UNIVERSITY OF CAPE TOWN
FACULTY OF LAW

THE NATIONAL CREDIT ACT

Interim Attachment of Goods Sold on Credit in a New Era of South African Consumer Credit Law

by

ML SMITH

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for a degree of Master of Laws at
the University of Cape Town

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University of Cape Town

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"The commandments of law are these:
live honourably harm nobody; give everyone his due"

Justinian's Institute's
Book One at 1.13
Translated with an introduction
by Peter Birks and Grant Mcleaod
Cornell University Press
1987

CHAPTER 1

INTRODUCTION

The financial crisis of 2007 has been described, by leading economists, as the worst financial crisis since the Great Depression of 1929.[1] This crisis has contributed to the failure of businesses, the closure of banking and other financial institutions, and a dramatic decline in consumer wealth. The prevailing economic climate has created a proliferation of 'cash-strapped' consumers. The consumer, worldwide, has been left in a very poor state indeed, with many losing their jobs, their homes and their livelihoods. Unable to generate an income the consumer has turned to credit providers, often relying on the credit they provide to live. But, as countries fall deeper into recession consumers become worse off and are defaulting on their credit obligations.

South Africa is no exception, our economy shrunk by 6.4% in the first quarter of 2009, the biggest fall since 1984, and plunged Africa's largest economy into its first recession since 1992.[2]

The South African consumer did not escape unscathed, with banks repossessing vehicles, homes and countless other items, financed on credit, for which the cash strapped consumer could no longer pay. In late 2008 homes and motor vehicles were being repossessed at a rate of 2000 and 6000 units per month, respectively.[3] Furthermore, according to *The Independent* newspaper more than 50 percent of credit consuming South Africans are behind in payments. In July 2009, statistics showed that 42.3 percent of consumers were meeting obligations and paying on time, 15.3 percent were one month in arrears, 15.3 were more than three months behind, with the remainder having an adverse credit record and were having court proceedings instituted against them.[4]Nobody could have foreseen the impact of the global financial crisis on South Africa's economy and more and more South Africans are finding themselves in financial distress.[5]

The economic crisis and the ensuing spate of repossessions have put the debt enforcement mechanisms of the NCA under the spotlight.

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[1] Mail and Guardian "It's Official: SA hits first recession in 17 years" (26 May 2009). Available at www.mg.co.za

[2] Ibid.

[3] A Snyman (of 'Consumer Assist') cited in "Debt is like suspecting you have a terminal illness" *Mail and Guardian* (20 August 2008). Available at www.mg.co.za (Accessed 3 September 2009).

[4] B Gerretsen "Consumers continue to get into debt" *The Independent* (25 July 2009) 2.

[5] E West "Debt worries affect all income groups" *Business Day* (7 October 2009).

As pointed out, in today's world most people rely on credit facilities to make major purchases such as homes and motor vehicles, and thus, the NCA will effect a majority of people in South African society. Further, a problem faced by many South African credit consumers is that while they can afford the credit for which they apply and are granted today, with the rise in the interest rates, constant fluctuations of the petrol price and the ever increasing cost of living, they may not be able to afford it tomorrow.

The Department of Trade and Industry recognised the need for legislative reform in the field of consumer credit law, arising *inter alia* because of the shortcomings and ineffectiveness of previous legislation in dealing with the demands of an increasingly complex consumer credit market.[6]

The NCA is the first in a series of legislation[7] which aim to shield the consumer from unscrupulous business and lending practices, as well as from themselves, and has introduced new rules by which the credit industry must play.

The Act came into operation incrementally from 1 June 2006 and has been fully operational since 1 June 2007.[8] It repeals the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980, which until recently have governed the granting of credit in South Africa.[9] The NCA is a comprehensive piece of legislation, dealing exclusively with consumer credit, with the aim that all aspects of credit in South African are regulated by and subject to it. The Act seeks 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; ... to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over- indebtedness; to regulate credit information ... to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework

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[6] See: Department of Trade and Industry (South Africa) *Consumer Credit Law Reform: Policy framework for consumer credit* (2004); Renke, Roestoff and Haupt "The National Credit Act: New parameters for the granting of credit in South Africa" 2007 *Obiter* 230–238.

[7] the next being the *Consumer Protection Act*.

[8] JM Otto *The National Credit Act Explained* (2006); JW Scholtz et al *Guide to the National Credit Act* (2008) Chapter 2 at 2-1

[9] P Jordaan *The Credit Law of South Africa: A guide to consumers, credit users and credit grantors* (2007) at 34.

relating to consumer credit ..." [10] Furthermore, it seeks to promote black economic empowerment and ownership within the consumer credit industry.[11] The purpose of the Act is, *inter alia,* to create a single system to regulate credit.[12] In addition, part of its purpose is to provide for "a consistent and accessible system of consensual resolution of disputes arising from credit agreements" and "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."[13] The Act therefore provides for debt enforcement procedures in respect of all credit agreements, as defined, subject to certain exceptions.[14]

Debt enforcement is critical when extending credit to consumers, as it is a reality of the credit industry that the consumers may be unable to service their debt.[15] The provisions dealing with debt enforcement are contained within Part C of Chapter 6 of the Act. These provisions of the NCA, while undoubtably introducing important consumer protection measures, are at the same time, or have the potential to be, very cumbersome, unreasonable and even detrimental towards the credit provider.[16] This is mainly a result of the prescribed notice periods, required before enforcement proceedings can be undertaken.[17] It is common in practice that a credit grantor sends out the notice purely as a formality, knowing full well that there is no chance of the debtor ever meeting his obligations.[18] While waiting for the expiry of the notice period, the goods deteriorate and decline in value while being used by the debtor. This is of particular relevance when goods are by their nature, and by virtue of their use, put at risk of damage or deterioration.[19] Furthermore, often these goods are the credit provider's only form of security.[20] It is in this

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[10] Extract from the Act's long title. See: D van Loggernberg, L Dicker, J Malan "Civil Procedure: Aspects of debt enforcement under the National Credit Act" *De Rebus* (Jan/Feb 2008).

[11] Renke et al. (note 7).

[12] Scholtz et al (note 9) at 2-6; Otto *Explained* (note 9).

[13] section 3*(h)–(i)*.

[14] Van Loggernberg et al (note 11).

[15] H Taylor 'Enforcement of debt in terms of the National Credit Act 2005, trial and celebration: A Critical Evaluation' *De Jure* Vol 1 (2009).

[16] Otto *Credit Law Service* (1991) par 29.

[17] Ibid ; Taylor (note 16).

[18] Otto *Credit Law Service* (note 17) par 29.

[19] Otto *Explained* (note 9) at 92.

[20] Ibid.

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[16] Otto *Credit Law Service* (1991) par 29.

[17] Ibid ; Taylor (note 16).

[18] Otto *Credit Law Service* (note 17) par 29.

[19] Otto *Explained* (note 9) at 92.

[20] Ibid.

regard where the question of whether a credit provider may obtain an order from a court, pending expiry of the period and cancellation of the contract, for the temporary return of the goods, so as to protect them against damage and deterioration arises.[21] The NCA does not, however, make clear whether such interim interdicts in the form of attachment[22] may be granted under it.[23]

By way of introduction, before the provisions of the Act concerning debt enforcement, and more specifically, interim attachment can be addressed, this paper will begin by introducing the NCA, present the history of the consumer credit industry in South Africa and the legislative framework within which the NCA, as a whole, developed.
Closer attention will then be paid to the issue of whether a court within the Republic may grant an interim attachment order in respect of a credit agreement to which the NCA applies, so as to protect goods against deterioration and damage pending a court order.[24] As a starting point in this regard, the nature of this general provisional remedy will be discussed with reference to the foundations of the modern South African law of interdicts.[25] The role of interdicts in South African *credit* law will be explored, by discussing debt enforcement under the NCA generally, and whether the provisions allow for the granting of any interim measures which may be sought by the credit provider prior to the fulfillment of the stipulated legislative requirements.

The Acts which preceded the NCA, particularly the Credit Agreements Act of 1980 have been extensively supplemented by case law, however, comprehensive case authority is lacking for the NCA.[26] The Act is often ambiguous or simply remains silent, on salient issues, such as interim attachment, and it will take time for such matters to be resolved by the courts.[27]Thus, an examination of the prevailing case law, (despite having been decided under different legislation) may prove helpful is assessing what the attitude of the courts may be towards these unsettled issues, under the new dispensation. In fact, some

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[21] Ibid.

[22] 'Interim interdicts' or 'attachments pendente lite', are orders made before action for the enforcement or cancelation of the contract are launched.

[23] Otto *Explained* (note 9) at 92-3.

[24] Scholtz et al (note 9) at par 12.8.4.1.

[25] CB Prest *Law and Practice of Interdicts* (1996) at 9.

[26] Taylor (note 16).

[27] Taylor (note 16).

academic opinion goes so far as to suggest that the courts will follow the precedent set by these judgments, regardless of the change in the governing statutes.[28]

The interim attachment of goods sold on credit are not without precedent in foreign consumer legislation,[29] and thus another source offering clarification for what the approach towards interim interdicts in credit law should be, is foreign law.[30] Sound credit legislation is not easy to design nor to interpret and apply, but fortunately, there are many lessons which can be learnt from the efforts of other countries, both historical and current.[31] By analysing foreign jurisdictions approaches to interim attachment orders it is hoped that we may identify a trend of foreign best practice, which can be adapted and adopted by South African law.

While the Act offers no clear answer to the question posed herein, it is the object of this paper to suggest what the approach of the courts may be in this regard.

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[28] Otto *Explained* (note 9) at 93.

[29] JM Otto, NJ Grove' "The Usury Act and Related Matters: New Credit Legislation for South Africa" *SA Law Commission Working Paper 46 Project 67* (1991) at 361.

[30] Ibid at 361.

[31] N McBride *Consumer Credit Regulation,* presented at Asian Conference on Consumer Protection, Competition Policy and Law (2003)

CHAPTER 2

THE NATIONAL CREDIT ACT IN A NUTSHELL

A Survey of the Act: Its History, Scope and Application

Before grappling with the research question posed by this paper, it is useful to set the scene in which the NCA has developed. To do this we must take a few steps back, and see the NCA in its broader context, why it was drafted and what it tries to achieve.
Thus, as a starting point the historical background to the Act will be considered, by providing a brief outline of the history of consumer credit in South Africa.

1. The History of Consumer Credit in SA

The notion of credit is by no means novel to our society, and through the ages various forms of contract and commercial practice relating to the granting and receiving of credit have been prolific.[1] Exploitation of consumers and malpractice in the sector prompted lawmakers to formulate laws and regulations which made such practices subject to the law.[2] For example, the Cape Colony had consumer credit legislation introduced in 1909 in the form of The Cape Usury Act, which applied to money-lending transactions.[3] Each colony within the South African territory dealt with the matter of credit, and specifically interest charged thereon, in different ways. The Usury Act 37 of 1926 was the first consumer credit legislation which was applied nationally, and it sought to introduce uniformity.[4] However, it did not result in complete uniformity within the Union, as it did not repeal all credit legislation existing in the various colonies.[5] Furthermore it was only applicable to money lending transactions, which left instalment agreements unregulated.[6] The Hire-Purchase Act[7] functioned alongside the Usury Act from 1942 until 1967, when the Minister of Finance recognised the shortfalls of the legislation and appointed a committee to scrutinize the Usury Act. By 1968 the Usury Act was replaced by the Limitation and Disclosure of Finance Charges Act[8], followed by the Sale of Land on Instalments Act,[9] in

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[1] Scholtz et al *Guide to the National Credit Act* (2006) Chapter 1 at par 1.2.

[2] JM Otto, NJ Grove' "The Usury Act and Related Matters: New Credit Legislation for South Africa" *SA Law Commission Working Paper 46 Project 67* (1991) at 20-22.

[3] Ibid at 23.

[4] Ibid at 24.

[5] Ibid at 26.

[6] Ibid at 26.

[7] 36 of 1942.

[8] 73 of 1968 (Became known as the "Usury Act of 1968").

[9] 72 of 1971.

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[3] Ibid at 23.

[4] Ibid at 24.

[5] Ibid at 26.

[6] Ibid at 26.

[7] 36 of 1942.

[8] 73 of 1968 (Became known as the "Usury Act of 1968").

[9] 72 of 1971.

1971.[10] These three Acts regulated three aspects of consumer credit in the country: namely, the financial aspects of money-lending and instalment transactions, the contractual aspects of credit, and the sale of immovables by instalments.[11]

By 1980 the Legislature recognised the changing face of commerce. With rapid development in the sector and the growing ingenuity of lenders, who were able to evade the existing legislation's application, measures had to be introduced to remedy the situation.[12] Thus, in an effort to harmonise the various Acts and close loopholes, the legislature promulgated the Credit Agreements Act 75 of 1980, to replace the Hire-Purchase Act. The provisions of the Usury Act of 1968 were overhauled and brought in line with the new Act.[13]In addition, the Alienation of Land Act[14] was repealed and replaced the with Sale of Land on Instalments Act.[15] Despite these legislative advances the tripartite distinction (outlined above) endured.[16]Agreements not falling within the scope of these Acts were subject to the common law.[17]

1.1 The Usury Act

The Usury Act regulated the *financial aspects* of credit agreements.[18] The Act applied to credit transactions, lease agreements relating to movables and money lending transactions, including home-loans, overdraft facilities and credit cards.[19] The Usury Act has a far wider scope than the Credit Agreements Act, however the two do compliment each other.[20]

1.2 The Credit Agreements Act

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[10] Otto & Grove (note 2) at 28.

