i) specifies that the NCA's purpose is to support consumers fulfilling their financial obligations, as opposed to avoiding them.

16 *Absa Bank Limited v Mokebe* 2018 6 SA 492 (GJ), 2018 ZAGPJHC 485 (12 September 2018) para 1. Palmer and Malan "Foreclosures – A welcome new approach" ttps://withoutprejudice.co.za/fee/article/6658/view# (accessed 15-10-2020). *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC), 2019 2 SA 620 (WCC), 2018 ZAWCHC 175 (14 December 2018).

The interpretation of section 129 is an area of contention in that different judicial interpretations have resulted in one party being protected over the other party. This is not a favourable situation for the credit industry and economy of the country. Therefore, an interpretation that balances the rights of both parties is imperative for longevity of the section and health of our credit industry. The issues raised above and a lot more will be dealt with in this study. Issues interrogated are first placed in historical context after which the current situation is analysed through case law.

1 2 STATEMENT OF THE PROBLEM

Like its predecessors, the NCA provides for notice to a consumer by a provider when he or she defaults on the agreement. The need to interpret section 129, being the notice section, becomes imperative due to the unclear and poor drafting of the section. The fact that there have already been two amendments to the section by way of the National Credit Amendment Act of 2014 and 2019 highlights that the section lacks clarity and is poorly drafted. This ambiguity led to the inconsistent and varied interpretation and application of the section in practice.

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Few issues in the history of South African law have been examined in so many High Court decisions and Supreme Court of Appeal judgments of great length and yet still required multiple examinations by the Constitutional Court, all for a seemingly simple section of the NCA namely, section 129. This issue clearly needs to be addressed.

The tension between the rights of the consumer on the one hand and the provider on the other becomes even more tangible in the South Africa context where many individuals are not in a position to afford a large asset such as a house or motor vehicle without the support of a financial institution.[17]

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[17] The right to housing is enshrined in section 26 of the Constitution of the Republic of South Africa, 1996, which states that: 1) Everyone has a right to have access to adequate housing. 2) The state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right. 3) No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. This section is highlighted here in relation to the requirement that eviction (repossession) of a house that is mortgaged by a provider requires additional procedural steps in order to ensure that there is no arbitrary deprivation of a citizen's section 26 right. This amounts to additional consumer protection.

The purpose of this study is to analyse critically section 129 of the NCA and determine in each area if the rights of both the consumer and provider have been equally protected, with particular reference to the following:

(a) Determining whether compliance with section 129(1)(a) is a prerequisite for debt enforcement and the implications of non-compliance therewith prior to debt enforcement (due to the choice of the word "may" in section 129);
(b) Procedural difficulties pertaining to debt enforcement as highlighted by the definition of "delivered" in section 129 and the consequent case law (the burden of proof of whether the section 129 notice has been "delivered" to the consumer);
(c) The meaning of the phrase "enforce" under sections 129 and 130 of the NCA; and
(d) The impact of the National Credit Amendment Act of 2014 and 2019[18] on section 129, specifically in relation to the required method of delivery of the section 129 notice and the possibility of reinstating an agreement.

There is divergence of opinion in respect to the delivery obligation of the section 129 notice required of the provider, two schools of thought come to the fore. One school, labelled by the writer as the pro-provider school of thought, holds that the provider is merely required to adhere to the mechanical steps required in the NCA or as enunciated by the court to meet the requirements of the section.[19] The second school, labelled by the writer as the pro-consumer school of thought, holds that the provider is required to ensure that the section 129 notice comes to the actual knowledge of the consumer.[20]

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Courts have grappled with interpreting section 129 repeatedly and amendments to the section have been made. The issues which arise will be dealt with at length.

1 3 RESEARCH AIMS AND OBJECTIVES

1 3 1 Research Aims

The aim of this study is to analyse the meaning, interpretation and application of section 129 of the NCA with a view to identifying the problems and tension it raises in balancing the rights

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18 Act 19 of 2014 and Act 7 of 2019.
19 *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA).
20 *Absa v Mkhize* 2012 5 SA 574 (KZD) para 73, and 76 – 77.

of consumers and providers. The issues that the section raise including possible loopholes will be identified and highlighted for interrogation. Thereafter, the study will provide recommendations for amendment of section 129 either by way of a further Amendment Act, or alternatively by way of suggestions that could guide the courts' interpretation of the section.

The study therefore aims to not only consolidate the mass of case law, legislation and academic opinion on section 129 of the NCA but also to propose a consistent interpretation of the section whilst balancing the rights of the consumer and provider.

1 3 2 Research Objectives

The specific objectives of this study, in light of the aims identified above, are to:

(1) Investigate the aim and purpose of section 129 of the NCA;

(2) Identify the debt enforcement procedure under the NCA, in particular the meaning of the phrase "enforce" in terms of sections 129 and 130;

(3) Determine if compliance with section 129(1)(a) is a prerequisite for debt enforcement and the consequent implications of non-compliance;

(4) Identify and analyse the procedural flaws pertaining to debt enforcement in section 129 of the NCA, in particular, the method and requirements of section 65 and delivery of the notice;[21]

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(5) Identify and analyse the options available and consequences to a consumer in receipt of a section 129 notice with particular focus on the issue of reinstatement;

(6) Evaluate the impact of the Prescription Act,[22] National Credit Amendment Act of 2014 and 2019 on section 129; and

(7) Present a summary of findings and recommendations on the way forward.

This study will attempt to address these and other related issues. Whilst the issues will be canvassed it is not assumed that final answers will be provided. Tentative suggestions will be made as to a proposed way forward.

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21 This will be achieved by analysing applicable case law. For instance, *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA); *Sebola v Standard Bank of South Africa Ltd* 2012 8 BCLR 785 (CC); 2012 5 SA 142 (CC); *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC); *ABSA Bank Ltd v Mkhize* 2012 5 SA 574 (KZD); *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC); *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick* 2018 ZAGPJHC 485 (12 September 2018), 2018 6 SA 492 (GJ), and many others.

22 Act 68 of 1969.

1 4 RESEARCH QUESTIONS

Several questions arise concerning the purpose and interpretation of section 129 of the NCA, which this study seeks to address as follows:

(1) Is compliance with section 129(1)(a) a prerequisite for debt enforcement?

(2) What are the procedural flaws in section 129 pertaining to debt enforcement?

(3) What is the meaning of "delivered" in accordance with section 129(1)(a)?

(4) What options are available to a consumer in receipt of a section 129 notice?

(5) Has the legislature adequately encapsulated the correct amendments required to the NCA in the National Credit Amendment Act of 2014 and 2019?

(6) What is the most reasonable and balanced interpretation of section 129 in light of its purpose, the NCA's purpose and the rights of both consumers and providers?

1 5 SCOPE OF STUDY

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This study deals with the pre-enforcement procedure under the NCA. An attempt will be made to discuss the historical perspective of this procedure in South Africa and thereafter discuss the current procedure outlined in section 129 of the NCA as well as its interpretation and application. An analysis of the issues which this section generates will be undertaken. The application of the section will be discussed in light of its purpose and the purpose of the NCA. The definition and interpretation by the courts of the words "may", "enforce" and "deliver" will require particular focus.

Prior to the promulgation of the NCA there was a history in South Africa of legislation seeking to govern agreements in general and in particular credit agreements between parties in an endeavour to protect the parties and enforce the agreements.[23] It would therefore be apt to

[23] Including but not limited to Act 6 of 1858 (Natal), Act 41 of 1908 (Natal), Usury Act (Cape) 23 of 1908, Usury Act 37 of 1926, Hire-Purchase Act 36 of 1942, Hire-Purchase Amendment Act 46 of 1954, Conventional Penalties Act 15 of 1962, Hire-Purchase Amendment Act 30 of 1965, Limitation and Disclosure of Finance Charges Act (re-named Usury Act 73 of 1968), Sale of Land on Instalments Act 72 of 1971, Credit Agreements Act 75 of 1980; Usury Act 73 of 1968, Limitation and Disclosure of Finance Charges Amendment Act 90 of 1980, Alienation of Land Act 68 of 1981, Alienation of Land Amendment Act 51 of 1983, Limitation and Disclosure of Finance Charges Amendment Act 42 of 1986, Sectional Titles Act 95 of 1986, Consumer Affairs Act (Unfair Business Practices Act) 71 of 1988, Usury Amendment Act 100 of 1988, Usury Amendment Act 30 of 1988, Usury Amendment Act 30 of 1993, Integration of Usury Laws Act 57 of 1996.

commence the study with a brief exploration from whence we have journeyed in this aspect of the law to place the current section in context. The study would then focus on the current position regarding the NCA as well as the proposed amendments thereto in relation to the abundance of case law over the past twelve years since full implementation of the NCA.

The study will focus on section 129 and only refer to other sections of the NCA in so far as they interact with section 129. Debt relief remedies, which have been introduced by the NCA, will not be explored in that they are beyond the scope of this study. The study is also not of a comparative nature.

1 6 LIMITATION OF THE STUDY

The study is confined to a discussion of the pre-enforcement processes as they apply in South Africa. The further major limitation of the study is that it is mainly based on an analysis of section 129 of the NCA and as such other sections of the NCA are only referred to in relation to this section. This is not a comparative study and comparable jurisdictions will only be referred to where they may add value to the present discussion and in particular the recommendations in the concluding Chapter. There is no doubt that many similarities, and differences, are bound to be found if one were to endeavour to cover other jurisdictions. However, this study is focussed on interpretation of section 129 of the NCA in the South African context. The limitations enunciated are required in order to ensure the discussion is focussed, precise and accordingly achieves the aims and objectives set.

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1 7 JUSTIFICATION FOR THE STUDY

The NCA seeks, *inter alia*, to promote equity in the credit market by balancing the respective rights and responsibilities of providers and consumers. This seeks to guard against the vacuum and catastrophic impact that the South African economy would experience had the gap not been addressed by the NCA. The discussion below highlights a number of these negative factors in the credit market had South Africa's credit law left the consumer-provider relationship unbalanced.

Credit is inextricably connected to both the financial and social well-being of persons. It unlocks a diverse range of opportunities most of which are economic.[24] Thus, where borrowing is based on an unequal relationship between provider and consumer, exploitation is likely to arise.[25] If left unbalanced, the credit onerous and costly compliance requirements, is likely to lead to higher cost of credit for consumers and lower returns for providers.[26] The main issues that relate to reckless behaviour by providers is exploitation of consumers by some microlenders, debt administrators and debt collectors; lending without regard for a borrower's ability to repay, leading to high levels of indebtedness; deceptive pricing; and abusive collection techniques including the abuse of administrative orders by legal practitioners.[27]

Overprotection of consumers, unregulated credit practices, national norms and standards relating to consumer credit and over-indebtedness would lead to predatory and reckless lending. One example is the 2008 economic crisis which was detrimental to several economies across the world. There were several factors that contributed to this financial crisis, one of the factors that played a critical role in creating the financial crisis was high volumes of reckless lending.[28] Such problems have the potential of landing South Africa in the so-called 'ponzi phase'.[29] The ponzi phase is the critical phase that occurs before a financial crisis.[30]

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The unbalancing of rights has prospects of causing fragility in South Africa's financial system due to reckless lending to consumers.[31] As per Brits, unaffordable loans can cause social and economic devastation for consumers, their families and society at large.[32] Similarly,

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24 Department of Trade and Industry (DTI) "Consumer credit law reform: Policy Framework for Consumer Credit August 2004" 6.

25 Brown "Consumer credit relationships: protection, self-interest/reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" 2016 *Legal Studies* 231.

26 Department of Trade and Industry (DTI) "Consumer credit law reform: Policy Framework for Consumer Credit August 2004" 7.

27 Goodwin-Groen and Kelly-Louw "The National Credit Act and its regulations in the context of access to finance in South Africa" http://www.finmark.org.za/wpcontent/uploads/2016/01/Rep_NCA_AccesstoFinance_2006.pdf (accessed 30-03-2020) 8. See also Department of Trade and Industry (DTI) "Consumer credit law reform: Policy Framework for Consumer Credit August 2004" 13; Pearson, Stoop and Kelly-Louw "Balancing Responsibilities – Financial Literacy" 2017 *PER / PELJ* 20.

28 Gwata "Is the secondary role of the NCA preventing a South African financial crisis?" 2018 (December) *De Rebus* 16.

29 *Ibid*.

30 Gqwaru "Is the National Credit Act accidentally a step towards curtailing financial system fragility as described by Minsky's Financial Instability Hypothesis?" Paper presented at the biennial conference of the Economic Society of South Africa, 31 August 2017 – 1 September 2017 5.

31 *Ibid*.

32 Brits "The National Credit Act's Remedies for Reckless Credit in the Mortgage Context" 2018 *PELJ* 21.

it contributes to the prudential integrity in the broader financial industry.[33] Additionally, unequal rights would result in poor market practices and adversely affect fair consumer outcomes in the Consumer Credit Insurance (CCI) market, especially for consumers in the lower-income market.[34] Hence, there is a fundamental need to balance the rights and duties of providers and consumers under the NCA.

Consumer protection broadly refers to the laws and regulations that ensure fair interaction between service providers and consumers. The framework generally includes the introduction of greater transparency and awareness about lending risks (information), promotion of competition in the marketplace, prevention of fraud, education of customers (information), and elimination of unfair practices.[35] The general theme appears to relate to the greater flow of information towards consumers.

The Constitution promotes the right to access to information. Section 32 (1)(b) in particular provides that everyone has the right of access to—(b) any information that is held by another person and that is required for the exercise or protection of any rights and subsection (2) confirms that national legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state. Section 32 therefore provides the impetus for the underlying purpose of the NCA in ensuring information for consumers. This is coupled with the interpretation clause of the Constitution, being section 39, which requires that:

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> "(1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[36]

Therefore, the NCA was developed in alignment with the Bill of Rights and interpretation of the Act must accordingly be aligned with the Constitution and the underlying right to information. Consumer protection is therefore justified based on inherent information asymmetries and power imbalances in markets, with providers having more information than

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33 *Ibid*.

34 Department of National Treasury "Technical Report on the Consumer Credit Insurance Market in South Africa 2014" http://www.treasury.gov.za/public%20comments/CCI/CCI%20Technical%20Paper.pdf (accessed 19-04-2022) iii.

35 Ardic, Ibrahim and Mylenko "Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set" The World Bank Financial and Private Sector Development Consultative Group to Assist the Poor *Policy Research Working Paper* (2011) 8.

36 Sections 32 and 39 of the Constitution.

the consumers.[37] Therefore, the purpose of the consumer protection in lending is to ensure fairness.[38]

An effective protection framework normally includes three complementary aspects; it includes laws and regulations governing relations between providers and consumers, enforcement mechanisms including dispute resolution, and promotion of financial literacy and capability by assisting consumers to acquire the necessary knowledge and skills to manage their finances. Knowing that their rights are effectively protected may bring in new consumers to the financial sector.[39] In the South African context, the consumer protection brought by the NCA has been acknowledged as a shield from some of the worst excesses of the global recession of 2008/2009.[40]

The NCA was a response to a market that was dominated by micro lenders who granted loans to lower income earners, exploited them with high interest rates and became aggressive at times.[41] The NCA introduced provisions that protect consumers from reckless and predatory lending.[42] Reckless credit lending is prohibited by section 80 of the NCA. Scholars observe that this is the first time in the history of South Africa's consumer-credit legislation that such provisions have been enacted.[43] Others state that the Act is far more comprehensive than its predecessors as it creates certain statutory rights and duties in addition to the common law rights and duties conferred on providers and consumers under instalment agreement.[44]

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37 Ardic, Ibrahim and Mylenko "Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set" The World Bank Financial and Private Sector Development Consultative Group to Assist the Poor *Policy Research Working Paper* (2011) 8.

38 *Ibid*.

39 *Ibid*.

40 Woker "A critical examination of the role that the National Consumer Tribunal plays in debt relief with suggestions for reform" Paper presented at the International Conference on Over Indebtedness and Credit Regulation, Pretoria, South Africa (August 2010).

41 Kanniah *Banks' Adherence to the National Credit Act: Its effects on domestic indebtedness and fragility in South Africa* (Master of Management in Finance and Investments, University of Witwatersrand, 2015) 7.

42 Schmulow "Curbing Reckless and Predatory Lending: A Statutory Analysis of South Africa's National Credit Act" 2017 *Consumer Interests Annual* 1. See also Green "Enactment of The National Credit Act and Its Implication on New and Improved Borrowers Rights in South Africa" 2015 *The Journal of Applied Business Research* 1761.

43 Renke, Roestoff and Haupt "The National Credit Act: new parameters for the granting of credit in South Africa" 2007 *Obiter* 244.

44 Otto, Van Heerden and Barnard "Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement" 2014 *South African Mercantile Law Journal* 256.

The protection of consumers is based on the need to ensure that households are given credit that they can afford to pay back, are not overcharged on interest payments and that all loan costs are transparent to avoid over-indebtedness.[45] The NCA also recognizes that previously disadvantaged persons are, in general, functionally illiterate, and most likely to be abused by providers.[46] An example of this is in the case of *Standard Bank of South Africa v Dlamini* where the court expressed the view that due to his illiteracy Mr Dlamini signed the documentation from Standard Bank in the course of purchasing a car, all he understood was that he had signed documents from Standard Bank and that they were necessary to enable him to get the money to purchase the vehicle and that he was required to pay some amount as monthly repayment.[47]

Private borrowing from formal institutions and smaller moneylenders is mostly done to fulfil social requirements,[48] for business financing, real or financial investment.[49] Depending on the sector, credit supply includes bank loans, vehicle finance, furniture and appliances on instalments and housing loans.[50] Over-indebtedness is one major issue affecting consumers, especially before the coming into effect of the NCA. High interest rates and higher prices inevitably resulted in individuals and small businesses turning to providers for assistance.

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As James put it "customers who might have fallen on hard times, when handed reminders of payment due, often threw them away or hid them under the bed only to endure the shame of having items repossessed."[51] When the NCA came into effect, although informed by a conviction that providers should be held to account, it became a tool to reform consumers. The NCA achieved some small successes: curtailing mortgage credit well and establishing a system of debt review.[52] Similarly, section 129 of the NCA plays a very significant role, especially by preventing the shame of unreasonable repossession.

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45 Bihma "Effectiveness of the National Credit Act of South Africa in reducing household debt: a Johansen Cointegration and vecm analysis" 2014 *Journal of Governance and Regulation* 164.

46 Ngubane *The objectives of plain language in section 64 of the National Credit Act 34 of 2005* (LLM-thesis, University of Johannesburg, 2017) 30. See also section 3(d) of the NCA.

47 2013 1 SA 219 (KZD) 22.

48 James "'Deeper into a Hole?' Borrowing and Lending in South Africa" 2014 *Current Anthropology* 17.

49 de Beer, Nhlapo and Nhleko "A perspective on the South African flow of funds compilation – theory and analysis" paper prepared for the Irving Fisher Committee on Central Bank Statistics (IFC) Invited Paper Meeting no 71 held at the Durban International Convention Centre from 16 to 22 August 2009 239.

50 James "'Deeper into a Hole?' Borrowing and Lending in South Africa" 2014 *Current Anthropology* 21.

51 James 2014 *Current Anthropology* 24.

52 James 2014 *Current Anthropology* 20.

Section 129 the NCA encourages the resolution of disputes between providers and consumers so that debt enforcement through litigation is a last resort.[53] The provider is required to first send a notice of default to the consumer, making suggestions and affording the parties a chance to resolve the dispute.[54] This provision must be read in conjunction with section 130(1) which states that a provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default. In other words, if no default is found, the provider cannot sue.

It is thus apparent that the developments in the South African policy which led to the enactment of the NCA played a huge role in protecting the consumer whose property would be unreasonably attached or repossessed. Without a doubt, the provisions of the NCA, especially section 129, do recognise the negative impact that over-indebtedness, reckless lending, and unregulated debt enforcement can have on society.[55]

Providers play a significant role in South Africa for those who wish to possess or own large assets such as houses and motor vehicles but who cannot afford to do so without the assistance of a financial institution. If the consumer defaults on repayment of the loan the provider is then forced to institute legal proceedings to either enforce or cancel the agreement. The provider needs to follow this course of action to protect its interests. However, to proceed in this manner, the NCA requires that certain requirements should first be met by way of a pre-enforcement procedure. This procedure needs to balance the protection of consumer as well as provider rights. The balancing requirement is to take into consideration the provider's risk in providing the required credit and the possible loss associated with unfulfillment of the agreement.

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The legislature, due to the abundance of case law in this area, has identified the issues in the interpretation of certain words in the pre-enforcement procedure outlined in section 129 of the NCA. The words "may" and "delivered" and the circumstances of reinstatement as required in the section 129(1)(a) notice (pre-enforcement procedure) are the cause of much

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53 Brits "The 'reinstatement' of credit agreements: Remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act" 2015 *De Jure* 78.
54 See *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) 46-49.
55 Brits 2015 *De Jure* 79.

confusion and accordingly section 129 of the NCA was amended by the National Credit Amendment Act of 2014 and 2019.[56]

The National Credit Amendment Act of 2014 amended section 129 of the NCA.[57] However, the amendments did not resolve the issue entirely in that there has still been case law around the interpretation of section 129, "may", "delivered" and the possibility of reinstatement; hence the National Credit Amendment Acts[58] and continued necessity for this study. One of the main problems with section 129 of the NCA is the lack of clarity provided by the section. Additional definitions in the NCA would have prevented much litigation in this regard.

The 2012 Literature Review found that the impact of the NCA on providers has two aspects.[59] First, the financial impact of compliance with the NCA is significant in direct and indirect cost terms. 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 NCA to promote responsible lending while fee and interest rates have been capped, resulting in reduced revenue for providers.[60] 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 to cover such risk, it was concluded that there is a net negative impact to the provider. There needs to still be a benefit to providers in providing credit as the alternative will result in a negative outcome to the credit industry and in turn the already fragile economy,

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56 Act 19 of 2014 and Act 7 of 2019.

57 Section 65 of the NCA provides that delivery can be made in accordance with a particular mode chosen by the consumer and be effected in accordance with that election. *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) held that the legislature's grant to the consumer of a right to choose the manner of delivery under section 65 read with section 96 of the NCA, "… inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders …." (para 32). Therefore, if the consumer had chosen postage under section 65 as his or hers preferred manner of communication, then dispatch by registered post to the address chosen by the consumer is sufficient for purposes of section 129. In these circumstances, actual receipt is the responsibility of the consumer and proof of receipt by the provider is unnecessary and irrelevant. *Rossouw* held, however, that dispatch of the notice by registered post was essential. The jurisdictional requirements of section 129 were therefore satisfied only once the provider proved dispatch of the notice to the consumer at his chosen *domicilium citandi et executandi* address by registered post. This speaks to a pro-provider approach.

58 Act 19 of 2014 and Act 7 of 2019.

59 Devnomics Developmentnomics (Pty) Ltd Research and Surveys "NCR Literature Review on the Impact of the National Credit Act (NCA) has had on South Africa's Credit Markets" Final Report (June 2012) 14. This is a report provided by Devnomics Developmentnomics (Pty) Ltd Research and Surveys on the impact of the NCA on South Africa's credit markets. The Report was presented in June 2012.

60 *Ibid*.

which has been made even that much more fragile by the covid-19 pandemic.[61] Thus, the balancing of rights of providers and consumers is as imperative as ever.

The study is conducted in order to provide insight into the application of the NCA and more particularly the pre-enforcement requirements encapsulated in section 129 in order to determine if the interpretation adopted by the courts constitutes a balanced approach to the protection of both parties. A balance between protecting the rights of the provider and the rights of the consumer is necessary in order to promote a healthy credit industry. The study considers whether the NCA protects and maintains equilibrium between the parties.

It is accordingly submitted that the study is justifiable in that recommendations are required and would be pertinent to any future amendments of the NCA and its interpretation.

1 8 LITERATURE REVIEW

Academic writers have written a considerable amount of work regarding section 129 of the NCA and the balance to be achieved in the protection of providers and consumers. The authors at the forefront of credit law in South Africa such as Otto,[62] Kelly-Louw,[63] and Roestoff,[64]

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61 Final Report 14.

62 Otto *Credit Law Service* (1991); Otto "The National Credit Act: Default Notices and Debt Review; the *Ultra Duplum* Rule" 2012 *THRHR* 127; Otto "Mora Interest, Consensual Interest, Incidental Credit Agreements and the National Credit Act: *Voltex (Pty) Ltd v SWP Projects CC* 2012 6 SA 60 (GSJ)" 2014 *TSAR* 399 – 407; Otto 2015 *TSAR* 583-601; Otto "Notices in terms of the National Credit Act: Wholesale National Confusion. *Absa Bank Ltd v Prochaska t/a Bianca Interiors*; *Starita v Absa Bank Ltd*; *FirstRand Bank v Dhlamini*" 2010 *SAMLJ* 595-607; Otto "Tussentydse beslagleggingsbevele by kredietooreenkomste" 2017 *TSAR* 370; Otto "Die impak van die nasionale kredietwet op die sakereg en saaklike sekerheid' 2017 *TSAR* 167; Otto (2006) 4; Otto 2012 *THRHR* 127.

63 Kelly-Louw "Introduction to the National Credit Act" 2007 *JBL* 147; Kelly-Louw "The Default Notice as Required by the National Credit Act 34 of 2005" 2010 *SAMLJ* 568; Kelly-Louw "The Overcomplicated Interpretation of the Word 'May' in sections 129 and 123 of the National Credit Act" 2015 *SALJ* 245; Kelly-Louw *Consumer Credit Regulations in South Africa* (2012) 16; Kelly-Louw "The Prevention and Alleviation of Consumer Over-indebtedness" 2008 *SAMLJ* 222.

64 Roestoff *et al* "The Debt Counselling Process – Closing the Loopholes in the National Credit Act 34 of 2005" 2009 *PER* 247; Roestoff "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; Roestoff "*Ferris v FirstRand Bank Ltd* 2014 3 SA 39 (CC*):* Enforcement of a Credit Agreement After Breach of a Debt Rearrangement Order and the Ineffectiveness of Debt Review in terms of the National Credit Act" 2016 *De Jure* 134; Roestoff "Termination of debt review in terms of section 86(10) of the National Credit Act and the right of a provider to enforce its claim: *Standard Bank of South Africa Ltd v Kruger* 2010 4 SA 635 (GSJ); *Standard Bank of South Africa Ltd v Pretorius* 2010 4 SA 635 (GSJ);" 2010 *Obiter* 782-792; Roestoff and Van Heerden "*Nedbank Ltd v Swartbooi* Unreported Case No 708/2012 (ECP): Termination of Debt Review in terms of the National Credit Act - not the end of the road for Over-indebted Consumers" 2014 *De Jure* 140; Roestoff and Smit "Non-compliance with time periods - should the debt review procedure lapse once a reasonable time has expired?" 2011 *THRHR* 501.

amongst others, have followed the progression and debate around the interpretation of the requirements in section 129.

According to Otto,[65] the NCA protects consumers over a wider range than is normally the case with other consumer credit legislation worldwide.[66] This cannot, in the writer's opinion, be denied. It is however important to interrogate and ensure that this protection is not at the detriment of providers. The NCA has led to an enormous amount of litigation, reported court cases and publications by authors.[67]

The initial debate as to whether or not it was compulsory (mandatory) to send a section 129 notice prior to commencement of proceeding against a consumer centred around the word "may" in section 129 which with its ordinary grammatical meaning would indicate that the sending of the notice is discretionary. However, Van Heerden and Boraine[68] confirmed that the word "may" in section 129 indicates that it is mandatory for a provider to send a section 129 notice prior to proceeding against the consumer. This appeared to be a rather relaxed and contrary interpretation of the word "may". What subsequently transpired in the interpretation was the realization that a section 129 notice will not be required if the provider does not intend pursuing action against the consumer for the debt, hence the utilization of the word "may" to indicate that ultimately the option or election to proceed is that of the provider. If the provider elects to proceed then indeed he or she will be required to commence with the compulsory section 129 notice to notify the consumer of the various rights and provide the opportunity to exercise them.

Essentially, there are two schools of thought as to how the section 129(1)(a) notice must be "brought to the attention" of the consumer. The one view, which is considered and termed

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65 Otto *The National Credit Act Explained* (3rd edition) (2013) 30 - 35.

66 Rudo "NCR impact assessment. The National Credit Regulator, South Africa" http://www.ncr.org.za/publications/Impact_Assesment.pdf (accessed 16-08-2017); Stoop "South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness" 2009 *SAMLJ* 386; Van Heerden and Borraine "The interaction between the debt relief measures in the National Credit Act 24 of 2005 and aspects of insolvency law" 2009 *PELJ* 21; Vimsalu "The over-indebtedness regulatory system in the light of the changing economic landscape" 2010 *Juridica International* 217.

67 Nagel *Commercial Law* 6th ed (2019) 285. Authors to name a few are: Otto, JM; Eiselen, S; Grové, NJ; Kelly-Louw, M; Stoop, PN; Tennant, S; van Heerden, C; Bentley, B; Boraine, A; Renke, S; Roestoff, M; Brits, R; Campbell, J; Moolla, M; Schulze, H; and Steyn, L.

68 Van Heerden and Boraine "The Conundrum of the Non-compulsory Compulsory Notice in terms of section 129(1) (a) of the National Credit Act" 2011 *SAMLJ* 45. See also Scholtz *Guide to the National Credit Act* (2009) 12.4.2.e.

by the writer as such - the pro-consumer approach, is that the notice must actually come to the attention of the consumer with the onus being on the provider to prove this on a balance of probabilities, at any subsequent enforcement proceedings.[69] Broadly speaking, the second and contrary view, which is considered and termed as such by the writer - the pro-provider approach, is that mere dispatch of the notice, including by registered post (in accordance with the "greater is included in the lesser"[70] principle), was all that was required to comply with the notice requirement. The risk of non-receipt falls on the consumer. The pro-consumer approach proved a challenge to providers, as proving actual subjective receipt of the notice by the consumer is an evidentiary problem; it was a way out to dilatory consumers and their legal practitioners.[71]

Otto criticises the pro-consumer approach in the decision of the case of *FirstRand Bank Ltd v Dhlamini*[72] stating that the decision does not refer to decisions under previous legislation.[73] Otto who appears in the minority therefore from the outset in favouring a pro-provider approach, which is understandable given that the provider is the one providing credit and needs therefore to be assured of the enforceability of the contract in order to be secure in the provision of credit. It stands to reason that unsecured providers are less likely to provide credit, which would result in a weakened credit industry affecting both the provider and the consumer alike. A weakened credit industry in the sense that less providers means less competition in the field and consequently reduced credit options for a consumer. Furthermore, the initial burden of providing a notice is similar to that provided for in previous legislation and thus it would make sound argument to follow such precedent. Otto[74] argues in this regard that although the NCA must be interpreted on its own terms, when other legislation is comparable with the Act, court decisions of the past dealing with similar issues may play a persuasive, perhaps even decisive, role. It is for this reason that the writer has commenced with the historical analysis of consumer notices in South Africa and the associated burden of "delivery". The word "notify" as used in previous statutes is similar to the words "bring to the attention"

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69 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD).
70 *Rossouw v FirstRand Bank Ltd* 2010 10 439 (SCA) para 57.
71 Bentley "NCA s129(1)(a) notice – a practical perspective on the interpretative challenge" 2019 (April) *De Rebus* 6.
72 2010 4 SA 531 (GNP).
73 Otto 2010 *SAMLJ* 595-607. See also Kelly-Louw 2010 *SAMLJ* 579 – 583.
74 Otto 2010 *SAMLJ* 599.

of the consumer according to Otto.[75] It was held in *Holme v Bardsley*[76] that notice had to reach the purchaser to be effective. Otto and Otto disagree with this approach and prefer a more practical approach stating that if the formal requirements for notification have been met then notification has been fulfilled.[77] This argument is based on the fact that to find otherwise would place undue hardship on the innocent party (usually the provider) to ensure that the notice reaches the consumer.

Otto and Otto take the view that the additional compliance requirements set out in the case of *Sebola v Standard Bank*[78] and now encapsulated in the 2014 amendments complicate the interpretation of the NCA and provides an unbalanced approach in that it adds complications for the provider.[79] Van Heerden and Coetzee who state that the Constitutional Court went too far in favour of the consumer support this view. The unbalanced approach as alluded to by Otto is debatable when one takes into consideration the purpose of the NCA as consumer protection legislation as well as the fact that at the conclusion of most agreements the power is unbalanced in favour of the provider. One would then be inclined to support a balancing out of powers at the dissolution of an agreement or when there is a breach in favour of the consumer and in line with the notion of consumer protection. Otto, van Heerden and Coetzee appear to be more in support of the provider approach.[80]

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Kelly-Louw supports Otto's pro-provider approach. She refers to the approach of the court in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*[81] and *Dhlamini*, the pro-consumer approaches, as "stringent" and "rigid" approaches to the interpretation of section 129(1) of the NCA. She argues that the approach of the court in *Munien v BMW Financial Services (Pty) Ltd*[82] and *Starita v Absa Bank Ltd*[83] is more sensible and balanced.[84]

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75 The wording of section 11 of the Credit Agreements Act 75 of 1980 versus the wording of section 129 of the NCA. Otto *Credit Law Service* (2001) 292.
76 1984 1 SA 429 (W).
77 Otto and Otto '*Consumer Credit' in: Joubert (ed) The Law of South Africa* 2 ed (2010) par 62 and page 106.
78 2012 5 SA 142 (CC).
79 Otto and Otto *The National Credit Act Explained* (3rd ed) (2013) 117 – 118.
80 Van Heerden and Coetzee "Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: verwarrende verwarring oor voldoening" 2012 *Litnet (Akademies) Regte* 286. Otto 2010 *SAMLJ* 595-607.
81 2009 2 SA 512 (D).
82 2010 1 SA 549 (KZD).
83 2010 3 SA 443 (GSJ).
84 Otto 2010 *SAMLJ* 599.

Van Heerden and Coetzee agree with the reasoning and motivation of Wallis J in *Munien* that "delivery" for the purposes of section 65(1) of the NCA, which provides some form of guidance, means that the document has to be delivered in accordance with regulation 1.[85] Mills[86] points out that the same conclusion as contended for by Otto, Kelly-Louw, Van Heerden and Boraine could have been reached by a much shorter route provided for in section 1 of the NCA, which defines the word "prescribe" to mean "prescribed by regulation". Van Heerden and Boraine indicate that if the section 129(1)(a) notice was delivered to a consumer in accordance with the prescription in regulation 1 of the NCA, for example, if it was sent by registered post but was not received by the consumer, such delivery by registered post does not amount to non-compliance (pro-provider approach). This stance finds support in previous

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85 Van Heerden and Coetzee *"Marimuthu Munien v BMW Financial Services (SA) (Pty) Ltd* unreported case number 16103/08 (KZD)" 2009 *PER* 333. Section 65 of the NCA is titled: "Right to receive documents" and provides as follows:
"(1) 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.
(2) 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;
(iii) by email; or
(iv) 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).
(3) A credit provider must not charge a fee for the original copy of any document required to be delivered to a consumer in terms of this Act.
(4) On written request from the consumer the credit provider must provide the consumer with-
(a) a single replacement copy of a document required in terms of this Act, without charge to the consumer, at any time within a year after the date for original delivery of that document; and
(b) any other replacement copy, subject to any search and production fees permitted by regulation.
(5) On application by a credit provider, the Tribunal may make an order limiting the credit provider's obligation in terms of subsection (4) if the Tribunal is satisfied that the consumer's requests for information are frivolous or vexatious.
(6) Subsections (3), (4) and (5) do not apply to a developmental credit agreement if-
(a) the National Credit Regulator has pre-approved procedures to be followed by the credit provider in the delivery of documents with respect to such credit agreements in terms of this Act; and
(b) the credit provider has complied with those pre-approved procedures in dealing with the particular consumer.
(7) When pre-approving any procedure as contemplated in subsection (6), the National Credit Regulator must balance the need for efficiency of the credit provider with the principles of subsections (1) to (5). Regulation 1 to the NCA provides the definitions for certain concepts. "Delivered" is included in the definitions as follows: "unless otherwise provided for, means sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, to the recipient's registered address. Where notices or applications are required to be delivered to the National Consumer Tribunal, such delivery shall be done in terms of the Tribunal's Rules. Where notices or applications are required to be delivered to the National Credit Regulator, such delivery shall be done by way of hand, fax, email or registered mail to the registered address of the National Credit Regulator"

86 Mills "National Credit Act 34 of 2005 – Section 129 Notice – dispatch or receipt?" 2009 (August) *De Rebus* 26.

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legislation such as the Credit Agreements Act of 1980 and Hire-Purchase Act of 1942 and bearing in mind the relevance of previous precedent.[87]

On the other hand, Tennant takes quite the opposite view and endorses the pro-consumer conclusion reached in *Prochaska* and *Dhlamini*, which is likewise an understandable stance to adopt in light of the overarching purpose of the NCA espoused in section 2. Once again this stance is understandable bearing in mind the overall balancing of interests at the commencement and conclusion of the contract.[88]

Woker submits that the NCA promotes extensive consumer protection. She points out that notwithstanding arguments that the legislation is unnecessary and will burden the South African economy further, this ignores the reality that consumers are vulnerable and that unfair practices are widespread.[89] Kelly-Louw agrees that the section 129(1)(a) notice serves an important purpose and states that the main purpose of section 129(1)(a) is to place a duty on the provider to inform the consumer of the possible assistance that there is at his or her disposal before legal action could be instituted. In other words, the notice gives the consumer the opportunity to decide whether he or she wishes to use the available alternative methods first to try to resolve the legal disputes without the provider having to resort to legal action this would imply that the notice actually reaches the consumer in order for them to be aware of such options.[90]

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Van Heerden and Boraine agree with the views of Woker and Kelly-Louw. They are of the view that the purpose of section 129(1)(a) is that it presents a consumer with certain alternatives that he or she may consider prior to debt enforcement in order to deal with the debt. Such alternatives, if successful, might obviate the need for costly and often protracted litigation. It accordingly appears to be a compulsory procedure devised by the legislature in favour of the consumer obliging the provider first to propose certain alternatives by means of which the issue could possibly be resolved before turning to litigation. Where a section 129 (1)(a) notice is not delivered prior to the commencement of legal proceedings, the purpose of providing a means

87 Van Heerden and Boraine 2011 *SAMLJ* 52.
88 Tennant "A Default Notice under the National Credit Act must come to the Attention of the Consumer unless the Consumer is at Fault" 2010 *TSAR* 852.
89 Woker "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" 2010 *Obiter* 230 – 231.
90 Kelly-Louw 2010 *SAMLJ* 579-583.

of avoiding litigation would be defeated.[91] Taylor encapsulates the views of academics relating to the NCA when he states:

> "the Act focuses primarily on the consumer's rights and consumer protection, and providing assistance to the generally uninformed public. This was required as credit providers often included unreasonable provisions in the credit agreements. That had a detrimental effect on consumers. On the other hand the interests of the credit provider are also protected as the Act aims to provide effective enforcement of debt as well as effective access to redress. Effective redress would entail general contractual concepts such as restitution or specific performance, depending on the circumstances. The Act strives to redress the situation without unnecessary interference with the relationship between the credit provider and the consumer. However, a certain amount of interference is inevitable as the main purpose of the Act is to restore the balance between the parties' interests and the uneven bargaining position they find themselves in. The need for consumer protection is apparent as a result of the credit providers' exploitation of the consumers' lack of knowledge; however, the need to enable credit providers to enforce debt in a legal and acceptable manner is often understated."[92]

Otto[93] states that the word "enforce" is not defined but it is clear that a provider cannot enforce an agreement, including cancellation, unless the pre-enforcement requirements have been fulfilled.[94] Van Heerden and Otto[95] and Boraine and Renke[96] prefer the interpretation that "enforce" means all the remedies available to the provider including all contractual remedies, which would result in a broader interpretation possibly benefitting all parties. Otto, relying on the case of *Absa Bank Ltd v De Villiers,*[97] opines that the section 129 notice has limited the common law and *ex contractu* remedies, thus the notice protects the consumer but is cumbersome on the provider.[98] Restricting the interpretation of the word "enforce" on the other hand would go against the purpose and purport of the NCA to protect the consumer and thus as confirmed in the case of *De Villiers* a broad meaning must be provided to "enforce" in order to protect consumers.[99] The writer is inclined to agree with this interpretation due to the consumer protective nature of the NCA and its purpose.

However, not everyone agrees with the wide interpretation of the word "enforce" in the NCA. In general, Eiselen agrees that the word "enforce" in the context of section 129 bears

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91 Van Heerden and Boraine 2011 *SAMLJ* 52. *Standard Bank of South Africa Ltd v Rockhill* 2010 5 SA 252 (GSJ).

92 Taylor "Enforcement of debt in terms of the National Credit Act 34 of 2005 trial and celebration? A critical evaluation" 2009 *De Jure* 104.

93 Otto and Otto *The National Credit Act Explained* (4 ed) (2017) 103.

94 *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) page 141.

95 Van Heerden and Otto "Debt Enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655.

96 Boraine and Renke "Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 Part 1" 2008 *De Jure* 41 and Boraine and Renke "Some practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 (Part 2)" 2008 *De Jure* 9.

97 2009 5 SA 40 (C) para 14.

98 Otto 2012 *THRHR* 141. This delay may even result in a loss to the goods.

99 2009 5 SA 40 (C) para 14.

the extended meaning, but he strongly disagrees that the notice under section 129(1)(a) is required when a provider cancels an agreement, stating that scholars, particularly Otto, have ignored Malan JA's important words "enforcement of those remedies by *judicial means*" stated in *Nedbank v Juselius and the National Credit Regulator*[100] which in reality point towards a much narrower interpretation one that indicates that "enforce" includes all remedies that require judicial intervention such that a section 129 notice would only be required if enforcement is required by judicial means.[101] In the ordinary course cancellation would not require judicial intervention unless it is for confirmation or due to a dispute. Thus, a section 129 notice on this interpretation would only be required for cancellation which needs to proceed to litigation for one or other reason. Eiselen refers to the presumption in the interpretation of statutes that a statute does not alter the common law more than necessary unless it appears clearly from the intention of the legislature. Sometimes a statutory provision is even interpreted as a mere extension of the common law. Therefore, unless the NCA specifically stipulates that it alters the general rules and principles of the common law concerning contracts, they are still applicable and hence covered in this work.[102] The NCA does not deal with *lex commissoria* clauses contained in credit agreements, and they are therefore still valid.[103]

IN LUMINE TUO VIDE BIMUS LUMEN

Roestoff is of the view that the NCA favours and promotes the providers' rights over that of the consumer.[104] The court's approach to "bend over backwards" in ensuring that the consumer receives the section 129 notice appears to be premised on the fact that non-receipt of a section 129 notice by a consumer is not fatal to a provider's court proceedings in that the proceedings can be postponed to ensure compliance. In other words a mere dilatory effect is experienced by the provider in terms of section 130(4)(b) of the NCA. Whereas non-receipt of a section 129 notice by a consumer, where no postponement is ordered, may result in a consumer losing his or her home, the prejudice may be more heavily on the consumer. Thus, the unequal burden of notification is placed on the provider in that non-receipt of a section 129 notice by a consumer is prejudicial as the consumer is not afforded an opportunity to attempt to settle the default or dispute with the associated possible significant consequences.

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100 2011 ZASCA 35 (dated 28 March 2011) para 12.
101 Eiselen "National Credit Act 34 of 2005: The confusion continues" 2012 *THRHR* 396.
102 Eiselen 2012 *THRHR* 396. Du Plessis *The Interpretation of Statutes* (2002) 177–178.
103 Kelly-Louw 2015 *SALJ* 252.
104 Roestoff 2016 *De Jure* at 786 and 813.

If goods have been judicially attached in accordance with section 131 or the consumer has voluntarily surrendered the goods in terms of section 127 and such goods were subsequently sold, the consumer cannot re-instate the agreement. Where any other court order (i.e. an order other than an attachment order as referred to in section 129(4)(a)(i)) has been executed for purposes of enforcing that agreement, the consumer can also re-instate the agreement.[105] The question now arises as to what is meant by "any other court order" in section 129(4)(b). It is submitted by van Heerden and Otto that it excludes an attachment order in accordance with section 131 as referred to in section 129(4)(a)(i) and would for instance refer to an order given at default judgment or summary judgment proceedings. If execution is undertaken pursuant to default judgment and the financed item is sold, the agreement cannot be re-instated.[106] It is submitted that in all the above instances mentioned in section 129(4), the implication is that the credit agreement has been cancelled and that such cancellation is a bar to re-instatement. In view of this obstacle, it would seem that the only credit agreements that can be re-instated in accordance with section 129(3) are those where the financed item has been repossessed from a third party pursuant to an attachment order and the credit agreement with the original consumer has not been cancelled, for instance, where an item is damaged in an accident and later repossessed from a panel beater.[107]

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There clearly is an inter relation between section 129 and section 127 of the NCA in that section 127 deals with the surrender of goods and refers to a number of notices to be sent to the consumer and the right of the provider to proceed against the consumer for any outstanding amounts. The wording of the notices to the consumer is likened to that of the wording in section 129 and accordingly in some judgments discussed in this study the principles related to one are extrapolated to the other.[108] Furthermore, section 130 of the NCA is

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105 Van Heerden and Otto 2007 *TSAR* 683.

106 Section 123 provides that a provider may terminate a credit agreement if the enforcement steps prescribed by the NCA have been followed and may close a credit facility (for example a cheque account or credit card facility) after written notice of 10 business days.

107 This is reminiscent of section 12 of Credit Agreements Act of 1980, where such re-instatement could occur pursuant to a "forced" surrender or attachment order. It would however seem that section 129(3) only caters for repossession after an attachment order. This leaves open the question whether a forced surrender (without obtaining a court order) is at all possible under the NCA - Van Heerden and Otto 2007 *TSAR* 684.

108 Section 127 is titled the "Surrender of goods" and is provided here for further reference later:
(1) A consumer under an instalment agreement, secured loan or lease-
(a) may give written notice to the credit provider to terminate the agreement; and
(b) if-
(i) the goods are in the credit provider's possession, require the credit provider to sell the goods; or
(ii) otherwise, return the goods that are the subject of that agreement to the credit provider's place of business during ordinary business hours within five business days after the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.

mentioned twice in section 129. Section 130 deals with the debt procedures in court and therefore is the procedure that would follow from section 129 (pre-enforcement) should resolution between the parties not occur.[109] Section 130(1)(a) and (b) therefore refers to the

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

[109] Section 130 in its original form provided as follows: "(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-
(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(l), as the case may be;
(b) in the case of a notice contemplated in section 129(l), the consumer has-
(i) not responded to that notice; or
(ii) responded to the notice by rejecting the credit provider's proposals; and
(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

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section 129(1) notice specifically. Section 130(4)(d) also contains the section which empowers the court to postpone proceedings when a section 129 notice has not been sent to a defaulting consumer. This is dealt with in Chapter four in detail. Section 131 dealing with the repossession of goods is a natural progression from the pre-enforcement notice, enforcement procedure and / or surrender of goods. Section 131 indicates that if a court makes an attachment

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(2) In addition to the circumstances contemplated in subsection (l), 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-
(a) all relevant property has been sold pursuant to-
(i) an attachment order; or
(ii) surrender of property in terms of section 127; and
(b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.
(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that -
(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;
(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and
(c) that the credit provider has not approached the court-
(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or
(ii) despite the consumer having-
(aa) surrendered property to the credit provider, and before that property has been sold;
(bb) agreed to a proposal made in terms of section 129(l)(a) and acted in good faith in fulfilment of that agreement;
(cc) complied with an agreed plan as contemplated in section 129(l)(a); or
(dd) brought the payments under the credit agreement up to date, as contemplated in section 129(l)(a).
(4) In any proceedings contemplated in this section, if the court determines that-
(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;
(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) the court must-
(i) adjourn the matter before it; and
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;
(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may-
(i) adjourn the matter, pending a final determination of the debt review proceedings;
(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or
(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b);
(d) there is a matter pending before the Tribunal, as contemplated in subsection (3)(b), the court may-
(i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or
(ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or
(e) the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter."

Section 130 was amended by section 33 of the 2014 National Credit Amendment Act – by the substitution in subsection (1) for paragraph (a) as follows: "at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(10), or section 129(1), as the case may be"

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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, apply with respect to any goods attached in terms of that order. These are the pertinent sections of the NCA to this work and will be referred to throughout.

Otto criticised section 129(3)(a) and (b) prior to the amendment and is of the opinion that the amendment did not remedy his criticisms but merely created more uncertainty.[110] The writer is in agreement with this sentiment, as there were definitely clearer and more elegant ways to amend the section. Section 129(3)(b) was removed in the 2014 amendment. Otto argues that it is unclear how property will be repossessed before cancellation, but also it could be interpreted that the repossessed property may not be returned.[111] Brits is of the opinion that reinstatement is a reasonable compromise.[112] The writer is in agreement with Otto when he states that it is irrational to refer to reinstatement of an agreement that is still in force (not yet cancelled); this is a contradiction in terms.[113] Section 129(3) is a limitation on the acceleration clause but it is a remedy that cannot be utilized after cancellation.

It should be pointed out that the literature outlined above only deals with some of the aspects of the tension in section 129, leaving much to still be uncovered. These issues need closer attention, something which has to date not been achieved. This study will endeavour to do so.

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1 9 RESEARCH METHODOLOGY

This study is a qualitative study based on primary sources of the law, namely statutory law and judicial pronouncements. It will also utilize secondary sources of law in the form of books, academic writings in journals as well as online material. This study examines on a qualitative basis, the pre-enforcement procedures that are available to a provider once a consumer has breached the credit agreement, being an agreement within the scope of the NCA.

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110 Otto (2006) 98 and Otto (2010) 117.
111 *Ibid*.
112 Brits "The Reinstatement of Credit Agreement: Remarks in Response to the 2014 Amendment of section 129 (3) - (4) of the National Credit Act" 2015 *De Jure* 78 – 90 and Brits "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: Quo vadis?" 2017 *THRHR* 193 – 194.
113 *Ibid*.

The history of the NCA is examined through an analysis of its predecessors, the most recent being the Credit Agreements Act[114] and Usury Act,[115] in relation to the history of credit, interest and credit agreements, as these developed in South Africa. An examination of the pre-enforcement procedure led to a need to scrutinise a number of other concepts, some imposed by legislation while some rules are found in the common law.[116]

Legislation and common law were not the only sources utilized in this study. Besides extensive reliance on academic writings, such as journal articles or books referenced and publications attention was also given to research reports directly relevant to the NCA. The internet played a significant role in gathering information. Library and electronic media sources comprise the bulk of the information for reasons of accessibility and financial constraints.

A historical approach is adopted in viewing the progressive realisation of the protection of consumers and providers alike from the common law to legislation. Then, in particular, section 129 of the NCA is viewed from inception to the first changes made to the section through the 2014 Amendment Act and then with the latest amendments from the 2019 Amendment Act. This linear historical time based approach is utilised as a method throughout this work to clearly depict the changes in interpretation and level of protection provided to consumers over time, this is made explicit when viewing the initial section 129, the interpretation and application of it followed by the amended section and the subsequent interpretation. The 'evolutive model of legal research' is utilised in this work in that the writer traces the evolution and development of the law governing pre enforcement procedures and how they came to be what they are today. The evaluative model of legal research aims at expounding the logical coherence of concepts, elements, facts and interests of legal phenomenon individually, of their relationship *inter se* and their relationship with the concepts, elements, facts and interests outside the legal system for determining and defining the terms and presuppositions used in law.

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The process of interpreting legislation through its purpose and objects by including social and political directions is known as the "text-in-context approach" to interpretation (also

114 Act 75 of 1980.
115 Act 73 of 1968.
116 For example, the acceleration clause.

known as the purposive or contextual approach).[117] The predecessor to this approach is known as the "mischief rule",[118] 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 real reason for the remedies.[119] The mischief rule also examines the historical context of particular legislation to place it in its proper perspective.[120] The text-in-context approach provides a balance between grammatical and overall contextual meaning.[121] Botha argues that it is imperative to take the context into account in order to have an accurately complete interpretation process.[122] The methodology adopted in understanding the pre-enforcement requirements was based on the text-in-context approach to interpretation together with the mischief rule.

The purposive (or contextual) approach to statutory interpretation is perhaps best understood and defined in relation to its opposite; the literal approach. Du Plessis best describes this approach as the contrast between establishment of the purpose of legislation as opposed to the intention of the legislator.[123] Case law reveals that prior to the democratic constitutional era, South African courts favoured the more traditional theories of interpretation, with the emphasis being on the literal theory or the text-based approach. However, "The advent of constitutional democracy in South Africa […] brought about a revolution in the field of the interpretation of enacted law."[124] In this regard Ngcobo J stated in *Daniels v Campbell*[125] "Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation to ''promote the spirit, purport and objects of the Bill of Rights." The effect of the Constitution in interpretation is captured by Cameron J in *Holomisa v Argus Newspapers Ltd*[126] in the following words: "The Constitution has changed the 'context' of all legal thought and decision making in South Africa." It emphasises interpretation that takes into account the Bill of Rights contained in chapter 2.[127]

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117 Du Plessis 96.
118 As laid down in *Heydon's Case* (1584) 76 ER 637.
119 Botha *Statutory Interpretation: An introduction for Students* (2012) 97.
120 Botha 152.
121 Botha 98.
122 *Ibid.*
123 Du Plessis, "Theoretical (Dis-) Position and Strategic Leitmotivs in Constitutional Interpretation in South Africa" 2015 *PER* 61.
124 *Ibid*
125 *Daniels v Campbell* NO 2004 5 SA 331 (CC).
126 1996 2 SA 588 (W) 618.
127 This is affirmed by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) as follows at para 72: "The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court 'must promote the spirit,

Recent case law, particularly from the Constitutional Court reveals a clear trend and shift in preference from the literal approach towards a more purposive approach of interpretation. The reason for this shift is plain: for courts to exercise their powers to evaluate and invalidate legislation, all statute law, in the new constitutional and political dispensation,

> "[has] to be interpreted to be compatible with the letter and the spirit of the constitution. This means that a value-coherent theory of interpretation should become increasingly prevalent. In effect the introduction of a justiciable bill of rights is likely to herald a new methodology and theory of interpretation of statutes."[128]

O'Regan J, relying on Schreiner JA in an oft-quoted passage in his dissenting judgment in *Jaga v Dönges; Bhana v Dönges,*[129] notes that: "it is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning. But it is also a well-known rule of construction that words in a statute should be construed in the light of their context."[130] In delivering his judgment in the decision, Khampepe J, Quoting from *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*[131] states resoundingly that: "While language cannot always have a perspicuous meaning, the elementary rule and starting point in an interpretive exercise entails a determination of the plain meaning of words in the relevant statutory provision to be construed."[132]

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The Constitutional Court's decision in *Cool Ideas v Hubbard,*[133] is instructive in this regard, it tells us, that the following three basic and kindred principles apply to the contemporary process of statutory interpretation in modern South Africa:

> "First, that statutory provisions should always be interpreted purposively; secondly, the relevant statutory provision must be properly contextualised; and lastly that all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity."[134]

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purport and objects of the Bill of Rights' when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights 'is a cornerstone of [our constitutional] democracy.' It 'affirms the democratic values of human dignity, equality and freedom.'"

128 *Daniels v Campbell* NO 2004 5 SA 331 (CC).
129 1950 4 SA 653 (A).
130 *Jaga v Dönges NO, Bhana v Dönges NO* 1950 4 SA 653 (A).
131 2009 1 SA 337 (CC).
132 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC).
133 2014 4 SA 474 (CC).
134 *Cool Ideas v Hubbard* 2014 4 SA 474 (CC).

Van der Merwe JA, in delivering the decision in the matter, *CSARS v Daikin Air Conditioning,*[135] extensively relies on the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[136] at para 18 where it was held that:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or business-like results or undermines the apparent purpose of the document."[137]

This follows the Constitutional Court's decision in *Governing Body of the Rivonia Primary School v MEC for Education: Gauteng Province*[138] where the court stated that purposive rules of reinterpretation cannot be applied so as to yield a bizarre result. In *Diener N.O. v Minister of Justice and Correctional Services*[139] Khampepe J also cited the Supreme Court of Appeals decision in *KJ Foods CC v First National Bank,*[140] in the context of interpreting section 153(1)(a)(ii) and (7) of the Companies Act,[141] where it was aptly stated that:

> "In interpreting the provisions of the Act the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality; and Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* find application. These cases and other earlier ones provide support for the trite proposition that the interpretive process involves considering the words used in the Act in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. Furthermore, as was said in *Endumeni,* 'a sensible meaning is to be preferred to one that leads to insensible or business-like results'. Thus when a problem such as the present arises, the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies."[142]

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Nevertheless, while the concept of a purposive interpretive approach is quite broad, some scholars have argued that this approach, is not without difficulties, as its practical application requires:

> "[t]he evaluation of legislation carries with it the necessary requirement of a balancing of competing interests. For example, on the one hand the tendency towards a strict and literal interpretation, whilst another, competing approach, is in which the interpreter ascribes towards establishment of the purpose of the relevant statutory provision(s). A contrast between establishment of the purpose of legislation as opposed to the intention of the legislator has long been a theme for discussion throughout the years."[143]

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135 *CSARS v Daikin Air Conditioning* 2018 ZASCA 66.
136 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA).
137 *Supra.*
138 *Governing Body of the Rivonia Primary School v MEC for Education: Gauteng Province* 2012 ZASCA 194.
139 *Diener N.O. v Minister of Justice and Correctional Services and Others* 2019 4 SA 374 (CC).
140 *KJ Foods CC v First National Bank* 2015 ZAGPPHC 221.
141 Act 71 of 2008.
142 *KJ Foods CC v First National Bank* 2015 ZAGPPHC 221.
143 *Supra.*

Considering the above decisions, the most pervasive interpretive approach to statutes remains the purposive approach. For author Wallis JA, the recent body of precedents in support of the purposive approach is so expansive, it should be commonplace. He argues: "[...] courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate."[144]

In light of the discussion above on the interpretative approach this work takes both a purposive, constitutional and text- in context with historical evaluative precedent approach to the issue of interpreting section 129 of the NCA.

This work is not a comparative study and comparable jurisdictions such as the United States, United Kingdom, Sweden and Australia will only be referred to where it may add value to the present discussion and in particular the recommendations in the concluding Chapter.

1 10 OUTLINE AND OVERVIEW OF CHAPTERS

The work consists of eight chapters structured as follows:

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Chapter one is the introduction and provides a background to the study. It also identifies the research problem, articulating its relevance, objectives, scope, methodology and limitations to the study.

Chapter two encompasses a concise historical perspective of the study, indicating in very broad terms the history of consumer credit protection in South Africa through common law and legislation prior to the NCA as well as a broad introduction of the NCA. The historical perspective and *rationale* for the NCA place in context and provide the purpose for the rules and regulations that govern parties when an agreement is breached as well as the remedies and recourses that are available to the aggrieved party.

144 *Supra*.

Chapter three provides a comparison of the debt enforcement process under the common law (Roman-Dutch law and English law) and legislation[145] preceding the NCA. Remedies for breach of contract differed from statute to statute in the beginning and could have involved one or more remedies being either cancellation, acceleration clause, penalty clause or arrear payments. These remedies were tempered through legislation. The query always arose as to what notice had to be sent to the consumer in default of an agreement and whether it was required to come to his or her attention to be considered effective.

Chapter four deals with debt enforcement under the NCA, putting particular emphasis on the leading cases of *Sebola v Standard Bank of South Africa Ltd,*[146] *Kubyana v Standard Bank*[147] and *Investec Bank Limited v Ramurunzi*.[148] The Chapter indicates that the purpose of consumer protection is to inform consumers of their rights.[149] It also assesses the impact of prescription on selected aspects of section 129.

Chapter five expands upon the understanding of "delivery" from Chapter four with the amendments to section 129 by the 2014 Amendment Act and the potential interrelation with the Electronic Communications and Transactions Act in providing for a more balanced approach.[150]

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Chapter six deals with options available to a consumer who is in receipt of section a 129 notice. Decisions dealing with the various options especially in relation to a mortgagor will be analysed as well as a discussion on the possible reinstatement of the agreement. The idea of referral by the consumer to a debt counsellor is canvassed for discussion in the next Chapter.

Chapter seven deals with debt review versus debt enforcement. It commences with an identification of debt review and debt enforcement and thereafter compares such processes by highlighting the interrelation between sections 86, 88 and 129 of the NCA and the implications of non-compliance with section 129.

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145 Hire-Purchase Act 36 of 1942, Alienation of Land Act 68 of 1981 and Credit Agreements Act 75 of 1980.
146 2012 5 SA 142 (CC).
147 2014 3 SA 56 (CC).
148 2013 ZAWCHC 52 and 2014 3 All SA 34 (SCA).
149 Smit *A Procedural flaw encountered with debt enforcement in terms of the National Credit Act* (LLM-thesis, University of Pretoria, 2012) 9. Otto and Otto (2010) 1.
150 Act 25 of 2002.

Chapter eight presents the conclusions reached in the study and seeks to answer two pertinent questions: “Has the legislature adequately incorporated the correct amendments required to the NCA in the National Credit Amendment Acts of 2014 and 2019 to properly bring about the interpretations raised by the judiciary?” and “Do any of the conflicting current interpretations provide an equitable balance of protection of the rights of both the consumer and provider?” Recommendations regarding the future interpretation and application of section 129 are made in order to provide legal certainty and facilitate smooth running of the credit industry. The conclusion includes a consideration on whether the legislature has over-protected the consumer through over-regulation and whether this would adversely affect the credit industry.

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Chapter 2

Credit legislation in South Africa: A historical overview and *rationale*

2 1 INTRODUCTION

This Chapter provides a historical overview of consumer protection and credit legislation, including the purpose thereof in South Africa whilst identifying the users of credit and their motives for utilising the facility. It will thereafter present a discussion of the aim and purpose of the NCA with reference to section 3 thereof and conclude with an exploration of the application of the NCA. The historical perspective is imperative to appropriately position the current legislation in the context from which it has evolved in order to correctly ascertain the purpose of the current section and how it should therefore be interpreted. This positioning allows for a more purposive evaluative approach to the interpretation of the NCA in subsequent chapters.

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Credit is one of the cornerstones of modern market economy that lubricates the economy and stimulates commercial activity.[1] Credit provision is a double-edged sword.[2] Credit enables individuals to spend money they do not have, spend more money than they earn, use credit for ordinary purchases, use credit for large asset purchases such as a house or motor vehicle, use credit even when they have cash and use debt to pay off debt.[3] The use of credit

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1 Notably, in a capitalist economy such as that of South Africa the importance of credit cannot be overstated.

2 This illustration was tendered by the South African Department of Trade and Industry and it depicts the need to regulate consumer credit in a more sustainable, prudent and holistic manner. See the South Africa Department of Trade and Industry "Making Credit Markets Work A Policy Framework for Consumer Credit" https://www.ncr.org.za/documents/pages/background_documents/Credit%20Law%20Review.pdf (accessed 16-01-2017); Department of South African National Treasure "Safer Financial Sector to Serve South Africa better" http://www.treasury.gov.za/twinpeaks/20131211%20%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf (accessed 17-01-2017).

3 Academic commentators agree that credit plays a vital part in an economy. Among the merits of credit provision is that it enables people to have use of a product or service, at a cost represented by an interest rate, prior to them having paid for that product or service or, where an item cannot be afforded from a single month's salary (for example a home), to spread the payments over a number of months. On the other hand, the inability to regulate consumer credit effectively has led to the persistent problem of reckless lending and over-indebtedness haunting South Africa: see Otto *Guide to the National Credit Act* (2008) 1; Boraine and Van Heerden "The Interaction between debt relief measures in the National Credit Act 24 of 2005 and aspects of insolvency law" 2009 *PER* 22-63; Boraine and Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 656; Jacobs *et al* "Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis" 2010 *PER* 302-406; Otto "The distinction between a credit facility and an incidental credit agreement in terms of the National Credit Act, and an afterthought on credit guarantees and registration" 2011 *TSAR* 547-555; Nagel

and poor money management skills often lead people into a situation of over-indebtedness where they are unable to service credit agreements.[4]

Legislation protecting consumers (and debtors) in various ways is an international phenomenon.[5] Legislation, however, differs from country to country depending on amongst others the needs, circumstances, resources, political agenda, economic philosophy and history of the country.[6] A consumer in this context is normally an individual or a small juristic person and legislation usually covers contracts up to a maximum amount of debt extended by the creditor, which amount serves as a ceiling for the legislation's field of application.[7] Some countries prefer to have very concise legislation which provides the credit industry and consumers alike with basic principles and few details. Legal writers and courts then provide the skeleton legislation with the necessary substance where it is required.[8] Other countries prefer to set out the rules quite comprehensively in the legislation itself. Most English-speaking countries follow this tradition.[9]

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Commercial Law 6th ed (2019) 284; Wang *et al* "Theoretical Framework for Investigating Consumer Over-indebtedness and Bankrupcy Risk" https://www.deutschland-im-plus.de/download/iff_discussion_paper_2017_1.pdf (accessed 17-07-2017); Kelly-Louw "The Prevention and Alleviation of Consumer Over-indebtedness" 2008 *SAMLJ* 200; Brits "The Reinstatement of Credit Agreement: Remarks in Response to the 2014 Amendment of section 129 (3) - (4) of the National Credit Act" 2015 *De Jure* 75-91; Subramanien "Section 86 (10) of the National Credit Act 34 of 2005: *FirstRand Bank v Raheman* (5345/ 2010) 2012 ZAKDHL" 2010 *Obiter* 693; Van Heerden and Coetzee "Wesbank v Deon Winston Papier and the National Credit Regulation" 2011 *De Jure* 463-479.

4 Renke and Roestoff "The Consumer Credit Bill: A solution to over indebtedness?" 2005 *THRHR* 121.

5 Niemi "Consumer insolvency in the European legal context" 2017 *Journal of Consumer Policy* 443.

6 Globally, legislation regulating consumer credit is designed in response to peculiarities existing within the country taking into account social, economic and political requirements. For instance, in South Africa, the aim of the regulation of consumer credit is, *inter alia*, (a) to promote a fair and non-discriminatory marketplace for access to consumer credit, and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; (b) to promote black economic empowerment and ownership in the consumer credit industry; (c) to prohibit certain unfair credit and credit-marketing practices; (d) to promote responsible credit granting and use, and for that purpose to prohibit reckless credit granting; (e) to provide for debt re-organisation in cases of over-indebtedness; (f) to regulate credit information to provide for registration of credit bureaux, providers and debt counselling services; (g) to establish national norms and standards relating to consumer credit; (h) to promote a consistent enforcement framework relating to consumer credit; (i) to establish the national credit regulator and the national consumer tribunal. For further exposition on the objectives of the consumer credit regulation see the preamble to the NCA.

7 The predecessors of the NCA are examples of legislation that contained a ceiling regarding their scope of application. The Credit Agreements Act of 1980 did not apply to credit agreements where the cash price exceeded R500 000 and the Usury Act of 1968 did not apply to credit agreements under which the principal debt exceeded R500 000. Credit above this amount was not regarded as consumer credit and it was left to the parties to determine their relationship in their contract, subject only to the rules of the common law.

8 Britain, Australia and Germany are some of the examples of countries using this method.

9 Otto and Otto *The National Credit Act Explained* 4 ed (2016) 1.

Consumer protection, even though it may be a refined concept in the modern age, is by no means a new concept in the history of the human race. According to Otto, legal rules protecting the vulnerable have existed since the beginning of time.[10]

2 2 HISTORY OF CONSUMER CREDIT LEGISLATION

2 2 1 General

Lawmakers have had to make rules to regulate dealings between contracting parties in order to combat abuse and misconduct. The need to protect consumers has been historically recognised. The early Babylonians, Romans, and Greek society all adopted legislation which protected the interest of the creditor and debtor in credit transactions. By way of example, §§48-50 of Hammurabi's laws, rulings that stabilized the grain/silver exchange rate "are all meant to give a weak debtor (a small farmer or tenant) some legal protection and help," and are "'given teeth' by stipulating that if [the creditor] takes more he will forfeit 'everything he gave,' that is, his original claim". Babylonian debtors thus were saved from being harmed at harvest time when payments were due and grain prices were at their seasonal low against silver outside the large institutions. [11]

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[10] Otto and Scholtz (ed) *Guide to the National Credit Act* (2008 – continually updated) (2008) 1. The footnote hereunder contains examples of how the vulnerable were protected in the development of credit transactions, especially in the area of limitation or fixing of interest and the scrapping of debt in totality.

[11] Neolithic and Bronze Age economies operated mainly on credit. As a means of payment, the early use of "monetized" grain and silver was mainly to settle debts. This monetization was administrative and fiscal. "The concept of value equivalency was a secure element in Babylonian accounting by at least the time of the sales contracts of the ED IIIa (Fara) period, c. 2600 BC." The rate of interest on commercial advances denominated in silver was set in the simplest sexagesimal way: 1/60th per month, doubling the principal in five years (60 months). This standardized rate was adopted by the economy at large.

The origins of monetary debts and means of payment are grounded in the accounting practices innovated by Sumerian temples and palaces c. 3000 BC to manage a primarily agrarian economy that required foreign trade to obtain metal, stone and other materials not locally available.

Royal proclamations cancelling agrarian debts preserved economic viability on the land. Public oversight of money thus went hand in hand with public management of debt, including the setting of interest rates and the customary royal amnesties for agrarian and personal debts. Underlying the conflict between the Barter and State theories of money is whether public policy should favour creditors or debtors. Interest has always been an inherently monetary phenomenon and officially regulated. Interest-bearing debt is found spreading westward to the Mediterranean lands around the 8th century BC.

Classical Greek experience confirms a number of generalities drawn from earlier Near Eastern monetary development. Despite the palace's role as the major creditor, it protected debtors by debt amnesties that reversed the polarizing effect of interest-bearing debt. Most debts in early Mesopotamia were owed to the palace, so rulers basically were cancelling debts owed to themselves and their collectors when they proclaimed Clean Slates that saved their economies from widespread debt bondage that would have diverted labour to work for creditors. As debts came to be owed mainly to Greek and Roman oligarchies, debts no

Lending on interest was one of the first economic milestones of life in society and considered an essential driving force in its development.[12] As a result, the control of interest became one of the initial mechanisms used to protect consumers. These early attempts to purify the credit industry provided the historical justification for the effective regulation of consumer credit.[13] Usury law has a strong social, economic and moral basis.[14] It is important to take note of the historical developments in usury law as they provide the social, economic and juridical background to current legislation and accordingly the interpretation thereof.[15]

Credit has 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 at a future date.[16] The receiver agrees to 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.[17] Credit legislation has far-reaching consequences due to malpractices that they seek to diminish.

2 2 2 Ancient traditions and practices

Many ancient societies, for example the Romans, had firm rules in order to protect individuals whilst contracting. These rules however were not necessarily under the guise of "consumer

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longer were cancelled except in military or social emergencies. What came to be "sanctified" was the right of creditors to foreclose, not cancelling debts to restore economic balance. Money and debt in Greece and Rome thus followed a different trajectory from its origins in Mesopotamia. Oligarchies gained sufficient power to stop civic debt cancellations. Hudson "Palatial Credit: Origins of Money and Interest" https://michael-hudson.com/2018/04/palatial-credit-origins-of-money-and-interest/ (accessed 05-04-2020).

12 Gelpi and Julien-Labruyére *The History of Consumer Credit Doctrines and Practices* (2000) 1.

13 See Otto and Grové "South African Law Commission Working Paper 46 – Project 67: the Usury Act and Related Matters: New Credit Legislation for South Africa (proposed to the South African Law Commission)" 1991 http://www.justice.gov.za/salrc/anr/1999_ar.pdf (accessed 22-01-2017).

14 Otto "Consumer Credit" in Joubert (ed) *Lawsa* 2 ed (2004) para 2.

15 Campbell *The Cost of Credit in the Micro-finance Industry in South Africa* (LLM-thesis, Rhodes University, 2006) 45. South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 18.

16 Walker *The Oxford Companion to Law* (1980) 312.

17 Grové and Jacobs *Basic Principles of Consumer Credit Law* 2 ed (2002) 1.

protection".[18] A few examples are the warranty against latent defects in the sale of a *res*, the *beneficia* available to a surety and the *in duplum* rule.[19]

The codification of common law principles developed over extended periods of time.[20] The Roman edicts established the *actio quanti minoris* and the *actio redhibitoria* as interventions in order to protect consumers when the common law, as it then was, did not sufficiently do so.[21]

Interest was prohibited in the Old Testament of the Bible, save for certain exceptions.[22] The teaching of the New Testament is less clear, and the old church fathers and biblical philosophers disagreed as to the interpretation of biblical texts. For a long time, therefore, the debate was about whether or not interest could be charged at all. In terms of traditional canon law, interest was forbidden, although from the time of Calvin it has been accepted.[23] This means legislation that limits interest rates has existed for nearly 4000 years,[24] the first known enactments as mentioned previously being in the Code of Hammurabi of 1750 BC.[25] By the twelfth century interest could only be charged where it represented fair compensation for special risks and after the debtor was in *mora*. Around the thirteenth century and with developing commerce, resistance to the prohibition on interest was becoming stronger as it became known that every loan involves some risk, justifying the payment of interest.[26] By the

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18 Roman-Dutch law was the legal system that applied in Holland during the seventeenth century. It was a fusion of medieval Dutch law 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; the Frankish period from the fifth century to the ninth century; the Middle Ages from the ninth century to the sixteenth century. 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 Kahn *The South African Legal System and its Background* (1973) 330 - 331).

19 Otto "The History of Consumer Credit Legislation in South Africa" 2010 *Fundamina* 258.

20 Otto *Fundamina* 259.

21 *Ibid.*

22 Otto *Lawsa* vol 5(1) para 2.

23 South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 18.

24 Otto *Lawsa* vol 5(1) para 2.

25 Grové *Gemeenregtelike en Statutere Beheer oor Woekerrente* (LLD-thesis, RAU, 1989) 10. Interest is permissible within certain limits (Grové 73ff). Buckley *Teachings on Usury in Judaism, Christianity and Islam* (2000) 11. Hammurabi who reigned in Babylon decreed the Code in Mesopotamia from 1792 to 1750 BC. It consists of about 282 paragraphs of which approximately 260 have been preserved. The Code concerns litigation between borrowers and lenders (Gelpi and Julien-Labruyére (2000) 3).

26 Hahlo and Kahn 462.

seventeenth century "usury" had gained a new meaning, that is, the charging of excessive interest.[27]

The phrase "consumer credit" stems back to an era when humans had moved from 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, animals or metal, with the earliest historic interest rates ranging from 20 – 50 percent *per annum* and later settling on 33 percent for loans on grain and 20-25 percent for loans on silver. These types of loans were made mainly for two reasons, either to invest in future production or for non-productive purposes, which was known as consumer credit.[28]

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 percent according to the risk involved and therefore these individuals became "private" bankers.[29] The practice of commercial, industrial and agricultural loans advanced on the basis of interest became so prevalent in the Roman Empire that Justinian[30] had to promulgate a law determining the rates of interest which could be charged to different borrowers.[31]

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Therefore, the practice of granting credit, lending on interest and setting up of lending institutions has been a widely popular ancient practice, which invoked debate throughout the world. The concept of protecting the consumer is likewise not a contemporary one.

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27 *Ibid.* This is where South Africa's regulatory regime is today. The consideration is not whether interest should be allowed, but how much interest should be allowed in order to provide an adequate balance to protect the consumer from exploitation whilst ensuring the provider's risk is considered. More recent cases declare that there is no common law ceiling on the rate of interest: *Structured Mezzanine Investment (Pty) Ltd v Dawids* 2010 6 SA 622 (WCC) and *Structured Mezzanine Investments (Pty) Ltd v Basson* 2013 ZAWCHC 63 (24 April 2013).

28 Peterson "Truth, Understanding, the High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act" 2003 *Florida Law Review* 808 - 809.

29 Usmani "The Text of the Historic Judgment on Interest Given by the Supreme Court of Pakistan" https://www.albalagh.net/Islamic_economics/riba_judgement.shtml#77 (accessed 21-11-2019).

30 Byzantine emperor (527 – 565 AD).

31 Usmani https://www.albalagh.net/Islamic_economics/riba_judgement.shtml#77 (accessed 21-11-2019); *Novellae* 121, 138 and 160.

2 2 3 Roman and Roman-Dutch Law

From the earliest times in the Republic of Rome lending and borrowing were common features of commercial society.[32] The contract governing the loan of money for consumption was known as *mutuum*.[33] If the lender wanted to demand interest on such loan, he would have to do so by way of another contract known as a *stipulatio.*[34] Roman customary law gave way to statutory law, one of the most prominent being the Twelve Tables.[35] Roman law permitted charging interest, with various limitations on rates of interest being imposed throughout different periods. However, lenders ignored stipulated interest rate ceilings, which led to a ban on the practice of charging interest.[36] This proved counter-productive and towards the end of the Republic fixed interest rates for ordinary people were set at 12 percent and 6 percent for senators.[37] During the sixteenth century and with the Reformation, the prohibition on usury was no longer tenable and by the time German imperial legislation was decreed in 1654, which acknowledged the possibility of allowing the charging of interest, the Canonical prohibition had been repealed by disuse. This led to a general move back towards Roman rules on usury and interest with certain modifications.[38] After the Reformation, the courts of Holland allowed the charging of interest.[39]

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In Roman-Dutch law interest was permitted subject to certain maximum rates at various developmental periods.[40] Consumer credit protection from the inception of this concept seems to be founded in the control of interest rate charges. Regulating other aspects of the credit transaction was a consequence of the need to control the interest rate. Under Roman law, there were always maximum rates of interest, which changed from time to time.[41] Whilst the Roman

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32 Lee *An Introduction to Roman-Dutch Law* (2013) 128.

33 A *mutuum* involved the transfer of ownership of the money or other consumable to the borrower who then had an obligation to return the equivalent to the lender at a stipulated or reasonable future time - Thomas *et al Historical Foundations of South African Private Law* 2 ed (2000) 269.

34 Thomas *Textbook of Roman Law* (1976) 272.

35 Gelpi and Julien-Labruyére (2000) 9. A ceiling rate was contained in the Twelve Tables and in case of contravention the usurer would incur criminal liability. Lee *Elements of Roman Law* 4 ed (1965) 284.

36 Through the *Lex Genucia.*

37 Thomas *et al* (2000) 273.

38 Zimmerman *The Law of Obligations – Roman Foundations of Civilian Tradition* (1990) 175.

39 Otto and Grové *The Usury Act and Related Matters: South African Law Commission Working Paper* (1991) 19.

40 Huber *Heedendaegse Rechtsgeleertheyt* (1987) 1 37 1, 1 36 2, 1 36 4.

41 See Thomas (1976) 273. The Twelve Tables provided for an interest rate of one twelfth of the loan per month. Later, Justinian laid down that business loans would be at 8% *per annum*, ordinary loans at 6%, loans to illustrious persons at 4%, and that in the case of goods bought beyond the sea 12% was permitted. Compounding of interest was forbidden.

law position could be enlightening, it provided limited assistance, since the fixing of interest rates as per Roman law was not received into Roman-Dutch law.[42] Roman-Dutch authorities had to contend with the conflict between commercial realities and the canon law prohibition on the charging of interest and wrote at length about the various rates applicable to loans at different stages and under different circumstances.[43]

2 2 4 South African Law

2 2 4 1 General

Consumer credit protection in South Africa developed slowly. It developed through the continued and increased utilisation of money. At first, there was no statutory or common-law control over finance charges.[44] The history of South African common law with its Roman origins, and mostly fostered on the Old Testament,[45] consists of the history of Roman-Dutch law and its transportation to and reception in South Africa.[46]

The South African legislature has regarded the common law as providing insufficient protection to consumers. However, the common law is still relevant, notwithstanding the existence of legislation in the form of the Usury Act[47] and exemption notices and subsequently the NCA and regulations, in view of the presumption that a statute alters the common law as little as possible.[48] This should be borne in mind whilst continuing the discussion on consumer protection through legislation.

