REPORTABLE

THE HIGH COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

Case No: 15692/07

In the matter between:

ABSA BANK LTD Plaintiff

and

PIETER DE VILLIERS First Respondent

THE MAGISTRATE FOR THE

DISTRICT OF SIMON'S TOWN Second Respondent

JUDGMENT DELIVERED: 25 NOVEMBER 2008

FOURIE, J

[1] This is a review application which concerns certain aspects of debt enforcement under the National Credit Act No. 34 of 2005 ("the NCA"). In particular, it involves the interpretation of certain provisions of the NCA dealing with the repossession of property that is the subject of an instalment agreement.

[2] The NCA came into operation incrementally and has been fully in operation since 1 June 2007. It has repealed the Credit Agreements Act No. 75 of 1980 and the Usury Act No. 73 of 1968. In terms of section 3 the purposes of the NCA are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by, inter alia, providing for a consistent and harmonised system of debt enforcement which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

[3] Academic writers have commented on various aspects of the NCA, including the provisions dealing with debt enforcement procedures. Apart from articles in law journals, two works have recently been published, namely JM Otto, **The National Credit Act Explained**, 2006 ("Otto") and JW Scholtz *et al*, **Guide to the National Credit Act**, 2008 ("JW Scholtz *et al*"). The views expressed in these two publications, and in the articles published in law journals, have been of great assistance in the preparation of this judgment. I am not aware of, nor have we been referred to, any decisions of our courts dealing with the aspects of debt enforcement which are the subject of this judgment.

[4] The background to this application may be summarised as follows: On 25 August 2006, first respondent concluded an instalment agreement in terms of which he purchased a motor vehicle on certain conditions from Premier Attraction 650CC. The instalment agreement is a credit agreement as defined in section 8 of the NCA, and the NCA applies to the instalment agreement by virtue of the provisions of section 4 of the NCA. All the rights arising out of the instalment agreement, including ownership of the subject motor vehicle, have been ceded and transferred to applicant, the latter being a registered credit provider in terms of section 40 of the NCA. Subsequent to the cession, respondent breached the instalment agreement by failing to make payment of the monthly instalments due to applicant. Applicant brought an urgent ex parte application in the Simon's Town Magistrate's Court, in terms of section 130 (1) of the NCA, for an order authorising the sheriff to attach the motor vehicle which is the subject matter of the instalment agreement, and to hand same over to applicant for safe-keeping. After hearing argument on behalf of applicant, second respondent dismissed the application.

[5] Applicant now seeks an order reviewing, setting aside and correcting second respondent's decision to dismiss the application for the attachment of the motor vehicle. Service of these proceedings was

effected upon first respondent at his chosen *domicilium citandi et executandi*, but he has failed to give notice of his intention to oppose. Second respondent abides the decision of the court, but has filed written reasons for his order dismissing the application. At the hearing of the review application, applicant was represented by Advocate P Coetsee SC, to whom we are indebted for his most helpful submissions, both written and oral.

[6] At the outset I should emphasise that the application in the court below, was not for relief *pendente lite*, but for a final order authorising the attachment of the subject vehicle. Applicant did not institute an action for cancellation of the instalment agreement, nor was it alleged that applicant intended instituting such an action. Applicant maintained that, as a credit provider, it is entitled to obtain possession of the vehicle sold in terms of the instalment agreement, by means of an attachment order, in circumstances where the consumer (first respondent) is in default and refuses or neglects to return the vehicle to applicant. Applicant contended that it only had to prove compliance with the requirements set out in section 130 (1) of the NCA, to be entitled to the order of attachment.