[11] Ibid at 28.

[12] JM Otto *The National Credit Act Explained* (2006) at 2.

[13] Otto & Grove (note 2) at 28.

[14] 68 of 1981.

[15] Otto & Grove (note 2) at 29.

[16] Ibid at 29.

[17] Ibid at 29.

[18] Ibid at 83.

[19] Ibid at 81.

[20] Ibid at 83.

This Act applied to credit agreements relating to movables, and sought to regulate the *contractual aspects* of these agreements.[21] The Act had a very specific application, and did not apply to all instalment sale or leasing transactions, nor did it apply to the rendering of services on credit.[22] Transactions to which the the Act did not apply were not invalid, they were regulated by the common law and the terms of the contract concluded.[23] It must be noted that the Usury Act may be applicable where the Credit Agreements Act is not.

As stated above, the Usury Act regulated the financial aspects, and the Credit Agreements Act the contractual aspect of instalment contracts. These aims, however, were not fully realised. Furthermore, the spheres of application of the Acts diverged.[24] For example, there was no consistency in the definitions of important concepts, such as 'credit transaction' and 'leasing transaction' in the Acts. The statutory limitations regarding the scope of the Acts differed as well.[25] These and other disparities created great difficulty in determining whether or not one, or both, or neither of the Acts applied to a particular transaction, and have resulted in much uncertainty in practice.[26]

Together the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980, have been the cornerstone of consumer credit in South Africa for approximately thirty years.[27] It was decided that these Acts would be replaced by one piece of legislation, the NCA, 34 of 2005.[28]

2. Background to the National Credit Act

In 1991 the South African Law Commission issued a working paper,[29] presented by Professors JM Otto and NJ Grove. The working paper reviewed the prevailing consumer

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[21] Otto & Grove (note 2) at 83.

[22] See: Otto & Grove (note 2) at 68 for a discussion on the application.

[23] Otto & Grove (note 2) at 70.

[24] Ibid at 104.

[25] Ibid at 104.

[26] Ibid at 104.

[27] Otto *Explained* (note 12) at 2.

[28] Ibid.

[29] Otto & Grove' (note 2).

credit regulation and proposed a new credit legislation for South Africa, and marked the beginnings of the NCA.

According to the Department of Trade and Industry the credit market is worth approximately R362 Billion, and provides credit to over 15 million people in South Africa.[30] The importance of having access to credit is undeniable, as it provides a means for people to take up economic, educational and other 'standard of living' opportunities.[31] However, unregulated credit granting and a generally laizze faire approach by government to credit led to severe problems, such as over-indebted consumers. There was a dire need to balance access to credit with consumer protection, while not undermining the interests of credit providers.[32]

The NCA came into operation incrementally from June 2006, and had been fully operational since 1 June 2007.[33]

3. Overview of the NCA

JM Otto suggests that the Act "represents a clean break from the past and shows very little resemblance to its predecessors. It introduces new concepts and mechanisms of protection of credit consumers into South African law".[34]

The NCA is a voluminous affair, consisting of 116 pages, 173 sections, three schedules and an extensive set of regulations.[35] Otto has described the task of working through the entire Act as arduous.

What follows is a cursory discussion of the NCA, in which the reasons for its implementation, its purpose and objectives, and scope and application will be presented.

3.1 Why was the NCA implemented?

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[30]Department of Trade and Industry (South Africa) *Consumer Credit Law Reform: Policy framework for consumer credit* (2004).

[31] Ibid.

[32] A Louw "Credit Agreements: The National Credit Act 34 of 2005" *Lecture Series.* Available at www.library.und.ac.za. (Accessed 10 November 2009).

[33] Scholtz et al (note 1) at par 12.8.4.1.

[34] Otto *Explained* (note 12) at 2.

[35] Ibid at 2.

The reason for the promulgation of this new Act was to promote the implementation of rules through which to better govern the credit industry.[36] According to the CEO of the National Credit Regulator, Mr. Gabriel Davel, "the current credit environment is not sustainable, is damaging to Consumers and there is little relief in current outdated legislation, hence the reason why a new piece of legislation has been introduced to address these pressing issues".[37]

Prior to the NCA coming into operation, the South African credit regulatory framework was outdated and required reform in order to deal with a plethora of problems arising from the "dysfunctional credit market".[38] Various reports were considered by the Department of Trade and Industry[39] and the following problems were identified:[40]

- outdated legislation;[41]
- ineffective consumer protection (especially in relation to consumers in low-income groups);
- high cost of credit;
- difficulties faced by members of low income groups when attempting to gain access to credit;
- rising levels of over-indebtedness; and
- reckless lending by credit providers and exploitation of consumers by micro-lenders, intermediaries, debt collectors and debt administrators.

3.2 Application and Scope

The Act has a wide application,[42] extending its protection over a broad spectrum of transactions and agreements.[43] It protects both natural and juristic persons[44], including

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[36] T Nortje *Impact of the New National Credit Act on Debt Recovery and Credit Bureau Industries* (2009) at 4.

[37] Ibid at 4.

[38] www.thedti.gov.za

[39] These include the Law Commission's 1994 review of the Usury Act; the Strauss Report on Rural Finance; the National Small Business Regulatory Review by Ntsika Enterprises Promotion Agency in 1999 and the Policy Board Report on SME Finance under the chairmanship of Dr Hans Falkena in 2001.

[40] DTI (note 30).

[41] The numerous difficulties with the old legislation were discussed earlier, and do not warrant repeating here.

[42] Otto *Explained* (note 12) at 3.

[43] Otto *Explained* (note 12) at 11

[44] The extension of the Act's protection is subject to certain limitations with regard to juristic persons. See: Otto *National Credit Act Explained* (supra) for a discussion hereon.

partnerships, closed corporations and companies, whose asset value or annual turnover falls below a prescribed threshold (currently R1 million).[45]However, it does not apply to loans made to the State, or where an entity which falls within the scope of the Act enters into a large transaction.[46]

The NCA casts its net over a majority of credit agreements: overdraft facilities, credit cards instalment agreements, incidental credit agreements, secured loans, mortgages, leases and credit guarantees (suretyships),[47] and regulates the content thereof.[48] The Act applies to all (1) credit agreements between (2) parties dealing at arm's length (3) made or having effect within South Africa,[49] subject to certain exceptions.[50] The term "credit agreement" is defined in section 8 of the Act. Generally, such an agreement involves the granting of credit by one party to another in exchange for the payment of interest or some other charge. Section 8 states that an agreement constitutes a credit agreement if it includes the following:

- a credit facility: the credit provider supplies goods or services to the consumer, or pays an amount or amounts of money to the consumer, and defers the consumer's obligation to pay for such supply or repay monies advanced, and further levies a charge or fee payable by the consumer on the amounts due;[51]
- a credit transaction: these include instalment agreements, pawn or discount transactions, lease of movable property, mortgage or secured loan;[52]
- a credit guarantee: an agreement in which an individual undertakes to satisfy, upon demand, any obligation of another consumer in terms of a credit facility or transaction, such as a surety agreement.[53]

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[45] Otto *Explained* (note 12) at 11

[46] Ibid at 1.

[47] Ibid at 15.

[48] Ibid at 11.

[49] Section 4(1) NCA.

[50] See: section 4(1) (a)-(d), Otto *Explained* (note 12) at 15.

[51] Louw (note 33).

[52] See: section 1 definitions.

[53] Louw (note 33).

The NCA provides certain exemptions, and thus certain credit agreements are not subject to the strict regulation of the Act. An example of such a transaction is the developmental credit agreement as defined in section 10.

3.3 The Objectives of the NCA

When a credit agreement is concluded the relationship that originates from it is the obligation to extend credit to a consumer (the consumer's right to credit) and the obligation of the consumer to render payment for the credit provider (the credit provider's right to receive payment).[54] The purpose of the Act is to regulate this relationship between the credit provider and the consumer.

The NCA is essentially *consumer credit legislation*, as its primary objective is to protect the debtor (or 'consumer').[55] However, one should not labour under the misapprehension that the Act, in its provision of protection and relief, removes the responsibilities of the consumer entirely.[56] The purpose of the Act is, *inter alia*, to protect the consumer by:

"Providing for a consistent and harmonized system of debt restructuring, enforcement and judgment, which *places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*."[57] (own emphasis)

The various purposes of the Act are set out in Section 3, and the NCA provides for specific policy to achieve the aims and objectives of the Act in full. The NCA's overarching purpose is to create a single framework of credit regulation, and an institution[58] to administer the credit industry in South Africa.[59] It seeks "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"[60] for all South Africans, particularly those who have historically been unable to access credit.[61] In

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[54] H Taylor 'Enforcement of debt in terms of the National Credit Act 2005, trial and celebration: A Critical Evaluation' *De Jure* vol 1 (2009) at 103-104.

[55] Otto *Explained* at 2.

[56] Taylor (note 54) at 105.

[57] Section 3(i).

[58] The National Credit Regulator.

[59] RP Goodwin-Groen *The National Credit Act and its Regulations in the Context of Access to Finance in South Africa* (2006) 74.

[60] Section 3.

[61] Goodwin-Groen (note 59) at 74; Otto *Explained* (note 12) at 6.

addition, the Act aims to prohibit unfair credit marketing practices, and to protect and educate consumers.[62] Furthermore, it encourages responsible borrowing, avoidance of over-indebtedness and reckless lending, and to provide a consistent, harmonised system of debt restructuring, debt enforcement and judgement.[63]

Relevant to the current paper are the NCA's provisions regulating debt enforcement and judgement. These provisions, relating to attachment, and specifically interim attachment will be considered in the subsequent chapter. However, before looking to these specific provisions and the application of attachment in our new credit law, it is prudent to discuss the nature of the generic interim remedy, providing a context in which this general measure developed.

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[62] Otto *Explained* (note 12) at 6.

[63] Goodwin-Groen (note 59) at 74.

CHAPTER 3

INTERDICTS
&
DEBT ENFORCEMENT

This chapter will be divided into two parts. The first dealing with interdicts and interim remedies in general. The second will discuss the application of such remedies in South African credit law, and whether interim interdicts and attachment of goods are permissible under the NCA.

PART A

INTERDICTS

Interim Interdicts and Attachment Orders

1. Introduction

The focus of this chapter is on interim remedies, which allow for the safekeeping and preservation of goods sold on credit when the credit consumer defaults on payment. Thus, the general remedy of interim interdicts will be considered before turning to their specific application in the field of credit law.

The issue of attachment *pendente lite* is not one peculiar to our credit law. It is a general procedural remedy recognised under both the common and statutory laws of all Commonwealth countries. The remedy of interim attachment is analogous to that of interim *interdicts* (or *injunctions* in English law).[1]

2. What is an interdict?

Interdicts are orders of court which either prohibit or compel the performance of a certain act to avoid injustice and hardship.[2] A distinction is drawn between prohibitory interdicts and mandatory interdicts.[3] The distinction has little practical significance, except to the extent that a court, when exercising its discretion whether or not to grant an interdict will have regard to the fact that, depending on the circumstances, one may be more difficult

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[1] S Renke A Boraine "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 Part 2" *De Jure* (2008) 1.

[2] AC Cilliers *Herbstein and Van Winsen: The Civil Practice of the HIgh Court and the Supreme Court of Appeal of South Africa* (2009) at 1454, referring to *Airoadexpress Pty (Ltd) v Chairman, Local Road Transportation Road, Durban* 1986 (2) SA 663 (A) at 676

[3] LTC Harms (ed) *Civil procedure in Magistrates' Court* Chapter 27 par 27.14-.21. Available at http://butterworths.uct.ac.za (Lexis Nexis).

than the other to enforce.[4] A further distinction is that the mandatory interdict may remedy the effects of any unlawful action which has already been taken.[5]

An interdict may be either *final* or *interim.* If the order is based on the ultimate determination of the litigating parties' rights and obligations, it is final.[6] Alternatively, it may be interim,[7] when the outcome of the proceedings between the parties is pending.[8] The purpose of an interim interdict is "the preservation or the restoring of the status quo" pending the final determination of the parties' rights and is separate from determination of those rights.[9] Unlike interim interdicts, a final interdict effects the final determination of rights and is granted in order to put a stop to an unlawful course of conduct or state of affairs.[10] The process is most commonly resorted to when there are no other remedies available,[11] or when there is a need for expedience.[12]

The interdict is an important judicial procedure and "[t]he law reports abound with decisions arising out of applications for interdicts, covering virtually every facet of human life and every aspect of substantive law."[13] The reasons for and purposes of applying for interdicts are as diverse as the conflicts giving rise to them.[14] The scope for the law relating to interdicts is determined by the applicable substantive law which governs the dispute in question.[15]Unless it is expressly prohibited,[16] this remedy finds application to a myriad of situations, "within every field of substantive law and in respect of any kind of

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[4] Harms (note 3) at 24.14-.21

[5] Cilliers (note 2) at 1454.