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Otto and Grové[49] have usefully divided usury legislation into first, second and third generation consumer credit laws.[50]

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42 Thomas (1976) 273.
43 Otto *Lawsa* (2004) para 2, who refers in turn to Van Leeuwen CF 1 4 4 5 and 1 4 4 9.
44 Otto and Grové (1991) 19.
45 Otto and Grové (1991) 18.
46 Hahlo and Kahn (1973) 324.
47 Act 73 of 1968.
48 Campbell 49 - 50. Du Plessis 177–178.
49 South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993).
50 Campbell 50. South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 22–29.

2 2 4 2 First Generation

2 2 4 2 1 General

First generation consumer legislation pre-dated the Union of South Africa and was designed to remove uncertainty as to whether interest could be charged at all, at a time in South African legal history when no statutory or common law control over maximum finance charge rates existed.[51] A distinguishing feature was that the different colonies dealt with the matter in different ways and there was no uniformity.[52] For the first time, diverse rates for different amounts lent were prescribed and any person exacting more than the maximum prescribed rate was guilty of an offence. If a creditor recovered too much interest, a court could order him or her to pay back the excessive interest.[53]

2 2 4 2 2 Cape Colony

The law of Holland transplanted by Van Riebeeck was applied from 1650 to 1800 in the Cape of Good Hope, with some variations.[54] Early in the nineteenth century the Napoleonic wars brought the Cape of Good Hope into the ranks of British crown colonies but retained Roman-Dutch law in that it has been the general policy of the British Crown in dealing with conquered territory to interfere as little as possible with the existing law and customs. However, for practical purposes the judiciary was reorganised, and English laws of procedure and evidence were introduced.[55]

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The South African common law is therefore of Roman and Roman-Dutch extraction and thus the first cases to deal with the question of usury looked to these authorities to settle the common law position. Initially, according to the common law, usurious contracts were considered void. No maximum rate of interest was established.[56] South African cases that

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51 South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 22.

52 South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 24.

53 Campbell 50 – 51.

54 *Ibid.*

55 Campbell 50 – 51.

56 *Sutherland v Elliot Brothers* 1841 1 Menz 99, *Dyason v Ruthven* 3 Searle 282, *Reuter v Yates* 1904 TS 835, *SA Securities v Greyling* 1911 TPD 352, *Structured Mezzanine Investment (Pty) Ltd v Dawids* 2010 6 SA 622 (WCC). Section 105 of the NCA as read with regulation 42 (GG 28864 of 31.05.2006). The Minister

discuss the common law position in relation to usury all date back more than 95 years. The case of *Dyason v Ruthven*[57] provides a good description of the Roman and Roman-Dutch authorities' writings in relation to usury.[58] Hodges J held: "I should not be prepared to say that this Court, or any other Court can, by a mere decision, or by a series of mere decisions, declare authoritatively what shall be the rate of interest which being exceeded, shall be accounted usury."[59] In the same case Bell J held:

> "It by no means follows that the Justinian law is to be regarded as fixing the rate of interest, that fixing of interest being from its very nature fluctuating, and not belonging to the class of laws fixing principles of right and wrong which are to govern future laws."[60]

The court concluded that no law existed in the Cape Colony that stipulated a fixed amount of interest be charged in loan contracts.[61]

Eventually legislation was enacted in the form of the Usury Act of 1908.[62] However, the scope of the Act was much larger than the mere regulation of interest and in fact covered a variety of aspects of the consumer-provider relationship. The Act also sought to increase disclosure of information between the parties.[63] This Act applied primarily to moneylending transactions, did not incorporate business transactions and it permitted different rates according to different amounts lent.[64] Anyone requesting or exacting more than was permitted under the Act was guilty of an offence and could be ordered by court to pay the extra interest back to the debtor.[65] The Act further extended to incorporate sale transactions where interest was charged

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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 that the Usury Act 73 of 1968 determined the maximum recoverable rate of interest. *Spencer v The Merchant's Credit Corporation* 1933 WLD 69.

57 1860 Searle 282.

58 It is significant to highlight that the South African legal system is a "hybrid" one. It is derived from Roman-Dutch law as well as infused with principles borrowed from the English law. The implication is that legal rules and principles regulating consumer credit exhibits the same diversity of origin. *Dyason v Ruthven* 1860 Searle 282 stated that under the common law a transaction or agreement would be considered usurious if it were shown that there had been either extortion or oppression or something that was similar to fraud. Watermeyer J stated in the same case that if any stipulation of interest were to be reduced, on the ground of usury or extortion, that could only be achieved by providing proof of the usury and extortion in that case – *Dyason v Ruthven* 3 Searle 305.

59 *Dyason v Ruthven* 3 Searle 291.

60 *Dyason v Ruthven* 3 Searle 305.

61 *Dyason v Ruthven* 3 Searle 291 – 292.

62 Act 23 of 1908 which also prescribed interest rates for the Colony.

63 Vessio *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* (LLD-thesis, University of Pretoria, 2015) 45 - 46.

64 Section 5 of the Usury Act 23 of 1908.

65 Section 6 of the Usury Act 23 of 1908.

on amounts outstanding. This was first generation consumer credit legislation. The laws applied after Union until the Usury Act of 1926.[66]

2 2 4 2 3 Natal

The Natal Law Book recorded that people were entitled to demand as much interest as they deemed fit.[67] Section 1 of Law 6 of 1858 (Natal) provided that companies or individuals could "lend…, at any rate of interest, or premium or discount, that may be arranged or agreed between the borrower and lender of capital." The Natal Law was amended in 1908[68] to provide protection for "natives", who were entitled to be charged a maximum of 15 percent interest *per annum*. Other maximum interest rates were prescribed and contracts that exceeded prescribed rates were void.[69] Law 41 of 1908 provided that contracts of sale for example attracted a maximum interest rate of 8 percent *per annum* on the outstanding balance.

2 2 4 2 4 Orange Free State

A similar arrangement to that of Natal applied in the Free State from 1858 as per section 1 of Law 6 of 1858. The Orange Free State Lawbook[70] stated that the "The trade in money shall be free, and everyone shall have the right to demand as much interest for his money as he may think fit."

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2 2 4 2 5 Transvaal

In 1911 the Supreme Court in Transvaal in *SA Securities v Greyling*[71] found the common law view vague and would not consider interest charged at 120 percent *per annum* as usurious.[72] Wessels J held that a usurious transaction should show "either extortion or oppression, or

66 Sections 3 and 16 of the Usury Act 23 of 1908; Otto and Grové (1991) 23 – 24; South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 22 – 29.
67 Law 6 of 1858 (Natal).
68 Law 41 of 1908.
69 Section 3 of Act 41 of 1908.
70 OVS Wetboek, 1854–1891. Chapter 98, as translated in the South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 22.
71 1911 TPD 356.
72 *SA Securities v Greyling* 358.

something akin to fraud."[73] Wessels J's difficulty with determining a "definite principle" in this regard indicated the need for legislation to regulate this area of law.

2 2 4 3 Second Generation

2 2 4 3 1 General

Otto and Grové's identified second-generation consumer credit legislation was so-called because it applied for the first time on a national scale (as opposed to each colony having their own laws), with different legislation providing for different types of transactions.

2 2 4 3 2 Usury Act of 1926

The first national consumer credit Act passed by Parliament of the Union of South Africa was the Usury Act of 1926,[74] which applied only to moneylending transactions.[75] Prior to this Act the various colonies, as noted above, regulated their own consumer legislation.[76]

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This Act was, amongst others, aimed at the limitation of the cost of credit as well as the regulation of the disclosure of information to the consumer. The Act provided a sliding scale of interest rates depending upon the amount of the loan. Loans of less than 10 pounds sterling attracted a maximum of 30 percent interest per year; whilst larger loans exceeding 50 pounds attracted a maximum of 12 percent interest per year. Any person contravening these provisions was guilty of an offence and liable to a fine not exceeding 100 pounds.[77] All moneylending transactions had to be in writing and contain certain prescribed information which formed part of the secondary measures of consumer protection.[78] Provision was also made for certain permissible expenses other than interest.[79] These included stamp costs, mortgage costs, rates

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73 *Supra.*
74 Act 37 of 1926.
75 In effect, instalment transactions relating to movables were not statutorily regulated until the passing of the Hire-Purchase Act 36 of 1942, from which date the Usury Act of 1926 and the Hire-Purchase Act of 1942 coexisted without affecting each other in that they applied to different types of contracts. Otto and Grové (1991) 24. It must be noted that at first the Act did not create complete homogeneity as only the Free State and Cape Colony repealed their laws to make way for the 1926 Act, while Natal did not. Natal only conformed in 1967 with the Pre-Union Statute Law Revision Act 78 of 1967.
76 Grové (LLD-thesis, RAU, 1989) 132.
77 Section 1(2) of the 1926 Usury Act.
78 Section 5(1) of the 1926 Usury Act.
79 Section 2(1) of the 1926 Usury Act.

and taxes, licence fees, insurance premiums (in certain cases) and "any costs which have actually been incurred by the lender in the recovery of his debt."[80] The 1926 Act prescribed a maximum fixed interest rate.[81] Although there was disclosure of costs required that appears to have been selective by providers.[82] The Act did not, however, prescribe any particular procedure to be followed by a provider who wished to issue summons following a breach of contract by the consumer and therefore the common law would have still regulated this process.

2 2 4 3 3 The Hire-Purchase Act of 1942

The 1926 Usury Act did not cover finance for the purchase of goods on credit, known as hire-purchase contracts, which was the reason for the introduction of the 1942 Hire-Purchase Act.[83] These two Acts functioned together for some time.[84] The Hire-Purchase Act of 1942 was passed in order to protect consumers who purchased goods in this manner and accordingly fulfilled a social and economic necessity and legislatively filled a gap in the common law.[85]

The Act defined a "hire-purchase agreement" as an agreement whereby goods were sold subject to the condition that ownership in such goods would not pass merely by the transfer of possession. In terms of the contract, the purchase price had to be paid in instalments, two or more of which had to be payable after the transfer of ownership of the goods. Any other agreement /s, which together had the same significance, whatever the form, were included. Section 1 of the Act defined an "instalment sale agreement" as an agreement of purchase and sale of movable goods in accordance with which the ownership in the goods sold passed upon delivery. The purchase price had to be paid in instalments, two or more of which had to be payable after delivery of the goods. Failure by the buyer to comply with any provision of the contract entitled the seller to the return of the goods sold.

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In 1965 the Hire-Purchase Amendment Act[86] amended the definition of "instalment sale agreement". The first part of the definition remained the same, however, the amended

80 Section 1(1).
81 Section 2 of the 1926 Usury Act.
82 Kelly-Louw 2008 *SAMLJ* 201.
83 Act 36 of 1942.
84 Otto and Grové (1991) 24 – 26.
85 The Hire-Purchase Act of 1942 applied to certain instalment sale and hire-purchase agreements relating to movable goods.
86 Act 30 of 1965.

definition provided that the contract had to prohibit the buyer from alienating or encumbering the goods sold until the purchase price had been paid in full. Alternatively, the contract could state that the full purchase price would become payable should the buyer alienate or encumber the goods sold. Otherwise the contract had to provide that the seller would be entitled to the return of the goods if the buyer failed to comply with any provision of the agreement. The legislative addition of the option of implementing or referring to an acceleration clause, as well as the legislative prohibition aimed at preventing alienation or encumbrance of goods of which the buyer was the owner serve to highlight the right to enforcement of the contract afforded to the seller. These provisions sought to increase protection offered to the seller in these types of contracts.

The Act only covered a small number of transactions and this together with developments in commerce led to its replacement by the Credit Agreements Act of 1980,[87] which had a wider scope.

2 2 4 3 4 Limitation and Disclosure of Finance Charges Act of 1968

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In March 1967, the Minister of Finance appointed a committee to investigate and improve the 1926 Usury Act. Within a few months of the Committee completing its report, the Limitation and Disclosure of Finance Charges Act[88] was passed, repealing the 1926 Usury Act, which later became the Usury Act 73 of 1968.[89] Its scope included the financial aspects related to purchase and sales, lease of movables and money lending transactions, which were widely defined in the Act. Agreements that were concluded under the Act were those that involved the Land and Agricultural Bank of South Africa, the South African Reserve Bank, lending money to financial institutions, moneylending or credit transactions that were above R500 000 (Five Hundred Thousand Rand) and three month leasing agreements which were renewed, and the provider charged a financial fee that was payable on expiry of the lease agreement.[90]

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87 Act 75 of 1980.
88 Act 73 of 1968.
89 The Act was renamed in terms of section 9 of the Limitation and Disclosure of Finance Charges Act 42 of 1986.
90 Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* (LLD-thesis, University of Pretoria, 2012) 345. Sections 1, 2 and 6 of Act 73 of 1968.

2 2 4 3 5 Usury Act of 1968

The Usury Act[91] of 1968 did not set fixed rates for transactions falling within its ambit, but provided for maximum interest rates in moneylending, leasing and credit transactions respectively.[92]

The Usury Act did not define "credit" and as such the common law definition was utilized. The preamble to the Usury Act of 1968 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." The Usury Act applied to three main classes of transactions (moneylending, credit and leasing transactions) and 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.[93]

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.[94] The purpose of the Usury Act was to regulate the limitation and disclosure of finance charges and thus the Minister prescribed maximum rates allowed in terms of the Act frequently. 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.[95] The Usury Act also

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91 Act 73 of 1968. Until June 1, 2007, the Usury Act prescribed limits on the interest rates that providers could charge. Until this date, the maximum interest rate was twenty (20%) percent per year on all credit agreements up to R10,000 and seventeen (17%) percent per year on credit agreements over R10,000. However, registered micro-lenders were exempt from the Usury Act from 1992, meaning that they were free to charge any interest rate. This resulted in exorbitant interest rates, with micro-lenders charging in general thirty (30%) percent per month. Because of the excessive profits that micro-lenders could make, the industry spiralled out of control, growing exponentially year-on-year. In the three years between September 2003 and August 2006, the industry grew by an average of over thirty (30%) percent per year. For the twelve months ending August 2006, the total Rand-value of loans disbursed in the registered micro-finance sector was over R30,000,000,000.

92 Prior to 1993 the relevant Minister was the Minister of Finance - see the Usury Amendment Act 30 of 1993, section 1.

93 Act 75 of 1980.

94 The definition of "credit transactions" under the Credit Agreements Act of 1980 was a broader definition also referring to leasing transactions as compared to the definition under the Usury Act of 1968. The definition of "leasing transaction" in the Credit Agreements Act of 1980 provides more detail than the Usury Act of 1968 but also defines leasing in the negative to state that ownership may not ensue from the lease – refer to section 1 of both the Usury Act 73 of 1968 and Credit Agreements Act 75 of 1980.

95 As covered in section 2A of the Usury Act 73 of 1968. At the time that the Usury Act of 1968 was repealed the maximum annual finance charge rate as determined by the Minister were as follows:
"1) for the purpose of section 2(1), (2) and (3) of the Usury Act of 1968 the different percentages

gave creditors the right to contract for variable finance charges and made provision for variable and non-variable rates.[96] We see an increasing emphasis on the right to disclosure and information coming to the fore in consumer protection.

The 1968 Usury Act as amended did not purport to regulate the procedure to be followed by a provider when faced with breach of contract by the consumer with the result that the common law remained in effect. As in the case of most consumer credit laws the Usury Act restricted many of the traditional rights and powers of creditors and increased the remedies available to debtors. The Act introduced a number of sections which saw the creditor's right to charge and recover finance charges being limited, such as sections 2, 2A and 2B. The Act also made disclosure of finance charges[97] compulsory thereby increasing the rights of the debtors and placed a limitation on the sum recoverable on default or deferment of payment.[98] The debtor received the right to reduce his or her instalments in the event of advanced payment, refinancing or consolidation of debt in section 6. The Act ensured that the debtor was aware of his or her obligations by making disclosure and the provision of a copy of the debt instrument compulsory as per section 10. Further, section 11 provided that if a debtor in litigation alleged that he had been charged finance charges exceeding the permitted annual rate then this allegation would have to be investigated by the court, provided it was reasonable to do so. Additional charges could not be levied by a creditor upon a debtor's account unless they were agreed upon and were reasonable.[99] The Act saw the introduction of "reasonableness" as a guideline for additional costs and investigations as well as the increased involvement of the judiciary in determining this "reasonableness".

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In spite of its consumer protective orientation the Usury Act of 1968 was unfortunately an example of highly complex, poorly drafted and lengthy legislation. An example of this

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contemplated in that section shall be calculated as follows:
a) For transactions not exceeding R10 000, the Repo Rate plus one third thereof, plus 11 percentage points;
b) For transactions exceeding R10 000, the Repo Rate plus one third thereof, plus 8 percentage points;
c) Where the percentage as calculated per paragraph 1(a) or 1(b) does not result in a whole number, such percentage must be rounded down to the closest whole number without any decimals." (GN 166 in GG 29661 26 February 2007). See also sections 3, 3A, 6A, 6B, 6D, and 6L of the Usury Act 73 of 1968. Grové and Otto *Basic Principles of Consumer Credit Law* (2002) 72.

96 Section 5(1) and 5A of the Usury Act 73 of 1968. Grové and Otto (2002) 82.

97 Section 3.

98 Section 4 of the Usury Act 73 of 1968 provided the moneylender or credit grantor or lessor with the entitlement to recover from the borrower or credit receiver or lessee the amount unpaid together with an additional amount in respect of finance charges. Section 5 provided for the limitation of the sum recoverable from borrower, credit receiver or lessee.

99 The Usury Act 73 of 1968.

verbosity is the perpetuating of differing interest rates depending on the capital loaned from the 1926 Usury Act to the 1968 Usury Act.[100] Furthermore, the definitions provided in the Act were excessively long.

2 2 4 3 6 Sale of Land on Instalments Act of 1971

Otto and Grové[101] point out that with the passing of the Sale of Land on Instalments Act in 1971[102] a pattern of "second-generation legislation" was established. Specific credit agreements, for example the sale of land on instalments, are regulated by specific legislation, such as the Sale of Land on Instalments Act.

Section 13 of the Sale of Land on Instalments Act provided that notice had to be provided to the purchaser if the seller wished to terminate the contract for breach. This pre-enforcement notice is covered elsewhere in this study. The second-generation legislation was of an *ad hoc* nature and there was no evidence of the legislature attempting to harmonise these laws with one another.[103] This pattern was to continue to apply to consumer credit law in South Africa until the NCA came into effect.

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Whilst the history of the development of consumer credit legislation in South Africa is similar to that of other countries, in many respects South African legislation was more fragmented than other modern jurisdictions in that there was a tripartite distinction between legislation related to land, movables and finance and often the purpose of the legislation differed making it even more problematic to integrate.[104]

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100 Section 2.
101 South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 28.
102 Act 72 of 1971.
103 South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 28.
104 Campbell 52 -53; South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 45.

2 2 4 4 Third Generation

2 2 4 4 1 General

According to Otto and Grové third-generation consumer credit legislation represents a modernisation of the second-generation legislation. The Credit Agreements Act[105] repealed the Hire-Purchase Act[106] and regulated the contractual aspects of instalment sale transactions. The Limitation and Disclosure of Finance Charges Act[107] was extensively revised, in an attempt to bring it into line with the Credit Agreements Act,[108] and to make it applicable to instalment sale transactions relating to land. The Sale of Land on Instalments Act[109] was repealed and replaced by the Alienation of Land Act of 1981.[110] This legislation in some areas overlaps with the NCA, although this overlap has not been dealt with in any detail in this study.

Otto and Grové contend, however, that despite the adoption of the new legislation, the tripartite distinction between legislation relating to land, movables and that relating to finance remained largely intact.[111] Right from the promulgation of these Acts, reconciling their ambits was a problem which worsened over time. Amendments to the legislation resulted in the range of the various provisions drifting further apart, which further complicated the practical application of the Acts.[112] This was due to the different Acts addressing the issue of interest rates and regulations differently, hence the need for the common regulatory scheme.

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2 2 4 4 2 Credit Agreements Act of 1980

The Credit Agreements Act of 1980[113] replaced the Hire-Purchase Act. It covered sales and leases of movable goods but had a higher ceiling of application.[114] It operated in conjunction

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105 Act 75 of 1980.
106 Act 36 of 1942.
107 Act 73 of 1968.
108 Act 75 of 1980.
109 Act 72 of 1971.
110 Act 68 of 1981.
111 South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 29.
112 Campbell 53 - 54. South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 29.
113 Act 75 of 1980.
114 The Hire-Purchase Act applied to contracts where the purchase price was not in excess of R4000, the Credit Agreements Act applied to contracts where the cash price was up to R500 000.

with the Usury Act of 1968[115] and the two Acts complemented each other. The Usury Act provided for interest rates applicable to credit agreements governed by the Credit Agreements Act of 1980. In some transactions both Acts would sometimes apply, while in others only one of them would be applicable. In the light of the problems that were experienced in the administration of these Acts the South African Law Commission later made a proposal for a single Credit Act.[116]

The Minister of Trade and Industry determined the transactions that were governed by the Credit Agreements Act. The Minister extended the scope of the Credit Agreements Act to include the leasing or selling of goods, which are specified in the regulations and had the discretion to exempt any person or type of credit agreement from the operation of the Act.[117] For a transaction to be regulated by the Credit Agreement Act, it had to have been concluded for a period of not less than six months.[118]

> A "credit agreement" was defined in section 1 of the Credit Agreements Act as follows: "A transaction, including an instalment sale transaction, in terms of which goods were 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."[119]

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The preamble to the Credit Agreements Act outlined its objectives being to provide for the regulation of certain transactions in accordance with which movable goods were purchased or leased on credit or certain services were rendered on credit. Agreements regulated by the Credit Agreements Act and as defined by the Act were "credit transactions" and "leasing

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115 See Grové and Jacobs (2002) 5, 11; Greenbaum "Consumer Credit" in McQuoid-Mason D (ed) *Consumer Law in South Africa* (1997) 131- 132; Fouché (ed) *The Legal Principles of Contracts and Negotiable Instruments* 5 ed (2002) 170. Different government departments previously administered these Acts: The Credit Agreement Act was administered by the Department of Trade and Industry whilst the Department of Finance administered the Usury Act. Since 19 March 1993 one government department, namely the Department of Trade and Industry has been responsible for the administration of these Acts.

116 South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993).

117 See GN R402 GG 7440 of February 1981 (as amended by GN R989 GG 13900 of 27 March 1992). Since 27 March 1992, the items covered by the Act include durables and semi-durable goods (e.g. household furniture, including garden furniture); mattresses, floor carpets and floor rugs; electrical and non-electrical appliances for domestic use; camping equipment including tents; jewellery; clocks; watches; photographic and cinematographic cameras; projectors; television; receivers and accessories; radios and gramophones; sound recorders and players; video cassettes and video tapes; etc. The Act applied to these transactions only if the cash price of the goods did not exceed R500 000. The amount could be changed from time to time by notice in the Government Gazette.

118 The following transactions were excluded from the ambit of the Act: agricultural machinery and tractors as well as goods sold or leased with the sole purpose of selling or leasing to others or using the goods in connection with mining, engineering, construction, road building or manufacturing process. Also excluded from the ambit of the Act were transactions in which the state was a credit grantor.

119 Section 1 of the Credit Agreement Act of 1980.

transactions". The Act was applicable to movable goods only and provided a relatively narrow scope of application in comparison to the NCA.[120]

The 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 he had in writing in terms of section 11 notified the consumer that he had so failed and required him to comply with the obligation within a certain period, being not less than thirty days after the notification and the credit receiver had failed to comply with this requirement. Provided further that if the consumer had failed on two or more occasions to comply with obligations under any credit agreement and the provider had given notice as required, the period was reduced from thirty days to fourteen days.[121] The section 11 notice is covered in detail in the next Chapter.

The Credit Agreements Act provided the consumer with the cooling-off right in terms of section 13, which was a consumer protection tool allowing the consumer to exit the contract subject to procedural adherences, without committing breach of contract.

Under the Credit Agreements Act the credit receiver had the right to reinstatement after returning the goods to the credit grantor.[122] In accordance with section 12 the credit receiver could, within thirty days after the credit grantor had repossessed the goods, claim the return of the goods. Section 12 was applicable to both credit and leasing transactions. Therefore, 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 continue with the contract.[123] This right of redemption was subject to the following conditions: the credit grantor should not have obtained the goods by means of a court order; 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 would

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120 Otto and Grové (1991) para 8(3).
121 Section 11 of the Credit Agreements Act of 1980.
122 Section 12 of the Credit Agreements Act of 1980. If the credit grantor failed or refused he was in breach of a statutory duty under section 12(2) and therefore liable for damages and committed an offence in terms of section 23 – see Otto "Right of the Credit Receiver to Re-instatement after Return of the Goods to the Credit Grantor" 1981 *SALJ* 516.
123 Nagel *et al Business Law* 6 ed (2019) 272.

have incurred.[124] The credit grantor was not entitled to refuse return of the goods[125] and was prevented from inducing or requiring the credit receiver to sign a document in terms of which the 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.[126] The credit receiver was obliged to go to the credit grantor's place of business to obtain possession of the goods. 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. 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 under the agreement[127] and all reasonable costs incurred by the credit grantor in connection with the return of the goods.[128] It was not uncommon for reservation of ownership clauses to be incorporated into credit agreements.[129]

The Credit Agreements Act[130] therefore conferred on the debtor the right, when the creditor had repossessed the goods, to pay the arrear amount and to be reinstated in his contract.[131]

The credit grantor was entitled to incorporate a *lex commissoria*[132] in the credit agreement. Its enforcement was however subject to section 11 of the Credit Agreements Act. Acceleration clauses were not prohibited by the Credit Agreements Act, unlike its predecessor the Hire-Purchase Act, which limited the enforcement of acceleration clauses.[133] In the event of penalty and forfeiture clauses, the Credit Agreements Act applied. It provided that a credit

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124 *Trust Bank van Afrika Bpk v Eales* 1989 2 SA 586 (T); *Mdakane v Standard Bank of South Africa* 1999 1 SA 127 (W); and Grové and Otto (2002) 47.

125 Section 12 of the Credit Agreements Act; Otto and Grové (1991) para 33; Grové and Otto (2002) 46.

126 Section 12(3) of the Credit Agreements Act of 1980.

127 If the amount was not paid by the credit receiver within thirty (30) days, he lost his right of reinstatement, however, not his common law rights (*Maswanganyi v First National Western Bank Ltd* 2002 3 SA 365 (W)).

128 Grové and Otto (2002) 47.

129 Otto (1991) para 7.

130 Act 75 of 1980.

131 The debtor does have a limited right in this regard in the NCA section 127, when he surrenders the goods or when debt enforcement proceedings are under way (section 129(3)). The right however differs from the one in the Credit Agreements Act. Otto (2016) 6 paras 30.12 and 44.4.

132 *Lex commissoria* is a clause that provides a consensual right of cancellation giving the creditor the right to cancel the contract should the debtor commit a breach. The wording of the clause will determine the circumstances under which the creditor may exercise the right. Normally, the clause is phrased in wide terms thereby enabling the aggrieved party to cancel the contract, regardless of the seriousness of the breach. This is discussed further in Chapter 3.

133 Otto and Grové (1991) para 39. They could only be enforced if a certain number and percentage of instalments were due and the consumer had received a ten-day notice.

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.[134] Therefore, the credit grantor could recover his actual damages and nothing more. This section, however, 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.[135]

Like the majority of credit legislation the Credit Agreements Act was primarily concerned with safeguarding the common law rights of debtors and creating statutory rights for them. Therefore, almost all the provisions in the Credit Agreements Act created, protected or enhanced some form of right for the consumer.[136]

There was some overlap between the Usury Act and the Credit Agreements Act, with important distinctions between them. The Acts had to be applied jointly to credit transactions, which made the area of consumer credit a difficult environment to navigate. 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 due to unequal treatment of different products and providers.[137]

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2 2 4 4 3 Alienation of Land Act of 1981

The Alienation of Land Act of 1981[138] is still in force today. As indicated above specific credit agreements, for example the sale of land on instalments, have not been dealt with in any detail in this study.[139]

It is noteworthy that schedule 2 of the NCA provides that the provisions of the NCA enjoy preference over the provisions in Chapter II of the Alienation of Land Act.[140] The result

134 Section 14 of the Credit Agreements Act.
135 Nagel *et al* (2019) 278.
136 Otto (1991) para 27.
137 2004 Policy Framework 23.
138 Act 68 of 1981.
139 See para 2 2 4 3 6.
140 The sale of immovable property on instalments is another form of credit common to the modern economy as it allows those who cannot afford a mortgage bond or cash purchase of a house to still be in a position to purchase a house in instalments. This possibility assists individuals in exercising their right to adequate

is that the two Acts apply jointly with the NCA taking preference where conciliation between the two is impossible. Differences between the Acts occur specifically with regard to the termination and enforcement of the contract.[141]

2 2 4 5 Fourth Generation

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 until 2005 been governed by separate legislation, namely the Credit Agreements Act, the Usury Act and the Alienation of Land Act. The NCA, known as the fourth generation of consumer credit legislation, repealed both the Credit Agreements and Usury Acts in an attempt to implement current, cohesive and effective legislation.[142]

2 3 WHO ARE THE USERS OF CREDIT?

According to the United Kingdom Crowther Report from 1971,[143] natural persons who would normally fall into the lower to middle class income bracket that are buying or borrowing for personal or family use and not for business purposes are the most common users of credit.[144]

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Insights from TransUnion's South African Industry Insights Report for the first quarter of 2021[145] reveals that younger consumers are increasing their credit card balances more than

housing. 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). The Alienation of Land Act 68 of 1981 subsequently replaced it.

141 Section 19 of the Alienation of Land Act 68 of 1981 and section 129 and 130 of the NCA.

142 Vessio (LLD-thesis, University of Pretoria, 2015) 53.

143 Report of the Committee Consumer Credit, chaired by Lord Crowther volume 1 Cmnd 4596 London (1971) 1.1.1; 6.1.2. - 14.

144 The Crowther Committee identified the following criteria that may be motivation for consumers to utilise credit:
a) Practical convenience where credit enables the consumer to pay for the purchase of goods and/or services;
b) Bridging the gap between the intermissions of income and spending;
c) The consumer is able to purchase goods now at a lower cost than in the future with the potential benefit that the consumer's future income may be greater than his or her current income, which in turn will result in greater affordability and customer satisfaction; and
d) Credit enables the consumer to purchase real and financial assets in excess of his own accumulated savings or earning capacity. This enables the consumer to add to his capital equipment. The Crowther Committee was of the view that credit provided both monetary and nonmonetary benefits to a consumer and in doing so contributed to a more efficient allocation of resources by increasing both consumer satisfaction as well as economic efficiency. Smit *A Procedural flaw encountered with debt enforcement in terms of the National Credit Act* (LLM-thesis, University of Pretoria, 2012) 8; Crowther (1971) 118.

145 "TransUnion Industry Insights Report" First Quarter 2021. https://www.transunion.co.za/lp/IIR (accessed 14-12-2021).

their older counterparts. A clear generational divide has emerged according to the report.[146] The report further notes that;

> "Younger generations tend to transact more online, and the utility a credit card provides is fundamental to this activity. At the same time, according to the TransUnion Consumer Pulse Study, when compared to other generations, a higher proportion of Millennials experienced job loss or reduced working hours as a result of the impact of the COVID-19 pandemic, and are also using cards more as a means of liquidity for day-to-day purchases."[147]

The above dataset ties in with the June 2021 South African Revenue Services Prudential Authority Selected trends, which show a 6.5% increase in credit cards between the year 2020 and 2021; as well as a 7.4% increase in home-loans in the years 2020-2021. The household sector therefore arguably contains the most common users of credit, which are the young consumers from various demographics.[148] Thus, this would indicate that the trend of natural persons who would normally fall into the lower to middle class income bracket that are buying or borrowing for personal or family use and not for business purposes are the most common users of credit. This type of individual would require particular protection in that they are, in general, vulnerable to the provider in relation to the power relation dynamics, literacy and availability of information and knowledge.

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The NCA defines "consumer" as:

a) The party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
b) The party to whom money is paid, or credit granted, under a pawn transaction;
c) The party to whom credit is granted under a credit facility;
d) The mortgagor under a mortgage agreement;
e) The borrower under a secured loan;
f) The lessee under a lease;
g) The guarantor under a credit guarantee; or
h) The party who receives money or credit under any other credit agreement.[149]

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146 *Ibid.*
147 *Ibid.*
148 "South African Revenue Services Prudential Authority Selected trends." June 2021. https://www.resbank.co.za/en/home/publications/publication-detail-pages/prudential-authority/pa-statistics-selected-trends---monthly/2021/Selected-SA-Banking-Sector-Trends---Monthly (accessed 14-12-2021).
149 Section 1 of the NCA.

2 4 THE GENERAL PURPOSE OF CONSUMER CREDIT LEGISLATION

It is submitted that the main purpose of consumer credit legislation is to protect consumers against exploitation by providers. According to the Crowther Committee, the purpose and function of protective legislation for consumers can be assessed under the following headings:[150]

a) To address the consumer's unequal bargaining power by - [151]

   (i) Requiring disclosure of essential information in the contract and advertisements of the asset;

   (ii) Providing consumers with certain standard contractual rights and limitations of liability, which cannot be excluded by mutual agreement of the parties;

   (iii) Constricting contractual provisions, which are harsh.[152]

b) To curb malpractices in the commercial arena by prohibiting them and imposing sanctions.

c) To curb the provider's remedies by restricting and prohibiting certain extra-judicial remedies such as enforcement of the right to repossess goods and by providing courts with a discretion to order payment by instalments.

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The Crowther Committee believed that the effectiveness of consumer protection legislation lay in its ability to give a safe and economic platform to consumers who were not adequately equipped to state their own case.[153] It has been established that a certain percentage of society does not possess the skill and/or knowledge to engage in the economic arena without protective measures such as consumer credit legislation as an aid.[154] These measures are justified by a variety of factors extending from illiteracy to ignorance on the part of the consumer.[155]

Since all businesses are primarily designed to serve consumers, protection of consumers is vital to ensure that all consumer rights are protected, and that consumers are not exploited by

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150 Crowther (1971) 234.
151 *Ibid*.
152 Crowther 234. Smit (LLM-thesis, University of Pretoria, 2012) 8.
153 *Ibid*.
154 Smit (LLM-thesis, University of Pretoria, 2012) 9.
155 Smit (LLM-thesis, University of Pretoria, 2012) 9 - 10. See also Crowther (1971) 119.

unethical providers or marketers.[156] Consumer protection legislation thus seeks to ensure that businesses in South Africa run their enterprises legally and ethically.[157] At first glance one would think that consumer protection legislation is aimed at protecting consumers only. However, it also sets out guidelines for compliance to a businessman wishing to carry their trade with fairness and in an ethical manner. The consumer protection legislation should also be understood in line with the Department of Trade and Industry's aim "to create a fair regulatory environment that enables investment, trade and enterprise development in an equitable and socially responsible manner."[158]

Scholars also note that the protection of consumers emerged in South Africa because of the changes in the market due to different factors, such as the continuous introduction of new products, the changing behaviour of consumers, increasing competition across all industries and globalisation.[159] Consumer protection legislation ensures that South Africa keeps pace with the global trends and complies with the Consumer Bill of Rights which is the international law that protects the rights of consumers across the globe to which South Africa is a signatory.[160] Consumer protection legislation is vitally important in protecting the illiterate and vulnerable consumers who do not necessarily understand their rights. Otto and Otto opine that measures implemented to ensure that consumers are protected are a common occurrence in most countries.[161] The writer submits further that vulnerable or not, literate or not, consumer protection is essential for the consumer at the conclusion of the contract as this is the point at which the consumer finds themselves in the most unequal bargaining position.

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The primary objectives for consumer credit regulation includes improvement of consumer protection; ensuring consumer credit law supports national objectives and black economic empowerment and small, medium and micro enterprises growth; and to ensure that the review is consistent with international standards.[162] The consumer credit policy aims to

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156 Hes "What is the consumer protection act, and why does it matter?" https://www.oxbridgeacademy.edu.za/blog/consumer-protection-act-matter/ (accessed 21-04-2022).

157 *Ibid*.

158 Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 566 in Micklitz & Saumier *Enforcement and effectiveness of consumer law* (2018).

159 Mugobo and Malunga "Consumer Protection in South Africa: Challenges and Opportunities for Furniture Retailers in Cape Town, South Africa" 2015 *Mediterranean Journal of Social Sciences* 224.

160 Mugobo and Malunga 2015 *Mediterranean Journal of Social Sciences* 225.

161 Otto and Otto (2010) 1.

162 Department of Trade and Industry "Credit Law Review August 2003 Summary of findings of the Technical Committee" (August 2003) 25.

promote adequate disclosure by providers; prevent unfair practices by providers; prohibit anti-competitive behaviour; promote and protect the economic interest of the consumers; improve consumer education such as financial literacy; ensure effective consumer redress; establish compliance monitoring mechanisms and resolution mechanisms; ensure consistency between the regulatory framework for consumer credit and related legislation, and consistency with the broader framework for financial regulation.[163]

The primary objectives for consumer credit regulation includes improvement of consumer protection; ensuring consumer credit law supports national objectives and black economic empowerment and small, medium and micro enterprises growth; and to ensure that the review is consistent with international standards.[164] The consumer credit policy aims to promote adequate disclosure by providers; prevent unfair practices by providers; prohibit anti-competitive behaviour; promote and protect the economic interest of the consumers; improve consumer education such as financial literacy; ensure effective consumer redress; establish compliance monitoring mechanisms and resolution mechanisms; ensure consistency between the regulatory framework for consumer credit and related legislation, and consistency with the broader framework for financial regulation.[165]

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The South African population consists predominantly of lower income earners who have limited or no access to regular credit channels.[166] The complex nature of credit agreements rendered many consumers, especially illiterate individuals, vulnerable and often exploited by providers.[167] Micro-financiers predominantly provide reckless credit to consumers unable to access regular credit channels, which results in over-indebtedness and an inability to service monthly repayments.

This led to the passing of the NCA to create an accessible and affordable credit market with mechanisms to protect consumers against unprincipled lending and over-indebtedness.[168] However, this protection is not achieved without creating administrative burdens for creditors.

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163 *Ibid*.
164 *Ibid*.
165 *Ibid*.
166 Kelly-Louw 2008 *SAMLJ* 200.
167 *Ibid*.
168 For an overview and discussion of the direct and indirect legislative measures in the NCA aimed at preventing over-indebtedness, see Stoop "South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness" 2009 *SAMLJ* 365-8.

Consumer protection comes at a price and the NCA is no exception. The NCA is the key operative legislative piece tasked with consumer credit regulation in South Africa.[169] The NCA's purposes and objects are clearly set out in the Act itself. The court in *Investec Bank Ltd v Motloung*[170] indicated that: "the Act seeks to balance the respective rights of consumers and credit providers. It is thus clear that the court may not only take account of the needs of the consumer for protection but must also take note of the credit provider's legitimate right to seek relief."[171]

In addition, the court in *Kubyana v Standard Bank of South Africa Ltd*[172] held that, whilst the NCA 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 the interests of credit providers […] for just as the Act seeks to protect consumers, so too does it seek to promote a competitive, sustainable, efficient and effective credit industry."[173]

Consumer protection to the detriment of providers may well result in disaster for all future consumers of credit.

2 5 THE AIM AND PURPOSE OF THE NATIONAL CREDIT ACT OF 2005

2 5 1 General

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The NCA may aim to simplify many areas of uncertainty surrounding the South African credit market, but it does so in a convoluted matter. The NCA, like other legislation such as the Financial Advisory and Intermediary Services Act[174] and the Financial Intelligence Centre Act[175] that affect the financial services industry, assist to enhance control of the provision of credit for a better and more responsible credit practices industry.[176] The purpose of the NCA

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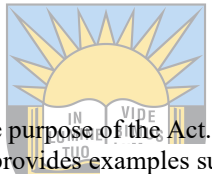
169 Renke "Measures in South African consumer credit legislation aimed at the prevention of reckless lending and over-indebtedness: An overview against the background of recent developments in the European Union" 2011 *THRHR* 208.
170 *Investec Bank Ltd v Motloung* 2017 ZAFSHC 36.
171 *Supra.*
172 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).
173 *Supra.*
174 Act 37 of 2002.
175 Act 38 of 2001.
176 Otto (2016) 3.

is to provide a credit market in South Africa that is fair, transparent, accessible, responsible, competitive, sustainable, effective and protects consumers.[177]

In enacting the NCA, the South African legislature decided to protect consumers over a wider range than is normally the case with consumer credit legislation. The NCA applies widely to all consumer credit agreements where a provider enters into a credit agreement with a consumer. In order to determine to which transaction the Act applies, one needs to consider two definitions. Firstly, who would be a 'consumer' for purposes of the Act, and secondly, which agreements are classified as 'credit agreements' in terms of the Act. The Act defined a 'consumer' to include all natural persons, as well as some juristic persons. With respect to natural persons, the Act regulates all credit agreements with natural persons, irrespective of the amount involved. With respect to juristic persons, the Act determines that only small enterprises will enjoy the protection afforded by the Act.[178] The legislature also decided to



[177] Section 3 of the NCA broadly sets out the purpose of the Act. This section lists several reasons for which the Act was enacted. Section 3 of the NCA provides examples such as procedures aimed at preventing reckless credit and assistance to debtors who are overcommitted. The NCA amongst other things seeks to: "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, by – ...(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." See also Otto (2016) paras 30.9 and 34.2. See in general Stoop 2009 *SAMLJ* 365; Renke "Aspects of incidental credit in terms of the National Credit Act 34 of 2005" 2011 *THRHR* 208.

[178] For example, a rich businessman borrowing millions of Rand enjoys the same protection as a person with limited means. Two sections should be consulted in order to determine if the NCA applies to an agreement. Firstly, section 4(1) of the NCA states: "Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except a credit agreement in terms of which the consumer is –

(i) A juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);
(ii) The state; or
(iii) An organ of state

(b) a large agreement as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1)." Secondly, section 8 of the NCA which defines what credit agreements are and separates the definition into four categories. The NCA definition of juristic person is not the common South African legal definition of juristic person. It extends beyond incorporated entities to include partnerships, associations or other unincorporated bodies of persons and trusts if there are three or more individual trustees or the trustee is itself a juristic person.
Section 6 of the NCA excludes the application of numerous provisions of the Act to juristic persons, importantly the sections governing the charging of interest and the reckless lending provisions.

pass comprehensive legislation, in contradistinction to concise legislation containing basic principles only. This is in line with the South African tradition.[179]

The credit industry in South Africa is huge. It has trebled in size within a decade and by 2014 was worth more than a trillion rand.[180] According to Experian South Africa's Consumer Default Index (CDI) for the fourth quarter of 2020 showed an improvement, down from 4.68% in September 2020 to 4.07% in December 2020. Consumer debt, in December 2020 stood at R1.81 trillion, showing an overall improvement due to relaxation of lockdown levels and relatively low new business volumes for credit products. The South African Reserve Bank's quarterly economic review, also showed that "The year-on-year rate of increase in total loans and advances decelerated markedly from 5.3% in March 2020 to 1.2% in December 2020, and then decreased by 0.8% and 0.6% in March 2021 and April 2021 respectively – the first contractions since April 2010."[181]

The NCA has its own original underlying policy framework aimed at ensuring the effectiveness of the NCA provisions. The NCA has its regulations to ensure proper compliance by providers and consumers. For example, in terms of Regulation 63 of the Regulations[182] a provider must complete and submit a Compliance Report to the National Credit Regulator on an annual basis within 6 months after the financial year-end of the provider. The National Credit Regulator is responsible for monitoring trends in the consumer credit market and industry, review legislation and underlying policy, and report to the Minister concerning matters related to consumer credit.[183]

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179 Otto (2016) 2. Smit (LLM-thesis, University of Pretoria, 2012) 10.

180 Kelly-Louw 2008 *SAMLJ* 200; National Credit Regulator Annual Report (2008) 5; National Credit Regulator Annual Report (2010/11) 4; National Credit Regulator Consumer Credit Market Report (March 2012) 1; National Credit Regulator Annual Report (2011/12) 15; National Credit Regulator Annual Report (2014) 47. The 2014 report put the amount of the debtor's book at R1.55 trillion.

181 South African Reserve Bank Quarterly Bulletin. Statistics available at: https://www.resbank.co.za/content/dam/sarb/publications/quarterly-bulletins/quarterly-bulletin-publications/2021/back-up-folder-june-/01Full%20Quarterly%20Bulletin%20June%202021.pdf (accessed 14-12-2021).

182 Government Notice R489 in Government Gazette 28864 of 31 May 2006 (the National Credit Regulations). https://pbsa.co.za/wp-content/uploads/2019/10/NATIONAL-CREDIT-ACT-REGULATIONS.pdf (accessed 23-04-2022).

183 National Credit Regulator (NCR) Annual Report 2016/2017 (March 2017). https://nationalgovernment.co.za/entity_annual/1267/2017-national-credit-regulator-(ncr)-annual-report.pdf (accessed 23-04-2022).

The NCA is therefore still an important piece of legislation not only from the consumer's point of view but also from the provider's point of view and from a broad economic perspective.[184]

2 5 2 Section 3 of the National Credit Act of 2005

Section 3 of the NCA sets out the purposes at length. It's provisions, are not merely statements of ideals as they have an effect on the interpretation of all the provisions of the NCA. Read in conjunction with the preamble of the Act, this section forms the bedrock of the greater protection of consumers.[185] Section 2(1) provides explicitly that the NCA must be interpreted in a manner that gives effect to the purposes set out in section 3. In interpreting the NCA, foreign and international law may be considered.[186]

The purposes of the NCA 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 to protect consumers.[187] These purposes are attained by:

a) Promoting the development of an accessible credit market, particularly to those who have historically been unable to access credit;

b) Ensuring consistent treatment of different credit products and providers;

c) Promoting 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 providers and default by consumers;

d) Addressing and correcting imbalances in negotiating power by educating consumers about credit and consumer rights, providing consumers with disclosure of information and protecting them from deception and unfair or fraudulent conduct by providers and credit bureaux;

e) Improving consumer credit information;

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184 Otto (2016) 2.

185 Govender and Kelly-Louw "Delivery of the Compulsory Section 129(1) Notice as required by the National Credit Act of 2005" 2018 *PER / PELJ* 2.

186 Otto (2016) 7. This is not unusual. The courts in this country have always considered the position in other legal systems when they had to develop the common law. This process of comparative legal research was not as common when legislation had to be interpreted except when the legislation had its roots in a foreign system. Examples of such legislation are the Companies Act 61 of 1973 and the Bills of Exchange Act 34 of 1964. See also section 39 of the Constitution.

187 Section 3 of the NCA.

f) Preventing over-indebtedness and providing mechanisms for resolving over-indebtedness;

g) Providing for a system of dispute resolution;

h) Providing for debt restructuring, enforcement and judgment; and

i) Promoting equity in the credit market by balancing the rights and responsibilities of providers and consumers.[188]

Section 3 promotes accountability in the credit market by encouraging reasonable borrowing and discouraging irresponsibility in lending.[189] It outlines the core objectives and the context within which the Tribunals and the Courts should interpret the NCA provisions. In this regard, Otto and Otto state that:

> Section 3 is not a hollow statement of nice-sounding ideals but rather has an effect on the interpretation of all of the NCA's provisions…that the NCA can be regarded as consumer credit legislation, as its purpose is to protect the average debtor – the person in the street.[190]

This position is also supported by the Supreme Court of Appeal in *Nedbank v National Credit Regulator*[191] where the Supreme Court of Appeal held that the NCA must be interpreted in a manner that gives effect to the objectives set out in section 3 and in that exercise, the court may consider appropriate foreign and international law. On the face of it, the objects of the Act seem to protect the consumers more and the providers less. However, the Supreme Court of Appeal also clarified that the competing rights and interests of both parties ought to be balanced in the construing process.[192]

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Section 3(g) envisages debt relief mechanism which is provided for in section 86 of the Act. Section 86 affords an over-indebted consumer the opportunity to apply to a debt counsellor for a review of the credit agreements to which they are a party and eventually to be

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188 This last-mentioned purpose, contained in section 3(d), calls for a balanced approach which leads to reasonable protection of consumers. Providers have rights too and courts should not apply the Act in a one-sided manner (unbalanced approach), which keeps only consumers' interests in mind. For a discussion of the matter and some cases in this regard, see Otto "Kennisgewings kragtens National Credit Act: Moet die Verbruiker Dit Ontvang? — *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D)" 2010 *THRHR* 136, particularly 142.

189 Brits "The National Credit Act's Remedies for Reckless Credit in the Mortgage Context" 2018 *PER / PELJ* 2.

190 Otto and Otto (2010) 6.

191 2011 3 SA 581 (SCA) 2.

192 *Nedbank v National Credit Regulator* para 3.

2 5 3 Comment on the National Credit Act of 2005

The NCA represents a clean break from the past and bears very little resemblance to its predecessors. [193]

The fact that the country now has only one credit Act is no doubt an improvement on the previous dispensation.[194] The NCA has a much wider field of application than that of its predecessors because it applies to credit agreements regardless of the amount of credit involved.[195] The NCA applies to all movable goods which form the subject of a credit agreement provided of course, the agreement itself falls within the definition of "credit agreement" as defined. The Usury Act[196] had a similar approach but the Credit Agreements Act[197] applied only to certain consumer goods listed in the regulations in terms of that Act.[198] The new dispensation is simpler and easier to apply in this regard.[199] Creditors however find the debt enforcement provisions or rather the obstacles in the way of debt enforcement and cancellation of contracts, protracted.[200]

The NCA is poorly drafted in many respects[201] and its uncertainties and gaps leave providers and consumers struggling in some instances, as will be highlighted by this study.[202] There are definitions and phrases which could have been worded more clearly and accurately[203] while certain terminology is not only new but also rather meaningless in the South African context[204] in that some of the definitions in the NCA deviate completely from the basic

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193 For a discussion of the National Credit Amendment Act of 2014, see Otto "National Credit Act. *Vanwaar Gehási? Quo Vadit Lex*? And Some Reflections on the National Credit Amendment Act 2014 (Part 2)" 2015 *TSAR* 756. For a discussion of the historical events, research and surveys that led to the NCA, see Kelly-Louw 2008 *SAMLJ* 205-207. For some of the reasons behind the passing of the Act, see Woker 2010 *Obiter* 217. Otto (2016) 3.

194 The Usury Act and the Credit Agreements Act had to be applied jointly to credit agreements. This was not an easy task because there were important differences in their application.

195 The Credit Agreements Act had an upper ceiling of R500 000 as regard the cash price of goods.

196 Act 73 of 1968.

197 Act 75 of 1980.

198 The description of the regulated "consumer goods" in the regulations led to differences in interpretation and to uncertainty about whether a particular item fell within the legislative framework or not.

199 Otto (2016) 4 - 5.

200 Otto (2016) 2; see Stoop 2009 *SAMLJ* 440.

201 *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) para 2.

202 Eiselen "The Unreasonable refusal of consent orders by the national consumer tribunal under the National Credit Act: *Barnes v Absa Bank Ltd and Others confirming Motitsoe v Standard Bank Ltd*" 2013 *SAMLJ* 377.

203 For example, the poor worded definitions of "mortgage agreement" and "secured loan" in section 1 of the NCA.

204 Otto (2016) 5. For example "Incidental credit agreement".

principles of South African law and the consequences thereof are not clear.[205] The NCA has also imported concepts and definitions in a "cut and paste method" - which are foreign to the South African legal system.[206]

The history of consumer credit legislation appears to have been birthed from a place of a need and desire to protect the consumer with regard to charging of exorbitant and uncontrolled or unregulated interest rates. This protection then expanded beyond regulation of interest, as it became apparent that the consumer in general was a person in need of a special form of protection due to, not only the unbalanced powers in the lending relationship, but also the fact that the consumer in general was a more vulnerable individual with regard to education, income and knowledge. This expanded protection has now included the increased flow in information to the consumer called disclosure, additional rights being afforded to the consumer, as well as the requirement to notify the consumer (information) of a breach of contract prior to proceeding (pre-enforcement requirement). The pre-enforcement requirement forms the backbone of this study as we examine the development and requirement of this notice in light of the necessity to balance the respective rights of the consumer and provider, which is where the efficacy of the NCA will lie.

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The NCA further seeks to regulate the granting of credit through the National Credit Regulator, which facilitates the role of a national consumer tribunal and that of a debt counselling service. It was hoped that through adherence to the new regulation, consumers would be educated to make informed financial decisions.[207]

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205 An excellent example is the definition of "lease" in section 1, which describes a lease as a contract in which ownership passes at the end of the agreement. See para 9.3(g) of the regulations.

206 Examples of foreign concepts to the South African legal system introduced by the NCA are the concepts of reckless lending, over-indebtedness, and the debt review procedure. Otto (2016) 5.

207 The NCA applies to credit cards, overdrafts, mortgages, instalment agreements, leases and micro loans. Chipeta and Mbululu "The Effects of the National Credit Act and the Global Financial Crisis on domestic extension of credit: Empirical evidence from South Africa" 2012 *JEFS* 216. As the South African economy was growing, there was rising concern about an increasing number of vulnerable consumers who had minimal protection from the trap of over indebtedness. The 1968 Truth in Lending Act of the United States, the 1974 Consumer Credit Act of the United Kingdom and legislation in many other countries advocated greater transparency regarding the cost information in consumer credit products. For example, the Swedish Consumer Credit Act of 1977, which was subsequently revised in 1993, requires that a lender providing credit should include two cost indicators – that is, the annual percentage rate and the total credit charge. The cost of the loan calculated in monetary terms is a substantial element of the repayment by the consumer. It is therefore important for providers to disclose accurately in a transparent manner the cost implications to consumers so that consumers can make informed decisions regarding competing products.

The NCA adopted the approach of ensuring that consumers understand the implications of their credit lending by requiring providers to disclose information in the consumer's home language.[208]

Certain rather difficult provisions in the previous legislation, particularly in the Usury Act,[209] have been discarded in the NCA.[210] Some important provisions in the Usury Act[211] and the Credit Agreements Act[212] which have fallen away include[213] the concept of "present value of the book value" in the Usury Act,[214] which applied to leasing transactions; the prescriptions regarding minimum deposits that a purchaser or lessee was required to pay at the conclusion of certain leasing and instalment sale transactions, as well as the maximum periods of payment which were prescribed for these contracts.[215] The fact that these hurdles were abandoned makes it easier for consumers to conclude these contracts.[216]

The purposes of the NCA may indeed prompt a court to make special orders to ensure that consumers are protected adequately. In *FirstRand Bank Ltd v Maleke,*[217] for instance, the court held that a High Court could terminate proceedings before it if justice and the purpose of the NCA required such termination. That was permitted to ensure, for instance, that the provider litigated in a magistrate's court, which was often better suited to dealing with matters under the NCA and furnishing appropriate orders. The *Maleke* decision was a ground-breaking one in this regard.[218]

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The NCA attempts to prevent over-indebtedness of consumers and assist them should this be required. Providers are obliged to evaluate a prospective debtor's creditworthiness before extending credit. In addition, a debtor who becomes over-committed may apply for debt

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208 Chipeta and Mbululu 217.
209 Act 73 of 1968.
210 Examples include the difficult and detailed provisions of the Usury Act dealing with the early termination of leasing transactions, advanced payment of rent and related matters. The definition of "principal debt" in section 1 which spanned more than three pages in the Act and the provisions dealing with prepayment of a debt. See Otto (2016) 5. See also section 6B read with subsections 3A and 2(5).
211 Act 73 of 1968.
212 Act 75 of 1980.
213 The list is not exhaustive.
214 Act 73 of 1968.
215 Section 6(5) and (6) of the Credit Agreements Act and the regulations promulgated in accordance with the Act.
216 Section 18 of the Credit Agreements Act, which had the effect of an interdict. See also section 12.
217 2010 1 SA 143 (GSJ).
218 Otto (2016) 8.

review and a rescheduling of his debts to enable him to pay over an extended period.[219] Control over maximum interest rates, charges and fees are an important aspect of the NCA and of the regulations promulgated in terms thereof.[220] The NCA regulates the rate of interest to be charged, which rate varies according to the type of agreement concluded.[221] Interest regulation as viewed throughout the development of consumer credit legislation is a manner of consumer protection.

A provider's right to enforce the arrears is limited by the NCA. The consumer must first be notified of his default and advised to seek advice and a certain period must lapse before the provider may take legal steps. The NCA provides for a comprehensive system of dispute settlement and for the resolution of problems through dispute resolution agents, the National Credit Regulator, ombuds and debt counsellors. From the purposes of the NCA, stated in section 3, it is clear that the NCA is aimed at addressing the imbalances that have arisen between providers and consumers and replacing the inadequacies of previous legislation. The NCA must therefore be interpreted against this background, aiming at a careful balancing of the interests of providers and consumers. However, credit agreements are also contracts and the NCA must therefore be interpreted against the background of the common law of contract.[222]

2 6 APPLICATION OF THE NATIONAL CREDIT ACT OF 2005

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The NCA, generally, applies to every credit agreement made in or having effect within South Africa where the parties are dealing at arm's length.[223] The NCA does however provide for

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219 Otto (2016) 13. The Act confers on consumers the normal consumer rights common in legislation of this kind. Examples are a cooling-off right (in terms of which certain contracts concluded outside the business place of the provider may be cancelled by the consumer within a certain period of time), the right of a consumer to surrender the goods (return them to the provider) and settle an account early.

220 Section 3 of the NCA.

221 Unsecured loans can incur interest of up to 31 percent *per annum* whereas a credit facility will attract maximum credit of 24 percent *per annum*, incidental credit agreements on the other hand incur a monthly interest of 2 percent.

222 Eiselen 2012 *THRHR* 390.

223 Smit (LLM-thesis, University of Pretoria, 2012) 13. See also section 4(1) as expounded by Otto and Van Zyl in Scholtz (ed) para 4.1. Application of the NCA "4(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except –
(a) a credit agreement in terms of which the consumer is -
(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);
(ii) the state; or
(iii) an organ of state;

exceptions to the rule[224] such as agreements between family members who are co-dependent on each other or agreements between a juristic person and an individual who holds the majority share or interest in said legal entity.[225] These agreements will not fall within the ambit of the NCA and therefore parties may not rely on any of its provisions.[226]

Regulation 42 of NCA provides the threshold applicable to providers and states that on the effective date, and at intervals of not more than five years, the Minister, by notice in the *Gazette*, must determine a threshold of not less than R500 000 for the purpose of determining whether a provider is required to be registered in terms of section 40(1). Following the amendment of the NCA by the National Credit Amendment Act 19 of 2014, a person was only required to register as a provider if the total principal debt owed to him or her in terms of all current credit agreements exceeded R 500 000 (meaning that the number of 100 credit agreements or not became irrelevant and even if the number of 100 was exceeded but the total principal debt owed in terms of the total agreements was less than R 500 000, then no registration was required). On 11 May 2016, however, a new threshold of R 0 (nil) was published and from 11 November 2016, six months after the publication of the new R 0 (nil) threshold, all providers (irrespective of the number of credit agreements) should register as providers with the National Credit Regulator. Thus, increasing the ambit of application of the NCA. This position remains largely unchanged.

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Generally, all credit agreements have two things in common, namely credit is extended, and a charge, fee or interest is payable or a lower price applies in the event of early payment. The mere fact that credit is extended does not bring an agreement within the ambit of the NCA

(b) a large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1);
(c) a credit agreement in terms of which the credit provider is the Reserve Bank of South Africa; or
(d) a credit agreement in respect of which the credit provider is located outside the Republic, approved by the Minister on application by the consumer in the prescribed manner and form."

Subsection (2) provides for the determination of who qualifies as a juristic person and when parties are said to be dealing at arm's length. Subsection (3) provides the application of the NCA in accordance with which credit agreements are included. Subsection (4) provides that if the NCA 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 principal 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. The section continues to provide that a credit facility is also included within the ambit of the NCA. Subsection (7) provides that the contents of the NCA prevail above any advertising related thereto.

224 Section 13 (a); See also Otto and Otto (2010) 33; Scholtz in Scholtz (ed) para 3.2.2.
225 Section 4(2) (b); See also Van Zyl in Scholtz (ed) para 4.2.
226 Section 4(1) (a) - (d); See also Otto and Otto (2016) 28.

in the absence of a charge, fee or interest. There are exceptions, such as credit guarantees and mortgage agreements, regarding which payment of interest, a charge or a fee is not a prerequisite for the NCA's application.[227] Section 8 of the NCA indicates what constitutes a credit agreement. The following are indicated as credit agreements: (a) a credit facility,[228] (b) a credit transaction;[229] (c) a credit guarantee;[230] or (d) any combination of these agreements,[231] which are all defined further in the subsections of section 8. Some agreements are not credit agreements irrespective of their form, these are: (a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance; (b) a lease of immovable property; or (c) a transaction between a stokvel and a member of that stokvel. Section 9 of the NCA indicates the different categories of credit agreements for additional clarity.

The question has been posed whether parties may make the NCA applicable to their contract by agreement in circumstances under which the NCA will not ordinarily apply to it, for instance where a large agreement is concluded by a juristic person and a credit guarantee is executed to provide security for the debt arising from the exempted underlying credit agreement. It was decided under the Hire-Purchase Act[232] that parties may indeed make the legislation applicable to their contract by agreement. The question arose in the decision of *RMB Private Bank v Kaydeez Therapies* CC.[233] The court held that the NCA did not apply to a credit agreement where the parties referred to the NCA in their agreement because they

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227 Otto (2016) 19 - 20. The NCA does not apply to levies paid by members to a body corporate in terms of the Sectional Titles Act 95 of 1986 or to interest charged on arrear levies. These levies are not paid based on a credit agreement, particularly an incidental credit agreement, the type of agreement one would consider in this regard but by virtue of a statutory obligation imposed by the Sectional Titles Act 95 of 1986. The Act also does not apply to an acknowledgement of debt that has as its *causa* a claim for damages.

228 A credit facility is defined in section 8(3) of the NCA as where a provider undertakes- to supply goods or services or to pay an amount/s, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and either to- defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the provider any part or bill the consumer periodically for any part of the cost of goods or services, or any part of an amount and any charge, fee or interest is payable to the provider in respect of- any amount deferred; or any amount billed and not paid within the time provided in the agreement.

229 A credit transaction is defined in section 8(4) of the NCA as a pawn transaction or discount transaction; an incidental credit agreement, subject to section 5(2); an instalment agreement; a lease; or a mortgage agreement or secured loan; any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the provider in respect of- the agreement; or the amount that has been deferred.

230 An agreement constitutes a credit guarantee in terms of Section 8(5) of the NCA 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 NCA applies.

231 Refer to section 8(6) of the NCA.

232 Act 36 of 1942.

233 2013 6 SA 308 (GSJ).

erroneously thought that the agreement was subject thereto. The parties were entitled to incorporate specific rights and duties contained in the NCA in express terms but could not make it in *toto* applicable to their contract. Only Parliament could decide on the applicability of an Act. A different view was taken in *First National Bank: A Division of First Rand Bank Ltd v Clear Reek Trading* (Pty) Ltd.[234] The court held that parties could indeed agree that the NCA be applicable to their agreement. The agreement would simply not bind third parties such as the National Credit Regulator but would still be valid between the parties. This view is preferred to the one in *RMB Private Bank v Kaydeez Therapies* CC in that it allows the parties the freedom to contract within the law as is the principle of our law.[235]

A contract may, on the face of it, fall within one of the definitions in the NCA, yet a court could decide on the facts and the substance of the agreement that it should nonetheless not be treated as a credit agreement. This would occur if a court were of the opinion that, bearing in mind the purposes of the NCA, it was not the intention of the legislature to cover the type of agreement being considered.[236]

2 7 SUMMARY

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Consumer credit legislation in South Africa has developed from a base of common law to fragmented and varied governance in each colony (first generation) to fragmented national legislation per type of contract which unfortunately did not adequately protect consumers of credit (second generation) to an attempt to combine the legislation under the Credit Agreements Act, Usury Act and Alienation of Land Act (third generation). Eventually, the problems of synchronizing legislation and the difficulties of divergence between the Acts led to the birth of the current fourth generation, the NCA. The NCA has provided a substantial improvement on previous consumer protection legislation and a system for regulating credit in the country.

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234 2014 1 SA 23 (GNP).

235 Otto (2016) 20.

236 Otto 21. This transpired in *Hattingh v Hattingh* 2014 3 SA 162 (FB) where two brothers who had a business relationship stretching over decades decided to terminate the relationship. The contract provided that the one had to pay the other a certain amount over a period of time. The court decided that there was no provider-consumer relationship between them, and it was not the intention of the legislature to cover such a relationship.

The challenge of ensuring an equitable balance between the rights of providers and consumers remains paramount in the NCA in light of its purpose and aims as provided in section 3.

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Chapter 3

Overview of debt enforcement process at common law and legislation preceding the National Credit Act of 2005

3 1 INTRODUCTION

This Chapter provides a comparison of the debt enforcement process when the consumer is in *mora* under the common law (Roman-Dutch law and English law) and legislation[1] preceding the NCA. Remedies for breach of contract differed from statute to statute in the beginning and could have involved one or more remedies being either cancellation, acceleration clause, penalty clause or arrear payments. These remedies were tempered through legislation. The query always arose as to what notice had to be sent to the consumer in default of an agreement and whether it was required to come to his or her attention to be considered effective.

The requirement of the delivery of a notice of demand in terms of the common law and the aforementioned legislation will be of specific focus.[2] The common law and legislation have a history and coherent body of precedents on the requirements for the delivery of a notice of demand during debt enforcement as this enquiry frequently formed the bedrock of much litigation and contestation.[3]

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The common law and legislative overview preceding the NCA will assist in the interpretation and application of section 129 in that the overview will provide a historical evaluative perspective on the meaning of "delivered" and indicate the legislation's intention as it developed in consumer protection. This perspective will ultimately assist in answering the research question: "what is the meaning of "delivered" in accordance with section 129(1)(a)?

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1 Hire-Purchase Act 36 of 1942, Alienation of Land Act 68 of 1981 and Credit Agreements Act 75 of 1980.

2 These statutes constitute the core pieces of legislation for credit regulation.

3 Otto "Notices in terms of the National Credit Act: Wholesale National Confusion. *Absa Bank Ltd v Prochaska t/a Bianca Interiors; Starita v Absa Bank Ltd; FirstRand Bank v Dhlamini*" 2010 *SAMLJ* 595; Smit *A Procedural flaw encountered with debt enforcement in terms of the National Credit Act* (LLM-thesis, University of Pretoria, 2012) 38; Bentley "Separating the baby and the bath water – garnishee and emoluments attachment orders" 2014 *De Rebus* 41.

3 2 DEBT ENFORCEMENT PROCEDURE IN TERMS OF THE COMMON LAW

3 2 1 General

Chapter two of this study indicated that the South African common law has, at its foundation, a blend of Roman-Dutch law and English law evolving over time.[4] The common law has specific principles and rules regarding the contractual relationship between parties, including the procedure and remedies available to an innocent party in the event of a breach of contract whether it be due to delay in performance or any other ground. The different credit statutes all provided that a provider could only exercise certain of his remedies once he had sent a notice to the consumer informing him of his breach of contract and providing him with a certain period in which to rectify such breach.[5] The remedies involved differed from statute to statute and often had one or more of the following: a right to cancel the contract; implementation of an acceleration clause; enforcement of a penalty clause or a claim for arrear payments.[6] The rights of cancellation and acceleration were tempered through legislation. The question, however, always arose as to the nature of the notice that had to be sent to the debtor prior to cancellation or acceleration. In addition, the further question was whether the notice had to come to the debtor's attention in order to be valid.

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Roman law only provided for specific agreements, each with its own set of rules.[7] An agreement that fell beyond the requirements for those specific agreements was considered invalid.[8] Roman-Dutch writers, however, took this concept and developed a general set of rules that could be applied to any agreement.[9] They accordingly extended the application of

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4 Van den Bergh and Van Niekerk (eds*) Libellus ad Thomasium: Essays in Roman Law, Roman-Dutch Law and Legal History in honour of Philip J. Thomas* (2010) 273; Otto (ed) "Consumer Credit" *The Law of South Africa* (1986) 117; Mbhele *The South African Law of Contract as influenced by the National Credit Act 34 of 2008* (LLM-thesis, University of Pretoria, 2015) 7; Stoop "South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness" 2009 *SAMLJ* 386; Grové and Otto *Basic Principles of Consumer Credit Law* 2 ed (2002) 129.

5 Van den Bergh and Van Niekerk (eds) (2010) 273.

6 An example of this legislation is the Credit Agreements Act 75 of 1980 which allowed for the surrender and sale of goods under instalments sale. Boraine and Van Heerden "The Interaction between debt relief measures in the National Credit Act 24 of 2005 and aspects of insolvency law"2009 *PELJ* 22-63. Smit (LLM-thesis, University of Pretoria, 2012) 16; Kreuser "The application of section 85 of the National Credit Act in an application for summary judgement" 2012 *De Jure* 141.

7 Otto and Scholtz (ed) *Guide to the National Credit Act* (2008 – continually updated) 8-22.

8 Hutchison (ed) *et al The Law of Contract in South Africa* 3 ed (2018) 12.

9 The Roman-Dutch law of contract is based on canon and natural laws. Adopting the canonist position, all contracts were said to be an exchange of promises that were consensual and *bona fidei*, that is, based simply

contractual remedies beyond the specific agreements as defined in Roman law[10] to all agreements that complied with the general rules.[11]

To assess the debt enforcement processes under the common law and applicable legislation, it will be beneficial to have an understanding of the various remedies available to an innocent party, but for purposes of this study, it is not necessary to venture into elaborate detail regarding the common law remedies.[12] A basic understanding will suffice in view of the fact that the aim of this study is to discuss certain flaws in the current credit legislation.[13]

3 2 2 Remedies in terms of the common law

Common law remedies are the standard remedies applicable to any contract for the benefit of both contracting parties but are usually utilised by the innocent contracting party in the event of a breach of the terms of the agreement by the other party.[14] The remedies are specific performance,[15] damages,[16] cancellation of the agreement[17] and an interdict.[18]

As a general rule parties to a contract are free, subject to legislative restriction, to arrange the occasions, method, and means of cancellation of the agreement by agreement. Parties are free to choose the terms and conditions of their contract. This is done in order to further and protect their vested interest in the event of an infringement. This fundamental freedom to structure the legal consequence of one's agreement is the doctrine of freedom to

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on mutual assent and good faith. The *pacta sunt servanda* principle was developed which required all serious agreements to be enforced and upheld regardless of compliance with strict formalities. A contract was now described as a meeting of wills, and each party's "promise" was now seen as a declaration of will free of moral obligation. Van den Bergh and Van Niekerk (2010) 257-273.

10 Hutchison (ed) *et al* 12.

11 Once all agreements that met the general requirements of mutual assent and good faith were accepted by law, these agreements were then granted the same remedies available to the specific agreements under Roman Law, such as interdict, specific performance etc. Smit (LLM-thesis, University of Pretoria, 2012) 16.

12 Van Heerden and Coetzee "Debt Counselling v Debt Enforcement: Some procedural questions answered" 2010 *Obiter* 756.

13 Smit (LLM-thesis, University of Pretoria, 2012) 16; Marisit "Impact of the New National Credit Act on the Debt Recovery and Credit Bureau Industries http://www.marisit.co.za/wp-content/uploads/2014/11/impact-of-the-national-credit-act.pdf" (accessed 11-02-2018).

14 *Ibid*.

15 Van der Merwe *et al Kontraktereg - Algemene Beginsels* (2012) 276.

16 Hutchison (ed) *et al* 327-329; See also Van der Merwe *et al* 299.

17 Cancellation of a contract is an extraordinary remedy. Broadly speaking, cancellation is permitted only when the breach is material enough to justify termination or when the creditor can rely on a *lex commissoria* in the contract. See Joubert *General Principles of the Law of Contract* (1987) 236; Van der Merwe *et al* 424 and 289; and Hutchison (ed) *et al* 322-323.

18 Hutchison (ed) *et al* 344-345.

contract. Either party may elect to terminate the contract where the other commits a material breach, or where the terms of the contract contain a cancellation clause permitting the non-defaulting party to cancel for that particular breach.[19]

Apart from the standard remedies available to contracting parties, the parties may also agree to include additional contractual remedies in their agreement for additional security such as the acceleration clauses[20] or *lex commissoria*.[21] Obviously a contracting party will only utilise his contractual remedies in the event that a breach of one, some or all of the terms of the agreement to which he is a party has occurred.[22] The first step in the process to utilise said remedies is notification required in accordance with either the contract, legislation or common law in order to show that the debtor has been placed *in mora*.[23]

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19 *SPF v LBCCT/A LB* 2016 ZAGPPHC 378 para 10, 17 and 21.

20 Hutchison (ed) *et al* 446.

21 *Lex commissoria* is a clause that provides a consensual right of cancellation giving the creditor the right to cancel the contract should the debtor commit a breach. *Lex commissoria* has acquired a somewhat flexible meaning in the law of contract. The phrase denotes, primarily, a term which permits a contracting party to abandon an agreement on the ground of delay, but it has also acquired a wider and more general meaning, in other words, a term conferring the right to cancel an agreement based on any recognised form of breach. Such a term may include a right on the part of the creditor to claim forfeiture of amounts already received, but it is not limited to that right (*GPC Developments CC v Uys* 2017 4 All SA 14 (WCC)). *Deez Realtors v SA Securitisation Program* 2016 ZASCA 194 (2 December 2016). The wording of the clause will determine the circumstances under which the creditor may exercise the right. Normally, the clause is phrased in wide terms thereby enabling the aggrieved party to cancel the contract, regardless of the seriousness of the breach. According to the law at present, an aggrieved party may cancel even if the breach is trivial. See *Oatorian Properties (Pty) Ltd v Maroun* 1973 3 SA 779 (A). It remains to be seen whether the courts will countenance the enforcement of the clause under circumstances that may lead to oppressive or harsh results. See Otto "Die Konsensuele Terugtredingsreg (*lex commissoria*). Breidelloos Afdwingbaar?" 2001 *TSAR* 203. Hutchison (ed) *et al* 293; See also Van der Merwe *et al* 250 and 318; Otto 2010 *SAMLJ* 595. Even before the NCA, the strict enforcement of cancellation and acceleration clauses was limited under certain circumstances to ensure that their inequitable results did not occur as seen in *Delloite Haskins and Sells Consultus (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 1 SA 525 (A) para 532 h. Section 129 and 123 of the NCA have amended the concept of the *lex commissoria.* Boraine and Renke "Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 - Part 1"2008 *De Jure* 41. The generally accepted position would nonetheless appear to be that it is necessary to set a date for performance, either as a term of the contract or by means of an *interpellatio*, before a party will fall into *mora*. Further, a party will only be entitled to cancel the contract based on such *mora* where the contract contains a *lex commissoria* or time is of the essence for the contract or made to be of essence through a notice of rescission. This is regardless of the duration of the delay in performance. Harker *The Nature and Scope of Rescission as a Remedy for Breach of Contract* (PhD-thesis, University of Natal, 1981); Harker "The Nature and Scope of Rescission as a Remedy for Breach of Contract in American and South African Law" (1980) *Acta Juridica* 72 justifies the position in South African law on the basis that as Roman-Dutch law does not regard delay as ever constituting a fundamental breach, a delay must always be elevated to a fundamental breach by means of an express or tacit *lex commissoria* or in accordance with the "time of the essence" doctrine. The *lex commissoria* gives the innocent party a right to cancel for any breach, irrespective of its materiality under the common law rules (Eiselen "Remedies for Breach" in Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (2018) 324 – 325). See also Boraine and Van Heerden 2009 *PELJ* 22-63.

22 Otto 2010 *SAMLJ* 595.

23 Smit (LLM-thesis, University of Pretoria, 2012) 18. In certain cases, a demand is required as a prerequisite for litigation, failing which a cause of action cannot arise and any action instituted would be premature. The

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Where the parties wish to include a cancellation clause in their contract they must agree on the *essentialia* of the contract and accept those terms imposed upon them by law (*naturalia*). In addition, the parties may negotiate, and agree to additional terms or obligations (*incidentalia*).[24] The clause may be in favour of one of the parties, or a right to cancel may be conferred on both. The clause often empowers the innocent party in the event of a breach (minor or major) to cancel the contract. It is said that "in its usual form, the cancellation clause does not require the exercise of the right to cancel to be reasonable and no reasons have to be given for the exercise of the right to cancel the contract."[25] A corollary to cancellation clauses is that the contractual right to cancel a contract by virtue of a cancellation clause is separate from, and exists alongside and in addition to, any legal right to do so,[26] and courts are obligated to enforce them, given South African law of contracts strong adherence to the *pacta sunt servanda* principle. This was brought to the fore in the decision of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd,*[27] where the court reaffirmed this Roman law maxim which provides that "[a]greements solemnly made should be honoured [and, where necessary,] enforced by courts of law."[28] The rationale for the maxim is that "[…] parties must know that should either of them fail to honour their promise the other might invoke the assistance of the law to hold them to the agreement. Except for relaxation on grounds of public policy."[29]

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In the common case of "mixed and new specific contract types whose *ex lege* residual terms (or *naturalia*)"[30] are not expressly set out in the terms of the contract, the implied terms or residual rules of contract law, that is "the rules governing the consequences of contracts absent specific agreement by the parties"[31] are applicable. Thus, in regards the difference

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rules of substantive law determine whether a demand is an essential element of the cause of action. A demand is required in two instances: to complete a cause of action and where legislation requires it. A demand can be made verbally or in writing. The purpose of the demand is to inform the prospective defendant/respondent that a particular legal representative acts on behalf of the prospective plaintiff/applicant; about the nature and content of the claim; payment or performance is being requested; about the time period within which action is required and about the consequences of failure to comply with the demand in order to convince the person to meet their obligations and thus avoid litigation - Hurter, Faris, and Cassim *Civil Procedure* 7 ed (2015) 11–12.

24 Van der Merwe *Contract: General Principles* (2007). Kerr AJ *The Principles of the Law of Contract* 6 ed (2002).

25 *Hothersall v South British Insurance Co Ltd* 1945 WLD 25.

26 *SA Eagle Versekeringsmaatskappy Bpk v Steyn* 1992 1 PH A11 35.

27 *Everfresh Market Virginia (Pty) Limited* 2012 1 SA 256 (CC).

28 *Everfresh Market Virginia (Pty) Limited* para 70.

29 *Mohamed's Leisure Holdings v Southern Sun Hotel Interests (Pty) Ltd* 2017 4 SA 243 (GJ).

30 Naude "The function and determinants of the residual rules of contract law" 2003 *SALJ* 820.

31 *Ibid*.

between cancellation clause and the residual position is that the former requires parties to expressly include a cancellation clause as part of the *incidentalia* terms of the contract, whereas in the absence of certain *naturalia* terms, residual provisions or implied provisions in contracts are read into the contract by the court. These are the rules which the law provides and imposes in the absence of express or implied agreement of the parties.[32]

The manner in which a party commits a breach is what is important and ultimately the differentiating factor when the innocent party is considering which remedy to opt for. A common element amongst all traditional forms of material breach of contracts in South Africa, namely: *mora debitoris*; *mora creditoris*; prevention of performance and repudiation, is the concept of *mora*. Properly put, time is an element common to all contracts and to decide the consequences of failure to perform a contractual obligation within the appropriate time the law employs the concept of *mora*.

The choice of remedy is usually determined by factors such as the type of contract and type of performance, actual damage suffered and whether performance is still possible. According to the late Professor A J Kerr "[a] breach of contract may be major or minor (..),"[33] and the manner in which a party commits a breach that leads to ending of a contractual obligation is what is important when considering the remedy. According to legal scholars and our courts, it is accepted, as Tembe notes, that breach of contract in itself does not bring the contract to an end. It provides to the innocent party a choice of remedies, which will vary according to the nature and seriousness of the breach. In the case of a major breach of contract, the aggrieved party is entitled to terminate the contract by cancelling it. Additionally, the innocent party has an election between cancellation and keeping the contract intact. The innocent party must also exercise this election within a reasonable period of time. A failure to make the election within a reasonable period of time, will lead to the inevitable conclusion that the innocent party has elected to keep the contract intact. However, in the case of a minor breach, a party may not cancel and he or she is only entitled to specific performance and/or damages. In short, materiality of breach is a requirement for cancellation whereby a breach has to be serious enough to justify giving notice and electing to cancel.[34]

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32 Tembe *Problems regarding exemption clauses in consumer contracts: the search for equitable jurisprudence in the South African Constitutional realm* (LLD-thesis, University of Pretoria, 2017).
33 Kerr AJ *The Principles of the Law of Contract* 6 ed (2002) 595.
34 Tembe (LLD-thesis, University of Pretoria, 2017) 55.