[7] In his reasons for dismissing the application, second respondent found that applicant had duly complied with the requirements of sections

129 and 130 of the NCA, for the commencement of legal proceedings to enforce the instalment agreement. However, he held that a final order for the attachment of the vehicle could not be granted in the absence of an action for cancellation of the instalment agreement by applicant. Second respondent was of the view that applicant's interpretation of the provisions of the NCA, would lead to an unacceptable result, in that it would place applicant in final and permanent possession of the vehicle while maintaining the agreement, thereby absolving applicant from performance in terms of the agreement but requiring performance from first respondent, whilst at the same time depriving first respondent permanently of possession. In addition, second respondent held that the facts set out in the affidavit in support of the application, were insufficient and fell short of the requirements for the granting of urgent applications of this nature.

[8] Mr. Coetsee submitted that these findings of second respondent amounted to errors of law, constituting a gross irregularity in the proceedings. He accordingly argued that the findings of second respondent are reviewable by this court in terms of section 24 (c) of the Supreme Court Act No. 58 of 1958. In this regard Mr. Coetsee relied on the decisions in **Oosthuizen v Landdros Senekal en Andere** 2003 (4)

SA 450 (O) at 455 A – B and **Hira and Another v Booysen and Another** 1992 (4) SA 69 (A) at 93 A – I.

[9] In dealing with the relevant provisions of the NCA, it has to be borne in mind that section 2 (1) of the NCA requires its provisions to be interpreted in a manner that gives effect to the purposes set out in section 3. As explained by JW Scholtz *et al* at 2-2, the NCA is an improvement on the previous legislation in this field. There is no doubt that the provisions aimed at the prevention of the over-indebtedness and exploitation of consumers, are laudable. However, as emphasised by the learned authors, the NCA is unfortunately not always a model of legal accuracy or elegance. As will be illustrated hereinlater, the use of confusing terminology by the legislature, particularly with regard to debt enforcement procedures, tends to hamper the process of interpreting the relevant provisions of the NCA.

[10] Before dealing with the debt enforcement provisions of the NCA, I should refer to section 123, which deals with the termination of a credit agreement by the credit provider. Section 123(1) prescribes that a credit provider may terminate a credit agreement, before the time provided in that agreement, only in accordance with section 123. This section, however, does not detail the steps to be taken by a credit provider to

terminate a credit agreement before the agreed termination date thereof. Section 123 (2) gives some guidance, in providing that if a consumer is in default under a credit agreement, "the credit provider may take the steps set out in Part C of Chapter 6 of the NCA, to enforce and terminate that agreement".

[11] As mentioned by CM Van Heerden and JM Otto, TSAR 2007.4, page 655, the use of the words "enforce" and "terminate" in section 123 (2), is rather unfortunate. These words are not defined in the NCA and their simultaneous use may be confusing. The ordinary meaning of "enforce", in legal parlance, particularly in a contractual setting, would be the enforcement of an obligation. The use of the word "terminate", on the other hand, conveys the legal notion of the extinguishing of contractual obligations. It is difficult to understand how, as a matter of law, a credit agreement can be enforced and terminated at the same time, as is suggested by the wording of section 123(2). Be that as it may, it is necessary to consider the ambit of the relevant remedies which a credit provider has in terms of the debt enforcement provisions of the NCA.

[12] Part C of Chapter 6 of the NCA (sections 129 to 133) deals with "debt enforcement by repossession or judgment". Section 129(1)(b) provides that if a consumer is in default under a credit agreement, the

credit provider may not commence any legal proceedings to enforce the agreement, before complying with the notice requirement of section 129(1)(a), as well as the requirements of section 130. If the word "enforce" in section 129 (1) (b) were to be given the restricted meaning of the enforcement of a contractual obligation, it would mean that where a consumer is in default and the credit provider wishes to invoke the more serious remedy of cancellation, it would not be necessary for the credit provider to comply with the notice provision and other requirements detailed in sections 129 (1) (a) and 130. As stated by Otto 88, this would surely go against the grain of the NCA, one of the declared purposes of which is to protect consumers.