[6] Ibid at 1455.

[7] CB Prest *Interlocutory Interdicts* (1993) 2 at fn 2. In South Africa the words 'interim interdict', 'interlocutory interdict', 'temporary interdict' and 'interdict pendente lite' are used interchangeably.

[8] Cilliers (note 2) at 1455.

[9] Ibid at 1455. See: *Apleni v Minister of Law and Order & Others* 1989 (1) SA 195.

[10] Prest (note 7) at 46-47.

[11] Cilliers (note 2) at 1455.

[12] Prest (note 7) at 1.

[13] Ibid.

[14] Ibid at 2.

[15] Ibid at 2.

[16] See: Magistrates' Court Act 32 of 1944, which limits the court's power with regard to the granting of interdicts.

property, movable and immovable."[17] The consumer credit arena is no exception. Under the old credit law dispensation, the courts, applying the then applicable legislation,[18] held that a consumer's default under a credit agreement does not entitle a credit provider (the wronged party) to an attachment order until such time as the requirements for an interdict have been established.[19]

3. Characteristics of Interim Interdicts

Prest [20] describes interim interdicts as displaying the following eight characteristics in South African practice:

(a) an interim interdict is an order of court, in other words it is a remedy. It is not a court procedure nor a cause of action;

(b) it is a provisional ("interim") court order, pending the determination of the main dispute between the parties;

(c) its purpose is to preserve or restore the status quo pending the final determination of the matter;

(d) it is an extraordinary remedy, available in the absence of alternative remedies;

(e) an interim interdict does not constitute a final determination of rights and does not affect their final confirmation;

(f) it is not a remedy for the past invasion of rights;

(g) it is a discretionary remedy;

(h) the remedy may be granted in circumstances where an apprehension of irreparable harm is well-grounded.

In summary, interim interdicts in South African law are extraordinary, discretionary remedies, falling outside the framework of ordinary judicial remedies.[21] Attachments *pendent lite* are orders compelling the consumer to hand-over, for safekeeping, the goods subject to the credit agreement. It is conceivable that the court may simply prohibit the consumer from using the goods, while he retains possession of them pending the outcome

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[17] Prest (note 7) at 2-3.

[18] See: Credit Agreements Act 75 of 1980.

[19] See: *BMW Financial Services (Pty) Ltd v Rathebe* 2002 (2) SA 368 (W)

[20] Prest (note 7) at 5.

[21] Ibid at 4 - 5.

of the main action. However, such a remedy is likely to be unsatisfactory in light of the difficulties in monitoring compliance therewith. Interdicts of this nature are common in American jurisprudence.

4. Requirements for the Granting of Interim Interdicts

The South African law reports abound with decisions relating to the granting (or refusing) of applications for interdicts. However, prior to 1914 the case law provided limited discussion of the factors taken into account when reaching a decision, seldom providing comprehensive reasons for their decisions.[22] Furthermore, the cases cited a myriad of sources, some looking to Roman-Dutch authorities (specifically Johannes Van der Linden) and others to English Law. This provided little clarity on the matter as even where they relied on the same source the judges often differed in their interpretation thereof.[23] Thus, it is difficult to identify precisely what factors the courts relied on in the course of their determinations.[24]

Greater examination of the case law pre-1914 does not warrant discussion here, as the history of interdicts in South Africa is not at issue. What is provided is a brief overview of the development of the requirements for *interim* interdicts in our law. To this end the 1914 decision of the Appellate Division in *Setlogelo v Setlogelo*[25] is of significance, in that it marked the start of a line of cases "in which the requirements for the granting of (interim) interdicts are elaborated and refined."[26] The Appellate Division endorsed the view that the authority for the South African law of interdicts is rooted in Roman-Dutch law not the English system, and confirmed that the requirements set out in Roman-Dutch law were applicable. [27]

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[22] Prest (note 7) at 28, provides examples of such cases. *Saunders v Executrix of Hunt* (1840) 2 Menz 295; *Dickson & Co v Sunley* (1846) 3 Menz 340; *Willet v Blake* (1843) 3 Menz 343; *Maynard v Proprietors of Colonial Bank* (1849) 3 Menz

[23] *De Smidt v Steytler (1852)* 1 Searle 136; *Blackburn v Krohn* (1855) 2 Searle 209. See: Prest (note 7) at 30.

[24] Prest (note 7) at 28-29.

[25] 1914 AD 221.

[26] Prest (note 7) at 37.

[27] Ibid 37 and 54.

Briefly, these requirements are as follows: Van der Linden[28] identified three principal requirements for the grating of an interdict. Namely, (a) that the applicant had a clear right, failing which that irreparable harm would result if the interim interdict was not granted; (b) an act of interference (or reasonable apprehension hereof) by the respondent; (c) that no other, ordinary, remedy is available which can protect the applicant to the same degree as an interdict.[29] Innes JA "elaborated and refined" these requirements in *Setlogelo (supra)*, and to date the requirements as set out in his judgement have been consistently applied.[30] The requirements, as presented by Innes JA, will be outlined below.

To succeed in obtaining a *final* interdict, which unlike an interim interdict results in the final determination of rights, an applicant must show:[31]

(a) a clear right;

(b) an act of interference or "injury actually committed or reasonably apprehended";[32] and

(c) the absence of any other satisfactory remedy

Incontrovertibly, an application for an *interim* interdict will succeed if the above requirements can be satisfied.[33] Regarding such applications the court has a discretion to grant the remedy in the absence of a clear right. As such, the requisites are that the applicant must show: [34]

(a) that the right which is the subject matter of the main action and which the applicant seeks to protect is clear, or if not clear, then *prima facie* established, even though open to doubt;

(b) a well-grounded apprehension of irreparable harm to the applicant should the interim relief to refused and the applicant ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of the interim relief; and

(d) the applicant has no other adequate remedy.

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[28] The Roman-Dutch Law writer

[29] Prest (note 7) at 54.

[30] Ibid at 38.

[31] Cilliers (note 2) 1456.

[32] *Setlogelo v Setlogelo* 1914 AD 221 at 227

[33] Cilliers (note 2) 1456.

[34] Corbett J in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C), cited by Prest (note 7) at 55 and Cilliers (note 7) at 1456-7.

In light of the discretionary nature of an interim interdict these requirements are not judged in isolation and are considered to interact.[35] Further, the court is not obliged to grant such an interdict even if all the requirements are satisfied.[36] "The court must exercise the discretion judicially and will grant or refuse the interdict depending on a consideration of all pertinent issues, including the prospects of success, the potential injury, the balance of convenience and the availability of alternative remedies."[37]

As will be seen in a subsequent chapter, the courts have taken different approaches with regard to the granting of interdicts *pendente lite*. While the decisions discussed deal predominately with the provisions of now repealed Credit Agreements Act and its application to interim interdicts, the courts do on occasion expressly deal with the requirements set out above. That is, the decisions, after concluding that the relevant legislative provisions permit applications for interim attachment to be brought by an injured credit provider, look at how these common law requirements may be satisfied. It is submitted that although the decisions in question related to a now repealed legislative framework their approaches to the requirements for interim interdicts are still of importance, as these common law grounds remain under the new credit law dispensation. Thus, courts faced with an application for attachment *pendente lite* under the NCA will, should they find it permissible thereunder, have to consider whether the necessary common law requirements have been met. It is probable that the courts will look to pre-NCA judicial precedent to aid them in exercising their discretion in this regard.

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[35] Harms (note 3).

[36] S Pete *Civil Procedure: A practical guide* (2005) 447.

[37] Ibid at 447.

PART B

DEBT ENFORCEMENT:

Through Repossession or Judgment

1. Introduction

The NCA is a comprehensive piece of legislation, regulating a complex credit industry. One aspect of this industry which the Act seeks to regulate is the debt enforcement procedure employed by the credit provider.

The need for debt enforcement arises when there is a contractual breach, that is when one party to the contract fails to fulfill its obligations under that contract. A consumer rarely needs relief in terms of debt enforcement due to the fact that if credit is not properly rendered by the credit provider, the consumer can simply withhold payment. The need to enforce debt obligations would mostly arise in relation to the credit provider, as the aggrieved party.[1] Thus, the emphasis of the present discussion will be on the position of the credit provider, and his rights and obligations when the consumer commits a material breach of the credit agreement. Further, the remedies available to the credit provider when such a breach is committed will be discussed.

First, debt enforcement in general will be discussed, including specific performance and cancellation of the contract under the NCA,[2] highlighting the prerequisites which much be fulfilled before debt enforcement procedures can be undertaken.[3] The focus will then turn to interim measures which may be sought by the credit provider prior to the fulfillment of said requirements. In other words, to matters concerning the maintenance of the status quo and protection of the goods which form the subject matter of the breached credit agreement.

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[1] H Taylor 'Enforcement of debt in terms of the National Credit Act 2005, trial and celebration: A Critical Evaluation' *De Jure* 2009 (1) at 106

[2] "Enforcement" is a *new* term introduced by the Act, but it is not defined therein. Otto and Van Heerden suggest that in the context of the Act the term includes the credit provider using any of is remedies. In other words, to enforce the agreement means an exercise of remedies by the credit provider. See: Otto & Van Heerden 'Debt enforcement in terms of the National Credit Act 34 of 2005' in *TSAR* 2007 (4); JW Scholtz, JM Otto, E van Zyl, CM van Heerden, N Campbell *Guide to The National Credit Act* Issue 2 (2009) Chapter 12.

[3] For a discussion on the procedures of debt enforcement under previous legislative dispensations see: Taylor (note 1).

The most common breach of contract committed by consumers is in the form of a failure to pay the required monthly instalment amount.[4] The Act requires that in the case of breach of contract the parties must attempt to settle their dispute between themselves or by alternative dispute resolution.[5] However, it may be that court action is inevitable.[6] Under such circumstances creditor providers have certain common law remedies available to them, however, it has become common practice to insert consensual "remedy clauses"[7] into credit agreements which provide additional, often draconian, remedies to the credit provider.[8] One of the purposes of the NCA is to limit the credit provider's exercise of its contractual remedies in order to protect the consumer and to "level the playing field between the contracting parties,"[9] in that the credit provider is more knowledgeable and specialised in terms of lending, putting him or her in a superior position to that of a less informed consumer.[10]

When a consumer defaults while in possession of goods sold in terms of a credit agreement to which the Act applies, the credit provider must: decide which rights to enforce;[11] determine if the exercise of those rights is permissible under the Act; and whether those rights are limited in any way.[12]

The specific provisions of the Act regulating debt enforcement will now be discussed. It warrants mention that repossession of the financed goods is not always achieved by legal means. Voluntary surrender is provided for in section 127 of the Act, and will not be discussed in any detail. Suffice to say that the defaulting consumer may surrender the

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[4] A Boraine S Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 Part 1" *De Jure* (2007) 1; Renke *et al* 'The National Credit Act: new parameters for the granting of credit in South Africa' in *Obiter* (2007).

[5] Chapter 7, ss 134–152. See: Taylor (note 1).

[6] Taylor (note 1).

[7] For example, 'acceleration clauses' which force a consumer to pay all due and future instalments when a breach is committed, and *lex commissoria*, which gives the creditor the right to cancel the contract immediately in the case of a breach, even if said breach is not material. See: Joubert *General Principles of Contract* (1987) at 222; RH Christie *The Law of Contract* 4ed (2001) at 487; JM Otto *National Credit Act Explained* 84.

[8] Boraine & Renke (note 3) at 222.

[9] Ibid.

[10] Taylor (note 1) at fn 11.

[11] That is, the credit provider has to elect to either enforce the payment of the arrear instalments by means of a claim for specific performance, or to cancel the agreement and institute a claim to repossess the goods.

[12] A Boraine S Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 Part 2" *De Jure* (2008).

goods to the credit provider and thereby avoid lengthy enforcement procedures.[13] However, legal intervention may be unavoidable. Chapter 6, Part C, sections 129 - 133 deal with debt enforcement by way of repossession or judgment. For purposes of Part C of Chapter 6, it is submitted by Otto and Van Heerden[14] that "enforce" refers to enforcement of a credit provider's remedies by means of legal proceedings, and thus procedures provided for in the law of Civil Procedure must be read in conjunction with these provisions.[15]

Authors[16] accept that the reference to "debt enforcement" in this Part includes, *inter alia,* both claims for specific performance under, and cancellation of, the credit agreement. Whether the credit provider is claiming arrear instalments or return of the goods, the Act is applicable. Support for this proposition is found in the wording of section 123(2) of the Act, which affords, to the credit provider, the right to take the steps provided for in Chapter 6 Part C to enforce and cancel the contract if the consumer is in default.[17] Furthermore, to afford a restrictive interpretation to the sections, finding that they apply only to applications for specific performance would have the effect that a credit provider who wished to utilise a more extreme remedy such as cancellation, would not have to comply with the debt enforcement provisions of the Act, and thereby undermine its very purpose.[18]

Against this background the debt enforcement procedures, and what requirements must be satisfied by the credit provider before he can initiate such procedures will be discussed.