Seeking a remedy for a *mora* via specific performance or cancellation depends on why and with what implications was the *mora*.[35] The two remedies are understood and differentiated as follows: At first, where a party is relying on cancellation as a remedy for the *mora,* contract law requires that the innocent party, in the case of a material breach, must approach a court for an order of cancellation for the *mora.* One must note that, to cancel an agreement, is not only restricted to cases in which there is a contractually agreed procedure. In *ABSA Bank Ltd v Havenga*[36] the North Gauteng High Court, Pretoria, per Horwitz AJ, validates the right to cancel an agreement arising out of an application of the rules of the law of contract in this context:

> "It is a trite principle of the law of contract that the right of a party to a contract to cancel it, is not restricted to cases in which there is such an express term: generally speaking, in the absence of an express term allowing for cancellation of a contract, a party may cancel a contract by reason of the breach of a material term by the other party to the contract, or the breach of a term which the first-mentioned party has by notice to the other party made material."[37]

In the decision *Standard Bank of SA Ltd v Hand* Halgryn, AJ held:

> "A party wishing to rely on the cancellation of an agreement because of breach must allege and prove the breach of the agreement; that the right to cancellation has occurred because the breach was material or in the event that the agreement contains a cancellation clause, that its provisions have been complied with; and that clear and unequivocal notice of rescission was conveyed to the other party, unless the agreement dispenses with such notice."[38]

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By way of example, failure to make the goods available in a contract of sale is a major breach and entitles the buyer to cancel the contract. Cancellation is thus only competent as a remedy if the breach is a major one.[39] Another remedy for a breach of contract is to approach a court for an order for specific performance. In this instance, an essential element in obtaining the equitable remedy is that the party seeking such relief must plead and prove he was ready, willing, and able to timely perform his obligations under the contract.[40] Put differently, for an injured party to be entitled to specific performance, it must show, as outlined in the landmark decision, *Santos Professional Football Club (Pty) Ltd v Igesund*[41]

> "that it has substantially performed its part of the contract, and that it is able to continue performing its part of the agreement. This burden of proving readiness, willingness and ability is a continuing one that extends to all times relevant to the contract and thereafter."

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35 Pretorius CJ "General principles of the law of contract" 2007 *Annual Survey of South African Law 520* – 522.
36 *ABSA Bank Ltd v Havenga* 2010 5 SA 533 (GNP).
37 *ABSA Bank Ltd v Havenga* para 2.
38 *Standard Bank of SA Ltd v Hand* 2012 3 SA 319 (GSJ) para 11.
39 Hutchison and Pretorius *The law of contract in South Africa* 3 ed (2018).
40 *Standard Bank of SA Ltd v Hand* 2012 3 SA 319 (GSJ).
41 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 23 ILJ 2001 (C).

The creditor may cancel a contract where the treatment of the common-law principles applicable to the transactions are not governed by statutory measures.[42] This right arises out of an application of the rules of the law of contract to cancel an agreement if there is a breach. However, this may be coupled with statutory rules, and rules of court which are procedural in nature and merely prescribe the procedure that the provider must follow in those instances in which he enjoys a right of cancellation, no matter how that right arises. The *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[43] decision is instructive in this context. The court here, stated that "where the innocent party seeks to rely on the common law for the cancellation of the agreement, such allegation must be made in the founding papers." In *ABSA Bank Ltd v De Villiers*[44] where the provider sought a final order authorising attachment of a motor vehicle, the court is also instructive, it held that "the credit provider must first cancel the relevant agreement with the consumer [and for a creditor] to cancel an agreement, there has to be right vesting in the credit provider to do so."

In terms of legislation, a provider, and the party(s) to the contract are free, subject to legislative restriction, to arrange the occasions, method, and means of cancellation by private agreement. In this instance, the provider is often empowered to cancel a contract in terms of a cancellation clause. In *SA Eagle Versekeringsmaatskappy Bpk v Steyn,*[45] the point was made that "the contractual right to cancel an insurance contract by virtue of a cancellation clause is separate from, and exists alongside and in addition to, any legal right to do so, for example, by reason of a non-payment of premiums."

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As a rule, the innocent party in the case of breach of contract is entitled to enforce performance of the contract in *forma specifica*, that is, performance of precisely that which was agreed upon or specific performance. The right to specific performance applies to both positive and negative obligations. A distinct feature of specific performance, as highlighted by the *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd*[46] decision is that "the contract may make a party's entitlement to specific performance conditional upon his or her making a prior written demand that includes certain information."

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42 Hutchison and Pretorius *The law of contract in South Africa* 3 ed (2018).
43 2012 1 SA 256 (CC).
44 2009 5 SA 40 (C).
45 1992 1 PH A11 35 (A).
46 *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 2 SA 537.

The main distinction between these two remedies is that for ultimate cancellation to be enforced, notarial rules require the person receiving the payment to consent to the ultimate cancellation. Such consent, however, is not a prerequisite for seeking specific performance for a breach. The parties are indeed at liberty to include an operative clause which stipulates how each party is to claim specific performance, for example the parties may agree in writing that "the innocent party may cancel a contract by reason of a breach of a material term by the other party to the contract, or the breach of a term that the innocent party has by notice to the defaulting party made material."[47] The absence of such an express clause does not prohibit the aggrieved party from seeking specific performance. Such consent, however, is a requisite for ultimate cancellation.

At common law, as soon as the provider had obtained the right to cancel the contract as explained above[48] and had exercised it, the contract ceased to exist and, therefore, could not be automatically "re-instated" when the breach of contract or default was subsequently corrected.[49] Before cancellation, the debtor usually could remedy his default, but could not do so after cancellation.[50] After cancellation, the creditor can refuse late payment, and he is entitled to demand payment of the full outstanding debt by virtue of an acceleration clause. The same applies if the provider relied on an acceleration clause to demand the full outstanding debt.[51]

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The only exception that the common law provided was a right of "redemption" in respect of any property that had been attached in execution.[52] The debtor then had the right to "redeem" the attached property by paying the full (accelerated) outstanding amount payable. Redemption was possible after the property had been sold in execution but prior to it being transferred to a third party who bought it. Since the full debt had to be paid, redemption can

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47 *ABSA Bank v Havenga* 2010 5 SA 533.
48 Either due to a material breach or in terms of a *lex commissoria.*
49 Smit (LLM-thesis, University of Pretoria, 2012) 18.
50 Otto and Otto (2010) 106. Smit (LLM-thesis, University of Pretoria, 2012) 18.
51 It was, of course, possible for the creditor to indulge the debtor by accepting late payment after cancellation. This technically did not involve the "re-instatement" of the cancelled agreement, but rather entering into a new agreement.
52 Brits "Purging mortgage default: Comments on the right to reinstate credit agreements in terms of the National Credit Act" 2013 *SLR* 165.

not rightly be compared to reinstatement under the NCA.[53] Redemption involved the payment of the judgment debt which terminated all obligations towards the creditor and furthermore freed the property from any attachment or security rights.[54] After cancellation of a credit agreement, the common law therefore did not allow much leeway for debtors, and instead confirmed the rights of providers to cancel the contract and demand payment of outstanding amounts.[55] It is consequently understandable that the legislature over the years made provision to temper the operation of the cancellation and acceleration clauses.[56]

The South African legislature has for many decades, and in various credit statutes, limited the exercise of the right contained in a *lex commissoria* and cancellation in terms of the common law.[57] The different credit statutes all provided that the provider could only exercise certain of his remedies once he had sent a notice to the debtor informing him of his breach of contract and providing him with a certain period in which to rectify such breach.[58]

In all legislation concerned, one particular question was eventually posed at some time during the existence of the statute namely, whether it was required that the notice should reach

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53 *Ibid*. See also *Standard Bank of South Africa Limited v Hendricks; Standard Bank of South Africa Limited v Sampson; Standard Bank of South Africa Limited v Kamfer; Standard Bank of South Africa Limited v Adams; Standard Bank of South Africa Limited v Botha NO; Absa Bank Limited v Louw* 2018 ZAWCHC 175 (14 December 2018), 2019 1 All SA 839 (WCC), 2019 2 SA 620 (WCC).

54 Hutchison (ed) *et al* 12.

55 Otto 2010 *SAMLJ* 17.

56 Brits "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: Quo Vadis?" 2017 *THRHR* 179.

57 Refer to footnote 21 above.

58 For example, the Credit Agreements Act 75 of 1980 required under section 11 that the credit grantor issue the credit receiver with a notice of his failure to comply with his obligation and required him to perform on or before an indicated date before the credit grantor could proceed further. Similarly, section 13 of the Sale of Land on Instalments Act 72 of 1971 required the seller to hand over to the purchaser a letter or send a letter by registered post informing the purchaser of his or her failure and providing them with thirty (30) days in which to remedy the defect before the seller would be entitled to terminate the contract or proceed for damages. Boraine and Van Heerden 2009 *PELJ* 22-63.

the consumer.[59] The question was whether the notice was effective if it was properly dispatched to the consumer but for some reason never came to his or her attention.[60]

3 2 3 Notification of breach: Letter of demand

As alluded to, the commencement of the process involved in exercising one's contractual remedies under the common law required some form of notification to the breaching party.[61] A written agreement between two contracting parties would, in most cases at least, have a "breach" and/or "termination" clause, which would outline the process to be followed in the event that one contracting party was in breach of the terms of the agreement.[62] The "breach" clause would, in most instances, require correspondence to be sent to the breaching party's *domicilium* address.[63] Under normal circumstances, a party in breach of contract would be afforded a period within which to rectify the breach.[64] There is no prescribed period in terms of the common law that needs to lapse before the innocent party may proceed with a letter of demand. In a standard "breach" clause the parties usually agree on a specific period. The question is whether the time afforded to the breaching party is reasonable and fair.[65]

Should the breaching party not comply with the letter of demand the innocent party could proceed to exercise his remedies either by way of action or application procedure.[66] The letter of demand usually states the intention of the innocent party should the breaching party not adhere to the terms or remedy the defect as stated in the letter.[67]

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59 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D); *Munien v BMW Financial Services* 2010 1 SA 549 (KZD); *Starita v Absa Bank Ltd* 2010 3 SA 443 (GSJ) and *FirstRand Bank Ltd v Dhlamini* 2010 4 SA 531 (GNP). It was decided under the Hire-Purchase Act of 1942 that a notice, which did not reach the buyer, was still effective if it had been sent in accordance with the Act - *Fitzgerald v Western Agencies* 1968 1 SA 288 (T). This decision was based on an amendment to the Hire-Purchase Act of 1942 by the Hire-Purchase Amendment Act 30 of 1965. The Sale of Land on Instalments Act 72 of 1971, however, was interpreted to the contrary in *Maron v Mulbarton Gardens (Pty) Ltd* 1975 4 SA 123 (W) 125D. This decision was however not followed by the court in *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 1 SA 314 (D) 318E. *Holme v Bardsley* 1984 1 SA 429 (W), a case decided under section 19 of the Alienation of Land Act followed the *Maharaj* case.

60 Otto 2010 *SAMLJ* 595 - 597. The question whether the notices provided for in the different legislation referred to above must reach their destination if sent by post came up for decision in various cases. For an account of these cases see Otto (2001) 29 and Otto "Consumer Credit" in Joubert (ed) *Lawsa* (2004) 29.

61 Van Huyssteen *et al Contract Law in South Africa* 7 ed (2021) 184. See also Hutchison (ed) *et al* 347.

62 Otto and Grové (ed) *The Usury Act and Related Matters. New Credit Legislation for South Africa* (1993) 588.

63 Van Huyssteen *et al* 184.

64 *Ibid.*

65 Van Huyssteen *et al* 184. Smit (LLM-thesis, University of Pretoria, 2012) 18.

66 Smit (LLM-thesis, University of Pretoria, 2012) 18.

67 Van Huyssteen *et al* 184. Smit (LLM-thesis, University of Pretoria, 2012) 19.

Without legislation it appears that the parties were left to determine whether a letter of demand was required at all, the delivery method of the letter and time period applicable to the remedying of the breach. This determination was made at the point of contracting. If no breach clause requiring demand was included in the agreement then there was no general obligation to send a letter of demand unless a letter of demand was required to complete the cause of action. Therefore, whether or not the letter of demand had to be received by the defaulting party was determined contractually between the parties by the manner in which delivery was outlined in the agreement.

The law regards breach of a contract as a wrongful act in itself which allows the innocent party to cancel the contract. Cancelling a contract is an extreme remedy that is only available in exceptional circumstances, namely where there is a cancellation clause or where the breach of contract is material or serious. If the contract is however silent on cancellation, there is no cancellation clause, the innocent party may still cancel the contract provided that the breach is material or serious in nature. What effectually constitutes a material breach depends on the terms of the contract. According to South African case law, a material breach is one which goes to the root of the contract and constitutes a breach of a crucial term.

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3 3 AN OVERVIEW OF DEBT ENFORCEMENT NOTICES IN TERMS OF LEGISLATION PRECEDING THE NATIONAL CREDIT ACT OF 2005

3 3 1 General

The NCA provides in section 129(1) that a provider may not enforce a credit agreement unless he has notified the consumer of his default, provided him with certain options and awaited the lapse of a specified period. The provisions of the NCA dealing with notices to consumers who are in arrears are not new in our legislation. Neither is the question whether the required notice must in fact reach the consumer *res nova*. There has been significant development in the statutes and case law in this regard.[68] What follows is an analysis of the Hire-Purchase Act,[69]

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68 Otto 2010 *SAMLJ* 596.
69 Act 36 of 1942.

Sale of Land on Instalments Act,[70] Alienation of Land Act[71] and Credit Agreements Act in regard to their required notices.[72]

3 3 2 Hire-Purchase Act of 1942

The Hire-Purchase Act came into effect on 1st of May 1942 bringing with it a greater measure of protection to debtors in that the purpose of the Act, according to its long title, was "to make provision for the regulation of hire-purchase agreements and of instalment sales subject to resolutive conditions, and for matters incidental thereto."[73] The Act was necessary to protect debtors due to the unequal bargaining position between the parties. It applied both to sale agreements by instalment and hire-purchase agreements in relation to movable goods. The only qualification was that the purchase price could not exceed four thousand Rand (R4000).[74]

Section 12 of the Hire-Purchase Act dealt with the limitation of a seller's right to enforce certain provisions of an agreement. Prior to 1965, section 12 of the Hire-Purchase Act read as follows:

> No seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce -
> (b) any provision in the agreement for the payment of any amount as damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment, unless he had made written demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the buyer has failed to comply with such demand.

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In 1965 section 12 was amended[75] to read as follows:

> No seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce –
> (b) any provision in the agreement for the payment of any amount as damages, or for the acceleration of the payment of any instalment, unless he has by letter handed over to the buyer or sent by registered post to him at his last known residential or business address, made demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the buyer has failed to comply with such demand.[76]

After the amendment section 12(b) gave clear and precise direction that the seller was barred from taking certain steps against the purchaser for the payment of damages or for the

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70 Act 72 of 1971.
71 Act 68 of 1981.
72 Act 75 of 1980.
73 Act 36 of 1942.
74 Section 2(1)(a) of the Hire-Purchase Act of 1942.
75 By the Hire-Purchase Amendment Act 30 of 1965.
76 Section 12 of Hire-Purchase Amendment Act 30 of 1965.

acceleration of the payment of any instalment as a result of the purchaser's breach of the agreement unless the seller had made written demand to the purchaser to act in accordance with the agreement to which the purchaser was legally bound. The letter of demand either had to be handed over to the purchaser presumably by hand delivery or sent to the purchaser to his last known residential or business address by registered mail.[77]

The letter had to state that the purchaser had failed to comply with his obligations and that he was required to remedy such default within a period specified in the demand, which had to be not less than ten days. Because the letter of demand could either be hand delivered or sent by registered mail, providers often encountered a question when letters were sent by registered mail. The question was whether the letter had to reach the consumer in order to be effective. In addition thereto the providers encountered the issue of determining how the "10 (ten) day period" had to be calculated.

In *Weinbren v Michaelides*[78] the seller, in purporting to comply with the provisions of section 12(b) of the Hire-Purchase Act, as it read prior to the 1965 amendment, addressed a letter to the purchaser and sent it by registered post to the purchaser's last known address. The letter failed to reach the purchaser. The Post Office returned it to the seller with a brief and unsupported note stating, "gone away."[79] The court expressed the view that based on first impression, and failing to be convinced otherwise, section 12(b) had the *prima facie* result that the demand was required to be in writing and had to reach the purchaser.[80] Based on an amendment by the Hire-Purchase Amendment Act[81] it was held that a notice, which did not reach the buyer, was still effective if it had been sent in accordance with the Hire-Purchase Act.[82]

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In *Fitzgerald v Western Agencies*[83] the court dealt with an interpretation of the amended section 12(b) of the Hire-Purchase Act and held that a notice sent in accordance with the Hire-Purchase Act which did not reach the intended recipient would have been deemed delivered and therefore effective if the notice had been sent in accordance with the provisions of the Hire-

77 Section 12(b) of the Hire-Purchase Amendment Act 30 of 1965.
78 1957 1 SA 650 (W).
79 *Weinbren v Michaelides* 651.
80 *Supra*.
81 Act 30 of 1965.
82 *Fitzgerald v Western Agencies* 1968 1 SA 288 (T). See also Otto 2010 *SAMLJ* 597.
83 1968 1 SA 288 (T).

Purchase Act. It was noted in this case that the change in the wording of section 12(b) to specify the various ways in which the notice could be delivered clearly indicated the legislature's intention to do away with the requirement of receipt of the notice for it to be effective.[84] Thus, under *Fitzgerald v Western Agencies*[85] the interpretation by the court was such that the more detail the legislation provides as to the manner in which the notice was to be sent reduced the burden of evidencing receipt of the notice by the consumer. This, in the writer's opinion, speaks to a pro-provider approach, where if the letter of the law has been followed the provider is absolved of the duty of notification. Noting further that this interpretation was pre-constitutional era and thus the interpretation was based on the intention of the legislature and not the purpose of the legislation.

3 3 3 Sale of Land on Instalments Act of 1971

The Sale of Land on Instalments Act[86] came into effect on the 1st of January 1972 and applied to contracts of sale of land where the purchaser was a natural person. The Act did not apply where the purchaser was a juristic person or the state.[87]

Section 13(1) dealt with the requirements to be complied with by the provider prior to taking action against a consumer who failed to meet his contractual obligations and provided as follows:

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

Accordingly, the provider could only enforce the debt where a consumer had failed to perform an obligation once he had informed him of his failure to perform, by means of a letter and required the consumer to carry out the specific obligation within a period of not less than 30 (thirty) days.[88] The letter, in terms of section 13(1), had to be delivered by means of either

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84 *Fitzgerald v Western Agencies* 369G.
85 1968 1 SA 288 (T).
86 Act 72 of 1971.
87 Section 2(a) and (b) of the Sale of Land on Instalments Act 72 of 1971. See also Diemont and Aronstom *The Law of Credit Agreements and Hire-purchase in South Africa* (1982) 6.
88 Section 13 of Sale of Land on Instalments Act 72 of 1971.

personal hand delivery to the consumer with an acknowledgement of receipt being obtained or sent using registered post to the consumer's last known residential or business address.

The Sale of Land on Instalments Act[89] was interpreted to the contrary of how the Hire-Purchase Act was dealt with. It was held in *Maron v Mulbarton Gardens (Pty) Ltd*[90] that the word "inform" in section 13(1) of the Act could only be interpreted to have the meaning that the notice had to reach the purchaser / consumer.[91] The court went on to state that the method used by the provider to inform the consumer should not be to the consumer's detriment. The consumer should, regardless of the manner in which the provider sent the letter, have thirty (30) days to remedy his breach.[92] The reasoning behind the decision in *Maron* was that where a provider sent a notice by mail instead of hand delivering the notice, the consumer who received the letter by mail would have been given less time to remedy his breach in comparison to the consumer who received his notice by hand. This could not have been the intention of the legislature. The interpretation at this stage still being based on the intention of the legislature.

This decision was not followed by the court in *Maharaj v Tongaat Development Corporation (Pty) Ltd*.[93] In the *Maharaj*[94] case the Appellate Division favoured the view that the notice must reach the purchaser, but the court did not base its decision on the meaning of the word 'inform'. The court was confronted with the question as to when the thirty (30) day period began to run. The court of first instance held that the notice did not need to reach the consumer for it to be effective. However, before the Appellate Division, the view that the notice must reach the consumer was favoured. The decision of the court was based on the purpose of the thirty (30) day period and the protection of the consumer by section 13(1) of the Sale of Land on Instalments Act. The court held that the option of sending the letter by mail was to make it convenient for the provider but not to be to the detriment of the consumer.[95]

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89 Act 72 of 1971.
90 1975 4 SA 123 (W).
91 The court had to decide whether or not the seller complied with the requirements of section 13(1) of the Sale of Land on Instalments Act 72 of 1971 and held that the notice had to come to the attention of the consumer in order for the seller to have complied.
92 *Maron v Mulbarton Gardens (Pty) Ltd* 35.
93 1976 1 SA 314 (D).
94 *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 1 SA 314 (D).
95 *Maharai v Tongaat Development Corporation (Pty) Ltd* 622. This appears to be a pro-consumer argument similar to that found in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) and *FirstRand Bank Ltd v Dhlamini* 2010 4 SA 531 (GNP) para 20 and 31.

The writer submits that section 13 of the Sale of Land on Instalment Act is distinct from section 12 of the Hire Purchase Act by virtue the fact that section 13 takes the delivery method of personal hand delivery one-step further in requiring acknowledgement of receipt of the notice. This requirement is not stated for registered mail however, the presumption should be that where two options of delivery are provided that both options would require the same burden of proof from the provider and have the same benefit of notification to the consumer. Thus, the writer views the drafting of section 13 of the Sale of Land on Instalment Act as pro-consumer in attempting to ensure that the notice comes to the attention of the consumer although falling slightly short in not explicitly enunciating this and enforcing the notification requirement for the registered mail method as well. The writer's opinion in this regard, although synonymous with the decision of *Maharaj v Tongaat Development Corporation (Pty) Ltd*,[96] is not based on the word "inform" or the purpose of the thirty day period but rather the options of delivery methods provided and the associated burden of proof of delivery required.

3 3 4 Alienation of Land Act of 1981

The Sale of Land on Instalments Act was repealed by the Alienation of Land Act[97] in 1981. It likewise provides that a seller should "notify"[98] a purchaser by handing over, or by sending a letter by registered post when the purchaser was in default and await a period of thirty (30) days before he could cancel the contract, enforce an acceleration clause or claim damages should the purchaser continue with his breach of contract.[99]

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The position that the notice must reach the purchaser was preferred in *Holme v Bardsley,*[100] a case decided under section 19 of the Alienation of Land Act. Section 19 of the Alienation of Land Act originally also provided that the purchaser had to be 'informed'[101] in the letter of his breach of contract. However, the Alienation of Land Amendment Act amended

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96 1976 1 SA 314 (D).

97 Act 68 of 1981.

98 Section 19(1) of the Alienation of Land Act 68 of 1981 provides as follows: "(1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled - (a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract; (b) to terminate the contract; or (c) to institute an action for damages, unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand."

99 Section 19 of the Alienation of Land Act 68 of 1981. See also Otto 2010 *SAMLJ* 597.

100 1984 1 SA 429 (W).

101 Alienation of Land Act 68 of 1981.

this in 1983.[102] The word 'inform' was replaced with the word 'notify' in an apparent attempt to make receipt of the notice unnecessary.[103] This development clearly indicated the pendulum effect of the courts and the legislature in determining whether the prescribed letter of demand was required to be received before it could be stated that the requirements had been fulfilled.

In *Holme v Bardsley*[104] the court had to rule on the interpretation of sections 19 and 23[105] of the Alienation of Land Act.[106] In this matter the applicant sent the section 19 notices to the addresses chosen by the respondent in accordance with section 23 of the Alienation of Land Act. The respondent did not receive the letters of demand. The court followed a pro-consumer approach and held that the correct interpretation was that the notice had to reach the purchaser in order to be effective.[107] Otto and Otto[108] however are of the opinion that the ruling in *Holme v Bardsley*[109] was incorrect. They favour a more practical approach where, if the provider has complied with the specific requirements of a section, it would be assumed that he has complied with the law for purposes of the legislation even though the notice may not have reached the recipient.[110] It could not be laid down as an absolute rule that the notice should in all circumstances reach the consumer, as this would lead to undue hardship upon the innocent party, the provider.[111] If the writer follows her argument on section 13 of the Sale of Land on Instalments Act then indeed if the letter of law is followed in section 19 of the Alienation of Land Act it is not required that the notice actually be received or come to the attention of the consumer. This is a pro-provider approach or practical approach as stated by Otto. It is in fact following the direct interpretation of the section. Should the legislature have required some other interpretation this should have been explicit in the wording utilised in the section. A trend of unconscious or unintentional use of words in the drafting of legislation emerges with the subsequent effect, whether negative or positive on the involved parties.

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102 Act 51 of 1983.
103 See further Van Rensburg and Treisman *The Practitioner's Guide to the Alienation of Land Act* (1984) 205.
104 1984 1 SA 429 (W).
105 Section 23 of the Alienation of Land Act 68 of 1981 deals with the issue of addresses of purchasers and sellers, stating as follows: "The addresses stated in any contract in terms of section 6 (1)(a) 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."
106 The Alienation of Land Act 68 of 1981.
107 *Holme v Bardsley* 432A-F.
108 Otto "Consumer Credit" in Joubert (ed) *Lawsa* 1st re-issue vol 5(1) (1994) par 62.
109 1975 4 SA 123 (W).
110 Otto "Consumer Credit" in Joubert (ed) *Lawsa* 1st re-issue vol 5(1) (1994) 106. See also Smit (LLM-thesis, University of Pretoria, 2012) 38.
111 Otto 2010 *SAMLJ* 598.

The case of *Van Niekerk v Favel,*[112] dealt with a notice in terms of section 19 of the Alienation of Land Act and held that a notice properly sent need not reach the debtor. In this case *Holme v Bardsley*[113] was rejected and the reasoning of *Marques v Unibank Ltd,* which is discussed below was followed.[114] All three cases were decided in the Witwatersrand Local Division, which has concurrent jurisdiction over Johannesburg and surrounding areas.[115] Being a High Court division the decision of the Witwatersrand Local Division was binding on the lower courts and on itself unless it was convinced that its previous decision was incorrect. However, the Witwatersrand Local Division decisions would have only been of persuasive authority in other provinces within the country as determined by the doctrine of judicial precedent. What is clear is that the courts differed in their decisions on this area in law and differed even more so in the reasoning for their decisions.

3 3 5 Credit Agreements Act of 1980 and Usury Act of 1968

3 3 5 1 General

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Like its predecessor,[116] the Credit Agreements Act contained a clause dealing with the limitation of the credit grantor's right to enforce certain provisions of the credit agreement. The exercise of the common law right known as *lex commissoria*[117] was subject to the provisions of section 11 of the Credit Agreements Act[118] which required the credit grantor to issue the credit receiver a notice of his failure to comply with his obligations under the transaction, calling him to perform his obligation on or before the indicated date and warning him of the consequences of his failure to comply.

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112 2006 4 SA 548 (W).
113 1984 1 SA 429 (W).
114 2001 1 SA 145 (W).
115 In 2009 the name of the court changed to the South Gauteng High Courts and since 2013 the name of the court is the Gauteng Local Division of the High Court of South Africa. The Gauteng Local Division, Johannesburg has concurrent Jurisdiction with the Gauteng Division, Pretoria over the entire Gauteng province.
116 The Hire-Purchase Act 36 of 1942.
117 See Kerr *The Principles of the Law of Contract* (1998) 554. In *Nel v Cloete* 1972 2 SA 150 (A) 160 D - E it was held that the provider was not entitled to cancel the contract merely because he had the right to do so.
118 In accordance with section 11 of the Credit Agreements Act of 1980 it was required of a provider who wanted to claim return of the goods to hand over or send a letter by registered mail to a consumer notifying him of his breach and providing him with 30 days to perform.

3 3 5 2 Section 11 of the Credit Agreements Act of 1980

Section 11 of the Credit Agreements Act of 1980 provided as follows:

> "No credit grantor shall, by reason of the failure of the credit receiver to comply with any obligation in terms of any credit agreement, be entitled to claim the return of the goods to which the credit agreement relates unless the credit grantor by letter, handed over to the credit receiver and for which an acknowledgement of receipt has been obtained or posted by prepaid registered mail to the credit receiver at his address stated in the credit agreement in terms of section 5(1)(b) or the address changed in accordance with section 5(4), has notified the credit receiver that he so failed and has required him to comply with the obligation in question within such period, being not less than 30 days after the date of such handing over or such posting, as may be stated in the letter, and the credit receiver has failed to comply with such requirement: Provided that should the credit receiver have failed on two or more occasions to comply with obligations in terms of any credit agreement and the credit grantor has given notice as aforesaid, the said period shall be reduced to 14 days."

Section 11 applied when a breach of contract occurred and was only essential if a provider intended to recover goods to which the agreement related because of the consumer's failure to fulfil his obligations under the agreement. The provider therefore had to notify the consumer of his failure to meet his commitments and require his compliance within thirty (30) days. Notification under section 11 of the Credit Agreements Act was by means of a letter, which was either handed over to the consumer and for which an acknowledgement of receipt had to be obtained or was posted by prepaid registered mail at an address stated in the credit agreement or at the subsequent changed address, being the business or residential address which served as the *domicilium citandi et executandi* as per section 5(4) of the Credit Agreements Act.[119]

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It was mandatory that the notice in terms of section 11 of the Credit Agreements Act should be in writing and had to contain the following information:

(a) the nature of the consumer's breach of contract;

(b) the action required in order to remedy the breach;

(c) the period within which the action stipulated in (b) had to be taken; and

(d) if the contract did not contain a *lex commissoria* clause, a notice that the provider would be entitled to cancel the agreement if the breach of contract was not remedied.[120]

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119 Section 5(4) of the Credit Agreements Act of 1980 read as follows: "The address stated in terms of subsection (1)(b) in a credit agreement, shall for all the purposes of that credit agreement serve as a *domicilium citandi et executandi* of the parties thereto, and any notice of any change of any such address shall be given in writing by the party concerned and delivered by hand or sent by registered mail by him to the other parties, and in such case the changed address being so given notice of shall serve as *domicilium citandi et executandi* of the party who gave such notice."

120 Section 11 of the Credit Agreements Act of 1980. Grové and Otto (2002) 43 – 44.

The handing over of a letter resulted in the default notice coming to the attention of the consumer. However, the posting of a letter by registered mail did not always have this result. In this instance, the legal question was whether such a notice had to come to the attention of the consumer.[121] This is the same issue as that which arose under the Sale of Land on Instalments Act. The problem seems to be caused by the indication of two methods of delivery in the same section that appear to provide differing levels of notification to the consumer. The method of hand delivery of a letter coupled with notification of such delivery cannot be said to be the same as delivery by way of registered mail. Differing burdens on a provider could not have been the intention of the legislation as this provides uncertainty to the consumer.[122] Noting at this stage that the intention of the legislature was still the interpretation method commonly utilized.

If the consumer failed to carry out his contractual obligations or if any other contingency occurred which in terms of such agreement entitled the provider to take action against him and such credit agreement still existed, the consumer would not be obliged to make any payment or perform any other act which would place the provider in a better financial position than that in which he would have been if the credit receiver had carried out that obligation in question or if such contingency had not occurred.[123]

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The leading case in answering the question as to whether the notice had to come to the attention of the consumer is *Marques v Unibank Ltd*[124] where it was held that a section 11

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121 Otto (2016) 131. The credit receiver could make use of possessory remedies for the restoration of the *status quo* if the credit grantor sought to recover the goods by using ways other than court order to obtain possession of the goods and the credit receiver had not terminated the agreement (See Greenbaum "Consumer Credit" in McQuoid-Mason (ed) *Consumer Law in South Africa* (1997) 150). Greenbaum has noted that in a large number of repossessions the credit grantor repossessed the goods in contravention of the Credit Agreements Act of 1980.

122 Notice in accordance with section 11 had to be given to the credit receiver every time he or she committed a breach of contract and the credit grantor intended to recover the goods. However, the section contained a proviso that in the event that two notices had previously been sent which resulted in the credit receiver rectifying his breach, the credit grantor was entitled to reduce the period in which the credit receiver had to remedy his breach to a fourteen (14) day period.

123 Section 14 of the Credit Agreements Act of 1980.

124 2001 1 SA 145 (W). The facts of the case were that the defendant purchased a motor vehicle from the plaintiff in accordance with a written contract. The defendant breached the contract by failing to make payments on due dates. The plaintiff sent a section 11 notice by registered post to the defendant's *domicilium* address requesting payment within 30 days from the date of posting the letter. Upon the lapse of the 30 days the plaintiff approached the court *a quo* requesting that the contract be cancelled, the motor vehicle repossessed and the outstanding amounts in terms of the contract be paid. That court held the plaintiff was entitled to claim return of the motor vehicle. On appeal, the legal question was whether the notice had to come to the attention of the credit receiver (the appellant on appeal and the defendant in the court *a quo*). There was no authority under the 1980 Act that dealt with such a position and authors of textbooks were

notice did not have to come to the attention of the consumer but that it merely needed to be proven, by the provider, that it was sent or dispatched to the consumer.[125] This would seem to indicate that the "acknowledgement of receipt" of the notice indicated in section 11 speaks more to a notice indicating proof of delivery by the deliverer than actual receipt by recipient. In the *Marques* case a notice was sent in accordance with section 11 of the Credit Agreements Act but the letter was returned marked "unclaimed".[126] The High Court made it clear that a section 11 notice did not need to come to the attention of the consumer but that it merely needed to be proven by the provider that it was sent or dispatched to the consumer in terms of the Credit Agreements Act.[127] It based its decision on the wording of section 11, which provided that "the consumer must be notified."[128] The court remarked that the word "notify" meant "sending of a notice" whereas the word "inform" implied "imparting of knowledge".[129] The court further held that the fact that the method of delivery by hand required the notice to come to the attention of the consumer did not necessarily mean that where the notice was posted, it had to have the same effect.[130] The writer finds this conclusion concerning as it in effect, on this interpretation, would allow the provider to determine the level of "notification" or information being received by the consumer based on the provider's election of the method of delivery of the notice. Furthermore, the fact that section 11 indicated when the 30 day period would commence, being the date of handing over or posting, meant that the argument that actual receipt would be necessary for purposes of knowing fell away.[131] If the legislature had required proof of receipt, it would not have been necessary to add the requirement that registered post be used.[132]

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divided as to the answer. Cloete J, (Boruchowitz J concurring) interpreted section 11 of the Act to mean that the notice need not come to the attention of the credit receiver and held "it is the duty of every credit receiver to ensure that communications sent to him at the *domicilium* he has provided does come to his attention. His failure to do so should not, in my view, be to the disadvantage of the credit grantor." In support of the court's view, it was held that the legislature did not specify that proof of receipt was needed in section 11, but if it did specify this, then it would not be necessary to add the requirement that registered post be used. Registered post together with the reference to the chosen *domicilium* is aimed at minimising the risk of the notice not coming to the attention of the credit receiver. The court took the decision despite the fact that the post office received the letter back as "unclaimed" once the respondent had sent it. Accordingly, the respondent had complied with section 11 of the 1980 Act, as it had dispatched the default letter notwithstanding the fact that it did not come to the attention of the consumer. The decision and issues arising are commented on by Tennant *The Practitioner's Guide to the Alienation of Land Act* 2010 *TSAR* 852.

125 *Marques v Unibank Ltd* 2000 4 ALL 146 (W) at 151 – 156, this approach is cherished by Tennant 2010 *TSAR* 852.

126 For a discussion of this and other cases see Otto "Kennisgewings van Ontbinding by Kredietooreenkomste en Afbetalingskope van Grond" 2001 *TSAR* 169.

127 *Marques v Unibank Ltd* 151.

128 *Marques v Unibank Ltd* 151.

129 *Marques v Unibank Ltd* 155 - 156.

130 *Marques v Unibank Ltd* 151.

131 *Marques v Unibank Ltd* 154.

132 *Marques v Unibank Ltd* 153.

Requiring repeated attempts to ensure that a defaulting consumer is given actual notice to remedy the default would only result in further delay and prejudice to the provider.[133] The consumer who elected the address to which notices should be sent bore the risk that the notice might not reach him.[134] This conclusion was reached despite section 11 referring to acknowledgement of receipt being required for the hand delivery method of the notice. Acknowledgement of receipt on plain interpretation could only possibly be issued by a recipient thus inferring that the recipient was required to receive the notice in order for the notice to be effectually delivered under the explanation of "notified". This plain interpretation however runs contrary to having registered mail as another form of delivery in the same section in that these forms of delivery would then require differing levels of "notification" as the registered mail method did not require the recipient to acknowledge receipt of the notice. The court possibly attempting to reconcile these two differing levels of notification erred on the side of a lesser burden on the sender or provider.

In *Mercedes Benz Finance (Pty) Ltd v Coster*[135] the court had to rule on the same legal question pertaining to the statutory requirements for a section 11 notice in accordance with the Credit Agreements Act. The court came to the same conclusion as the one in *Marques v Unibank Ltd*[136] and found that for the provider to be compliant in terms of the legislation, actual receipt of the notice by the credit consumer was not necessary.[137]

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3 3 5 3 Comment on the Enforcement Procedure under the Credit Agreements Act of 1980

Under section 11 of the Credit Agreements Act, a provider was not entitled to claim the return of the goods to which the credit agreement related by reason of a breach of contract by the consumer, unless he had notified the consumer of his breach by letter and demanded performance.[138]

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133 *Marques v Unibank Ltd* 155.

134 *Van Niekerk v Favel* 2006 4 SA 548 (W) para 24. Otto 2010 *SAMLJ* 598 says that a series of cases over a long period dealing with different credit acts preceding the NCA established the principle that a notice properly sent by a provider need not reach the consumer in order to be effective.

135 2000 JOL 6191 (N) 1.

136 2001 1 SA 145 (W).

137 *Mercedes Benz Finance (Pty) Ltd v Coster* 7 – 8. See Otto and Otto (2010) 106 and Smit (LLM-thesis, University of Pretoria, 2012) 18 for comment on the issue.

138 Van Heerden and Otto "Debt Enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655 discuss the issue.

Once the prescribed time period in terms of section 11 of the Credit Agreements Act had lapsed and the provider had a right to claim return of the goods, section 17(2) of the Credit Agreements Act provided that a court could, on application, make an order prohibiting the use of the goods or to protect them from damage or depreciation or make an order as to the custody of the goods.[139] The Credit Agreements Act also acknowledged an automatic interdict against the removal or use of the goods when a summons was issued.[140] Some courts allowed the interim attachment under the common law for purposes of safekeeping of goods financed under the Credit Agreements Act.[141]

Section 12 of the Credit Agreements Act provided that if:

> "the credit grantor, otherwise than by order of court, has recovered possession of any goods to which a credit agreement relates, the credit receiver, except where he has himself terminated the 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".[142]

Section 12 could be invoked by the consumer in limited instances, namely where movables ("goods") financed under credit agreements were repossessed without a court order and in the absence of termination of the agreement by the consumer himself.

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Section 12 of the Credit Agreements Act differed from section 13 of the Hire-Purchase Act in that it had a wider reach as it did not specifically require the consumer to be in default with paying an instalment; it provided for a longer period within which payment had to be made in order to successfully re-instate the agreement, namely thirty days; it expanded the amounts that were required to be paid in order for re-instatement to occur, adding the provider's reasonable costs in connection with the return of the goods and it specifically provided for the consumer to be re-instated in his rights and obligations. It was also confirmed in case law that section 12 became relevant after the agreement had been cancelled, hence the term

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139 Otto "Consumer Credit" in Joubert (ed) *Lawsa* (2004) para 29(g).

140 Section 18 of the Credit Agreements Act. A summons could however only be issued if a credit grantor had a right against the debtor and this in turn depended on whether the requirements of section 11 of the Credit Agreements Act of 1980 had been met - see Otto "Consumer Credit" in Joubert (ed) *Lawsa* (2004) para 29(g).

141 *Santambank BPK v Dempers* 1987 4 639 (O) and *BMW Financial Services (Pty) Ltd v Mogotsi* 1999 3 384 (W).

142 Brits 2017 *THRHR* 180.

"reinstatement".[143] Similar to the previous Acts,[144] section 12 of the Credit Agreement Act contained no requirement for specific notices, in writing or otherwise, regarding *inter alia* the intention to re-instate or the payment of specified amounts.[145]

3 4 SUMMARY

In terms of the common law there are remedies available for breach of contract, namely specific performance, damages, cancellation of a contract and implementation of an interdict. Furthermore, additional remedies can be included in a contract if agreed upon by the parties, namely an acceleration clause and or a *lex commissoria*.

To make use of these remedies it was required that the provider first proceed with notification to the consumer either in accordance with the contract, legislation or common law in order to show that the consumer had been placed in *mora*. The notification in terms of the common law had to be written but there was no set time frame that had to be provided to the consumer to remedy their default save that the time frame had to be fair and reasonable.[146] Parties were free to contract and provide set time frames and manner of delivery of the breach letters.

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There has been for some time uncertainty regarding the manner in which the default notices must be sent to the consumer and whether the notice must come to the actual attention of the consumer. This uncertainty was perpetuated by the legislature through various statutes and likewise by the judiciary through the interpretation of the applicable sections in the statutes.

Hand delivery of a notice coupled with the additional requirement of proof of receipt as in the statutes of Sale of Land on Instalments Act of 1971 and the Credit Agreements Act of 1980 leans towards indicating that the notice should come to the actual knowledge of the consumer. However, in these clauses this delivery method was coupled with the alternative

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143 *Trust Bank van Afrika Beperk v Eales* 1989 4 SA 509 (T) 513B–C.
144 For example, the Hire-Purchase Act of 1942.
145 Brits 2017 *THRHR* 181.
146 *Sebola v Standard Bank of South Africa Ltd* 2012 8 BCLR 785 (CC) para 108 – 121. See also *Swart v Vosloo* 1965 1 SA 100 (AD); *Noble v Laubscher* 1905 TS 125 and *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 1 SA 632 (A) para 640C.

delivery method of registered mail which does not normally indicate that a notice should come to the actual knowledge of the consumer if sent by this method. What is clear is that hand delivery and registered mail do not have the same effect and it therefore seems counterproductive to include them in the same section as it appears to result in differing levels of notification to the consumer dependent on selection of delivery method by the provider. The legislature could have specifically required in any of the statutes mentioned above that the notice come to the actual knowledge of the consumer. As the legislature did not do this, one tends to believe that this was not the intention of the legislature or purpose of the legislation. However, the judiciary on the other hand appears to have considered through interpretation of the sections that this is not in the best interests of the consumer and have tended to lean towards the notices being required to come to the actual knowledge of the consumer.[147]

There can be no doubt that the inclusion of breach notification clauses in the statutes mentioned above was intended to protect the consumer to a degree and provide the provider with the avenue in which to effectively enforce their rights. Ultimate protection however can only be provided to a consumer in this form if the notice comes to the actual knowledge of the consumer. The legislature seems not to have intended this in any of the statutes explored or if they did, they failed to clearly express such intention.

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147 *Maron v Mulbarton Gardens (Pty) Ltd* 1975 4 SA 123 (W); *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 1 SA 314 (D) and *Holme v Bardsley* 1984 1 SA 429 (W).

Chapter 4
Debt enforcement procedure in terms of the National Credit Act of 2005

4 1 INTRODUCTION

Having explored a historical overview of credit legislation in South Africa and debt enforcement processes at common law and legislation preceding the National Credit Act of 2005 this Chapter turns now to analyse the debt enforcement procedure under the NCA. As indicated in Chapter one, this study is a historical time based analysis of the changes to consumer protection provided in section 129 of the NCA. This Chapter therefore focusses on the analysis of the original section 129 first prior to the 2014 and 2019 addition and amendments, which are then covered in the next Chapter.

In focusing on section 129 and determining its essential requirements the word "enforce" will be deconstructed in order to determine its true meaning. This deconstruction and analysis support the determination of several of the research questions of this study in that the meaning of "delivered" will be discussed together with the compulsory nature of the section 129(1)(a) notice based on the word "may" and the procedural flaws contained in this process.

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This analysis sets the scene for determining the court's interpretation of these key areas of uncertainty. This scene is important for the subsequent Chapters' analysis of the amendments implemented by way of the 2014 and 2019 National Credit Amendment Acts and ultimately the determination as to whether all these amendments have encapsulated the courts' interpretation and resulted in a balanced approach to the pre-enforcement procedures.

The impact of the Prescription Act of 1969[1] on selected aspects of section 129 will also be explored.

As the analysis in this Chapter refers largely to section 129 in its original form, it is provided here as follows:

> "(1) If the consumer is in default under a credit agreement, the credit provider—
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to, a debt counsellor, alternative dispute resolution agent, consumer court or ombud

[1] Act 68 of 1969.

with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and
(ii) meeting any further requirements set out in section 130.
(2) Subsection (1) does not apply 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.
(3) Subject to subsection (4), a consumer may –
(a) at any time *before the credit provider has cancelled* the agreement reinstate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default and reasonable costs of enforcing the agreement up to the time of reinstatement; and –
(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.
(4) A consumer may not re-instate 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 enforcing that agreement; or
(c) the termination thereof in accordance with section 123.

As mentioned in Chapter one, quite a few sections in the NCA interrelate with and affect section 129. For the purpose of this study the following sections need to be considered as they affect the section in so far as it relates to the research objectives – sections 65, 127, 130, 131. These sections are provided in Chapter one section 1.8.

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4 2 THE PURPOSE OF SECTION 129(1)(a) NOTICE

The NCA aims at establishing a careful balance between protection of the rights of consumers on the one hand and those of creditors on the other.[2] The NCA assists consumers who are facing financial strain due to over-indebtedness but only affords limited assistance to consumers who are in default.[3] The NCA is not aimed at relieving consumers from their obligations but only at assisting them to comply with their obligations on less onerous terms.[4] Cancellation of obligations is not the primary focus of the NCA, rather the NCA seeks to determine a manner in which a consumer can ultimately fulfil all their obligations.

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2 Eiselen "National Credit Act 34 of 2005: The confusion continues" 2012 *THRHR* 393.

3 A provider may enforce a credit agreement if a consumer is in default and has not applied for debt review under section 86(1) of the NCA. If the consumer has applied for debt review and defaults, the provider may proceed to terminate the debt review provided it is not before court and proceed accordingly. See *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 9 – covered more fully in Chapter 7. Section 129 has been further amended by the 2019 Amendment Act which effective date is still pending. This new wording includes the possibility in section 129(1)(a) of debt intervention.

4 Eiselen 2012 *THRHR* 394.

The purpose of section 129 in particular is to ensure that the consumer, when in default, is provided with a notice by the provider in which he brings the default to the attention of the consumer and proposes that the consumer refer the credit agreement to dispute resolution agents or alternative parties in order to resolve the disputes or to come to an agreement with respect to remedying the default, before he may enforce the credit agreement.[5] This purpose relates directly to section 3 of the NCA discussed in Chapter two as to the purpose of the NCA in general. Section 129 in essence assists in fulfilling the enunciated purpose of the NCA.

The words "in default" in section 129(1)(a) refer to breach of the credit agreement by the consumer. It is, however, not mentioned whether such breach must be a material breach of the terms of the agreement, such as not paying the agreed amount on or before a stipulated date or whether a non-material breach, such as not informing the provider of a change of mobile number, constitutes a breach that activates the provisions of section 129.[6] For a breach of material terms of the credit agreement, the answer is obvious in that the provider is required to send a section 129(1)(a) notice in order to enforce the agreement thus requiring some form of specific performance from the consumer.

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The answer is not clear when the breach is not of a material nature, but the common law would indicate that cancellation of the agreement would not be permitted for this type of breach. If the provider and the consumer agreed contractually that the consumer has an obligation to inform the provider when his mobile number changes for example and the consumer neglects this duty, then the strict and literal interpretation of "in default" indicates that the provider must send a section 129(1)(a) notice to the consumer informing him of his default. However, the manner of enforcement would be problematic as it would seem ineffectual to make application to court to compel a consumer to provide their updated details, alternatively to cancel the contract for such a default. It is submitted that the provider would have to comply with all the formalities prescribed by section 129, which effectively makes this an arduous exercise.[7]

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5 Section 129(1) of the NCA.

6 Although breaches other than those relating to payments would be difficult for the provider to enforce.

7 Stander *Formal procedural requirements for debt enforcement in terms of the National Credit Act* (LLM – thesis, University of Pretoria, 2012) 25.

Section 129(1)(b) makes it clear that it is mandatory for a provider to issue a section 129 notice before commencing legal proceedings.[8] Based on this interpretation, the section 129 notice would then afford a consumer the opportunity to apply for debt review under section 86(1), effectively placing a sixty (60) business days' *moratorium* on the enforcement of the debt.[9] The interrelation between enforcement and debt review, sections 129 and section 86 of the NCA is covered in Chapter seven.

4 3 THE CONTENT OF THE NOTICE IN TERMS OF SECTION 129(1)(a)

Section 129(1)(a), in the original form on the face of it, requires only the following of a provider issuing the notice:

(a) that the notice draws the consumer's attention to his default;

(b) that it proposes that the consumer refer his agreement to the National Credit Regulator for debt intervention, a debt counsellor, alternative dispute resolution agent, consumer court or ombud in order that:

(i) disputes be resolved; or

(i) a payment plan be developed.[10]

However, the court in *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc*[11] warned that it was not enough for providers merely to reproduce section 129(1)(a) in the notice as the section had to be made understandable and practical to consumers.[12] The court's view may seem commendable, but it is submitted that the court should not expect too much from providers in this regard for a number of reasons. Firstly, the sheer volume of section 129 notices issued by prominent financial institutions would not allow the personalization referred to by the court in any substantial or meaningful form whilst still meeting the minimum requirement of sending the notice. This type of personalisation would place an additional burden on providers in terms of staffing capacity required to implement the personalization of the section 129 notices. This would in turn increase costs which in the long

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8 Although section 129(1)(a) states that a provider "may" draw the default of the consumer to his or her attention, section 129(1)(b) (i) indicates that a provider "may not" commence legal proceedings against the consumer before compliance with section 129(1)(a), being the sending of the section 129(1)(a) notice. Hence, the notice is not mandatory unless the provider wants to proceed against the consumer.

9 Eiselen 2012 *THRHR* 393.

10 Otto and Otto *The National Credit Act Explained* 4 ed (2016) 116.

11 2009 3 SA 348 (B).

12 *BMW Financial Services (SA) Pty Ltd v Dr M B Mulaudzi* para 13. See also Otto (2016) 116.

run could very well result in increased costs of credit – a negative consequence to all consumers. Secondly, to make a notice "understandable" and "practical" to an individual is quite a subjective task in that what is understandable in terms of language and grammar for one individual is not the same for another individual. This is nuanced even more so in South Africa with the varying levels of illiteracy and numerous official languages. There is the plain language movement in the legal fraternity in an endeavour to make legal documents more "lay person" friendly. This movement however does not extend to providers, and it is submitted that this kind of burden should not be placed on them. The court's view in *Standard Bank of South Africa Ltd v Maharaj*[13] was similarly that it would be expecting too much from providers to expand upon section 129(1)(a) in the notice sent to consumers.[14] The section 129 notice is already quite a lengthy notice, to attempt to elaborate further would lengthen the notice even further and be even more likely to disengage the reader.

It can be argued further that the NCA is a comprehensive piece of legislation with detailed regulations and therefore had the legislature intended to put more substance to section 129(a), it could have regulated the matter in that section itself or in the regulations. Obviously, providers would be sensible to warn consumers of the consequences of ignoring a section 129(1)(a) notice. As ultimately the providers would benefit from consumers receiving the notice, understanding it and electing one of the options available to them. This would result in the fulfilment of more agreements and the reduction of litigation costs.[15]

4 4 DECONSTRUCTING THE WORD "ENFORCE" IN TERMS OF SECTIONS 129 AND 130 OF THE NCA

4 4 1 Meaning of "enforce"

Section 129 of the NCA deals with pre-debt enforcement procedures. It provides that subject to section 130(2),[16] a provider may not commence any legal proceedings to "enforce" a credit

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13 2010 5 SA 518 (KZP).

14 *Standard Bank of South Africa v Maharaj* paras 7 and 13.

15 Otto (2016) 117. *FirstRand Bank Ltd v Folscher* 2011 4 SA 314 (GNP).

16 It is noteworthy that section 130(2) deals with the enforcement of the remaining obligations under a credit agreement. Its correct interpretation is at the centre of debt enforcement. See *First Bank Limited v Dlamini* 2010 ZAGPPHC 25, 2010 4 SA 531 (GNP) 17; *Standard Bank Ltd v Rockhill* 2010 5 SA 252 (GSJ); *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D).

agreement before first providing a notice in accordance with section 129(1)(a) or in terms of section 86(10) to the consumer and meeting any further requirements as set out in section 130.[17]

Therefore, a provider may not issue a summons or application to enforce a credit agreement without:

a) First providing the consumer with a notice in accordance with section 129(1)(a) or a cancellation notice of debt review proceedings in terms section 86(10).
b) Second, ensuring that the consumer has been in default for at least twenty (20) business days and at least ten (10) business days have elapsed since delivery of the section 129(1)(a) notice.
c) Third, the consumer either has not responded to the notice or responded by rejecting the proposals in the notice.

Otto and Otto[18] note that the word "enforce" is not clearly defined in section 129(1) of the NCA. In normal terminology, the word "enforce" would mean the enforcement of debt or obligations, but in terms of the NCA, it might mean the provider using any of his remedies as discussed in Chapter three. Van Heerden and Otto[19] as well as Boraine and Renke[20] opine that "enforce" refers to all remedies available to the provider when he approaches a court for an appropriate order or relief.[21] Therefore, it would appear from the opinion of these authors that apart from the common law remedies, which constitute the cancellation of the agreement or a claim for specific performance or a claim for damages,[22] it would also be possible for the provider and the consumer to contractually agree on remedies in the express terms, for example, a *lex commissoria*[23] which would then be used in the enforcement of the agreement.[24]

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17 Section 129(1)(b) of the NCA. See also Van Heerden and Coetzee "Perspectives on the Termination of Debt Review in terms of the National Credit Act 34 of 2005" 2011 *PER* 46.
18 Otto and Otto *The National Credit Act Explained* 2 ed (2010) 103.
19 Van Heerden and Otto "Debt Enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655.
20 Boraine and Renke "Some practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 - Part 2" 2008 *De Jure* 5.
21 See also Stander 23.
22 Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (2018) 290.
23 By definition, a *lex commissoria* is an express or implied cancellation clause in an agreement as discussed in Chapter 3 of this study. See Hutchison (ed) *et al* 290.
24 It should be emphasized that the section 129(1)(a) notice remains a pre-requisite for the cancellation of an agreement and therefore, despite the *lex commissoria,* the provider should still provide a section 129(1)(a) notice to the consumer.

In support of this argument, in *Nedbank v National Credit Regulator*[25] the court held that "enforce" included a reference to all contractual remedies, including cancellation and ancillary relief and meant the enforcement of those remedies by judicial means.[26] The ambiguity surrounding the interpretation of the word "enforce" should not lead to the assertion that the purpose of the legislation is to limit a provider's remedies since the NCA has to be interpreted in light of the purpose of the legislation[27] and to the benefit of both the provider and the consumer.[28] The decision of the court in *Nedbank v National Credit Regulator*[29] and the opinion of the authors,[30] namely that "enforce" refers to the normal civil procedure in approaching a court for an order for appropriate relief should be accepted. It is further evident from the *Nedbank v National Credit Regulator*[31] decision that apart from the common law remedies the *ex contractu* remedies will also be available to the provider when the consumer is in breach of the credit agreement.[32]

4 4 2 Limiting provider's right to "enforce" the contract

Legislation worldwide[33] limits the exercise of the provider's rights, usually by requiring providers to send the consumer a demand informing him of his breach and giving him an opportunity to rectify it within a stated period. South African legislation does not ignore global

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25 2011 3 SA 131 (SCA).

26 *Nedbank v National Credit Regulator* para 12. In *Absa Bank Ltd v De Villiers* 2009 5 SA 40 (C) para 13 the court held that a wider meaning should be used when referring to "enforcement", thus meaning exercising any of its remedies. See also Stander 24.

27 Discussed with reference to section 3 of the NCA in Chapter 2.

28 Section 1 of the NCA does not contain a definition for "enforce".

29 2011 3 SA 131 (SCA).

30 Van Heerden and Otto 2007 *TSAR* 655 and Boraine and Renke 2008 *De Jure* 5.

31 2011 3 SA 131 (SCA).

32 Stander 24.

33 Section 87 and 88 of the United Kingdom Consumer Credit Act 39 of 1974, as amended by the Consumer Credit Act of 2006, requires that a default notice be sent to the consumer before proceedings commence. English law has a comprehensive, developed legal system regarding credit law, more than other countries. Section 87 of Act 39 of 1974 requires the "service" of a notice on the debtor when there is a breach by the debtor under a regulated agreement or credit agreement prior to taking the actions listed in this section, which include payment of a sum, the recovery of possession of any goods and the right to enforce security. The notice has the effect of reminding the debtor of the breach and giving him an opportunity to remedy it. The meaning of "service" is specifically dealt with in section 176(2) headed "service of documents." It states that the document may be "delivered or sent [by an appropriate method] ... or addressed to him [the debtor] by name and left at his proper address." "Delivered", "sent" and "left" are not defined in the Act but it is clear from this section that they incorporate both the receiving and the non-receiving of the notice by the debtor (Tennant *The Practitioner's Guide to the Alienation of Land Act* 2010 *TSAR* 860). In South African law a default notice must still come to the attention of the consumer as the NCA has a unique and specific purpose provision with emphasis on the protection of the consumer, which the English Act of 1974 does not contain. There is a similar provision contained in section 88 of the Australian National Consumer Credit Protection Act 134 of 2009.

developments in the field of credit agreements. The discussion in Chapter three of the legislation preceding the NCA highlights this and indicated the provisions that tempered with the enforcement of for example a *lex commissoria* or an acceleration clause.[34]

The NCA following global trends limits providers' rights when it comes to exercising their remedies by curtailing their implementation. It is noteworthy that the NCA's provisions are far more complicated than those of its predecessor, the Credit Agreements Act,[35] and are vaguely worded in certain sections. Although, the NCA goes a long way to assist debtors, it has proven to be cumbersome and detrimental to providers in respect of enforcement. For example, providers may suffer irreparable damage, particularly when movable goods are involved, which can deteriorate pending the lapse of time limits prescribed by the NCA.[36]

It is in the context of the enforcement of contractual rights that Otto notes that the word "enforcement" in section 129 also includes the exercise of the remedy of cancellation of the contract.[37] For this conclusion Otto[38] relies on Malan JA in *Nedbank v The National Credit Regulator*[39] where the court held:

> "Section 86(2) uses the words 'has proceeded to take the steps contemplated in section 129 to enforce that agreement'. Enforce, it seems, includes a reference to all contractual remedies including cancellation and ancillary relief, and means the enforcement of those remedies by judicial means."[40]

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The section 86(2) of the NCA referred to above is the original section. This section was subsequently amended in the 2014 Amendment Act to no longer refer to section 129 in section 86(2) but to now reference section 130. This change is discussed further in Chapter seven.

Otto also relies on *Absa Bank v De Villiers*[41] for this conclusion. In that case, the bank applied for a final order of attachment of a vehicle that had been purchased by De Villiers in terms of a credit agreement. The bank did not allege that it had cancelled the agreement, nor

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34 Section 19 of the Alienation of Land Act requires that a demand notice be sent to a defaulter prior to any further proceedings being implemented. See Otto (2016) 110 - 111.
35 Act 75 of 1980.
36 Otto (2016) 111.
37 Otto "The National Credit Act: Default Notices and Debt Review; the *Ultra Duplum* Rule. *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581" 2012 *THRHR* 141. See also Boraine and Renke 2008 *De Jure* 2.
38 Otto 2012 *THRHR* 141.
39 2011 3 SA 581 (SCA).
40 *Nedbank v National Credit Regulator* para 12. See also Eiselen 2012 *THRHR* 394.
41 2009 5 SA 40 (C).

did it indicate in its action that it was instituting an action for the cancellation of the instalment agreement. The court, relying on the views expounded by Otto and Van Heerden, held:

> "It can be argued that in the event of a consumer defaulting under a credit agreement, the credit provider who wishes to invoke any remedy at his/her disposal in terms of the relevant credit agreement will have to comply with the requirements laid down in section 129 and 130."[42]

The effect of this decision and the viewpoint held by Otto is that a provider is not entitled to terminate or cancel a credit agreement due to the breach of the consumer unless he has given the consumer a section 129 notice.

4 4 3 Extending the meaning of "enforce"

In the *De Villiers* case[43] the court accepted Otto's justification that giving the word "enforce" the restricted general meaning would go against the grain of the NCA, namely the protection of consumers.[44] The courts have, however, on a number of occasions indicated that consumer protection is not the only object of the NCA but that it includes other objectives such as creating a stable credit market and balancing the interests of consumers and providers respectively.[45] Hence, the necessity to ensure a balanced approach. In *Nedbank v National Credit Regulator*[46] the court also agreed that "enforce" in section 129 must be given an extended meaning. It is submitted that this is the correct position as it is clear that section 129 uses the word "enforce" in a wider sense than just holding the contract intact and applying for specific performance. The word "enforce" also includes "terminate" in that context.[47] That the word "enforce" should have this extended meaning is clear from the provisions of section 123 which deals with the termination of the credit agreement by the provider.[48] On scrutiny of the passage in *Nedbank*

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42 *Absa Bank v De Villiers* para 14. See also Eiselen 2012 *THRHR* 394.

43 *Absa Bank Ltd v De Villiers* 2009 5 SA 40 (C).

44 *Absa Bank Ltd v De Villiers* paras 11 – 14; Eiselen 2012 *THRHR* 395.

45 Eiselen 2012 *THRHR* 395; *Nedbank v National Credit Regulator* para 2; *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 9 – 10 and *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 5 SA 618 (KZD) para 16.

46 2011 3 SA 581 (SCA).

47 Eiselen 2012 *THRHR* 395. That enforce is given a broader meaning is clear from the provisions of section 123 which deals with the termination of the credit agreement by the provider - *Absa Bank Ltd v De Villiers* 2009 5 SA 40 (C) para 10 to 13.

48 Section 123 of the NCA titled: "Termination of agreement by credit provider" indicates as follows:
"(1) A credit provider may terminate a credit agreement before the time provided in that agreement only in accordance with this section.
(2) If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement.
(3) A credit provider in respect of a credit facility may
(a) suspend that credit facility at any time the consumer is in default under the agreement; or

v The National Credit Regulator[49] quoted above that Otto relies on, it becomes clear that the statement of the court does not have as wide or general import as Otto reasons. The court held that the word "enforce" must bear this extended meaning in the "enforcement of those remedies by *judicial means*".[50] The court therefore restricted its extension of this meaning to this context and also only to where it is used in Part C of Chapter 6, that is, in section 129.[51]

Therefore, the extended meaning of "enforce" would include cancellation of the agreement but by *judicial means* and provided the breach of the agreement is of a serious nature, alternatively if there is a *lex commissoria* included in the agreement and all the requirements of the clause have been complied with. The judicial intervention would only be required in the instance where cancellation requires confirmation as to the legality of the step when it is disputed by the party in default and not in the ordinary course of cancellation. Cancellation can ordinarily occur in line with common law principles without court intervention.

4 4 4 Comment on issues raised by "enforce"

In *Dwenga v FirstRand Bank Ltd*[52] the court perpetuated the misinterpretation of Malan JA's statement in *Nedbank v The National Credit Regulator*[53] as quoted above by omitting the important words "by *judicial means*" just as Otto does.[54] Eiselen takes the view that the court's statement that "cancellation is in my view not an act which the mortgagor performs unilaterally and at its whim" is without proper legal foundation and wrong.[55] It must be remembered that

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(b) close that credit facility by giving written notice to the consumer at least ten business days before the credit facility will be closed.
(4) A credit agreement referred to in subsection (3) remains in effect to the extent necessary until the consumer has paid all amounts lawfully charged to that account.
(5) A credit provider may not close or terminate a credit facility solely on the grounds that -
(a) the credit provider has declined a consumer's request to increase the credit limit;
(b) the consumer has declined the credit provider's offer to increase the credit limit;
(c) the consumer has requested a reduction in the credit limit, unless that reduction would reduce the credit limit to a level at which the credit provider does not customarily offer or establish credit facilities; or
(d) the card, personal identification code or number or other identification device used to access that facility has expired.
(6) The unilateral termination of a credit agreement by a credit provider as contemplated in this section does not suspend or terminate any residual obligations of the credit provider to the consumer under that agreement or this Act."

49 *Nedbank v The National Credit Regulator* para 12.
50 *Nedbank v The National Credit Regulator* para 12 (own emphasis).
51 *Nedbank v The National Credit Regulator* para 12. See also Eiselen 2012 *THRHR* 395.
52 *Dwenga v First Rand Bank Ltd* 2011 ZAECELLC 13 (29 November 2011).
53 2011 3 SA 581 (SCA).
54 Eiselen 2012 *THRHR* 393.
55 Eiselen 2012 *THRHR* 395.

in the interpretation of the NCA one should not lose sight of the fact that the NCA is embedded in the law of contract. The general rules and principles of the law of contract still apply in so far as they have not been amended or changed by the provisions of the NCA.[56] It is also one of the principles of interpretation of statutes that there is a presumption that the legislation does not intend to change the common law or existing law more than is required by the Act and its objectives.[57] Where common law rights are restricted or excluded by legislation, those provisions must be interpreted restrictively in the case of ambiguities and uncertainties.[58] These rules are, of course, further amplified by sections 2 and 3 of the NCA.

At common law, termination or cancellation of a contract for breach is a remedy that may be employed by an aggrieved party where the breach is serious or where the contract contains a *lex commissoria* and the conditions have been fulfilled.[59]

It is common knowledge that most credit agreements contain clauses providing for either acceleration of payments in instalment contracts or for the termination of contracts when the consumer defaults.[60] Unlike specific performance, which has to be enforced by judicial proceedings, the non-breaching party may exercise cancellation or termination of an agreement due to breach extra-judicially by simply notifying the breaching party of the cancellation. The notification may be given verbally or by any other means.[61] The effect of a notice of cancellation is the immediate termination of the contract and an obligation on the parties to restore any performance received subject to any claims for damages.[62] Often termination clauses will also contain provisions dealing with restitution. The interpretation of sections 123 and 129 must therefore be seen against this background.[63]

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56 Eiselen 2012 *THRHR* 396.

57 *S v Leeuw* 1980 3 SA 815 (A) para 823F–G; *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA) para 38. Eiselen 2012 *THRHR* 396.

58 Du Plessis "Statute law and interpretation" 25(1) *Lawsa* (2001) para 322(a). Eiselen 2012 *THRHR* 396.

59 Christie and Bradfield Christie's *The Law of Contract in South Africa* 7 ed (2016) 561ff; Kerr *The Principles of the Law of Contract* 6th ed (2002) 602–607 and 617–618. Eiselen 2012 *THRHR* 396. A *lex commissoria* is not objectionable in principle, as it is not included in the list of unlawful provisions in section 90 of the NCA.

60 *Absa Bank Ltd v Havenga* 2010 5 SA 533 (GNP). See also *Standard Bank of South Africa Ltd v Manyifolo* 2012 ZAECMHC 3 (2 February 2012) paras 15 and 16. Eiselen 2012 *THRHR* 396.

61 Christie and Bradfield *The Law of Contract in South Africa* 7 ed (2016) 561; *Sonia (Pty) Ltd v Wheeler* 1958 1 SA 555 (A) 560–561; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) para 28. Eiselen 2012 *THRHR* 396.

62 Van der Merwe *et al Contract General Principles* 4 ed (2012) 402–404. Eiselen 2012 *THRHR* 396.

63 Eiselen 2012 *THRHR* 396.

It is submitted then that unless one can find a clear intention in either section 123 or 129 to restrict the common law rights of providers, the providers retain the right to terminate contracts extra-judicially due to a breach by the consumer.[64] Although section 123 provides that a contract may only be terminated in accordance with that section, it gives little practical guidance about termination after breach.[65] Subsection 2 provides that if a consumer is in default the provider may take the steps set out in Part C of Chapter 6 to enforce and terminate the agreement.[66] The problem is the use of the word "may", which usually denotes an option or a voluntary act, which is not mandatory.[67]

According to section 129(3) in its original form, a consumer may at any time before the provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the provider all amounts that are overdue, together with the provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement.[68] Section 129(3) allows a provider to unilaterally and extra-judicially terminate the credit agreement. The words in this section are clear and unambiguous and in conformity with the common law rights of the provider.[69] Reinstatement of the credit agreement by the consumer deprives the provider of the right to terminate the contract, as the consumer is no longer in breach and as indicated in Chapter one termination cannot proceed without default.[70] It is submitted therefore that this interpretation is correct in the light of three cases, namely *Absa Bank Ltd v Havenga,*[71] *Standard Bank of South Africa Ltd v Hand*[72] and *FirstRand Bank Ltd t/a Wesbank v Pillay.*[73]

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In *Standard Bank of South Africa Ltd v Hand*[74] the court held:

> "It is trite that a party wishing to rely on the cancellation of an agreement, because of its breach, must allege and prove: the breach of the agreement that the right to cancellation has occurred because the breach was material or in the event that the agreement contains a cancellation clause, that its provisions

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64 *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA) para 8 the court held that "may" in the context of s 129(1) means "must". Eiselen 2012 *THRHR* 396.
65 Eiselen 2012 *THRHR* 397.
66 *Ibid*.
67 *Nedbank Ltd v The National Credit Regulator* para 8. Eiselen 2012 *THRHR* 397.
68 Section 129.
69 Eiselen 2012 *THRHR* 397.
70 *Absa Bank v Havenga* 2010 5 SA 533 (GNP), *Standard Bank of South Africa Ltd v Hand* 2012 3 SA 319 (GSJ) and *FirstRand Bank Ltd t/a Wesbank v Pillay* (Case No 11978/2010 unreported judgment of the court dated 8 December 2011). Eiselen 2012 *THRHR* 398.
71 2010 5 SA 533 (GNP).
72 2011 ZAGPJHC 55 (15 June 2011), 2012 3 SA 319 (GSJ).
73 Case No 11978/2010 unreported judgment of the KwaZulu-Natal Local Division, Durban dated 8 December 2011.
74 Case No 34066/10 unreported judgment of the South Gauteng High Court, Johannesburg dated 15 June 2011.

> have been complied with; that clear and unequivocal notice of the rescission was conveyed to the other party, unless the agreement dispenses with such notice."[75]

From this passage it is clear that a provider is normally entitled to terminate the agreement without the intervention of the court. This conclusion, based on general contractual principles, which were never properly considered in *De Villiers*[76] or *Dwenga,*[77] is also supported in *Pillay*.[78] Eiselen submits that a provider is entitled to enforce the agreement by cancelling unilaterally and extra-judicially, provided that the cancellation takes place in accordance with the provisions of the contract or the common law.[79] This is therefore the extended meaning of "enforce" referred to above. Termination of the agreement is permissible without court intervention unless the consumer disputes the termination, and the matter needs to proceed to court for confirmation of termination in which event a notice in terms of section 129 would be required.

4 5 SECTION 129(1)(a) NOTICE - METHOD OF DELIVERY

4 5 1 General

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According to the original section 129(1)(a), the provider should bring the default to the attention of the consumer in writing.[80] The section does not indicate how the written notice should be brought to the attention of the consumer. The 2014 Amendment Act added subsections (5) to (7) which provided a bit more detail in this regard. Section 129(5) indicates that the notice contemplated in subsection (1)(a) must be delivered to the consumer either by registered mail or to an adult person at the location designated by the consumer. Section 129(6) indicates that the consumer must in writing indicate the preferred manner of delivery and subsection (7) provides that proof of delivery is satisfied by either written confirmation by the postal service or its authorised agent of delivery to the relevant post office or postal agency or by the signature

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75 *Standard Bank of South Africa Ltd v Hand* para 11.

76 *Absa Bank Ltd v De Villiers* 2009 5 SA 40 (C) where the court agreed with the submission that the words "enforce" as well as "enforcement" entailed a wider meaning and included all contractual remedies, especially cancellation. The word should be understood in the wide sense of "exercising contractual remedies" and not just "specific performance".

77 *Dwenga v First Rand Bank Ltd* 2011 ZAECELLC 13 (29 November 2011).

78 *FirstRand Bank Ltd t/a Wesbank v Pillay* Case No 11978/2010 an unreported decision of the KwaZulu-Natal Local Division, Durban dated 8 December 2011. The court had to decide whether a contract that had been cancelled after termination of the debt review process could be reinstated by the court. The court accepted the right of the provider to unilaterally and extra-judicially cancel the contract due to breach by the consumer.

79 Eiselen 2012 *THRHR* 398.

80 The original section 129 is provided in Chapter 1.

or identifying mark of the recipient. These additions to the section will be discussed in Chapter five whilst this Chapter focuses on the interpretation adopted by the courts prior to the amendments.

The notice requirement in section 129 should be read with section 130 for a number of reasons. First, it is impossible to establish what a provider is obliged and permitted to do without reading both provisions. Second, both sections require that notice be given, but do so in different ways. Third, while section 129 focuses on the consumer to whom the provider must furnish notice, and to whose "notice" the information must come, section 130 indicates to the provider what must be done in order to fulfil the requirements of section 129, namely to "deliver" a notice as contemplated in section 129(1) of the NCA.[81] Section 130(1)(a) refers to the "delivery" of the section 129 (1)(a) notice to the consumer. However, the NCA does not provide a definition of "delivery", but section 65(1) indicates that every document that is required to be delivered must be delivered in the prescribed manner. It is evident that the section 129(1)(a) notice should be delivered, but the meaning of "delivery" is the subject of much debate.

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Section 129(1) of the NCA must also be read together with section 65(1) and (2) in order to provide a holistic interpretation. Sections 65(2) and 168, together with regulation 1, provided some clarity on these matters prior to the 2014 Amendment Act additions to section 129. Section 65(2) provides that if no method has been provided for the delivery of a document, such document must be made available to the consumer using one of the following methods:

(i) in person at the provider's business address or address chosen by the consumer or by normal post;[82]

(ii) by fax;

(iii) by email; or

(iv) by printable web-page.

The document should be delivered to the consumer in the manner chosen by such consumer.[83]

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81 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) paras 132 – 133.

82 In *Munien v BMW Financial Services (Pty) Ltd* 2010 1 SA 549 (KZD) para 12, the court confirmed that despite the reference to normal post in section 65(2), the sending of a section 129(1)(a) notice by registered post also amounts to "delivery".

83 Section 65 is provided and discussed in section 1.8 of Chapter 1. Regulation 1 and section 168 of the NCA. Stander 26.

Section 168 of the NCA provides that a notice, order or other document will be properly served if it has been delivered[84] to that person or sent by registered mail to the last known address.[85] Regulation 1 defines "delivered" as sending a document by hand, by fax, by email or by registered mail to an address chosen in the credit agreement by the proposed recipient, and, if no address is available, then delivery to the registered address of the consumer.

In a number of cases,[86] the courts attempted to interpret the parameters and content of section 129 prior to the 2014 amendments. The method of delivery of the section 129(1) notice has caused much controversy and conflicting case law. Case law in this area depicts a pendulum movement between protection of the consumer's rights to protection of the provider's rights and so forth. The balancing of these rights and interests is the crux of the issue at hand. Conflicting judgments by different divisions of the High Court are not only undesirable but the result may also infringe on constitutional rights. The consequent lack of uniformity when courts reach contradictory outcomes threatens one of the basic tenets of the legal system, namely legal certainty. This foundational principle is essential for predictability, allowing individuals to regulate their conduct to ensure it meets the required standard.[87]

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4 5 2 Conflicting views of High Court Decisions

Before the NCA came into operation section 11 of the Credit Agreements Act of 1980[88] applied when a breach of a credit agreement arose and required a credit grantor to notify the consumer of his failure to comply with any obligation under a credit agreement and to demand performance within 30 (thirty) days before claiming return of goods and cancelling the contract. Notification under section 11 was by means of a letter, which was either handed over to the consumer and for which an acknowledgement of receipt had to be obtained or was posted by prepaid registered mail to an address stated in the credit agreement or at the subsequent changed address, which address served as the *domicilium citandi et executandi* as per section 5(4) of the Credit Agreements Act. The handing over of a letter resulted in the default notice coming

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84 Section 168(a).
85 Section 168(b).
86 *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA)*; FirstRand Bank Ltd t/a Wesbank v Pillay* Case No 11978/2010 of 8 December 2011 (KZD); *Absa Bank Ltd v De Villiers* 2009 5 SA 40 (C); *Dwenga v FirstRand Bank Ltd* 2011 ZAECELLC 13 (29 November 2011); *Nedbank v National Credit Regulator* 2011 3 SA 131 (SCA); *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP).
87 Hawkey "Urgent Action for Conflicting Judgments" 2012 (November) *De Rebus* 3.
88 Act 75 of 1980.

to the attention of the consumer. However, the posting of a letter by registered mail did not always have this result. In the latter instance, the legal question posed, which is now similar to the question posed in terms of the NCA, was whether such a notice had to come to the attention of the consumer.[89]

As discussed in Chapter three, in *Marques v Unibank Ltd,*[90] which was the leading case in answering this question, it was held that a section 11 notice did not need to come to the attention of the consumer but that it merely needed to be proven, by the provider, that it was sent or dispatched to the consumer.[91]

After the NCA came into operation two cases, namely *Munien v BMW Financial Services (SA) (Pty) Ltd*[92] and *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*[93] dealt with the legal question, although with different outcomes. The latter case, which was heard first, held that a section 129(1)(a) notice had to be brought to the attention of the consumer,[94] whereas the former case decided otherwise, agreeing with the interpretation of section 11 of the Credit Agreements Act[95] in the *Marques case* and not referring to or even considering the *Prochaska* case.[96]

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The position under the Credit Agreements Act is reflected in *Marques* in which the defendant purchased a motor vehicle from the plaintiff under a written contract. The defendant breached the contract by failing to make payments on due dates. The plaintiff accordingly sent a section 11 notice by registered post to the defendant's indicated *domicilium* address requesting payment from the defendant within 30 (thirty) days from the date of posting the letter. Upon the lapse of the 30 (thirty) days the plaintiff approached the court *a quo* requesting that the contract be cancelled, the motor vehicle repossessed and the outstanding amounts in terms of the contract claimed. That court held that the plaintiff was entitled to claim return of the motor vehicle. On appeal, the legal question was whether the notice had to come to the attention of the consumer.

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89 Tennant 2010 *TSAR* 852.
90 2001 1 SA 145 (W).
91 *Marques v Unibank Ltd* para 155. Tennant 2010 *TSAR* 852.
92 2010 1 SA 549 (KZD).
93 2009 2 SA 512 (D).
94 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) para 55.
95 Act 75 of 1980.
96 *Munien v BMW Financial Services (SA) Pty Ltd* 2010 1 SA 549 paras 13 and 24. Tennant 2010 *TSAR* 852 - 853.

There was no authority under the Credit Agreements Act that dealt with such a position and authors of textbooks were divided as to the answer. Cloete J and Boruchowitz J interpreted section 11 of the Credit Agreements Act to mean that the notice need not come to the attention of the consumer and decided that "[i]t is the duty of every credit receiver to ensure that communications sent to him at the *domicilium* he has provided do come to his attention. His failure to do so should not, in my view, redound to the disadvantage of the credit grantor."[97] It was held that the legislature did not specify that proof of receipt was needed in section 11, but if it did specify this, then it would not be necessary to add the requirement that registered post be used.[98] Registered post together with the reference to the chosen *domicilium* was aimed at minimising the risk of the notice not coming to the attention of the credit receiver.[99] That was the position despite the fact that the post office received the letter back as "unclaimed" once the respondent had sent it. Accordingly, the respondent had complied with section 11 of the Credit Agreements Act as it had dispatched the default letter notwithstanding the fact that it did not come to the attention of the consumer.[100]

In *Munien* an instalment sale agreement was concluded in March 2006, after the NCA came into operation, for the purchase of a motor vehicle by Munien, the applicant. The applicant fell into arrears in 2008. A section 129(1)(a) notice was sent by registered post to the applicant's chosen *domicilium* as per the credit agreement. The applicant never responded to this notice and a further letter, now indicating that the agreement had been cancelled, was sent in the same manner as the first letter. The applicant again failed to reply to this letter. A summons was accordingly served at the applicant's *domicilium.* The applicant once again did not respond. In 2009 default judgment was granted against the applicant. The applicant sought rescission of the judgment and brought an application in the interim for an interdict preventing the first respondent from executing judgment until the rescission application was heard. The applicant claimed he never received the two letters nor the summons as in November 2006 he had moved elsewhere without informing the creditor as agreed and the postal service did not function properly as there was no street delivery for mail.

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97 *Marques v Unibank Ltd* 153F.
98 *Supra* 153.
99 *Marques v Unibank Ltd* 153F.
100 *Marques v Unibank Ltd* 153-154; see Tennant 2010 *TSAR* 853 for comment on the case.

The applicant asserted that section 129(l)(a) of the NCA had not been complied with and more specifically he, as the consumer, never had any default notice brought to his attention. He argued that this section fell in line with section 130(1) of the NCA, which requires that such a notice must be "delivered ... to the consumer" prior to legal proceedings commencing.

In the case of *Prochaska*[101] Absa, being the applicant, advanced a loan to Prochaska t/a Bianca Cara Interiors, the respondent. Prochaska registered a notarial bond over her movable assets as security for the loan. Absa also granted Prochaska an overdraft facility. Prochaska provided a *domicilium* address in the loan agreement and notarial bond and an alternate address in the notarial bond. Prochaska subsequently fell into arrears with her payments and Absa sent letters to an address other than her chosen *domicilium* address or the alternate address provided in the notarial bond. There was no allegation in the founding affidavit explaining why these letters were not sent to the chosen addresses, nor was a notice of change of *domicilium* provided. Prochaska claimed that section 129(1)(a) of the NCA had not been complied with as the notices sent by Absa were "not delivered" as required by section 130(1) and no legal proceedings could be instituted under section 130 of the NCA as she never had the notices brought to her attention. Absa claimed judgment and an order to perfect its security.

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In the *Munien* case BMW complied with the NCA but in the *Prochaska* case it was the fault of Absa that neither the *domicilium* address nor the alternate address were used and no explanation was provided for not doing so.[102] The findings in *Munien* were that a section 129(1)(a) notice was deemed to be delivered if it was sent by registered post to an address selected by the consumer, irrespective of whether it was capable of being delivered to that address or whether it actually came to the attention of the consumer.[103] Wallis J held that section 65 of the Act gave the consumer a right to receive documents. The documents needed to be delivered to the *domicilium* address. BMW delivered the notices and summons to an address chosen by Munien per the credit agreement and per section 65 of the Act. It was for Munien to ensure that the method of delivery chosen by him would be one that was certain to bring a notice to his attention. Munien was aware of the shortcomings in the postal system and was aware he had moved, so he should have altered his *domicilium* address under the credit agreement. Section 96(2) of the NCA allowed a consumer to change an address "by delivering

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101 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D).
102 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* paras 44, 45 and 55
103 *Munien v BMW Financial Services (SA) Pty Ltd* 556, 559, and 561.

to the other party a written notice of the new address ...” Munien’s failure to receive the notices and summons appeared to follow mainly from his own action or inaction.[104]

The word “delivered” under section 65 of the NCA must be read with the section 1 (definitions) of the National Credit Regulations[105] which provide that it is the sending of the document that amounts to delivery, which may be by hand, facsimile, electronic mail or registered mail to an address chosen in the agreement or a registered address where there is no chosen address.[106] If the Minister wanted delivery to mean “notice had to be received and come to the attention of the consumer” he would have indicated as such in the regulations.[107] A number of factors could prevent the intended recipient from receiving the notification when it was posted by registered mail and the sender had few means of ensuring that the notice actually came to the attention of the addressee, and the costs involved for providers having to ensure that notices such as these actually reached the consumer could be substantial.[108] The section 1 regulation on the definition of “delivered” clearly has a wider interpretation and inclusion of communication methods than that contained in section 129(5) to (7) which still limits providers to hand delivery or registered mail. The legislature missed the opportunity in the 2014 amendments to align the regulations and section 129, together with the trends in the increased use of technology. The use of technology may actually decrease the cost to the provider and increase the reception of information by the consumer. One wonders why this *lacuna* has been allowed to continue for so long when the remedy could be quite simple in expanding the delivery methods to reference to the regulations which could then be divided into methods for different notices or entities. These could then easily be updated when necessary, from time to time.

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This interpretation of the NCA in *Munien* is in line with the interpretation of similar provisions in the Credit Agreements Act, as is evident from the *Marques* case[109] and with regard to the purposes in section 3 of the NCA. The question is not so much one of underlying policy

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104 *Munien v BMW Financial Services (SA) Pty Ltd* 559.
105 Published in Regulation Gazette No 28864, Volume 491, GN R489 of 31 May 2006.
106 *Munien v BMW Financial Services (SA) Pty Ltd* 555, 556 and 558.
107 *Munien v BMW Financial Services (SA) Pty Ltd* 556.
108 *Marques v Unibank Ltd* 151, 155 – 158; *Munien v BMW Financial Services (SA) Pty Ltd* 556 – 557; Tennant 2010 *TSAR* 855.
109 *Marques v Unibank Ltd* 151, 155 – 158; *Munien v BMW Financial Services (SA) Pty Ltd* 556; Tennant 2010 *TSAR* 855.

and purpose of the NCA but the balance to be struck between the interests of a provider and a consumer when it comes to the giving of notices.[110]

In *Prochaska* a different approach was adopted, and this led to a different outcome. Naidu AJ held that the purpose and scheme of the NCA had to be borne in mind when answering a legal question such as the one under discussion.[111] According to section 3 of the NCA the purposes include to "promote and advance the social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry; and to protect consumers", which were achieved through means listed in section 3 of the NCA.[112] The words "draw the default to the notice of the consumer" in section 129(1)(a), "providing notice" in sections 86(10) and 129(1)(b)) and "delivered" in sections 65 and 130(l)(a) (read with the regulations) together show an obligation on the provider to do more than merely dispatch a letter as previously required by the courts under the Credit Agreements Act, which corresponds with one of the main purposes of the NCA, namely the enhanced protection of the consumer.[113] The provider in *Prochaska* failed to show that it complied with section 129(1)(a) properly as it never brought the letters to the attention of Prochaska by sending them to the chosen *domicilium* address. The application was accordingly postponed *sine die* until Absa had complied with section 129(l)(a).[114]

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The Munien case was heard in 2009 by the Durban and Coast Local Division. The *Prochaska* case had already been heard in 2008 by the same court. In the former case the very important judgment of the latter case was not considered. Wallis J did not even refer to Naidu J's decision. Wallis J in the *Munien* case opted to focus his attention mainly on the leading case under the Credit Agreements Act, the *Marques case.*[115]

Even though both the *Munien and Prochaska* cases referred to section 65 of the NCA and its regulations in understanding how a section 129(l)(a) notice had to be "delivered" prior to legal proceedings being instituted under section 130(1), Wallis J failed first to read section 65 and the regulations as well as section 86(10), section 86(11), the rest of section 129 and

110 *Munien v BMW Financial Services (SA) Pty Ltd* 557; Tennant 2010 *TSAR* 855.
111 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 516.
112 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 517.
113 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 525 - 526.
114 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* para 59.
115 *Munien v BMW Financial Services (SA) Pty Ltd* para 6 and 13; Tennant 2010 *TSAR* 857.

section 130, and second failed to properly consider section 3 of the NCA. With regard to the first failure, the narrow approach of interpreting only a part of section 129 by failing to look at section 65 and the regulations and interpreting "delivery" to mean the sending of a default notice should not be accepted as it does not align with the purposive interpretation adopted under the Constitution.[116] Wallis J considered only the word "delivered", without considering the words "draw the default to the notice of the consumer" in section 129(1)(a), "providing notice" in section 86(10) (read with section 86(11) and section 129(1)(b)) and "delivered" in section 130(1)(a). Section 129 and section 130 both specifically refer to each other and must be read together in context. As Naidu AJ held, there is an obligation on the provider to ensure the default notice comes to the attention of the consumer in writing.[117] The provider is required, according to Naidu AJ, to bring the default to the attention of the consumer in a way which provides an assurance to the court that the default has been drawn "to the notice of the consumer."[118] It would be expected from the approach of Naidu AJ that the burden of proof of delivery and or receipt of the section 129(1)(a) notice by the consumer could even escalate to the extent of personal service by way of a sheriff in order to ensure that the default has been brought to the attention of the consumer. It is hoped that this would not ensue as the associated costs, time delays and capacity issues on the part of the sheriff's office would cause prejudice to both parties equally.

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With regard to the second failure, section 2 provides that the NCA "must be interpreted in a manner that gives effect to the purposes". Section 2 makes it clear that the purposes must be fulfilled. Neither the *Munien* nor the *Prochaska* case took into account the fact that section 65 speaks of a "right to documentation". This is a right of a consumer, listed together with the other rights of the consumer found in sections 60 to 66 of the NCA. A right is an "entitlement to have or do something".[119] This means the section 129(1)(a) notice must be brought to the consumer's attention. The consumer in both cases exercises the right to receive a section 129(1)(a) notice at the chosen *domicilium* prior to legal proceedings being instituted in terms of the credit agreement. In neither case was the provider concerned that the default notice was not brought to the consumer's attention. Their attitude resulted in the matters being brought before a court to "accelerate, enforce, suspend or terminate" the credit agreements without

116 *Munien v BMW Financial Services (SA) Pty Ltd* para 20 and 25.
117 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* para 55.
118 *Supra*.
119 Oxford Dictionary 2006.

offering the consumers an opportunity to rectify their breached obligation. Hence, the consumers involved were not given protection under the NCA.[120] The consumers were not provided with an opportunity to rectify their breach prior to summons in that they did not "receive" the section 129(1)(a) notice. Invariably, the question is what the provider is required to do to ensure the consumer's rights to be provided with the opportunity to rectify the breach by receiving the section 129 (1)(a) notice prior to enforcement.

Although *FirstRand Bank Ltd v Dhlamini*[121] was reported after *Starita v Absa Bank Ltd*[122] in the law reports, it will be discussed first because the court in *Starita* reflected and commented on the *Dhlamini* case in its unreported form. The facts in *Dhlamini* were that the applicant, FirstRand Bank, applied for summary judgment for the amount outstanding under a covering mortgage bond. The respondent, an attorney, did not deny that he was in default. He raised the defence that he had not received the section 129 notice. He chose his home address in the credit agreement as the address to which notices had to be sent. He admitted that the notice was dispatched to his home address. He investigated the matter and it turned out that the letter was received at the Tembisa North Post office and that for reasons that he could not establish, no notification was sent to him that the letter was awaiting collection. It was subsequently returned to sender, being the applicant.

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The facts in *Starita* were that the consumer applied for rescission of a default judgment in connection with a debt secured by a mortgage bond in favour of the respondent. She averred that she had not received the section 129 notice nor the summons that was served, both at her *domicilium* address.

The court in the *Munien* case referred to the differences in section 65 of the NCA and the regulations as regards the requirement that the letter should be sent by ordinary post[123] and that it should be sent by registered post.[124] The court did not consider this too deeply and decided that "the mechanism . . . remains the postal service and the fact that the letter is registered makes it more, not less, likely to reach its destination".[125] The court was of the view

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120 Otto "Notices in terms of the National Credit Act: Wholesale National Confusion. *Absa Bank Ltd v Prochaska t/a Bianca Interiors; Starita v Absa Bank Ltd; FirstRand Bank v Dhlamini*" 2010 *SAMLJ* 601.
121 2010 4 SA 531 (GNP).
122 2010 3 SA 443 (GSJ).
123 Section 65(2)(a)(i).
124 Regulation 1.
125 *Munien v BMW Financial Services (SA) Pty Ltd* 2010 1 SA 549 (KZD) para 26.

that the consumer who selected the address bore the risk if the provider sent the notice to the address and in the manner selected by the consumer.[126] In doing so, the provider had done his duty and the consumer could not then raise the non receipt of the notice as a defence if the notice did not in fact reach him.[127]

Munien's case was followed in other decisions.[128] The court in *Dhlamini* considered the decisions in the *Prochaska* and *Munien* cases in depth and rejected the *Munien* decision. Murphy J distinguished between the words "delivery" in section 65 of the NCA and drawing "the default to the notice of the consumer in writing" in section 129(l)(a). The judge expressed the view that Wallis J erred *in Munien* "by equating the requirement of bringing the default to the notice of the consumer with delivery."[129] The court referred to the purpose of the NCA, agreed with the views in the *Prochaska* case in this regard and concluded that "the Act is consciously structured and designed for the protection of the consumer."[130] In the result the court held that a default notice had to be brought to the "actual attention" of the consumer.[131] The court postponed the matter *sine die* based on section 130(4)(b) of the Act and directed the provider to comply with section 129.[132]

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The decisions in *Munien, Prochaska* and *Dhlamini* were all considered in *Starita.* Gautschi AJ preferred the decision in *Munien* and a number of other unreported cases and emphatically rejected *Prochaska* and *Dhlamini.* He agreed with the position that notices could be sent by registered mail, despite the reference to ordinary mail in section 65. He concluded that a consumer need not actually receive a section 129(1) (a) notice. It was sufficient if it was sent by registered post to the chosen *domicilium* address. In reaching this conclusion, the judge pointed out that there is no consistency in the usage of certain expressions by the legislature:[133]

> "The fact is that it is a badly drafted Act.. .. A perusal of the Act further shows that the expressions 'giving written notice', 'advise in writing', 'give notice', 'deliver' and 'serve' are used indiscriminately and without precision. Accordingly, undue emphasis should not be placed on the actual words used".[134]

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126 *Munien v BMW Financial Services (SA) Pty Ltd* para 14.
127 *Munien v BMW Financial Services (SA) Pty Ltd* para 20.
128 *FirstRand Bank Ltd v Bernardo* 2009 ZAECPEHC 19 (28 April 2009)*; Absa Bank Ltd v Kritzinger. Standard Bank of South Africa Ltd v Pienaar* (Case No 6474/2009 unreported decision of the Western Cape High Court dated 16 October 2009); *Standard Bank of South Africa Ltd v Rockhill* 2010 5 SA 252 (GSJ).
129 *FirstRand Bank Ltd v Dhlamini* 2010 4 SA 531 (GNP) para 26.
130 *FirstRand Bank Ltd v Dhlamini* para 29.
131 *FirstRand Bank Ltd v Dhlamini* para 31.
132 *FirstRand Bank Ltd v Dhlamini* para 33.
133 *Starita v Absa Bank Ltd* para 18.9
134 *Supra*.

The judge referred to the views in *Prochaska* and *Dhlamini* and said the following:

> "Murphy J and Naidu AJ emphasise the purpose of the Act as set out in s 3, and the fact that it is directed strongly at the interests of consumers. That is undoubtedly correct, but the legislature has not thereby ignored the interests of credit providers. There is no imperative that credit providers should be put to the trouble and expense of ensuring actual receipt by consumers of a s 129 notice, or other notices which might have equally adverse effects."[135]

4 5 3 Sending notice to physical address

In the 2012 case of *Greef v FirstRand Bank Ltd*[136] Greef and FirstRand were parties to a mortgage loan agreement. The agreement provided for a postal address to receive "all forms, communications and notices, which will be sent by registered or ordinary post" and a physical address for "the service of all forms, notices and documents in respect of any legal proceedings which may be instituted." After Greef fell into arrears with the monthly payment, the bank sent the required section 129 notice to her physical address. Greef denied having received the notice. After default judgment was granted Greef applied for rescission of the judgment based on the defence that she was over-indebted, which defence the court rejected. However, the court, of its own account, raised the question whether the notice had been sent to Greef as required by section 129 of the NCA. The bank argued that the contract provided for the service of more important documents, such as court documents, to the physical address of the consumer and that the section 129 notice was such a document, it being the first step in the litigation process. Olivier J held that where a consumer had chosen a method of delivery for documents for purposes of the NCA, proof of sending the document by means of that method was sufficient to prove "delivery" without proving that the consumer had actually received the document.[137] In this regard, the court referred with approval to the decision in *Rossouw v FirstRand Bank Ltd*.[138] Where the provider uses a method of delivery other than that agreed on, the provider must prove actual receipt of the document in order to comply with the requirements of section 129.[139] The court further pointed out that a section 129 notice was not a document "in respect of legal proceedings."[140] It was simply a notice that was expressly authorised in the agreement to be sent by registered post. Sending a letter by registered post also did not constitute "service" as provided for in the agreement.[141]

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135 *Starita v Absa Bank Ltd* para 18.10. Otto 2010 *SAMLJ* 603.
136 2012 3 SA 157 (NCK).
137 *Greef v FirstRand Bank Ltd* para 44.
138 2010 6 SA 439 (SCA).
139 *Greef v FirstRand Bank Ltd* para 44.
140 *Greef v FirstRand Bank Ltd* para 40.
141 *Greef v FirstRand Bank Ltd* para 43.

In the *Rossouw*[142] case, it was held that the fact that the legislature had allowed the consumer to elect the manner of delivery as provided for in section 65 read with section 96 of the NCA, proved that the legislature intended to place the risk of non-receipt on the shoulders of the consumer. If the consumer, under the credit agreement, elected postage as his or her preferred method of receiving legal notices or documents from the provider and the provider posted (by way of registered post) the section 129 notice to the consumer's chosen *domicilium* address that would be sufficient for purposes of section 129. The consumer was thus burdened with the responsibility of actual receipt of the notice. The provider did not have to prove that the consumer had received the notice. However, the position as set out in the *Rossouw* case was altered by the Constitutional Court judgment of *Sebola.*

Therefore, the case of *Greef*[143] asserted that a section 129 notice is not a document in respect of the institution of proceedings and that should a party have elected a manner in which "delivery" of a notice of this nature is to occur then that method is to be honoured. If the method selected for the type of document or notice is not honoured by the provider then in such instance the provider carries a greater burden in proving receipt by the consumer as opposed to mere dispatch by the provider.

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4 5 4 ***Sebola v Standard Bank of South Africa Limited***

4 5 4 1 Facts

The contestations[144] about "delivery" required in the original section 129 of the NCA revolve around whether the required notice must in fact reach the consumer. In another 2012 case,

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142 *Rossouw v First Rand Bank Limited* 2010 6 SA 439 (SCA) para 32.

143 *Greef v FirstRand Bank Ltd* 2012 3 SA 157 (NCK).

144 This statutory *lacuna* has been the subject of adjudication in many cases. The contentious issue of delivery of the notice was initially decided by the Supreme Court of Appeal in *Rossouw v FirstRand Bank* Ltd 2010 6 SA 439 (SCA). The Constitutional Court later also made a ruling in respect of delivery of the notice in other cases. For a further exposition on the subject see Govender and Kelly-Louw "Delivery of the Compulsory Section 129(1) Notice as required by the National Credit Act of 2005" 2018 *PER / PELJ* 2; *Standard Bank of South Africa Ltd v Rockhill* 2010 5 SA 252 (GSJ) paras 17 and 18; *Griekwaland-Wes Korporatief Limited v Jacobs* (NCK) case number 1995/2010 unreported judgment of the Northern Cape Division, Kimberley dated 5 August 2011 para 14; *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) para 8; *Moegemat v Nedbank Ltd* (ECG) case number CA39/2010 an unreported judgment of the Eastern Cape Division, Grahamstown dated 27 October 2010; *Nedbank Limited v Mokhonoana* 2010 5 SA 551 (GNP); *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) para 8; *African Bank Ltd v Myambo* 2010 6 SA 298 (GNP) 311A-D.

Sebola,[145] the Constitutional Court provided further clarity on what is required by the provider to demonstrate compliance with the notice requirement contained in section 129.

The applicants in this case were married in community of property and had concluded a home loan agreement with the respondent, Standard Bank, for a loan against security of a mortgage bond over their home. Significantly, clause 13 of the agreement provided that the applicants chose the mortgaged property as the address where notices and documents in any legal proceedings should be served. Further, the applicants specified a post office box as the postal address to which letters, statements and legal notices could be delivered.[146] Years later, the applicants defaulted on their bond repayments. Consequently, the respondent purportedly sent a notice by registered mail in terms of sections 129 and 130 of the NCA setting out the options available to the applicants. The applicants contended that they never received this notice.[147] The applicants furnished evidence to prove that non-reception of the respondent's notice was because the postal services diverted the notice to the wrong post office. Therefore, the main issue was whether the provisions of the NCA that entitled a debtor to a written notice before a provider could institute action required the notice to reach the consumer. The High Court had dismissed an appeal against a decision of a single judge of the same court, which refused to rescind a default judgment entered against the applicants in favour of the respondent. The High Court relied heavily on the decision in *Rossouw v FirstRand Bank Ltd*[148] that held that proof by the respondent that the notice had been despatched was sufficient, even if the notice did not reach the debtor, and therefore the action against the applicants was correct. The ramifications of these judgments were that the sale in execution of the applicant's property could proceed unhindered.

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4 5 4 2 Submissions by the parties

The applicants contended that the High Court erred by failing to adopt a purposive and contextual reading of section 129. In other words, section 129 should have been interpreted constitutionally in the light of the NCA's purpose and objectives. The Full Court's

145 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC).
146 *Sebola v Standard Bank of South Africa Ltd* para 4.
147 Section 130 of the NCA.
148 2010 6 SA 439 (SCA).

interpretation, they contended, rendered the protection afforded to consumers by statute irrelevant.

The respondent submitted that the applicant should not be allowed to appeal directly to the Constitutional Court without first seeking a ruling from the Supreme Court of Appeal. It was the respondent's contention that the interests of justice were against a direct appeal as the way the applicants had framed their application did not raise a constitutional issue. It was non-service of the summons that led to the default judgment against them, and not merely the fact that they did not receive the statutory notice.

The respondent rectified the defect in the service of the summons by abandoning the judgment.[149] In addition, the respondent argued that the Supreme Court of Appeal had not had the opportunity to consider constitutional arguments on section 129. Hence, the Constitutional Court would decide that question as a court of first and last instance. The respondent therefore urged the Constitutional Court to not pronounce on the constitutional questions which had not been properly pleaded or ventilated.[150] The respondent supported the *Rossouw* decision. There was no reason, it contended, to think that the decision did not promote the spirit, purport and objects of the Constitution. The NCA, it submitted, sought to achieve an equitable balance between the rights and responsibilities of consumers and providers. If anything, the applicants' interpretation would unjustifiably limit providers' right of access to courts.[151]

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There were three other organisations who were admitted an *amicus curiae*. The first was the Socio-Economic Rights Institute of South Africa ("SERI") a non-profit company providing legal advice and representation on socio-economic rights. SERI emphasised that the wording of section 129(1)(a) required the provider to "draw the default to the notice of the consumer."[152] SERI contended that the wording of section 129 should be interpreted to mean that the notice must come to the consumer's actual attention. However, a provider need not in every case prove conclusively that the consumer had received the notice. Rather, SERI argued that the court should adopt the following standard, namely if it appears that:

(a) the provider had delivered the section 129 notice in compliance with the NCA and

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149 *Sebola v Standard Bank of South Africa Ltd* para 19.
150 *Sebola v Standard Bank of South Africa Ltd* para 20.
151 *Sebola v Standard Bank of South Africa Ltd* para 21.
152 *Sebola v Standard Bank of South Africa Ltd* para 45.

the credit agreement;

(b) the proceedings were not premature, and;

(c) there was nothing to suggest otherwise, then a court would normally be satisfied, on a balance of probabilities, that a consumer has in fact received the notice. This would not apply where the provider's papers were defective on their own terms, or a consumer attended court and asserted that the notice was not received. In those circumstances, the court should adjourn the matter so that the consumer could be informed of, and consider exercising, the options the NCA afforded. SERI seemed in their submissions to stop short of a pro consumer approach and attempted to balance the interests of both consumers and providers with the "balance of probabilities" argument.

The second *amicus curiae* was the National Credit Regulator ("NCR").[153] The NCR submitted that section 129(1) should be interpreted so that its notice requirement was *prima facie* satisfied only when the provider showed that he or she had taken the steps necessary to bring the notice to the attention of the consumer acting reasonably.[154] Generally, this would require the provider to satisfy the court that the section 129(1)(a) notice actually reached the address specified by the consumer. The NCR emphasised the importance of actual receipt of the notice. It argued that the interpretation in *Rossouw* promoted neither the purpose of the NCA nor the constitutional rights of consumers, which section 129(1)(a) was enacted to protect. For the NCR the important purpose of the NCA was to promote non-litigious methods of resolving consumer defaults. The section 129(1)(a) notice was, it stated, intended to bring extra-judicial remedies to the attention of consumers who were caught in debt default. Many of these consumers were members of previously disadvantaged or low-income communities and were unaware of the remedies available to them. A court had to be "satisfied" that the notice was received at the stipulated address.[155] This requirement would be satisfied by appropriate averments made by the provider in the summons that the letter was sent by registered post on a specific date; delivered to the appropriate post office using the post office's tracking mechanism; was not returned to the sender and that the provider knew of no other circumstances to indicate that the consumer did not actually receive the notice.[156] Where an

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153 The National Credit Regulator is a body established under the NCA to promote public awareness of consumer credit matters, and to provide guidance to the credit market and industry. *Sebola v Standard Bank of South Africa Ltd* para 48.

154 *Supra*.

155 *Sebola v Standard Bank of South Africa Ltd* para 48.

156 *Sebola v Standard Bank of South Africa Ltd* para 49.

opportunistic consumer deliberately declined to collect a registered letter, the NCR submitted that a sheriff could effect service. The NCR averred that these costs are relatively low. Once service had been proven, the onus would shift to the consumer to prove that the notice did not actually come to his or her attention, through no fault of his or her own.[157] The NCR therefore assumed a pro consumer stance.

The third *amicus curiae* was the Banking Association of South Africa ("BASA"), an association incorporated not for gain under the Companies Act[158] and the official trade body of the banking industry. BASA contended that it is not in the interests of justice to decide the appeal as the evidence before the court was inadequate. According to BASA, the court lacked the facts needed to determine the true impact of the interpretations urged by SERI and the NCR on the banking industry. However, BASA was not able to quantify the cost implications of such interpretations, but instead speculated that it would amount to hundreds of millions of rand. Consequently, this would have a ripple effect throughout the credit industry and economy, increasing the cost of providing credit to all, thus harming consumers the most. It therefore urged the court not to decide the matter. BASA was also of the view that the interpretations advanced by the SERI and the NCR were unsustainable long term for providers which would ultimately affect the provision of credit.

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The respondent conceded that the applicants raised constitutional issues. These issues were whether the Supreme Court of Appeal in *Rossouw* gave enough weight to constitutional considerations in assigning a meaning to the NCA's provisions.[159] These considerations were pertinent, which was clear since the preamble to the NCA indicated that it was enacted to promote "a fair and non-discriminatory marketplace for access to consumer credit" and "black economic empowerment". The means by which the NCA's purposes were to be achieved included "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" and "promoting equity in the credit market by balancing the respective rights and responsibilities of providers

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157 *Supra*.

158 Act 71 of 2008.

159 In *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA), 2010 ZASCA 130 (30 September 2010) para 42 the only constitutional issue considered was the constitutionality of the provider not being able to recover the balance of the debt from a consumer once the mortgaged property has been sold, should there be a balance remaining. It was held that this would be constitutionally unjustified and would not reconcile with section 83(2)(a) of the NCA.

and consumers". These goals, and the means by which they are to be pursued, were intimately connected to the Constitution's commitment to achieving equality.[160]

4 5 4 3 Decision of the Constitutional Court

The Constitutional Court held that the requirement that a provider should provide notice in accordance with section 129(1)(a) to the consumer had to be understood in conjunction with section 130, which required delivery of the notice.[161] The NCA, though giving no clear meaning to "deliver", required that the provider seeking to enforce a credit agreement should aver and prove that the notice was delivered to the consumer. Where the provider posted the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, would in the absence of any contrary indication, constitute sufficient proof of delivery.[162] If in contested proceedings the consumer averred that the notice did not reach him or her, the court would be required to establish the truth of the claim. If it found that the provider had not complied with section 129(1), it should in terms of section 130(4)(b) adjourn the matter and set out the steps the provider had to take before the matter could be resumed.

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The appeal succeeded and the applicants were granted the costs they incurred in seeking to set aside the judgment granted against them.[163] The Constitutional Court was of the view that to require mere despatch of the section 129 notice, as the respondent and BASA sought, under-appreciated its importance in the statutory scheme.[164] It provided too little force to the plain wording of the provision, which required that the notice come to the attention of the consumer.[165] To require that the provider should show that the notice reached the intended post office did add expense and effort to the recovery process, but it provided proper recognition to the statutory mechanisms designed to avoid court action. Court action was almost invariably more costly and could be disastrous for the consumer,[166] which was what the NCA's notice requirement sought to evade. This would heighten the cost of credit and thus affect the pockets of not only providers but also consumers, particularly those new to the credit market. However,

160 *Sebola v Standard Bank of South Africa Ltd* para 52.
161 *Sebola v Standard Bank of South Africa Ltd* para 82.
162 *Supra*.
163 *Sebola v Standard Bank of South Africa Ltd* para 83.
164 *Sebola v Standard Bank of South Africa Ltd* para 84.
165 *Sebola v Standard Bank of South Africa Ltd* para 85.
166 *Sebola v Standard Bank of South Africa Ltd* para 86.

that was a social burden the legislation imposed. The alternative would be to underplay the importance of the notice and under-weigh the impact of the wording of section 129. The latter would offend the objectives of the NCA.[167]

In the majority judgment delivered by Cameron J the court held that the NCA did not require the provider to prove that the default notice had actually come to the attention of the consumer or that it had been delivered to a specific address, as this would ordinarily be impossible to achieve. Although it might be difficult for the provider to show that the notice came to the attention of the consumer, the provider had to make allegations that would satisfy the court from which enforcement was sought that the notice, on a balance of probabilities, had reached the consumer.[168] Therefore, where the notice was posted, mere despatch of it was not sufficient. Because of the risk of non-delivery by ordinary mail, the majority judgment emphasised that registered mail was essential, because though registered letters could go astray, at least there was a high degree of probability that most of them were delivered.[169] Cameron J maintained that even when a registered letter was sent there was a possibility that proof of registered despatch by itself was not sufficient. Thus, it was not sufficient for the provider to simply allege and provide proof that the notice had been sent by registered mail to the address chosen by the defaulting consumer.[170] The court did not accept that the notice had to come to the attention of the consumer but held instead that the NCA required the provider to prove "delivery" of the notice.

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A separate judgment delivered by Zondo AJ, with whom Mogoeng CJ and Jafta J concurred, agreed with the order proposed by Cameron J but based on different reasoning. In Zondo AJ's opinion, the provider had to make the consumer aware of the consumer's default and the non-litigious options of dispute resolution which was stipulated by section 129 of the NCA.[171] His view was based on the common law principles relating to delivery of notices, judicial interpretations of statutes with similar provisions and a construction of the statute as a whole with an emphasis on its purposes and section 129(1)(a).[172] In his view the interpretation attributed by Cameron J would disadvantage people without access to an effective and efficient

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167 *Sebola v Standard Bank of South Africa Ltd* para 87.
168 *Sebola v Standard Bank of South Africa Ltd* para 88.
169 This statement is seriously questionable with large numbers of consumers not collecting their registered mail either intentionally or unintentionally.
170 *Sebola v Standard Bank of South Africa Ltd* para 88.
171 *Sebola v Standard Bank of South Africa Ltd* para 90.
172 *Sebola v Standard Bank of South Africa Ltd* para 108.

postal service. Zondo AJ was of the view that the NCA aim to secure a credit market that was "competitive, sustainable, responsible and efficient" should be balanced with the respective rights and responsibilities of consumers, particularly those who resided in rural areas.[173]

4 5 4 4 Comment on the decision

Previous consumer-credit legislation left defaulting consumers largely at the mercy of providers and provided very little protection for them.[174] In this light, the legislature deemed it appropriate to adopt new consumer-credit legislation in the form of the NCA which provides greater consumer protection through section 129(1)(a). The essence of this judgment is that notice can still be sent by registered mail, with the registered slip serving as proof of service. However, it was not sufficient for the provider to show that the notice had merely been sent. The creditor would have to go one step further and show that the notice was actually delivered to the post office serving the address of the consumer. In other words, a provider must show that the notice reached its destination. The effect of this was that a provider needed to obtain documentary confirmation from the post office that the notice had in fact reached its destination. The court was of the view that it was reasonable to expect that a consumer would collect his mail. It appeared that it was not always possible to obtain a track and trace printout from the post office in question. Accordingly, in order to meet the requirements it could be necessary to resend the notice.[175]

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Although the Constitutional Court has made a ruling to the effect that the notice must reach the consumer, the decision only sparked a new debate and conflicting views arose in the different High Courts concerning instances where the notices were sent using registered mail. These conflicting views, coupled with various ambiguous statements made in this case, eventually led to the matter again being discussed and considered by the Constitutional Court in other cases.

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173 *Sebola v Standard Bank of South Africa Ltd* para 141.

174 The precursor to the NCA such as Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980, Banks Act 94 of 1990, Sale and Service Matters Act 25 of 1964 formerly called the Price Control Act were ill suited to South Africa's post-apartheid economy. See Otto and Otto (2010) xi and para 2.

175 *Sebola v Standard Bank of South Africa Limited* para 28 and 97.

The court did not follow the long line of decisions under previous legislation that did not require actual receipt of the letter.[176] If in contested proceedings the consumer avers that the notice did not reach him or her, the court would have to establish the truth of the claim. If it finds that the provider has not complied with section 129(1), it should in terms of section 130(4)(b) adjourn the matter and set out steps the provider must take before the matter could be resumed.[177]

It is submitted that the majority decision's *obiter dictum* regarding the reliability and preference of registered mail is highly questionable being that our postal service is not always reliable and being further that consumers are required of their own volition to collect the registered mail letter from the post office. The issue should not be considered adequately settled given that such default notices could be even sent to consumers electronically in the digitalised era. Electronic communication and new age methods of communication are discussed as alternative "delivery" methods in Chapter five.[178]

The *Sebola* judgment overturned an earlier interpretation of the section 129(1) notice in *Rossouw*. After the *Sebola* judgment there was a heavier burden on a provider to ensure that the notice is sent and delivered to the correct post office. The provider had to make allegations that would satisfy the court from which enforcement was sought that the notice, on a balance of probabilities, had reached the consumer.[179] This caused procedural difficulties for providers, which in turn resulted in two conflicting judgments in the form of the Western Cape Division judgment in *Binneman* and the KwaZulu-Natal judgment in *Mkhize*.[180]

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In *Binneman* it was held that proof of delivery of the letter to the appropriate post office was sufficient, whether or not it was collected by the debtor while in *Mkhize* it was held that further steps should be taken by the provider if it knew from the track and trace report that the registered letter had not been collected by the debtor.[181]

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176 As highlighted in Chapter 3 of this study.
177 *Sebola v Standard Bank of South Africa Limited* para 79. Otto (2016) 121.
178 Govender and Kelly-Louw 2018 *PER / PELJ* 35.
179 Fuchs "The Impact of the National Credit Act 34 of 2005 on the Enforcement of a Mortgage Bond: *Sebola v Standard Bank South Africa* 2012 5 SA 142 (CC)" 2013 *PELJ* 378.
180 *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC) and *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD).
181 *Nedbank Ltd v Binneman* para 4, 6 and 7; *Absa Bank Ltd v Mkhize* para 19 and 37.

4 5 5 *Nedbank Limited v Binneman*

Nedbank Limited v Binneman[182] was the first post *Sebola* case and was heard within one week after the latter. It was the case in which the track and trace report showed that the registered postal item had been dispatched by the provider and was sent to and received by the correct post office. However, it was returned to the bank because the consumer did not collect it.[183] The question was whether or not the bank was entitled to default judgment. The court held that *Sebola* did not overrule *Rossouw*[184] and that in accordance with *Rossouw*, the risk of non-receipt of the section 129 notice sent by registered post rested with the consumer and once delivery by registered post to the chosen *domicilium* was shown, together with proof that the notice reached the correct post office as required by *Sebola*, this evidence would ordinarily constitute sufficient proof of delivery.[185] Despite the fact that the section 129 notice was returned to the provider because the consumer had not collected the registered item, the requirements as set out in *Sebola* were met and the notice was properly delivered as provided by the NCA.[186] The risk of non-receipt rested with the consumer. As a result, default judgment was granted against the consumer.

4 5 6 *Absa Bank Limited v Mkhize*

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In the second of the cases post *Sebola*, namely *Absa Bank Ltd v Mkhize*[187] the court held that proof that a registered letter had reached the correct post office was insufficient to show delivery of a section 129 notice to a consumer if there was evidence that the consumer did not collect the notice. Thus, registered post was not the most reliable method to prove delivery of a section 129 notice. Providers had to provide reliable evidence that the notice probably came to the consumer's attention.[188]

The court held that ordinary mail was more reliable than registered mail, since the percentage of registered mail that was returned undelivered was much higher than ordinary

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182 2012 5 SA 569 (WCC).
183 *Nedbank Ltd v Binneman* para 2.
184 *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA).
185 *Nedbank Ltd v Binneman* para 8; Robbins "Life after *Sebola*: Financial Law- National Credit Act" 2013 (November) *Without Prejudice* 54.
186 *Nedbank Ltd v Binneman* para 8; Robbins 54.
187 2012 5 SA 574 (KZD).
188 *Absa Bank Limited v Mkhize* para 12 and 20.

mail. This view differs from the conclusions in *Sebola* that registered mail is more reliable than ordinary mail. Fuchs[189] agrees with the viewpoint in *Mkhize* that held that when a section 129(1) notice was sent with registered post and the delivery was unsuccessful due to the consumer not collecting the letter, "there is a high degree of probability that the consumer has avoided delivery."[190] Consequently, the reason registered mail will frequently be returned undelivered might be the consumer's avoidance tactic, which places a provider in a difficult position. It is therefore argued that the Constitutional Court in effect left a door open for consumers to avoid receipt of the section 129(1) notice, and thus to circumvent the enforcement of the credit agreement.[191]

The additional compliance requirement of the *Sebola* judgment complicates the interpretation of the NCA in that it does not take into consideration the well-balanced approach required when interpreting an Act. Otto and Otto[192] argue that this additional compliance required by *Sebola* will only cause more complications for providers. Van Heerden and Coetzee support this assertion.[193] Commenting on the *Sebola* judgment both Van Heerden and Coetzee and Otto and Otto[194] conclude that the Constitutional Court went too far with the additional compliance requirement for notice in accordance with section 129(1). They state that the *Sebola* judgment does not contribute to legal certainty in this regard.[195] This is confirmed by the contradictory high court decision in *Mkhize*.[196]

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It became apparent that an intervention by the legislature was required to revise section 129 in order to prevent providers from becoming reluctant to grant credit and to minimise an increase in the costs of credit that could arise because of the additional burden. Such revision would also contribute to legal certainty and prevent an unnecessary evidential burden. Otto and Otto accept that consumer protection comes at a price but argue that after *Sebola* this protection is stretched to breaking point.[197] It seems that the Constitutional Court in the *Sebola*

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189 Fuchs 2013 *PELJ* 388.
190 Fuchs 2013 *PELJ* 390.
191 *Ibid*.
192 Otto and Otto *The National Credit Act Explained* (3rd ed) (2013) 117-118.
193 Van Heerden and Coetzee "Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: verwarrende verwarring oor voldoening" 2012 *Litnet (Akademies) Regte* 286.
194 Otto and Otto (2013) 117-118.
195 Van Heerden and Coetzee 2012 *Litnet (Akademies) Regte* 286; Otto and Otto (2013) 117-118; Fuchs 2013 *PELJ* 388.
196 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZN) paras 34, 35, and 66.
197 Otto and Otto (2013) 118. See also Van Heerden and Coetzee 2012 *Litnet (Akademies) Regte* 286.

case lost sight of the requirement that a balanced approach should be followed in interpreting the NCA and leaned in favour of consumers.[198] The interests of both the provider and the consumer should always be equally balanced so that both parties would enjoy equal protection.[199]

In *Mkhize*[200] Olsen AJ held that there had not been compliance with section 129 and postponed the default judgment applications *sine die*, reserving the question of costs. The court also made orders that the provider had to comply with before the proceedings could resume. As to the exact manner of service of section 129(1) notices, the court found it convenient to leave all options provided for by section 65(2) open, including the use of registered post. The court held that where the consumer had not chosen one of the modes set out in section 65(2), any were available to the provider.[201] The court suggested, for example, that in addition to being sent by registered post the section 129 notice should also be sent by ordinary post to the selected address and "any other address which may appear to hold out a prospect of delivery to the consumer."[202] This placed a clear additional burden on the provider.

Distinguishing this case from the *Sebola* case the court held that given how registered post operated, the selection of the point when a registered letter reached the consumer's post office could well have been significant in the *Sebola* case but in the ordinary case, where the letter reached the correct post office, the selection of that point in the process would be entirely arbitrary but for the fact that it could be proven that it reached the correct post office. There was, therefore, no justification for a finding that the legislature intended that the provider's obligations under section 129(1) be discharged when the letter reached the consumer's post office. It was not permissible for the court to reach a conclusion that the effect of the *Sebola* case was that the court could ignore conclusive evidence that the section 129 notice did not reach either the consumer or the consumer's address beyond the post office and that compliance with the section was proven. Positive proof of the fact that the notice did not reach the consumer surpassed any conclusion that could be drawn from the facts, which suggested that the notice ought to have reached the consumer. If one knew for a fact that the section 129

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198 See Otto and Otto's (2013) 8 statement that a provider also has legal interests that are entitled to protection.
199 Fuchs "The Impact of the National Credit Act 34 of 2005 on the Enforcement of a Mortgage Bond: *Sebola v Standard Bank South Africa* 2012 5 SA 142 (CC)" 2013 *PELJ* 390.
200 2012 5 SA 574 (KZD).
201 *Absa Bank Ltd v Mkhize* para 51.
202 *Absa Bank Ltd v Mkhize* para 73.

notice did not reach the consumer, then evidence which could have gone the other way in other circumstances became irrelevant, a fact the court was aware of in *Sebola*. It was impossible to be satisfied that the notice reached the consumer if one knew in fact that it did not do so because it was returned to the provider.[203]

The *Mkhize* case did not follow the *Binneman* decision and effectively held that *Sebola* did overrule *Rossouw*. In the *Mkhize* case, the court held that conclusive evidence that the section 129 notice did not reach the consumer or the consumer's address, could not be ignored and was not irrelevant as was held in the *Rossouw* and *Binneman* cases.[204] It found that in terms of *Sebola*, actual notice to the consumer was in fact the standard as set by section 129(1) and proof showing that the notice did not reach the consumer overrode any conclusion or inference, which could be drawn from the facts that suggest the notice ought to have reached the consumer.[205]

4 5 7 Notice that does not come to the attention of the consumer

4 5 7 1 A consumer gives dysfunctional address at own risk

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The facts in *Edwards v FirstRand Ltd t/a Wesbank*[206] were that the appellant Edwards and the respondent Wesbank concluded an instalment sale agreement for the purchase of a motor vehicle. After Edwards had fallen into arrears, the motor vehicle was attached subsequent to the cancellation of the agreement and summary judgment having been granted. Wesbank claimed the shortfall between the amount outstanding and the selling price of the vehicle. A notice in accordance with section 127(2) of the NCA was dispatched by ordinary post to Edwards using the address he furnished in the credit agreement as his *domicilium citandi et executandi* address. Edwards, however, knew that there was no street delivery of post at this address. At the hearing of the case for the determination of the amount of damages to be paid (the shortfall) Edwards' only defences were that the bank had failed to comply with section 127 of the NCA and that the vehicle had not been sold for the best price possible.

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203 *Absa Bank Ltd v Mkhize* para 51.
204 *Supra*.
205 *Absa Bank Ltd v Mkhize* para 53.
206 2017 1 SA 316 (SCA), 2016 4 All SA 682 (SCA).

The court of first instance held that this conduct was unreasonable and that the non-receipt of the notices was therefore no defence. On appeal to the Supreme Court of Appeal Cachalia JA pointed out that the provisions of section 127 of the NCA were considered by the Constitutional Court in the case of *Baliso v FirstRand Bank Ltd t/a Wesbank.*[207] The majority of the court held *obiter* that there was much force in the argument that it was illogical to make a distinction between the manner of giving notice under section 127(2) and that required under section 129(1). Based on the ordinary grammatical meaning of the words used in section 127(2), registered mail was not what the legislature had in mind when it used the words "give the consumer written notice." It would be advisable to send the notice in terms of section 127(2) by registered mail but that was not what the law required. From the evidence adduced, it was clear that the bank did send a notice in accordance with section 127(5) to the address furnished by Edwards. He did not receive it due to his unreasonable conduct in providing an address where such notice would not be delivered. The risk of non-receipt was Edwards' due to his unreasonable conduct. The appeal was accordingly dismissed.

The 2014 Amendment Act came into effect on the 13th of March 2015. Judgment was handed down in this matter on the 30th of September 2016. However, the case related to an agreement concluded in 2009 and enforcement thereof which occurred due to default on the part of the consumer in 2011. Therefore this decision was reached without taking into account the effect of the 2014 Amendment Act.

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4 5 7 2 Kubyana v Standard Bank of South Africa Ltd

4 5 7 2 1 Facts

The case of *Kubyana v Standard Bank of South Africa Ltd*[208] likewise deals with the interpretation of section 129(1) of the NCA. The issue is steps which the provider is required to take to ensure that a notice of default has reached a consumer before commencing litigation and the facts which a provider must prove to satisfy a court that it has discharged its obligation to effect proper delivery.[209]

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207 2017 1 SA 292 (CC), 2016 10 BCLR 1253 (CC).
208 2014 3 SA 56 (CC), 2014 ZACC 1 (20 February 2014).
209 See also *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA).

The facts of the case were that Kubyana and the respondent Standard Bank concluded an agreement governed by the NCA in terms of which the applicant purchased a motor vehicle and was obliged to pay the purchase price in monthly instalments. The applicant chose an address as his *domicilium citandi et executandi* for purposes of all notices and correspondence sent by the respondent in relation to the instalment sale agreement. Thereafter the applicant defaulted on his credit repayments on a number of occasions. After consistently remaining in arrears, the respondent sent a notice in accordance with section 129(1) of the NCA by registered mail to the specified address. The applicant failed to collect the notice from the post office, after the post office notified him twice that he had documents for collection. The post office returned the unclaimed section 129 notice. Subsequently, the respondent issued summons. The applicant argued that the respondent did not comply with its obligations in terms of section 129, as he did not receive the notice as was evident from the return of the notice to the respondent by the post office.[210]

4 5 7 2 2 Submissions by the parties

From the outset, the applicant argued that the respondent had breached section 106 of the NCA by impermissibly debiting his account with insurance premiums and that the proceedings were unfair and in violation of section 34 of the Constitution. Furthermore, the applicant argued that if there was evidence that a section 129 notice was sent by registered post but was returned to the provider unclaimed, this showed that there had not been proper delivery as required by the NCA as it demonstrated that the notice had not come to the attention of the consumer for whom it was intended.[211] That meant that a court hearing the dispute had to adjourn the proceedings as contemplated in section 130(4)(b) of the NCA and could not grant judgment.[212]

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The applicant relied on sections 8(3), 32(1)(b) and 39(2) of the Constitution and argued that he was entitled to information held by another person if that information was required for the exercise or protection of his rights. Therefore, his constitutional right to receive information was infringed when he did not receive delivery of the section 129 notice, as that notice contained information necessary for the exercise of his rights under the Act.[213]

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210 *Kubyana v Standard Bank of South Africa Ltd* para 3.
211 *Kubyana v Standard Bank of South Africa Ltd* para 10.
212 *Kubyana v Standard Bank of South Africa Ltd* para 10
213 *Kubyana v Standard Bank of South Africa Ltd* para 11.

The court admitted SERI as a friend of the court. SERI submitted that given the decision in *Sebola*[214] the crucial question for determination in this dispute was whether the section 129 notice came to the attention of the consumer. In light of this, the reason the notice did not reach the consumer was irrelevant, for the NCA did not require an enquiry into subjective factors such as a consumer's culpability for not receiving notices.[215] SERI further contended that it was clear that the section 129 notice did not reach the applicant. It was never collected by the applicant from the post office and was returned to the respondent unclaimed. Therefore, there was no compliance with section 129 of the NCA. This argument seems entirely skewed. In not considering the reasons for the non receipt the consumer could, as in this case, entirely delay proceedings by causing the non delivery of the notice to themselves with no recourse for the provider.

The respondent argued that once it was proven that the section 129 notice was sent by registered mail to the correct branch of the Post office, the provider could credibly aver receipt of the notice by the consumer.[216] This satisfied the requirements of the NCA. The burden of rebuttal then shifted to the consumer to assert that the notice did not reach her and to invite the court to make a finding in relation thereto. To place additional requirements on the provider would impose too onerous a burden and would afford consumers the undue advantage of being able to ignore validly sent notices with liberty.[217]

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4 5 7 2 3 Decision of the Constitutional Court

The Constitutional Court held that section 129 of the NCA had to be interpreted with due regard to its purpose and within the context.[218] This general principle was buttressed by section 2(1), which expressly required a purposive approach to the statute's construction. Furthermore, the NCA had to be understood holistically and interpreted within the relevant framework of constitutional rights and norms. However, that did not mean that ordinary meaning and clear language could be discarded.[219]

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214 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC).
215 *Kubyana v Standard Bank of South Africa Ltd* para 14.
216 *Kubyana v Standard Bank of South Africa Ltd* para 12.
217 *Kubyana v Standard Bank of South Africa Ltd* para 13. The facts of *Naidoo v Standard Bank of South Africa Ltd* 2016 ZASCA 9 (9 March 2016) should also be considered in this matter.
218 *Kubyana v Standard Bank of South Africa Ltd* para 73.
219 *Kubyana v Standard Bank of South Africa Ltd* para 74.

The court upheld the decision of the High Court and found in favour of the respondent. Mhlantla AJ found that under section 129 of the NCA, a provider wishing to enforce a credit agreement had to deliver a notice to a consumer setting out the consumer's default and drawing the consumer's attention to his or her rights.[220] This was an essential component of the NCA's efforts to achieve non-litigious resolution of disputes. In order to effect delivery, the provider had to take those steps that would bring the notice to the attention of a reasonable consumer. When a consumer had elected to receive notices by way of post, a provider should prove (i) dispatch of the notice by way of registered mail; (ii) that the notice reached the correct branch of the post office; and (iii) that the notification from the post office requesting that the consumer collect the section 129 notice was sent to the chosen address. If a provider had taken these steps it would generally have discharged its obligations unless, in the circumstances, the section 129 notice would still not have come to the attention of a reasonable consumer.[221]

Jafta J wrote separately on the interpretation of section 129(1) of the NCA and in order to clarify what the Constitutional Court in *Sebola* previously said about that provision. Both Mhlantla AJ and Jafta J concluded that the NCA did not allow consumers to frustrate the delivery of section 129 notices by ignoring notifications from the post office. The respondent had done all that was required of it by the NCA. Despite having gone through a full trial, the applicant failed to provide an explanation as to why he did not respond to the notifications from the post office.[222] There was therefore no evidence before the court showing why it was reasonable for the applicant not to have taken receipt of the section 129 notice. The court granted leave to appeal but unanimously dismissed the appeal with no order as to costs.[223]

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4 5 7 2 4 Comment on the decision

The *Kubyana* matter was heard and decided prior to the 2014 Amendment Act came into effect. In this context the judgment was lauded as influential in balancing the rights of the providers and consumers under the NCA.[224] The decision made it clear that there was no obligation on the provider to use additional measures to ensure that the notice was brought to the subjective

220 *Kubyana v Standard Bank of South Africa Ltd* para 54.
221 *Kubyana v Standard Bank of South Africa Ltd* para 55.
222 *Kubyana v Standard Bank of South Africa Ltd* para 94.
223 *Kubyana v Standard Bank of South Africa Ltd* para 100.
224 Govender and Kelly-Louw 2018 *PER / PELJ* 27.

knowledge of the consumer.[225] The court endorsed the decision in the *Binneman*[226] case and decided that all that was expected of a provider was to send the notice properly to the address chosen by the consumer. Beyond ensuring that the notice was sent to the correct post office, there was no further expectation on providers to bring the notice to the subjective knowledge of the consumer as this would impose an excessively onerous standard of performance and afford consumers the advantage of being able to ignore valid notices. It could be expected of a reasonable consumer to collect his post.[227] The consumer could not frustrate the process by ignoring notices from the post office. In such a case, a court could as well hold that there was fictional fulfilment of the requirement of delivery of a notice. Without an acceptable explanation why the consumer did not receive the notice, for example that he was incapacitated in hospital, the provider could proceed and enforce the credit agreement if the notice was sent properly.[228] There is accordingly a duty on consumers to receive notices and not deliberately fail to collect and rely on this failure to attempt to avoid legal action.[229] The judgment coupled with the *Sebola* judgment paved the way for the 2014 amendment and addition to section 129.

The pendulum movement between pro provider and pro consumer approaches continued pre the 2014 Amendment Act.

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4 5 8 Other cases

In *Balkind v Absa Bank*[230] the court disagreed with the reasoning adopted in the *Binneman* case and agreed with that applied in the *Mkhize* case. The facts are briefly that Balkind, along with another person, bound himself as surety and co-principal debtor jointly and severally with a close corporation in favour of Absa. Under the suretyship agreement, Balkind chose his former residential address, in East London, as his *domicilium citandi et executandi* for the purposes of all notices and correspondence relating to Absa. He then sold his members interest in the close corporation and moved to Johannesburg without notifying Absa of his change of *domicilium* address. The close corporation was indebted to Absa and was unable to pay the amount owed. Absa instituted action against Balkind and the third party in their capacity as sureties and co-

225 *Kubyana v Standard Bank of South Africa Ltd* para 13.
226 *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC).
227 *Kubyana v Standard Bank of South Africa Ltd* para 33; see also Otto (2016) 123.
228 *Kubyana v Standard Bank of South Africa Ltd* paras 80 - 82. See also Otto (2016) 123.
229 *Kubyana v Standard Bank of South Africa Ltd* para 101.
230 2013 2 SA 486 (ECG).

principal debtors with the close corporation. Prior to doing so, Absa had a section 129 notice sent to Balkind by registered post to the *domicilium* address as chosen in the deed of suretyship. The track and trace report showed that it reached the correct post office. The summons was also served on that same address. Despite the fact that in terms of the suretyship agreement Balkind was obliged to notify Absa of any change to his *domicilium* address, he did not do so and Absa served the section 129 notice and summons on the address on record. Consequently, the section 129 notice and the summons never came to his attention. Balkind only became aware of the notice and summons when the writ of execution was served on him at his address in Johannesburg. As a result he applied for rescission of the default judgment. The question was whether these facts constituted compliance with the requirements of delivery as set out in the *Sebola* case.

It was held that what was required in order to deliver the section 129 notice was that reasonable steps were taken to ensure that the notice reached the consumer who would reasonably collect the item from the post office. However, if there was proof that the notice (without the consumer being at fault) was not delivered or did not come to the attention of the consumer, the summons would be premature. It was held that the section 129 notice was not brought to the attention of the consumer as required by the *Sebola* judgment.[231] If the provider had taken certain extra measures to ensure the notice came to the attention of the consumer but the notice sent using registered post was nevertheless returned to the provider uncollected by the consumer, the court could find that the consumer had evaded service of the notice on purpose. In such an instance, the court could find the institution of legal proceedings against the consumer was not premature in accordance with the NCA.[232]

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KwaZulu-Natal court was bound by the *Mkhize* decision, the Western Cape by the *Binneman* decision and the Eastern Cape by *Balkind.* A High Court, provided it was a Full Bench judgment, in one province is not bound by a decision of the court in another province. It is bound only by its own previous Full Bench judgments and judgments of the Supreme Court of Appeal and Constitutional Court.

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231 *Balkind v Absa Bank* para 60 - 62.
232 *Balkind v Absa Bank* para 64.

4 5 9 Section 130 time frames

Section 130 of the NCA highlighted earlier in this Chapter and detailed in Chapter one deals with debt enforcement procedures in a court. In accordance with section 130 the consumer should be at least twenty (20) business days in default and ten (10) business days should have passed from the date on which the section 129(1)(a) notice was delivered, before the provider could approach the court. A "business day" is defined as excluding the first day and including the last day of the event to occur, and excluding Saturdays, Sundays and public holidays.[233] The period before the section 129(1)(a) notice can be sent may be extended by means of a provision in the credit agreement. In *Standard Bank v Rockhill*[234] the court held that the parties could contractually agree in the credit agreement that longer periods would be applicable than the minimum periods prescribed in section 130(1)(a).[235]

Section 129(1)(b), read with section 130(1), creates the impression that in respect of a consumer who has opted to apply for debt review, it is always a prerequisite for enforcement that a section 86(10) notice should first have been delivered and *inter alia* that ten (10) business days should have lapsed since delivery of such notice. It may, however, be asked if, in the context of a consumer who opted to apply for debt review, it is indeed always necessary to give a section 86(10) notice prior to enforcement. It should further be noted that although section 130(1)(a) requires ten (10) business days to elapse after delivery of the section 86(10) notice, it does not require any response by the consumer as in the case of a section 129(1)(a) notice. It may therefore be questioned as to what the purpose of this requirement is in respect of a section 86(10) notice.[236] One should bear in mind that the running of the ten days after delivery commences at different point depending on the method of delivery. Upon hand delivery the ten days can commence running immediately, however, on dispatch of a notice by registered mail the period cannot start running as the consumer would not be aware of or even have received notice to collect the notice. This additional time frame must be taken into account when considering the impact on delaying procedures and or the jeopardy it places the assets in. This extra time is indicating by Rule 9 of the Magistrate's Court Rules which provides an additional four days for "service" by registered mail.[237]

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233 Section 2(5).
234 2010 5 SA 252 (GSJ).
235 *Standard Bank v Rockhill* paras 14 - 18.
236 Van Heerden and Coetzee 2011 *PER* 37.
237 Rules Board for Court of Law Act 107 of 1985.

The period of 10 (ten) and 20 (twenty) days referred to in section 129 of the NCA may run concurrently — the provider need not wait 30 (thirty) days before going to court, only twenty days need to have elapsed. The provider may act 20 (twenty) business days after the breach of contract has occurred, even if the default notice was delivered within these 20 (twenty) days, provided that 10 (ten) days have elapsed since delivery of the notice.[238] These provisions, to some extent, are commendable as they seek to enhance procedural fairness in debt enforcement.

4 6 IS COMPLIANCE WITH SECTION 129(1)(a) A PREREQUISITE FOR DEBT ENFORCEMENT?

It is not clear why the NCA used the word "may" in section 129(1)(a). It is submitted that the word "may" does not refer to mandatory steps to be taken in a normal literal context, but rather implies that if the provider so desires, he can send a notice to the consumer. The provisions of section 129(1)(b) and section 130(1) if read together clearly indicate that before the provider can enforce the credit agreement he or she must have complied with the provisions of section 129(1)(a).[239] Van Heerden[240] is of the view that when a consumer is in default, regardless of the type of credit agreement or relief sought, the provider must deliver a section 129(1)(a) notice. Boraine and Van Heerden[241] are of the opinion that in all instances where debt enforcement is required to enforce a credit agreement and where the NCA is applicable, a section 129(1)(a) notice must be provided to the consumer before the enforcement commences. It is unfortunate that the interpretation of "may" was not considered by the court in the important decision of *Nedbank v National Credit Regulator*.[242] The court only indicated that "an analysis of the relevant provisions is required."[243]

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238 Sharrock *Business Transactions Law* (2016) 703.
239 Stander 22.
240 Van Heerden in Scholtz *Guide to the National Credit Act* (2009) 12.4.2.e.
241 Boraine and Van Heerden "The Conundrum of the Non-compulsory Compulsory Notice in terms of section 129(1) (a) of the National Credit Act" 2011 *SAMLJ* 51.
242 2011 3 SA 131 (SCA).
243 *Nedbank v National Credit Regulator* para 8. See also *Absa Bank Ltd v de Villiers* 2009 5 SA 40 (C); *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) and *Munien v BMW Financial Services* (Pty) Ltd 2010 1 SA 549 (KZD). The courts were of the view that the sending of the section 129(1)(a) notice was mandatory before legal procedures could be instituted to enforce a credit agreement.

Whether the word "may" was intentionally included in the provisions of section 129 by the legislature or whether it was an oversight remains unclear. However, it is submitted that in accordance with the NCA, the word "may", actually means "must" and "may" should not be interpreted literally. It is further submitted that the legislature should amend section 129 by replacing "may" with "must" in order to create legal certainty.[244] It is the context within which the word is used in section 129 that leads to the conclusion that it is mandatory.[245] If the legislation through the NCA sought to deprive the provider of its common law right to cancel summarily the agreement due to breach, it would have done so in express terms, unless of course the legislator was not aware of this right. Likewise, the parties can contract out of the right should they choose to do so. However, this is unlikely as the NCA's predecessor had specific provisions limiting the provider's rights to terminate, which have not been carried over to the NCA.[246]

There is no time limit for expiry of a notice given under section 129(1)(a) or section 86(10). The provider may institute legal proceedings at any time after the expiry of the prescribed periods in that the notice remains effective until the consumer has paid the arrear amount.[247] The NCA does not impose any duty on the consumer to respond or to act upon either of the notices. If the consumer does respond, but after expiry of the 10 (ten) day period, the provider is not obliged to consider the response and its rights are not affected.[248] The word "may" in section 129(1) of the NCA is misleading in that the provider may not commence any legal proceedings to "enforce" the agreement unless the section 129(1)(a) notice has been provided. The notice is therefore a *sine qua non* for enforcement of the debt. This approach was followed in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*[249] where it was held that the notice was prerequisite to commencing legal proceedings. The court in *Standard Bank of SA Ltd v Van Vuuren*[250] and *Nedbank Ltd v National Credit Regulator*[251] described the notice as a "mandatory requirement". The consumer may raise an exception that the provider has not followed the steps in section 129(1)(a) of the NCA if the notice has not been sent. However, even if such an exception is upheld, it is not fatal to the provider's cause of action as it would

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244 Stander 23.
245 Eiselen 2012 *THRHR* 397.
246 *Ibid*.
247 *Ibid*.
248 Otto "Mora Interest, Consensual Interest, Incidental Credit Agreements and the National Credit Act: *Voltex (Pty) Ltd v SWP Projects CC* 2012 6 SA 60 (GSJ)" 2014 *TSAR* 406.
249 2009 2 SA 512 (D).
250 2009 5 SA 557 (T) 562C.
251 2011 3 SA 581 (SCA).

merely have a dilatory effect in that the court would be obliged to postpone the hearing in terms of section 130(4)(b).[252]

The court will not give judgment unless there is evidence that there was 10 (ten) days' notice, that the consumer was informed of his/her rights, that the consumer failed to approach or exercise any of their rights, that the consumer is more that 20 (twenty) days in *mora* (delay), that the consumer did not make any attempt to respond to the section 129 letter and there is no debt review pending.[253] In *Baliso v FirstRand Bank Ltd t/a Wesbank*[254] it was held that a summons may well be excipiable if it does not meet the standard set down in the *Sebola*[255] case as well as in *Kubyana.*[256]

Thus, under the current interpretation of "may" a provider may elect not to send a section 129(1)(a) notice to a defaulting consumer, they however, then would not be entitled to proceed with enforcement or cancellation of the agreement. The election is still that of the provider.

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252 Sharrock 117.

253 Section 130(3) of the NCA provides the basis for this – see also *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC), 2012 8 BCLR 785 (CC) and *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).

254 2017 1 SA 292 (CC), 2016 10 BCLR 1253 (CC). Under section 130(3)(a) of the NCA compliance with the notice requirements of *inter alia* section 127(2) was a prerequisite for "determining the matter". When a matter was "determined" depended on whether the matter was unopposed and default judgment was sought or whether it was opposed and judgment was to follow only upon hearing evidence at a trial. In an opposed matter the consumer may give evidence to contradict the provider's evidence. The guidance in *Sebola* was restricted to unopposed matters where default judgment was sought and was not exhaustive of the manner in which notice could probably be brought to the attention of a reasonable consumer. For the purpose of section 127 what was required before a court could determine a matter was proof that the section 127(2) notice was probably received by or came to the attention of a reasonable consumer. This is an issue that in an opposed matter must be determined by way of evidence at the trial.

255 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC), 2012 8 BCLR 785 (CC).

256 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).

4 7 THE IMPACT OF THE PRESCRIPTION ACT OF 1969 ON THE NOTICE IN TERMS OF SECTION 129(1)(a)

4 7 1 *Investec Bank Limited v Ramurunzi*

4 7 1 1 Background

The interplay between the NCA and the Prescription Act[257] came under the spotlight in this case. The Supreme Court of Appeal had to decide on the interpretation of sections 129 and 130 of the NCA read with the relevant provisions of the Prescription Act. The bone of contention was whether the running of prescription in relation to debt was interrupted by service of summons even though a notice in accordance with section 129(1)(a) of the NCA was delivered to the consumer after the prescription period had lapsed. In other words, does summons interrupt prescription in cases where the provider has not complied with section 129(1)(a) notice requirements?[258]

In *Investec Bank Ltd t/a Investec Private Bank v Ramurunzi*[259] the court held that if a provider instituted action to enforce payment of a debt arising from a credit agreement without first delivering the required notice of default in terms section 129(1)(a) of the NCA, the action was not void, subject to the court making an order in accordance with section 130(4)(b) as to how the proceedings were to be continued. A consequence of this is that the running of prescription in respect of the debt owed under a credit agreement is interrupted by service of the summons even though the required notice in terms of section 129(1) (a) has not been provided.[260]

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4 7 1 2 Facts

In 2003 the plaintiff Investec Bank issued a credit card to Ramurunzi, the defendant. In December 2004, the bank then financed his purchase of a motor vehicle. The credit card was linked to a journey card for the motor vehicle. In March 2008, the bank sent a notice in

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257 Act 68 of 1969.
258 *Investec Bank Ltd t/a Investec Private Bank v Ramurunzi* para 2.
259 2014 4 SA 394 (SCA), 2014 3 All SA 34 (SCA).
260 Sharrock 702.

accordance with sections 123 and 129 of the NCA (first notice) informing Ramurunzi that he had defaulted, that his credit facility had been suspended and that the bank was entitled to claim the balance outstanding in respect of the motor vehicle. The notice was sent by both ordinary mail and registered mail to the address Ramurunzi had chosen as his *domicilium citandi et executandi* address when he first entered into a credit agreement with the bank.

On 1st of August 2008 the bank served summons at the same address seeking judgment against Ramurunzi for payment of a sum of money with the return of the cards issued by the bank, together with interest and costs. Ramurunzi contended that he had changed his address and that the summons had been served on his previous address.[261] He also advised that he had sent notice of his change of address to the bank in August 2008. In September 2008, the bank applied for summary judgment and Ramurunzi opposed the judgment on the basis that the bank had not complied with the section 129 notice.[262] Summary judgment was refused and Ramurunzi was granted leave to defend the matter. When the parties held a pre-trial conference in April 2012 they agreed for the court to order the matter to be adjourned under section 130(4)(b) of the NCA to allow the bank to send another section 129 notice to Ramurunzi. The bank sent this notice by email in April 2012 (the second notice).[263]

4 7 1 3 Special plea of prescription

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At the trial in the High Court Ramurunzi raised a special plea of prescription in respect of the claim. The basis for the plea was that in spite of summons having been served on the defendant in August 2008, notice in terms of section 129(1)(a) of the NCA (second notice) was only provided to Ramurunzi in April 2012, more than three years after the summons was served, as a consequence of which the claim had prescribed.[264] The bank opposed the special plea on the basis that on 19th of April 2012 an order, taken by agreement between the parties, was granted by the High Court in accordance with which the matter was adjourned as envisaged by section 130(4)(1)(b) of the NCA and the bank was required to deliver a notice in terms of section 129(1) by way of email to Ramurunzi before the matter was resumed.

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261 The question whether Ramurunzi had notified the bank of his change of address was in dispute.
262 *Investec Bank Ltd v Ramurunzi* para 7.
263 *Investec Bank Ltd v Ramurunzi* para 8.
264 *Supra* para 2

There was a dispute between the parties as to whether the first notice in accordance with section 129(1)(a) was "delivered" to Ramurunzi before summons was served in August 2008. The parties, however, sought the High Court to determine only the effect of the notice provided to Ramurunzi in April 2012 (the second notice). Ramurunzi argued that because the section 129 notice had been sent to him only after a period of three years had elapsed since the debt became due, the claim had prescribed.[265]

4 7 1 4 Decision of the High Court

Savage AJ held that the summons was void since it did not comply with the peremptory provisions of sections 129 and 130 of the NCA and accordingly upheld the special plea of prescription. The court also held that the notice served pursuant to the court order made in terms of section 130(4)(b) of the NCA did not retrospectively validate the summons as Ramurunzi had a vested right to plead prescription. Although the NCA was silent on the effect on prescription of non-compliance with section 129, the High Court held that the legislature could not have intended compliance to have retrospective application.[266]

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The court also held that service of process upon the debtor for purposes of the Prescription Act should be undertaken in a legally effective manner. Where service of process was premature under a statutory provision, legal proceedings were not effectively commenced and prescription was not interrupted.[267] The NCA did not state that compliance with the court's order in terms of section 130(4) applied retrospectively to the date of service of the summons.[268] The High Court thus concluded that in the absence of clear language to this effect, it had to be presumed that the legislature did not intend such compliance to have retrospective application.

The High Court found that the service of summons in proceedings instituted under the NCA only interrupted the running of prescription upon the provisions thereof having been complied with. The date on which the court should determine whether the debt had prescribed was the date on which there had been proper compliance with the NCA.[269] The notice provided

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265 *Investec Bank Ltd v Ramurunzi* para 9.
266 *Supra*.
267 *Investec Bank Ltd v Ramurunzi* para 16. The court applied the principles enunciated in *Evins v Shield Insurance Company Limited* 1980 2 SA 814 (A).
268 *Investec Bank Ltd v Ramurunzi* para 17.
269 *Investec Bank Ltd v Ramurunzi* para 27.

by the bank to the defendant in April 2012 in terms of section 129(1)(a) was only provided to him more than three years after the service of summons and more than three years after the period of prescription of the claim. The bank could only enforce its claim against Ramurunzi if it was able to prove that a notice was provided to him in accordance with the provisions of section 129 prior to the prescription of its claim.[270]

It was held that actions taken in accordance with a section 130(4) of the NCA were not retroactive nor did they have retrospective effect.[271] This was premised on the trite principle that unless the contrary was clearly indicated by the legislature a piece of legislation only had prospective effect.[272] The court was of the view that compliance with provisions of the NCA which was effected post a section 130(4) adjournment, in circumstances where a debt would have already prescribed under the Prescription Act, would essentially result in the NCA having a retroactive effect. The court was of that view because it found that a contrary interpretation would permit the resurrection of claims which had died a natural death by way of prescription, which the court held was irreconcilable with the intention of the legislator[273] and the prescripts of the NCA.

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The court found, as a result of the peremptory wording of section 129 and 130 and the prospective nature of the NCA, that in the event that a section 129 notice was not delivered to a debtor within three years period from the date on which the debt became due, that debt had prescribed. It found that to be the position irrespective of the service of a summons during the said three-year period. The court found further that the cause of action would not have been completed during the period of the running of prescription and accordingly prescription would not have been interrupted.

This decision therefore stood to change the whole perspective and application of prescription in relation to the NCA and debt.

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270 *Investec Bank Ltd v Ramurunzi* para 29.
271 *Investec Bank Ltd v Ramurunzi* para 13.
272 *S v Acting Regional Magistrate, Boksburg* 2012 1 BCLR 5 (CC).
273 *Investec Bank Ltd v Ramurunzi* para 15.

4 7 1 5 Argument before the Supreme Court of Appeal

Investec obviously aggrieved by the court's finding appealed against the judgment and the order of the court *a quo.* Ramurunzi opposed the appeal and personally litigated and appeared in court, as he had done in the court *a quo* proceedings. The Supreme Court of Appeal had to determine whether the summons was defective because it was not preceded by delivery of a section 129 notice on Ramurunzi. Investec Bank, the appellant, argued that the conclusion by the High Court was inconsistent with the analysis of sections 129 and 130 of the NCA in *Sebola.*[274] The Constitutional Court in *Sebola* per Cameron J held:

> "In my view the notice requirement in s 129 cannot be understood in isolation from s 130. This emerges from three considerations. First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while s 129(1)(b) appears to prohibit the commencement of legal proceedings altogether ('may not commence'), s 130 makes it clear that where action is instituted without prior notice, the Action is not void. Far from it. The proceedings have life, but a court 'must' adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter. The bar on proceedings is thus not absolute, but only dilatory. The absence of notice leads to a pause, not to nullity." [275]

Investec argued that the court *a quo* erred in its finding that irrespective of action being instituted by a provider by way of a summons prior to the lapsing of the three year period, provided for in the Prescription Act, the said summons would not have interrupted prescription unless the provisions of section 129 were complied with within the three year period. This argument was based on the submission that a summons issued prior to a section 129 notice having been delivered was not void but in the absence of compliance by the provider, a court was obliged to adjourn the matter in terms of section 130 and to require certain steps to be taken to ensure compliance, failing which the provider would be precluded from enforcing its claims.[276] The appellant submitted that the summons interrupted the running of prescription in accordance with section 15(1) of the Prescription Act and that the date of compliance with section 129 was not determinative as the summons interrupted prescription.[277]

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The appellant based considerable reliance in the appeal argument on the decision of the Constitutional Court in *Sebola* specifically paragraphs 52 and 53 of Justice Cameron's majority judgment. It argued that the judgment by the court *a quo* was

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274 *Sebola v Standard Bank of South Africa Ltd* 2012 8 BCLR 785 (CC).
275 *Sebola v Standard Bank of South Africa Ltd* para 52 - 53.
276 Appellant's practice note para 8.1.
277 Appellant's practice note para 8.3.

completely at odds with the decision of the Constitutional Court in the *Sebola* matter,[278] which was binding on both the court *a quo* and the Supreme Court of Appeal because of the application of the principle of *stare decisis.* The appellant accordingly was of the view, in light of the *Sebola* judgment and the implications thereof, that the decision by the court *a quo* was incorrect.

It was admitted, on behalf of the appellant, that a summons issued and served prior to compliance with the provisions of section 129 would be flawed and accordingly would necessitate an adjournment in the proceedings in accordance with section 130 of the NCA.[279] It was submitted that this would hold true on the condition that the provider prosecuted its claim under that summons until final judgment in accordance with the requirements of section 15(2) of the Prescription Act, in which event such summons would have interrupted the running of prescription, irrespective of the flaws, which required rectification. It was the appellant's submission that a contrary interpretation would heavily penalise providers while unduly benefitting consumers simply because the consumer's rights were not brought to their attention by way of a section 129 notice prior to the issuing of a summons, which flaw could have been the fault of the consumer and not the provider.[280]

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The respondent's argument before the Supreme Court of Appeal was the same as it was before the court *a quo.*[281] The respondent essentially argued that the provisions of the Act were peremptory failing which the summons would be of no legal force and effect unless the court adjourned the matter in terms of section 130 and compliance was thereafter effected.[282] This argument was based on the principles as set out in the *Evins v Shield Insurance Co Ltd*[283] decision of the then Appellate Division. The respondent aligned himself with the dictum in the *Evins* case which confirmed that a summons issued prematurely was unenforceable[284] and accordingly was ineffective for the purposes of interrupting the running of extinctive prescription due to the non-compliance with a

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278 Appellant's heads of argument para 20.
279 Appellant's heads of argument para 24.4.
280 Appellant's heads of argument para 24.1. See also *CGU Insurance Ltd v Rundel Construction (Pty) Ltd* 2004 2 SA 622 (SCA).
281 Respondent's heads of argument para 6 to 20.
282 Respondent's heads of argument paras 10 - 12.
283 1980 2 SA 814 (A).
284 *Evins v Shield Insurance Co Ltd* 822.

peremptory provision in the Compulsory Motor Vehicle Insurance Act.[285] It was argued that a contrary interpretation would defeat the main purpose of the NCA and would undermine the provisions of section 129, which were designed to be consumer friendly.[286]

4 7 1 6 Decision of the court

The Supreme Court of Appeal held that besides the fact that the finding by Cameron J in *Sebola* was binding on it, it was the only logical analysis of the purpose and effect of section 130(4)(b) of the NCA. Section 130 regulated debt procedures in court and it ensured that any shortcomings in the pre-summons enforcement procedures were rectified for the benefit of the consumer. The consumer was entitled to the opportunity, before the debt could be recovered, to embark on the processes envisaged by the NCA to seek debt counselling or alternative dispute resolution, for example or even to make payment.[287]

The court held further that section 130(4) was unusual for it required a court to pause the proceedings so that the service provider could provide the consumer with the benefit of notice as to his or her options, a notice that should ordinarily be given before a summons is issued and served. It was the consumer who would be prejudiced were he or she not to be given those options. Thus, the proceedings had a life, as Cameron J held, and were not void despite the absence of a section 129 notice. The fact that a court had to make an order as to how the proceedings were to be continued indicated the validity of the summons rather than its nullity.[288] The Supreme Court of Appeal thus held that the purpose of section 130(4)(b) was to ensure that even though a summons had been served, the consumer was still provided with a section 129 notice so that he or she knew what options were available to resolve the matter before the debt was enforced.[289]

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The court noted that Ramurunzi conceded that the summons was valid. He, however, argued that it had no effect until the section 129 notice had been properly delivered, which occurred more than three years after the debt became due. Nonetheless, he could not explain when interruption would occur in the ordinary course of a provider's attempt to enforce a debt.

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285 Act 56 of 1972.
286 Respondent's heads of argument para 19.
287 *Investec Bank Ltd v Ramurunzi* para 22.
288 *Investec Bank Ltd v Ramurunzi* para 23.
289 *Investec Bank Ltd v Ramurunzi* para 25.