2. Required procedures before debt enforcement and debt procedures in a court

2.1 Notification

The NCA prescribes certain preconditions which must be fulfilled before the credit provider can exercise the available remedies. Before discussing these prerequisites for enforcement, it is worth noting that the enforcement provisions of the NCA are "more

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[13] Otto & Van Heerden (note 2).

[14] Ibid.

[15] Boraine & Renke Part 2 (note 12).

[16] SEE: Boraine & Renke Part 2 (note 12) at fn 131; Otto *Explained* (note 7) at 87-88; Renke et al *Obiter* (note 3)

[17] Boraine & Renke Part 2 (note 12) at fn 131.

[18] Renke et al *Obiter* (note 3).

extensive and differ markedly" [19] from those of the repealed Credit Agreements Act 75 of 1980.[20] Otto points out that the Act goes a long way to assist debtors, and may indeed prove detrimental to credit providers, as certain provisions are vaguely worded and the procedures cumbersome.[21]

Section 129(1)(a) dictates that when a consumer is in default under a credit agreement, the credit provider "may", by written notice, draw the consumer's attention thereto, and further propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court, or ombud. Such referral must occur with the intent that any dispute be resolved, or that a plan be agreed upon to bring the arrear payments up to date.[22] The use of "may" in the section is misleading: the issuance of the notice is not left to the discretion of the credit provider. Section 129 (1)(b) states that, subject to section 130(2), the credit provider may not initiate any legal proceedings aimed at enforcing the agreement until such time as the required notice has been delivered.[23] Therefore, it is clear that the commencement of legal proceedings can only follow the delivery of notice, and compliance with any further requirements set out in section 130.[24]

It must be noted that section 129 (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to court proceedings which could result in such an order.[25] Further, the section 129 (1)(a) notice is required in instances where the matter is *not* subject to debt review.[26]

2.2 Additional Requirements

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[19] Otto & Van Heerden (note 2).

[20] For a detailed discussion of the enforcement procedures under the previous credit law dispensation see: Otto & Van Heerden (note 2).

[21] Otto *Explained* (note 7) 86-8.

[22] JM Otto *Credit Law Service* Issue 15 Para 5-6.

[23] The required notice may be that contemplated in either section 86(10) or 129 (1)(a), whichever applies. A section 86(10) notice is required in instances where the credit provider wants to enforce a credit agreement that is already subject to an application for debt review. A section 129(1)(a) notice is required in those instances where the matter is not subject to debt review. See: Boraine & Renke Part 2 (note 12).

[24] Ibid; Otto *Explained* (note 7) at 87.

[25] Section 129 (2): 'Subsection (1) [of section 129] 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.'

[26] Boraine & Renke Part 2 (note 12).

It is now clear that the section 129 (1)(a) notice is an essential condition for the enforcement of credit agreements by a court, and, in addition to furnishing the information required by section 129 (1)(a), the notice must also clearly set out the nature of the breach committed by the consumer, the consequences thereof, and the means of remedying the breach.[27] The purpose of the s 129(1) notice is not only to indicate to the consumer that he is in breach of his obligations under the agreement, but also to inform the consumer of the rights afforded to him by the NCA, and argue that the consumer should be informed of his additional rights. [28] This proposition is based on the fact that section 3 of the Act has protection of consumers as one of the NCA's most important purposes.

Issuing the notice alone is not sufficient. Before a credit provider can approach the court for an order of attachment, the consumer must have been in default for no less than 20 days, and at least 10 business days have elapsed since the notice of default was delivered to the consumer.[29]The consumer must not have responded to the notice, or has responded by rejecting the credit provider's proposals made therein, and the consumer has not voluntarily surrendered the goods himself.[30]There are certain instances where a court will not entertain the enforcement matter at all, for example if the matter is pending before a Tribunal or has been referred to a debt counsellor, alternative dispute resolution, consumer court or ombud.[31]

3. Attachment and Repossession

3.1 Procedures subsequent to the attachment of goods

Section 131 is the provision of the NCA which authorises repossession of goods, but it does not elaborate much on this topic.[32] Section 131 simply determines that if a court makes an attachment order regarding goods which are the subject of a credit agreement,

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[27] The section 129(1)(a) notice serves as a letter of demand, and forms part of the *facta probanda* on any court action instituted by the credit provider. See: Taylor (note 1); and Renke et al *Obiter* (note 3) at fn 327.

[28] S Stadler 'Consumers and ss 129 and 86(10) of the National Credit Act' *De Rebus* (2009). Available at http://buterworths.uct.ac.za.

[29] There is nothing to suggest that the 20 days and 10 days are cumulative, and that the credit provider must wait 30 days before approaching the court. The periods run concurrently. See: Otto *Explained* (note 7) at 91.

[30] See: the discussion of section 127, which deals with voluntary surrender provided by Renke et al *Obiter* (note 3).

[31] As provided for in section 130 (3).

[32] Scholtz et al (note 2) Chapter 12 at par 12.1 - 12.3.

sections 127(2) to (9) and 128 are applicable to any goods attached under that order.[33] This refers to the execution and the realization process following the attachment order.[34]

3.2 Interim Attachment

The provisions and time periods subscribed by the Act, in regard to debt enforcement are indeed onerous for the credit provider. As a result, credit providers may suffer irreparable harm, particularly where the goods involved can be damaged or deteriorate pending the expiry of the prescribed time limits.[35] It is in this context that the question of interim attachment arises.

It is trite law that interim interdicts are a part of South African law. However, what remains unresolved is whether such a general, generic remedy has any place in the consumer credit context, specifically under the NCA. In other words, what must be determined is whether the NCA places any constraints on the credit provider's access to such an interim remedy.

The question of whether a credit provider was entitled to obtain an order from court, pending cancellation of the agreement, for an interim return of goods to safeguard them against deterioration and damage, arose under the old credit regime.[36]There were conflicting court decisions, which interpreted and applied the relevant section[37] of the now repealed Credit Agreements Act, with some courts finding that such an order could be granted, while others were disinclined to grant interim attachment orders.[38] These decisions have been discussed in detail elsewhere in this paper and do not warrant repeating here.[39]

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[33] Boraine & Renke Part 2 (note 12).

[34] Ibid

[35] Otto *Explained* (note 7) at 91-2.

[36] Otto *Explained* (note 7) at 92.

[37] section 11.

[38] Otto *Explained* (note 7) at 92.

[39] See: Chapter 4 of this paper, on PRIOR PRACTICE: Interim Attachment of Goods Under the Old Consumer Credit Law Dispensation

The Acts under which these cases were decided used particular words and expressions, which are not found in the new Act.[40] Otto asserts that as the NCA uses different terminology it must be interpreted anew.[41] The NCA makes no apparent reference to the interim attachment of goods, pending the cancellation of a contract in order to protect them against deterioration and damage.[42] However, while not expressly providing for the interim interdicts or attachment, the Act does not expressly prohibit the granting of such an order either.[43] Thus, it provides no clear answer as to whether, on a consumer's default, a credit provider is entitled to an order attaching the goods which relate to the credit agreement.[44]

Jones & Buckle, supported by Otto, suggest that attachment *pendente lite* is permissible under the Act provided that the requirements for such an interdict are satisfied.[45] Is there anything in the legislation which supports this contention? Or, does the legislature's silence on the matter offer support to the opposing view that such attachment is prohibited. What will follow is an examination of the pertinent sections within Chapter 6 Part C, with the aim of establishing which contention is correct.

Section 131 acknowledges the granting an order of attachment as part of the repossession of goods sold, following cancellation of the contract.[46]However, it is submitted that the reference to "attachment" in the section is to an order of *final* attachment, being a consequence of a decision regarding the enforcement of the agreement, and given in favour of the credit grantor. As pointed out by Otto,[47]"interim attachment orders serve a different purpose, however, and do not form part of the enforcement[48] of the agreement."

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[40] Scholtz et al (note 2) at 12-30 par 12.8.4.1.

[41] Ibid.

[42] Taylor (note 1); Otto *Explained* (note 3) at 92.

[43] Erasmus, Van Loggerenberg (ed) *Jones & Buckle Civil Practice of the Magistrates' Courts in SA* 9 ed Vol 1 Service 22 (2009) 86-7.

[44] Ibid.

[45] Ibid at 87; Otto *Explained* (note 7) at 91-2.

[46] Taylor (note 1).

[47] Otto *Explained* (note 7) at 91-2.

[48] section 129 (1) read with section 130 (1).

Scholtz *et al*[49] proffers that section 129 (3)(b) can be construed as indicating that the Act does permit the granting of interim attachment orders:

s129 (3) subject to subsection (4), a consumer may-

(a) ...

(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.

It may be argued that the wording of the section creates the impression that the Act allows the granting of such an oder as it entitles the consumer who is in default, after meeting the necessary requirements,[50] to reclaim possession of "any property that had been repossessed by the credit provider pursuant to an attachment order."[51] The wording of section 129(3) raises questions. Firstly, according to section 129 (3)(a) the consumer only has the right to reinstate the agreement "at any time before the credit provider has cancelled the agreement." It is difficult to understand how an agreement can be "reinstated" if it has not been cancelled.[52] Secondly, in order for a credit provider to obtain an interim interdict in the form of attachment, the credit agreement has to have been cancelled.[53] This was decided in the 2008 case of *ABSA Bank Ltd v De Villiers,*[54] in which Fourie J (with Saldanha J and Madima AJ concurring) held that upon the proper interpretation of the debt enforcement provisions of the NCA, and in light of the Act's purpose, "requiring the cancellation of the instalment agreement prior to the attachment and repossession of [the goods] is a necessary requirement for a consistent and harmonised system of debt enforcement and for the protection of consumers' rights." However, this case dealt with *final* attachment, and applied section 127(2) to (9) read with section 131. Therefore, what remains, is to consider what "attachment" in the context of section 129(3) means. If the use of "attachment" in the section was to be given the same meaning as "attachment" in section 131, which is a clear reference to final attachment, in

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[49] Scholtz et al (note 2) par 12.3.

[50] Including the payment of all overdue amounts owed, plus default charges and costs of enforcing the agreement.

[51] Section 129 (3)(a) gives a defaulting consumer the right to reinstate a credit agreement which has *not* been cancelled. Section 129 (3)(b), gives the consumer the right to resume possession of the goods after complying with (3)(a). See: Otto *Explained* (note 7) at 93 fn 116.

[52] Boraine & Renke Part 2 (note 12).

[53] RD Sharrock "Interim Attachment of Goods Sold in terms of a Credit Agreement" *De Rebus* (1989) 446, is of the opinion that until the cancelation of the contract the credit provider does not have the requisite prima facie right and therefore is not entitled to an interim attachment order; L Steyn "Interim Attachment of Goods Sold in terms of a Credit Agreement: More Clarity Required" *SA Merc LJ* (2004) 77

[54] 2008 JDR 1448 (C).

in light of *De Villiers*,[55] section 129(3) would make no sense as it envisages attachment *before* cancellation. Fourie J[56] made clear in his judgment that an order of final attachment is only permissible subsequent to cancellation. Thus, section 129(3) is meaningless unless one interprets "attachment" in this section to mean something different from that of section 131. Perhaps the attachment contemplated in section 129 (3)(b) is *interim* in nature, and not final.

However, while the above proposition may be arguable to a certain degree, it does appear to be largely tenuous. Section 2(1) of the NCA requires that its provisions be interpreted in a manner that gives effect to the purposes set out in section 3. To construe section 129 (3) (b) as permitting interim attachment surely runs contrary to the Act's protection of consumers as they would be confronted with dispossession despite this protection. The author's view is substantiated by Otto[57] who points out that while the section "creates the impression that even a genuine attachment order is possible before cancellation of the agreement," it is unclear and unlikely to be the case. Furthermore, the contention by Renke, that the section is poorly drafted and requires revisitation by the legislature, is citied herein with support.[58]

Where to from here? Well, until such clarity is provided, Otto[59] says that it can "be expected that the courts will follow the practice in their divisions which was followed prior to the National Credit Act whenever a credit provider approaches a court in future for an order securing temporary safekeeping of the goods." The approaches of the various divisions will be discussed in the next chapter.

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[55] *ABSA Bank Ltd v De Villiers (supra).* See: Scholtz et al (note 2) at 12-32 par 12.8.4.2.

[56] *ABSA Bank Ltd v De Villiers (supra).*

[57] Otto *Explained* (note 7) at 93.

[58] Boraine & Renke Part 2 (note 12); Otto *Explained* (note 7) at 93.

[59] Otto *Explained* (note 7) at 93.

CHAPTER 4

PRIOR PRACTICE:

Interim Attachment of Goods Under South Africa's Old Consumer Credit Law Dispensation

1. Introduction

In this chapter the author will analyse the courts approach to attachment *pendente lite* under the old credit regime.

Otto[1] provides a detailed discussion of the legal position of a credit provider who wished to cancel a credit agreement in terms of the Credit Agreements Act and to institute a claim for the return of those goods which formed its subject matter. Briefly, section 11 of the Credit Agreements Act provided that a credit provider may not claim the return of the goods to which the contract relates by reason of a breach of contract by the consumer, unless he has notified the consumer of his breach and has demanded performance.[2] The section required that this notification be by letter.[3] The credit provider was required to notify the debtor of his default and request that he rectify the breach within a certain period or face dispossession.[4] The credit consumer could be afforded no less than 30 calender days in which to correct said breach.[5] Only if the debtor's failure to comply with his obligations persisted, could the credit provider cancel the contract and claim return of the goods.[6] Strictly speaking, cancellation did not fall within the scope of section 11, which dealt only with the return of goods.[7] Restitution is, however, the usual result of cancellation, with the credit provider claiming the return of the goods following the termination of the agreement.[8] Thus, the effect being that section 11 does apply to cancellation, albeit that the section is not limited to instances where the agreement is cancelled.[9]

The provisions of section 11 were indubitable important consumer protection measures.[10] However, Otto submits that the provisions were also cumbersome, and arguably

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[1] Otto Credit Law Service par 29, as cited in Boraine and Renke "Some practical and comparative aspects of the cancellation of installment agreements in terms of the National Credit Act 34 of 2005 (Part 1)" *De Jure (*2007) 226.

[2] JM Otto "Commentary" *Credit Law Service* (1991) Chapter 5 par 29. Available at http://butterworths.uct.ac.za. (Accessed 12 July 2009).

[3] Ibid.

[4] JM Otto *The National Credit Act Explained* (2006) 84.

[5] Otto *Explained* (note 4) at 84-5; Boraine & Renke (note 1).

[6] Otto *Explained* (note 4) at 84-5.

[7] Otto *Credit Law Service* (note 2) par 29.

[8] Otto *Credit Law Service* (note 2) par 29, citing JM Otto *TSAR* (1999) at 163.

[9] Ibid.

[10] JM Otto *Credit Law Service* (note 2) par 29.

detrimental towards the credit provider, especially because of the long 30 day notice period required by the Act.[11] It was often the case in practice that a credit provider delivered the necessary notice knowing that the debtor was unable to meet his obligations, and while waiting out this period the goods deteriorate and depreciate.[12] The effect thereof being that despite defaulting on the contract the consumer continued to benefit from the use and enjoyment of the goods. This was of particular concern where "the goods are by their nature, and by virtue of the use they are put to, at risk, for example, motor vehicles."[13]

The question arose under the Credit Agreements Act whether the credit provider can, pending the expiry of the 30 day period or cancellation of the contract, approach the court for an interim attachment order.[14] The purpose of such an order was to serve as an interim remedy pending the outcome of the dispute between the parties, and not the permanent return of the goods.[15] Various divisions of the High Court have dealt with the matter, but were inconsistent in their approaches, giving rise to conflicting decisions and divergent opinions.[16]

To date, there has been no case law dealing specifically with this topic under the NCA. Otto[17] is of the view that when dealing with applications for attachment *pendente lite* under the new dispensation, courts are likely to follow the precedents set in their divisions prior to the operation of the NCA. In light of this, it is prudent to consider these cases. What will follow is a discussion of the reported decisions dealing with the matter of interim attachment, as well as various authors' opinions as to the correctness of the judgments.

2. The Judgments

Several decisions taken in the Witwatersrand and Orange Free State (as it then was) highlight the diametrically opposed positions held on this particular issue.[18]

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[11] JM Otto *Credit Law Service* (note 2).

[12] Ibid.

[13] Otto *Explained* (note 4) at 92.

[14] Ibid 92 -3.

[15] Ibid.

[16] Ibid 93.

[17] Ibid.

[18] RD Sharrock "Interim Attachment of Goods Sold in terms of a Credit Agreement" *De Rebus* (1989) 446.

In *Fil Investments (Pty) Ltd v Levinson* 1949 (4) SA 482 (W) the Witwatersrand Local Division was confronted with a claim for the interim return of goods sold under a credit agreement. The court decided that the granting of such an interim order was not possible. The case concerned an application for interim attachment of a motor vehicle, sold in terms of the now repealed Hire-Purchase Act 36 of 1942. The Applicant asserted that he had a right to have the property attached by the Deputy-Sheriff for safekeeping, pending institution of the main action. Section 12(b) of this Act required that written notice be issued and a 10-day notice period elapse before the credit provider could "enforce any provision in the agreement for the payment of any amount as damages or for any forfeiture of for the acceleration of the payment of any instalment."[19] Roper J interpreted "forfeiture" widely, and regarded any loss of possession to fall within its meaning:

"In my view forfeiture may mean loss of possession of property or of the right to possess property, and the property may be other than money[20] ... the word is wide enough to cover the loss of any right or privilege by reason of a breach of covenant, and in my view the word is used in that sense in the Act with which I am now concerned. I consider, therefore, that loss of possession of the car is a forfeiture in terms of section 12."[21]

The judge, applying the requirements for the granting of an interim interdict, found that the credit provider had no prima facie right to claim the goods, as such a right only accrued once the requirements of the Act were fulfilled:

"No authority was quoted to me for the proposition that a litigant was entitled to the intervention of the Court to protect a right of action which had not yet accrued to him; and, so far as I am aware, in all cases in which courts have made orders protecting property pending action at least a *prima facie* right of action has been established. Here there is no right of action because no demand has been delivered to the respondent as required by the Act."[22]

The court found interim attachment orders were not permissible in these circumstances, and dismissed the application.

Some years later the question arose again, this time in the Free State Local Division. In *Santambank Bpk v Dempers* 1987 (4) SA 639 (O) the court held that a credit provider

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[19] At para 485. See: JW Scholtz et al *Guide to the National Credit Act* (2008) at par 12.8.4.1 fn 144; Boraine & Renke Part 1 (note 1) 228.

[20] Roper J at page 485. Roper cited the decision of *In re Sumner's Settled Estates* (1911 (1) Ch. 319) Mr. Justice EVE, dealing with the meaning of "forfeiture" in the English Settled Land Act of 1882, said:
"I think that the word is here used with the meaning assigned to it in the Imperial Dictionary, where it is said 'in regard to property 'forfeiture' is a loss of the right to possess'; and that it includes cesser, or determination on bankruptcy, alienation, remarriage, or any other event."

[21] At 485.

[22] At 486.

could obtain an interim attachment for the purpose of protecting goods from damage and depreciation, before the expiry of the required notice period.[23] The case concerned an appeal against an order, under section 30 of the Magistrate's Court Act, refusing to grant an interim attachment of a motor vehicle, leased in terms of the Credit Agreements Act.

The case was distinguished from *Fil Investments* as the order sought was "teruggawe vir veilige bewaring" ("return of goods for safekeeping"), which does not mean the same as "forfeiture" under the Hire-Purchase Act.[24] Briefly, Lichtenberg J (with Brink J concurring) reasoned as follows: section 11 of the Credit Agreements Act did not forbid the granting of an interim interdict (i.e. during the 30-day notice period) for the protection of goods sold and leased, as such attachment is not the same as claiming return of the goods, contemplated by section 11.[25] A credit provider applying for attachment *pendente lite* is not requesting 'return' of the goods, but only that the goods be removed from the possession of the debtor and placed in the custody of the Sheriff.[26] The latter is not prohibited by section 11. The learned judge examined section 18 of the Credit Agreements Act, which provides for the issuing of summons when the credit provider seeks to sue for specific performance under the contract. Unlike section 11, under section 18(1) and (2) there is no mandatory waiting period and in these circumstances no protection is afforded to the credit consumer's right to use the goods, as the credit provider was permitted to issue summons immediately. Lichtenberg J points out that it is unlikely that the legislature intended to put the credit provider who sues for cancellation in a worse position than he who sues for specific performance. In the court's view, as the legislature did not seek to protect the rights of the consumer when sued for specific performance, it does not seek to protect the consumer's right to use the goods prior to the expiry of the 30-day period either.[27] Such an order should be permitted as the credit provider is entitled to the return of his goods in the condition in which they were at the time when he exercise his right of cancellation of the contract, provided the credit provider fulfills the necessary requirements.[28] The requirements referred to are those for interim interdicts. Lastly, the court found that the

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[23] at 645. See: Boraine & Renke Part 1 (note 1) at 227.

[24] L Steyn "Interim Attachment of Goods Sold in terms of a Credit Agreement: Has the issue been resolved?" *SALJ* (2000) 661 at 663.

[25] Boraine & Renke Part 1 (note 1) at 227.

[26] Scholtz et al (note 19) at fn 144.

[27] at 646. See: Steyn *SALJ* (note 24) at 663.

[28] at 647-8. See: Steyn *SALJ* (note 24) at 664.

application, while permissible, was subject to a condition: the application for interim attachment must be followed, as soon as possible, by an action for cancellation of the agreement and return of the goods.[29] It is clear from the judgment that such an order is not a right. The credit provider will have to advance good reasons for such an order to be granted. It was accepted that where the goods in question are by their nature subject to rapid depreciation and damage, and that the credit provider's security is at risk, would be good reasons.

Santambank v Dempers[30] was initially, however, not followed in the Witwatersrand Local Division, and was rejected in *First Consolidated Leasing and Finance Corporation Ltd v N M Plant Hire (Pty) Ltd* 1988 (4) SA 924 (W). The court followed the *Fil Investments*[31] decision, in holding that any loss of possession by the debtor was prohibited by section 11:

"[Section] 11 expressly disentitles the applicant to claim 'the return of the goods' at this stage. In my view attachment, albeit by the deputy-sheriff, amounts to claiming such return."[32]

The court considered itself to be bound by a line of cases dealing with section 12(b) of the Hire-Purchase Act.[33] Goldstein J[34] relied upon the wide meaning of "forfeiture" proffered by Roper J in *Fil Investments*, the judge found that if "forfeiture" includes loss of possession, then the words "the return of the goods" in section 11 of the Credit Agreements Act "bear at least such a meaning".[35] The learned judge reached the conclusion that attachment *pendente lite* was a loss of possession sufficient to meet the definition and therefore not permissible, despite the contrary finding in *Santambank v Dempers.*[36]Goldstein J held that while, as raised in *Santambank v Dempers,* the credit provider (as owner) is entitled to the

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[29] Scholtz et al (note 19) at fn 144; Boraine & Renke Part 1 (note 1) at 227.

[30] *supra.*

[31] *supra.*

[32] at 925 C: See Scholtz et al (note 19) at fn 144.

[33] at 925 F.

[34] at 925.

[35] at 925G/H - I Goldstein J said as follows:
"It seems to me that the decision is in conflict with that in the Fil Investment case supra. In the Santambank decision supra Lichtenberg J distinguishes the Fil Investment case and others on the basis that the word 'forfeiture' in s 12(b) does not have the same meaning as the expression 'teruggawe vir veilige bewaring' (return of the goods for safekeeping). The passage at 485 in the Fil Investments case supra quoted by me shows that Roper J regarded the mere loss of possession of property as falling within the meaning of the word 'forfeiture'. I am in respectful agreement with this view. It seems to me that if the word 'forfeiture' includes the loss of possession, the words 'return of the goods' in s 11 bear at least such a meaning."

[36] at 925 F-1. See: Sharrock (note 18) at 447; Steyn *SALJ* (note 24) at 663.

return of his property in the condition in which it is at the time of cancellation, such time has not arrived, as the contract cannot be cancelled until the required period lapses.[37]
However, the decision in *First Consolidated Leasing Corporation* was subsequently rejected in the Witwatersrand. *BMW Financial Services (Pty) Ltd v Mogotsi* 1999 (3) SA 384 (W) followed the Free State Division's approach, endorsing the decision of Lichtenberg J in *Santambank v Dempers*. The facts of the case are as follows:[38] The case concerned an unopposed, urgent application for attachment *pendente lite* of a 1995 BMW Convertible which had been leased to Mr Mogotsi in terms of a contract concluded under the Credit Agreements Act. The parties agreed that should the respondent breach the contract, the applicant would be entitled to obtain possession of the vehicle and recover damages arising from the breach. Mr Mogotsi committed a breach when he fell into arrears with his monthly instalments. In compliance with the Credit Agreements Act, the applicant issued notice to the respondent, claiming return of the vehicle. Before the expiry of the 30-day notice period the applicant made application to the court for an order authorizing the Sheriff to attach the vehicle for safekeeping, until such time as the respondent paid all outstanding moneys, failing which, the outcome of the action instituted for the cancellation of the contract and permanent return of the vehicle.

Willis J examined the approaches taken in earlier case law and the reasons set out therein. The learned judge criticized and rejected the reasoning of Goldstein J in *First Consolidated Leasing*,[39] holding that the Credit Agreements Act which repealed and replaced the Hire-Purchase Act used different wording, namely 'return of goods' and not 'forfeiture' and this alteration must have been a deliberate action of the legislature. Willis J said "...it strains the meaning of the words to hold that 'return of goods' to the credit grantor [provider] means the same as 'forfeiture' of the goods by the credit receiver [consumer]."[40]

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[37] at 926 C-D. See: Steyn *SALJ* (note 24) at 663.