He accepted that the section 129 notice would not itself interrupt prescription if delivered before the summons was served.[290]

Lewis JA concluded that the summons interrupted the running of prescription when it was served on Ramurunzi. The High Court could not, however, grant a judgment against him until after adjourning the matter and a section 129 notice was delivered to him. Accordingly, the special plea should have been dismissed and the trial continued. The appeal against the order of the High Court was thus upheld in favour of Investec and replaced the court *a quo's* order with an order that the defendant's special plea that the debt had prescribed was dismissed.[291]

The court agreed with the findings of Justice Cameron in the *Sebola* judgment that the proceedings were not void as suggested by the respondent. In the circumstances where the section 129 notice had not been delivered the proceedings should merely be adjourned in order for compliance to be effected. The court also distinguished the present matter from that of *Evins*[292] as it agreed with the submissions of the appellant that the *Evins* decision was in direct conflict with the decision in the *Sebola* judgment, which judgment was binding on the Supreme Court of Appeal. It was found that the contrary interpretation was the only logical conclusion, which could be reached on the facts of the matter due to the provisions of the NCA, which specifically provide for an adjournment of the proceedings in accordance with section 130 in order to ensure compliance.[293]

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4 7 1 7 Comment on the decision

This case applied the principles enunciated in *Sebola* that where a summons was issued and served on the defendant prior to the delivery of a valid section 129 notice as prescribed by the NCA, prescription was interrupted. The decision clarified the issue in relation to interruption of prescription and section 129 notice. The court's finding that where a provider instituted action to enforce payment of a debt arising from a credit agreement, the running of prescription in respect of the debt was interrupted by service of the summons even though a notice in terms

290 *Supra*.
291 *Investec Bank Ltd v Ramurunzi* paras 26 and 28.
292 *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A).
293 *Supra*.

of section 129(1) was delivered to the consumer only after the prescription period has elapsed, is commendable.[294] Had the Supreme Court of Appeal on this matter confirmed the High Court decision this would have had negative consequences for providers who made *bona fide* attempts to comply with the section 129 notice. The fact that interruption of prescription is exempt from the section 129 requirements is a relief for providers who could fail at their recovery because a consumer changed an address or because the notice was not "delivered" in accordance with section 129 of the Act.

At present, the Supreme Court of Appeal's decision remains the final authority on the matter, and it seems unlikely that this will be challenged again. The matter was not taken up to the Constitutional Court. The only possible changes to the current status *quo* on the decision would be legislative amendment.

4 7 1 8 Implications of the decision

It is ultimately the responsibility of the legislature to implement policy considerations through legislative amendments. In the event that the legislature envisaged a section 129 notice being a prerequisite to the interruption of the running of extinctive prescription, amendments to the NCA would be necessary.

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The disadvantage of accepting Ramurunzi's argument is that the result would be to enable consumers to avoid their obligations under credit agreements by waiting for the three-year period to lapse, irrespective of being afforded the opportunity to exercise their rights as advised of in the section 129 notice. This could not have been the purpose of the NCA, especially considering the fact that it aims to hold consumers ultimately responsible for their debts. It should nevertheless be acknowledged that a provider is responsible for securing his or her rights and proceeding to "enforce" timeously rather than waiting for the possibility of a prescription defence by the consumer.

The judgment of the Supreme Court of Appeal safeguards against the abuse of the provisions of the NCA to the unfair advantage of a consumer. The judgment also clearly

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294 See Tsusi "The New Approach to s 129 of the National Credit Act: Case Note" 2014 (June) *De Rebus* 38 for examples of cases involving section 129.

explains why the section 129 notice cannot be seen as a pre-requisite for the interruption of prescription and why the legislature included the mandatory adjournment of matters where there was non-compliance with the provisions of the NCA in order to afford the consumer the opportunity of utilizing the avenues available to them as advised in the section 129 notice.

One may consider that a cost order against the provider (or in favour of a consumer) may be applicable in circumstances where a consumer has *bona fidei* not received a section 129(1)(a) notice prior to the service of a summons or court proceedings in order to ensure that such consumers don't suffer unreasonable consequences of such lack of notice and to allow them the opportunity to exercise any rights permitted in terms of the notice without the consequences of the cost of a summons or court proceedings that were in fact premature.

4 7 2 The Prescription Act

The Prescription Act[295] impacts on section 129 of the NCA. This follows from the case of *Ramurunzi* where the discussion regarding a claim prescribing whether a section 129(1)(a) notice had been sent commenced.

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The Prescription Act[296] governs what can be described as "the effect of the lapse of time in creating or destroying rights."[297] Although prescription has a legal effect by the very nature of the running of time, a court is not empowered to *mero motu* raise prescription and take notice thereof.[298] Parties wishing to invoke the principles of prescription need to plead it in the course of the proceedings.[299]

Extinctive prescription, as the phrase indicates, refers to the "the extinction of a title or right by failure to claim or exercise it over a long period."[300] The most significant practical application of extinctive prescription for the purposes of this study is the effect that it has on the extinction of debts, which is specifically dealt with in chapter 3 of the Prescription Act.[301]

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295 Act 68 of 1969.
296 *Ibid.*
297 Garner *et al Black's Law Dictionary* 7th ed (1999) 1201.
298 Section 17(1) of the Prescription Act 68 of 1969.
299 Section 17(2) of the Prescription Act 68 of 1969. The Prescription Act is applicable unless it is inconsistent with another Act of Parliament in which case the other Act will take preference. Section 16(1) of the Prescription Act 68 of 1969.
300 Garner *et al* (1999) 1201.
301 Section 10 - 16 of the Prescription Act 68 of 1969.

The Prescription Act provides various time periods for the prescription of debts, which range from three (3) years to thirty (30) years.[302] Section 11(a)(i) and (ii) and (d) provides the applicable prescription periods for the purpose of this study. Section 11(a)(i) and (ii) indicate that any mortgage bond or judgment debt will prescribe after thirty years; and section 11 (d) provides a prescription period of three years for any other debt.

Extinctive prescription starts to run from the date the debt becomes due[303] subject to provisions requiring the provider to be aware of the debt,[304] have knowledge of the identity of the consumer or having been able to acquire such by exercising reasonable care. Extinctive prescription will continue to run unless interrupted.[305]

4 7 3 Delay or interruption of prescription

The running of extinctive prescription is delayed or interrupted under certain circumstances as indicated in sections 13 - 15 of the Prescription Act. In cases where prescription is merely delayed,[306] the Prescription Act provides that the period of prescription shall not be completed before one (1) year has lapsed after the cessation of the interruption, provided that prescription would otherwise have been completed within the one (1) year period. However, when prescription is interrupted[307] it begins to run afresh after the termination of the interruption.[308]

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302 Section 11 of the Prescription Act 68 of 1969 provides as follows: "The periods of prescription of debts shall be the following:
(a) thirty years in respect of –
(i) any debt secured by mortgage bond;
(ii) any judgment debt;
(iii) any debt in respect of any taxation imposed or levied by or under any law;
(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);
(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);
(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

303 Section 12(1) of the Prescription Act 68 of 1969.

304 Section 12(2) of the Prescription Act.

305 Section 12(3) of the Prescription Act.

306 Section 13 of the Prescription Act of 1969.

307 Section 14 – 15 of the Prescription Act of 1969.

308 Section 15(1) of the Prescription Act.

Davies states that when determining whether a section 15 interruption of prescription is applicable, one should first determine whether a "process" claiming a debt has been served.[309] A "process" is described in the Prescription Act as a petition, notice of motion, rule *nisi*, pleading in reconvention, third party notice referred to in any rule of court and any document whereby legal proceedings are commenced.[310] Thus, a summons would satisfy the requirements of a "process" claiming a debt, which will under normal circumstances interrupt the running of extinctive prescription. What is unclear is if a section 129 notice also constitutes a "process" for the interruption of extinctive prescription of a debt in accordance with the Prescription Act.[311]

A section 129 notice, as already indicated, is a statutory pre-enforcement notice, which is a pre-requisite for a provider to be able to enforce the debt.[312] A section 129 notice however cannot be said to amount to a "process" as defined in the NCA and reinforced by the court in *Ramurunzi* as it does not amount to one of the specifically defined categories in section 15(6) of the Prescription Act. Similarly, it cannot be said that the section 129 notice amounts to a document commencing legal proceedings either. Accordingly, a section 129 notice does not meet the requirements of a "process" in terms of the Prescription Act with the effect that the notice does not interrupt extinctive prescription running against a debt but that it needs to be delivered prior to the summons being issued and served – which is the process which interrupts prescription.[313] Therefore, the time period of default, delivery and period contained in the notice must be considered in light of the prescription time frames to ensure service of any process interrupting prescription occurs within the necessary time frame.

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When determining how to interpret the Prescription Act and NCA there is no assistance provided by the NCA or the regulations thereto. The NCA only deals with the time periods within which a complaint regarding prohibited conduct should be lodged but not prescription of a debt.[314] Schedule 2 of the NCA deals with conflicting pieces of legislation but does not

309 Section 15(1) of the Prescription Act.
310 Section 15(6) of the Prescription Act.
311 Davies *The Influence of the Prescription Act 68 of 1969 on selected aspects of the Notice in terms of Section 129(1)(a) of the National Credit Act 34 of 2005* (LLM-thesis, University of Pretoria, 2014) 11.
312 Section 129 read with section 130 of the NCA.
313 Davies (LLM-thesis, University of Pretoria, 2014) 11.
314 Section 166 of the NCA.

mention the Prescription Act. It is unclear whether this was an oversight or deliberate on the part of the legislature.[315]

4 7 4 Section 126B (1)(b) of the National Credit Amendment Act of 2014

The National Credit Amendment Act of 2014[316] introduced an extraordinary new section into the credit law by way of section 126B (1)(b) of the NCA. Section 126B(1)(b), which came into effect in March 2015, prohibits the collection or revival of a debt that has been extinguished by prescription under the Prescription Act.

Section 126B of the National Credit Amendment Act of 2014 reads as follows:

> "(1) (a) No person may sell a debt under a credit agreement to which this Act applies and that has been extinguished by prescription under the Prescription Act.
> (b) No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies-
> (i) which debt has been extinguished by prescription under the Prescription Act; and
> (ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise." [317]

This section was inserted presumably because consumers, unaware of the law regarding prescription, were held liable for prescribed debts enforced by buyers in their capacity as cessionaries.[318] When section 126B of the NCA is applied it could make a huge difference to the original creditor, and indeed, to the new creditor, whether the debt involves one debtor or many debtors.[319]

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Section 126B (1)(a) of the NCA is aimed at cedents and section 126B (1)(b) at cessionaries. Section 126B may lead to the situation that part only of a debt is sold and the corresponding rights are ceded even though it is trite that a debt may not be ceded in part, as this would result in an additional burden to the debtor to pay multiple creditors.[320] If a debt has become prescribed, there will not be a second creditor to enforce it under section 126B (1)(b) of the NCA.[321]

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315 Davies (LLM-thesis, University of Pretoria, 2014) 11.
316 Act 19 of 2014.
317 "Defaulting Debtor can take the sting out of an existing default judgment by reinstating a credit agreement" https://www.stbb.co.za/wp-content/uploads/2014/10/stbb_lu1-2014_s2.pdf (accessed 11-12-2017) 1 -3.
318 Otto (2016) 153.
319 Otto (2016) 154.
320 *Ibid*.
321 Otto (2016) 154.

The legislature did not provide for an exception in section 126B. The legislature could have provided that a court may, out of its own accord, raise the possibility of prescription and that the provider bears the onus of rebutting the fact that the debt has become prescribed, as this would have simplified matters.[322]

The Supreme Court of Appeal in *Kaknis v Absa Bank Ltd*[323] held that section 126B of the NCA made it unlawful to continue to collect or revive a debt that had prescribed.[324] The court held that the new provision in the NCA that prohibits the collection of previously uncollected or prescribed debt had no retrospective application.[325]

4 8. SUMMARY

The NCA and section 129 in particular has been amended twice since inception. In order to assess the impact of these amendments and to determine if the amendments encapsulate the interpretation by the courts prior to the amendments the interpretation of the original section 129 by the courts is required. Only once this has been determined can an assessment as to

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322 *Ibid*.

323 2017 4 SA 17 (SCA), 2017 2 All SA 1 (SCA).

324 See also Schulze "Credit Law: Unlawful to Collect or Reactivate a Prescribed Debt" 2017 *De Rebus* 44.

325 Goko "Appeal Court Ruling - New Credit Act provision does not protect historical prescribed debt. The Supreme Court of Appeal judgment could have significant consequences for consumers with legacy debt agreements, 3 January 2017" http: www.businesslive.co.za/bd/national/2017-01-03-new-credit-act-provision-does-not-protect-historical-prescribed-debt/ (accessed 31-10-2017). The consumer in this case, Pantelis Kaknis, had used this provision as his defence after his providers, Absa Limited and Man Financial Services SA, issued summons. The High Court in Port Elizabeth dismissed his defence and said the provision did not apply retrospectively. Kaknis appealed to the Supreme Court of Appeal. Kaknis entered into agreements with Absa Limited between 2006 and 2008. In 2010, he applied for debt review in accordance with which his obligations to his various providers were rearranged. He made his last payment on 8 July 2011. The debt prescribed on 8 July 2014 as more than three years had passed since his last payment. On 3 October 2014, Kaknis concluded an acknowledgement of debt with Absa and Man Financial Services. The majority court of the Supreme Court of Appeal held that section 126B(1)(b) of the Amendment Act had no retrospective operation and provided no defence to Kaknis. The majority found the section was not intended to take away or impair vested rights acquired under existing laws. In a dissenting judgment, Shongwe JA held that the provision was intended to prohibit providers from benefiting from prescribed debts and was aimed at protecting vulnerable consumers from enforcement of such debts. The majority further held that there was a strong presumption that legislation was not intended to be retrospective. There had to be clear language from the legislature that retrospectivity was intended. It further emphasised that there was also a rule that new legislation, even though clearly intended to be retrospective, would not affect matters which were subject to pending legal proceedings. This presumption applied in most legal systems and was settled in South African law. It was further common cause that section 126B did not expressly provide that it was intended to apply with retrospective effect. Finally, the court held that there was no other indication that the legislature intended the retrospective effect of section 126B. The appeal was dismissed. See also Schulze 2017 *De Rebus* 44.

whether the revised sections provide for a balanced interpretation and protection of the provider and consumer.

The ultimate purpose of the section 129 notice as aligned with the Constitution and the purpose of the NCA is to provide information and an opportunity to a defaulting consumer to elect alternative courses of action to avoid litigation. This dovetails with the overarching purpose of the NCA of consumer protection and fulfilment of agreements. With this in mind, it becomes evident that delivery of a section 129 notice is mandatory prior to enforcement, which is given the broadest possible meaning, irrespective of the unfortunate "may" in the section. Enforcement in this context is given the broadest possible meaning. Should a section 129 notice not have been sent prior to enforcement and the matter appears on a defended basis, the court would adjourn or postpone the hearing for service of a section 129 notice. A provider should not issue or serve a summons, a step in enforcement process, if a section 129 notice has not been sent and allegations to this extent are not canvassed in the summons.

In analysing the "delivery" requirement of the NCA section 129(1)(a) is read in conjunction with section 65 and section 1 of the Regulations. In 2009 in *Prochaska* it was held that a section 129(1)(a) notice had to be brought to the attention of the consumer (pro consumer approach) whereas in 2010 the *Munien* case took the pro provider position similar to that under the Credit Agreements Act and did not require such a burden of proof from the provider. In 2010 *Dhlamini* rejected the *Munien* decision and preferred the *Prochaska* approach (pro consumer approach). However, in *Starita* the court rejected *Prochaska* and *Dhlamini* and instead preferred the *Munien* approach (pro provider). This was symbolic of the pendulum movement by the courts of protection of providers in one case to protection of consumers in the other.

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In 2012 in *Greef* the court adopted a pro provider approach and relied on *Rossouw* where it was held that the risk of non-receipt was placed on the shoulders of the consumer where the provider had sent the notice in the method elected by the consumer and to the address stipulated.

Should a summons be served prior to a section 129 notice having been sent to the consumer, the consumer would be in a position to raise an exception that the provider has not followed the procedure required in section 129(1)(a) of the NCA. If such an exception is upheld the court would be obliged to postpone the matter in terms of section 130(4)(b) of the NCA

with a possible associated cost order.[326] Non-compliance with the substantive and procedural mechanisms of section 129 has far-reaching consequences and consumer and provider alike should therefore, as far as possible, adhere to the provisions. It is important that the provider adhere to the substantive and procedural requirements of section 129 of the NCA, not only to allow for legal enforcement but also to allow the consumer to receive, through effective delivery, the notice and thereby be aware of his rights and have the option to remedy the default complained of or refer the matter to a debt counsellor, prior to enforcement.

One would have thought that the decision of *Sebola* in the Constitutional Court settled matters in overturning the *Rossouw* judgment and in determining the method of delivery and whether the notice must reach the consumer. *Sebola* held that section 129(1)(a) should be understood in conjunction with section 130. Here it was determined that if a provider posted the notice, proof of registered despatch to the address of the consumer together with proof that the notice reached the appropriate post office would – in the absence of any contrary indication – constitute sufficient proof of delivery. However, this decision only ignited new areas of contestation. After *Sebola* there was a heavier burden on a provider to ensure that the notice is sent and delivered to the correct post office. This caused difficulties for providers which led to two conflicting judgments of *Binneman* and *Mkhize* where proof of reaching the correct post office was found to be sufficient in *Binneman* but insufficient in *Mkhize*. The pendulum continued to swing.

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The decision of *Kubyana* in the Constitutional Court attempted to bring balance once again between the parties by highlighting that there was no obligation on the provider to use additional measures to ensure that the notice was brought to the subjective knowledge of the consumer. The court in the majority of cases seems to continue to support notification by registered mail unreservedly. This support will be proven to be misplaced in the next Chapter and in fact has led to the confusion raised by *Sebola*. *Sebola* and *Kubyana* together set the scene for the amendments to follow.

The decision of the Supreme Court of Appeal in the *Ramurunzi* case reflects the correct interpretation of the effect of the section 129 notice on the interruption of extinctive prescription in that although the section 129 notice is a statutory prerequisite for the enforcement, non-

326 Section 129(1)(a), (b) and 130(4)(b) of the NCA. Otto and Otto (2010) 117.

compliance therewith does not preclude the interruption of extinctive prescription by the service of a summons, which constitutes a "process", which interrupts the running of extinctive prescription in accordance with the Prescription Act.

Non-compliance with section 129 may not be fatal to a provider as proceedings would generally be postponed allowing the provider to remedy this defect. Non-receipt of the notice by the consumer, however, may have dire consequences in respect of the financial well-being of the consumer and his right of access to adequate housing. This may be, besides the purpose of the NCA, the reason for the judiciary's inclination to protect the consumer sometimes above the provider.

There has been a pendulum movement between the prioritising of rights of providers and consumers alike. Providers found themselves favoured in cases such as *Marques*,[327] *Munien*, *Starita*, *Rossouw* and *Binneman*. On the other hand, consumers ended on the upper hand in cases such as *Prochaska*, *Dhlamini*, *Sebola*, *Mkhize* and *Balkind*. In the case of *Kubyana* the Constitutional Court acknowledged the need to adopt a balanced approach for the protection of consumer and provider's rights.

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Consumer protection is, of course, the main aim of the NCA but the application of its provisions calls for a balanced approach, particularly because it makes drastic inroads into the rights of providers who should not be held responsible for consequences they did not cause. Otto and Otto according agree with the decision in *Munien*.[328]

It was pointed out that legislative provisions requiring delivery of notices should not be interpreted in a way that allows a consumer to frustrate a provider. An overly consumer-orientated approach may make it difficult for a provider to reach a consumer who knows that he is in default and avoids notices or deliberately fails to collect registered mail.[329]

The court in *Dhlamini* regarded as a serious and legitimate concern Wallis J's argument in *Munien's* case that the costs incurred by providers in having to ensure that notices actually reach the consumer would be substantial and that they would eventually be borne by

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327 2001 – under the Credit Agreements Act of 1980.
328 Otto and Otto (2010) para 44.2.
329 Otto 2001 *TSAR* 175.

consumers.[330] The legislature, the court opined, "is clearly ready to up the cost of credit" to achieve its purposes with the NCA. It is trite that consumer protection comes at a price.[331] However, one may ask whether providers and, indeed, the whole body of consumers, should bear the risk and the costs when defaulting consumers' very breach of contract was the cause of the costs and losses involved.[332]

Effective utilization of section 129, it is submitted, is supposed to result in the promotion of both the provider and consumer's rights equally. However, the original wording of the section has resulted in ambiguity and preference of consumer's rights over the provider's rights, which is never a desirable situation.

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330 *FirstRand Bank Ltd v Dhlamini* para 30.
331 *FirstRand Bank Ltd v Dhlamini* para 30; Otto 2010 *SAMLJ* 604.
332 Otto 2010 *SAMLJ* 604.

Chapter 5

"Delivery" and the Electronic Communications and Transactions Act 25 of 2002

5 1 INTRODUCTION

Chapter four commenced the discussion of the interpretation of "deliver" in terms of the section 129 notice. This discussion was based primarily on the original section 129 and the case law that ensued. It was indicated earlier that it is a requirement that a section 129 notice be "delivered" to a consumer in default prior to the provider being entitled to proceed with debt enforcement. The contestation, however, revolves around the method of delivery prescribed in order to fulfil the requirement of "deliver" in section 129 of the NCA to lawfully permit a provider to proceed with enforcement. After the *Kubyana v Standard Bank of South Africa Ltd*[1] judgment had been delivered, the National Credit Amendment Act of 2014 made amendments to section 129 of the Act by adding the following subsections to section 129, namely subsections (5), (6), and (7) which provide 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)."

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The three new subsections were drafted based on the *Sebola v Standard Bank of South Africa Ltd*[2] judgment and the interpretation adopted therein, which was the authority at the time.[3] The subsections clarify the issue of the delivery of the section 129(1) notice to a defaulting consumer before the provider may institute legal proceedings against such a consumer.[4] The sections clarify that actual knowledge of the notice by the consumer is not required. The subsections provide for two methods of delivery of the default notice and set out how a provider should go about proving that he or she has complied with the obligations placed on him or her under section 129(1)(b) of the NCA.

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1 2014 3 SA 56 (CC).
2 2012 8 BCLR 785 (CC), 2012 5 SA 142 (CC).
3 Govender and Kelly-Louw "Delivery of the Compulsory Section 129(1) Notice as required by the National Credit Act of 2005" 2018 *PER /PELJ* 23.
4 *Ibid.*

This Chapter now turns to see if the abovementioned amendment resolves the issues and procedural flaws raised in the cases discussed in Chapter four and assists in achieving the research objective of evaluating the impact of the National Credit Amendment Act of 2014 on section 129 whilst considering the changing norms and evolving electronic communication.

5 2 METHOD OF DELIVERY

5 2 1 Section 65 and section 129 (5) to (7) requirements

As a general rule, service of legal processes, especially those initiating proceedings need to be effected personally to be served and normally by the sheriff.[5] It has already been determined in this study that a section 129(1) notice is not a legal process, but a notice required before proceedings may ensue and thus these rules do not necessarily apply to the notice. The relevant sections of the Act, which supposedly shed light on how the notice is to be delivered are sections 65, 96 and 168 and regulation 1 of the 2006 Regulations, which defines the word "delivered." These sections are provided in Chapter one.

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The requirement that the provider must have "delivered" a notice in accordance with section 129(1)(a) does not necessarily mean that the consumer must have received it. Section 129(5) provides that a section 129(1)(a) notice must be "delivered" to the consumer (a) by registered mail; or (b) to an adult person at a location designated by the consumer. Under section 129(6) the consumer is required to indicate in writing which of these two delivery options he prefers. Proof of delivery since the 2014 Amendment Act is now satisfied by (a) written confirmation by the postal agency; or (b) the signature or identifying mark of the relevant adult person.[6] It is noteworthy that the prescribed manner now provided in the new sections 129(5) to (7) of the NCA introduces a higher burden than that depicted in section 65 in that the latter does not prescribe personal service or registered mail as the method for delivery.

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5 Rule 4(1) Uniform Rules of Court.

6 Section 129(7) of the NCA; Sharrock *Business Transactions Law* (2016) 703.

Before section 129 was amended there was no indication from a plain reading of the section whether the notice needed to actually come to the attention of the defaulting consumer or if it was sufficient for the notice merely to be dispatched in accordance with the NCA. Furthermore, it was impossible to ascertain, by reading section 129 alone, how the default notice was to be delivered, as no method of delivery was provided for in this section. It was therefore necessary to look beyond section 129 to determine the purpose of the legislation.[7] The question remains whether the default notice must in fact reach the consumer for it to be effective in that even the new sections provided by the 2014 Amendment Act refer to the notice being "delivered" to the consumer. In other words, could a defence that the letter containing the notice got lost in the post fend off the provider's claim? This question was raised in numerous cases[8] dealing with similar provisions in other consumer credit legislation. The crucial question was whether the courts would follow any of the decisions in Chapter three in interpreting and applying section 129(1)(a) of the NCA. In Chapter four it was indicated that some courts decided that the notice had to reach the consumer in order it to be effective, whilst

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7 Govender and Kelly-Louw 2018 *PER /PELJ* 12.

8 Refer to Chapter 3 for a full discussion on the cases and legislation preceding the NCA which dealt likewise with the issue of whether a default notice needs to come to the actual notice of the defaulter. In the case of *Weinbren v Michaelides* 1957 1 SA 650 (W) in accordance with the Hire-Purchase Act 36 of 1942 the court held that the notice had to reach the consumer. This was however before the amendment to the Hire-Purchase Act. After the amendment to the Act in 1965 (Hire-Purchase Amendment Act 30 of 1965) it was held that the notice was effective even if not received by the consumer provided it was sent in accordance with the Act. In *Fitzgerald v Western Agencies* 1968 1 SA 288 (T) a case which was heard after the amendment, the court confirmed that actual receipt of the notice was not required. The court held that the fact that the amendment provided for various methods of delivery of the notice indicated the legislature's intention to do away with the requirement of actual receipt. In the case of *Maron v Mulbarton Gardens (Pty) Ltd* 1975 4 SA 123 (W) "inform" as used in the Sale of Land on Instalments Act 72 of 1971, was interpreted contrary to the interpretation found under the Hire-Purchase Act and it was held that "inform" means that the notice must reach the consumer. In *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 1 SA 314 (D) the Appellate Division held that notice must reach the purchaser. In *Holme v Bardsley* 1984 1 SA 429 (W) in relation to the Alienation of Land Act 68 of 1981 the court held that the notice must reach the purchaser. However, in *Van Niekerk v Favel* 2006 4 SA 548 (W) the court held it was enough to comply with the formal requirements and it was not necessary that the notice come to the actual attention of the purchaser. In *Marques v Unibank Ltd* 2001 1 SA 145 (W), in terms of the Credit Agreements Act 75 of 1980, the court held that the notice did not have to come to the attention of the credit receiver provided the provider could prove that it had been sent in compliance with the requirements laid out. This was followed with approval in *Mercedes Benz Finance (Pty) Ltd v Coser* 2000 JOL 6191 (N). *Nedbank Ltd v Binneman*, which was heard in the Western Cape Division held that the delivery of the section 129 letter to the correct post office was sufficient proof of delivery. However, this decision was rejected by the case of *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) in the Kwa-Zulu Natal High Court where it was found that further steps should be taken by a provider who is aware from the track and trace report that the section 129 letter has not been collected from the post office by the consumer. In *Munien v BMW Financial Services (SA) Pty Ltd* 2010 1 SA 549 (KZD) a section 129(1)(a) notice was deemed to be delivered if it was sent by registered post to an address selected by the consumer, irrespective of whether it was capable of being delivered to that address or whether it actually came to the attention of the consumer.

others decided that this was not necessary provided that the provider sent the notice in the correct manner in accordance with both the NCA and the contract between the parties.[9]

It has been pointed out that prior to the 2014 Amendment the NCA expressly gave consumers the option of selecting the mode of delivery of notices. The new section 129(5) provided by the 2014 amendment allows for a selection from only two modes of delivery, namely personal service or registered mail. No other methods of delivery of the notice are permitted.[10] It seems reasonable, therefore, that consumers should carry the risk of the notice not arriving at its destination. The Supreme Court of Appeal held the same view in the *Rossouw*[11] case.

The new subsections provide that proof of delivery of the notice must be recorded so that no misunderstandings arise with regard to the receipt of the notice.[12] Proof of delivery is satisfied, depending on the manner in which the notice is provided to the consumer. Either the authorised agent of the postal service confirms in writing that the notice was delivered to the correct post office;[13] or the recipient signs for the receipt of the notice.[14] In either case, the provider does not have to prove that the notice came to the actual attention of the defaulting consumer.[15]

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While the new subsections provide valuable guidance and clarification on the issue of the delivery of the section 129(1) notice, there are still some unresolved issues in that no mention is made of the situation where the provider sends a default notice per registered mail to the correct address of the consumer and it reaches the correct post office, which then duly notifies the consumer to fetch the registered letter but, for whatever reason, the consumer neglects or fails to fetch the notice.[16] At the time the *Kubyana* judgment dealing with this specific issue was delivered the National Credit Amendment Act of 2014 had already been

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9 Otto (2016) 120; *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC)*; Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD)*; Munien v BMW Financial Services (SA) Pty Ltd* 2010 1 SA 549 (KZD).

10 Govender and Kelly-Louw 2018 *PER / PELJ* 26.

11 *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) para 32. Otto and Otto (2016) 120.

12 Govender and Kelly-Louw 2018 *PER /PELJ* 23.

13 Section 129(7)(a) of the NCA.

14 Section 129(7)(b) of the NCA.

15 Govender and Kelly-Louw 2018 *PER /PELJ* 23.

16 Otto and Otto (2016) 123.

drafted, but was not yet in operation. The judgment was therefore not taken into consideration during the drafting of the amendments.[17]

The *Kubyana*[18] case as discussed in Chapter four held that where the provider had complied with all the requirements for delivery, there was nothing further that could be required and the defaulting consumer would bear the onus of proving that the notice had not come to his attention, providing reasons for this. However, the lack of direction from the legislature as to what the situation would be if the consumer did not fetch the notice, despite the provider having complied with all its notification obligations in section 129, has the potential to continue the confusion. One could interpret this to mean that it is the purpose of the legislation with the Amendment Act of 2014 to indicate that mere proof of receipt by the correct post office is sufficient and will constitute compliance, despite indications that the consumer did not receive the notice.[19] In this instance, the *Kubyana* judgment will still govern such a situation and should be read in conjunction with section 129.[20] This means that if the provider can show that he properly delivered the notice by registered mail and in compliance with section 129, there is nothing further that would be required from him thus advocating for the pro provider approach in these circumstances.[21]

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In *Wesbank (a division of Firstrand Bank Ltd) v Ralushe*[22] a matter heard in the High Court, Eastern Cape Division, Grahamstown in 2021 under the amended section 129 the plaintiff instituted action against defendant seeking relief arising from an instalment sale agreement in terms of which the plaintiff sold to defendant a 2011 Hyundai motor vehicle in June 2011. The plaintiff sought relief claiming return of the vehicle based on defendant's alleged failure to make the final balloon payment instalment of R89,970.00 by the end of June 2017. The defendant alleged that the plaintiff did not give the defendant notice in terms of section 129(1)(a) of the NCA.[23] Despite the acknowledgement of the track and trace post office reports showing the notice dispatched to recipient, at his physical address, the defendant did not accept that notice in terms of section 129 was sufficiently proven.[24] He also denied receipt

17 Govender and Kelly-Louw 2018 *PER /PELJ* 24.
18 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) paras 35-36.
19 Govender and Kelly-Louw 2018 *PER /PELJ* 24.
20 Govender and Kelly-Louw 2018 *PER /PELJ* 24.
21 *Ibid.*
22 2021 ZAECGHC 78 (31 August 2021).
23 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 5.
24 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 8.

of the postal slip relevant, despite regularly checking his home post box.[25] The court was thus asked to *inter alia* decide on whether the plaintiff had complied sufficiently with Section 129; and specifically the issue of proof of delivery of the section 129 (1)(a) notice.[26]

In its analysis, the court draws its attention to the amended section 129 of the NCA.[27] The court noted that the amendments were drafted based on *Sebola,*[28] clarifying the issue and making it clear that actual knowledge of the notice by the consumer is not required, providing for two methods of delivery (one of which is registered post) and setting out the methods of proving compliance, the consumer to set out in writing the preferred manner of notice.[29] The learned judge deals with the delivery of the section 129 notices after the amendment and notes that section 129(5) requires (using the word "must") *inter alia* delivery by registered mail, and section 129(7) stipulates specifically that proof of delivery (by registered mail) is "satisfied" by "written confirmation by the postal services of delivery to the relevant post office or postal agency."[30] The court observed that the birth of the new provisions was a result of *Sebola* and that *Sebola* provides useful authority for matters arising from section 129 if read in conjunction with the 2014 amendment.[31] It is noted that *Kubyana*[32] provides that if the provider can prove delivery by registered mail in compliance with section 129 (as in this matter) the onus shifts to the consumer to adduce evidence as to why this was not received.[33]

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Consequently, once the provider has complied with the requirements for delivery, the defaulting consumer bears the onus of showing that the notice had not come to his attention and provide reasons for this, however, this is subject to the presumption effect of section 129 (5) and (7).[34] The presumption is rebuttable only by facts on a balance of probabilities (the defendant bearing the onus) showing failure of the prior fact being "written confirmation."[35] The court held that the proof of delivery to the relevant post office by the plaintiff was sufficient.[36] Whether or not the defendant received a slip or whether this was delivered is

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25 *Supra*.
26 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 10.
27 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 15.
28 2012 5 SA 142 (CC).
29 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 16.
30 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* paras 37 and 53.
31 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 39.
32 2014 3 SA 56 (CC).
33 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 40.
34 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 42.
35 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 54.
36 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 55.

legally irrelevant as delivery is presumed.[37] The onus of proof thus fell on the defendant to rebut the presumption of delivery, which he failed to do.[38] The court thus found that the plaintiff had sufficiently established compliance with section 129 of the NCA and its claim succeeded.[39] The court cancelled the Instalment Sale Agreement and ordered the defendant to return the vehicle to the plaintiff.[40]

In this case the court observed and approved the finding in *Amardien v Registrar of Deeds*[41] that even after the 2014 amendment, section 129 notice remains a warning function and an opportunity to rectify default to avoid legal action and provides the only gateway for the institution of proceedings.[42] It upholds the finding in *Sebola* that the broad purpose of section 129 read with section 130 of the NCA is "consumer friendly and court-avoidant." Section 129 offers consumers the opportunity to "restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls."[43] However, the new provisions presumption of delivery of notices as noted in the discussion above places the burden on the defaulting consumer to rebut the delivery of notice.

The 2014 Amendment appears to make matters easier for providers. It may be argued, however, that the *adagio lex impossibilia non cogit* should still apply. A court should come to the rescue of a consumer where circumstances warrant it, for instance, when a consumer was in hospital and could not have been expected to collect his post or even if he collected it, was not in a position to respond and pursue any of the alternative ways forward. The matter should then be adjourned to afford the provider the opportunity to send another notice. One would therefore assume that in the future cases in which a consumer will be able to rely successfully on non-receipt of notice would be rare.[44]

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One still has to wonder however if the 2014 amendment really is the best option available in terms of bringing a section 129 notice to the attention of a consumer. Ultimately, this is the aim of section 129 – that the consumer become aware of their rights and elect an

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37 *Supra*.
38 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 67
39 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe* para 69.
40 *Wesbank (a division of FirstRand Bank Ltd) v Ralushe Wesbank* para 70 - see the order of Lowe J.
41 2019 3 SA 341 (CC).
42 See also *Amardien v Registrar of Deeds* 2019 3 SA 341 (CC).
43 *Sebola v Standard Bank of South Africa Ltd* 2012 8 BCLR 785 (CC) para 50.
44 Otto (2016) 124.

option accordingly which preserves the agreement and ultimately fulfils their obligation. This is much more likely to occur when there is a greater possibility or degree of certainty that the notice will be received by the consumer and come to their actual knowledge – this then should surely be the provider's ultimate aim.

5 2 2 Hand delivery or Registered mail

Academics criticize the legislature for restricting the methods of delivery to the traditional methods and ignoring online methods of the present day.[45]

Hand delivery of a section 129 letter of demand by a provider has its own challenges. The least of which is safety of the deliverer who is required to ascertain the address of the consumer (who may be attempting to allude providers) which may not be in a safe location and attend to personal service upon someone, presumably the consumer, who must acknowledge receipt of the notice. Second, the expense associated with a provider hand delivering every section 129 notice would be quite substantial. Some providers may not have the capacity to attend to these hand deliveries in house and may have to either outsource the function or hire more staff to fulfil this role. Third, if the provider decides to request the sheriff's office to attend to service of their section 129 notices for safety and possibly capacity issues this too would not only be expensive but may very well over burden the sheriff's office who would most likely then not be in a position to fulfil this function timeously as they would prioritise the service of actual process. This would then unduly the delay of the pre-enforcement procedure and ultimately the enforcement procedure – which could jeopardise the value of an encumbered asset.

Likewise registered mail is an archaic method of delivery that has many challenges. Registered mail may be cheaper and less laborious than hand delivery, but it too carries an expense that some other technological forms of delivery would not. Second, and in addition to the expense is the unreliability of delivery by the post office which is a real and valid issue in South Africa. Not to mention the issue that not every area has a local post office and the post office closest to a consumer may be well out of their reach – thus substantially reducing the likeness of the consumer attending at the post office to collect the notice which they have

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45 See Govender and Kelly-Louw 2018 *PER / PELJ* 26.

probably already assumed is not favourable for them. It should also be reiterated that the level of delivery provided through the new subsections (7)(a) and (b) in section 129 of hand delivery and registered mail is not the same. The proof of hand delivery is as per subsection 7(b) the signature or identifying mark of the recipient contemplated in subsection (5)(b) – being an adult person at the location designated by the consumer. Whereas the proof of delivery of the registered mail is written confirmation by the postal service of delivery to the relevant post office. Thus, the registered mail proof of delivery seems to be a step removed from that of the hand delivery proof in that the proof is merely that the notice reached the correct post office, not the consumer whereas at least with hand delivery the notice is confirmed to be received by someone at the address selected by the consumer. Lastly, the consumer may elect not to collect the notice from the post office in this form of delivery. This would then defeat the mandate of the notice's purpose and indeed the NCA's information paradigm purpose.

To highlight the inefficiencies of the post office, it is noticeable that it is currently in battles with PostNet and Takealot have recently joined this battle. The post office is insisting that they have the sole right to deliver all parcels mailed in South Africa weighing one kilogram or less. This dispute commenced in 2018 when Icasa's Complaint and Compliance Commission (CCC) ruled that the Post Office had a legal monopoly to carry these packages because they fell under "reserved postal services" in the Postal Services Act.[46] The issue of delivery efficiency is precisely what has many industry players concerned about the consequences of the South African Post Office winning this case. Some have questioned whether the Post Office would have the necessary logistics, workforce, or financial resources to take over the delivery of all couriered packages in the country. Over the last few years the Post Office has built quite an infamous reputation for delays and lost packages.[47]

The South African Post Office Soc Ltd Amendment Bill[48] published in April 2022 provides amendments which will enable the Post Office to take advantage of the technological developments in its environment including integrated logistics, e-commerce and positioning

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46 Act 124 of 1998. Labuschagne "Takealot joining battle against Post Office's plan to block courier deliveries under 1kg" (https://mybroadbankd.co.za/news/it-services/43662-takealot-joining-battle-against-post-offices-plan-to-block-courier-deliveries-under-1kg.html (accessed 19-04-2022).

47 Labuschagne "Takealot joining battle against Post Office's plan to block courier deliveries under 1kg" (https://mybroadbankd.co.za/news/it-services/43662-takealot-joining-battle-against-post-offices-plan-to-block-courier-deliveries-under-1kg.html (accessed 19-04-2022). This matter is most likely only going to be heard in 2023.

48 South African Post Office Soc Ltd Amendment Bill, 2021 Government Notice 2031 in Government Gazette 46250 of 20-04-2022.

itself as a digital hub for businesses and communities. This is mentioned here as a foreshadowing for the discussion in the next section.

5 2 3 Electronic Communications and "Substituted Service"

Technology changes and develops more rapidly than our rules can evolve. It has increasingly embedded itself as a necessary part of human interaction locally and globally. It is a common assumption that the recognition of the evolution of communication systems by South Africa's legislature is desirable and necessary since communication technology has woven itself into the fabric of society and its effect on law cannot be ignored. The impact of the increasing reliance on electronic communications and social media services has been reflected in the enactment of new legislation, and amendments to some existing legislation which aligns with the constitutional imperative highlighted in Chapter one of the right to access to information.[49] The Electronic Communications and Transactions Act[50] (the "ECTA") and the Uniform Rules of Court, are just two examples.

In 2012 already the KwaZulu-Natal High Court in Durban, per Steyn J in *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*[51] recognised the common assumption that the legislature is to recognise the evolution of communication systems in South Africa and granted an application for substituted service of a notice of set down and pre-trial directions on the respondent (the defendant in the main action) via a message on social media website Facebook, in addition to the notice being published in a local newspaper."[52]

In delivering the judgment, Steyn J recognised the changes in the technology of communication, and the corresponding need for "law to recognise such changes and accommodate it."[53] Indeed, jurisprudence in recent years provides valuable contextual background detailing our courts recent embrace of technological developments in the context of legal prescripts.[54] This attitude is also exemplified by the amendments to the High Court Rules, which brought about an extension to Chapter 3 of the ECTA[55] providing for service of

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49 Section 32(1)(b) of the Constitution is applicable to this study.
50 Act 25 of 2002.
51 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD).
52 Hawkey "Service of court process by social media" 2012 (October) *De Rebus* 47.
53 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD).
54 Hawkey 2012 (October) *De Rebus* 47.
55 Act 25 of 2002.

court documents on litigants by way of e-mail or telefax, as well the amendment to the Uniform Rules of Court[56] which now provide for service (other than processes instituting proceedings) by way of electronic mail, registered post and facsimile. This addition to the procedure regulating service of processes is an innovation that recognises the impact of technology in our lives and the potential benefits to the judicial process of using data messages.

The precedent setting cases on addressing the service of court documents include those already mentioned, namely *CMC Woodworking Machinery (Pty) Ltd v Peter Odendaal Kitchens,*[57] *Sebola,*[58] *Kubyana,*[59] and the case of *Amardien v Registrar of Deeds.*[60] In short, these cases respectively dealt with the rules of civil process and court proceedings for serving court documents by a mechanism not contemplated within the Rules ("substituted service"), which the court can grant if the Plaintiff can show that personal service or the other mechanisms listed have been attempted and are impractical.

Substituted service is not a symbolic gesture but it is rather a way of achieving in law the same results as if the processes, notice or order had been personally delivered to the intended respondent.[61] "For an application of this nature to be granted for service upon a person known, or believed, to be within the Republic, but whose whereabouts cannot be ascertained, the applicant must show that traditional service is not possible due to factors beyond the applicant's control."[62] While the *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*[63] judgment has no doubt made history in South Africa, a number of courts around the world, including in Australia and the United Kingdom, have permitted service of court documents via social media websites. And while the court in this matter did not consider these rulings in coming to its decision, it did take into account the Canadian decision in *Boivin & Associés c. Scott*,[64] in which the court authorised service of motion proceedings via the defendant's

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56 Rule 4A "Delivery of documents and notices" Erasmus, van Loggerenberg and Farlam *Superior Court Practice* 2 ed (2015). Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, also available at: http://jutastat.juta.co.za/nxt/gateway.dll/scpr/359/382/383/384/385/391?f=templates$fn=default.htm.

57 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD).

58 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC).

59 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).

60 *Amardien v Registrar of Deeds* 2019 3 SA 341 (CC).

61 *Pretoria City Council v Ismail* 1938 TPD 246.

62 Mahmoud and Bellengère "A Social Service? A case for accomplishing substituted service via WhatsApp in South Africa" 2020 *SALJ* 373.

63 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD).

64 2011 QCCQ 10324 (CanLII).

Facebook account. These decisions, including that in the *CMC Woodworking Machinery* case, reflect the need for courts to adapt to reflect developments taking place in the society in which they exist. As stated by the judge in her concluding remarks in this matter: "This application has reminded me that even courts need to take cognisance of social media platforms, albeit to a limited extent, for understanding and considering applications such as the present."[65]

However, the judge also cautioned that: "Courts, however, have been somewhat hesitant to acknowledge and adapt to all the aforesaid changes and this should be understood in the context that courts adhere to established procedures in order to promote legal certainty and justice."[66] Therefore, despite the court's openness to new forms of media, Steyn J emphasised that each case must be decided on its own merits and must also take into account the type of document that is to be served.

More recently, in what IOL News[67] termed a ground-breaking order, the Gauteng High Court (Pretoria) in *Commissioner for the South African Revenue Service v Louis Pasteur Investments (Pty) Ltd,*[68] where the applicant applied to court for leave in terms of section 133 of the Companies Act[69] to enforce its cause of action against the first respondent, Louis Pasteur Investments (Pty) Ltd by proceeding with summons, judgment and execution. In addition, the applicant sought an order to serve the section 133 application by way of substituted service in terms of Rule 4(2) of the Uniform Rules of Court.[70] The application was successful, and the court granted an order in favour of the applicant for the business rescue proceedings in respect of the first respondent to be converted into liquidation proceedings in terms of section 132(2)(ii) of the Companies Act.[71] The court also granted an order for substituted service which effectively allowed the applicant to proceed with summons by publishing the judgment in the Government Gazette; the Sunday Times newspaper; the Rapport newspaper; Star newspaper; and in the Business Day newspaper.

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65 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD) para 14.

66 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* para 2.

67 Venter "Letter of demand can now be sent digitally" 2021 available at: https://www.iol.co.za/pretoria-news/news/letter-of-demand-can-now-be-sent-digitally-bfcbab16-f3dc-42a1-8bb9-6b817eb703ab (accessed 20-04-2022).

68 2021 ZAGPPHC 89.

69 71 of 2008.

70 Erasmus, van Loggerenberg and Farlam *Superior Court Practice* 2 ed (2015). (Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, also available at: http://jutastat.juta.co.za/nxt/gateway.dll/scpr/359/382/383/384/385/391?f=templates$fn=default.htm.

71 71 of 2008.

The influence of this judgment, one might argue is that in March 2021 the Commissioner of the Companies and Intellectual Property Commission ("CIPC") issued a "Practice Note"[72] providing that:

> "The process of service of corporate legal documentation on the CIPC, has been simplified, to allow for electronic service via corporateleaalservices@cipc.co.za. In some instances, it is required for legal documentation such as notices of motion, subpoena's and court orders, to be served on the CIPC, especially where the CIPC is an interested party, or certain action is to be taken by the Commission. Uniform Rules of Court, specifically Rule 4 and 4A, describes the requirements of service of legal documents in detail and allows for the service of documents by way of electronic means […]and times for delivery of documents and also provides for the service thereof by electronic means"[73] And;
> "all corporate legal documents, where the CIPC is an interested party or where certain action is required to be taken by the CIPC, in terms of a court order or SAPS issued subpoena, [must] be served electronically via corporateleaalservices@cipc.co.za."[74]

The jurisprudence, and the precedents discussed above make electronic service of notices to consumers in terms of section 129, in conjunction with section 130 of the NCA possible by substituted service in terms of Rule 4 (2) of the Uniform Rules of Court.

Prior to the precedents set in the Constitutional Court decisions addressing the NCA that are relevant to the present context, and the most recent being the North Gauteng High Court, Pretoria judgment in *Commissioner*[75] decision discussed above, cases from earlier years indicate several instances where service of court documents was electronically executed. Because of difficulties in service and legal ambiguity, including the obstacle that mere despatch of a section 129 is not enough, and other interpretative challenges, it became widespread practice for providers to approach courts seeking service by substitution. A contextual background (through the evaluation of earlier court decisions) detailing the history of alternative service process; the Uniform Rules of Court which prescribe the requirements for substituted service and examples of courts granting orders for substituted service aptly illustrate this. For example. in the case of *Pretoria City Council v Ismail,*[76] Steiner J classed substituted service as "a way of achieving in law the same result as if the proceedings, notice or order, or whatever the matter may be, had been brought to the notice of the persons affected."[77] Put

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72 Service of Subpoenas and other Court Documents on CIPC Practice Note 1 of 2021 Government Gazette 92 No 44593.
73 *Ibid.*
74 *Ibid.*
75 *Commissioner for the South African Revenue Service v Louis Pasteur Investments (Pty) Ltd* 2021 ZAGPPHC 89.
48. *Pretoria City Council v Ismail* 1938 TPD 246.
77 *Supra.*

differently, substituted service is a method of delivering legal proceedings or court orders to a person other than by delivering it to them in-person. *Erasmus Superior Court Practice*[78] describes substituted service as:

> "Substituted service is ordered when the defendant is believed to be in the Republic but one of the normal forms of service set out in the rules cannot be effected. The court then gives directions authorising some form of 'substituted service'. Substituted service differs from edictal citation which is ordered when the defendant is or is believed to be out of the Republic, or the exact whereabouts of the defendant are unknown."[79]

In regard to electronic service, the court in the *Pretoria City*[80] decision emphasised that such service "is just as operative and has the same legal results as if the party who had to be served was presented with a copy of the document to be served."[81] Therefore, the aim of this type of service remains to inform the party concerned of a particular notice. The rule on substituted service in South Africa was amended on the 27th of July 2012 and is laid down in Rule 4A Uniform Rules of Court which reads:

> "4A Delivery of documents and notices
> (1) Service of all subsequent documents and notices, not falling under rule 4(1)(a), in any proceedings on any other party to the litigation may be effected by one or more of the following manners to the address or addresses provided by that party under rules 6(5)(b), 6(5)(d)(i), 17(3), 19(3) or 34(8), by —
> (a) hand at the physical address for service provided, or
> (b) registered post to the postal address provided, or
> (c) facsimile or electronic mail to the respective addresses provided.
> (2) An address for service, postal address, facsimile address or electronic address mentioned in subrule (1) may be changed by the delivery of notice of a new address and thereafter service may be effected as provided for in that subrule at such new address.
> (3) Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002) is applicable to service by facsimile or electronic mail. (4) Service under this rule need not be effected through the Sheriff.
> (5) The filing with the registrar of originals of documents and notices referred to in this rule shall not be done by way of facsimile or electronic mail."[82]

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Rule 4(1) excepts from this amendment those processes the service of which is required by a sheriff.[83] Rule 4A only applies where a party has nominated an address. If this is not the case or the address is invalid, then in such cases substituted service would need to be considered.

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78 Erasmus, van Loggerenberg and Farlam *Superior Court Practice* service issue 37 (2011). Also see Cilliers, Cloots, Nel *Herbstein & Van Winsen – The Civil Practice of the High Courts South Africa* 5 ed (2017) 360 where the authors state that substituted service has been generally effected by allowing for notices to be sent by registered mail or by sending a registered letter.

79 *Ibid.*

80 *Pretoria City Council v Ismail* 1938 TPD 246.

81 *Supra.*

82 Rule 4A "Delivery of documents and notices" Erasmus, van Loggerenberg and Farlam *Superior Court Practice* 2 ed (2015). (Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, also available at: http://jutastat.juta.co.za/nxt/gateway.dll/scpr/359/382/383/384/385/391?f=templates$fn=default.htm.

83 The amendment therefore does not allow for a summons to be served by the means indicated in Rule 4A of the Uniform Rules of Court.

Rule 4A (3) specifically incorporates Chapter III, Part 2 of the ECTA[84] as being applicable to effecting service by facsimile or electronic mail. Section 23 and 26 of the ECTA is particularly relied upon by providers seeking service electronically prior to the 2021 decision. The sections read as follows:

> "23. Time and place of communications, dispatch and receipt. –
> A data message-a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;
> b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and
> c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence."[85]
> And
> "26. Acknowledgement of receipt of data message. -
> 1) An acknowledgment of receipt of a data message is not necessary to give legal effect to that message.
> 2) An acknowledgement of receipt may be given by
> (a) any communication by the addressee, whether automated or otherwise; or
> (b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received."[86]

Therefore the ECTA creates a presumption of receipt of a data message by stating that the acknowledgement of receipt of a data message (whether automated or otherwise) is not necessary to give legal effect to that message. This now extends to the service of process under Rule 4A. The effects of the landmark decision in *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* resulted in various applications for substituted service orders, including two high court cases, where it was found that registered electronic communication held the same legal status as registered mail.[87]

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In order to utilise "substituted service" as a method of service, an application to court would need to be made in which the applicant sets out the details of the nature, grounds and extent of the claim, the jurisdiction of the court to entertain the claim, the manner of service which the court is asked to authorise and any inquiries which have been made to ascertain the whereabouts of the party to be served.[88]

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84 Act 25 of 2002.
85 *Ibid.*
86 *Ibid.*
87 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD).
88 Rule 5(2) Uniform Rules of Court. These requirements determine that the proposed method will be warranted in the circumstances and there is a reasonable possibility that the service will be positive (Mahmoud and Bellengère "A Social Service? A case for accomplishing substituted service via WhatsApp in South Africa" 2020 *SALJ* 372).

The amendment of the Uniform Rules of Court to include service by electronic mail has raised a further question as to whether service can also occur through electronic media other than electronic mail such as Facebook.[89]

Due to the volume of section 129 letters sent out the method and extent of "delivery" of such letters is a procedurally important question.[90] However, there is a fundamental assumption that continues to be asserted by the legislature and the courts with regards to the NCA that registered mail is the more reliable method of communication in South Africa. Surprisingly, the courts have stated that there is "a high degree of probability that most registered mail letters are delivered."[91] However, Cloete JA in *Rossouw v FirstRand Bank Ltd*[92] relied on a 1976 judgment, long before the introduction of cellular telephones and the international network (internet) in South Africa, to put forward the apparently settled position that registered mail is the most reliable method of communication. This issue was noticed for the first time in *Absa Bank Ltd v Mkhize*,[93] in which Olsen AJ was provided with statistics on unclaimed registered mail by Absa Bank, which he described as "to say the least, startling."[94]

If one considers the time and expense taken to resolve what should have been an elementary issue it is rather surprising that the entire issue could have been avoided by adopting the correct approach to legislative drafting when dealing with technology issues. It is a settled principle worldwide that, due to the rapid change of technology, it is advisable to draft legislation in such a way as to be technology neutral. South Africa endorses this principle in

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89 The use of social media messaging services in judicial procedure is also not new. It has been a trend in other jurisdictions. A Ghanaian court in *Kwabena Ofori Addo v Hidalgo Energy and Julian Gyimah* (Writ no AC 198/2015 (unreported)) for example approved an application for substituted service by use of WhatsApp. Mahmoud and Bellengère 2020 *SALJ* 378. Australia (*MKM Capital Pty Ltd v Corbo & Poyser* Supreme Court (ACT), 12 December 2008 (unreported)); Canada (*Burke v John Doe* [2013] BCSC 964); England (*AKO Capital LLP v TFS Derivatives* February 2012 (unreported)); and New Zealand (*Axe Market Gardens v Axe* High Court (New Zealand)), 16 March 2009, CIV: 2008-845-2676) have introduced the permission of substituted service by social messaging services.

90 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) paras 21, 27 – 29 indicate that 70 % of sent out registered letters are returned unclaimed. During the period January to May 2012 (five months) Absa despatched some 5 195 section 129 letters in respect of unsecured loans (some 3 803 of which had already been removed from Absa's balance sheet by reason of the extent of default). In the same period 19 555 section 129 letters were sent out to consumers in respect of default on credit card debt. During 2012 Absa's computerised system generated between 10 000 and 15 000 section 129 letters per month in respect of asset and vehicle finance.

91 *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 4 SA 994 (A) 1001B, quoted by Cloete JA in *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) para 56.

92 2010 6 SA 439 (SCA).

93 2012 5 SA 574 (KZD).

94 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) para 25.

the ECTA,[95] which goes to great lengths to provide wider definitions in order to cater for this problem and which ironically precedes the NCA.[96]

In contrast, the drafters of the NCA and even National Credit Amendment Act of 2014 have essentially mandated the use of a particular communication medium, registered mail, even though this mandate was firmly based on the untested assumption that this is the best and most reliable method to communicate with consumers, probably because it is a verifiable method. Unfortunately, this assumption is clearly incorrect. Evidence from large-volume debt collection firms indicate that even normal mail has a far higher success rate than registered mail. However, even normal mail disappears into insignificance when considering the availability of mobile telephones in South Africa.[97] If the number of registered postal addresses is compared to the number of cellular telephones, there is no doubt that far more South Africans have access to mobile telephones. There is a greater prospect of reaching a particular person using a cellular telephone in comparison to a postal address, which often services several people.[98] It therefore appears that the drafters of the NCA were mistaken in mandating a particular communication method in the NCA and even in the 2014 Amendment Act.[99]

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Mahmoud and Bellengère discuss the future of substituted service and make a case for service by WhatsApp taking into account the technological features and capabilities of the application which can be used to authenticate the identity of the intended recipient as well as ensure delivery and provide legal certainty of the service processes. They conclude that WhatsApp "would be a self-sufficient medium of substituted service if the appropriate guidelines are put in place."[100] Consumers can ignore a registered letter or choose not to sign for it at the post office. A letter of demand through registered email or registered SMS is more

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95 Act 25 of 2002.

96 Esselaar "Technology the Answer to Section 129 Delivery Dilemma" 2012 (November) *De Rebus* 38.

97 Phillips, Lyons, Page, Viviez and Dr Molina "African Mobile Observatory: Driving Economic and social development through mobile services 2011" http://www.mobileactive.org/files/file_uploads/African_Mobile_Observatory_Full_Report_2011.pdf, (accessed 27-9-2012).

98 Added to this is the fact that the use of short message system (SMS) codes is pervasive in internet banking in South Africa and frequent updating of information relating to SIM cards by the cellular network operators in accordance with the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 is necessary. In South Africa, the number of people actively accessing the internet had reached 26.8 million in 2016, just under 50 per cent of the total population, with over 85.53 million active mobile connections in the country. These figures would definitely be higher in 2022 (Mahmoud and Bellengère 2020 *SALJ* 374).

99 Esselaar 38.

100 Mahmoud and Bellengère 2020 *SALJ* 372.

difficult for a consumer to ignore, as it is delivered through a convenient and accessible channel, directly to their mobile number or email address. It reaches them wherever they are, without the need to visit a post office.

The Gauteng High Court, Pretoria in March 2021 ordered that a company could recover its debt from an owing consumer after the latter was alerted through a digital letter of demand. There had been similar default judgments handed down in the Randburg Magistrate's Court in 2018, which were the first in South Africa to afford registered digital channels, such as registered SMS and registered Email, the same status as conventional registered letters. The court approved substituted service in this matter to allow service of legal notices through electronic registered mail. The company Registered Communication and one of its software partners, Swordfish Software, a debt collection software provider, hailed the victory which they had obtained.[101]

The owner of the electronic communication company noted that they are using a track and trace concept that is similar to traditional registered mail and that his company could deliver an instant electronic certificate and detailed audit report to clients as evidence that communication had been sent and delivered by SMS or emailed to recipients – with the same legal status as traditional registered post.[102] This statement in terms of section 129 is still reliant on an application being brought to court by the provider requesting substituted service of the section 129 notice in that the legislation still only provides in the NCA for delivery of the section 129 notice by way of hand delivery or registered mail. This additional application would not only be time consuming but also costly for a provider.

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The owner went on to indicate that in a recent campaign that they ran with a client, less than three percent of their letters sent by conventional registered mail had been delivered successfully by the end of the second month. Whilst nearly ninety seven percent had been delivered, accepted and certified digitally, by the end of the first month with their electronic communication service.[103] This is an interesting development, also in light of the Post Office's bid mentioned earlier to amend their purpose and mandate to include more digital and e-

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101 Venter "Letter of demand can now be sent digitally" 2021 available at: https://www.iol.co.za/pretoria-news/news/letter-of-demand-can-now-be-sent-digitally-bfcbab16-f3dc-42a1-8bb9-6b817eb703ab (accessed 20-04-2022).

102 *Ibid.*

103 *Ibid*.

commerce services. One has to wonder based on the Post Office's current legal battles if they too will be insisting soon that electronic service of any form for legal notices is their exclusive domain.

5 3 SUMMARY

Section 129(5) to (7) and the subsequent case law appears to have achieved a more balanced approach to delivery of a section 129 notice with the moving of the burden of proof to the consumer once the provider has complied with the method chosen by the consumer and has the proof required by the section. But was balance the ultimate aim? Or rather was it consumer protection by way of information which is unlikely achieved most definitely in the method of registered mail or at least there are more compelling technological advanced methods of delivery that would yield greater results.

It is clear that the decision as to which communication methods could be used for delivery of the section 129 notice should have been left to the regulations. This would have allowed the Department of Trade and Industry to have sufficient flexibility, based on statistics that could be obtained from the providers and the National Credit Regulator, to update the communication medium that should be used to ensure that a section 129 notice comes to the attention of a consumer. This would have then easily allowed for the inclusion of electronic forms of service now advocated for by providers without the need for providers to first proceed with costly and time consuming "substituted" service applications. The 2014 amendment has failed in this regard and left more questions unanswered – especially in the unbalanced approach to comparing the proof burden of hand delivered notice to that of registered mail notice.

The failure of both the courts and legislation to take into account the possibilities and efficiencies that technology can provide is inexcusable. This is even more disappointing in view of the fact that the ECTA[104] recognised the need to develop an e-strategy.[105]

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104 Act 25 of 2002.
105 Esselaar 38.

In *Amardien v Registrar of Deeds*[106] Mhlantla J, relying on the decision in *Sebola*[107] described the NCA as "[…] a legislative effort to regulate and improve relations between consumers and providers of credit."[108] This costume consists almost entirely out of the material of the need to preserve the balance between debtors and creditors. The *Amardien*[109] decision is instructive on the purpose of section 129, here the court laid down the purpose of section 129 of the NCA as follows

> "(a) It brings to the attention of the consumer the default status of her credit agreement.
> (b) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain possession of the asset subject to the credit agreement.
> (c) It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement."[110]

This purpose can only surely be achieved if the section 129 notice comes to the attention of the consumer which also aligns with section 32(1)(b) of the Constitution in promoting the right to access to information. This would also improve the relations mentioned between the consumer and the provider by opening up communication channels.

Ensuring a reasonable degree of likelihood of accomplishing service is a basic requirement in determining what method a court grants for the purpose of substituted service. And surely this should be the same requirement for any "delivery" or service. It would thus be counterproductive not to explore all potential options for substituted service, as long as the court is convinced that if such an order is granted, there is a reasonable possibility that notice will indeed reach the intended recipient. Indeed the most effective form of delivery should be explored and permitted for all forms of legal notices. This may even extend in the near future to applications such as WhatsApp. Section 129 in its current form however would not allow for delivery by this method of the notice easily as a court application would be required to pave the way in setting a precedent.[111]

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This once again confirms that section 129, even after its amendments, at least in respect to delivery, is still falling short.

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106 *Amardien v Registrar of Deeds* 2019 3 SA 341 (CC).
107 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC).
108 *Supra.*
109 *Amardien v Registrar of Deeds* 2019 3 SA 341 (CC).
110 *Supra.*
111 Mahmoud and Bellengère "A Social Service? A case for accomplishing substituted service via WhatsApp in South Africa" 2020 *SALJ* 389.

Chapter 6

Exploring options available to a consumer in receipt of a section 129 notice

6 1 INTRODUCTION

The NCA provides for debt enforcement in two stages, first the necessary procedures prior to debt enforcement and second, debt procedures in court.[1] A consumer's options upon receipt of a section 129(1)(a) notice are to either respond to the notice by accepting one of the proposals, namely settlement, referral to a debt counsellor or Consumer Court, alternate dispute resolution agent, ombud or surrender of the goods.[2] Alternatively, the consumer may not respond to the notice at all or reject the proposals. Should the consumer not respond to the notice at all or reject the proposals the provider may proceed with enforcement by way of cancellation of the agreement and issuing of summons, which may either result in an application for default judgment or a defended action, alternatively the consumer may request reinstatement of the agreement. This Chapter provides a discussion on options available to a consumer in receipt of a section 129 notice.

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Debt enforcement cannot commence if the default is rectified. First, the notice of default, a step in preparation for debt enforcement, can only be sent if the consumer is in default,[3] implying that if default is rectified before this point, the notice cannot be sent. Secondly, the provider may only approach a court by serving a summons if the notice has been

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1 Van Heerden and Boraine "The Conundrum of the Non-compulsory Compulsory Notice in terms of section 129(1) (a) of the National Credit Act" 2011 *SAMLJ* 46.

2 The consumer may also now under section 20 of the National Credit Amendment Act 7 of 2019 refer the matter to the National Credit Regulator for debt intervention. Therefore, the notable change to section 129 is that in future the consumer may upon receipt of a section 129, or before, not only refer the credit agreement to a debt counsellor, alternate dispute resolution agent, consumer court or ombud with jurisdiction but may now also elect to refer the credit agreement to the Credit Regulator for debt intervention 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. The National Credit Amendment Act of 2019 seeks to suspend debts for those who qualify, in part or in full, for up to two years in order to assist individuals with debt crises. If their situation does not improve, after the suspension period, then their debts may be written off provided certain criteria are met. If the unsecured debt is not more than R50 000; if the unsecured debt is as a result of unsecured credit agreements and unsecured credit facilities; and if the person earned an amount of R7 500 or less per month for the last six months – Section 88A of the National Credit Amendment Bill of 2017.

3 See section 129(1).

sent and twenty (20) business days have elapsed after default.[4] Thirdly, a court may not hear the matter if the arrears referred to in the notice of default have been brought up to date.[5]

This Chapter therefore highlights section 129 as the initiating notice from which all of the following consequences may follow. It is the notice that identifies for the consumer their rights and options on how to avoid litigation, for example. This Chapter therefore assists in fulfilling the research objective of identifying and analysing the options available and consequences to a consumer in receipt of a section 129 notice with particular focus on the issue of reinstatement.

The option of debt review is a particular option that intersects with debt enforcement when a section 129 notice has been sent. This particular option is not covered in detail in this Chapter but is dealt with in the next Chapter – Chapter seven.

6 2 CONSUMER'S FAILURE TO RESPOND TO THE SECTION 129(1)(a) NOTICE AND A PROVIDER'S CONSEQUENT COURSE OF ACTION

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As discussed in Chapter four, section 129(1)(b), read with section 130(1), makes it clear that a provider may not enforce a credit agreement to which the NCA applies without first delivering to the consumer a notice in terms of section 129(1)(a).[6] Allegation of compliance with section 129(1)(a) is necessary to complete the provider's cause of action. It was held in *African Bank Ltd v Additional Magistrate Myambo NO*[7] that "by virtue of s 129(1)(b)(i) the credit provider's cause of action is not complete unless the section 129-notice ... has been given".[8] This notice and proof thereof would then form part of the summons and cause of action. Once served upon the consumer, he or she may elect to either defend the action, in which event the provider may proceed with summary judgment; alternatively, if the consumer elects not to respond, the provider may proceed to request default judgment as per the normal options available to a Plaintiff.[9]

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4 See section 130(1).
5 Brits "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *Quo vadis*?"2017 *THRHR* 178 - 179. See section 130(3)(c)(ii)(dd) of the NCA.
6 The section 129(1)(b) notice was dealt with in Chapter 4 above.
7 2010 6 SA 298 (GNP). This was confirmed in *FirstRand Bank Ltd t/a First National Bank v Moonsamy t/a Synka Liquors* 2020 ZAGPJHC 105 (15 April 2020).
8 *African Bank Ltd v Additional Magistrate Myambo* 20.
9 Van Heerden and Boraine 2011 *SAMLJ* 53 – 54.

Section 130(4)(b) of the NCA provides that where there is *inter alia* non-compliance with section 129(1)(a), the court is obliged to adjourn the matter before it and make an appropriate order setting out the steps the provider must complete before the matter may be resumed. The court is afforded no discretion and must make the aforesaid order if there is non-compliance with section 129(l)(a).[10] In *Standard Bank of South Africa Ltd v Rockhill*[11] the court remarked that section 129(1)(a) was an impediment to commencing any legal proceedings to enforce a credit agreement and indicated that in the event of non-compliance with the subsection, "the court's hands are tied and it must act in accordance with s 130(4)(b)."[12] The court consequently adjourned the application for summary judgment *sine die* and afforded the plaintiff the opportunity to provide a section 129(1)(a) notice to the defendants.[13]

6 2 1 Where the matter is defended

Where a consumer defends legal proceedings seeking to enforce a credit agreement in respect of which there appears to be non-compliance with section 129(1)(a), various possibilities may arise because of a variety of procedural remedies available in defended action or application proceedings.

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Where an applicant (plaintiff) seeks to enforce a credit agreement prior to judgment by, for instance, applying for an attachment order, compliance with section 129(l)(a) has to be alleged in the founding affidavit supporting the application. Where this allegation is lacking, it may be either because no section 129(l)(a) notice was delivered prior to the commencement of the enforcement proceedings or because the applicant (plaintiff) failed to allege delivery of a section 129(1)(a) notice despite actually having delivered it. In defended matters, it may also occur that compliance with section 129(l)(a) is alleged by the applicant (plaintiff) but that the respondent (defendant) then disputes it.[14]

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10 *Ibid*.
11 2010 5 SA 252 (GSJ). The case was followed in *FirstRand Bank Ltd t/a First National Bank v Moonsamy t/a Synka Liquors* 2020 ZAGPJHC 105 (15 April 2020).
12 *Standard Bank of South Africa Ltd v Rockhill* para 18.
13 *Standard Bank of South Africa Ltd v Rockhill* para 19. Van Heerden and Boraine 2011 *SAMLJ* 53 – 54.
14 Van Heerden and Boraine 2011 *SAMLJ* 56.

Where a section 129(l)(a) notice was in fact delivered but the allegation is lacking in the pleadings, the applicant (plaintiff) will most likely during argument on the point *in limine* draw the court's attention to the compliance. In such instance, because there was compliance with section 129(l)(a), a court will not be obliged to make an order under section 130(4)(b) and it would not be necessary to re-deliver the section 129(1)(a) notice, but the court would most probably require a supplementary affidavit by the applicant (plaintiff) confirming that the section 129(1)(a) notice was delivered prior to enforcement.[15] In the event that the founding affidavit does contain an allegation of compliance with section 129(1)(a) but such compliance is disputed, the issue will be argued during the hearing of the point *in limine*. If the court holds that there was compliance with section 129(l)(a), there is nothing further to be done. However, if the court holds that despite the allegation of compliance, there was no compliance, the order that it is empowered to make at that point is in terms of section 130(4)(b), to adjourn the matter as discussed in Chapter four and indicate the steps to be completed by the applicant (plaintiff) before the matter may be resumed.[16]

Where a summons which requires compliance with section 129(1)(a) lacks that allegation, it is submitted that it is a defect which, because of an apparently mandatory pre-enforcement requirement, goes to the core of the pleading and therefore an exception may be raised in regard thereto.[17] If the notice was delivered prior to the commencement of enforcement, a court would uphold an exception as the pleading itself lacks an allegation necessary to complete the cause of action.[18] However, it would not be necessary for the court to invoke section 130(4)(b) because the notice had actually been delivered and an amendment of the particulars of claim would remedy the defect.[19]

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Where an exception is raised and it transpires that no section 129(1)(a) notice was delivered prior to the commencement of proceedings, a court would be obliged to act in accordance with section 130(4)(b) by adjourning the matter and ordering the plaintiff to comply with the steps under section 129(1)(a) before the matter may resume.[20]

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15 Van Heerden and Boraine 2011 *SAMLJ* 56 - 58.
16 Van Heerden and Boraine 2011 *SAMLJ* 58.
17 *Ibid.*
18 Van Heerden and Boraine 2011 *SAMLJ* 58.
19 The judge in in *FirstRand Bank Ltd t/a First National Bank v Moonsamy t/a Synka Liquors* 2020 ZAGPJHC 105 (15 April 2020) specifically commented at para 47.8 that this was not a question the court was required to answer but would most likely follow previous reasoning.
20 *Beets v Swanepoel* 2010 ZANCHC 55 (5 October 2010), 2010 JOL 26422 (NC) para 13; Van Heerden

It is submitted that where there has been non-compliance with section 129(1)(a), the defendant would be able to allege prejudice by arguing that section 129(1)(a) affords him or her certain rights that could have the effect of resolving the dispute between the parties and that he or she was not afforded the opportunity to exercise those rights which ultimately is the purpose of the rights.[21]

6 2 2 Default judgment and Summary judgment

In the case where the consumer received the section 129 notice but failed to respond, the provider may proceed with the issuing and service of summons. Should the consumer not respond to the summons by entering an appearance to defend within ten (10) days the provider would then be in a position to apply to court for judgment to be granted by default. On the other hand, should the consumer receive the summons and enter an appearance to defend in the prescribed time the provider may proceed with an application for summary judgment.[22]

The summary judgment remedy enables the plaintiff to obtain judgment against the defendant at an early stage of the proceedings without the matter proceeding to trial and thus with a limitation on the *audi alteram partem* principle, given that "the doors of the court are closed" to the debtor at an early stage.[23] It is for this reason that summary judgment as a remedy has been regarded as extraordinary and stringent. However, the Supreme Court of Appeal in *Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[24] remarked: "The procedure

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and Boraine 2011 *SAMLJ* 59; Theophilopoulos, Rowan, Van Heerden and Boraine *Fundamental Principles of Civil Procedure* 4 ed (2020) 201; *Lobo Properties (Pty) Ltd v Express Lift Company (SA) (Pty) Ltd* 1961 1 SA 704 (C).

21 Van Heerden and Boraine 2011 *SAMLJ* 58 – 59. In the case of *FirstRand Bank Ltd t/a First National Bank v Moonsamy t/a Synka Liquors* 2020 ZAGPJHC 105 (15 April 2020) summary judgment was refused due to the summons being excipiable and for non-compliance with sections 129 and 130 of the NCA. It was clear from the wording of the "track-and-trace" report that the default notice was sent to the incorrect post office (para 2). The applicants relied on *SA Taxi Development Finance (Pty) Ltd v Phalafala* 2013 JDR 0688 (GSJ) stating that there was compliance with section 129(1)(a) if a copy of the notice is attached to the summons. De Villiers AJ rejected this argument. In *Amardien v Registrar of Deeds* 2019 3 SA 341 (CC) section 129(1)(a) notices that did not contain the outstanding amount were held to be defective.

22 High Court Rule 32(1)(a). Summary judgment is a remedy available to a plaintiff who has issued summons against a defendant for, *inter alia*, a liquidated amount of money in instances where the debtor enters an intention to defend the claim, but the plaintiff believes that the debtor does not have a *bona fide* defence to such claim.

23 *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 5 SA 1 (SCA) para 11C–G; Erasmus, van Loggerenberg and Farlam *Superior Court Practice* 2 ed (2015) B1-206.

24 2009 5 SA 1 (SCA).

is not intended to deprive a defendant with a triable issue or a sustainable defence of his/her day in court."[25]

If the court grants the consumer access to the debt review process it would have a dilatory effect on the summary judgment proceedings as it would cause such proceedings to be postponed pending the outcome of the debt review proceedings. If the consumer is eventually granted a debt restructuring order it would result in the further postponement of the summary judgment proceedings pending compliance with the debt restructuring order and may even lead to the summary judgment proceedings becoming redundant in the event of the consumer having fully complied with the debt restructuring order.[26]

However, where the consumer raises his over-indebtedness by means of the allegation that he or she was subject to a pending debt review which was never duly terminated in accordance with the requirements of section 86(10) of the NCA prior to enforcement or where the debt review was alleged to have been unlawfully terminated pursuant to section 86(10) by a provider who acted in bad faith and a resumption order in terms of section 86(11) is subsequently granted, it is submitted that this may constitute a *bona fide* defence for summary judgment purposes.[27]

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Where an application for summary judgment is adjourned in accordance with section 130(4)(b), the plaintiff would have to deliver the section 129(1)(a) notice to the defendant at the correct address and would have to amend the particulars of claim to its summons to reflect this compliance. Should the defendant then not respond to the section 129(1)(a) notice within the required time or respond by rejecting the proposals contained therein, the application for summary judgment could be re-enrolled and resumed. If the consumer raised no other *bona fide* defence in his or her opposing affidavit apart from the issue of non-compliance with section 129(1)(a), which by itself does not constitute a *bona fide* defence, summary judgment could be granted against the defendant.[28] In such circumstances the only point of postponement would

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25 *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* para 32.

26 Van Heerden and Roestoff "Over-indebtedness under the National Credit Act as a *bona fide* defence to summary judgment" 2014 *THRHR* 287.

27 Van Heerden and Roestoff 2014 *THRHR* 287. In *Absa Bank v Janse van Rensburg* 2013 5 SA 173 (WCC) para 5F it was held that a simple summons is not a pleading. The court drew a distinction between a simple summons and a combined summons. The court held that a simple summons as it is not a pleading is not susceptible to an exception.

28 Van Heerden and Boraine 2011 *SAMLJ* 61. Reference may be made to the judgment in *FirstRand Bank Ltd t/a First National Bank v Moonsamy t/a Synka Liquors* (07747/2018) 2020 ZAGPJHC 105 (15 April 2020)

be to provide the consumer with the opportunity to exercise their rights as provided for in section 129.

6 2 3 Trial

If, after rejecting the proposals in the section 129 notice or alternatively ignoring the notice, the consumer receives the summons and subsequently enters an appearance to defend the action, and thereafter survives summary judgment, the matter will then proceed to trial as with any other civil action.

In the event that it transpires as late as at the trial stage that there was non-compliance with section 129(1)(a) prior to the commencement of enforcement, the court would have no option other than to adjourn the matter and order the provider to deliver such notice. The matter would resume once the appropriate time period has expired and the consumer has either not responded to the section 129(1)(a) notice or responded by rejecting the proposals contained therein. If the consumer does not accept the proposals in the notice, postponement at this late stage would be costly and ultimately result in delaying the proceedings. Having regard to the challenges of congested trial rolls, such a postponement could create a delay of a considerable number of months or years in busy courts such as Gauteng Local Division, Johannesburg or Gauteng Division, Pretoria.[29]

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6 3 JUDGMENT FOR MONEY ORDER v ORDER FOR EXECUTABILITY: The case of immovable property

6 3 1 General

Section 129 allows a provider to obtain a default judgment in respect of a claim involving immovable property, and a drastic procedure for execution against immovable property when the consumer is in default. In other words, a consumer runs a risk of losing their property to a third party who is willing to make payments. This is one of the possible consequences of non-response to a section 129 notice where the credit agreement is that of a home loan. The right

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and the cases referred therein for a full explanation on the postponement and resumption of proceedings based on compliance or non-compliance with section 129.

29 Van Heerden and Boraine 2011 *SAMLJ* 61.

to housing is not a focus of this work but is raised here due to the fact that the majority of consumers as mentioned in Chapter one cannot afford to purchase large assets such as a house or motor vehicle without financing. Therefore this is a particular area of vulnerability for consumers in South Africa. As Marais puts it:

> "A mortgagor agrees, contractually, that if he or she does not fulfil the obligation to repay the loan, the creditor may enforce the mortgage debt by foreclosing the mortgage agreement, approaching the court for a default judgment and an execution order, and then selling the mortgaged property. Furthermore, upon the registration of the mortgage bond in the deeds office the mortgagee acquires a limited real right over the mortgaged property."[30]

Fuchs concedes that section 129 has been difficult to interpret, as to how it affects the execution procedure in the case of a mortgage bond over immovable property.[31] The section 129 notification is an opportunity for the consumer to find ways to bring the payments up to date "whilst preventing the mortgagee from foreclosing the mortgage and invoking the acceleration clause to accelerate the repayment of the outstanding debt."[32] The notification required also prevents providers from abusing the court processes and simultaneously promoting out of court procedures and agreements between the parties. In terms of Section 130(3)(c) of the NCA, should the two parties reach a consensus out of court on how the owed amount will be paid, then the provider cannot proceed with debt enforcement.

In *Firstrand Bank Ltd v Maleke*[33] it was noted that section 129(1)(a) contains no express provision to the effect that consumers are warned about their homes that may be sold in execution when they fail to pay.[34] The court went on to say that "in cases where historically disadvantaged consumers are involved, courts should be astute to protect their rights when it comes to the application of the provisions of the Act."[35] In other words a court is discouraged from granting an application of execution from the onset if it will infringe the consumer's right to adequate housing.[36] In fact, the Constitutional Court has held that in certain instances courts

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30 Marais "Mortgage foreclosures and the national credit act: balancing the rights of the creditor and the rights of the debtor in light of *Jaftha v Schoeman*" 2013 *Responsa Meridiana* 99.

31 Fuchs "The Impact of the National Credit Act 34 of 2005 on the Enforcement of a Mortgage Bond: *Sebola v Standard Bank South Africa* 2012 5 SA 142 (CC)" 2013 *PELJ* 338.

32 Marais 2013 *Responsa Meridiana* 105.

30 2010 1 SA 143 (GSJ).

34 *FirstRand Bank Ltd v Maleke* para 6.

35 *FirstRand Bank Ltd v Maleke* para 9.

36 Section 26 of the Constitution provides that: "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." Although it is subsections 1 and 3 that are the most relevant for the purposes of this discussion, it is worth noting that 26(2) places a duty on the state to ensure realisation of the right to

should refuse to order the execution of a consumer's home if there are other alternative ways to recover the debt without the execution.[37] Since the sale in execution would limit the debtors' right to have access to adequate housing, such a limitation must be justifiable in light of section 36 of the Constitution.[38] In this regard, Marais reached a conclusion that "a court may not order the sale in execution of the mortgaged property without investigating all the relevant circumstances in order to maintain a constitutionally compliant proportional balance between the rights of the debtor and the rights of the creditor."[39]

In *Jaftha v Schoeman; Van Rooyen v Stoltz,*[40] the Constitutional Court stressed the need for judicial oversight, which should take into account a number of circumstances in order to strike the balance between section 129 and the right to housing, in line with section 36 of the Constitution. In this case the consumer, Ms Jaftha, was granted a housing subsidy to buy a home and she did so. A provider lent Ms Jaftha R250, and monthly instalments were to be paid to satisfy the debt. Ms Jaftha was inconsistent in her payments which resulted in the provider hiring attorneys to handle the matter. Judgment was granted against Ms Jaftha for R632,45 in the Magistrates' Court. When Ms Jaftha attempted to make further payments, she was hospitalised. Having been released from hospital, Ms Jaftha discovered that a sale in execution was scheduled against her home. She was notified that a sum of R5500 would stay the sale in execution and she made payments that amounted to R500,00. Subsequently, Ms Jaftha was notified that the amount to stay the sale had increased to R7000,00. Ms Jaftha could not pay this amount and she was given no further opportunity to pay it. The sale occurred and Ms Jaftha was forced to leave her home, where she lived with her children.[41]

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adequate housing, which suggest that the right is a socio-economic right. In so far as section 26 relates to section 129(1), it suggests that the notice should also advise the consumer of the possibility of the drastic procedure of enforcement, the sale in execution in the event that judgment is obtained against him. It is submitted that the notice should also advise the consumer about their right to have access to housing, this is especially important for historically disadvantaged and indigent consumers.

37 *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 56.

38 Section 36 provides that: " (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— (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. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

39 Marais 2013 *Responsa Meridiana* 101.

40 2005 2 SA 140 (CC).

41 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 4.

In a similar case, the consumer, Ms Van Rooyen was unemployed and impoverished. Her husband received R15 000 as a state subsidy to finance the purchase of a home in 1997 but he passed away shortly thereafter. Ms Van Rooyen inherited the home. Ms Van Rooyen then purchased vegetables on credit and could not repay the amount of R190. At the Magistrates' Court, a judgment was granted against her for R198,30 and her home, where she lived with three children, was sold in execution.[42] In attempt to interdict the transfer of properties to the buyers, an application was lodged with the High Court to set aside the execution. Ms Van Rooyen further sought orders:

> "interdicting the sale of property…directing the review of all sales in execution of immovable properties in Prince Albert…or sales in execution where it appears that they have taken place in violation of rights entrenched in the Bill of Rights."[43]

The High Court found no infringement of section 26 of the Bill of Rights. It held that section 66(1)(a) of the Magistrates' Court Act[44] was constitutionally compliant. Section 66(1)(a) set out the procedure to sell homes in execution when providers obtain the order of the court to execute the property.[45] When the matter came before the Constitutional Court, the court approached the issues in a manner that will ensure a balance between the provider's right of enforcement and the purport of the Bill of Rights. The Court sought to establish whether a sale in execution of consumers' homes did in fact limit the right to adequate housing in light of the limitation test under section 36 of the Constitution.

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The Constitutional Court noted that to a certain extent, section 66(1)(a) violated section 26 of the Constitution. The court stated that selling a home in execution may only be permitted in instances where it is justified and as such a court should play a significant role in investigating such circumstances in each case.[46] Hence, the need for judicial oversight when selling a home in execution. The court read into the section the words 'a court, after consideration of all relevant circumstances, may order execution." The court further set out

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42 *Jaftha v Schoeman* para 5.
43 *Jaftha v Schoeman* para 6.
44 32 of 1944.
45 The section provides that: "Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made."
46 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 42.

guidelines (or the proportionality test) that may be followed by the court in their inquiry as follows:

> "It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided. If the procedure prescribed by the rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate…
>
> This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless… It is for this reason that the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor… Another factor of great importance will be the circumstances in which the debt arose…
>
> If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge… A final consideration will be the availability of alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home."[47]

The need for judicial oversight proposed and adopted by the Constitutional Court must be welcomed as it balances the socio-economic issues of the country and the interests of the consumers. This is likened to the balance to be obtained in the NCA pre-enforcement procedures.

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The *Jaftha* judicial oversight function in the sale of homes in execution marked the beginning of the development of South Africa's law relating to enforcements of debts against consumer's immovable property. Indeed, the recognition of constitutional principles before selling the home of a consumer in execution is now embedded in our jurisprudence. The *Jaftha* proportionality test is a recognition by the court that homeowners enjoy substantive rights against their homes being sold in execution.

6 3 2 *Gundwana v Steko Development CC*

Our jurisprudence now recognises both substantive rights and procedural aspects that ought to be observed when enforcing judgments against homeowners and before the court can proceed

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47 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 56-59.

to grant an order of sale in execution. The case of *Gundwana v Steko Development CC*[48] gives more clarity on the Uniform Rules relating to the sale of property in execution.

This was an application by Ms Elsie Gundwana (Applicant). The applicant purchased property in the Western Cape in 1995 for R52 000. A payment of R25 000 was made by the applicant, with money lent to her by the provider under a mortgage bond.[49] In terms of the mortgage bond the property served as security for the loan. In 2003 the applicant fell in arrears with her monthly repayments. Subsequently, in November 2003 the registrar granted default judgment against the applicant in the High Court at the Bank's instance for payment of R33 543,06 with an order declaring the property executable.[50]

A writ of attachment was issued to give effect to the declaration of executability. No action whatsoever was taken by the provider in relation to the execution for a period of four years. The applicant continued making irregular payments. According to the applicant, she only discovered on her return from a visit to her sister in Cape Town that the sale in execution of the property was to take place.[51] Having made a follow-up with the provider, she was informed that she was in arrears in the amount of R5 268,66 and that the total outstanding balance on the bond amounted to R23 779,13, which she promised to settle.[52]

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Despite the promise and a payment of R2 000.00, the applicant was faced with eviction when the property was sold in execution to Steko Development CC, based on the initial writ.[53] Despite the transfer of property and its registration under Steko, the applicant did not vacate the property. Steko Development CC therefore sought an order of eviction from the George Magistrates' Court. On the first hearing of the matter, the applicant requested a postponement of the matter to seek legal advice.[54] On the return day, when the applicant asked for a further postponement, the court declined her request, and an order of eviction was granted.

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48 2011 3 SA 608 (CC).
49 *Gundwana v Steko Development CC* para 5.
50 *Supra*.
51 *Gundwana v Steko Development CC* para 6.
52 *Supra*.
53 *Gundwana v Steko Development CC* paras 6 – 7.
54 *Gundwana v Steko Development CC* para 8.

The applicant unsuccessfully appealed against the eviction order in the High Court. Leave to appeal to the Supreme Court of Appeal was also refused.[55] When the applicant lost the eviction battle, she also challenged the 2003 default judgment by the High Court.[56] At the centre of the argument was whether a High Court registrar may grant an order declaring mortgaged property that is a person's home specially executable, when ordering default judgment in terms of Rule 31(5)(b) of the Uniform Rules of Court.[57]

When the matter came before the Constitutional Court, the applicant sought to appeal against the eviction order and to be granted direct access on the substantive constitutional issue in order to dispose of the rescission application.[58] The applicant admitted that the summons which formed the basis of the default judgment was served on her in October 2003. However, it appears that the applicant assumed that default judgment would not be taken against her after having made arrangements and promises to the provider that she would settle her arrears.[59] She was not aware that default judgment had been taken against her. She only became aware of the default judgment when the execution sale was imminent.[60]

The applicant's contention was that the power of the registrar to grant an order declaring mortgaged property that is a person's home specially executable in the course of ordering default judgment, was constitutionally invalid.[61] As such, at the heart of the Constitutional Court inquiry was whether a High Court registrar may, in the course of ordering default judgment under Rule 31(5)(b) of the Uniform Rules of Court, grant an order declaring mortgaged property that is a person's home specially executable. Perhaps the most concerning

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55 *Supra*.
56 *Gundwana v Steko Development CC* para 9.
57 The Rule provided as follows: "(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment. (b) The registrar may— (i) grant judgment as requested; (ii) grant judgment for part of the claim only or on amended terms; (iii) refuse judgment wholly or in part; (iv) postpone the application for judgment on such terms as he may consider just; (v) request or receive oral or written submissions; (vi) require that the matter be set down for hearing in open court (c) The registrar shall record any judgment granted or direction given by him. (d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court…"
58 *Gundwana v Steko Development CC* para 11
59 *Gundwana v Steko Development CC* para 12.
60 *Gundwana v Steko Development CC* para 24.
61 *Gundwana v Steko Development CC* para 1 - 2.

issue alleged by the applicant was that the underlying constitutional implications of the eviction was not raised fully in court before the eviction order was granted.[62]

As the applicant was seeking direct access to the Constitutional Court it was submitted, on behalf of the provider, that direct access should not be granted as the rescission application was still pending in the High Court and that it is not in the interests of justice for the Constitutional Court to hear the matter.[63] In rejecting these arguments, the court per Froneman J expressed the view that even if the applicant had no direct access the court accepted that the constitutionality of the Rule has the potential of affecting many other people if found to be in breach of the constitutional imperatives.[64] From this paragraph alone, it is clear that the learned judge took a very broad approach to the issues at hand.

In other words, and at least from the court's view, the matter concerned more than what the applicant alleged. It concerned the possible practical collision between the drastic procedure of sale in execution of property against housing rights. As such the court granted direct access to determine the constitutionality of the registrar's competence to declare a person's home specially executable, in default judgments granted under Rule 31(5)(b), and consequently had to consider the rescission application and the eviction order.[65] The court, however, noted that the questioned Rule 31(5) contained no express provision relating to orders declaring mortgaged property specially executable, but found Rule 45(1)[66] which deals with execution following a judgment to be relevant.

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The court opted not to analyse the Rule as it had already been dealt with in previous cases.[67] It remarked that execution upon judgment on a money debt generally took place against movable property first and upon immovable property only if there was insufficient

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62 *Gundwana v Steko Development CC* para 24.
63 *Supra*.
64 *Gundwana v Steko Development CC* para 26.
65 *Gundwana v Steko Development CC* para 34.
66 This Rule provides that "The party in whose favour any judgment of the court has been pronounced may, at his own risk, sue out of the office of the registrar one or more writs for execution thereof as near as may be in accordance with Form 18 of the First Schedule: Provided that, except where immovable property has been specially declared executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his movable property, and the registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ."
67 See *Gerber v Stolze* 1951 2 SA 166 (T) and *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W).

realisable movable property to satisfy the judgment.[68] Procedurally, the court had to be approached for an order declaring immovable property executable when movables were insufficient to satisfy the debt but the procedure was discontinued.[69]

The court confirmed the *Jaftha* view that "where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought after judgment on a money debt, further judicial oversight by a court of law of the execution process is a must."[70] The provider unsuccessfully challenged that the matter should be decided in line with the *Jaftha* principles as it fell out of the circumstances set out in *Jaftha* – the fact-bound argument. The provider also argued that mortgaged property is property that does not come within *Jaftha*'s reach, because mortgagors willingly accept the risk of losing their secured property in execution when concluding a mortgage loan agreement - the voluntary placing-at-risk argument. In rejecting these arguments, Froneman J held as follow:

> "There are two different reasons why the fact-bound argument, that neither the applicant nor her property falls within the Jaftha category, should not succeed. The first is that the constitutional validity of the rule cannot depend on the subjective position of a particular applicant. It is either objectively valid or it is not. The second is that the fact-bound nature of each case supports the opposite conclusion to the one the Bank advances…Some preceding enquiry is necessary to determine whether the facts of a particular matter are of the *Jaftha*–kind. An enquiry of that sort requires an evaluation that goes beyond merely checking the summons to determine whether it discloses a proper cause of action. On the face of the summons in this case there is nothing to indicate, either way, whether the applicant was indigent or whether the mortgaged property was her home. The voluntary placing-at-risk argument also runs into difficulty. It is true that a mortgagor willingly provides her immovable property as security for the loan she obtains from the mortgagee and that she thereby accepts that the property may be executed upon in order to obtain satisfaction of the debt. But does that particular willingness imply that she accepts that—(a) the mortgage debt may be enforced without court sanction; (b) she has waived her right to have access to adequate housing or eviction only under court sanction under section 26(1) and (3); and (c) the mortgagee is entitled to enforce performance, in the form of execution, even when that enforcement is done in bad faith? I think not."[71]

Having rejected the two arguments by the provider, the learned judge concluded that it is the court that can do the necessary investigation to determine whether a declaration that hypothecated property constituting a person's home is specially executable, and thus High Court Rules and practice were unconstitutional to the extent that allowed the registrar to conduct the evaluation.[72] It should be noted that the court did not criticise the function of the registrar in its entirety. The court rather suggested that execution orders relating to a person's

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68 *Gundwana v Steko Development CC* para 37.

69 See *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC). In which a legislative provision providing for the seizure of property without recourse to a court of law upon default of payment of a debt was successfully challenged on constitutional grounds.

70 *Gundwana v Steko Development CC* para 41.

71 *Gundwana v Steko Development CC* paras 43 – 44.

72 *Gundwana v Steko Development CC* paras 49.

home require evaluation, and it is the court that should evaluate the circumstances, not the registrar. Without a doubt the court's reasoning was informed by the *Jaftha* decision.

The court however made it clear that constitutional considerations and protection of homeowners / consumers do not necessarily take away the provider's right to enforce debts. It stated:

> "It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."[73]

In its order, the court found that it was unconstitutional for the registrar to declare immovable property specially executable when ordering default judgment under Rule 31(5) of the Uniform Rules of Court in that it permitted the sale in execution of the home of a person. The matter was then referred back to the High Court to consider the rescission application in line with the Constitutional Court guidelines. The court also referred back to the Magistrates' Court the eviction order for reconsideration.

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The first and obvious observation from this judgment is the *Jaftha* effect. The court demonstrated its willingness to give effect to the housing clause which also matches the *Jaftha* case. In as far as civil procedure is concerned, *Gundwana* extended the consequence of *Jaftha* on the Magistrate Court Rules, to the High Court Rules. The two cases have many things in common but the most notable one is that they both confirm that judicial oversight is needed to ensure that the right to housing is not infringed.

The *Gundwana case* provided clarity and cleared up most of the confusion regarding selling residential property in execution in terms of the Uniform Rules.[74] In line with *Gundwana*, Rule 46(2)(c) prohibits the registrar from issuing writs of execution. The case further covers gaps that were not covered by *Jaftha* and overturned the findings in *Standard Bank of South Africa Limited v Saunderson*[75] and *Nedbank v Mortinson*[76] that the registrar was constitutionally competent to make execution orders when granting default judgment in terms

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73 *Gundwana v Steko Development CC* paras 54.
74 Du Plessis "Judicial oversight for sales in execution of residential property and the NCA" 2012 *De Jure* 552.
75 2006 2 SA 263 (SCA).
76 2005 6 SA 462 (W).

of Rule 31(5)(b). The judgment was delivered in 2011, six years after the *Jaftha* decision, and it confirmed most of the *Jaftha* principles.

Approving the *Jaftha* proportionality test in *ABSA Bank Ltd v Ntsane*,[77] the court stated that "there will be circumstances in which it will be unjustifiable to allow execution."[78] In *Maleke* the court also expressed the view that judicial oversight is compulsory where the execution order has the potential to affect debtors' section 26(1) right to have access to adequate housing. Factors such as "how the debt was incurred", the "financial situation of the debtors", the size of the debt and the "attempts made by the debtor to pay off the debt" should be considered.[79] However, the judicial oversight should not be a blockade to a provider from enforcing their mortgaged debt against dishonest consumers.[80]

It is apparent that the guidelines adopted by the Constitutional Court and approved by our jurisprudence seek to ensure that courts grant execution orders without interfering with the Bill of Rights and in a manner that balances the provider and consumer rights. The *Jaftha* development must be welcomed as it has also developed the civil procedure rules relating to the execution orders.

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6 3 3 Amendment to Rule 46

The consideration of the right to adequate housing in the *Jaftha* case did not only change the way courts now interpret the law governing the sale in-executions of property, but also led to the amendment of the civil procedure rules.[81] The *Jaftha* judgment led to the Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (the new Rules).[82] In *Jaftha* the Constitutional Court conceded that the court procedure had not been compliant with the constitutional

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77 2007 3 SA 554 (T).
78 *ABSA Bank Ltd v Ntsane* para 64.
79 *FirstRand Bank Ltd v Maleke* 2010 1 SA 143 (GSJ) para 60.
80 See the warning by the court in *ABSA Bank Ltd v Ntsane*2007 3 SA 554 (T) para 72.
81 Lombard "Amendments of rules in line with constitutional rights to adequate housing" 2018 (May) *De Rebus* 30.
82 Rules Board for Court of Law Act 107 of 1985 Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (execution against immovable property). GN R1272 *GG*41257/17-11-2017.

standards, the rules affected peremptory judicial oversight in all sale in-executions of property.[83]

Consequently, in November 2017, the process of execution of immovable residential property changed by the incorporation of Rules 46A and 43A of the Uniform Rules of Court and the Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa.[84] It has been acknowledged that the recent introduction of Rule 46A into the Uniform Rules which requires that the court "consider alternative means of satisfying the judgment debt, other than execution against the judgment debtor's primary residence"[85] This places a duty on the court to investigate an application for a declaration of executability and ascertain the possible consequences in relation to the consumer's circumstances and the value of the property.[86] As noted in *Jaftha*, with the consideration of the right to access to adequate housing under section 26, the loss of a home should be the last resort, when it is clear that there are no reasonable alternative ways to satisfy the provider's rights.[87]

One problem that was faced by consumers, and which became a norm, was having their homes being sold at auctions for amounts unreasonably lower than the market value.[88] The new Rule 46A seeks to close this gap by setting out a broad set of provisions dealing with different aspects concerning the sale in execution of residential property.[89] The main purpose of this amendment can be found in Rule 46A(2)(a) which obliges a court to consider whether the consumer can satisfy the debt in an alternative way so as to avoid a sale of the consumer's home, when hearing an application for an execution order against a consumer's primary residence.[90] A court can only proceed to grant an order of sale in execution of the consumer's

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83 *Jaftha v Schoeman; Van Rooyen v Stoltz* para 67.

84 Lombard 2018 (May) *De Rebus* 30.

85 See *Absa Bank Limited v Njolomba, FirstRand Bank Limited v Mbale, FirstRand Bank Limited v Kiwanuka, FirstRand Bank Limited v Thomas, Changing Tides 17 (Proprietary) Limited N.O. v Wesley, Changing Tides 17 (Proprietary) Limited N.O. v Lundberg, Changing Tides 17 (Proprietary) Limited N.O. v Getrude, Changing Tides 17 (Proprietary) Limited N.O. v Ntombifuthi* 2018 ZAGPJHC 94 (5 March 2018) para 3.

86 *Absa Bank Limited v Njolomba* para 3. Steyn "Execution against a debtor's home in terms of Roman-Dutch Law and the Contemporary South African Law: Comparative Observations" 2017 *Fundamina* 106.

87 *Jaftha v Schoeman; Van Rooyen v Stoltz* paras 53-59.

88 Brits "Executing a debt against residential property: The potential application of Rule 46A of the Uniform Rules of Court beyond a literal reading of "property of a judgment debtor" 2020 *Journal for Juridical Science* 76.

89 *Ibid*.

90 Rule 46A(2)(a) provides that: "A court considering an application under this rule must— (i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and (ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence (b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court,

home if it has complied with Rule 46A(2)(a) and such execution is warranted.[91] The court has broad powers including the power to set a reserve price for auction.[92] This power allows a court to prevent homes being sold at auctions for amounts unreasonably lower than the market value, however, it does not always mean that the court will protect the consumer from this occurrence. In *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick*[93] the court confirmed this power in the following words:

> "It all depends on the size of the debt and in particular the amount in arrears or owing. Whatever mechanisms may be employed; judges cannot ensure that a debtor is not left with a debt after a sale in execution. Courts can ensure that the sale is at a just and equitable price by taking the factors of each specific matter into account…The courts' power and duty to impose a reserve price is founded, *inter alia*, in s 26(3) of the Constitution. The process of granting judgment against the home owner is the first step that may lead to his or her eviction from the property. Thus a court is to consider all the relevant factors when declaring a property specially executable at the behest of a bondholder. It is thus incumbent upon the bank or bondholder to place 'all relevant circumstances' before the court when it seeks an order for execution."[94]

The literal approach to the meaning of a *judgment debtor* suggests that Rule 46A is based on the assumption that the consumer is also an occupier of the property and therefore the provider will have to comply with the strict requirements of Rule 46A. This is worrisome as it is not always the case that the consumer is also occupying the property. There are instances where the property has been rented out, for example.[95]

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In *Firstrand Bank Ltd v Folscher*,[96] a judgment that was decided under the old Rule 46(1)(a)(ii), it was found that the meaning of a "judgment debtor" for purposes of Rule 46(1)(a)(ii) refers to "an individual, a person."[97] This authority excludes legal persons. This position was confirmed in *Firstrand Bank Limited t/a RMB Private Bank v 1301 Myrtle Road,*

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having considered all relevant factors, considers that execution against such property is warranted. (c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property."

91 Rule 46A(2)(b). Rule 46A (3) -(6).

92 Rule 46A(8)-(9).

93 2018 6 SA 492 (GJ).

94 *Absa Bank Limited v Mokebe* 2018 6 SA 492 (GJ) paras 56-57.

95 This may also imply that the occupier's right to access to adequate housing is not at stake, which is problematic, for section 26 applies to everyone. See section 26(3) which provides that: "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." Brits extended the question to instances "where the property is occupied by family member of the judgment debtor, where the property is owned by a juristic person, but occupied by a shareholder or member of the juristic person or a beneficiary of the trust." Brits "Executing a debt against residential property: The potential application of Rule 46A of the Uniform Rules of Court beyond a literal reading of "property of a judgment debtor" 2020 *Journal for Juridical Science* 78.

96 2011 4 SA 314 (GNP).

97 *FirstRand Bank Ltd v Folscher* 2011 4 SA 314 (GNP) para 31.

Fourways Gardens CC.[98] In other words judicial oversight will only come into play when the consumer is a natural person.[99] However, in *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*,[100] a case which was decided under the new Rule 46A, the court took a different approach. It stated that a trust does not have a legal personality, even for the purposes of Rule 46A. It thus interpreted the Rule with due regard to section 26 and *Jaftha*.[101]

The right to adequate housing protected under section 26 of the Constitution is now entrenched in the civil procedure rules relating to sale in execution orders. Unlike before the *Jaftha* judgment, a court now has a duty to investigate the circumstances under which the execution order is to be granted. This judicial oversight is to ascertain whether the facts of a case reveal an unjustifiable infringement of the right to adequate housing. The development of these rules started from consideration of section 26 in *Jaftha* and gave birth to Rule 46A. It is, however, apparent that there is a need to clarify as to when the section 26 and the strict requirements of Rule 46A will be applicable. Thus far the authorities suggest that the occupier should be a natural person who regards the property as a home.

There are two decisions *Absa Bank Limited v Mokebe*[102] and *Standard Bank of South Africa Limited v Hendricks*[103] dealing with the issue whether a judgment for money order and another for an order of executability of the mortgaged property should be dealt with together or be separated. These cases dealt with other related issues as well such as postponement, reserve price, the advantages and disadvantages of ordering money judgments separately from the order of executability, judicial oversight, right of access to adequate housing as well as the position before and after the amendment of section 129(3) and (4) of the NCA. All the issues centred around the delicate balancing act required in measuring the respective rights of the bondholder / provider against those of the consumer.

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98 2015 ZAGPJHC 270 (17 November 2015) para 37-52.

99 Brits 2020 *Journal for Juridical Science* 80.

100 2019 ZAGPPHC 336 (9 July 2019).

101 Another significance of the *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust* 2019 ZAGPPHC 336 (9 July 2019) judgment is that it went even further to say that the occupier must not just occupy the property but must also regard it as a home (para 14). There is no doubt that a court will have to further investigate these circumstances. Factors like when a person is occupying the property with a family or with children will have to be taken into consideration by the court. As for a tenant occupying the property of the consumer, Brits convincingly argues that Rule 46A does not apply to them since they are protected adequately by the *huur gaat voor koop* rule and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust* 2019 ZAGPPHC 336 (9 July 2019) para 12.

102 2018 4 All SA 306 (GJ), 2018 ZAGPJHC 485, 2018 6 SA 492 (GJ) (12 September 2018).

103 2018 ZAWCHC 175, 2019 1 All SA 839 (WCC), 2019 2 SA 620 (WCC) (14 December 2018).

6 3 4 *Absa Bank Limited v Mokebe*

During April 2018 a number of foreclosure applications served in the Gauteng Local Division of the High Court in Johannesburg motion court before Van der Linde J. The Practice Manual of the Gauteng Local Division of the High Court of South Africa regulates certain aspects of cases in which foreclosure is sought. In the matter[104] before Van der Linde J provisions of section 14(1)(b) of the Superior Courts Act[105] were invoked by the learned Judge. It was after this that the Judge President of the Gauteng Division issued a directive setting out the issues requiring determination.[106] The issues presented to the court for determination were: (a) Does a court have discretion to postpone a money judgment against a debtor along with the application for leave to execute against a debtor's home, and adjudicate on both issues simultaneously?; (b) Whether the granting of a money judgment and the order of executability is a bar to the revival of the agreement and; (c) under which circumstances, if any, should the court set a reserve price when execution is granted.

First, the court dealt with its exercise in judicial oversight and held that it is obligatory upon a mortgagee (or as referred to is this study a "provider") to disclose whether it holds security and the nature of the security in all matters where a claim is made pursuant to a home loan. When the provider claims or intends to claim for execution against the property and fails to disclose such then it risks being denied the relief for special executability if such order is sought separately. Prior to the amendment of Uniform Rule 46 and the promulgation of Rule 46A, the court cautioned, the execution procedure that lenders followed was prescribed by the former Rule 46, which did not *per se* require the intervention of a court.[107] Now it is required as indicated above that full disclosure to the court of all relevant facts be made when judgment is sought as any monetary judgment may impact on the discretion which a court is required to

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104 *Absa Bank Ltd v Mokebe* 2018 4 All SA 306 (GJ), 2018 6 SA 492 (GJ), 2018 ZAGPJHC 485 (12 September 2018).

105 Act 10 of 2013. Section 14 is titled "Manner of arriving at decisions by Divisions" and section 14(1)(b) states: "A single Judge of a Division may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, at any time discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that Division as contemplated in paragraph (a)."

106 *Absa Bank Limited v Mokebe* para 6.

107 Uniform Rule 46 was amended and Rule 46A was inserted by Government Gazette Notice 41257 dated 17th of November 2017.

exercise when execution is sought. Thus, the executionary relief has become an integral part of the provider's cause of action.[108]

Second, in addressing the granting of monetary judgment separately from the application for execution, the court was of the view that money judgment was an intrinsic part of the cause of action and inextricably linked to the *in rem* claim for an order for execution, the latter being non-existent without the money judgment. The default of the consumer and the money judgment was a pre-condition for the entitlement of the provider to foreclose.[109] The court held that there was a duty on banks to bring their entire case including the money judgment, based on a mortgage bond, in one proceeding simultaneously. Should the matter require postponement for whatever reason, the entire matter fell to be postponed and piecemeal adjudication was not competent.[110] The court took the view that piecemeal adjudication was undesirable as it resulted in undue delay and increased costs. This once again amounts to a balancing consideration by the courts of the providers and consumers respective rights and responsibilities *albeit* not necessarily in respect of section 129 of the NCA.

The court indicated that section 172(1)(b) of the Constitution[111] empowers courts with a broad discretion when deciding a constitutional matter within its power to grant just and equitable relief, because the granting of an order declaring property executable or to defer its operation where the property is a debtor's primary residence implicates a constitutional right to adequate housing.[112] There was no argument raised by the parties on this matter in the proceedings.

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108 *Absa Bank Limited v Mokebe* para 12.

109 *Absa Bank Limited v Mokebe* para 14.

110 *Absa Bank Limited v Mokebe* para 29. Postponement could even be for compliance to occur in respect of s129(1)(a) as discussed earlier in this Chapter.

111 Section 172 (1)(b) of the Constitution states: (1) When deciding a constitutional matter within its power, a court— (b) may make any order that is just and equitable, including— (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

112 The execution process is governed by Rules 45, 46 and 46A of the Uniform Rules of Court. Rule 45(3) requires that whenever a sheriff is commanded by any process of court to raise a sum of money upon the goods of any person, he must proceed to the dwelling or place of employment of such person and demand satisfaction of the writ, and failing satisfaction, he must demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the writ and failing such pointing out he shall search for such property. According to Rule 46(1), a writ of execution against the immovable property of any judgment debtor must only be issued if: a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or such immovable property has been declared to be specially executable by the court. The Supreme Court of Appeal in *Nkola v Argent Steel Group (Pty) Ltd t/a Phoenix Steel* 2019 2 SA 216 (SCA) held that it was correct that in executing a judgment, a judgment debtor's movable property should

In dealing with the issue as to whether the postponement of the application for the money judgment under certain circumstances is objectionable or desirable the court was of the opinion that the postponement of the money judgment was both desirable and necessary and was to be heard together with the question of executability should any part of the matter be postponed.[113]

There has been concern over the years about the lack of governance of the sale in execution process as mentioned above, as it previously allowed for homes to be sold for a fraction of their real value.[114] Prior to the introduction of Rule 46A, the Uniform Rules of Court expressly required that the sale of immovable property on sheriff's auction was to be without reserve price. Rule 46A was amended to allow courts the discretion to set a reserve price for the sale in execution in accordance with Rule 46A(9) which provides that the court "may" set a "reserve price" for a sale in execution. The amendment seeks to protect consumers by ensuring that homes are not sold for unreasonably low prices. The effect of the amendment is that if the sale does not reach its court-set reserve price the property would not be sold, and the court would be required to set another reserve price or consider alternatives. The circumstances under which this discretion is to be exercised and the factors to be considered

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be attached and sold to satisfy the judgment debt before the judgment creditor could proceed to execute against immovable property. Only in the event that the movables were insufficient to fulfil the debt could a judgment creditor proceed against immovable property. The SCA held further that the common law and the Uniform Rules of Court placed no obligation on a judgment creditor to execute against movable property where a judgment debtor had failed to point these out and or make them available i.e. an obstructive consumer. The court referred with approval to *Silva v Transcape Transport Consultants* 1999 4 SA 556 (W) where Wunsh J considered that because the judgment debtor in the matter had not pointed out movable property that was available to satisfy the judgment debt, he had deliberately frustrated the judgment creditor's efforts to obtain payment. Wunsh J was of the view that this was a case where the interests of justice did not dictate that the execution of the judgment should be stayed and a case where execution should proceed against the judgment debtor's immovable properties. In *Nkola's* case the appellant's further contentions relied on the right to housing as entrenched in s 26 of the Constitution and that subsequent judgments had changed the common law as reflected in the *Silva* case. The court emphasized that those judgments dealt with a different factual matrix and that those cases followed on the judgments in the Constitutional Court dealing with the right to housing, which might be jeopardised where execution was permitted in respect of a debtor's primary residence. Those decisions of the Constitutional Court (for example *Jaftha v Schoeman*, *Van Rooyen v Stoltz* 2004 ZACC 25 (8 October 2004), 2005 2 SA 140 (CC) and *Gundwana v Steko Development CC* 2011 3 SA 608 (CC)) were confined to execution in respect of a debtor's primary home and brought the law in line with the constitutional right to housing. The objective was to achieve judicial oversight in instances where the right to housing was implicated. The decision of the SCA confirms that a judgment creditor is entitled to have immovable property belonging to a judgment debtor declared specially executable even in circumstances where the judgment debtor has sufficient movable property but is being evasive and deliberately frustrating the judgment creditor's efforts to obtain payment.

113 *Absa Bank Limited v Mokebe* para 33.

114 *Nxazonke v Absa Bank Ltd* 2012 ZAWCHC 184 (4 October 2012) where for example a sale in execution resulted in a home being sold for the unrealistically low price of R10 as compared to the real value of the property where the municipal value was R81 000.

and the weight apportioned to each, however, remained unclear. Variations in foreclosure practice had grown in the various jurisdictions. In some jurisdictions a practice had arisen to postpone applications for leave to execute against immovable property, usually for a period of six months in order to allow the consumer an opportunity to remedy the default. In other jurisdictions, it was required of the provider to indicate that attempts had been made to execute first against the movable property of the consumer before it would be permitted to execute against immovable property. Although this study is not about Rule 46 or sales in execution it does illustrate the balancing considerations of the rights and responsibilities of consumers and providers as continuously required and undertaken by the judiciary in different aspects of the NCA and civil litigation in general.

The court in the *Mokebe* case first noted that the role or involvement of judges, or the duty of courts when dealing with certain matters serving before them are not new and the source of the duty is to prevent unjust or inequitable outcomes, which duty is based in the Constitution.[115] It was held that courts' power and duty to impose a reserve price is founded,

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[115] Rule 46A provides as follows: "(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.
(2)(a) A court considering an application under this rule must –
(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and
(ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.
(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.
(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.
(3) Every notice of application to declare residential immovable property executable shall be –
(a) substantially in accordance with Form 2A of Schedule 1;
(b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in rule 46(5)(a): Provided that the court may order service on any other party it considers necessary;
(c) supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and
(d) served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner." [own emphasis]. It is noted in the context of this study on delivery of notices that the notice to the consumer pertaining to the application for declaration of his or her immovable property executable is to be served by the sheriff on him or her personally. This level of notification is clear and direct by the legislator. The section then proceeds to add that the court may order service in any other manner. It is however clear that the consumer must become aware of the application for the declaration of executability and this is due to the fact that should such application succeed the consumer's right to housing in terms of section 26 of the Constitution would be affected.

Rule 46A(8) refers in particular: "A court considering an application under this rule may –
(a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;
(b) order the furnishing by –

inter alia, in section 26(3) of the Constitution, this is so because no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. Thus, a court is to consider all the relevant factors when declaring a property specially executable.[116]

Accordingly, the court held that Rule 46A(8)(e) empowered the court to set a reserve price for the property at the sale in execution. In addition, the court was of the view that it would be expedient and appropriate to generally order a reserve price in all matters depending on the facts of each case. It noted though that the facts of a particular case could convince a court to depart from the general practice of setting reserve prices.[117] The court's oversight further ensures regulation of sales rather than precludes sales in execution. The court reiterated the importance of judicial oversight in achieving a fair outcome referring to *Mkhize v Umvoti Municipality*[118] to the effect that "insisting on judicial scrutiny in every case should hold no terrors." The court held further that a reserve price would balance the misalignment between providers and consumers where execution orders were granted and ensured that the consumer was not in a worse off position due to unrealistically low prices being obtained and accepted at sales in execution. This balance would be to the benefit of both parties.[119]

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6 3 5 *Standard Bank of South Africa Limited v Hendricks*

On 13th of September 2018 a number of foreclosure matters served in motion court in the Western Cape Division of the High Court held at Cape Town before Savage J in which an order of execution was sought against immovable property which was the primary residence of the judgment debtor.[120] The immovable property in the case of *Hendricks,* like that of *Mokebe*, was the respondent's primary residence with the result that its outcome would directly impact

(i) a municipality of rates due to it by the judgment debtor; or
(ii) a body corporate of levies due to it by the judgment debtor;
(c) on good cause shown, condone –
(i) failure to provide any document referred to in subrule (5); or
(ii) delivery of an affidavit outside the period prescribed in subrule (6)(d);
(d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;
(e) set a reserve price;
(f) postpone the application on such terms as it may consider appropriate."

116 *Absa Bank Limited v Mokebe* para 57.
117 *Absa Bank Limited v Mokebe* para 59.
118 2012 2 SA 1 SCA.
119 *Absa Bank Limited v Mokebe* paras 62 - 66.
120 2018 ZAWCHC 175 (14 December 2018), 2019 1 All SA 839 (WCC), 2019 2 SA 620 (WCC).

on the right to access to adequate housing in terms of section 26 of the Constitution. The individual respondents did not participate in the proceedings.

The court referred to the Constitutional Court decision in *Gundwana v Steko Development CC*[121] where it was emphasized that the constitutional requirement of judicial oversight did not challenge the principle that a judgment creditor (the provider) was entitled to execute upon the assets of a judgment debtor (the consumer) in satisfaction of a judgment debt in money when the judgment debtor had willingly placed his or her home as security for the debt. Furthermore, it recognised the mortgage bond as "an indispensable tool for spreading home ownership," with its value as an instrument of security existing through the "confidence that the law will give effect to its term."[122] This speaks to all forms of credit and the confidence providers need in the fulfilment of their agreements.

The Judge invoked the provisions of section 14(1)(b) of the Superior Courts Act [123] to have the matters before her postponed. The Judge President of the Western Cape Division based on section 14(1)(a), thereafter referred the matters for hearing by a Full Bench which was called to address a number of issues:

(a) Whether Uniform Rule 46A which came into effect on 22 December 2017 introduced substantive legal requirements for obtaining an order for the execution of judgments in mortgage contracts;

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(b) Whether, as is the practice in other divisions of the High Court, personal service by the sheriff was required prior to granting a money judgment for the accelerated full outstanding balance of monies lent, which monies were secured by a mortgage bond over immovable property;

(c) The circumstances under which it would be appropriate to grant a money judgment for the accelerated full outstanding balance and then postpone the application to declare the property secured by the bond specially executable given the impact on costs and the potential for attachment and execution of movables in the meantime;

(d) Whether the court had a discretion to decline a default money judgment for the accelerated full outstanding balance and whether there were considerations to which regard should be had to ensure uniformity of treatment in this regard;

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121 2011 3 SA 608 (CC).
122 *Standard Bank of South Africa Limited v Hendricks* para 9 and 10.
123 Act 10 of 2013.

(e) Whether the postponement of the application for the money judgment under certain circumstances was objectionable or desirable;
(f) Whether the court had a discretion to afford the mortgagor an opportunity to remedy a default in such credit agreement by paying to the provider all amounts that were overdue under the NCA (reference is here made to section 129(3) and (4) with regard to reinstatement);
(g) Whether the operation of Rule 46A(9) insofar as the setting of a reserve price was concerned purported to amend the substantive law or not; and
(h) The circumstances under which a court was to set a reserve price and how this was to be determined in terms of the new uniform Rule 46A.[124]

In a display of judicial unity the Western Cape Full Bench to a large extent endorsed the findings of the Gauteng bench in the *Mokebe* case and in addition proposed a draft practice directive 33A incorporating the prescribed format of a foreclosure affidavit, which was similar to the Practice Directive contained in the Gauteng: Johannesburg Practice Manual.[125]

The first issue raised for consideration was whether Rule 46A introduced substantive legal requirements as opposed to simply procedural requirements, and if so, whether the Rule was *ultra vires* the powers of the Rules Board. The court acknowledged that all the parties before it took the view that Rule 46A was *intra vires* the powers of the Rules Board in that it set out only procedural matters which arose from rules of substantive law emanating from the Constitution. It held that it was not necessary to determine that issue at the time.[126]

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The second issue in respect of Rule 46A concerned execution against immovable property which was the primary residence of a judgment debtor and the requirement of personal service.[127] It was held that where personal service was not possible, the court should be approached to order service in any other manner ("substituted service") and that sufficient material was required to be placed before court to allow it to make such an order. This is comparable to the delivery requirement of the section 129 notice. It is becoming apparent that when a consumer's rights are at risk of limitation for whatever reason, even if due to their own default, the legislature wishes to ensure that they receive notification and a reasonable

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124 *Standard Bank of South Africa Limited v Hendricks* para 4 and 5.
125 Palmer and Malan "Foreclosure – A welcome new approach" https://www.withoutprejudice.co.za/free/article/6658/view#) (accessed 15-10-2020).
126 *Standard Bank of South Africa Limited v Hendricks* para 27.
127 *Standard Bank of South Africa Limited v Hendricks* para 32.

opportunity to remedy the default and or at the very least be aware of their rights and options in regard thereto.[128]

The court cited *Absa Bank v Mokebe* [129] where it was recognised that to grant judgment for the repayment of the accelerated money debt and postpone the relief to declare the hypothecated immovable property specially executable, was a course which gave rise to an undue protraction of the proceedings and piecemeal handling of the matter with a resultant increase in costs.[130] It was found that the money judgment was an intrinsic part of the cause of action and inextricably linked to the *in rem* claim for an order for execution, which was non-existent without the money judgment.[131] The court held that it was not appropriate to order a postponement of the implementation of the order of special execution and that both the money order and the execution order should be sought simultaneously by the provider. Furthermore, there would be an obvious advantage to a more uniform approach being adopted in such matters and that the Practice Manual of the Western Cape Division should be amended to reflect that the money judgment should be heard together with the claim for executability.[132]

The court held that it had a discretion to postpone the application for a money order in appropriate circumstances having regard to section 172(1)(b) of the Constitution.[133] In arriving at this conclusion, the court indicated that the NCA was designed to strike a balance between the competing interests of consumers and providers. In addition, the court held that having regard to the debtor's right enshrined in section 26 of the Constitution, the money judgment should be postponed together with the order for special execution where a court, on a proper consideration of the facts before it, considered this to be in the interests of justice.[134] It is after

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128 The court also held that the role of the sheriff was to serve process and that to differentiate between areas on the basis that some were historically township areas and others not, was unfair, even more so when the costs of this differentiation were borne by debtors who could least afford it - *Standard Bank of South Africa Limited v Hendricks* para 33.

129 2018 6 SA 492 (GJ).

130 *Standard Bank of South Africa Limited v Hendricks* para 36.

131 *Standard Bank of South Africa Limited v Hendricks* para 37.

132 *Standard Bank of South Africa Limited v Hendricks* para 40.

133 *Standard Bank of South Africa Limited v Hendricks* para 49. Section 172 of the Constitution is titled "Powers of courts in constitutional matters" and provides as follows:
"(1) When deciding a constitutional matter within its power, a court —
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including —
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

134 *Standard Bank of South Africa Limited v Hendricks* para 48.

all desirable in most cases to limit costs to have the application for money judgment and order of special execution heard simultaneously.

According to the court the proper interpretation of section 129(4)(b) of the NCA, which will be discussed in the next section, demonstrated that consumers were able to reinstate their home loans by purging their arrears right up until the immovable property is sold in execution, thus granting a money judgment would not deprive a consumer of this right. What prevented the reinstatement under section 129(4)(b) was only the sale in execution of the immovable property and the realization of the proceeds of such sale.[135] As to the costs which arose in the reinstatement of a mortgage bond, the court held that it was bound by the majority judgment in *Nkata v FirstRand Bank Limited.*[136]

The court held that the setting of a reserve price was a matter of procedural law in that it was concerned with the manner in which the judgment was executed, the conduct and procedure of the sale in execution. The factors to be taken into account by the court in deciding whether to set a reserve price were clearly set out in Rule 46A(9)(b).[137]

The court followed the approach in *Mokebe*[138] that the benefits of setting a reserve price in most instances outweighed any prejudice which might arise in doing so. It held that only in exceptional circumstances would the court exercise its discretion not to set a reserve price.[139]

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The case of *Hendricks* foreshadowed the important topic or right available to a consumer in default under the NCA – that of reinstatement.

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135 *Standard Bank of South Africa Limited v Hendricks* para 53.
136 *Nkata v FirstRand Bank Limited* 2016 4 SA 257 (CC) – discussed in terms of reinstatement under section 6 4 3. *Standard Bank of South Africa Limited v Hendricks* para 54.
137 *Standard Bank of South Africa Limited v Hendricks* para 61.
138 *Absa Bank v Mokebe* 2018 6 SA 492 (GJ).
139 *Standard Bank of South Africa Limited v Hendricks* para 63.

6 4 REINSTATEMENT OF THE AGREEMENT

6 4 1 General

Section 129(3) and (4) of the NCA are the provisions which introduced to South African consumer law a new concept of "reinstatement" or the "right to re-instate a credit agreement".[140] Due to unclear and poor drafting, the exact requirements and limitations of this mechanism are not obvious but its general purpose remains clear.[141] Reinstatement enables consumers to rectify their default by paying the amounts in arrears on their credit agreement, together with certain charges and costs.[142] Subject to certain qualifications[143] the consequence of such payment is effective in interrupting the debt enforcement process.[144] Therefore, the mechanism provides a way for a consumer to overturn the provider's enforcement of his rights under the agreement's acceleration clause and effectively reinstate the contract to its former position.[145]

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Prior to the National Credit Amendment Act of 2014 section 129(3) and (4) of the Act read as follows –

> "(3) Subject to subsection (4), a consumer may
> (a) at any time before the credit provider has cancelled the agreement reinstate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement; and
> (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.
> (4) A consumer may not re-instate 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 enforcing that agreement; or
> (c) the termination thereof in accordance with section 123".

In section 129(3) and (4) of the NCA the legislature purportedly intended to create a remedy for consumers who are willing and able to bring their arrears up to date and to compensate the provider for certain costs and charges that were incurred due to the default.[146] In principle, this

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140 Brits "The Reinstatement of Credit Agreement: Remarks in Response to the 2014 Amendment of section 129 (3) - (4) of the National Credit Act" 2015 *De Jure* 76.
141 *Ibid*.
142 Reinstatement is provided for in section 129(3) and (4) of the NCA; Brits 2015 *De Jure* 76.
143 As contained in Section 129(4) (a) to (c) of the NCA.
144 Brits 2015 *De Jure* 76; *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) para 142.
145 Brits 2015 *De Jure* 77. The issue was dealt with briefly in Chapter 7, specifically in section 7.4.
146 Brits 2017 *THRHR* 177 – 178.

is a valuable and worthy consumer protection mechanism but ever since the NCA was enacted, it was evident that these statutory provisions contained certain conceptual and terminological contradictions and that there were questions surrounding their interpretation. The National Credit Amendment Act of 2014 attempted to rectify these problems in section 129(3) and (4). Unfortunately, these amendments have created further confusion. The Constitutional Court in the judgment of *Nkata v FirstRand Bank Ltd*[147] was called upon to clarify the interpretation of certain points, particularly the controversial question of when the provider's legal costs become payable for re-instatement purposes. This judgment has brought the issue of reinstatement into the spotlight,[148] and created a paradigm shift within the legal fraternity and providers in the manner in which they approach collections.[149]

The 2014 amendment in attempting to clarify certain conceptual inconsistencies in the original subsections unfortunately introduces new uncertainties that necessitate some degree of interpretation to make sense of the provisions.[150] The first draft Amendment Bill[151] of the National Credit Amendment Act of 2014 that was published in 2013 proposed the removal of section 129(3) without replacing it, while leaving section 129(4) as it stood. No explanation was given for this proposal, but in the end, it was not accepted. Rather, the published National Credit Amendment Act of 2014 retained but amended both subsections.[152] Unfortunately, neither the 2013 review framework[153] nor the summary attached to the draft bill[154] to the National Credit Amendment Act of 2014 provided any indication to the legislature's intention or the purpose of the amendment of these subsections.[155] This factor complicates the task of interpreting the amendments but one can assume that Parliament intended to rectify some of the contradictions in the subsections. An alternative assumption is that the legislature intended to amend the substance of the right of reinstatement. However, it is unlikely that the intention was to amend drastically the substance or intention of these provisions.[156]

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147 2016 4 SA 257 (CC).
148 Brits 2017 *THRHR* 177 – 178.
149 Duvenhage "Changes in the NCA and the Interpretation of the Reinstatement Mechanism" 2017 (July) *De Rebus* 26 – 28.
150 Brits 2015 *De Jure* 77.
151 Draft National Credit Amendment Bill 2013, General Notice 560 in Government Gazette 36505 of 2013-05-29.
152 Brits 2015 *De Jure* 77. The amended sections are discussed below under 8 3 and 8 4.
153 Draft National Credit Act Policy Review Framework 2013, General Notice 559 in Government Gazette 36504 of 2013-05-29.
154 B47-2013, Government Gazette 36916 of 2013-10-09.
155 Brits 2015 *De Jure* 77.
156 Brits 2015 *De Jure* 77.

The amendment of subsection (3) is not that problematic because the substance of the consumer's right remains intact, and it is clear what the legislature attempted to achieve. Terminology has changed but this does not seem to have much effect. The point that requires further clarification is the requirement that the consumer may only remedy his default before the agreement has been "cancelled".[157] However, the most confusing aspect is the amendment to subsection (4).

6 4 2 The Amended Sections 129(3) and (4)

After the amendment, section 129(3) now provides as follows:

> "Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."

The content of the former paragraph (b) has been removed, and the terms "re-instate" and "re-instatement" have been replaced with the idea that a consumer may "remedy a default".[158] One can therefore reason that the legislature intended to correct some of the contradictions of the section. On the face of it, it appears that the subsection has been improved as there is now no longer a conflict between the term "re-instate" and the notion that re-instatement must take place prior to cancellation. In addition, the inconsistent suggestion that property could be attached before cancellation has been removed.[159] However, these adaptations do not address the real weakness that existed in the original subsection.

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The problem was not the terms "re-instate" and "re-instatement" or the rule enunciated in the old paragraph (b). The problem was the "before cancelled" qualification itself, which remains in place.[160] There is also no more clarity on what exactly "cancellation" means in this context. The subsection now states the obvious, that the default can be remedied before cancellation, which adds nothing to the common law position. Section 129(3) now purely restates the implication of section 129(1) read with section 130(1), namely that a default which has been brought to the consumer's attention can be rectified before the provider approaches

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157 *Ibid*.
158 Duvenhage 2017 (July) *De Rebus* 26 – 28.
159 Brits 2017 *THRHR* 193.
160 *Ibid.*

the court.[161] Therefore, whatever remedy is contemplated by section 129(3) can only occur prior to the cancellation of the contract either due to a material breach or in accordance with a *lex commissoria*. Therefore, the problem that reinstatement is precluded after cancellation but not after the enforcement of an acceleration clause[162] has not been addressed, but in fact seems to have worsened.[163] One can assume that the amounts payable have remained the same and that the subsection still takes effect by operation of law, which means that the potential complications regarding the claim for enforcement costs, their taxation prior to being payable for re-instatement purposes remain and are in need of further clarification.[164]

> After the amendment section 129(4) provides:
> "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 enforcing that agreement; or
> (c) the termination thereof in accordance with section 123."

Subsection (4) has therefore been amended by substituting the term "consumer" with "credit provider" and by adding the phrase "or revive".[165] Although section 129(3) is still made subject to section 129(4), the former refers to the consumer's right to remedy a default, whereas the latter no longer refers to any right of the consumer. Section 129(4), instead, indicates the points at which the provider may no longer revive or reinstate a credit agreement.[166] Effectively the subsection prohibits the provider from accepting any reinstatement attempt on the part of the consumer. It is important to note that enforcement of the acceleration clause on its own without cancellation is most likely in the majority of cases ineffectual since a consumer who cannot pay a few instalments is unlikely to be in a position to pay the contract balance once off.

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161 Brits 2017 *THRHR* 193.

162 Cancellation is not required for enforcement of an acceleration clause as it is a part of the contract and as such enforcing the acceleration clause is fulfilment of the contract in a sense other than specific performance. One cannot claim cancellation of the agreement and then attempt to enforce. If the agreement is cancelled, then damages would be the resulting claim. A typical acceleration clause provides that upon failure to pay any one instalment or a number of them the whole contract balance becomes payable. Failure to do so would result in the provider electing to cancel the contract, repossessing the *merx*, selling it to settle or reduce the debt and suing for the contract balance. Therefore, activation of an acceleration clause may sometimes result in the cancellation of a contract, but not always, if the consumer attends to payment of the whole contract balance payable when called upon do so. In such event, there is specific performance of the contract which is fulfilled.

163 Brits 2017 *THRHR* 193.

164 *Ibid*.

165 Brits 2017 *THRHR* 193 - 194.

166 *Ibid*.

Section 129(3) deals with what may be done (positive) whereas section 129 (4) deals with what may not be done (negative). The apparent problem with the new sections as far as the consumer's right of re-instatement is concerned is that there is now no provision for the point of no return as it is now phrased from the provider's perspective who is provided with the point of no return by the words "after".[167] Therefore, the only qualification that remains is that default cannot be remedied after cancellation, but this only applies to situations where the provider actually cancels the contract as opposed to merely enforcing an acceleration clause *albeit* that not all contracts contain acceleration clauses.[168] The possibility is that if an acceleration clause is enforced, there is no express cut-off point for the consumer's right to remedy his default. This could not have been the purpose of this section.[169] It is unknown as to what was intended with the addition of the phrase "or revive" in the subsection.[170]

Looking at the position pre- and post-amendment of the NCA, it appears that the legislature has effected the following changes: first, instead of a consumer being able to "reinstate" a credit agreement, the consumer may now "remedy a default"; secondly, section 129(3)(b), which allowed for the repossession of property held pursuant to an attachment order, has been repealed in its entirety and does not appear in the amended NCA;[171] thirdly, the amended section 129(4) substitutes the word "consumer" with the words "credit provider". Therefore, a provider, rather than a consumer, appears to be afforded the ability to reinstate (revive) or allow reinstatement of a credit agreement, save in specific instances, as indicated in subsections (a) – (c).[172]

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Re-instatement of the agreement occurs in terms of section 129(3) by "paying to the credit provider" the required amounts. Although the meaning of "paying" is ordinarily not problematic, this point is now somewhat controversial due to the National Credit Amendment Act of 2014 and certain statements made in *Nkata v FirstRand Bank Ltd.*[173]

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167 Brits 2017 *THRHR* 193 - 194.
168 Brits 2017 *THRHR* 194.
169 *Ibid*.
170 Brits 2017 *THRHR* 194.
171 Duvenhage 2017 (July) *De Rebus* 26 – 28.
172 *Ibid*.
173 2016 4 SA 257 (CC), 2016 6 BCLR 794 (CC).

6 4 3 *Nkata v FirstRand Bank Limited*

In the first footnote of the main judgment in the *Nkata* case, which was handed down in April 2016, Cameron J acknowledged that the litigation in *Nkata* preceded the amendments to the NCA. It appears that the Constitutional Court reasoned that it was ultimately asked to consider a matter which had been decided by the High Court in 2014. *Nkata* was litigated in a court of first instance prior to the effectual amendment of the Act on 13 March 2015. In the majority judgment, Moseneke DCJ stated unequivocally that an interpretive task was undertaken to clarify the purpose of reinstating a credit agreement in terms of subsections 129(3) and (4).[174]

The case of *Nkata v FirstRand Bank Limited* [175] is a significant one and predominantly dealt with the interpretation of section 129(3) and 129(4) of the NCA.[176] The primary question in this case was whether reinstatement of a credit agreement occurred. The applicant, Ms Nkata, purchased a building by registering two mortgage bonds with the respondent, FirstRand Bank Limited. The applicant selected the address of the property for the first mortgage bond as the *domicilium* address for the service of all notices. For the second bond, the applicant selected a different address, which was a temporary address in which she lived while her house was being built on the property. The mortgage bond agreements were governed by the NCA.

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Subsequently, the applicant defaulted on payment of her credit agreement and repeatedly fell into arrears. This behaviour triggered many telephone calls and letters from the respondent, including two notices in accordance with section 129(1) of the NCA. However, the respondent, due to an error in the deeds office, delivered the section 129(1) notice to the applicant's first address instead of the second address. Three days later, the respondent addressed a second section 129(1) notice to the applicant.[177] The respondent misstated the address of the second notice and it was sent to a Rondebosch apartment. Meanwhile, the arrears of the applicant continued to rise. The respondent then issued summons, which copy was served by affixing to the outer door of the applicant's residence. The applicant did not enter an appearance to defend and argued that the summons was never served. Consequently, default judgment was granted. The respondent authorised the sheriff to attach the applicant's property

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174 *Nkata v FirstRand Bank Ltd* paras 92 and 99. See also Duvenhage 2017 (July) *De Rebus* 26 – 28.
175 *Supra*.
176 *Nkata v FirstRand Bank Ltd* para 3.
177 *Nkata v FirstRand Bank Ltd* para 5.

in execution. The applicant objected stating that she only became aware of the judgment when a representative from the respondent called her to inform her that the property was to be sold in execution.[178]

The applicant applied urgently to the High Court to rescind the default judgment. Before determination of the application the respondent concluded a settlement agreement with the applicant.[179] The respondent cancelled the sale in execution after the applicant agreed to pay monthly instalments of R10 000.[180] If the applicant defaulted in the payment of her arrears it was agreed that the respondent would proceed to sell the property in execution.[181] The applicant also agreed to pay the costs of the cancelled sale as well as the costs of the rescission application as taxed or agreed. However, the agreement was never made an order of court. The main question in the case was whether the court *a quo* was correct to hold that the applicant had reinstated the credit agreement, thereby purging her default and disentitling the respondent from proceeding to sell the property.

The applicant contended that after the settlement agreement, when she paid her arrears, the credit agreement with the respondent was reinstated. The respondent argued that the fact that default judgment had been granted made reinstatement impossible under the NCA. The respondent proceeded to debit the applicant's mortgage bond account with amounts titled

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178 *Supra*.

179 It is submitted that the application for rescission of the default judgment would most likely have been successful had the respondent provided a defence coupled with the non-compliance of delivery of the section 129 notice by the provider. The matter would have then reverted to an action if the respondent subsequently entered an appearance to defend.

180 It is noteworthy that the agreed settlement provided, *inter alia*:
"1. The sale in execution in respect of Erf 8832 Durbanville, also known as 35 Vin Doux Street, Durmonte, Durbanville (the property), which was scheduled to take place on 10 December 2010 is cancelled.
2. [The applicant] shall sign a standard FNB Quicksell Mandate (Quicksell agreement) within seven days of the granting of this [court order].
3. While the Quicksell agreement is in place [The applicant] shall make payment to the [Bank] of R10 000 per month in respect of the instalments due to the [Respondent].
4. Should the property not be sold in terms of the Quicksell agreement prior to its expiry/termination [The applicant] shall pay the full arrears to the [Respondent] within 14 days of such expiry/termination or on such terms as may be agreed between the parties.
5. Should [Applicant] pay the full arrears to the [Respondent] in terms of clause 4 the [Respondent] shall not sell the property in execution but [Applicant] shall pay the full monthly instalments to the [Respondent].
6. Should the property not be sold in terms of the Quicksell agreement and should [Applicant] fail to pay the arrear amount owing to the [Respondent], the [Respondent] shall be entitled to proceed to sell the property in execution forthwith.
7. [Applicant] shall pay the wasted costs occasioned by the cancellation of the sale in execution referred to in paragraph 1.
8. [Applicant] shall pay the costs of this application as taxed or agreed."

181 *Nkata v FirstRand Bank Ltd* para 7.

"Legal Fees" on the account statement. The respondent described these as being for the attorney's fees and counsel's day fee in the applicant's unsuccessful rescission application, which costs were covered by the parties' settlement agreement.[182] This was in addition to a globular amount debited to the mortgage bond account for fees that the respondent had incurred in pursuing the cancelled execution and sale. The applicant argued that these costs were not presented to her and the respondent did not invite her to pay them. The applicant consequently, attempted to have the default judgment rescinded.

The respondent also argued that section 129(3) of the NCA required a consultative process for a credit agreement to be reinstated and that a consumer could not unilaterally reinstate the agreement merely by making payment of all amounts that are overdue, together with the provider's prescribed default administration charges and the reasonable costs of enforcing the agreement up to the time the default was remedied, as contemplated in section 129(3). The respondent argued further that payment of arrear instalments did not always mean the consumer wished to reinstate the credit agreement and resume possession of the property.[183]

The Constitutional Court accepted that reinstatement of credit agreements under section 129(3) of the NCA was a novel creation with no known roots at common law.[184] This was the case even though the preceding Hire-Purchase Act[185] and Credit Agreements Act[186] both provided for the possibility of reinstating credit agreements in sections 13(1) and 12(1) respectively. Importantly, the difference between the preceding Acts and the NCA was that the terms under which credit agreements could be reinstated were materially different from the terms specified in section 129 of the NCA. Further, the lack of common law sources dealing with the reinstatement of credit agreements meant that the Constitutional Court had no point of reference when reaching its decision. What was not clear before *Nkata*, however, was whether the section conferred any duties or responsibilities on providers in the event that consumers attempted to reinstate their credit agreements.[187]

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182 *Nkata v FirstRand Bank Ltd* para 80.
183 *Nkata v FirstRand Bank Ltd* para 82.
184 Reinstatement could be compared with the common law remedy of redemption covered in section 3 2 2 of this study.
185 Act 36 of 1942.
186 Act 75 of 1980.
187 *Nkata v FirstRand Bank Ltd* para 91.

The Constitutional Court found that the applicant had successfully reinstated the credit agreement by paying all her arrear instalments, the creditor's permitted default charges and reasonable enforcement costs.[188] This was completed before the respondent obtained the default judgment against her and before the subsequent sale of the property. Consequently, the respondent could not rely on section 129(4) of the NCA to challenge reinstatement.[189] The court also held that in order to reinstate the credit agreement the applicant did not have to pay the full accelerated amount but rather only the arrear instalments due. On the second argument, the court held that it was the consumer who had the power to reinstate a credit agreement and that he or she could do so at any time before the provider cancelled the agreement.[190] The consumer was not compelled to give notice to or seek the consent or cooperation of the provider before reinstatement could be effective. Thus, because reinstatement occurred by operation of law to hold that reinstatement did not occur automatically after payment was made in the manner prescribed by section 129(3) would unduly undermine the value to the consumer of the remedy of reinstatement.[191]

6 4 3 1 Comment on issues raised by the case

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The *Nkata* judgment was a milestone achievement for consumers who have fallen into arrears under a credit agreement governed by the NCA, by overriding any acceleration clause which would otherwise be triggered by the consumer's default.[192] It meant that although a consumer could have defaulted on payments under a credit agreement the provider could not invoke an acceleration clause for payment of the full outstanding amount where the consumer had paid the arrear amounts, the permitted costs and charges contemplated in section 129(3) of the NCA. To come to a contrary conclusion, as the Constitutional Court held, would defeat the very purpose of section 129(3) which was meant to operate as a rescue mechanism that was available to the consumer precisely when he or she has fallen into arrears and could be liable for the full accelerated outstanding debt.[193] The effect of this decision is that an acceleration clause is

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188 *Nkata v FirstRand Bank Ltd* para 139.
189 *Nkata v FirstRand Bank Ltd* para 140.
190 *Supra*.
191 *Nkata v FirstRand Bank Ltd* para 141.
192 Acceleration clauses under the common law are discussed in Chapters 3 and 4 of this study. The amendments to section 129(3) and (4) appear to limit drastically the acceleration clauses inserted by providers. See also Steyn and Sharrock "Remedying mortgage default: Nkata v FirstRand Bank Ltd" 2017 *SALJ* 498.
193 Louw "Banks beware: Reinstatement of mortgage loan agreements" http://www.derebus.org.za/banks-beware-reinstatement-mortgage-loan-agreements (accessed 17-08-2019). *Standard Bank of South Africa*

rendered inoperative and unenforceable when reinstatement is lawfully triggered. A provider's efforts to retrieve the full accelerated debt owing under the credit agreement, such as by way of a sale in execution of the underlying property, would be frustrated where reinstatement is triggered by the consumer prior to cancellation of the credit agreement.[194] Provided there has been compliance with section 129(3), the consumer is not required to give notice to the provider of his or her intention to reinstate the credit agreement. Payment in a manner that complies with section 129(3) would be sufficient to trigger automatic reinstatement.[195]

The *Nkata* judgment is renowned for offering a lifeline to consumers facing impending enforcement action provided they comply with the provisions of section 129(3) of the NCA.[196] For providers, it means that simple reliance on acceleration clauses would not be sufficient to assist in the enforcement of other contractual rights. They will instead have to be proactive and act swiftly where consumers default on their payment obligations under credit agreements if they wish to cancel those agreements. This may seem as if the court's interpretation is favouring the consumer to a large extent. However, if one is reminded of the purpose of the NCA covered in Chapter two – being the ultimate fulfilment of agreements then this is achieved by this interpretation – by allowing consumers the longest possible opportunity to settle the arrears and continue with the agreement.[197]

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Another question raised relates to how reinstatement occurs since section 129(3) does not require anything more than payment of the relevant amounts. The implication is that the action of payment triggers section 129(3). Nothing is required before or after payment and therefore reinstatement occurs regardless of whether or not this was the consumer's intention and whether or not the consumer or the provider are aware of it. It is assumed that it is the consumer's intention to keep contractual payments up to date and retain the property otherwise

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Limited v Hendricks 2018 ZAWCHC 175 (14 December 2018), 2019 1 All SA 839 (WCC), 2019 2 SA 620 (WCC).

194 *Nkata v FirstRand Bank Ltd* para 92.

195 *Supra*.

196 Mnyandu and Kern "Reinstatement triumphs acceleration clauses in credit agreements subject to the National Credit Act" https://financialmarketsjournal.co.za/reinstatement-triumphs-acceleration-clauses-in-credit-agreements-subject-to-the-national-credit-act/ (accessed 05-05-2018); The decision of the Constitutional Court in this case has significant effects on parties to credit agreements and the credit economy. The majority judgment of the Constitutional Court reversed the decision of the Supreme Court of Appeal in *Nkata v FirstRand Bank Ltd* 2015 2 All SA 264, which itself had overturned the decision of Rogers J in the Western Cape High Court in *Nkata v FirstRand Bank Ltd* 2014 2 SA 412 (WCC). The majority decision in *Nkata* (CC) differs in important respects from that of Rogers J in *Nkata*.

197 *Nkata v FirstRand Bank Ltd* para 93.

there would be no reason for the consumer to attend to payment at all. Although providers have tried to argue that the consumer should approach and notify the provider when he wishes to reinstate the agreement, the courts have found that no such step is necessary.[198] Therefore, reinstatement takes place unilaterally, automatically and by operation of law the moment that the amounts are paid, even if neither of the parties is aware of it.[199] Unilateral and automatic reinstatement poses certain practical difficulties that were probably not foreseen when the section was drafted. One of the problems with the approach that reinstatement can take place without either of the parties being aware of it is that they may only realise quite a while after the fact that reinstatement had occurred. The effect of reinstatement is that everything that occurs thereafter is a nullity, including all sales and transfers of property.[200]

Section 129(3) of the NCA can be contrasted with section 12 of the Credit Agreement Act of 1980[201] which gave the credit receiver a right of redemption. He was entitled to be reinstated in his contract if the goods had been returned to the credit grantor provided that, amongst other things, he had not himself cancelled the contract and had paid the arrears amount within 30 (thirty) days. Normally the credit grantor would have cancelled the contract so that reinstatement literally meant that a terminated agreement was revived.[202] Section 129(3) of the NCA provides for a comparable, but dissimilar, right. In its original form it provided that a consumer who was in default could reinstate the agreement by paying the provider the amounts overdue, plus default charges and the costs of enforcing the agreement up to the date of reinstatement. He could do this only if the provider had not cancelled the agreement. The word "reinstate" in section 129(3) (a) was a misnomer. How an agreement, which had not been cancelled, could be "reinstated", is unknown, but this is still useful as it means that legal proceedings underway came to a halt. Section 129(3) was subsequently substituted.

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In addressing this matter, the court followed the approach taken in *Nkata v FirstRand Bank*[203] that what prevents the reinstatement under section 129(4)(b) is only the sale in execution of the immovable property and the realisation of the proceeds of such sale which in fact extends the possibility of reinstatement for the consumer as far as possible. This could

198 *Nkata v FirstRand Bank Ltd* para 26.
199 Brits 2017 *THRHR* 187; *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) para 43.
200 Brits 2017 *THRHR* 188.
201 Act 75 of 1980.
202 Section 12 of the Credit Agreements Act is discussed in section 2 2 4 4 2 of this study.
203 2016 4 SA 257 (CC).

then be considered a pro consumer approach as it sees fulfilment of the credit agreement and allows the consumer an opportunity to remedy the default. There is no doubt that this pro consumer approach may in fact frustrate providers who are eager to enforce their rights of recovery. However, their enforcement rights need to be weighed against the consumer's rights. The granting of the money judgment and the executionary order is therefore not a bar to reinstatement of the agreement. It is only when the mortgaged property is sold and its proceeds realised that reinstatement is impermissible.[204]

In dealing with section 129(3) of the NCA, the court held that this section has been substituted by section 32(a) of the National Credit Amendment Act of 2014[205] which came into effect on 13 March 2015. This amendment speaks of a consumer remedying the default under the agreement instead of a consumer reinstating the agreement.[206] The Court was of the opinion that the prohibition of reinstatement of the agreement in subsection (4) had to be read in conjunction with the Constitutional Court judgment in the *Nkata* case where it was held that the provisions of section 129(4)(b) must be narrowly interpreted.

In concluding on this issue, the court held that it is necessary to have regard to the provisions of section 39(2) of the Constitution which enjoins courts when interpreting any legislation, such as the NCA, and in particular the provisions of section 129(3) and (4) of the NCA, to promote the spirit, purport and objects of the Bill of Rights.[207] The court criticised the terminology used before the amendment of subsections (3) and (4) and deemed that the appropriate word to be utilized should be "remedy" rather than "reinstatement". The court adopted the approach that the amendments made to section 129(4) should not be taken literally and that for all practical purposes, they might have to be ignored although when considered it is never practical or logical to ignore an amendment which should for all purposes serve a function.[208]

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At common law, a party who has breached the contract cannot purge his default by tendering proper performance. The NCA accordingly makes an exception to this principle.

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204 *Absa Bank Limited v Mokebe* para 43.
205 Act 19 of 2014.
206 *Absa Bank Limited v Mokebe* para 44.
207 *Absa Bank Limited v Mokebe* para 46.
208 *Absa Bank Limited v Mokebe* para 49.

Section 130(3)(c)(ii)(dd) applies if the amounts in question are brought up to date before any debt enforcement proceedings have been "commenced in a court". In such a case, the creditor would not be able to enforce through litigation its decision to cancel the credit agreement. Section 130(3)(c)(ii)(dd) says nothing about what happens when arrears are paid up after debt enforcement proceedings have commenced but are not yet completed or have been completed but not yet executed.[209]

The Constitutional Court in *Nkata v First Rand Bank*[210] provided insights on the NCA provisions dealing with reinstatement. The judgment was an opportunity for the court to clarify sub-sections 129(3)[211] and (4)[212] of the NCA. Both these subsections have been amended, although the changes seem to be less consequential. The *Nkata* judgment was decided under the old provisions, but Van Heerden is of the view that the judgment is still relevant even after the amendment.[213] In this case, the apex court exposed the shortcomings of subsections 129(3) and (4) of the NCA and different interpretations of the provisions. What is evident is that since *Nkata*, the courts have extended protection to debtors in default by adjourning *sine die* the applications for declarations of special executability to allow an opportunity for reinstatement of the credit agreement to occur.

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6 4 4 *FirstRand Bank Limited v Mdletye and FirstRand Bank v Zwane*

In *FirstRand Bank Ltd v Mdletye*[214] the provider gave a loan to the respondents for the acquisition of immovable property. As a consequence, a mortgage bond was secured in favour of the applicant as security for the loan. The property was identified as the primary residence of the respondents. The respondents defaulted in their mortgage bond instalments. The provider thus filed an application for default judgment in an amount of R291 634.33 together with costs and an order declaring the immovable property specially executable. The central issue before the court was whether it was appropriate for the court to dismiss an application to

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209 Brits "Purging Mortgage Default: Comments on the Right to Reinstate Credit Agreements in Terms of the National Credit Act" 2013 *SLR* 165.

210 2016 4 SA 257 (CC).

211 Section 129(3) deals with consumer's right to reinstate the credit agreement and set the prerequisites for reinstatement to occur.

212 Section 129(4) set out instances where the reinstatement of the credit agreement would be impossible.

213 Van Heerden 'Nkata v FirstRand Bank Ltd (2016) ZACC 12 April 2016 and its impact on the Reinstatement of Credit Agreements Governed by the National Credit Act 34 of 2005' in C Hugo (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) at 100.

214 2016 5 SA 550 (KZD).

declare immovable property specially executable in circumstances where there is a possibility of reinstatement of a credit agreement.

The court noted that judicial oversight is required in a situation where execution against a home will render a debtor homeless, as discussed earlier in this Chapter.[215] It took into consideration the factors set out in *Nkata* and found reinstatement renders invalid the default judgment previously obtained. However, if the property is sold in execution pursuant to the attachment order, reinstatement would be prohibited and in a mortgage bond agreement a debtor will lose his or her home. It was argued that execution takes time and it followed that, if the mortgagor makes payment, the agreement may be reinstated before the property is sold in execution.[216]

The court agreed that execution takes time, but pointed out that, if a sale takes place pursuant to an order of execution, reinstatement will be prohibited by section 129(4) of the NCA. Apart from the fact that the court granted an order against the respondent for the arrear amount, together with interest and costs it adjourned *sine die* the application to declare the immovable property specially executable and further directed that the matter should not be set down sooner than six months from the date of judgment.[217] It should be noted that contrary to *Nkata*, in this case the respondents neither complied with section 129(3) requirements nor tried to reinstate the credit agreement. A further remark in *Mdletye* is that immovable property constituting the primary residence ought not be declared executable if there is a possibility that the mortgagor may reinstate the credit agreement.

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Steyn highlights that the *Mdletye* and *Zwane* judgments were delivered from two different jurisdictions where different Directives of Practice apply.[218] These directives are important in the analysis as the development in the jurisprudence has resulted in their amendment. With regard to *Mdletye* court's reasoning Steyn notes very crucial points. She is

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215 *First Rand Bank Ltd v Mdletye* para 7.
216 *First Rand Bank Ltd v Mdletye* para 15.
217 *First Rand Bank Ltd v Mdletye* para 18.
218 The writer notes that the South Gauteng division is governed by directive 10.17 of the Practice Manual in terms of which an order of execution against primary residential property can only be granted by a court provided that the application has been served on the respondent personally or in the manner authorised by the court. In the KwaZulu-Natal Division of the High Court, the KwaZulu-Natal Practice Manual does not set out a detailed procedure to be followed when execution against a residential property is sought. It states that where foreclosure is sought, the summons must draw the debtor's attention to section 26 of the Constitution. It should be noted that these directives are amended from time to time.

of the view that the *Gundwana, Jaftha and Nkata* judgments influenced the court's reasoning which advanced that where there is the possibility that the debtor will lose their home the court must intervene by way of judicial oversight and with due regard to section 26 of the Constitution.[219]

Steyn notes the High Court in *Nkata* decided that the mortgage agreement was reinstated since the arrears were paid.[220] This position was confirmed by the Constitutional Court in *Nkata.* It is this jurisprudence which Gorven J relies on to reason that if Mr and Mrs Mdletye were able to eliminate the arrears and pay the other amounts required to be paid in terms of section 129(3) of the NCA the mortgage agreement would be reinstated by operation of law.[221] However, if the property was sold in execution, the mortgage agreement would not be capable of being reinstated and Mr and Mrs Mdletye would lose their home.[222] In Gorven J's evaluation, reinstatement cannot be in isolation but ought to be along with all other relevant factors in deciding whether to declare the property executable.[223] Perhaps the one notable and relevant aspect set out by Gorven J is that reinstatement does not require payment of the full judgment debt, but only the arrears and other specified charges.[224] Also having noted that the debtors had tried to reduce the outstanding amount and their arrears, the court in Mdletye expressed the view that there was a reasonable prospect of reinstating the agreement within a relative short period.[225] The court also looked into various factors, especially those that are set out in *Jaftha*.[226] The court thus adjourned *sine die* the application to have the immovable property declared executable and ordered that the application could not be set down earlier than six months from the date of judgment.[227]

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219 Steyn "Execution against a mortgaged home a transformed, yet evolving landscape: FirstRand Bank Ltd v Mdletye (KZD) and FirstRand Bank t/a First National Bank v Zwane (GJ)" 2018 *SALJ* 448; *First Rand Bank Ltd v Mdletye* 2016 5 SA 550 KZD para 7.

220 Steyn 2018 *SALJ* 448.

221 Steyn 2018 *SALJ* 449.

222 *Ibid*.

223 *Ibid*.

224 *First Rand Bank Ltd v Mdletye* para 11.

225 *First Rand Bank Ltd v Mdletye* para 13.

226 The court considered factors that: There were no other ways to satisfy the entire judgment debt; the respondents had made attempts to bring the arrears up to date; the respondents had 'a source of income by way of their pensions and any contributions made by family members who were employed and able to do so'; the amount of the arrears translated into a little more than two months' instalments ; the property in question was the primary residence of the respondents and their family members; and the age of the respondents rendered it unlikely that they would be able to purchase another property if their home was sold in execution. See Steyn 2018 *SALJ* 449. *First Rand Bank Ltd v Mdletye* para 15.

227 *First Rand Bank Ltd v Mdletye* para 18.

In *First Rand Bank v Zwane*,[228] the case concerned three applications.[229] The first two applications concerned a default judgment in the total amount of the outstanding debt and for the mortgaged property to be declared executable.[230] The third one was an application for a declaration that the property was executable because judgment for payment of the total amount of the outstanding debt had been granted previously.[231] The mortgage agreement contained an acceleration clause, was subject to the NCA and had not been cancelled.[232] When the matter came before Van der Linde J, he considered postponing each application for an appropriate period to afford the mortgagors a reasonable period to cover their default by paying up the arrears and any other necessary costs thereto.[233] This is justified, at least from the court's view, as the first two amount of the arrears represented only about three months of mortgage instalments for the first two cases, and represented just over six months of mortgage in the last case.[234]

The court's reasoning was also influenced by the provisions of the Practice Manual of the Gauteng Local Division of the High Court of South Africa (Practice Manual).[235] At the heart of the court's debate was whether the application for a declaration of executability of the mortgaged home could be postponed or whether the court could, and in the circumstances should, also postpone the application for judgment in an amount reflecting the total *accelerated* debt.[236] The court was immediately to decline the granting of an order declaring the debtor's home executable when the arrear amount is low, even though the total outstanding balance is large. It stated that such powers emanated from Rule 46(1)(a)(ii) of the Uniform Rules.[237]

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Van der Linde J was of the view that if a court were to postpone the application for a declaration of executability for a few months, the debtor might very well pay up the arrears during this period.[238] He observed that allowing immediate grant of default judgment for the

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228 2016 6 SA 400 (GJ).
229 *FirstRand Bank Ltd v Zwane* 2016 6 SA 400 (GJ).
230 *FirstRand Bank Ltd v Zwane* para 1.
231 *Supra*.
232 *FirstRand Bank Ltd v Zwane* para 2.
233 Steyn 2018 *SALJ* 451.
234 *Ibid.*
235 Para 10.17 of Practice Manual of the Gauteng Local Division of the High Court of South Africa stated that: 'When arrears are low, and/or the period of non-payment is a few weeks or months, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of 6 months and that notice of set down should again be served.'
236 Steyn 2018 *SALJ* 451.
237 *Ibid*.
238 *Ibid.*

full accelerated outstanding balance would be permitting the provider to execute against the consumer's other assets, thus defeating the purpose of postponing the matter, that is to find means to remedy their arrears.[239] The learned judge went on to justify the postponement in terms of section 26 of the Constitution and Rule 46 of the High Court Rules, that if one is mindful of the two provisions, it is hard to imagine the granting of an order declaring a home executable on the basis of arrears of only three months' instalments in a 240-month loan repayment scheme.[240] This, Van der Linde J held, is not to undermine the principle of sanctity to contract and further justified the court's power not to grant judgment in the amount of the accelerated debt immediately under the Practice Manual[241] and section 173 of the Constitution.[242] In the end, Van der Linde J regarded the arrears in the first two applications as low, and postponed the entire application *sine die* for both default judgment and a declaration of executability, and directed that each matter could not be set down again for a period of four months. In the last application Van der Linde J did not regard these arrears as low but required the applicant to report to the court on what had transpired since the judgment was granted. He expressed the view that if it transpired that the mortgage bond arrears had not been purged that would increase the prospects of success for an order declaring the mortgaged property executable, and an order for costs.[243] The two cases above indicate the importance of judicial oversight and the extent at which the court needs to investigate the underlying purpose of the provisions of the NCA and those of practice. Steyn submits that the cases reflect the routine courts need to take in resolving matters concerning execution against a mortgagor's home.[244] She, however, expresses a concern that although these two cases reveal different approaches to matters concerning execution against homes, they also show inconsistency in the approaches currently adopted by the courts.[245]

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It is also noted that another justification that courts should not grant a money judgment is that if movables are executed against, reinstatement of the mortgage agreement will be precluded in terms of 129(4)(b).[246] In line with these recent developments in the home

239 *FirstRand Bank Ltd v Zwane* para 7.
240 *FirstRand Bank Ltd v Zwane* para 12.
241 *FirstRand Bank Ltd v Zwane* para 25.
242 Section 173 of the Constitution gives court the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.
243 *FirstRand Bank Ltd v Zwane* para 33.
244 Steyn 2018 *SALJ* 454.
245 *Ibid.*
246 Steyn 2018 *SALJ* 457.

mortgage agreement, Steyn suggest that section 129(4) should preclude reinstatement only if the mortgaged property itself has been sold in execution and the proceeds have been realised.[247]

6 4 5 *Makubalo v Nedcor Bank Limited*

In *Makubalo v Nedcor Bank Ltd*[248] the provider obtained a default judgment in the Magistrate's Court against the applicants for the outstanding debt of R30 556.30, resulting from their default of monthly payments.[249] In this case the court was asked to determine whether the conduct of the applicant by paying an amount of R43 000.00 reinstated the credit agreement in terms of section 129(3) of the NCA and, whether the proceeds from the sale had been realised by the time the applicants made the payment of the arrear amount.