[38] at 385 F-J.
at 386 A-B. See: Steyn *SALJ* (note 24) at 664; L Steyn "Interim Attachment of Goods Sold in terms of a Credit Agreement: More Clarity Required" *SA Merc LJ* (2004) 77 at 79.

[39] at 387 C-D. See: Steyn *SALJ* (note 24) at 665.

[40] at 387 C-D.

Willis J quotes with favour the views expressed by Lichtenberg J in *Santambak v Dempers*[41], preferring this interpretation of section 11 over that of Goldstein J.[42]
Further, Willis J was referred, by counsel for the applicant, to the unreported Witwatersrand decision of *FBC Fidelity Bank v Spies* (case no 99/378 WLD) which "was a matter in which the facts bore a remarkable resemblance to those of the instant case." The application for interim attachment was granted by Leverson J in this matter, however, the learned judge passed away before giving reasons for his decision.[43] Willis accepted the submission of counsel that Leverson J reached the conclusion that Goldstein J was incorrect in his reasoning in *First Consolidated Leasing*.[44]

Thus, there were two conflicting Witwatersrand Local Division decisions with which Willis J was faced, and he believed he could follow whichever he considered to be the better.[45] Willis J, satisfied that Goldstein J's reasoning was wrong, held that a credit provider was entitled to apply for an interim order authorising the Sheriff to attach goods for safekeeping pending the institution, of an application for the cancellation of the contract and permanent return of the goods.[46] Thus, the applicant was successful in its application.

From the above, it is apparent that the position regarding the granting of interim attachment orders pending the expiry of the notice period was far from resolved. Otto states in this regard, "this is one of those cases where a definite answer is not that easy."[47] Steyn[48] writes that in his opinion Willis J, in *Mogotsi,* correctly rejected Goldstein J's interpretation of section 11, as argument that the section should bear the same meaning

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[41] "Gevolglik is ek van oordeel dat daar in beginsel geen beswaar kan bestaan nie teen die verlening van tussentydse regshulp pendente lite al is die aksie nog nie ingestel nie, mits dit so spoedig moontlik ingestel word nadat die tussentydse regshulp verleen is (en sodanige spoedige instelling van die aksie kan deur 'n gepaste bevel - wat deel vorm van die bevel vir tussentydse regshulp - verseker word), en mits die tussentydse regshulp natuurlik ook andersins regtens geoorloof is. Ingevolge die bogenoemde beslissing sou dit egter nie regtens geoorloof wees nie indien die woorde "teruggawe eis" in art 11 van die Wet dieselfde betekenis het as die woord "verbeuring" in art 12(b) van die Huurkoopwet, of indien herbesitname ("repossession") van die koper se eiendom gelyk staan aan "oorhandiging vir veilige bewaring" wat in die onderhawige aansoek gevorder was." at 645G.

[42] at 387 D-G. See: Steyn *SALJ* (note 24) at 665.

[43] at 387 G. See: Steyn *SALJ* (note 24) at 665.

[44] at 387 G-J. See: Steyn *SALJ* (note 24) at 665.

[45] at 388 A-B.

[46] Scholtz et al (note 19) at fn 145.

[47] Otto *Credit Law Service* (note 7) at par 29.

[48] Steyn *SALJ* (note 24) at 661.

as section 12(b) of the Hire-Purchase Act[49] cannot be supported. Steyn, however, has expressed his reservations regarding the decision in *Santambank v Dempers*, which was followed by Willis J.[50] In addition, Van Eck[51] and Eislen[52] proffer their support to Goldstein J's decision. Sharrock, too, levels criticism at Lichtenberg J's decision. While he acknowledges that the court in *First Consolidated Leasing and Finance Corporation* "appears to have misconstrued s 11"[53] however, the decision remains in his opinion to be correct. Sharrock points that a "major obstacle in the way of the creditor" is that, as applicant, he has to satisfy the common law requirements for an interim interdict and establish a prima facie right which he is seeking to protect.[54] That is, before the credit provider can claim the interim attachment of the goods, that right must have accrued to him.[55] Both Steyn and Sharrock criticise the *Santambank* decision on this basis. Sharrock says that, "[it] is trite that a breach *per se,* no matter how serious does not put an end to the contract or the rights of the parties under it ... the debtor's right to use the goods, therefore, is not affected by his failure to make payments and he may continue to use the goods prior to cancellation without committing any infringement of the creditor's rights of ownership."[56] Thus, prior to the expiry of the 30-day notice period and thereafter cancellation of the contract, the credit provider only has a claim for payment and is not entitled to the interim attachment of the goods. [57]

Otto expresses his support for the decision in *Santambank v Dempers,* and states that he is inclined to support those decisions in which the granting of interim attachment orders are favoured.[58]

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[49] *supra.*

[50] Steyn *SALJ* (note 24) at 666.

[51] *SA Merc LJ* (1989) 416.

[52] *De Jure* (1990) 98.

[53] Sharrock (note 18) at 446.

[54] Ibid at 447-8.

[55] Ibid 448.

[56] Ibid.

[57] Ibid 448; Steyn *SALJ* (note 24) 666.

[58] Ibid.
Otto's view in this regard has been cited with support by Boraine & Renke (note 1) at 228.

It remains to be seen what approach the courts of the NCA-era will adopt when faced with an application for interim attachment. Will Otto[59] be correct in his assertion that although the NCA has new terminology and must be interpreted anew, the courts may follow the approaches adopted in their divisions based on former legislation? It is arguable that following "the same procedure that was previously followed may improve the transition from the old system to the new, in terms of interim stress on the lower courts in this regard."[60]

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[59] Otto *Explained* (note 4) at 90 and 94-5.

[60] H Taylor "Enforcement of debt in terms of the National Credit Act 2005, trial and celebration: A Critical Evaluation" *De Jure* Vol 1 (2009) at 117.

CHAPTER 5

A COMPARATIVE PERSPECTIVE:

An Examination of Foreign Consumer Credit Laws

1. Introduction

Legislation protecting debtors in various ways is an international phenomenon. The legislation differs from country to country, depending on the needs, circumstances, resources, political and economic climates and history of the country. Regional considerations and a need for uniformity may also play a role as can be seen in Europe.[1] Certain legislatures may aim to protect the consumers, while others may have a wider field of application.[2] Some countries have very concise legislation which provides the credit industry and consumers alike with basic principles but little substantive detail.[3] While, other countries prefer to set out the rules and regulations comprehensively in the legislation itself.[4] Variations on this theme are possible and credit legislation in different countries may be comparable to each other, but are seldom similar.[5]

Interim attachment of goods sold on credit is not without precedent in foreign consumer legislation, where the object is to protect the security of the creditor.[6] In this chapter the the foreign practice in this regard will be examined, presenting the approaches to debt enforcement and attachment adopted in the consumer credit legislation of the United Kingdom, New Zealand and United States. These jurisdictions were selected because of the similarity of their consumer protection and credit law principles to those of South Africa. In addition, consumer credit law reform has taken place in these countries in recent years, thus providing the most accurate and modern sources for comparison. Moreover, the consumer credit laws of England and New Zealand were chosen because of the specific reference made to these jurisdictions in the South African Law Commission's Working Paper.[7]

Despite South Africa being a developing country it is useful to contrast our law with that of other countries. The challenges faced by the South African credit market are very similar to

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[1] JW Scholtz, JM Otto, E van Zyl, CM van Heerden, N Campbell *Guide to The National Credit Act* (2009) Chapter 1.

[2] Ibid.

[3] Ibid. Such as Germany.

[4] Ibid. Most English speaking countries have this tradition.

[5] Ibid.

[6] JM Otto and NJ Grove', "The Usury Act and Related Matters: New Credit Legislation for South Africa" *South African Law Commission Working Paper 46 Project 67* (1991) at 361.

[7] Ibid.

those of many other jurisdictions, both developing and developed, these include *inter alia*, reckless lending and over-indebtedness, lack of transparency and disclosure, lack of consumer awareness, and unscrupulous lending practices. The countries described below have market economies and similar legal systems to South Africa, and credit transactions are fundamentally the same despite the setting and context.

As a starting point this chapter will consider whether the jurisdictions in question recognise the generic procedural remedy of interim interdicts in the form of attachment. Secondly, the constraints on this general remedy within the consumer credit law context will be discussed, with reference to legislation and academic writings.

2. The Jurisdictions

2.1 England

The first jurisdiction to be examined will be the United Kingdom. South Africa has a mixed legal system, made from the interweaving of a number of distinct legal traditions: a civil law system inherited from its Dutch colonisers, a common law system from its English colonisers, and African Customary Law, or indigenous laws.[8] These traditions have had a complex interrelationship, with the English influence most apparent in procedural aspects of the legal system and methods of adjudication, and the Roman-Dutch influence most visible in its substantive private law.[9] As discussed in the previous chapter, an application for attachment *pendente lite* falls within the scope of interim interdicts, and as such is a part of our procedural law. For this reason the author shall consider the English Law as well as the laws of Scotland, in this regard.

2.1.1 Interdicts: The General Remedy

Before looking at the laws specific to consumer credit, the general remedy of interim injunctions (as 'interdicts' are termed in English law) will be discussed. By way of recap, interim injunctions "are temporary orders made with the purpose of regulating the position between the parties to an action pending trail."[10] English law, as in South Africa, draws a

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[8] F Du Bois, (ed) *Wille's Principles of South African Law* 9th ed. (2007) Chapter 2 at 33-5.

[9] Ibid at 33-5.

[10] S Sime and D French (ed), *Blackstone's Civil Practice* (2009) Chap 37 at 478.

distinction between interim and final injunctions. Similarly, a further distinction drawn is between mandatory and prohibitory injunctions, which can be either final or interim in nature. In the context of this paper, the purpose of the injunctions is to preserve and protect the assets or goods in question pending trail, and is thus interim in nature. The remedy is applicable to cases where the respondent's alleged wrongdoing will cause harm to the applicant's interests, during the period before trail.[11]

The imposition of such a remedy is recognised as a serious matter, and its application limited to appropriate cases.[12]The primary requirement in English law for the granting of interim relief is that the court must be satisfied that the applicant's claim is not frivolous or vexatious, that is, that there is a serious question to be tried.[13] In English law there are various types of interdictory orders which protect and preserve assets pending trail, one example being a freezing order however, this is an order *in personam* and does not operate as an attachment of assets.[14] For the current purpose, it is sufficient to note that interim injunctions issued to preserve goods, which may include attachments, are available under English procedural law.

2.1.2 Legislation: Credit Law

Attachment *pendente lite*, which as seen above is permissible as a general procedural remedy, will now be considered in the context of English consumer credit legislation. The English Consumer Credit Act 2006 was assented to in March 2006, and is similar to our National Credit Act in many ways especially with regard to its purpose and intentions. The 2006 Act introduced significant reforms to the Consumer Credit Act of 1974, extending the scope of the 1974 Act to offer wider protection to consumers from unscrupulous credit providers and to create a more equitable and competitive credit market.[15] The Act and its amendments affect all those who use credit to buy goods or services, for example, hire-

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[11] Ibid at 478.

[12] Ibid at 478.

[13] CB Prest, *Law and Practice of Interdicts* (1993) at 135, citing *American Cyanamid Co v Enthicon Ltd* [1975] 1 All ER 504 (HL) at 510C-D.

[14] Ibid at 114.

[15] E Vaughan, "Consumer Protection: A guide to the consumer protection act 2006" Avaiable at www.glovers.co.uk (Accessed 1 October 2009).

purchase agreements, using a credit card or overdraft facility. It governs the licensing of, and other controls, on traders who supply credit, or goods and services on credit.[16]
An example of the amendments introduced in 2006 include, *inter alia,* the requirements relating to default notices given to consumers by credit providers, the time period in which consumers must respond to the default notice has been increased from 7 days to 14 days.[17]

Section 131 of the Consumer Credit Act 1974 (as amended) concerns the "protection of property pending proceedings," and remains in force under the new dispensation.
The section states as follows:

"The court, on the application of the creditor or owner [of the goods] under a regulated agreement, may make such orders as it thinks just for protecting and property of the creditor or owner, or property subject to any security, from damage or depreciation pending the determination of any proceedings under this Act, including orders restricting or prohibiting use of the property or giving directions as to its custody."

This section gives the court a discretion, allowing it to "make such orders as it thinks just." The section may be construed in such a way that the orders contemplated herein may be seen to include interim remedies, allowing the credit provider to have the sheriff attach the goods for safekeeping, or for an interim injunction which prevent the consumer from doing anything which may devalue or damage the property in question.

As with South Africa's NCA, the United Kingdom's Consumer Credit Act updates consumer credit legislation that had been in place since the 1970s, and makes it more relevant to today's consumers. The Act regulates the process of debt enforcement, requiring the credit provider to fulfill certain mandatory requirements before instituting proceedings against the consumer. Similarly to the NCA, the English Act has as its primary purpose the protection of consumers. It was suggested by Otto *et al,* in the Law Commission Working Paper 46, that such credit provider protection as provided in Section 131 has a place in South African law and should be included in the new credit act. However, an equivalent section was not included in our Act. The NCA does not clearly provide for such protection, but it does not expressly prohibit it either. While it would certainly be going to far to read in such specific credit provider protection into the South African Act, the section in English law does offer persuasive evidence that providing the protection has merit.