The court found that the credit agreement had not been cancelled but that the first respondent chose to apply for specific performance in terms of the agreement.[250] It also noted that the payment made by the applicant as of 05 December 2014 consisted of all overdue amounts together with default charges and the reasonable costs of enforcing the agreement.[251] As far as the question of legal costs is concerned, the court made reference to *Nkata* to hold that at the time the applicant had made the payment no legal costs had been demanded, agreed to or taxed. The court found that an amendment to section 129(3) suggests that legal costs payable are calculated at the time the default was remedied.[252] The court further found that reinstatement was not prohibited by section 129(4).[253]

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It based it's finding on the fact that the proceeds of the sale had not been realised because the ten percent deposit of the purchase price was paid to the sheriff and not to the first respondent, and also because the full purchase price was only paid at a later stage.[254] The court thus concluded that the credit agreement was reinstated, and it set aside the sale in execution. The property was re-registered in the names of the applicants. As in *Nkata*, the applicants reinstated the credit agreement without the payment of legal costs. And most notable this case

247 Steyn 2018 *SALJ*) 458.
248 2017 ZANWHC 45 (29 June 2017).
249 *Makubalo v Nedcor Bank Ltd* para 2.
250 *Makubalo v Nedcor Bank Ltd* para 12.
251 *Supra*.
252 *Makubalo v Nedcor Bank Ltd* para 15.
253 *Makubalo v Nedcor Bank Ltd* para 21.
254 *Supra*.

suggest that a credit agreement can be reinstated up until the stage where the full purchase price is paid to the provider, which could be detrimental to the provider and purchasers in execution.

In *Mokebe,* discussed earlier in this Chapter, and in line with the amendment of section 129(3) by section 32(a) of the 2014 Amendment Act, the court noted that the provision refers to a consumer remedying the default under the agreement instead of the consumer reinstating the agreement.[255] To this end the court held the consumer's right to reinstate a credit agreement must be stated in the document initiating the proceedings where a mortgaged property may be declared specially executable.[256] This approach appears to be in line with section 26 of the Constitution. The court thus extended the protection of the homeowners / consumers. The court further determined that granting a money judgment does not qualify as *any other court order enforcing that agreement* in terms of subsections 129(3) and (4). Thus, it is only upon the receipt of the full purchase price will reinstatement be precluded.

It is apparent from the judgments discussed that the *Nkata* judgment influenced the findings of the courts in relation to the interpretation of subsections 129(3) and (4). The courts have adopted the *Nkata* judgment to extend the protection provided to the consumer. What is apparent from these cases is that a primary residence of the homeowner cannot be declared specially executable if reinstatement of the credit agreement is still an option. Further, it is clear from the cases that a credit agreement can be reinstated without payment of legal costs because if they have not been demanded at the time of reinstatement they will not be due and payable.

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6 4 6 Conclusion on the amended Sections 129(3) and (4) and reinstatement in relation to immovable property

When the interpretation and reasoning of the Constitutional Court in *Nkata*, to the effect that reinstatement of a credit agreement occurs by the operation of law, is applied to the amended subsections 129(3) and (4), the following becomes apparent: first, the wording of the provisions, which the Constitutional Court relied on to justify reinstatement by operation of

255 *Absa Bank v Mokebe* 2018 6 SA 492 (GJ)para 42 - 44.
256 *Absa Bank v Mokebe* para 46.

law has now been reformulated with material changes by the legislature.[257] There is an intentional substitution by the legislature of the word "reinstate" with the word "remedy". A simple definitional perspective suggests that the words "reinstate" and "remedy" cannot be accredited the same meaning or effect.[258] The Constitutional Court regarded section 129(3)(b) of the NCA, which is now entirely repealed, as important in respect of reinstatement. It enabled consumers to make the required payments and be rewarded with the reinstatement of the credit agreement and return of their attached property. The resumption of possession of property has now been entirely deleted by legislature by the removal of section 129(3)(b) which provided for the resume possession of any property that had been repossessed by the provider pursuant to an attachment order.[259] It is submitted that the wording of the present provisions is no longer as clear as it was when interpreted by the Constitutional Court as to who is the initiator of reinstatement.[260]

An alternative interpretation of the amended subsections 129(3) and (4) could be that the legislature intends to allow a consumer to remedy his or her default prior to cancellation, termination or enforcement of the credit agreement and that once such default is remedied, it no longer includes an opportunity for the consumer to claim the possession of repossessed property. In terms of the section the provider then *may* only reinstate or revive a credit agreement in the absence of the exceptions set out in sections 129(4)(a) – (c).[261] The principle confirmed by the Constitutional Court in *Nkata,* to the extent that it relates to the automatic reinstatement of credit agreements, does not apply to the current amended Act.[262] There is still automatic reinstatement as long as the agreement is not cancelled (section 129(3)) or section 129(4) applies.[263]

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257 *Nkata v FirstRand Bank Ltd* para 26 and footnote 51. The court went as far as to state that reinstatement was not one of the right's section 129(1) required the provider to draw to the consumer's attention in the section 129 notice. Since the Bank was not obliged to let the consumer know of this right, the court held that it would not then be logical that the consumer be required to let the provider know she or he intended to exercise such right. The court held that additionally, the provider did not have the discretion as to whether to accept or reject reinstatement. Instead, as the High Court found, reinstatement occurred automatically, by operation of law, upon the fulfilment of the requirements in section 129(3)(a). See also Duvenhage 2017 (July) *De Rebus* 26 – 28.

258 Duvenhage 2017 (July) *De Rebus* 26 – 28.

259 *Ibid*.

260 Duvenhage 2017 (July) *De Rebus* 26 – 28.

261 Duvenhage 2017 (July) *De Rebus* 26 – 28.

262 *Ibid*.

263 Duvenhage 2017 (July) *De Rebus* 26 – 28.

An interpretation that the reinstatement of a credit agreement occurs by the operation of law holds legal authority and certainty because of the *Nkata* case.[264] Unfortunately, the NCA has not defined the very important words "reinstate" or "revive", which poses the question what procedure, if any, has the legislature envisaged to facilitate the reinstatement or revival of a credit agreement by a provider in respect of a consumer who has remedied his or her breach?[265] The understanding and definition of these words would assist greatly in understanding the legislature's intention. If the reinstatement of a credit agreement is at the discretion of the provider or even part of a consultative process and excludes an opportunity for a consumer to resume possession of his or her repossessed property, would it even be beneficial for a consumer to remedy his or her breach? However, section 129(4) does not really provide the provider with a discretion to revive an agreement but rather indicates the points at which reinstatement will no longer be permitted.[266]

As a whole, it appears that section 129(3) and (4) still involves a reinstatement mechanism (a right to "remedy a default") for the consumer.[267] Subsection (3) establishes the right while subsection (4) sets out the limitations of the right even though, especially with regard to subsection (4), a degree of interpretational creativity is required for this consumer protection mechanism to make sense.[268] It is unclear whether "remedying the default" by the consumer should include the consumer obtaining the repossessed items in that subsection 129 (3)(b) has been deleted in entirety. However, if it does not include this opportunity the motivation for the consumer to remedy the default is radically reduced as then there would appear to be not point of remedying a default and "reviving" the contract if it does not assist the consumer in recovering possession of the item. "Reviving" of the contract without the inclusion of possession of the item seems nonsensical and in fact not a true "revival".

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The question is what happens if the consumer rectifies his default after the creditor has approached the court to commence enforcement proceedings. This is where the concept of reinstatement as contemplated in subsections 129(3) and (4) becomes relevant. In this instance, the creditor has *locus standi* to sue and the court has jurisdiction to hear the matter.[269] However,

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264 *Nkata v FirstRand Bank Ltd* para 26 and footnote 51.
265 Duvenhage 2017 (July) *De Rebus* 26 – 28.
266 In terms of section 129(4)(a)(i), (ii), (b), and (c) of the NCA.
267 Duvenhage 2017 (July) *De Rebus* 26 – 28.
268 Brits 2015 *De Jure* 78.
269 Brits 2015 *De Jure* 79.

if at some point during the enforcement process, the consumer complies with the requirements of section 129(3) and (4), the agreement will be "reinstated" and the enforcement process will be overturned.[270] Generally, the structure of the reinstatement mechanism involves two aspects: the first part is subsection (3) which establishes the consumer's right to reinstate the agreement and stipulates requirements such as the relevant amounts payable.[271] The second part is subsection (4) which indicates the limits of the right, namely the stages in the process after which reinstatement is no longer possible.[272] All-out debt enforcement can have some obvious detrimental impact on consumers' social and economic well-being, but in many cases, this will be justifiable.[273] Despite being justifiable, however, it would still be an infringement of the right to housing, section 26 of the Constitution, should the enforcement relate to a consumer's primary residence. Reinstatement on the other hand can assist consumers in avoiding the unnecessary and costly socio-economic effects and results of the strict enforcement of acceleration clauses.[274] It is very seldom that there is no acceleration clause in contracts nowadays. If however there is no acceleration clause in the contract then the provider would either have to enforce the contract for each instalment missed, alternatively cancel the contract and claim damages.

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An example of the importance and value of reinstatement is where a mortgage bond secures repayment of the debt over residential property, as demonstrated by the case of *Dwenga v First Rand Bank Ltd*.[275] Reinstatement in the housing context is important according to section 26(1) of the Constitution.[276] The general understanding is that a forced sale of, or an eviction from, a home in principle involves a violation of the negative duty not to limit a person's existing access to adequate housing.[277] A sale in execution of a primary residence therefore is not permitted to have an unjustifiable effect on the homeowner in accordance with section 36(1) of the Constitution, which entails a strict proportionality test. If the effect of the sale in execution on the homeowner would be disproportionately harsh in comparison to the

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270 Which one may argue in light of the *Absa Bank Limited v Mokebe* judgment is important especially in respect to possession and occupation of a primary residence and the right to housing protected in section 26 of the Constitution.
271 Brits 2015 *De Jure* 79.
272 *Ibid*.
273 Brits 2015 *De Jure* 79.
274 Brits 2015 *De Jure* 80.
275 2011 ZAECELLC 13 (29 November 2011).
276 Brits 2015 *De Jure* 80.
277 *Ibid*.

purpose of the sale, such sale would not be permitted.[278] In other words, if the creditor's rights under the acceleration and foreclosure clauses are strictly enforced despite the arrears being paid up, which is the traditional common law position, the result might be disproportionately harsh for the consumer.[279] The consumer would lose his home despite the fact that other less invasive mechanisms were available to honour the creditor's interests.[280] It is then unlikely that this outcome would satisfy the test in section 36(1) of the Constitution.[281]

A comparable example is *Absa Bank Ltd v Ntsane*[282] where the court relied on the principles in section 26 of the Constitution and refused to allow the provider to accelerate repayment of the full capital debt of R62 042.43 (Sixty Two Thousand and Forty Two Rand, Forty Three Cents) as the actual amount outstanding was a measly R18.46 (Eighteen Rand and Forty Six Cents).[283] If foreclosure and a sale in execution were held to be unacceptable under these circumstances, surely it would also be unacceptable if the arrears were completely settled. The NCA was not yet in force when *Ntsane* was decided but, as the court in *Nedbank Ltd v Fraser*[284] subsequently explained reliance on the right of reinstatement would have been the ideal solution in *Ntsane*.[285] It is understandable that there may be situations where the opportunity for a consumer to make use of the reinstatement mechanism is the best way in which an otherwise unjustifiable sale in execution could be avoided.[286] Therefore, a generously-interpreted right of reinstatement in favour of the consumer is arguably a necessity in order for unconstitutional sales in execution to be avoided which should be a sufficient ground on its own to justify such an interpretation.[287] It is thus imperative that the NCA

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278 Brits 2015 *De Jure* 80.
279 Brits 2015 *De Jure* 81.
280 *Ibid*.
281 The Constitutional Court held in *Jaftha v Schoeman*, *Van Rooyen v Stoltz* 2004 ZACC 25; 2005 2 SA 140 (CC) that the sale in execution would limit the debtors' section 26(1) right to have access to adequate housing and that such a limitation must be justifiable in light of section 36 of the Constitution. To ensure that the limitation is justifiable the court held that an execution order must be subject to judicial oversight. Judicial oversight ensures that all the relevant circumstances are taken into account when the consumer's section 26(1) right to housing is limited by an order for execution in order to ensure that any negative impact on the section 26(1) right of the mortgagor can be justified if it aligns with section 36. In other words the purpose of the limitation must be balanced "against the nature of the right and the nature and extent of the limitation". Therefore, a court may not order the sale in execution of the mortgaged property without investigating all the relevant circumstances in order to maintain a constitutionally compliant proportional balance between the rights of the debtor and the rights of the creditor. See also Brits 2015 *De Jure* 81.
282 2007 3 SA 554 (T).
283 Brits 2015 *De Jure* 81.
284 2011 4 SA 363 (GSJ).
285 Brits 2015 *De Jure* 81.
286 *Ibid*.
287 Reinstatement, it is argued by Brits, is also a reasonable compromise because it does not deny the providers' rights, but merely limits them to achieve the important purpose of avoiding debt enforcement, and its social

includes a mechanism that avoids instances where debt enforcement could have an unconstitutional result as such mechanisms or provisions would be invalid.[288] Hence, it is submitted that section 129(3) and (4) should not be interpreted literally but should take into account the broader constitutional and socio-economic context.[289]

6 4 7 Cancellation versus enforcement of an acceleration clause

The original section 129(3)(a) provided that if the debtor paid all the amounts that were overdue plus certain costs and charges, the credit agreement would be reinstated only if this were achieved prior to the creditor "cancelling" the agreement.[290] Paragraph (b) stated that after such amounts had been paid the debtor was entitled to "resume possession of any property that had been repossessed by the provider pursuant to an attachment order". Otto[291] criticised the conceptual contradictions in this subsection saying:

> "It escapes my mind how, first, an agreement which has not been cancelled can be reinstated. Secondly, it is not clear how a person can resume possession of a thing which has been repossessed pursuant to an attachment order, if the agreement was not cancelled to justify such an attachment order in the first place."

A limited solution to this inconsistency was found in *Nkata* where the Western Cape High Court explained that there was a conceptual distinction between the cancellation of an agreement and specific performance of an acceleration clause.[292] Where an agreement is terminated by the provider because of the consumer's breach, the contract is terminated by the act of the provider, provided he has complied with the procedures set out in the NCA.[293] The remedies then available to the provider are those provided by law where a contract has been terminated due to breach.[294] Where the provider invokes an acceleration clause, the contract remains in force and the consumer is required to make specific performance of the accelerated indebtedness.[295] If the consumer pays the accelerated indebtedness, the contract will be terminated not by the

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consequences, if the consumer's default is rectified in time. Reinstatement may cause inconvenience to a provider who is in the process of enforcement proceedings when the consumer settles and reinstates the agreement, but this can be compensated by the charges and costs that the consumer must pay. Besides, it is submitted that the benefits of protecting a home far outweigh the administrative inconvenience experienced by the provider in these circumstances. If the provider receives the outstanding amounts plus charges and costs, there is no reason it should continue enforcing the agreement or proceeding with a sale of the property.

288 Brits 2015 *De Jure* 82.
289 *Ibid*.
290 See Brits 2015 *De Jure* 83 for comment on this issue.
291 Otto (2006) 98, similarly repeated in Otto and Otto (2010) 117. See Brits 2015 *De Jure* 83.
292 *Nkata v FirstRand Bank Ltd* 2014 2 SA 412 (WCC) para 39 to 40.
293 Brits 2015 *De Jure* 84.
294 *Ibid*.
295 Brits 2015 *De Jure* 84.

act of the provider but through performance by the consumer.[296] Essentially therefore, the court held that "the enforcement of an acceleration clause does not in law constitute a cancellation of the agreement" but rather fulfilment of the agreement.[297]

Generally, the distinction between cancellation and specific performance is logically sound and it is probably the most reasonable way to understand the reinstatement mechanism as a whole.[298] It is reasonably clear that section 129(3) deals with the situation where for example the provider is in the process of enforcing the acceleration clause in the credit agreement and the consumer rather attends to settlement of all arrear amounts with the associated costs.[299] Section 129(3) does not deal with any situation after the agreement has been cancelled. However, at any time during the enforcement process, but before cancellation, it is still open to the consumer to pay the outstanding amounts and thereby overturn the creditor's decision to enforce the acceleration clause.[300] Despite the way in which the High Court in *Nkata* interpreted and applied section 129(3), it was still necessary to concentrate effort on the confusion surrounding the idea of reinstating an agreement that has not yet been cancelled, as well as the implication that property might have been attached prior to cancellation.[301] As Otto[302] pointed out, it is irrational to refer to the reinstatement of an agreement that is still in force and which has not yet been cancelled.[303] Presumably, this is the reason the legislature chose to remove references to the notion of reinstatement from subsection (3) and replaced it with the more neutral idea of "remedy a default".[304]

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The amendment assists in maintaining terminological sense but it is important to consider that this change in terminology probably does not affect the basic concept of what the consumer's rights involve.[305] The striking out of paragraph (b) might have the advantage of removing the other contradiction identified by Otto, namely the idea that property could be repossessed before cancellation.[306] However, this removal might have wider consequences

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296 *Ibid*.
297 *Nkata v FirstRand Bank Ltd* para 39; Brits 2015 *De Jure* 84.
298 Brits 2015 *De Jure* 84.
299 Brits 2015 *De Jure* 84.
300 *Ibid*.
301 Brits 2015 *De Jure* 84.
302 Otto (2006) 98, similarly repeated in Otto and Otto (2010) 117.
303 Brits 2015 *De Jure* 84.
304 *Ibid*.
305 Brits 2015 *De Jure* 84.
306 *Ibid*.

than merely solving a contradiction, since it may imply that even if he remedies his default, the consumer is still not entitled to be placed back in possession of property that had been repossessed thereby indicating that cancellation must have occurred.[307] This may be indicative of the legislature's intention that the opportunity to remedy the default is no longer available once the property has been repossessed.[308] The consumer would then consider it pointless to remedy default at this point as he or she would still not regain repossession. The legislature, however, probably only intended to eliminate the contradictions pointed out by Otto,[309] and one should be careful in assuming any intention to amend substantively the consumer's rights without a very clear indication to do so.[310] The removal of paragraph (b) does not create a serious gap as the operation of section 129(4) still provides for instances where the consumer remedies the default after repossession or attachment of the property in which event the agreement may not be reinstated or revived under those circumstances even if there is no cancellation of the contract as section 129 (3) is made subject to section 129(4).[311]

In summary, the amended section 129(3) still permits consumers in arrears to remedy their default by paying the relevant outstanding amounts and prescribed charges and costs.[312] However, this mechanism is only available before the provider has cancelled the agreement. This cancellation does not refer to the situation where the creditor is in the process of enforcing the acceleration clause. Therefore, enforcement of the acceleration clause does not prevent the consumer from remedying his default.[313] If the consumer complies with section 129(3) and none of the restrictions listed in section 129(4) apply, the legal consequence is that the enforcement process is interrupted and invalidated. Although paragraph (b) has been removed it is still obvious that, subject to subsection (4), any attached or repossessed property must be returned to the consumer in instances where debt enforcement is not proceeding.[314]

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307 Brits 2015 *De Jure* 85.
308 *Ibid*.
309 Brits 2015 *De Jure* 85.
310 *Ibid*.
311 Brits 2015 *De Jure* 85.
312 *Ibid*.
313 Brits 2015 *De Jure* 85.
314 *Ibid*.

6 4 8 The point beyond which reinstatement is not permissible

The power to cancel a contract is derived from a contractual term that comes into effect when the contract is breached. However, cancellation as a remedy is only available if the breach is material or serious or if the contract provides for a right to cancel, the classical *lex commissoria*.[315] The agreement may also include certain requirements for cancellation, for instance, that the provider must first give notice of the default and allow the consumer to rectify it within a certain time. Therefore, cancellation is a legal action that occurs prior to, and provides the basis for, enforcement through litigation and execution. For credit agreements that fall under the ambit of the NCA, cancellation may not take place before the provider has complied with providing the notice of default in terms of section 129(1)(a) and the consumer either rejects the proposals made or fails to respond within the required time period. The sending of the notice is regarded as a first step to enforce the credit agreement. Rectifying the default within this period prevents cancellation.

Although neither "termination" nor "cancellation" is defined in the NCA, it is apparent that these concepts refer to the same thing. To enforce or cancel (terminate) a credit agreement when the debtor is in default, the provider must follow the requirements of sections 129 and 130. Therefore, a credit agreement is not regarded as being fully "cancelled" or "terminated" before the debt enforcement process has been completed under sections 129 and 130.[316] These sections contain all the provisions that afford the right to reinstate, which implies that the right to a valid cancellation of a credit agreement is qualified by the debtor's right of reinstatement.[317]

Section 129(4)(a) only restricts reinstatement after sale but does not state whether transfer of ownership is a restriction to reinstatement. The court in *Nedbank Ltd v Fraser*[318] held that this was indeed the case. "Sale" included the conclusion of the sale agreement at the auction as well as transfer of ownership by way of registration, in the case if immovable property. Accordingly, reinstatement would cause the auction sale to fail if the property has not been transferred yet. The reason for the approach that was supported by *Fraser* was the common law right of redemption, which the court regarded as equivalent to reinstatement.

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315 As discussed in Chapters 2, 3 and 4 of this study.
316 Brits 2013 *SLR* 174.
317 Brits 2013 *SLR* 175.
318 2011 4 SA 363 (GSJ).

Under the common law an auction purchaser buys the property subject to the debtor's right of redemption and the court reasoned that the same should apply when it came to reinstatement under the NCA. There appears to be no reason to restrict the scope of reinstatement to provide lesser relief than the common law right of redemption. Given that the purpose of sale in execution arguably falls away when the mortgage default is purged, the implication is that the sale would have to fail unless registration has already taken place. Section 129(4)(a)(i)'s qualification on reinstatement was consequently interpreted broadly so as to include both sale and transfer of the attached property. However, the court in *Dwenga v FirstRand Bank Ltd*[319] did not agree and held that the opportunity to make use of reinstatement ended even before the sale was concluded at the auction, namely at the point of judgment being granted.[320]

Seeing that section 129(4)(a) does not expressly give this wide meaning to "sale", *Fraser's* accommodating interpretation might be incorrect, if one takes practical considerations into account. To interpret the provisions of the NCA that govern the scope of the right of reinstatement it might make sense to draw from the established principles that govern the common law right of redemption. However, the comparison is limited to the extent that reinstatement is a separate and new legislative measure and not as an extension of the right of redemption.[321] Moreover, reinstatement should be construed to make practical sense. Despite the similarities that can be drawn between the two mechanisms, reinstatement and redemption differ notably. The court in *Dwenga* may therefore have been correct in questioning the interpretation given to reinstatement by *Fraser*, at least on this point.[322]

Otto[323] submits that section 129(4)(a) should be interpreted wider than what was proposed in *Dwenga* but somewhat narrower that what was decided in *Fraser*. Reinstatement is not prohibited from the moment of judgment being granted but is also not allowed beyond the sale concluded at the public auction or the enforcement of judgment in some other way.[324] Hence, the concept "sale" in section 129(4)(a) is limited to the conclusion of the auction sale and does not include transfer by registration. As Coetzee concludes "sale of the property marks

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319 2011 ZAECELLC 13 (29 November 2011).
320 *Dwenga v FirstRand Bank Ltd* para 23 to 25 and ft 32 and 36.
321 The common law remedy of redemption is discussed in this study in section 3 2 2.
322 *Nedbank Ltd v Fraser* para 40; Brits 2013 *SLR* 176.
323 Otto (2006) 98, similarly repeated in Otto and Otto (2010) 117.
324 Brits 2013 *SLR* 177.

the final point of no return for the consumer" who wished to reinstate his or her credit agreement.[325]

In order to ensure certainty for all parties involved (and legal certainty is an important principle), it is important to provide for a point in the process until which the consumer can still remedy his default.[326] The original section 129(4) fulfilled this function by indicating the limitations of the consumer's right of reinstatement as is also indicated by the fact that subsection (3) is made subject to subsection (4). The original subsection provided that reinstatement was prohibited only after the attached or surrendered property had been sold, a court order that enforces the agreement had been executed or the agreement had been terminated in terms of section 123.[327] The original subsection (4) was not that problematic, although there were some inconsistencies between the events listed in the subparagraphs.[328] Although reinstatement after sale in execution seems unlikely and - more so - impractical, the courts' interpretation of section 129(2) and (3) at least supports the argument that reinstatement is possible until the judicial enforcement process is complete as this supports a pro consumer approach.[329] As indicated above in this study, the initial plan was to leave subsection (4) unchanged, but instead an amendment was effected and no explanation provided.[330]

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There would be very limited circumstances that would ever motivate a provider to reinstate a credit agreement such as if the financial position of the consumer improved substantially. Forcing reinstatement on a consumer by way of the provider's right to reinstate is at odds with the purposes of the NCA and would be inequitable.[331] One explanation might be that the legislature wants to afford the provider the choice as to whether to accept the debtor's payment of arrears, hence reinstatement, after debt enforcement proceedings have commenced. Therefore, whether the agreement is reinstated is in the provider's discretion provided that reinstatement may not occur in the circumstances listed in section 129(4).[332] If both parties want to reinstate, there is no dispute and hence no need for a specific statutory measure, since they could mutually arrange the matter provided of course they have considered the rights and

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325 Coetzee Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 581. See also Brits 2013 *SLR* 178.
326 Brits 2015 *De Jure* 86.
327 Section 129(4) of the National Credit Act of 2005.
328 *Ibid*.
329 *Nkata v FirstRand Bank Ltd* 2014 2 SA 412 (WCC) para 55. Brits 2015 *De Jure* 87.
330 This issue is discussed in paras 7 4 2, 8 2 and 8 4 of this study.
331 Brits 2015 *De Jure* 88.
332 Section 129(4) of the National Credit Act of 2005. Brits 2015 *De Jure* 88.

interests of affected third parties.[333] However, this mutual agreement could be prejudicial to a third party to whom the property could have been disposed. If the legislature wanted to afford the provider such a discretion, this could have been achieved in a much clearer manner.[334] It may be that the amended section 129(4) gives the discretion to "reinstate or revive" the credit agreement after cancellation to the provider alone but that he can elect to do so only until any of the events listed in paragraphs (a) to (c) occurs.[335] Even if the consumer pays all outstanding amounts, he is at the mercy of the provider who can elect whether or not to allow reinstatement.[336] If any of the events listed in the paragraphs (a) to (c) has occurred this would be an illogical arrangement, which also seems to contradict the overall purposes of the NCA and further may even discourage the creditor's co-operation in extra-judicial dispute resolution and settlement which by its very nature should be beneficial to both parties and fulfilment of the agreement.[337] Therefore, the amended section 129(4) would have no practical meaning as far as the consumer's rights are concerned, whereas the original version was a useful addition to the stipulation for the consumer's right of reinstatement, since it indicated the parameters of the right.[338] The fact that subsection (3) is still made subject to subsection (4) might give an indication of how the two could fit together and the function of subsection (4). It is likely that the intention is still that subsection (4) should indicate the boundaries of the reinstatement mechanism.[339] This makes sense but, if so, is achieved through poor drafting.[340]

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To make practical sense of section 129(3) and (4) regarding the right of "reinstatement" one is to stretch the wording of subsection (4).[341] Hence, there are two options when interpreting the amended section 129(4). The first option is that the legislature replaced "consumer" with "credit provider" to indicate that the reinstatement mechanism should be in the hands of the provider and not the consumer.[342] The second option is to assume that the amendments made to section 129(4) should not be taken literally.[343] A strong indication of this

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333 Brits 2015 *De Jure* 88.
334 *Ibid.*
335 Section 129(3) refers to the situation before cancellation and also refers to remedying as opposed to reviving. Brits 2015 *De Jure* 88.
336 Brits 2015 *De Jure* 89.
337 *Ibid*.
338 Brits 2015 *De Jure* 89.
339 Brits 2015 *De Jure* 89.
340 Section 129(3) and (4) of the National Credit Act of 2005 read together; Brits 2015 *De Jure* 89 and Choma and Kgarabjang "A critical analysis of debtor's right to reinstate a credit agreement & resume possession of property" 2018 *Risk Governance and Control: Financial Markets & Institutions* 8(1), 59-68.
341 Brits 2015 *De Jure* 89.
342 *Ibid*.
343 Brits 2015 *De Jure* 89.

possibility is the fact that the first draft Amendment Bill in 2013[344] proposed no amendments to this subsection.[345] Since the legislature also provided no explanation for the amendment, one must assume that it was never the intention to bring about the kind of substantive change that the literal wording of the modified subsection brings.[346] One is therefore tempted to interpret section 129(4) as if it has not been amended at all.[347] The legislature probably intended to emphasise that the provider must allow reinstatement if the consumer remedies his default prior to any of the events listed in the subsection.[348]

The aspect of section 129(4) that could have benefitted from the amendment process is clarity regarding the listed events after which reinstatement is no longer possible.[349] This issue in the subsection has led to some uncertainty, since not all the cases agree as to the latest point in the process until which the consumer can still rectify his default.[350] The general idea seems to be that reinstatement should be permissible until the moment that the agreement has been fully enforced or cancelled, which moment depends on the circumstances of each case.[351] If property is involved, it would be when a sale in execution takes place; when no property is involved, it would be when judgment is granted. However, the wording of the subsection could have been clearer.

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6 5 REFERRAL BY THE CONSUMER TO A DEBT COUNSELLOR

Referral by the consumer to a debt counsellor is an option available to a consumer before or on receipt of a section 129 notice. This option is prefaced here for greater discussion in the next Chapter.

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344 Draft National Credit Amendment Bill 2013, General Notice 560 in Government Gazette 36505 of 2013-05-29.

345 Brits 2015 *De Jure* 89 and Choma and Kgarabjang "A critical analysis of debtor's right to reinstate a credit agreement & resume possession of property" 2018 *Risk Governance and Control: Financial Markets & Institutions* 8(1), 59-68.

346 *Ibid*.

347 Brits 2015 *De Jure* 90.

348 *Ibid*.

349 Brits 2015 *De Jure* 90; Choma and Kgarabjang "A critical analysis of debtor's right to reinstate a credit agreement & resume possession of property" 2018 *Risk Governance and Control: Financial Markets & Institutions* 8(1), 59-68.

350 See for example *Dwenga v FirstRand Bank Ltd* para 35 - 36 (until judgment is granted); *Nkata v FirstRand Bank Ltd* para 51-53 (until the property is sold); *Nedbank Ltd v Fraser* para 40-41 (until the sold property has been transferred); Brits 2015 *De Jure* 90.

351 Brits 2015 *De Jure* 90.

There are instances where a court will not entertain the enforcement of a credit agreement at all, namely when a relevant matter is pending before the National Consumer Tribunal or has been referred to a debt counsellor, ombud, alternative dispute resolution agent or a consumer court or when the consumer has surrendered the goods but they have not been sold yet or when the consumer agreed to a proposal in terms of section 129(1)(a) and acted *bona fide* in fulfilment of the agreement or complied with an agreed plan under section 129(1)(a) or has indeed brought his payments up to date as envisaged in section 129(1)(a). The court will in these circumstances adjourn the matter.[352]

6 6 SUMMARY

Apart from the pre-litigation processes that could assist the consumer who is in default, even during the litigation stage right up to the trial stage, the consumer is still afforded some protection even if some of it, such as opposition to summary judgment, is only dilatory. For whatever it is, it is nonetheless some protection.

Section 129(1)(a) notice is compulsory, and a provider's cause of action will not be complete if a section 129(1)(a) notice has not been sent prior to enforcement. Accordingly, where there is non-compliance with section 129(1)(a) the court is *obliged* to adjourn the matter and set out steps that the provider must complete before the matter can be resumed.[353] This is supported by the case of *Standard Bank of South Africa Ltd v Rockhill*.[354]

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Reinstatement of a credit agreement is possible under section 129(3) upon payment of the required amounts as held in the case of *Nkata* which further held that such reinstatement is automatic.[355] The new section 129(3) provides that the consumer can remedy his default by paying all overdue amounts, prescribed administrative charges and reasonable costs. The amendment specified that it is not the full contract amount required for remedy but rather the amount in arrears where after reinstatement will occur by operation of the law.[356] The

352 Otto (2016) 125.
353 Section 130(4)(b) of the National Credit Act of 2005. This is not a discretionary but a compulsory procedure.
354 2010 5 SA 252 (GSJ).
355 *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) para 105, 143 and footnote 51.
356 *Nkata v FirstRand Bank Ltd* para 90, 105, 136, 143 and 164.

administrative charges are limited to those now prescribed and the costs are limited to those now agreed upon or taxed in order for them to be considered reasonable.[357]

The *Hendricks* case together with the *Mokebe* case are lauded as benchmarks in protecting consumer rights and the right to housing in particular. They continued the tone set by the Constitutional Court in *Jaftha* by requiring judicial oversight which takes into account a number of circumstances in order to strike the balance between section 129 and the right to housing, in line with section 36 of the Constitution. This decision marked the beginning of the development of judicial oversight in the sale of homes in execution in South Africa. These cases assist in protecting consumers and their families, particularly those who cannot afford legal representation, from having their homes arbitrarily or unfairly taken away when they are in financial difficulty and will also mitigate having their homes sold in execution for less than their worth with the requirement of judicial oversight in the setting of prices.

Mokebe and *Hendricks* further enforce the pro-consumer approach of automatic reinstatement and the possibility of reinstatement of the credit agreement at a point in the enforcement proceedings which provides the consumer with an extended opportunity to remedy their default and secure their right of access to adequate housing. Reinstatement is the consumer's right to have enough time to remedy their default. There is no doubt that this right is granted to the consumer in light of the constitutional considerations during debt enforcement, especially, the right to housing under section 26 of the Constitution.

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The case of *Gundwana* confirmed the *Jaftha* principles and extended the protection to consumers with immovable property under execution by finding it unconstitutional for the registrar to declare immovable property specially executable when ordering default judgment. Rule 46 was then amended by the inclusion of Rule 46A and 43A of the Uniform Rules of Court and the Rules Regulating the Conduct of the Proceedings of the Magistrates' courts of South Africa which provide for judicial oversight in this type of execution.

The provisions of the original section 129(3) and (4) of the NCA had to be clarified. The 2014 Amendment was a step by the legislature to clarify the questions raised in *Nkata* relating to reinstatement of credit agreements. However, having explored the difficulties in

357 In terms of s129(3) and (4) of the NCA.

interpretation of the modified version of these subsections, it is clear that the legislature has failed to remedy the questions on reinstatement. Rather, more confusion has been created. The National Credit Amendment Act of 2014 and 2019 are missed opportunities to simplify the right of reinstatement, its requirements and qualifications.[358]

The legal fraternity is still compelled to interpret the wording of the section 129(3) and especially subsection (4) of what is a practicable and fair reinstatement mechanism in light of the NCA's purposes.[359] The point of departure when interpreting the subsections is the NCA's clear policy preference for dispute resolution and the avoidance of expensive litigation. The preferred view would be that, where possible, credit agreements should not be cancelled, terminated or enforced, but should instead endure to their natural conclusion.[360] It is therefore imperative to develop ways to resolve disputes by rectifying breaches of contract.[361] The possibility of reinstatement should be seen as being aimed at achieving the same purpose and therefore the remedying of default should be encouraged and remain available as an option for as late in the enforcement process as reasonably possible.[362] This broad interpretation of the reinstatement mechanism is supported by the undeniable value it brings in avoiding unjustifiable limitations of constitutional rights, as is particularly evident if a debtor's home is at stake.

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The modified section 129(3) is not that problematic.[363] The new version at least maintains a right for the consumer to remedy his default before the agreement is cancelled.[364] The "before-cancelled" qualification does not preclude reinstatement during the process of specifically enforcing the acceleration clause.[365] Therefore, as long as the creditor does not cancel the agreement, the consumer is free to remedy his default by paying the prescribed amounts.[366] Confusion occurs when the amended section 129(4) is considered, as previously it indicated the point in the debt enforcement process after which the consumer could not reinstate the agreement.[367] Now, however, it refers to point in the process after which the

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358 Brits 2015 *De Jure* 90.
359 *Ibid*.
360 Brits 2015 *De Jure* 90.
361 Brits 2015 *De Jure* 91; Govender and Kelly-Louw 2018 *PER /PELJ* 24.
362 Brits 2015 *De Jure* 91.
363 *Ibid*.
364 Brits 2015 *De Jure* 91.
365 *Ibid.*
366 Brits 2015 *De Jure* 91.
367 *Ibid*.

provider may no longer reinstate the agreement. Listing these limitations from the provider instead of the consumer's perspective is strange and illogical.[368] Nevertheless, there should be some indication of the point until which the right established in section 129(3) is no longer available and one could assume that despite poor drafting this is still the purpose of section 129(4).[369]

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368 Brits 2015 *De Jure* 91.
369 *Ibid*.

Chapter 7

Debt review *versus* debt enforcement

7 1 INTRODUCTION

The NCA promotes, among others, responsible borrowing, avoiding over-indebtedness, discouraging the granting of reckless credit and contractual defaults by consumers.[1] As noble as the promotion of these notions is, some consumers still run into financial difficulties, and when they do, they invariably default on their monthly credit repayments.

The NCA provides relief for consumers who are unable to meet their monthly credit repayments by way of the debt review option. As already highlighted in this work, debt review and debt enforcement interact and intersect often in the NCA. This is an area where the tension between the respective rights and responsibilities of consumers and providers is clearly visible as consumers seek to avoid debt enforcement often by proceeding with a debt review application whilst providers seek to protect their interests in obtaining payment of the outstanding debts by way of debt enforcement.

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In analysing this intersection this Chapter continues the exploration from Chapter six of the research aim and question as to the options available and consequences to a consumer in receipt of a section 129 notice.

7 2 DEBT REVIEW

One of the processes pivotal to consumer protection is the debt review process[2] provided for in section 86 of the NCA, under which a consumer struggling with debt may apply to a debt counsellor to be declared over-indebted.[3] Under these provisions, an over-indebted consumer is provided with temporary relief against the enforcement of the credit agreement by the provider during the debt review process.[4] The process is aimed at ultimately assisting

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1 Section 3 of the NCA.
2 Van Niekerk "Debt Review: Points on Orders" 2017 (October) *De Rebus* 33 – 34.
3 See *Seyffert v FirstRand Bank Ltd t/a First National Bank* 2012 6 SA 581 (SCA); *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA).
4 *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 9.

consumers in paying off their debts by providing for a period of relief, extending the loan period or reducing the instalments payable.[5]

In the first two years after the provisions in the NCA became fully operative more than 100 000 (One hundred thousand) applications for debt counselling were received. By March 2011 this figure had grown to more than 240 000 (Two hundred and forty thousand), and 63 000 (Sixty three thousand) consumers were already paying rescheduled debts through accredited payment distribution agencies (hereinafter referred to as "the PDAs"). By March 2012 the number of applications for debt review stood around 300 000 (Three hundred thousand), and almost 80 000 (Eighty thousand) consumers were making payments through PDAs. On average 9100 (Nine thousand one hundred) consumers per month apply for debt counselling.[6] These alarming figures on the swift uptake by indebted consumers of the debt review process indicates the dire need in society for assistance regarding indebtedness, over indebtedness, as well as the importance of the debt review process in providing a lifeline to these consumers.

An evaluation of a debtor's position in order to decide whether he is over-indebted may be initiated in either of two ways:

(i) In any court proceedings in which it is alleged that a consumer is over-indebted, the court may refer the matter to a debt counsellor for evaluation and recommendation or may itself declare the consumer over-indebted;

(ii) The consumer may apply to a debt counsellor to be declared over-indebted. The consumer may not apply for a debt review in respect of a particular credit agreement if the provider has already taken steps to *enforce* the agreement.[7]

Debt review is an application[8] that is, as a rule, brought by a debt counsellor after a consumer has applied to have his or her debts that exist under a credit agreement reviewed in

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5 Section 87 and 88 of the NCA provide this relief. See also Eiselen "The Unreasonable refusal of consent orders by the national consumer tribunal under the National Credit Act: *Barnes v Absa Bank Ltd and Others confirming Motitsoe v Standard Bank Ltd*" 2013 *SAMLJ* 379.

6 Van Niekerk "Debt Review: Points on Orders" 2017 (October) *De Rebus* 33 – 34.

7 Otto (2016) 70 - 71.

8 The debt counsellor must notify all providers listed in the application for debt review and all registered bureaux of the application within 5 (five) business days of having received the application from the consumer. He must evaluate the consumer's indebtedness. The consumer and providers must co-operate with the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the possibility of debt rearrangement. They must all act in good faith – Form 17.1. See also section 86 and Regulation 24 of the 2006 NCA Regulations GN R489 in GG 28864 of 2006-05-31.

terms of section 86 of the NCA. Such an application is brought after the debt counsellor has satisfied himself or herself that the consumer is over-indebted, namely that based on the information available at the time, the consumer is or will be unable to satisfy his or her obligations under all credit agreements to which he or she is a party in a timely manner after considering the consumer's financial means, prospects and obligations.[9] Within a period of thirty (30) business days the debt counsellor must determine whether the consumer appears to be over-indebted.[10] If the debt counsellor concludes, on account of the assessment, that the consumer is not over-indebted[11] the debt counsellor must reject the application and the consumer may apply directly to the magistrate's court for a debt restructuring order.[12] However, if the debt counsellor concludes that the consumer is over-indebted,[13] the debt counsellor is required to draft a proposal for the restructuring of the consumer's obligations and submit it to all providers for their consideration. It is important to note in this regard that the NCA does not require any negotiations in respect of consumers who are found to be over-indebted.[14] However, in practice, debt counsellors prefer to negotiate with providers in the hope of reaching a compromise with them. Negotiations are also undertaken pursuant to the obligation in terms of section 86(5) "to participate in good faith in the review and any negotiations designed to result in responsible debt re-arrangement."

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If the parties do not reach an agreement, the debt counsellor must bring an application to the magistrate's court under section 87(1) for an order in terms of which the consumer is declared over-indebted and his or her debt obligations are restructured pursuant to the debt counsellor's proposal.[15] The restructuring powers of the court are limited and the court may, in essence, only order that the amount of the instalment be reduced and the payment term be extended or, in the alternative, postpone the dates on which payments are due or extend the payment term and postpone the dates on which payments are due under an agreement.[16] The consumer therefore does not receive any discharge of his debt obligations. The NCA in section 3(g) aims to provide "mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations." Section 3(gA) of the

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9 Section 79 of the NCA and Van Niekerk 2017 (October) *De Rebus* 33 – 34.
10 Section 86(6)(a) of the NCA read with regulation 24(6).
11 Section 86(7)(a) of the NCA.
12 Section 86(9) of the NCA.
13 Section 86(7)(c) of the NCA.
14 *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 317.
15 Section 86(7)(c) read with subsections 86(8)(b) and 87(1) of the NCA.
16 Section 86(7)(c)(ii) of the NCA.

NCA proceeds to indicate the provision of appropriate debt intervention for qualifying consumers. Section 88(3) protects the consumer by providing for a *moratorium* on debt enforcement in certain instances. While a consumer is under debt review or where a debt restructuring order applies to him or her and the consumer strictly complies with such order, a provider may not enforce any of its rights under a credit agreement. Section 88(3) is subject to section 86(10), which allows a provider to give notice to the consumer to terminate the debt review. This interrelatedness is discussed later in this Chapter.[17]

In the case of *Nedbank Ltd v Jones*[18] the Western Cape Division of the High Court heard an application for rescission of an order for debt review granted in the magistrate's court. The applicant here sought to review and set aside the order (debt review) made by the magistrate's court on 4 February 2014 rearranging the debt obligations of the first respondent in terms of section 87 (1)(b) of the NCA. The applicant is a commercial bank, and a registered provider as defined in the NCA. The applicant and the first respondent ("the consumer") had entered into an unsecured personal loan agreement for the amount of R 1,1 million, which had to be repaid over a period of 336 months in instalments of R 10 491 at a variable interest rate of 10,9% per annum. The consumer defaulted on his repayments and in turn made an application to a registered debt counsellor, to be declared overindebted in terms of section 86 (1) of the NCA. Having made a determination of over-indebtedness, the debt counsellor in terms of section 86(8)(b) of the NCA, referred the matter to a magistrate for a debt review order to be granted. The magistrate subsequently granted an order declaring the consumer to be over-indebted and ordered that their obligations in terms of the loan agreement be re-arranged (the "debt review order"). In terms of the re-arrangement the magistrate confirmed an order that the outstanding balance of the loan was R105 612.15. Provision was made for payment of a distributable amount to the applicant of a monthly instalment of R289.15. The re-arranged period to expire 260 months after the date of the order, with interest to be charged at 0%. Following the above, an application was made by the applicant to rescind this order. The court correctly concluded in its order that the magistrate erred in his order, and held that

> "A magistrate's court hearing a matter in terms of section 87 of the National Credit Act, 34 of 2005, does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed

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17 See Roestoff and Van Heerden "*Nedbank Ltd v Swartbooi* Unreported Case No 708/2012 (ECP): Termination of Debt Review in terms of the National Credit Act - not the end of the road for Over-indebted Consumers" 2014 *De Jure* 140-141.

18 2017 2 SA 473 (WCC).

> interest rate determined by a credit agreement, and any order containing such a provision is null and void."[19]

The magistrate's order was indeed *ultra vires* the NCA and was therefore null and void. A re-arrangement proposal in accordance with s 86(7)(c) of the NCA that contemplated a monthly instalment which was less than the monthly interest accruing on the outstanding balance did not meet the purpose of the NCA, was *ultra vires* the NCA and the magistrate's court likewise had no jurisdiction to grant such an order.[20]

When faced with an action or application for the foreclosure on immovable property or the repossession of a motor vehicle the usual defence raised by consumers is that the credit agreement relied on is under debt review. This defence has invariably been upheld in numerous cases.[21] In *Nedbank Ltd v Jones*[22] it was held that such a defence would not suffice if the debt review order granted was *ultra vires* the powers of the magistrate's court.[23]

A consumer who has been notified of his default in terms of section 129(1) of the NCA is well advised to refer the matter to a debt counsellor within the 10 (ten) days envisaged by sections 129 and 130. Should he fail to do so and only apply for debt review at a later stage when the provider is enforcing the agreement in court, the court may well exercise its discretion against him and refuse the application for debt review, as happened in the case of *FirstRand Bank v Oliver.*[24] A consumer who wishes to apply for debt review when the provider is claiming payment in court may do so but will be required to provide reasons why the matter should be referred to a debt counsellor and for his failure to apply for debt review after having received a section 129(1) notice.[25]

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It was argued for quite a while that once a consumer had received a section 129 notice he or she should be barred from proceeding for debt review, at least in respect of that particular credit agreement to which the section 129 notice referred. The argument seemed contrary to

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19 2017 2 SA 473 (WCC) order A.
20 *Nedbank Ltd v Jones* para 16 – 18. See also Van Niekerk 2017 (October) *De Rebus* 33 – 34.
21 *Hattingh v FirstRand Bank Ltd* 2017 ZANCHC 34 (28 April 2017), *De Beer v Nedbank Limited* 2018 ZAGPPHC 367 (16 May 2018) and *Nedbank Limited v Ntloko* 2018 ZAGPJHC 429 (8 June 2018).
22 2017 2 SA 473 (WCC).
23 *Nedbank Ltd v Jones* para 19 – 35.
24 2009 3 SA 353 (SEC). See also Otto (2016) 71.
25 Otto (2016) 71.

the purpose and intention of the section 129 notice, which was to bring to the attention of the consumer his or her rights and options and to allow the parties to resolve the issues without litigation. However, the legislature amended section 86(2) by no longer referring to section 129 but rather to section 130 of the NCA. The effect of the amendment is that a consumer is now only barred from applying for debt review once the provider has proceeded to "enforce" the agreement in respect of section 130 of the NCA (i.e. service of summons) as opposed to delivery of a section 129 notice.[26]

Debt review provisions and procedures cannot be used to reinstate an agreement which the provider has cancelled. The consumer can, at most, apply to be declared over-indebted as far as the claim for outstanding amounts and damages is concerned, but will not be allowed to claim back those goods which the provider has repossessed following cancellation of the agreement.[27] Cancellation of the agreement is always the point beyond which there is no return.

Certain time limits are prescribed within which the debt counsellor must furnish parties with documentation and make a determination as to the consumer's over-indebtedness. The debt counsellor must otherwise complete the process within a reasonable time. A debt review does not automatically lapse after the expiry of a reasonable period. However, section 86(10) used to allow a provider to terminate the debt review process if the application has not been heard within 60 (sixty) days after the consumer has applied for debt counselling in terms of section 86(1) and regulation 24(6). This section has now been amended and discussion on this change follows below.[28]

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While a debt review is pending, litigation by the provider against the consumer is suspended, but this suspension is subject to a number of exceptions.[29] The provider may

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26 Section 26 of the National Credit Amendment Act 19 of 2014 amended section 86 (2) of the principal Act as follows—by the substitution for subsection (2) of the following subsection:
''(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section [129 deleted] 130 (inserted) to enforce that agreement.''

27 Otto (2016) 72; *BMW Financial Services South Africa (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD) 801.

28 Section 86(6) read with regulation 24(6). See also *Changing Tides 17 (Pty) Ltd v Erasmus* 2009 ZAWCHC 175 (12 November 2009) para 30; Otto (2016) 73; Van Heerden and Coetzee "Perspectives on the Termination of Debt Review in terms of the National Credit Act 34 of 2005" 2011 PER 39.

29 A consumer who has applied for a debt review or alleged in court that he is over-indebted may not use his credit facility or enter into a further credit agreement, other than a consolidation agreement, until the debt counsellor has rejected his application and the time for the consumer filing an application himself has expired; a court has decided that the consumer is not over-indebted or has rejected a debt counsellor's proposal or the consumer's own application; or a rearrangement of the consumer's debts has indeed occurred

terminate the debt review by notice under section 86(10) not earlier than 60 (sixty) business days after the consumer applied for debt review, if the consumer is in default and notice has been sent providing ten (10) days prior to cancellation.[30] Debt review must take place before issuing of summons. If the summons has been filed and served debt counselling is no longer applicable.[31] This was confirmed by Mokose AJ in *De Beer v Nedbank Limited*[32] where the section 129 notice was received by the consumer on 4th of November 2016, summons was issued on 5th of December 2016, the consumer applied for debt review on 8th of December 2016 and summons was served on 19th of December 2016. This judgment was handed down after the amendment of section 86(2) to now refer to section 130 of the NCA. The judge followed the reasoning of Ellis AJ in *Nedbank Ltd v Mokhonoana*[33] in reiterating that he did not believe that it was the legislature's intention to bar the consumer from applying for debt review on issuing of the summons which, in any event, the consumer would have not been aware of. It was held that the consumer would be barred from applying for debt review from the date of service of the summons as that would "commence any legal proceedings to *enforce* [own emphasis] the agreement."[34]

In *FirstRand Bank Ltd v Adams*[35] the defendants, Mr and Mrs Adams, applied to a debt counsellor to be declared over-indebted in terms of section 86 of the NCA. They were in arrears and negotiations with the bank did not result in an agreement. After the requisite sixty (60) business days had elapsed, the bank terminated the debt review in accordance with section 86(10) and issued summons against the defendants. The defendants opposed the action and the bank applied for summary judgment. At the first hearing, the defendants applied for a resumption of the debt rearrangement proceedings in terms of section 86(11) of the NCA. The court postponed the hearing to provide the defendants with an opportunity to make reasonable proposals for debt rearrangement. However, the defendants and the debt counsellor simply

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and the consumer has paid all his debts in terms thereof. See section 88. Otto (2016) 74 – 75. Van Heerden and Coetzee "Perspectives on the Termination of Debt Review in terms of the National Credit Act 34 of 2005" 2011 PER 39 - 42.

30 Sections 86, 86(10), 88(3) and 130(3); Otto (2016) 76.

31 Sections 86, 86(10), 88(3) and 130(3); Otto (2016) 70 – 71; *Standard Bank of South Africa Ltd v Kruger* 2010 4 SA 635 (GSJ) para 24 (wherein it was decided that once a debt counsellor has referred a debt review with recommendations to the magistrate's court a provider may no longer terminate the debt review) and *Nedbank Ltd v Mokhonoana* 2010 5 SA 551 (GNP).

32 2018 ZAGPPHC 367 (16 May 2018).

33 2010 5 SA 551 (GNP).

34 *De Beer v Nedbank Ltd* paras 4, 21 – 24.

35 2012 4 SA 14 (WCC).

reused the previous proposal, which included a proposal to reduce the interest rate, which was considered unacceptable.

Davis J held that during summary judgment proceedings initiated by a provider a court, on application by the consumer in accordance with section 86(11), could order an adjournment to allow the consumer an opportunity to argue that the debt review process should be resumed in order to provide an opportunity for further negotiations between the parties. In order to decide whether there would be any benefit in postponing the summary judgment application, the court would strike a balance between the interests of the parties. In doing so, it would take into consideration the nature of the dispute, whether the parties acted in good faith during their negotiations and the prospect of a rearrangement that would ensure the discharge of the consumer's obligations. In this case, the new proposal after the postponement was merely a recycled proposal of the original proposal and therefore summary judgment was granted.[36]

In *FirstRand Bank Ltd v Kona*[37] the court *a quo* held that an application for sequestration included "other judicial process" in terms of section 88(3) of the NCA by which the provider enforced a right under the credit agreement between itself and a consumer. A debt re-arrangement order contemplated in section 86(7)(c)(ii), unless and until set aside by a competent court, constituted a bar to compulsory sequestration of a consumer's estate. On appeal Meyer AJA held that a provider's motive was irrelevant in deciding whether sequestration proceedings were proceedings to exercise or enforce by litigation or other judicial process as provided in section 88(3) of the NCA.[38]

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Before amendment of the NCA by the National Credit Amendment Act of 2014[39] section 86(10) allowed a provider to terminate a debt review by giving notice at least sixty (60) business days after the consumer applied for debt relief, provided that the consumer was in default under the credit agreement.[40] There were conflicting decisions and opinions as regards

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36 *FirstRand Bank Ltd v Adams* paras 7, 10 – 12. For comment on the case see Otto "*Tussentydse beslagleggingsbevele by kredietooreenkomste*" 2017 *TSAR* 370.

37 2015 5 SA 237 (SCA).

38 *FirstRand Bank Ltd v Kona* para 22 -24. See also Schulze "Credit agreements sequestration" 2015 (November) *De Rebus* 37.

39 Act 19 of 2014.

40 Section 86(10) prior to amendment read as follows: "If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to -
(a) the consumer;

the right of providers to terminate a debt review while an application for a rearrangement order was pending.[41] In *Collett v FirstRand Bank Ltd,*[42] the Supreme Court of Appeal held that a provider was entitled to terminate a debt review in accordance with section 86(10) after a debt counsellor had referred the matter to the magistrate's court for an order envisaged by section 86(7)(c) and while the hearing under section 87 was still pending.[43] One of the reasons for arriving at this conclusion was the debtor's right under section 86(11).[44] After amendment section 86(10)(b) now precludes a termination when an application for a rearrangement order is pending. This subsection provides that "[n]o credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal." This amendment has substantially tied the hands of the providers once a debt review application is before court.

A section 86(10) notice is not a requirement for enforcement when the consumer has breached the order.[45] Once a rearrangement order has been granted, the provider is entitled to enforce in terms of section 88(3)(b) if the consumer breaches it.[46] This provides for protection of the provider's rights in the case where a debtor is recalcitrant in payment. A section 86(10) notice of termination of the debt review is therefore only applicable in the instance when no order has been granted and the application is not yet before the court.

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Observations made by Moseneke ACJ regarding the ruling to deny the consumers' application for leave to appeal on the basis that it was not in the interests of justice are indicative of the inability of the debt review process to deal effectively and efficiently with the problems of consumer over-indebtedness. Moseneke ACJ held that if the court were to grant the relief

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(b) the debt counsellor; and
(c) the National Credit Regulator,
at any time at least 60 business days after the date on which the consumer applied for the debt review."

41 See Van Heerden and Coetzee "Wesbank v Deon Winston Papier and the National Credit Regulation" 2011 *De Jure* 463 for a discussion of cases prior to the decision of the Supreme Court of Appeal (SCA) in *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA).

42 2011 4 SA 508 (SCA).

43 *Collett v FirstRand Bank Ltd* para 11.

44 An additional challenge to debt review is the fact that various debts fall outside the ambit of credit agreements as defined under section 8, and therefore outside the powers conferred on debt counsellors and the courts in terms of sections 86 and 87 of the NCA.

45 *Ibid*.

46 Sections 86(10) and 129(1)(b) of the NCA. Roestoff "*Ferris v FirstRand Bank Ltd* 2014 3 SA 39 (CC*):* Enforcement of a Credit Agreement After Breach of a Debt Rearrangement Order and the Ineffectiveness of Debt Review in terms of the National Credit Act" 2016 *De Jure* 142. Section 88(3)(b)(ii) of the NCA. See also *Jili v FirstRand Bank Ltd t/a Wesbank* 2015 3 SA 586 (SCA) par 12; *FirstRand Bank Ltd v Kona* 2015 ZASCA 11 (13 March 2015), 2015 5 SA 237 (SCA). *Ferris v FirstRand Bank Ltd* 2014 3 SA 39 (CC) and *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA).

sought, it would merely delay the inevitable.[47] The Constitutional Court emphasized the fact that the debt-restructuring order was granted on terms proposed by the consumers themselves and the court, therefore, did not have too much sympathy with their case.[48] The debt review process does not provide for any discharge or maximum payment periods and, thus, would in many instances only perpetuate the consumers' over-indebtedness.[49] Therefore, the process cannot provide a realistic option for most over-indebted consumers.[50] The large number of section 86(10) terminations and enforcement actions pertaining to the debt review process indicate that such procedure is not a workable option for most over-indebted consumers.[51] The implication is therefore that a measure providing for a mere rescheduling of debt and an extension of payment dates is sometimes insufficient to provide effective relief.[52]

Debt review obviously has its place and is beneficial to the category of consumer who by the restructuring of their debt will be able to fulfill their financial obligations. There is however another category of consumers, as highlighted by this case, where the mere restructuring of their debt as allowed by debt review will not allow them to meet their obligations. One of the purposes of the NCA is to provide all consumers with affordable protection through fair, transparent, sustainable, and responsible processes. The 2019 Amendment Act seems to confirm this finding and purpose by providing a new form of debt intervention and greater focus on investigating reckless lending.[53] The preamble to the 2019 Amendment Act clearly places this in context:

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> "AND WHEREAS without suitable alternative natural person insolvency measures being made available to over-indebted individuals who do not have sufficient income or assets to show benefit to creditors, to afford the costs associated with an administration order, or to be an economically viable client for a debt counsellor, it is not only an insurmountable challenge for them to manage or improve their financial position, but it also amounts to unjustified and unfair discrimination on socio-economic grounds"[54]

It is understood that debt intervention will assist the consumers who do not currently benefit from insolvency, administration or debt review. Section 1 of the 2019 Amendment Act as amended by section 1 of the 2014 Amendment Act seems to indicate that debt intervention

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47 *Ferris v FirstRand Bank Ltd* para 31. See also Roestoff 2016 *De Jure* 143.
48 *Ferris v FirstRand Bank Ltd* para 19.
49 Roestoff 2016 *De Jure* 143. See also, Roestoff and Coetzee "Consumer debt relief in South Africa: Lessons from America and England, and suggestions for the way forward" 2012 *SAMLJ* 69.
50 Roestoff 2016 *De Jure* 144.
51 *Ibid.*
52 Roestoff 2016 *De Jure* 145.
53 Section 10 of the National Credit Amendment Act 7 of 2019 inserts section 82A in the NCA, being the reporting and investigation of reckless credit agreements.
54 National Credit Amendment Act 7 of 2019, preamble.

would benefit consumers with unsecured debt who have little to no income and are possibly over indebted due to a change in personal circumstances or other circumstances. Section 13 of the 2019 National Credit Amendment Act inserts section 86A on the application for debt intervention which empowers the National Credit Regulator and Tribunal to make certain determinations, extend the period of repayment, determine interest, fees and charges. Section 87A of the 2019 Amendment Act indicates the orders a Tribunal may make in a debt intervention and includes extension, suspension or extinguishing of the whole or a portion of the consumer's debt. The remainder of the clauses mimic those of the debt review clauses but in relation to debt intervention. The 2019 Amendment Act is not yet operational. It is believed that the delay is due to the need to capacitate the National Credit Regular and Tribunal to be able to fulfill their mandate. The efficacy of this additional measure would need to be tested and measured but on the face of it appears that it will fill the current gap and provide relief to a category of consumers currently left unassisted. This relief however may come at quite a cost to providers as it may negatively impact the banking industry.[55]

7 3 DEBT ENFORCEMENT

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Debt enforcement is the most common option available to a provider in order to secure rights in relation to a consumer. It usually infers the mandatory initial requirement of sending a section 129 notice and thereafter proceeding with the issuing of summons for the cancellation of the agreement and damages.

In seeking to enforce debt through a summons, the following allegations must be contained therein:

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55 Peterson "Debt intervention: South Africa's National Credit Amendment Act enacted but not yet in force" https://www.nortonrosefulbright.com/en/knowledge/publications/2ad52811/debt-intervention-south-africas-national-credit-amendment-act-enacted-but-not-yet-in-force (accessed 23-02-2022). Shongwe "Will the Signing of The National Credit Amendment Bill Into Law Be Somewhat Muted?" https://www.mondaq.com/southafrica/consumer-credit/848312/will-the-signing-of-the-national-credit-amendment-bill-into-law-be-somewhat-muted#:~:text=With%20the%20President%20having%20signed,fully%20effective%20by%20January%202021 (accessed 23-04-2022). See also Eselaar "The National Credit Act's Debt Intervention system – some key points" http://www.esselaar.co.za/legal-articles/national-credit-act%E2%80%99s-debt-intervention-system-%E2%80%93-some-key-points accessed 23-04-2022). See also Michaels "Does intention speak louder than words? An excursion into debt intervention provisions" 2020 (April) *De Rebus* 39. Section 86A(1) of the 2019 National Credit Amendment Act holds that: "A debt intervention applicant may apply to the National Credit Regulator in the prescribed manner and form to have the debt intervention applicant declared over-indebted, if that debt intervention applicant has a total unsecured debt owing to credit providers of no more than R50,000, or such an amount as may be prescribed by the Minister."

- there was a section 129 notice sent and proof thereof;
- there is no debt review pending;
- there was registration of the provider, if it is a credit agreement and there is no over-indebtedness or reckless credit.[56]

Under subsection (4) of section 130 of the NCA the court may make any of the following orders:

- cancellation of the debt;
- postponement for referral to the National Credit Regulator or the Tribunal or any other body;
- pending referral to anybody, adjourn the case;
- pending a Tribunal decision, refer the matter to a Tribunal; or
- dismiss or grant the request for default judgment.

Debt enforcement for the provider is the mechanism available to secure their rights of payment, fulfilment of the contract and to protect the encumbered asset, if there is one, provided there is timeous action.

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7 4 DEBT REVIEW *VERSUS* DEBT ENFORCEMENT

7 4 1 General

It is evident that there is a tension and interplay between the NCA's provisions regarding applications for debt review, on the one hand, and proceedings towards enforcement of the consumer's contractual obligations, on the other.[57]

Briefly, the one "procedure" may suspend or affect the other under the NCA as follows:

(a) If the provider has already proceeded with enforcement of the agreement because of the consumer's default, the consumer *may not* apply for a debt review in respect of that

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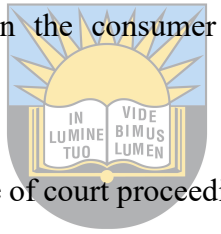
56 In the High Court, an affidavit proving the allegations in the summons will also be required for summary judgment or default judgment purposes. Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa. Government Notice R315 (Government Gazette 19834) of 12 March 1999.

57 Otto (2016) 111.

agreement and his application for a debt review does not apply to that particular agreement. The legislature amended the reference to section 129 in section 86(2) to a reference to section 130. The consequence of this is that a consumer is only barred from applying for debt review once the provider has proceeded to "enforce" the agreement in accordance with section 130, and not merely because a notice in terms of section 129 informing the consumer of his default has been sent. Moreover, on the authority of *Nedbank v National Credit Regulator*[58] the consumer may still apply for debt review regarding his other credit agreements, in other words, the credit agreements that are not being enforced by the provider in the particular case. A court still has the power to refer the matter relating to that particular credit agreement that is being enforced to a debt counsellor once the agreement concerned is considered by the court or to declare the credit provided reckless.[59] Since the amendment to section 86(2) enforcement now bars debt review "once commencement of proceedings to enforce an agreement" in accordance with section 130 has occurred. This has been interpreted to mean once summons has been served on the consumer in respect of that particular credit agreement.[60]



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(b) A provider who receives notice of court proceedings in connection with the suspension of an agreement on the ground of reckless credit or alleged over-indebtedness or who receives a notice from a debt counsellor or with whom a consumer has lodged an application for debt review, may not litigate to enforce the agreement, or security thereunder, until the consumer is in default under the particular agreement and:

(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 providers have come to an agreement rearranging the consumer's obligations, and all of the consumer's obligations under the credit agreements rearranged as such have been fulfilled. There would be no default and need to litigate in this instance; or

(iv) the consumer defaults under the rearrangement itself, in which event the

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58 2011 3 SA 131 (SCA).
59 Otto (2016) 111 - 112.
60 *De Beer v Nedbank Ltd* 2018 ZAGPPHC 367 (16 May 2018) paras 4, 21 – 24.

provider does not need to apply to court to have the rearrangement order set aside before enforcing his right or security. Section 88(3) as indicated in this Chapter gives him the right to go ahead with enforcement proceedings.[61]

(c) Previously, if a consumer under debt review defaulted on the agreement, the provider could give notice at any time, at least sixty (60) business days after the consumer has applied for debt review, to terminate the review.[62] Whereafter, the provider could proceed with enforcing the agreement, although a court hearing the matter had discretion to order resumption of the debt review.[63] Section 86(10) was however amended by insertion of section 86(10)(b), which states as follows: "(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal."[64]

The amendment accordingly resolves any dispute in favour of the consumer regarding the point at which a debt review may be terminated as no debt review may now be terminated once it is "before" the court. This therefore leaves the process before court open to abuse by consumers attempting to delay or curtail providers by utilizing delaying tactics and requesting endless postponements. Roestoff and Smit[65] submit that once a matter for debt review has been referred to a court, the court should be able to order that the proceedings have lapsed after the expiry of a reasonable length of time if the consumer abuses the process. The inference may be drawn from the debt review provisions in the NCA that a consumer can unduly delay the process to frustrate the provider.[66]

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As pointed out above, a consumer may not apply for a debt review once the provider has proceeded with enforcement of the agreement on the ground of the consumer's default. It must be borne in mind, however, that the courts have a wide discretion when enforcement

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61 Otto (2016) 111 - 112.
62 Section 86(10) of the NCA.
63 Section 86(11) of the NCA. Otto (2016) 112 - 113.
64 Section 86(10)(b) which was amended at the same time as section 86(2) by the National Credit Amendment Act 19 of 2014.
65 Roestoff and Smit "Non-compliance with time periods - should the debt review procedure lapse once a reasonable time has expired?" 2011 *THRHR* 501.
66 Otto (2016) 115.

proceedings are in process.[67] The exact effect of termination based on section 86(10), the correct interpretation of section 86(11) pertaining to the court which is empowered to order a resumption and the interrelationship between these two sub-sections have been the subject of many conflicting court decisions.[68] Section 86(11) of the NCA reads as follows:

> "If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrates' Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances."

Section 86(10) provides that a provider "may give notice to terminate the review". This wording is open to more than one interpretation. It is submitted that a likely interpretation is that it may indicate that a notice to terminate based on section 86(10) does not actually terminate the debt review, but that it simply serves as a notice of an intended or anticipated termination. Thus, a debt review in respect of which a section 86(10) termination notice is given, is not terminated at the moment that the said termination notice is delivered. Section 86(10) is therefore open to an interpretation that the magistrate's court may still be approached for a debt restructuring order under sections 86 and 87 up until the stage that the provider actually proceeds to enforce the particular agreement. In *Collett v FirstRand Bank Ltd*[69] Malan JA held the contrary view, namely that section 86(10) "entitles a credit provider to terminate the debt review relating to a specific credit agreement..." It would therefore appear that the Supreme Court of Appeal is of the opinion that a notice in accordance with section 86(10) is not merely a notice of an intended termination, but that its effect is indeed to terminate the debt review.[70] According to this interpretation, a debt restructuring order in respect of a particular agreement would thus not be possible once a notice of termination in terms of section 86(10) was given unless a resumption of the debt review is subsequently ordered by the court.

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However, it should be noted that there is authority for an interpretation that a section 86(10) termination notice does not in fact terminate the debt review pertaining to a specific

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67 Otto (2016) 116. They may still declare the agreement reckless, apparently *mero motu*. In addition, courts may in any proceedings declare a consumer over-indebted.

68 *Wesbank v Martin* 2012 3 SA 600 (WCC); *Changing Tides 17 (Pty) Ltd v Erasmus* 2010 JOL 25358 (WCC); *FirstRand Bank v Seyffert* 2010 ZAGPJHC 88 (11 October 2010), 2010 6 SA 429 (GSJ); *FirstRand Bank Ltd v Evans* Case No 1693/2010 (ECP), 2010 ZAECPEHC 55 (31 August 2010); *FirstRand Bank Ltd v Collett* 2010 6 SA 351 (ECG); *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC); *FirstRand Bank Ltd v Raheman* 2012 3 SA 418 (KZD); *FirstRand Bank Ltd v Britz* 2012 ZAFSHC 13 (9 February 2012). Roestoff and Van Heerden 2014 *De Jure* 141-143.

69 2011 4 SA 508 (SCA).

70 See *Changing Tides 17 (Pty) Ltd v Grobler* 2011 ZAGPPHC 235 (2 June 2011) para 24, where Murphy J interpreted the Supreme Court of Appeal's decision in *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) in the same way.

agreement and that the court dealing with the debt restructuring application could still grant a debt restructuring order in respect of such a credit agreement.[71] Both the *FirstRand Bank Ltd v Raheman*[72] and *FirstRand Bank Ltd v Britz*[73] cases were decided after the Supreme Court Appeal's decision in *Collett* but notably before the 2014 amendment.[74] In *Raheman*[75] Mokgohloa J sought to distinguish the facts of the case from those in *Collett* as the order for debt restructuring in *Raheman* was already granted when proceedings for debt enforcement were instituted, while the application for restructuring in *Collett* was still pending when enforcement proceedings were instituted.

In *Britz*[76] Phalatsi AJ held that a section 86(10) notice was of no force and effect where a rearrangement order was finally granted by the court. In *Wesbank v Martin*[77] Binns-Ward J held that the effect of a section 86(10) notice was in fact not *ipso facto* to terminate a debt review, but rather to afford a period of notice[78] upon the completion of which the provider could institute proceedings for debt enforcement. According to Binns-Ward J actual termination as intended in the termination notice would then only take place once the provider initiates debt enforcement proceedings after such notice has been given.

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In an earlier decision by Binns-Ward J in *Changing Tides v Erasmus*[79] the court indicated that the evident purpose of the notice was to enable the consumer and/or debt counsellor to urgently bring an application for debt restructuring in accordance with section 87(7)(c) or 86(8)(b).[80] These cases thus indicate that the purpose of a notice of termination is merely to enable the provider to institute proceedings for debt enforcement and that it does not actually terminate the debt review in respect of the particular credit agreement. However, in *Changing Tides v Grobler*[81] Murphy J held that a magistrate's court dealing with the debt restructuring application was not empowered to grant a debt restructuring order where the

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71 See *Wesbank v Martin* 2012 3 SA 600 (WCC); *FirstRand Bank Ltd v Raheman* 2012 3 SA 418 (KZD); *FirstRand Bank Ltd v Britz* 2012 ZAFSHC 13 (9 February 2012).
72 2012 3 SA 418 (KZD).
73 *FirstRand Bank Ltd v Britz* 2012 ZAFSHC 13 (9 February 2012).
74 *Collet v FirstRand Bank Ltd* 2011 4 SA 508 (SCA).
75 *FirstRand Bank Ltd v Raheman* para 9.
76 *FirstRand Bank Ltd v Britz* para 20.
77 *Wesbank v Martin* 2012 3 SA 600 (WCC) para 7.
78 For example, at least ten (10) business days – section 129(2) read with section 130(1)(a).
79 *Changing Tides 17 (Pty) Ltd v Erasmus, Changing Tides 17 (Pty) Ltd v Cleophas, Changing Tides 17 (Pty) Ltd v Frederick* 2009 ZAWCHC 175 (dated 12 November 2009).
80 *Changing Tides 17 (Pty) Ltd v Erasmus, Changing Tides 17 (Pty) Ltd v Cleophas, Changing Tides 17 (Pty) Ltd v Frederick* 2009 ZAWCHC 175 (dated 12 November 2009) para 41.
81 *Changing Tides 17 (Pty) Ltd v Grobler* 2011 ZAGPPHC 235 (2 June 2011).

provider had already given a notice of termination.[82] That was so as only the court dealing with debt enforcement proceedings was entitled to grant an order for resumption of the debt review process.[83]

It appears that the divergence of opinion as to whether the notice in terms of section 86(10) is merely a notice evidencing an intention to terminate the debt review at a later stage or whether it is the giving of the notice itself that terminates the debt review hinges largely on the interpretation of the ten (10) business day period mentioned in section 130(1)(a) which has to expire before debt enforcement may commence. As it stands, there is no explanation of the purpose to be served by these ten (10) business days that first have to expire prior to enforcement. This is an anomaly, as it is a principle of interpretation of statutes that the legislature does not intend to make meaningless legislation.[84] A possible answer to this apparent contradiction is that the legislature intended that the section 86(10) notice merely serves as an indication of an intention by the provider to terminate the debt review and enforce the relevant credit agreement and that the ten (10) business day period that has to elapse after delivery of the section 86(10) notice is presented as a final opportunity to the consumer to have the debt review lodged. This interpretation would provide purpose to the ten (10) day period. It is the most logical approach in the circumstances. If this logical approach is utilized as an analogy for the section 129 notice ten (10) day period then one could understand that the period is provided as a last attempt to allow the defaulting consumer to exercise the options available to them, as outlined in the notice, for that particular credit agreement; failing which the provider may proceed with enforcement.

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It is therefore submitted on this interpretation that it is the actual institution of enforcement proceedings and not the notice based on section 86(10) which terminates the debt review. Therefore, the magistrate's court dealing with the debt restructuring application should still be able to grant a restructuring order in respect of a credit agreement even though a termination notice has already been given in respect of such credit agreement. In addition it is submitted that the wording of section 86(10) being "notice to terminate" instead of "notice of termination" indicates that a termination notice does not have the effect of actually terminating the debt review. Its purpose is only to serve as a notice of an intended termination. Only when

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82 *Changing Tides 17 (Pty) Ltd v Grobler* para 8 and 20.
83 *Changing Tides 17 (Pty) Ltd v Grobler* para 26.
84 Botha *Statutory Interpretation: An Introduction for Students* (2012) 133.

the provider has indeed proceeded to enforce a credit agreement will actual termination take place, in which case the consumer will have to apply for resumption of the debt review in order to protect his or her interests.