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[16] Ibid.

[17] Vaughan (note 15) at fn 10.

2.2 Scotland

Scotland forms part of the United Kingdom. Scotland shares certain legislation with the rest of the United Kingdom, however several pieces of legislation are unique to and applicable in Scotland.

2.2.1 Interdicts: The General Remedy

Injunctions are in Scotland, as in England, recognised and enforceable. It is not necessary to repeat the discussion of the English position above, suffice to say that the same is applicable in Scotland.

2.2.2 Legislation: Credit Law

The Consumer Credit Act 2006 is applicable in Scotland, and thus the discussion above is relevant in this section too. A piece of Scottish legislation which warrants highlighting is the Bankruptcy and Diligence etc. (Scotland) Act 2007. Part 7 of this Act deals with interim attachment of goods by the credit provider. Interim attachment is the 'new diligence'[18] which has been introduced by the Act, that may be used prior to judgement or court action.[19] Although no mention is made of the attachment of goods which form the subject matter of the credit agreement upon which the consumer has defaulted it can be argued that if read with section 131 of the Consumer Credit Act such attachment is permissible. However, the Act limits that which can be attached to "corporeal movables outside the dwelling house" and excludes the attachment of various other items such as tools of the trade.[20]

2.3 New Zealand

New Zealand as a British colony inherited the common law system from English Law.[21]

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[18] Diligence is the Scottish term for methods of enforcing the repayment of debts through legal processes. Diligences include arrestment, attachment and inhibition. See: Scotland's Insolvency Services. Available at http://www.aib.gov.uk/MainNav/Services/dilligence.

[19] S Cowan *Credit Management* (2007) Available at www.britannica.com (Accessed 25 July 2009).

[20] For the list of excluded items see Section 11 of the 2002 Act which has been incorporated into the new Act.

[21] F Crichton *The New Zealand Legal System* (2008). Available at http://www.adls.org.nz/information-for-public/legal-system.

Firstly, the general remedy of interdicts will be considered and then closer attention will be paid to the consumer credit legislation of the jurisdiction, with a particular focus on attachment *pendente lite.*

2.3.1 Interdicts: The General Remedy

New Zealand law recognises the generic remedy of the interim interdict.[22] New Zealand's courts have followed the British in their acceptance and adoption of the principles of *American Cyanamid* decision.[23]

2.3.2 Legislation: Credit Law

What will be considered in this section is whether such interim interdicts are permissible under New Zealand's consumer credit law.

Otto *et al*, in the South African Law Commission Working Paper 46,[24] considered the position of New Zealand's credit laws regarding interim attachment of goods. The Working Paper discussed section 26(4) of the Hire-Purchase Act 1971, which required no letter of demand or notice of default to be sent to the consumer in circumstances where the credit provider's goods may be damages or destroyed. The Act went so far as to not even require that the credit provider obtain a court order before repossession. This position was criticized by Otto *et al*, as "taking the matter too far". This was the position in New Zealand law until 2005. The Act has subsequently been repealed and replaced by The Credit Contracts and Consumer Finance Act 2003 (the CCCFA).

The CCCFA took effect on 1 April 2005 and regulates all forms of consumer credit, including personal loans, credit sales, hire purchase agreements, credit cards, long term leases, home loans and housing buy-back schemes and therefore affects most New Zealanders.[25] When the CCCFA was introduced it replaced the existing credit legislation[26]

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[22] Prest (note 13) at 92.

[23] *American Cyanamid Co v Ethicon Ltd* (1975) 1 All ER 504 (HL).

[24] at 361.

[25] H. Ray *Consumer Credit Law Being Reviewed* (2009) Available at www.beehive.govt.nz (Accessed 1 November 2009)

[26] namely, the Hire-Purchase Act and Credit Contracts Act.

and was intended to provide better protections for New Zealand consumers. The underlying goal of the Act is to empower consumers by requiring disclosure of key information in credit contracts.[27] Currently, the credit law of New Zealand, specifically the CCCFA, is undergoing a review aimed at determining whether the Act is delivering satisfactory outcomes for New Zealanders now, and whether it will continue to do so into the future.[28]

The Credit (Repossession) Act 1997 (the C(R)A) sits alongside the CCCFA. It sets out the rules that apply when a creditor seeks to take possession of consumer goods sold under a security agreement. Such rules include, *inter alia,* repossession procedures and the processes to be followed.[29] The C(R)A is only applicable when a credit agreement, concluded in terms of the CCCFA between consumer and credit provider, provides that property can be attached when default of payment occurs.[30] The 1997 Act addresses a very difficult area of law involving finding the appropriate balance between the rights of creditors and consumers when in a situation of unpaid credit. It provides a number of very powerful rights to credit providers. For example, the Act provides that where there is unpaid credit, repossession agents have the right to enter homes and take possession of consumer goods within broadly prescribed times.[31]

However, neither Act deals with attachment *pendente lite*. It would seem that in remedying the over zealous approach of the 1971 Hire-Purchase Act, the legislature saw fit to remove the attachment mechanisms provided for therein. The legislature has not replaced the offending section with something similar in a milder form but would appear to have done away with them altogether. Whether such exclusion is a legislative oversight or deliberate decision, what remains is that under the new Acts attachment *pendente lite* is unregulated. This may imply prohibition or it may be that the legislature saw fit to leave the matter to be determined by the common law.

2.4 United States of America

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[27] Ray (note 25).

[28] Ibid.

[29] Ministry of Consumer Affairs (NZ) *CCCFA: Credit Sales, a Guide for Retailers* Available at www.consumeraffairs.govt.na (Accessed 1 November 2009)

[30] Ibid.

[31] Ibid; Ray (note 24).

The US operates under a Federal System where each state enacts its own laws, and thus may have different approaches with regard to the current matter. However, the federal government does issue certain statutes which are universally binding, alternatively, pieces of legislation are promulgated by the federal government which can be adapted and adopted by state legislatures. However, the federal courts have no 'federal' attachment procedures and such procedure will be governed by state law in which they sit.[32]

2.4.1 Injunctions: The General Remedy

Interdicts, or injunctions as they are known in US law, are defined as a court order requiring a person to do or cease doing a specific action.[33] Rule 65 of the Federal Rules of Civil Procedure, deals with *Injunctions and Restraining Orders*, and explains what injunctions are and the rules regarding them.[34] Temporary restraining orders and preliminary injunctions are temporary injunctions, they are issued early in a lawsuit to maintain the status quo aimed at stopping the defendant from continuing his or her allegedly harmful actions.[35] As in South African law, injunctive relief is regarded as a discretionary power of the court in which the court, upon deciding that the plaintiff's rights are being violated, balances the irreparability of injuries and inadequacy of damages if an injunction were not granted against the damage that granting an injunction would cause[36]

There is a balancing test that courts typically employ in determining whether to issue an injunction. The defendant's 5th Amendment due process rights are weighed heavily against the possibility of the defendant becoming judgment-proof, and the immediacy of the harm allegedly done to the plaintiff, in other words, assessing how urgent is the plaintiff's need for the injunction.[37] It is emphasized in the law that the duration of the

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[32] MC Helmer "Using prejudgment remedies to preserve nonresident's US assets during foreign litigation" *Practicing Law Institute's International Business & Arbitration 2006 Annual Conference Publication* (2006). Available www.millernash.com. See: Fed. R. Civ. P. 64.

[33] Legal Information Institute of Cornell University www.law.cornell.edu.

[34] Ibid.

[35] Ibid

[36] Ibid

[37] Ibid

injunction is typically as temporary as possible.[38] Additionally, in many states, plaintiffs demanding an injunction are required to post a bond.[39]

The availability of prejudgment injunctive relief under US Law was made clear in *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc.* [40] According to the court, such relief does not necessarily extend to full dispossession, but is rather aimed at prohibiting the defendant from disposing of the assets in his possession. [41] However, the case dealt with an "asset freezing order," which the court found to be unavailable. In a later decision[42] it was held that the finding in *Grupo* did not suggest the unavailability of attachment.

Thus, US law recognises *attachment* as both a prejudgment provisional remedy (injunction/interdict) and as a means to enforce a final judgment. A US court[43] has defined attachment as "a procedure by which the court, at the request of a plaintiff, directs an officer of the court to seize or assert dominion and control over a defendant's assets." Attachment, in this context, is used as a vehicle to preserve assets of a defendant with respect to pending claims.[44] That is, attachment is recognised in US law as an acceptable interim remedy. However, preliminary injunctive relief is considered a drastic remedy that will not be granted unless a clear right is established.[45]

As prejudgment attachment is recognised in US law, what must now be examined is whether such attachment is permissible in the credit law context.

2.4.2 Legislation: Credit Law

Consumer credit law is primarily embodied in federal and state legislation. These laws protect consumers and provide guidelines for the credit industry.[46]

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[38] Ibid

[39] Ibid

[40] 527 US 308 (1999). See: Helmer (note 32).

[41] *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc* 527 US 308 (1999).

[42] *Action Electric & Repair* 416 So 2d at 889. See: Helmer (note 32).

[43] Barclays Bank SA v Tsakos 543 A.2d 802 (D.C. 1988).

[44] Helmer (note 32).

[45] *Orange County v Lockey,* 490 NYS 2d 605 (App. Div. 1985). See: Helmer (note 32).

[46] Cornell Law (note 33).

Individual states have passed various statutes regulating consumer credit. The Uniform Consumer Credit Code, promulgated by the federal government, has been adopted in eleven states and Guam.[47] Its purpose is to protect consumers obtaining credit to finance their transactions, ensure that adequate credit is provided, and to generally govern the credit industry.[48]

US Congress passed the Consumer Credit Protection Act, in part to regulate the consumer credit industry.[49] The Consumer Credit Protection Act requires creditor providers to disclose credit terms to consumers, also protects consumers from loan sharks, restricts the garnishing of wages, and established the National Commission on Consumer Finance to investigate the consumer finance industry.[50] Credit card companies and credit reporting agencies are also regulated by the Act.[51] In addition, it prohibits discrimination based on sex or marital status in the extending of credit, moreover the Act regulates certain debt collectors and their procedures.[52] Thus, having very similar purposes to that of South Africa's NCA. However, the Act has nothing to say about attachment *pendente lite*.

The laws of most US states permit such attachments. The approaches of three states will be briefly outlined.

Under Florida law a credit provider may secure an attachment against a debtor.[53] However, the attachment claim cannot be brought alone. I may only be brought when there is an action seeking enforcement of a credit agreement or judgment on a debt.[54] This is a clear reference to interim attachment, brought prior to the issuing of judgment. In New York State, while attachment is permitted primarily to found quasi in rem jurisdiction,[55] it may also serve as a means of providing security for a credit provider who is seeking

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[47] Ibid

[48] Ibid

[49] Ibid

[50] Ibid

[51] Ibid

[52] Ibid

[53] See: *Payton v Swanson* 175 So. 2d 48, 49 (Fla. Dist. Ct. App. 1965).

[54] See: *Jansik v Studstill & Hollenbeck*, 16 So. 2d 165, 166 (Fla. 1944).

[55] The power of a court to hear a case and enforce a judgment against a party, even if the party is not personally before the court, solely because the party has an interest in real property or personal property within the geographical limits of the court. http://legal-dictionary.thefreedictionary.com.

judgment.[56] Similarly, Texas allows a credit provider to approach the court for an order of attachment (called "a Writ of Attachment").[57] However, it is described as "the least used of the major prejudgment remedies."[58]

Because attachment *pendente lite* deprives the debtor of the power to use, enjoy and dispose of his property before final judgment is given, they are subject to stringent safeguards.[59] It is common most states that an application seeking an attachment must be supported by an affidavit and allege facts demonstrating that such attachment is permissible under one or more statutory grounds. Further, it must establish a "reasonable probability that a judgment will be rendered on the underlying claim."[60]

3. Conclusion

The approaches of other jurisdictions to interim attachment orders offer lessons from which the South African courts can learn and experience from which they can draw. Foreign best practice may be of use in such circumstances, and although only persuasive in value, may prove helpful and illuminating when a court is faced with an application for interim attachment.

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[56] Helmer (note 32)

[57] Texas Civil Practice and Remedies Code s61.002. See: DD D'Arche *Prejudgment Remedies in Texas* (2002). Available at www.bakerlaw.com (Accessed 17 January 2010).

[58] Ibid.

[59] BA Blum *Bankruptcy and Debtor/Creditor: Examples and Explanations* 4ed (2006) at 12.

[60] Florida Statute s76.08, 76.24. See: *Cerna v Swiss Bank Corporation* 503 So. 2d 1297 (Fla. Dist. Ct. App. 1987).

CHAPTER 6

CONCLUSION

This paper has considered the position of the South African credit industry, provider and consumer under the new credit law dispensation. Its objective was to establish whether the interim attachment of goods sold on credit is permissible under the NCA.