Before a provider can enforce a credit agreement that is the subject of a pending debt review that is not lodged or filed, the debt review should be terminated in accordance with section 86(10),[85] provided other requirements have been met, *inter alia* that ten (10) business days should have lapsed since delivery of the notice of termination.[86] If a debt review is incorrectly terminated in accordance with section 86(10), the enforcement proceedings instituted thereafter would be unlawful and premature.[87]

7 4 2 Sections 86, 88 and 129

It was held in *Standard Bank of South Africa Ltd v Kruger*[88] that in those instances where a debt counsellor had lodged an application in a magistrate's court for purposes of debt restructuring within sixty (60) days from the date on which the consumer has applied for debt review, the provider could not terminate the debt review in terms of section 86(10) despite the fact that the application for restructuring had not been heard by the court within the aforesaid sixty (60) days. The court premised its judgment on the view that termination based on section 86 was competent only in respect of the actual debt review process that was conducted by the debt counsellor and that the referral to court in accordance with section 86(8)(b) for a hearing fell outside the ambit of such termination, as it was done in accordance with section 87 of the NCA.[89] Thus, the court was not held to a limited time frame in which to finalize the debt review application.[90]

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Kemp AJ in *SA Taxi Securitisation (Pty) Ltd v Nako*[91] criticised *Kruger*[92] stating that section 87 was dependent on a proposal in accordance with section 86 and that to argue that the words "that is being reviewed in terms of this section" in section 86(10) referred only to a debt

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85 Section 88(3).
86 Section 130(1)(a); Van Heerden and Coetzee 2011 *PER* 39.
87 Van Heerden and Coetzee 2011 *PER* 40.
88 2010 4 SA 635 (GSJ).
89 *Standard Bank of South Africa Ltd v Kruger* paras 13 - 14.
90 Van Heerden and Coetzee 2011 *PER* 41.
91 2010 JOL 25653 (E) (8 June 2010) para 10, 37 – 43 and footnotes 4 and 9.
92 *Standard Bank of South Africa Ltd v Kruger* 2010 4 SA 635 (GSJ).

review by a debt counsellor lost sight of this fact. The argument advanced in *Kruger* also lost sight of the protection provided by section 86(11) and specifically the words "hearing the matter" contained therein.[93] Accordingly, it would have been unnecessary to include the words "hearing the matter" in section 86(11) if the judge in *Kruger* was correct, as these words refer to a matter pending before the magistrate's court and on *Kruger's* construction there would have been no matter before it based on section 86(10).[94] Thus, Kemp AJ was of the opinion that the court referred to in section 86(11) was the court before which the debt restructuring proposal was serving.[95]

Subsequent to *Nako*[96] the issue of termination of debt review in terms of section 86(10) was considered by Kathree-Setiloane AJ in *South African Taxi Securitisation (Pty) Ltd v Matlala*[97] in which she disagreed with the interpretation of Kemp AJ in *Nako*[98] of "hearing the matter" as mentioned in section 86(11). She indicated that in her opinion these words referred to the court in which the credit agreement was being enforced and not the court to which the debt review has been referred under section 87 of the NCA.[99] According to her, Kemp AJ misunderstood section 129(1) and failed to consider section 129(2).[100] She referred to *National Credit Regulator v Nedbank*[101] where it was held that a debt restructuring referral by a debt counsellor has to be made by means of an application in accordance with Magistrates' Court Rule 55 and that service of such referral should be in accordance with Magistrates' Court Rule 9. She then concluded that the service and not merely the issuing of a referral on the provider would constitute a referral to the magistrate's court in accordance with section 86(8)(b) or 86(7)(c).[102]

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In *FirstRand Bank Ltd v Evans*[103] Eksteen J considered the conflicting judgments by Kathree-Setiloane AJ and Kemp AJ. He indicated that the role of the debt counsellor

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93 *Standard Bank of South Africa Ltd v Kruger* paras 12 - 13.
94 *SA Taxi Securitisation v Nako* para 43.
95 *SA Taxi Securitisation v Nako* para 10 and footnotes 5 and 8.
96 *SA Taxi Securitisation (Pty) Ltd v Nako* 2010 JOL 25653 (E) (8 June 2010).
97 *SA Taxi Securitisation (Pty) Ltd v Matlala* 2010 ZAGPJHC 70 (29 July 2010).
98 2010 JOL 25653 (E) (8 June 2010).
99 *SA Taxi Securitisation (Pty) Ltd v Matlala* 2010 ZAGPJHC 70 (29 July 2010) para 9.
100 *Supra* para 13.
101 2009 ZAGPPHC 100 (21 August 2009), 2009 6 SA 295 (GNP), 2009 4 All SA 505 (GNP).
102 *SA Taxi Securitisation (Pty) Ltd v Matlala* 2010 ZAGPJHC 70 (29 July 2010) para 14.
103 *FirstRand Bank Ltd v Evans* 2010 ZAECPEHC 55 (31 August 2010). Eksteen J delivered a similar judgment a few days later in *FirstRand Bank Ltd v Collett* 2010 ZAECGHC 75 (2 September 2010), 2010 6 SA 351 (ECG).

conducting a debt review in accordance with section 86 was not completed by mere reference of his or her debt re-structuring recommendation to the magistrate's court but that the debt review process continued until the magistrate's court made an order in accordance with section 87.[104] The more reasonable interpretation of the words "that is being reviewed in terms of this section" was that they were used to distinguish the process in section 86 from that in sections 83 and 85.[105] The court was unable to find anything in the structure of section 86 or of the NCA that was indicative of an intention on the part of the legislature to limit the right of a provider under section 86(10) to the process prior to the reference to the magistrate's court.[106] Consequently, the court was of the opinion that the provider's right to terminate a debt review under section 86(10) continued until the magistrate's court had made an order in terms of section 87.[107] The court referred to section 86(11) and the words "the Magistrates' Court hearing the matter" and interpreted it, based on similar terminology used in section 86(8)(b), to be a reference to the magistrate's court to which the matter has been referred for a hearing based on section 86(8)(b).[108] Section 86(11) was subsequently amended by section 26 of the 2014 Amendment Act by removing reference to "Magistrate's Court" and replacing it with "court" thus now confirming that the "court hearing the matter" in section 86(11) is the court in which the provider is seeking to enforce the agreement and not necessarily the court in which the debt review application is launched in that in terms of jurisdiction laws these may not be the same courts.

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The controversy continued with the South Gauteng High Court decision in *FirstRand Bank Ltd v Seyffert*.[109] Willis J indicated that to the extent that Kathree-Setiloane AJ over-emphasised the protection of the consumer as a purpose of the NCA in her conclusions in the cases of *Kruger*[110] and *Matlala*[111] she was clearly wrong.[112] In particular he disagreed with her that by reason of the provisions of section 129(2) of the NCA, a notice to terminate in terms of

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104 *FirstRand Bank Ltd v Evans* 2010 ZAECPEHC 55 (31 August 2010) paras 18, 19. Eksteen J relied on *National Credit Regulator v Nedbank Ltd* 2009 ZAGPPHC 100 (21 August 2009), 2009 6 SA 295 (GNP), 2009 4 All SA 505 (GNP) for the latter opinion.

105 *FirstRand Bank Ltd v Evans* para 20.

106 *Supra*.

107 *FirstRand Bank Ltd v Evans* para 20.

108 *FirstRand Bank Ltd v Evans* para 25.

109 *FirstRand Bank Ltd v Seyffert* 2010 ZAGPJHC 88 (11 October 2010), 2010 6 SA 429 (GSJ).

110 *Standard Bank of South Africa Ltd v Kruger* 2010 4 SA 635 (GSJ).

111 *SA Taxi Securitisation (Pty) Ltd v Matlala* 2010 ZAGPJHC (29 July 2010).

112 *FirstRand Bank Ltd v Seyffert* para 14. From the facts of the case it appears that the respondents, in opposition to an application for summary judgment, claimed that the relevant credit agreements were subject to debt review. It is not clear if the debt review had actually reached the stage of being referred to the magistrate's court for a debt restructuring order.

section 86(10) was incompetent once a debt counsellor has referred a debt review to a magistrate's court for determination.[113] That was so as section 129(2) merely absolved a provider from having to notify a consumer that he or she had a right to approach a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction where the consumer had already taken such steps.[114] According to Willis J a plain reading of section 86(10), especially when read together with section 86(11), made it clear that the giving of notice by the provider to a consumer to terminate a process of debt review did not necessarily terminate that process of debt review, but could have that consequence. The notice as indicated in the preceding paragraphs provide the debt counsellor and or consumer with an opportunity to have the debt review application lodged in time to prevent cancellation of the process just as the section 129 notice serves the purpose of providing the consumer with one last opportunity to exercise their options in resolving the default prior to enforcement proceeding by the provider. If this were not the purpose of the notices, which indeed aligns with the overall purpose of the NCA, then both notices would serve no real purpose and degenerate to mere procedural items with no substance.[115]

It was held in *Changing Tides 17 (Pty) Ltd v Erasmus*[116] that a debt counsellor was required to act with expedition in regard to applications to the magistrate's court.[117] A pending debt review has serious consequences in that amongst others it creates a *moratorium* on debt enforcement by the provider. However, a debt review in terms of section 86 does not end or lapse automatically on the non-occurrence of a specific event or the expiry of a specific time. Before a provider can enforce a credit agreement that is the subject of a pending debt review, the review must be terminated in accordance with section 86(10) and certain other requirements must be met, *inter alia*, that ten (10) business days should have lapsed since delivery of the notice to terminate.[118]

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Section 88(3)(b)(ii) is relevant for present purposes as it provides that a provider may not proceed to enforce a credit agreement, which is subject to the order, until the consumer defaults on any obligation under the order.[119] However, unlike the income restructuring debt

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113 *FirstRand Bank Ltd v Seyffert* para 14.
114 *Supra*.
115 *FirstRand Bank Ltd v Seyffert* para 13.
116 2009 ZAWCHC 175 (12 November 2009).
117 *Changing Tides 17 (Pty) Ltd v Erasmus* para 27.
118 Van Heerden and Coetzee 2011 *PER* 39
119 Roestoff 2016 *De Jure* 134.

relief mechanisms in most foreign jurisdictions,[120] which provide debtors with the opportunity to obtain a discharge of debt obligations after completion of a payment plan, the process of debt review does not provide for any such discharge, as the NCA's objective of providing debt relief is subject to the principle of satisfaction by the consumer of all responsible financial obligations.[121]

Section 88(3)(b)(ii) allows the provider to "enforce by litigation or other judicial process any right or security under that credit agreement" without requiring any further notice as soon as, amongst other things, "the consumer defaults on any obligation in terms of a re-arrangement ... ordered by a court."[122] The NCA does not provide for the setting aside or variation of rearrangement orders and enforcement is thus allowed without any notice and without having to apply for a variation or a setting aside of the order of the magistrate.[123] That the court's interpretation in *Jili v FirstRand Bank Ltd t/a Wesbank*[124] in this regard was correct also appears from section 129(2), which provides that the requirement to draw any default under a credit agreement to the notice of a consumer, in accordance with section 129(1) of the NCA, "does not apply to a credit agreement that is subject to a debt restructuring order." Moreover, as pointed out by the court in *Ferris,*[125] the wording of the debt restructuring order in that case indicated that the original loan would be enforceable without further notice if the debt restructuring order was breached although this wording was not necessary in light of sections 88(3)(b)(ii) and 129(2).[126]

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Section 88(3) provides that subject to section 86(9) and (10), a provider who receives notice of court proceedings contemplated in section 83[127] or 85,[128] or notice under section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process, any right or security under that credit agreement until:

(a) The consumer is in default under the credit agreement; and[129]

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120 Which belongs to company law, see Roestoff 2016 *De Jure* 141.
121 Section 3(g). See also section 3(h) and Roestoff 2016 *De Jure* 135.
122 Roestoff 2016 *De Jure* 141.
123 See *Jili v FirstRand Bank Ltd t/a Wesbank* 2014 ZASCA 183 (26 November 2014), 2015 3 SA 586 (SCA) para 12; *FirstRand Bank Ltd v Kona* 2015 ZASCA 11 (13 March 2015) and Roestoff 2016 *De Jure* 141.
124 2014 ZASCA 183 (26 November 2014).
125 *Ferris v FirstRand Bank Ltd* 2014 3 SA 39 (CC).
126 *Ferris v FirstRand Bank Ltd* para 15; Roestoff 2016 *De Jure* 141.
127 This refers to proceedings regarding reckless credit.
128 This refers to proceedings in which an allegation of reckless credit is raised.
129 As the subsections are joined by "and" subsections (a) and (b)(i) or (b)(ii) have to be read together.

(b) one of the following has occurred:

(i) an event contemplated in section 88(1)(a) to (c); or

(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and providers or ordered by a court or the Tribunal.

The events referred to in section 88(3)(b)(i) are listed in section 88(1)(a) to (c) to be:

(a) the debt counsellor rejects the application and the prescribed time for direct filing under section 86(9) has expired without the consumer having so applied;

(b) the court has determined that the consumer is not over-indebted or has rejected a debt counsellor's proposal or the consumer's application; or

(c) a court having made an order, or the consumer or providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

If one reads section 88(3) in context it becomes clear that the words "subject to section 86(10)" that appear at the beginning of section 88(3) apply only to the termination of a pending debt review and not to each of the instances mentioned in section 88(3). The reason for this statement is as follows: having regard to the situations mentioned in section 88(3)(a) and (b)(i) it is clear that in respect of a defaulting consumer whose application for debt review has been rejected by a debt counsellor and who has not approached a court timeously, there is no debt review to terminate, so it logically follows that section 86(10), is not applicable. Similarly, where the court has determined that the consumer is not over-indebted or has rejected the debt counsellor's proposal or the consumer's application, no debt review exists that can be terminated, and section 86(10) thus does not apply. Clearly, in the case where a consumer has fulfilled all of his or her obligations under a court-ordered debt re-arrangement or a re-arrangement agreement between a consumer and providers, there is no debt review in existence that has to be terminated in accordance with section 86(10).[130]

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With regard to section 88(3)(a), read together with section 88(3)(b)(ii), it is also clear that these provisions deal with a situation where a re-arrangement agreement between the consumer and the providers already exists or where a court has already made a debt re-

130 Van Heerden and Coetzee 2011 *PER* 49.

arrangement order, and there is thus no credit agreement that "is being reviewed" at this stage as the review would have occurred prior to the agreement or court order. Thus, if the consumer fails to pay in terms of such a re-arrangement agreement or court-ordered restructuring, section 86(10) also does not apply.[131]

In the case of *Nedbank Ltd v Mokhonoana*[132] Ellis AJ held that to "commence any legal proceedings to enforce the agreement" in section 129(1)(a) and to "approach a court for an order enforcing" in section 130(2) refer to the service of a summons and not the mere issuing thereof, as in the latter instance legal uncertainty would abound.[133] A provider will be informed that a debt counsellor has referred a matter to court for purposes of section 86. Once this has occurred "proceedings in a court that could result in such an order", as contemplated in section 129(2), have commenced and that section 86(10) no longer finds application as aligned with the 2014 amendment to section 86(10).[134]

7 5 SUMMARY

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It was inevitable that the impact of a section 129(1)(a) notice on debt review would be contentious. In some cases, the matter was left open, in others it was decided that a section 129(1)(a) notice barred an application for debt review and in yet others it was decided that it did not stay an application for debt review.[135]

The words "a particular credit agreement" in section 86(2) had a decisive impact on the reasoning of Malan JA in the Supreme Court of Appeal's decision in *Nedbank Ltd v National Credit Regulator*.[136] They inspired the conclusion that the "section thus contemplates a debt review under which a specific credit agreement may be excluded"[137] and "it does not exclude a debt review save in so far as it relates to the particular credit agreement under consideration"[138] and by delivering a section 129(1)(a) notice "a debt review relating to that

131 *Ibid*.
132 2010 5 SA 551 (GNP).
133 *Nedbank Ltd v Mokhonoana* para 14.
134 Van Heerden and Coetzee 2011 *PER* 54.
135 Otto "The National Credit Act: Default Notices and Debt Review; the *Ultra Duplum* Rule. *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581" 2012 *THRHR* 136.
136 2011 3 SA 581 (SCA); Otto 2012 *THRHR* 137.
137 *Nedbank Ltd v National Credit Regulator* para 11.
138 *Nedbank Ltd v National Credit Regulator* para 14.

specific agreement is thereafter excluded."[139] The impact of this decision was that an application for debt review by a consumer was barred by the very sending of a notice in terms of section 129(1)(a). This is in line with the view originally propagated by Otto[140] but subsequently abandoned and changed. The Supreme Court of Appeal emphasised that it is only the particular credit agreement to which the section 129(1)(a) notice pertains that is excluded from the debt review process.[141]

This decision was changed by the legislature through the 2014 amendment to section 86(2) which now indicates that only credit agreements wherein a provider has taken steps to "enforce" the credit agreement will be excluded from a debt review application. It was held in *De Beer v Nedbank Limited*[142] that "enforcement" in this context would mean the service of summons on the consumer as opposed to mere issuing of the summons, in order that the consumer may be aware of the action against him or her. This amendment therefore appears to be in favour of the consumer's rights to debt review in that it provides consumers with a greater length of time in which to apply for debt review (any time prior to service of summons as opposed to mere receipt of the section 129 notice). Only once summons has been served will the consumer no longer be in a position to have that credit agreement included in a debt review order. This interpretation is supportive of the purpose of the NCA in providing information to consumers to allow them an opportunity to exercise their options. Section 129 notice would have served no purpose if upon the mere receipt of same the consumer could then not exercise their options outlined to them in the notice. This would be completely nonsensical.

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The 2014 amendment to section 86(10) by insertion of section 86(10)(b) is the legislature's answer to the dispute as to the point in the debt review process a provider would be barred from terminating a debt review application. Section 86(10)(b) basically indicates that once a debt review application is before court a provider may not terminate the proceedings. This is once again an amendment in favour of the consumer, as he or she is now in a position to frustrate the provider's enforcement rights by expediting the debt review application to court and then delaying the granting of a debt review order as a provider is left powerless to expedite

139 Otto 2012 *THRHR* 137; *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 para 14.
140 Otto (2006) 85.
141 Otto 2012 *THRHR* 137.
142 2018 ZAGPPHC 367 (16 May 2018).

the granting of a debt restructuring order once it is "before court" and before a consumer is in default of the order.

Debt review has served a purpose for many consumers although there are many more who have not obtained relief from debt review. It is hoped that this *lacuna* will be filled by the debt intervention mechanism provided in the 2019 amendment once this becomes effected. The effect, however, on providers will need to be monitored for the same reasons mentioned in the paragraph below.

It has become blatantly clear that the placement and utilisation of every single word in legislation is imperative for the correct application and interpretation. Ambivalent phrases or nonsensical sections has been the cause of much of the litigation referred to in this work and necessitated the two amendments referred to. When the ambivalence or conflict in interpretation arises it is imperative that the parties refer to the ultimate purpose of the legislation – as outlined in Chapter two to achieve the correct interpretation. In the majority of instances where this has been done the interpretation that has been extended or resulted has achieved greater or prolonged protection for the consumer. The NCA is ultimately consumer protection legislation after all, but it cannot and should not be to the detriment of providers as that would ultimately affect all consumers and / or future potential consumers, the credit market and in turn the economy. If the cost of credit exceeds the benefit to providers the offering of credit would reduce thus causing the potential of a monopoly and more restrictive or severe terms for consumers. This would result in a contracting market.

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Chapter 8

Recommendations and Conclusion

8 1 INTRODUCTION AND RECAPITULATION

The composition of users of credit in South Africa and the historical overview on the need for protection of consumers from abuse and misconduct and the development of consumer protection sets the scene and identifies the need for this study[1] The NCA clearly articulates that it encompasses the purposes of consensual resolution and satisfaction of obligations. Section 3(d) of the NCA highlights the need for correcting the imbalance in negotiating power between the parties to a credit agreement and section 3(i) seeks to promote equity in the credit market by balancing the rights and responsibilities of both parties. These sections underpin the purposive interpretive approach adopted throughout this study to the interpretation of section 129 and its application.

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The balancing of the rights of two key role players in the credit industry, namely the provider and consumer, whose interests when there is a default are contradictory and irreconcilable has been at the forefront of the consumer credit industry since the inception of the concept of credit into the South African economy.[2] The balancing of the respective rights and interests of the parties was necessitated by the reality of the often unequal bargaining power between the parties.[3]

This study has shown that section 129 of the NCA encapsulates disclosure, pre-enforcement procedures and reinstatement mechanisms, is imperative to the health of the credit industry and is therefore also the section of the NCA where most tension between consumer

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1 Kelly-Louw and Stoop "Prescription of Debt in the Consumer-Credit Industry" 2019 *PER* 1. The *rationale* motivating change in consumer policies and legislation was fostered on experiences. Some of the main reasons 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 uniformed consumers in relation to the provider who has the robust power to manipulate and entice. Refer to section 2.3 for a discussion on who are the users of credit – really being identified as normally the vulnerable in society.

2 Chapter 2 of this study demonstrated the development of consumer protection legislation upon a trajectory that was pro-consumer from first generation to current legislation. See also Schraten "The Transformation of the South African Credit Market" 2014 *Transformation Journal* 2.

3 It bears reiterating that the NCA since November 2016 is applicable to a wider range of providers and thus to more credit agreements. One would presume this was implemented to provide greater protection to a wider range of consumers.

and provider rights and responsibilities is evident. The section is imperative to ensuring the protection of the rights of both parties. Protecting the rights of both parties, as this study has shown, requires a careful balancing of such rights in order that neither party is favoured over the other as both would have negative consequences for the credit industry and in turn the economy.

This study has demonstrated through the plethora of case law that it is indeed challenging to provide an interpretation and or application of section 129 of the NCA that does not favour one or the other role player. The result is either a pro-consumer or a pro-provider approach as identified and labelled in this study. This may be acceptable if the overall application of the NCA is balanced – this would allow for certain sections to favour one party over another in specific circumstances provided the overall balance of power and rights is maintained. It is evident for example that at the inception of a credit agreement that the provider is the party who is favoured not only in terms of rights but also the power dynamic. It would then stand to reason that at the termination of the contract the consumer should be protected but having said that – protection at the termination would be irrelevant if the consumer is not protected at the inception of the contract in terms of the clauses included in the contract that dictate the relationship. Therefore, it should be accepted and as highlighted throughout this study that the main purpose of the NCA is consumer protection and the primary purpose of the NCA must be given effect to.[4] However, consumer legislation should not only benefit consumers, but should also protect the rights of providers.[5] It has been held that the interpretation of the NCA "calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider."[6]

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4 The purpose of consumer credit law in general, according to the Crowther Report (Report of the Committee Consumer Credit, chaired by Lord Crowther (Smit) vol 1 Cmnd 4596 (1971) 234-235) is first to address consumers unequal bargaining power by requiring disclosure of essential information in contracts and advertisements, by including automatic contractual rights and limitations of liability that cannot be excluded, and by restricting contractual provisions that are unilateral and to the detriment of the consumer. Secondly, its purpose is to curb malpractices in the commercial world by identifying such malpractices and prohibiting them by imposing civil or criminal sanctions. Thirdly, the provider's remedies are limited by restricting and prohibiting certain extra-judicial remedies, such as the enforcement of the right to repossess goods or by providing a court with the discretion to order payment by instalments. See in this regard section 3 of the NCA and Chapter 2 of this study.

5 South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 57-59.

6 *Nedbank v National Credit Regulator* 2011 3 SA 581 (SCA) at para 3.

The poor drafting of the NCA and in particular section 129 has been lamented.[7] The legislature should always keep legislation simple, well defined, and to the point and should as far as possible avoid unnecessary and redundant words. The NCA has become legendary for its "numerous drafting errors, untidy expressions, …inconsistencies."[8] Section 129 would not have required such rigorous interpretation by the judiciary and numerous amendments by the legislature had it been clearly drafted from the outset. The problem however arose due to the vagueness and ambiguity of the section as a result of poor drafting which left the courts to interpret the section and attempt to provide the balance required between the provider and consumer rights and responsibilities in their tenuous relationship. These interpretations further led to amendments to the NCA by the legislature in an attempt to cure the vagueness of the section.

The purpose of this study was to analyse critically section 129 of the NCA and determine in each area if the rights of both the consumer and provider have been equally protected and aligned with the overall aim of the NCA. This study first determined whether compliance with section 129(1)(a) is a prerequisite for debt enforcement and the implications of non-compliance therewith prior to debt enforcement (due to the choice of the word "may" in section 129); the procedural difficulties pertaining to debt enforcement were highlighted by the definition of "delivered" in section 129 and the consequent case law (the burden of proof of whether the section 129 notice has been "delivered" to the consumer); the meaning of the phrase "enforce" in terms of sections 129 and 130 of the NCA; the impact of the National Credit Amendment Act of 2014 and 2019[9] on section 129, specifically in relation to the required method of delivery of the section 129 notice and the possibility of reinstating an agreement were discussed.

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The specific objectives of this study were to first, investigate the aim and purpose of section 129 of the NCA. Second, identify the debt enforcement procedure under the NCA, in particular the meaning of the phrase "enforce" in terms of sections 129 and 130. Third, determine if compliance with section 129(1)(a) is a prerequisite for debt enforcement and the consequent implications of non-compliance. Fourth, identify and analyse the procedural flaws

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7 *Sebola v Standard Bank of South Africa Ltd* 2012 8 BCLR 785 (CC), 2012 5 SA 142 (CC) para 66.

8 *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 SCA para 2; Kelly-Louw "The Overcomplicated Interpretation of the Word 'May' in sections 129 and 123 of the National Credit Act" 2015 *SALJ* 246.

9 Act 19 of 2014 and Act 7 of 2019.

pertaining to debt enforcement in section 129 of the NCA, in particular, the method and requirements of section 65 and delivery of the notice.[10] Fifth, identify and analyse the options available and consequences to a consumer in receipt of a section 129 notice with particular focus on the issue of reinstatement. Sixth, evaluate the impact of the Prescription Act,[11] National Credit Amendment Act of 2014 and 2019 on section 129. Lastly, present a summary of findings and recommendations on the way forward.

This Chapter provides conclusions reached in the study based on the aims and objectives and seeks to answer the pertinent questions: "Has the legislature adequately encapsulated the correct amendments required to the NCA in the National Credit Amendment Act of 2014 and 2019 to properly bring about the interpretation in application of the NCA as raised by our judiciary?" and "Is the current interpretation an equitable balance of protection of the rights of both the consumer and provider?" Recommendations regarding the future interpretation of section 129 are made in order to provide legal certainty and out of economic necessity. The conclusion will reveal whether room exists for improvements to the NCA and interpretation thereof.

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8 2 ISSUES AND THE DEBATE

8 2 1 General

This study has shown that it is only a section 129(1)(a) notice that is the default notice now required to be issued by a provider when a consumer is in breach of a credit agreement and to enforce the agreement through the litigation process, whether by way of cancellation or otherwise. This is the pre-enforcement procedure. 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 reverting to a debt collection action.[12] One of the most apt descriptions of

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10 This was achieved by analysing applicable case law. For instance, *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA); *Sebola v Standard Bank of South Africa Ltd* 2012 8 BCLR 785 (CC), 2012 5 SA 142 (CC); *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC); *ABSA Bank Ltd v Mkhize* 2012 5 SA 574 (KZD); *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC); *Absa Bank Limited v Mokebe* 2018 ZAGPJHC 485 (12 September 2018); 2018 6 SA 492 (GJ).

11 Act 68 of 1969.

12 It is not section 129 alone but the NCA as a whole which demonstrates the legislature's inclination to avoid litigation by providing the consumer with opportunities to resolve the problem and meet his obligations prior to the issuing of summons as the ultimate aim of the NCA is fulfilment of obligation. Chapter 3 of this study provides the history of pre-enforcement procedures from the common law to the NCA.

the purpose of section 129(1)(*a*) is found in *BMW Financial Services (SA)(Pty) Ltd v Donkin*,[13] where the court held:

> "That notice invites the debtor to refer the credit agreement (not the debt) to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction. The purpose of such reference is either to resolve a dispute that may exist in relation to that agreement or to reach agreement on a plan that will enable the debtor to bring his or her payments under the agreement up to date. In other words, what is contemplated is a consensual process mediated by the person to whom the credit agreement has been referred. This is a process entirely distinct from the general debt review under section 86, which depends upon the debtor being over-indebted."[14]

The courts have therefore spent considerable time attempting to interpret section 129 correctly. The controversial aspects of section 129 have been the word "may" in ascertaining whether it is compulsory to send a section 129 notice prior to debt enforcement, "deliver" in determining what manner the default notice must be delivered to a consumer, whether this notice actually must come to the (physical) attention of the consumer and when "reinstatement" of a credit agreement in default is permissible.[15] The different interpretations by the courts have either resulted in a pro-consumer or pro-provider approach. Very seldom has there been an approach that provides a balancing of rights and responsibilities between these role players. What this study has shown however is that it is clear that a consumer must be informed in accordance with section 129 in order for the purpose of the section and the NCA to be fulfilled.

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In attempting to interpret section 129 the courts often turned to the common law, previous legislation and the court's interpretation of the equivalent sections therein. Under the common law there are remedies available for breach of contract and as demonstrated in Chapter three of this study, to make use of these remedies it was required that the provider first proceed with notification to the consumer either in terms of the contract, legislation or common law in order to show that the consumer had been placed in *mora*. The notification in accordance with the common law had to be written but there was no set time frame that had to be provided to the consumer to remedy their default save that the time frame had to be fair and reasonable.[16]

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13 2009 6 SA 63 (KZD).

14 *BMW Financial Services (SA) (Pty) Ltd v Donkin* para 10.

15 Kelly-Louw 2015 *SALJ* 246 – 247.

16 Parties were free to contract and provide set time frames and manner of delivery of the breach letters. One of the additional common law remedies of acceleration was discussed in the case of *Nkata v FirstRand Bank Ltd* 2016 4 SA 25 (CC) which has been hailed as a milestone achievement for consumers who have fallen into arrears under a credit agreement governed by the NCA. The judgment overrides any acceleration clause which would otherwise be triggered by the consumer's default under an agreement. It means that although a consumer could have defaulted on payments under a credit agreement the provider could not invoke an acceleration clause for payment of the full outstanding amount where the consumer has paid the arrear amounts, the permitted costs and charges contemplated in section 129(3) of the NCA. The Constitutional

8 2 2 May

The meaning of "may" became an issue of legal certainty in that this study has indicated that although the ordinary grammatical meaning of section 129(1)(a) of the NCA indicates through the word "may" that the provider has a discretion as to whether or not he draws the consumer's default to the notice of the consumer in writing this is in fact not the case. It becomes apparent according to section 129(1)(b) of the NCA that a provider may not proceed against a consumer without having provided such notice.[17] The court in *Nedbank v National Credit Regulator*[18] also pointed out that the section 129 notice was a mandatory requirement if one had regard to the whole section even though the word "may" was used.

Therefore, although vague, the notice is only compulsory in the event of the provider intending to proceed for enforcement against the consumer. At present it is a discretionary notice that the provider does not need to send if the consumer is in arrears or default of the agreement, but the provider does not intend to proceed against the consumer for enforcement. This, it is assumed, would be in very limited circumstances. This interpretation is supported by Van Heerden and Boraine.[19]

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In the National Credit Amendment Act of 2014 and 2019 the word "may" is not replaced.[20] The basic rule of the law of interpretation is that the words in a statute should be

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Court held that to decide otherwise would defeat the purpose of section 129(3), which was meant to operate as a rescue mechanism that was available to the consumer when he or she has fallen into arrears and could be liable for the full accelerated outstanding debt (Louw "Banks beware: Reinstatement of mortgage loan agreements" http://www.derebus.org.za/banks-beware-reinstatement-mortgage-loan-agreements (accessed 17-08-2019). *Standard Bank of South Africa Limited v Hendricks* 2018 ZAWCHC 175 (14 December 2018), 2019 1 All SA 839 (WCC), 2019 2 SA 620 (WCC). The effect of this decision is that an acceleration clause is rendered inoperative and unenforceable when reinstatement is lawfully triggered. A provider's efforts to retrieve the full accelerated debt owing under the credit agreement, such as by way of a sale in execution of the underlying property, would be frustrated where reinstatement is triggered by the consumer prior to cancellation of the credit agreement. Provided there has been compliance with section 129(3), the consumer is not required to give notice to the provider of his or her intention to reinstate the credit agreement. Payment in a manner that complies with section 129(3) would be sufficient to trigger automatic reinstatement. See also Steyn and Sharrock "Remedying mortgage default: Nkata v FirstRand Bank Ltd" 2017 *SALJ* 498.

17 The provider's cause of action is not even complete without a section 129(1)(a) notice as held in *African Bank Ltd v Additional Magistrate Myambo* 2010 6 SA 298 (GNP) and as confirmed in *FirstRand Bank Ltd t/a First National Bank v Moonsamy t/a Synka.Liquors* 2020 ZAGPJHC 105 (15 April 2020).

18 2011 3 SA 131 (SCA); *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP).

19 Van Heerden and Boraine The Conundrum of the Non-compulsory Compulsory Notice in terms of section 129(1) (a) of the National Credit Act" 2011 *SAMLJ* 45.

20 Section 32 of the National Credit Amendment Act 19 of 2014.

given their literal or ordinary meaning.[21] This rule is not absolute and may be deviated from where a strict adherence to the literal or ordinary meaning of the words would defeat the intention of the legislature. If a strict adherence to the words of the statute lead to "an injustice or absurdity, the court is at liberty to deviate from the plain meaning of the statute's words."[22] If more than one meaning is possible the legislature must be held to have intended the meaning that will avoid harshness and injustice.[23]

This study has shown that the general consensus is that it is compulsory for a provider to begin by sending the section 129(1)(a) notice to a consumer if he or she wishes to *enforce* his or her credit agreement.[24] Where a court finds that a provider has failed to send this notice, such failure will not automatically invalidate the summons or application, because the court has a discretion in terms of section 130(4)(b) to adjourn the matter *sine die* and make an order setting out the steps that the provider must take before the matter may be heard.[25] In the case of *FirstRand Bank Ltd t/a First National Bank v Moonsamy t/a Synka Liquors*[26] De Villers AJ stated "Had I been the author of the section 130, I would have added a provision that would have empowered a credit grantor to fix an error in complying with section 129 without prior intervention by a court, and to seek condonation when the matter gets to court." Section 130 is mentioned here as a reminder that errors should be remedied without and prior to court intervention to limit costs and postponements.

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8 2 3 Enforce

Section 129 provides that subject to section 130(2) a provider may not commence any legal proceedings to "enforce" a credit agreement before first providing a notice in accordance with

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21 Botha *Statutory Interpretation: An Introduction for Students* (2012) 97.

22 Burger *A Guide to Legislative Drafting in South Africa* (2002) 37; Kelly-Louw 2015 *SALJ* 255; *Kubyana v Standard Bank* 2014 3 SA 56 (CC) para 18.

23 Burger (2002) 33 – 34; Kelly-Louw 2015 *SALJ* 255 - 256.

24 Kelly-Louw 2015 *SALJ* 249. *Greve v Bergkriek Properties CC* (GSJ) unreported Case No A3063/2010 of 16 September 2011; *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD).

25 *Greve v Bergkriek Properties CC* (GSJ) unreported Case No A3063/2010 of the South Gauteng High Court, Johannesburg dated 16 September 2011. Kelly-Louw 2015 *SALJ* 249. In the case of *Investec Bank Ltd t/a Investec Private Bank v Ramurunzi* 2014 4 SA 394 (SCA), 2014 3 All SA 34 (SCA) it was confirmed that non-compliance with section 129(1)(a) by the provider does not invalidate a summons but has a dilatory effect on the proceedings in that the court is obliged to postpone the hearing in accordance with section 130(4)(b) of the NCA for compliance to occur. Furthermore, the court held in this case that a summons issued and served on the defendant prior to the delivery of a valid section 129 notice as prescribed by the NCA interrupted prescription.

26 2020 ZAGPJHC 105 (15 April 2020)] para 13.

section 129(1)(a) or in terms of section 86(10) to the consumer and meeting any further requirements as set out in section 130.

Otto states that the word "enforce" is not defined but it is clear that a provider cannot enforce an agreement, including cancellation, unless the pre-enforcement requirements have been fulfilled.[27] Van Heerden and Otto[28] and Boraine and Renke[29] prefer the interpretation that "enforce" means all the remedies available to the provider including all contractual remedies which would result in a broader interpretation. Restricting the interpretation of the word "enforce" would go against the purpose and purport of the NCA to protect the consumer and thus as confirmed in the case of *Absa Bank v De Villiers*[30] a broad meaning should be provided to "enforce" to protect consumers.[31] The effect of the decision in the *De Villiers* case and the viewpoint held by Otto is that a provider is not entitled to terminate or cancel a credit agreement due to the breach of the consumer unless he has given the consumer a section 129 notice. This was accepted in that to hold otherwise would be contrary to the purpose of the NCA.[32] Chapter four demonstrated that a provider is normally entitled to terminate the agreement without the intervention of the court based on general contractual principles as supported in *Pillay.*[33]

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Eiselen on the other hand disagrees with the interpretation adopted and finds that "enforce" should not include when a provider cancels an agreement and accordingly contends that a section 129 notice should not be required in those circumstances.[34]

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27 Van Heerden and Otto "Debt Enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655; *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) page 141.

28 Van Heerden and Otto 2007 *TSAR* 655.

29 Boraine and Renke "Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 - Part 1 2008 *De Jure* 41 and Boraine and Renke "Some practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 - Part 2" 2008 *De Jure* 9.

30 2009 5 SA 40 (C).

31 *Absa Bank Ltd v De Villiers* para 14.

32 *Absa Bank Ltd v De Villiers* paras 11 – 14; Eiselen "National Credit Act 34 of 2005: The confusion continues" 2012 *THRHR* 395.

33 *FirstRand Bank Ltd t/a Wesbank v Pillay* Case No 11978/2010 of the KwaZulu-Natal Local Division, Durban dated 8 December 2011.

34 This interpretation is based on what Eiselen indicates is Otto's neglect of Malan JA's important words "enforcement of those remedies by *judicial means*" in *Nedbank v Juselius and the National Credit Regulator* 2011 ZASCA 35 (dated 28 March 2011) para 12. Eiselen also refers to the presumption in the interpretation of statutes that a statute does not alter the common law more than necessary unless it appears clearly from the intention of the legislature.

Debt enforcement for purposes of the NCA does not only mean claims for specific performance but the enforcement of any of the provider's remedies, including cancellation of the credit agreement and a claim for damages, if any were suffered. This interpretation is endorsed as any other interpretation would have meant that a section 129 notice is only required in the case of a claim for specific performance and not for the remedies such as cancellation. This would have deprived the consumer of important protection.

8 2 4 Deliver

There is divergence of opinion in respect of the delivery obligation of the section 129 notice required of the provider and this study demonstrated that two schools of thought come to the fore. One school, labelled the pro-provider school of thought, holds that the provider merely is required to adhere to the mechanical steps required in the NCA or as enunciated by the court to meet the requirements of the section.[35] The second school, labelled the pro-consumer school of thought, holds that the provider is required to ensure that the section 129 notice comes to the actual knowledge of the consumer.[36]

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For some time there has been uncertainty regarding the manner in which default notices should be sent to the consumer and whether they should come to the actual attention of the consumer. This uncertainty was perpetuated by the legislature through various statutes and likewise by the judiciary through the interpretation of the applicable sections in the statutes and became the main issue of this study. Otto argues that since other legislation is comparable with the NCA, court decisions of the past dealing with similar issues could play a persuasive role and therefore should be considered as was the case in Chapter three.[37]

This study indicates that there needs to be clarity as to the level of delivery of the default notice in order to provide certainty and uniformity of application. Protection of the consumer must be tempered with the burden to the provider and balanced with fairness and reasonableness in a purposive approach.[38]

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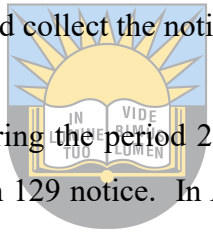
35 *Rossouw v FirstRand Bank Ltd* 2010 10 439 (SCA).

36 *Absa v Mkhize* 2012 5 SA 574 (KZD).

37 Otto "Notices in terms of the National Credit Act: Wholesale National Confusion. *Absa Bank Ltd v Prochaska t/a Bianca Interiors; Starita v Absa Bank Ltd; FirstRand Bank v Dhlamini*" 2010 *SAMLJ* 599.

38 Interpretation of the NCA therefore calls for a well-balanced approach, as was pointed out in *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D) 322B-C. The approach in this case is preferred to the one in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) paras 54 and 56. For criticism see

Chapter four and five of this study discussed the cases and the debate in the High Court, Supreme Court of Appeal and the Constitutional Court which revolved around the manner in which the section 129 notice had to be brought to the attention of the consumer. The courts differed on whether the risk of non-receipt of the section 129 notice rested with the consumer (pro-provider approach) or provider (pro-consumer approach). The issue seemed to reach finality in 2012 when the Constitutional Court handed down a ruling in the *Sebola*[39] matter that had far-reaching implications for consumers and providers in that the court decided that section 129 notices should be sent by registered mail to the consumer.[40] Effectively, the *Sebola* case held that dispatch of the notice by registered post was not enough as more was required. It concluded that proof by means of the post office "track and trace" report that the registered post reached the correct post office would constitute proper delivery of the notice to the consumer as contemplated by section 129.[41] This definition of proper delivery still seems superfluous in that delivery to the correct post office does not mean that the consumer received notification to collect the notice or that they in fact did collect the notice.



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However, after *Sebola* and during the period 2012 to 2014 there remained confusion around the requirements of the section 129 notice. In *Binneman*,[42] a decision of the Western Cape Division, delivery of a section 129 notice was interpreted to mean that it was sufficient that the provider dispatched the notice by registered mail to the consumer. Further, the court held that *Sebola* did not change the legal position of *Rossouw*[43] wherein it was held that delivery would be satisfied if the provider dispatched the notice by registered mail to the consumer.[44] An argument raised by the banks and accepted by Wallis J and even the Supreme Court of

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Otto 2010 *THRHR* 142 and *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) para 17. In *FirstRand Bank Ltd v Seyffert* 2010 6 SA 429 (GSJ) 434 Willis J also called for a more balanced approach which will take into account the interests of all role-players in the credit industry as did Levenberg AJ in *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 1 SA 310 (GSJ) para 32 *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Ealeen CC* 2011 2 SA 266 (SCA) 268 and likewise the Constitutional Court in *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).

39 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC), 2012 8 BCLR 785 (CC).

40 That would be so unless the parties have specifically chosen another form of delivery. *Sebola v Standard Bank of South Africa Ltd* para 68 – 69 and 75 -76.

41 When giving the judgment on the matter Justice Cameron held that the purpose of the section 129 notice was to "give consumers a last chance before court enforcement procedures drop the guillotine on them" - *Sebola v Standard Bank of South Africa Ltd* para 83.

42 *Nedbank Limited v Binneman* 2012 5 SA 569 (WCC).

43 *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA).

44 *Nedbank Limited v Binneman* 2012 5 SA 569 (WCC) para 6; Mohau "The New approach to Section 129 of the National Credit Act" 2014 (June) *De Rebus* 38.

Appeal in *Rossouw* was that it would be virtually impossible for providers to prove that the notice has actually come to the attention of the consumer.

The steps the provider must take in order to effect delivery are those that would bring the section 129 notice to the attention of a "reasonable consumer". Thus, "delivery" must be interpreted to mean that the reasonable consumer would receive the section 129 notice.[45] It was sufficient that the section 129 notice was sent to the consumer and notification dispatched, satisfying the requirement that delivery had been effected. It was then up to the consumer to elect whether he or she collected the notice or not. The provider would have performed his part according to section 129 read with section 130 of the NCA and could commence legal proceedings.[46] Otto and Otto, supported by Van Heerden and Coetzee,[47] argue that the additional compliance requirements set out in *Sebola* and now encapsulated in the 2014 amendments complicate the interpretation of the NCA and provide an unbalanced approach in that they add complications for the provider.[48]

Different interpretations of *Sebola* seem to arise in those cases where the requirements of *Sebola* are met[49] but, for whatever reason, the notification to the consumer by the post office to collect the registered item did not come to the notice of the consumer, resulting in the notice being returned to the provider by the post office without actual receipt by the consumer.

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The introduction of sections 129(5), (6) and (7) by the National Credit Amendment Act of 2014 seems to attempt to balance the rights and responsibilities of consumers and providers. Some clarity has been provided in regard to the delivery and receipt of section 129(1)(a) notices, which benefits both parties in that consumers can ensure that the address they elect for service in terms of section 129(6) of the NCA is one where they can receive the notice and the provider is now certain to an extent on how delivery should be effected. These amendments

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45 *Kubyana v Standard Bank* 2014 3 SA 56 (CC) para 33.

46 *Kubyana v Standard Bank* 2014 3 SA 56 (CC) para 31.

47 Van Heerden and Coetzee "Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: verwarrende verwarring oor voldoening" 2012 *Litnet (Akademies) Regte* 286. Kelly-Louw support's Otto's pro-provider approach and refers to the approaches of the courts in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) and *FirstRand Bank Ltd v Dhlamini* 2010 4 SA 531 (GNP), being the pro-consumer approaches, as being stringent and rigid. Kelly-Louw argues further that the approach of the court in *Munien v BMW Financial Services (Pty) Ltd* 2010 1 SA 549 (KZD) and *Starita v Absa Bank Ltd* 2010 3 SA 443 (GSJ) is more sensible and balanced.

48 Otto and Otto *The National Credit Act Explained* (4 ed)(2017) 117 – 118.

49 Namely, dispatch by registered post coupled with proof that the registered item was delivered to the correct post office.

can be said to give effect to the aim of establishing a balance in the credit market as provided for in section 3(d) of the NCA although with a still apparent bias against the provider who carries the onus of proof but a slight shift in risk passing to the consumer if the provider has followed the method of delivery selected by the consumer and utilized the address provided by the consumer.

It was, however, hoped that there would not be a *Sebola* situation again because if regard is had to the amendments, namely delivery by registered mail and proof that the registered mail has reached the correct post office, it becomes apparent that consumers may still allege non-receipt of the section 129 notice. However, the legislature makes it clear in sub-section (7) that "proof of delivery" is satisfied by written confirmation received from the postal service (or its authorized agent) or through the signature or identifying mark of the credit receiver in the case where the notice was hand delivered. The question remains whether this proof would be sufficient if the notice remains uncollected. *Kubyana*[50] which was heard before the 2014 Amendment Act held that where the provider had complied with all the requirements for delivery there was nothing further that could be required, and the defaulting consumer would bear the onus of proving that the notice had not come to his attention.

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On a literal interpretation the plain ordinary grammatical meaning of the words contained in the subsection must be given effect. Once the court is satisfied that the notice has been sent to the correct post office, the requirement of the section 129 notice would have been satisfied. There is no room in these circumstances for the consumer to satisfy the court that in fact she did not receive the notice even if she was a "reasonable consumer."[51]

The concept of a "reasonable consumer" is a viable option. The law should not, however, seek to protect perpetual defaulters who actively evade receipt of notices and legal documents. The courts should seek to protect those consumers who genuinely have not received section 129 notices through no fault of their own.[52] This would amount to a pro-consumer approach as it places a heavier burden on the provider.

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50 *Kubyana v Standard Bank* 2014 3 SA 56 (CC).

51 *Kubyana v Standard Bank* 2014 3 SA 56 (CC) para 37.

52 This protection could be extended to those consumers who have not notified the banks of the change of their *domicilium* address but such change of address is known to the banks through their own investigations or when the 'new address' is easily obtainable.

In 2021 in the matter of *Wesbank (a division of Firstrand Bank Ltd) v Ralushe*[53] under the amended section 129 the court had to indeed consider the *Sebola* situation. The provider dispatched the notice, provided proof as required and the consumer alleged non receipt. The court confirmed that the provider had fulfilled his duty and thus the onus shifted to the consumer to prove on a balance of probabilities of failure of the "written confirmation". The court held that once the provider proved delivery to the correct post office, delivery is presumed. The consumer could not rebut the presumption. Thus showing a greater burden on the consumer to rebut the delivery of notice. It is hoped that the courts in interpreting the subsection do not conclude that it precludes the consumer from establishing that, in fact, through no fault of his or her own, he or she did not receive the section 129 notice. On a purposive interpretation an argument can be made that the legislature could not have intended such a result as it would lead to an absurdity in that the purpose of section 129 would not be achieved. In addition, and utilizing the purposive interpretation, section 130(3) provides that a court may only determine a matter if it satisfied that the provision of section 129 have been complied with. Therefore, it is arguable that a court would only be satisfied that the provisions of section 129 have been complied with if the probabilities favour the conclusion that the notice was, in fact, brought to the attention of the consumer.

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One of the arguments of the banks opposing the notion that the notice must actually come to the attention of the consumer is that this would place too onerous an obligation on them.[54] This argument however pales in comparison to the importance and purpose of the notice. According to the information detailed in the case of *Mkhize*[55] regarding consumers not collecting registered letters, it is in fact not true that the notices do in fact come to the attention of the consumer. If the notice does not come to the attention of the consumer then its purpose is in fact defeated. Therefore, alternative forms of delivery of the notice should be considered such as ordinary mail,[56] electronic mail or even service by the sheriff.[57]

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53 2021 ZAECGHC 78 (31 August 2021).

54 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) para 20 – 21.

55 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) para 38 – 41 and 50 consumers attempt to utilize the ostrich or head in the sand approach in avoiding the reality of the default and attempting to run or hide from the repayment obligations. In para 15 the court indicated that the number of track and trace reports showing that the notice had been returned to sender, attached to applications for default judgment, showed that "more often than not" the consumer did not collect the section 129(1) notice - *Absa Bank Ltd v Petersen* 2013 1 SA 481 (WCC).

56 *Absa Bank Ltd v Mkhize* para 66 -76.

57 Although service by the sheriff would cause an onerous burden on the sheriffs who may be unable to meet the demand given the large number of notices dispatched monthly (*Mercedes Benz Financial Services v*

When one considers section 26 of the Constitution and the possibility of a consumer losing his or her immovable property then an argument could be made that the section 129 notice should be served personally (or at least other more effective methods should be utilized) on the consumer as it may impact on his or her right to housing. When a consumer's primary residence is at stake a section 129 notice should be notifying the consumer that, should action be instituted and judgment obtained against him or her, execution against the residence would ordinarily follow and usually lead to eviction.[58] The impact of section 129 on the consumer's right to housing is tangible.

The question is whether the 2014 amendments provide protection to consumer when the NCA promotes a non-litigious resolution of issues which would require the consumer to be aware of the default and his or her attention being drawn to the rights and the way they can be protected. This aim is underpinned by the constitutional right to access to information. It is submitted that the delivery methods of hand delivery and registered mail are not only archaic and costly but in the case of registered mail are also largely ineffective.[59] The Electronic Communications and Transactions Act[60] has not been appropriately leveraged and utilized in the consideration of delivery methods in the NCA. Technology is developing and the usage of same in society has escalated. This trend has become apparent in the amendment of the Uniform Rules of Court allowing for electronic services and the increase in substituted service applications requesting service to occur using a form of technology.[61] This jurisprudence and precedents occurring make electronic services of notices to consumers in terms of section 129 possible by way of substituted service. Being that there is an uptake and need for substituted service of a notice that is not instituting proceedings one would think that an amendment to the section permitting this form of service without an application would be pre empted.

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Power Ahead CC (unreported case number 12444/11) of KwaZulu-Natal Local Division, Durban heard on the 16th of February 2015).

58 *FirstRand Bank Ltd v Folscher* 2011 4 SA 314 (GNP). Kelly-Louw agrees with the court in *FirstRand Bank Ltd v Maleke* 2010 1 SA 143 (GSJ) that the section 129(1)(a) notice itself, if applicable, should also inform the consumer of his or her right of access to adequate housing set out in section 26 of the Constitution and contain an explicit warning to the consumer that he or she may end up losing the home by way of an execution sale if the provider is successful with his legal action (Kelly- Louw 2015 *SALJ* 200). See Fuchs "The Impact of the National Credit Act 34 of 2005 on the Enforcement of a Mortgage Bond: *Sebola v Standard Bank South Africa* 2012 5 SA 142 (CC)" 2013 *PELJ* 377.

59 Bentley "NCA s129(1)(a) notice – a practical perspective on the interpretative challenge" 2019 (April) *De Rebus* 7. Section 32(1)(b) of the Constitution.

60 Act 25 of 2002.

61 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD); *Commissioner for the South African Revenue Service v Louis Pasteur Investments (Pty) Ltd* 2021 ZAGPPHC 89.

As technology continues to evolve, we may see in future the increase in service by electronic mail and other electronic media such as Facebook or WhatsApp. The decision on which medium to utilize should be based on the probability or likeliness of the consumer receiving the document or notice.

8 2 5 Debt review

Chapter seven of this study demonstrated the intersection between the consumer's right to debt review and the provider's right to enforcement. It was argued for some time that once a consumer had received a section 129 notice he or she should be barred from proceeding for debt review, at least in respect of that particular credit agreement to which the section 129 notice referred. This is viewed as blatantly contrary to the purpose of the notice and NCA in that debt review ordinarily follows receipt of a section 129 notice although this does not always have to be the case.

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Subsequently, the legislature amended section 86(2) by no longer referring to section 129 but rather to section 130 of the NCA to the effect that a consumer is now only barred from applying for debt review once the provider has proceeded to "enforce" the agreement in respect of section 130 of the NCA (i.e. service of the summons as determined by case law[62]) which amounts to a pro-consumer approach in that it provides the consumer with the longest period possible in which to apply for debt review.[63]

Section 86(10)(b) basically indicates that once a debt review application is before court a provider may not terminate the proceedings or proceed against the consumer. This is an amendment in favour of the consumer, as he or she is now in a position to frustrate the provider's enforcement rights by expediting a debt review application to court and then delaying the granting of a debt review order as a provider is left powerless to expedite the granting of a debt restructuring order once it is "before court" and before a consumer is in

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62 *De Beer v Nedbank Limited* 2018 ZAGPPHC 367 (16 May 2018) paras 11, 12, 21 - 23.

63 Confirmed by *De Beer v Nedbank Limited* 2018 ZAGPPHC 367 (16 May 2018) para 4, 21 – 24 wherein Mokose AJ followed the reasoning of Ellis AJ in *Nedbank Ltd v Mokhonoana* 2010 5 SA 551 (GNP) who held that service of summons should be the end point from which debt review was not possible.

default of the order. Roestoff and Smit[64] submit that once a matter for debt review has been referred to a court, the court should be able to order the proceedings have lapsed after the expiry of a reasonable length of time if the consumer abuses the process.

8 2 6 Reinstatement

Chapter two of this study indicated that under the Credit Agreements Act of 1980 the credit receiver had the right to reinstatement after returning the goods to the credit grantor.[65] The right of redemption was subject to the conditions that the credit grantor should not have obtained the goods by means of a court order; 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 would have incurred. The credit grantor was not entitled to refuse return of the goods and was prevented from inducing or requiring the credit receiver to sign a document in terms of which the credit receiver terminated the credit agreement and agreed to return the goods to the credit grantor before the expiry of the thirty days. Section 12 of the Credit Agreements Act, like the Hire-Purchase Act of 1942, contained no requirement for specific notices, in writing or otherwise, regarding the intention to re-instate or the payment of specified amounts.[66]

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Section 129(3) of the NCA affords the consumer an opportunity which he did not have before to, even after judgment, remedy any default by paying the arrear amounts together with default charges and reasonable costs of enforcing the agreement. Section 129(3) is viewed as a consumer protection mechanism as it seeks to encourage consumers to pay their overdue amounts and secure reinstatement. Section 129(3) was amended and the amendment itself came under severe criticism.[67] Section 129(3) is a limitation on the acceleration clause. Since

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64 Roestoff and Smit "Non-compliance with time periods - should the debt review procedure lapse once a reasonable time has expired?" 2011 *THRHR* 501.

65 Under section 12 the credit receiver could within thirty days after the credit grantor had repossessed the goods, claim their return. Therefore, 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 given a second chance to rectify his breach and continue with the contract - Nagel *et al Business Law* 6 ed (2019) 272.

66 Brits "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *Quo vadis*?" 2017 *THRHR* 181.

67 Brits "The Reinstatement of Credit Agreement: Remarks in Response to the 2014 Amendment of section 129 (3) - (4) of the National Credit Act" 2015 *De Jure* 78 – 90 and Brits 2017 *THRHR* 193 – 194.

redemption required the payment of the judgment debt it can not be directly compared to reinstatement under the NCA.

It was held in the case of *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick*[68] that the granting of the money judgment and the executionary order is not a bar to reinstatement of the agreement. It is only when the mortgaged property is sold and its proceeds realised that reinstatement is impermissible.[69] The court adopted the approach that the amendments made to section 129(4) should not be taken literally and that for all practical purposes, they might have to be ignored although when considered it is never practical or logical to ignore an amendment which should for all purposes serve a function.[70]

In *Nkata v FirstRand Bank Ltd*[71] the Constitutional Court found that the applicant had successfully reinstated the credit agreement by paying all her arrear instalments, the creditor's permitted default charges and reasonable enforcement costs. This was completed before the respondent obtained the default judgment against her and before the subsequent sale of the property. Consequently, the respondent could not rely on section 129(4) of the NCA to challenge reinstatement.[72] The court also held that in order to reinstate the credit agreement the applicant did not have to pay the full accelerated amount but rather only the arrear instalments due. The court held further that it was the consumer who had the power to reinstate a credit agreement and that he or she could do so at any time before the provider cancelled the agreement.[73] The court added that the consumer was not compelled to give notice to or seek the consent or cooperation of the provider before reinstatement could be effective, which

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68 2018 6 SA 492 (GJ).

69 *Absa Bank Limited v Mokebe* para 43. The need for judicial oversight in the sale of a consumer's home was stressed in the matter of *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) where the right to housing (section 26) was to be balanced (section 36) with the provider's right to enforce. The judicial oversight seeks to balance the socio-economic issues with the interests of the consumers. This oversight marked the beginning of the development of South Africa's law relating to enforcement of debts against consumer's immovable property. The substantive and procedural considerations added by way of the amendments to the Rules of Court seek to enforce the proportionality test and where reasonably possible allowing a consumer to remedy their default and possibly reinstate the agreement as far into execution as possible (*FirstRand Bank Limited v Mdletye* 2016 5 SA 550 (KZD)). The courts have even postponed judgments and orders for specially executability against immovable property under certain circumstances for a period of time (around 6 months) to allow the consumer to remedy their default and in effect reinstate the agreement.

70 *Absa Bank Limited v Mokebe* para 49.

71 2016 4 SA 257 (CC).

72 *Nkata v FirstRand Bank Ltd* para 140.

73 *Supra*.

occurred automatically by operation of law.[74] The remedy of reinstatement appears in these circumstances to be pro-consumer as the court has limited the acceleration clause, allowed the consumer to remedy the default and reinstate the agreement.

Steyn[75] argues that the NCA should be amended to provide "clear cut substantive and procedural requirements" that should be met in order for re-instatement to occur, which would foster greater certainty, and that this should include a duty on the provider to inform the consumer of his or her right to re-instate. It is undesirable for re-instatement to occur by operation of law.[76] This information should then provide the consumer with the knowledge of the consequences of paying the relevant amounts as well as give him or her the opportunity to claim re-instatement intentionally. Brits supports this argument.[77]

One of the unintended consequences of the "before-cancelled" qualification is that a distinction is made currently between cases where debt is collected through the cancellation of the agreement and cases where an acceleration clause is enforced. Courts have confirmed that when an acceleration clause is enforced, which is typically what occurs during mortgage foreclosure, the contract is not cancelled and therefore this "before-cancelled" qualification does not prevent such a debtor from re-instating the agreement.[78] In other words, in the case of agreements that are enforced through acceleration, re-instatement is a much more extensive right than what it appears to be in the case of agreements that are cancelled. In the latter instance, the cut-off point is sooner. Doctrinally the difference between acceleration and cancellation makes sense, but it is artificial and illogical to permit re-instatement after the enforcement of an acceleration clause but not after the enforcement of a cancellation clause. Not only is there no logical reason for this differentiation, but it may now encourage mortgage providers to cancel their mortgage agreements instead of enforcing the acceleration clause when they proceed with foreclosure action. In other words, by simply electing to follow a different route (cancellation as opposed to acceleration), reinstatement is anticipated at an earlier stage.[79]

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74 *Nkata v FirstRand Bank Ltd* para 141.
75 Steyn "Reinstatement of a Home Mortgage Bond by Paying the Arrears: The need for Appropriate Legislative Reform" 2015 *SLR* 143.
76 Steyn 2015 *SLR* 153.
77 Brits 2017 *THRHR* 188.
78 *Nkata v FirstRand Bank Ltd* 2014 2 SA 412 (WCC) para 422I–423E; *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) paras 283C–D, 284C, 285C–E and 290E. *Makubalo v Nedcor Bank Limited* 2017 ZANWHC 45 (29 June 2017).
79 Brits 2017 *THRHR* 189.

There is no doubt that re-instatement is a worthy and important mechanism in consumer credit law but the current principles revealed by the subsections are simply too vague, unbalanced and chaotic.[80] Automatic re-instatement without communication between the role players is not advisable as the parties become unaware of the amounts due for payment or even that the agreement has been re-instated. After judgment has been handed down but before it has been executed against the consumer's property the contractual debt is replaced with a judgment debt. As the law currently stands, re-instatement is still possible during this stage,[81] but it is arguable that the process and conditions should be different. It is suggested that if the consumer is willing and able to remedy the default he should tender payment of these amounts to the provider. If the provider accepts such payment, then re-instatement could occur, provided that the judgment should be abandoned since if judgment remains it would be irrelevant to speak of reinstatement.

Conversely, to cater for instances after judgment where the provider does not accept payment of the relevant amounts, a procedure could be created through which the consumer could call upon the court to authorise re-instatement and grant a rescission of the judgment. In such a procedure the court could have a discretion based on, *inter alia*, the *bona fides* of the consumer, his willingness and ability to pay the amounts outstanding, as well as the costs, including the costs of the application for rescission. Other factors could include a consideration of the impact that enforcement of the judgment would have on the consumer's housing rights as well as the equity of the matter. This alternative may however result in multiple cases with the associated costs for a simple issue.

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After the judgment has been executed against the debtor's property through a sale in execution it is recommended that re-instatement be permitted only if payment and transfer have not occurred. It is submitted that this would amount to a more balanced approach and further diminish the possibility and complexity of prejudicing third parties who have purchased property sold in execution.[82]

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80 Brits 2017 *THRHR* 194.
81 *Ibid.*
82 Brits 2017 *THRHR* 195 – 197.

8 3 RECOMMENDATIONS

8 3 1 May recommendations

It would be prudent of the legislature, and it is accordingly recommended that "may" is amended to "must" in section 129(1)(a) to bring about certainty that the notice should be sent to the consumer in default before a provider may proceed with enforcement. It would further be prudent to always send a default notice to a consumer in default and not only in the instances where the provider wishes to proceed against the consumer. This is therefore an additional recommendation which would likewise replace "may" with "must" in section 129(1)(a). Making it compulsory to warn the consumer of his default as soon as he defaults, whether or not the provider intends to pursue the consumer for the arrears at that stage, is recommended to the legislature for implementation in that this would most definitely further the aims of the NCA.

Amendment of section 129 of Act 34 of 2005, as amended by section 32 of Act 19 of 2014 and section 20 of Act 7 of 2019
1. Section 129 of the principal Act is hereby amended –
(a) By the substitution in the subsection (1) for paragraph (a) of the following paragraph: "(a) Must draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to the National Credit Regulator for debt intervention, a debt counsellor, alternative dispute resolution agent, consumer court, or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and"

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It is also recommended that section 130 be amended to allow a provider to remedy any non-receipt brought to his or her attention prior to a court being required to order such compliance. This would decrease the costs incurred in court and possibly decrease any delay in proceedings. There is nothing in section 130 that prevents a provider from remedying non-compliance with section 130 of their own accord. All that would be required is a subsection which allows a provider to request the condonation of the court for complying with section 129(1)(a) at a stage that is later than intended by the section.

Amendment of section 130 of Act 34 of 2005, as amended by section 33 of Act 19 of 2014 and section 21 of Act 7 of 2019

1. Section 130 of the principal Act is hereby amended –

(a) By the addition of the following subsection:

"(6) In any proceedings contemplated in this section where the credit provider ascertains prior to hearing of the matter that –

(a) The credit provider has not complied with the relevant provisions of this Act as contemplated in subsection (3)(a), the credit provider may –

(i) take appropriate steps to remedy any non-compliance prior to hearing of the matter; and

(ii) at such hearing of the matter, make application to court for condonation of the steps taken to remedy the non-compliance post enforcement but prior to hearing the matter."

(7) The court may in the circumstances contemplated in subsection 6(a) –

(a) condone the steps taken by the credit provider and proceed with the matter; or

(b) adjourn the matter before it; and

(c) make an appropriate order setting out the steps the credit provide must complete before the matter may be resumed."

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8 3 2 Enforce recommendation

The word "enforce" is not precise enough in its current format without specifying that it refers to the institution of legal proceedings and or any available remedy to the provider inclusive of cancellation and specific performance and as such it is proposed that this clarification be added to the definition section of the NCA for legal certainty.

Amendment of section 1 of Act 34 of 2005, as amended by section 1 of Act 19 of 2014 and section 1 of Act 7 of 2019
1. Section 1 of the National Credit Act, 2005 (hereinafter referred to as the principal Act), is hereby amended – (a) by the insertion after the definition of "emergency loan" of the following definition: " **'Enforce'** means the institution of legal proceedings and or any available remedy to the credit provider inclusive of cancellation and specific performance."

8 3 3 Delivered recommendations

Despite the legislature's resolve to remain attached to archaic delivery methods, there are more relevant and effective solutions available in section 19(4) of the Electronic Communications and Transactions Act,[83] which provides:

> "Where any law requires or permits a person to send a document or information by registered or certified post or similar service, that requirement is met if an electronic copy of the document or information is sent to the South African Post Office Limited, is registered by the said Post Office and sent by that Post Office to the electronic address provided by the sender."

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If this provision were in operation, it would allow e-mail or even electronic text messages such as SMS's as even provided for in section 65 of the NCA, to serve as valid section 129(1)(a) notification mediums even though still to possibly be effected through the South African Post Office.[84] This may still remain a problem in that Post Office has proven on occasion not to be reliable especially when there is industrial action. The provider may not be in a position to prove delivery and access (opening or reading of the message) on the part of the consumer. This would merely result in a reoccurrence of the old problems. The failure to properly remedy

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83 Act 25 of 2002.

84 Bentley 2019 (April) *De Rebus* 8. Those reliant on registered post for legal compliance were encouraged by South African Post Office's announcement in May 2016 that it was launching 'eRegistered Mail'. Unfortunately, based on various meetings with sales representatives of South African Post Office and other players in the communications industry over a two-year period South African Post Office itself was not confident in the service as it was practically cumbersome and based on 'pull' as opposed to 'push technology'. Therefore, the public has not embraced nor made much use of it since inception. The challenge lies with section 19(4) of the Electronic Communications and Transactions Act 25 of 2002. While many service providers claim South African Post Office's endorsement, the communications do not appear to be sent by the sender to South African Post Office as required and do not appear to be sent by South African Post Office to the electronic address provided by the sender. Additionally, there is some uncertainty as to whether these electronic communications are registered by South African Post Office.

the defect in section 129 through the National Credit Amendment Act of 2014 and again in 2019 has bound the delivery requirements to outdated processes, full of practical inadequacies.

It is therefore recommended that the communications mediums indicated in section 129 (5) with specific reference to hand delivery and registered mail be deleted together with the method of proof in section 129(7) and that delivery options be made with reference to the regulations under the NCA which would then allow the Department of Trade and Industry to update the communication mediums available as different mediums become available and more efficient such as fax, email, WhatsApp etc and in alignment with current trends in case law and technological advancements. The Regulations, it is recommended, should then simultaneously indicate for each communication medium the required proof to be provided as sufficient compliance. Alternative and additional methods of delivery should be emphasized over registered mail.

Amendment of section 129 of Act 34 of 2005, as amended by section 32 of Act 19 of 2014 and section 20 of Act 7 of 2019
1. Section 129 of the principal Act is hereby amended – (a) By the substitution in subsection (5)(a) and (b) for the following paragraph: "(5) <u>The notice contemplated in subsection (1)(a) must be delivered to the consumer in accordance with the Regulations for delivery as amended by the Minister from time to time;</u> (b) By substitution in subsection (7)(a) and (b) for the following paragraph: <u>"(7) Proof of delivery contemplated in subsection (5) is satisfied according to the method selected and associated proof requirement indicated in the Regulations"</u>

Amendment of section 1 of Government Notice R489 *National Credit Act* (34/2005) Regulations Gazette Number 28864
1. Section 1 definition of the Regulations is hereby amended – By the substitution of the definition of "delivered" for the following: <u>"**deliver or delivered** unless otherwise provided for, means sending a document or notice to a recipient in the manner elected by the recipient to the address provided by the recipient in any agreement between the parties, if no such address is available , the recipient's registered address. The recipient can elect one of the following</u>

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methods of delivery: hand delivery, fax, registered email, registered mail or registered SMS.

(*Not an exhaustive list - which will be added to by the Minister from time to time based on statistic and reliability of receipt of documents or notices)*

Proof of delivery is satisfied dependent on the selected method of delivery as follows:

(a) For hand delivery: by signature or identifying mark of the recipient or an adult person at the address provided by the recipient or the recipient's registered address

(b) For fax: by the delivery report of the machine that sent the fax to the correct number provided by the recipient;

(c) For registered Email: by the delivery report received indicating that the document or notice was received at the email address provided by the recipient;

(d) For registered mail: by providing the written confirmation by the postal service or its authorised agent of delivery to the relevant post office or postal agency;

(e) For registered SMS: by the report from the service provider confirming that the SMS was delivered to the number provided by the recipient.

Where notices or applications are required to be delivered to the National Consumer Tribunal, such delivery shall be done in terms of the Tribunal's Rules.

Where notices or applications are required to be delivered to the National Credit Regulator, such delivery shall be done by way of hand, fax, email or registered mail to the registered address of the National Credit Regulator;

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It would be advisable to also add the above definition to the definitions section of the NCA to avoid any ambiguity or confusion.

Furthermore, it is recommended that it be required that a consumer's postal address, email address and physical address be provided in the agreement together with the consumer's selected chosen medium of delivery. As an additional consideration, the legislature could consider a form of civil penalty to be imposed upon a consumer who does not notify their

provider of a change of address.[85] Providers should provide for different addresses or points of contact in their standard-form contracts. Nothing in section 65 prevents this. In fact, section 65(2)(a) provides that the provider must "make the document available to the consumer through *one or more* of the **…**mechanisms" listed in the section. This will make it easier for providers to prove the sending, and even the receipt, of notices.[86] In light of the importance of the objectives of section 129 it is imperative that the notice is actually received by the consumer.

Furthermore, as the argument has unfolded with regard to the respective burdens of proof of delivery, the balancing of rights and the "reasonable consumer", it is recommended that the burden be placed on the provider to prove delivery when a consumer has elected a method and address and in accordance with the proposed Regulations' proof per medium scheme. Once proven, the rebuttable presumption should be held that the reasonable consumer has received the notice. If the consumer then contends that the notice has not been received, the provider may remedy such non-compliance prior to proceeding to court. It is submitted that this would amount to a balanced approach.

Once the provider has provided *prima facie* proof of *delivery* in the manner indicated in the section a *bona fide* consumer should still be provided with an opportunity to dispute the receipt of the notice based on the "reasonable consumer" test. This rebuttal by the consumer would need to indicate on a balance of probabilities that in fact the consumer did not receive the notice for whatever reason. Thereafter, the court, if not the provider as alluded to above, could continue, as is currently the case, to utilize section 130 to adjourn the matter on condition of delivery to be fulfilled by the consumer. This *prima facie* burden of proof coupled with the rebuttable presumption is what, as argued in this study, would amount to an effective, efficient and balanced approached to section 129.

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The addition of the electronic service methods without substituted service is warranted as there is a compelling argument and evidence that these forms of delivery are more likely to come to the intended recipients attention. Furthermore, based on the proof required there are sufficient checks and balances in place to provide the necessary proof on a balance of

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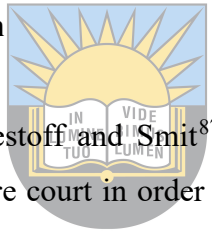
85 Noting that this could only be a form of civil penalty.

86 This recommendation is supported by van Heerden and Coetzee when they agreed with the reasoning of Wallis J in *Munien* that 'delivery' for the purposes of section 65(1) of the NCA means that the document has to be delivered in accordance with regulation 1. Van Heerden and Coetzee *"Marimuthu Munien v BMW Financial Services (SA)(Pty)Ltd* unreported case number 16103/08 (KZD)" 2009 *PER* 333

probabilities to account for legal certainty for delivery which is also better aligned with the ECTA which contains the presumption of receipt of data.

There is no need to amend section 65 in that this section speaks to the right to documentation and not service or delivery of a notice. Section 96 also does not require amendment as it would still be applicable and aligned to the proposed amendments. It may well be advisable to add in the NCA and Regulations, as neither contain, a definition for address which would include an email address, telefax or any other suitable address at which the party would receive documents or notifications – this would then better align section 96 to include all forms of addresses. Section 168 speaks to service of documents and then goes on to mention in subsection (a) "delivered to that person". Therefore, in light of the fact that "delivered" and "deliver" have now been defined in the NCA and Regulations this section would not require amending as it would now encompass those methods as well.

8 3 4 Debt review recommendation



The author is in agreement with Roestoff and Smit[87] that the inability by the provider to terminate a debt review pending before court in order to proceed with enforcement against a recalcitrant consumer is an unjustifiable and unreasonable limitation on the provider's rights to enforcement. This limitation throws the balancing of the consumer and provider rights out of equilibrium.

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It is therefore recommended that the NCA be amended to the effect that an exception be inserted into section 86(10)(b) which allows a provider to approach the court to terminate debt review proceedings which are before it when the consumer is in arrears, has been notified and the debt review proceedings have been unreasonably delayed due to no fault of the provider. The court would then be empowered to terminate the debt review and permit the provider to proceed whilst the consumer would still have the resumption clause of section 86(11) available to them.

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87 Roestoff and Smit 2011 *THRHR* 501.

Amendment of section 86 of Act 34 of 2005, as amended by section 26 of Act 19 of 2014 and section 12 of Act 7 of 2019
1. Section 86 of the principal Act is hereby amended – (b) By the substitution for subsection (10)(b) with the following subsection: "10(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal unless the application so filed has been unduly delayed in finalization by the consumer or debt counsellor to the prejudice of the credit provider."

8 3 5 Reinstatement recommendations

It is recommended that the amended section 129(3) and (4) be amended again. The redrafting process should take into account the fact that a consumer can be allowed to reinstate an agreement before cancellation is illogical and should therefore be avoided, not by removing the term "reinstatement" but by deleting the "before-cancelled" qualification from section 129(3). Even the notion that the consumer can "remedy a default" before cancellation is unsatisfactory as it is redundant and a simple restatement of the common law as well as of the principle that is already implied by section 129(1) read with section 130(1).

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What is required, it is submitted, is the complete removal of the "before-cancelled" qualification, since the events listed in section 129(4) could arguably be drafted in a manner sufficient to ensure that the opportunity to re-instate is limited within reasonable bounds.[88] Logically, re-instatement should refer to a mechanism that is available after, not before, cancellation or after the moment that debt enforcement proceedings commence when the provider approaches the court but only until a clearly identified future moment. The cut-off point as identified by the court is the execution of judgment, for example, through the sale in execution of property. Since sale in execution is the cut-off point, there must be some procedure in place to deal with a judgment that had already been granted and it is proposed in this regard that the judgment be abandoned.

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88 Roestoff "*Ferris v FirstRand Bank Ltd* 2014 3 SA 39 (CC*):* Enforcement of a Credit Agreement After Breach of a Debt Rearrangement Order and the Ineffectiveness of Debt Review in terms of the National Credit Act" 2016 *De Jure* 148.

Furthermore, it is recommended that re-instatement not take place automatically and by operation of law, as is currently the position, as it leads to uncertainty. In line with the overall purpose of the NCA, engagement between the parties should be encouraged. It is not unreasonable to expect a consumer to notify the provider of his wish to re-instate and to request a statement indicating the outstanding amounts and costs, which will then allow them to deal with any disputes that there might be in regard to the calculation of the amount outstanding. After this notification, payment of the relevant amounts can occur, and re-instatement will become operative. The detail as to how and when the consumer is to notify the provider of his intention to re-instate, what time frames should be applicable for this process, as well as the provider's provision of a statement of account can be worked out further to ensure legal certainty.[89]

Amendment of section 129 of Act 34 of 2005, as amended by section 32 of Act 19 of 2014 and section 20 of Act 7 of 2019

2. Section 129 of the principal Act is hereby amended –

(a) By the substitution for subsection (3) with the following subsection:

"(3) (a) Subject to subsection (4), a consumer may at any time remedy a default in such credit agreement by :

(i) paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied; and

(ii) notifying the credit provider of such payment and that same is made pursuant to reinstatement of the agreement."

(b) By inserting the following paragraph (b) after subsection (3)(a):

"(b) Should the consumer remedy the default after granting of judgment the judgment will be abandoned."

(c) By inserting the following paragraph (c) after subsection (3)(b):

"(c) After complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order."

(d) By the substitution in subsection (4) with the following subsection:

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[89] Section 129(3) does not prohibit negotiations and reinstatement. It only states the point beyond which it is no longer permissible. The courts also confirm this saying that before the point of no – return is reached, bringing payments up to date (costs and charges included) results in automatic reinstatement.

" (4) a consumer may not re-instate a credit agreement after –

(a) The sale of any property pursuant to an attachment order or surrender of property in terms of section 127 except in the circumstances where the default pertains to a mortgage loan agreement in which event a consumer would be entitled to re-instate the agreement after the sale of any movable property but not after the sale of the mortgaged property;

(b) The execution of any other court order or order of the Tribunal enforcing that agreement;

(c) The termination thereof in accordance with section 123

(e) The Tribunal ordered that the debt that underlies a credit agreement is extinguished" provided that where only a portion of the debt due under a credit agreement has extinguished, this subsection applies only in respect of the portion so extinguished."

8 4 CONCLUSION

Although the NCA has improved the position of the consumer in many ways, also concerning pre-enforcement and debt collection procedures, the legislature could have made some issues as discussed in this study clearer and regrettably, the 2014 and 2019 National Credit Amendment Acts were missed opportunities to simplify these vague areas.

As it stands, and to answer the overarching questions of this study, the legislature has encapsulated the judiciary's interpretation and application of section 129, especially in *Sebola's* case, through the amendments to the NCA. Whether or not this interpretation results in a balanced approach between the parties is debatable. However, what is clear is that the current interpretation and application of section 129 is far from being the most effective and efficient in order to provide adequate consumer protection that fulfils the purpose of section 129 and the overarching purpose of the NCA. It is pertinent that the application and interpretation of section 129 provides legal certainty for the parties and causes economic stability.

Otto observes that the amendments "were by and large consumer-orientated."[90] Although the courts have attempted to interpret the provisions of the NCA within the bounds of its purposes as set out in section 3(d), it is evident that in doing so, more often than not, these interpretations favour the consumer's rights over the provider's rights.

The unbalanced approach as alluded to by Otto is controversial when one takes into consideration the purpose of the NCA to be consumer protection legislation as well as the fact that at the conclusion of most agreements the power is in favour of the provider. One would then be inclined to support a balancing out of power at the dissolution of an agreement or when there is a breach of the agreement.[91] The provider is favoured at the conclusion of the contract and the consumer at the termination. This would ultimately result in justice arising out of inequality at different stages. Therefore, unequal bargaining power (pro-provider) at the beginning of the relationship coupled with unequal protection at the end of the relationship (pro-consumer) may in fact result in a justified balancing of power and rights overall.

Consumer legislation always calls for choices to be made, risks to be allocated and costs to be shouldered or shared. More often than not, the burden is shifted to those with greater resources, such as providers.[92] A one-sided view of consumer protection, namely protection at all costs, is a short sighted philosophy and does not create an atmosphere in which consumers take some responsibility for their own decisions and actions.

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It is hence hoped that section 129 would be further amended in order to provide clarity and consistency in its interpretation whilst balancing the rights of the consumer and provider. The amendment should provide more clarity than any guided interpretation of the section. The amended 129 should be one that could be considered to be pro-fulfilment of contracts and therefore pro-credit industry and in favour of the economy as a whole. Favouring both parties in the relationship and the credit agreement in totality would result in a balanced and beneficial outcome for all.

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90 Otto "National Credit Act. *Vanwaar Gehási? Quo Vadit Lex*? And Some Reflections on the National Credit Amendment Act 2014 (Part 2)" 2015 *TSAR* 764.

91 Otto and Otto *The National Credit Act Explained* (4 ed)(2017) 117 – 118. Van Heerden and Coetzee *"Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: verwarrende verwarring oor voldoening"* 2012 *Litnet (Akademies) Regte* 286.

92 Otto 2010 *SAMLJ* 604.

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1926	37	Usury Act

1942	36	Hire-Purchase Act
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1944	32	Magistrates' Courts Act
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1959	59	Supreme Court Act
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1967	78	Pre-Union Statute Law Revision Act
1968	73	Limitation and Disclosure of Finance Charges Act (re-named Usury Act 73 of 1968)
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1969	68	Prescription Act
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1981 68 Alienation of Land Act

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1983 51 Alienation of Land Amendment Act

1985 18, 87 Supreme Court Amendment Act

1985 107 Rules Board for Court of Law Act

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1986 42 Limitation and Disclosure of Finance Charges Amendment Act

1986 95 Sectional Titles Act

1988 71 Consumer Affairs (Unfair Business Practices Act)

1988 100 Usury Amendment Act

1990 94 Banks Act

1993 30 Usury Amendment Act

1996 57 Integration of Usury Laws Act

1996 106 Constitution of South Africa

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1998 19 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

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1998 124 Postal Services ActMah

1999 56 National Student Financial Aid Scheme Act

2001 38 Financial Intelligence Centre Act

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2002 25 Electronic Communications and Transactions Act

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FOREIGN LEGISLATION

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1968		Truth in Lending Act
United Kingdom		
1974	39	Consumer Credit Act
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2006		Consumer Credit Act
		Consumer Credit Act (Advertisements)
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