Undoubtably, the NCA has ushered in a new era of credit law and regulation for South Africa, as it seeks to successfully regulate the multifaceted credit industry.[1] It has placed significant emphasis on its role has a consumer protection mechanism, confining the credit providers' lending and recovery practices within certain established parameters and chastising those who do not comply. Such regulatory restriction of a credit provider's activities, prominent in many jurisdiction's credit laws, finds support in a deep seated cultural unease with credit and debt.[2] In Western societies, such attitudes can be traced back to biblical injunctions against usury and historical prohibitions on lending, with philosophers like Aristotle and Marx condemned lending at interest.[3] Further, in Islam there are religious injunctions against usury.[4]

The preceding chapters have presented the history and purpose of the Act, outlining the reason for its implementation and its objectives.[5]
The difficulties with the old legislation prompted law makers to review it. From the legislative enquiries they were found wanting, and the legislature undertook the task of drafting a new act rather than amending the existing ones. The flaws of the old dispensation included, *inter alia,* being outdated and obsolete in many respects, unable to deal with the fast growing credit market. It offered ineffective consumer protections allowing for over-indebtedness and unscrupulous lending practices to persist.[6]

The primary aim of the NCA is to protect the credit consumer, not only from unethical lenders but also from themselves.[7] However, while the Act is essentially consumer

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[1] Renke *et al* 'The National Credit Act: new parameters for the granting of credit in South Africa' in *Obiter* (2007).

[2] N McBride *Consumer Credit Regulation,* presented at Asian Conference on Consumer Protection, Competition Policy and Law (2003)

[3] Ibid.

[4] Ibid.

[5] JM Otto *The National Credit Act Explained* (2006) at 2.

[6] Department of Trade & Industry (South Africa) *Consumer Credit Law Reform: Policy Framework for Consumer Credit* (2004).

[7] Otto *Explained* (note 5). See: NCA Chapter 3.

orientated, it does not ignore the plight of the unpaid credit provider.[8] The interests of credit providers are also protected as the Act aims to provide effective enforcement of debt and effective access to redress.[9]

What is at issue in this paper is whether the granting of interim interdicts, to protect goods sold on credit, is one of the ways credit providers' interests are protected under the Act. Interim interdicts are important judicial remedies and, unless expressly prohibited by statute, are available in a multitude of situations.[10] The permissibility (or prohibition) of interim interdicts in the form of attachment are not expressly provided for in the Act, however, it has been suggested that it may be implicit therein.[11] The wording of section 129(3) may be construed as permitting the granting of these orders.[12] But, before assigning such meaning to this section it is necessary to look at the intention of the legislation as a whole. Section 2(1) of the Act requires that all its provisions be interpreted in a manner which gives effect to the Act's purposes in section 3. Would the granting of such an order not undermine the protections afforded to the consumer, and thus the objectives in section 3? It will be left for the courts to decide whether the granting of such an order is permissible. This will depend on their reading and interpretation of the enforcement provisions[13] of the Act, as well as the value attached to pre-2005 judgments.

Under the old credit law dispensation, the courts were divided over whether the legislation prohibited the granting of interim attachment orders prior to the expiry of the required notice periods. Their decisions turned on the courts' interpretation of the provisions of the now repealed Credit Agreements Act and Hire-Purchase Act. Some judges found that the acts could be construed as allowing for granting of such attachment *pendente lite*,[14]while others held that dispossessing the defaulting consumer before the expiry of the prescribed

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[8] H Taylor 'Enforcement of debt in terms of the National Credit Act 2005, trial and celebration: A Critical Evaluation' *De Jure* 2009 (1) at 103-4.

[9] Otto *Explained* (note 5).

[10] CB Prest *Interlocutory Interdicts* (1993).

[11] W Scholtz, JM Otto, E van Zyl, CM van Heerden, N Campbell *Guide to The National Credit Act* Issue 2 (2009) Chapter 12 par 12.3.

[12] Ibid.

[13] specifically, section 129(3).

[14] *Santambank Bpk v Dempers* 1987 (4) SA 639 (O); *BMW Financial Services (Pty) Ltd v Mogotsi* 1999 (3) SA 384 (W).

notice period was unjustified.[15] The approaches adopted by these courts, although applying repealed legislation, may be followed by the courts when faced with similar issues in the new regime.[16] It is arguable that following "the same procedure that was previously followed may improve the transition from the old system to the new, in terms of interim stress on the lower courts in this regard."[17]

When drafting legislation, drafters may be influenced by foreign best practice. Otto and Grove' looked to the approaches taken in foreign jurisdictions with regard to the issue of interim attachment.[18] They cited the English approach with support.[19] Section 131 of the Consumer Credit Act 1974 (as amended) provides for the "protection of property pending proceedings" and affords the English courts a discretion to have goods placed in the custody of the sheriff for safekeeping pending the finalisation of the case. Despite the section being cited with support in the Law Commission Paper[20] the legislature did not address it, and thus it would be going to far to read such a specific provision into the legislation.

Of the other jurisdictions[21] considered herein only the United States allows for the interim attachment of goods pending the outcome of litigation. However, the aim of such attachment is somewhat different to that of attachment for safekeeping from damage and depreciation. Under the American system it is used as a means of preventing the debtor from alienating the goods prior to the credit provider being able to execute against them. However, the nature of the remedy remains the same, an interim interdict (injunction). The US courts have recognised the value of the remedy but also its propensity for abuse. Therefore, the granting of such order is subject to stringent safeguards.

What conclusions can be drawn from this paper?

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[15] *Fil Investments (Pty) Ltd v Levinson* 1949 (4) SA 482 (W); *First Consolidated Leasing and Finance Corporation Ltd v NM Plant Hire (Pty) Ltd* 1988 (4) SA 924 (W).

[16] Otto *Expalined* (note 3) at 90 and 94-5.

[17] Taylor (note 8) at 117.

[18] JM Otto and NJ Grove', "The Usury Act and Related Matters: New Credit Legislation for South Africa" *South African Law Commission Working Paper 46 Project 67* (1991) at 361.

[19] Ibid.

[20] Otto & Gorve' (note 18).

[21] Outside the UK.

The NCA is unclear on the issue and the matter is left for the courts to resolve. As of yet no court, applying the Act, has dealt with the question of attachment *pendente lite*, and therefore we will have to wait for resolution on the matter. As the courts begin to grapple with this voluminous piece of legislation and the judgments roll in we will begin to better understand the Act, as its intricacies are unravelled and its areas of obscurity are clarified. What is certain is that in the future debt enforcement, in any form, will necessitate a far more comprehensive approach than was required under the Credit Agreements Act.[22]

The author is of the opinion that to deny credit providers recourse to the remedy of interim attachment would be unsatisfactory. However, to allow them free access to such recourse would be undesirable. It is submitted that an ideal approach would be a hybrid, of sorts, combining the English and American approaches. Firstly, the remedy should be available and granted at the discretion of the court. However, this discretion must be curtailed and limited to specific instances, subject to stringent safeguards and only granted when these have been indubitably satisfied.

[22] Otto & Van Heerden 'Debt enforcement in terms of the National Credit Act 34 of 2005' in *TSAR* 2007 (4) at 684.

BIBLIOGRAPHY

Primary Sources

Cases

ABSA Bank Ltd v De Villiers 2008 JDR 1448 (C)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 (HL)

Blackburn v Krohn (1855) 2 Searle 209

BMW Financial Services (Pty) Ltd v Mogotsi 1999 (3) SA 384 (W)

BMW Financial Services (Pty) Ltd v Rathebe 2002 (2) SA 368 (W)

De Smidt v Steytler (1852) 1 Searle 136

Dickson & Co v Sunley (1846) 3 Menz 340

FBC Fidelity Bank v Spies (case no 99/378 WLD)

Fil Investments (Pty) Ltd v Levinson 1949 (4) SA 482 (W)

First Consolidated Leasing and Finance Corporation v NM Plant Hire (Pty) Ltd 1988 (4) SA 924

Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc 527 US 308 (1999)

LF Boshoff Investments (pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C)

Maynerd v Properties of Colonial Bank (1849) 3 Menz

Payton v Swanson 175 So. 2d (Fla Dist Ct App 1965)

Santambank Bpk v Demper 1987 (4) SA 639 (O)

Saunders v Executrix of Hunt (1980) 2 Menz 295

Setlogelo v Setlogelo 1914 AD 221

Willet v Blake (1943) 3 Menz 343

South African Statutes

National Credit Act 34 of 2005

Credit Agreements Act 75 of 1980

Magistrate's Court Act 32 of 1944

Hire-Purchase Act 36 of 1942

Usury Act 37 of 1926

Foreign Statutes

UK

Consumer Credit Act 1974

Consumer Credit Act 2006

Bankruptcy and Diligence etc (Scotland) Act 2007

NEW ZEALAND

Credit (Repossession) Act 1997

Hire-Purchase Act 1971 [now repealed]

Credit Contracts and Consumer Finance Act 2003

UNTED STATES

Federal Rules of Civil Procedure

Uniform Consumer Credit Code

Consumer Credit Protection Act

Secondary Sources

Blum, BA *Bankruptcy and Debtor/Creditor: Examples and Explanations* 4ed (2006)

Boraine, A & Renke, S "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005" Part 1 *De Jure* (2007)

Boraine, A & Renke, S "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005" Part 2 *De Jure* (2008)

Christie, RH *The Law of Contract* 4ed (2001)

Cilliers AC *Herbstein and Van Winsen: The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa* (2009).

D'Arche, DD *Prejudgment Remedies in Texas* (2002)

Department of Trade & Industry (South Africa) *Consumer Credit Law Reform: Policy framework for consumer credit* (2004).

Du Bois, F (ed) *Wille's Principles of South African Law* 9ed (2007)

Erasmus & Van Loggerenberg (ed) *Jones & Buckle Civil Practice of the Magistrate's Courts in South Africa* 9 ed (2009).

Goodwin-Groen, RP *The National Credit Act and its Regulations in the Context of the Context of Access to Finance in South Africa* (2006).

Harms, LTC (ed) *Civil Procedure in the Magistrates' Court.* Available at http://butterworths.uct.ac.za (Lexis Nexis)

Helmer, MC "Using prejudgement remedies to preserve nonresident's US assets during foreign litigation" *Practising Law Institute's International Business & Arbitration 2006 Annual Conference Publication* (2006)

Jordaan, P *The Credit Law of South Africa: A guide to consumers, credit users and credit grantors* (2007).

Joubert *General Principles of Contract* (1987)

Louw, A "Credit Agreements: the National Credit Act 34 of 2005" *Lecture Series.* Available at www.library.und.ac.za. (Accessed 10 November 2009)

Mail & Guardian "It's official: SA hits first recession in 17 years" *Mail and Guardian* (26 May 2009). Available at www.mg.co.za. (Accessed 3 September 2009).

McBride, N *Consumer Credit Regulation,* presented at the Asian Conference on Consumer Protection, Competition Policy & Law (2003).

Ministry of Consumer Affairs (NZ) "CCCFA: Credit sales, a guide for retailers" Available at *www.consumeraffairs.govt.na*

Nortje, T *Impact of the new National Credit Act on Debt Recovery and Credit Bureau Industries* (2009)

Otto, JM *The National Credit Act Explained* (2006)

Otto, JM & Grove' NJ "The Usury Act and Related Matters: New Credit Legislation for South Africa" *SA Law Commission Working Paper 46 Project 67* (1991).

Otto, JM *Credit Law Service* Issue 15 (1991)

Otto, JM "Commentary" *Credit Law Service* (1991)

Pete, S *Civil Procedure: A Practical Guide* (2005)

Prest, CB *Law and Practice of Interdicts* (1996).

Prest, CB *Interlocutory Interdicts* (1993).

Ray, H *Consumer Credit Law Being Reviewed* (2009)

Renke Roestoff & Haupt "The National Credit Act: New parameters for the granting of credit in South Africa" 2007 *Obiter.*

Scholtz, JW Otto, JM Van Zyl, E & Van Heerden, CM *Guide to the National Credit Act* (2008).

Sharrock, RD "Interim Attachment of Goods Sold in terms of a Credit Agreement" *De Rebus* (1989).

Sime, S & French, D (ed) *Blackstone's Civil Practice* (2009)

Snyman, A "Debt is like suspecting you have a terminal illness" *Mail and Guardian* (20 August 2008). Available at www.mg.co.za. (Accessed 3 September 2009).

Stadler, S "Consumers and ss 129 and 86(10) of the National Credit Act" *De Rebus* (2009).

Steyn, L "Interim Attachment of Goods Sold in terms of a Credit Agreement: Has the issue been resolved" *SALJ* (2000) 661.

Steyn, L "Interim Attachment of Goods Sold in terms of a Credit Agreement: More clarity required" *SA Merc LJ* (2004).

Taylor, H "Enforcement of debt in terms of the National Credit Act 2005, trail and celebration: a critical evaluation" *De Jure* Vol 1 (2009).

Van Loggernberg, D Dicker, L & Malan J "Civil Procedure: Aspects of debt enforcement under the National Credit Act" *De Rebus* (2008).

Vaughen, E "Consumer Protection: A guide to the Consumer Protection Act 2006" Available at *www.glovers.co.uk*