[13] I accordingly share the view of Otto 87/8, that it appears that the legislature has used the word "enforce" in a wide sense, namely the exercising of any of its remedies by a credit provider. In addition to what has been said above, there are other *indicia* of this intention of the legislature, e.g. the use of the words "enforce" and "terminate" in section 123 (2), in describing the steps which a credit provider may take in terms of Part C of Chapter 6 of the NCA. In addition, section 129 (3), which forms part of Part C of Chapter 6, provides that a consumer may at any time before the credit provider has "cancelled" the agreement, rectify his or her breach and resume possession of goods which have been attached.

(See Otto 88 and CM Van Heerden and JM Otto, TSAR 2007.4, page 655).

[14] It follows, in my view, that in the event of a consumer defaulting under a credit agreement, the credit provider who wishes to invoke any remedy at his/her disposal in terms of the relevant credit agreement, will have to comply with the requirements laid down in sections 129 and 130. As I have mentioned previously, second respondent found that applicant had complied with these requirements. What has to be decided, is whether applicant was legally entitled to an order attaching the vehicle, in the absence of the cancellation of the instalment agreement.

[15] First respondent failed to pay the instalments due in terms of the instalment agreement, thereby committing a breach of contract in the form of *mora debitoris*. This entitled applicant, as the innocent contracting party, to exercise one of the following remedies available in terms of the instalment agreement:

(a) To claim specific performance of his contractual obligations by first respondent; or

(b) To cancel the instalment agreement, repossess the vehicle and claim damages for breach of contract.

[16] In terms of our common law principles of the law of contract, a claim for specific performance is only competent if the plaintiff has performed, or is ready and willing to perform, any obligations resting on him or her which are due and reciprocal. (See **Famers' Co-operative Society v Berry**, 1912 AD 343 at 350 and **Ese Financial Services (Pty) Limited v Cramer** 1973 (2) SA 805 (C) at 808-9). A party claiming specific performance of contractual obligations must therefore allege, or tender, performance of such reciprocal contractual obligations.

[17] The reciprocal obligation of applicant under the instalment agreement, is to provide first respondent with the vehicle which is the subject of the agreement. The principles of our law of contract accordingly dictate that, if applicant wishes to institute a claim for specific performance (ie for payment of the monthly instalments due in terms of the instalment agreement by first respondent), the particulars of claim will have to allege that the vehicle has been delivered to first respondent or delivery thereof should be tendered. It follows that a claim for the repossession of the vehicle is inconsistent with a claim for specific performance. I wish to reiterate that I am not referring to a claim for interim repossession pending the institution of a claim for cancellation of the agreement and damages, but to a claim for a final order authorising the attachment of the vehicle.

[18] If, on the other hand, applicant were to institute action for the cancellation of the instalment agreement, it would, in terms of clause 10.3.2 of the agreement, be entitled to repossess the vehicle and to claim damages suffered as a consequence of first respondent's breach of contract. According to our law of contract, restitution (repossession of the vehicle in the instant case) is the normal result following from the cancellation of a contract. By cancelling the instalment agreement, applicant, as the innocent party, would seek to set aside the agreement and return to the *status quo ante,* by claiming repossession of the vehicle, and to claim damages for breach of contract.

[19] It follows from the aforesaid that, in terms of the general principles of our law of contract, an order authorising the attachment of a vehicle which is the subject of an instalment agreement, would be granted by the court as a claim ancillary to the cancellation of the instalment agreement. As mentioned before, second respondent held that, absent a claim for the cancellation of the instalment agreement, applicant was not legally entitled to a final order for the attachment of the vehicle. This decision of second respondent is in accordance with the principles of our common law. What has to be decided, is whether the NCA, and, in particular, Part C of Chapter 6, has introduced a procedure at variance with our common

law, which entitles applicant to repossess the vehicle in the absence of the cancellation of the instalment agreement.

[20] The common law remedies of a credit provider have, as previously indicated, to a certain extent been curtailed by the procedures to be complied with prior to the enforcement of a debt (sections 129 and 130). Applicant, however, contends that Part C of Chapter 6 of the NCA, also allows for the repossession of the goods that are the subject of an instalment agreement, as a means of debt enforcement, without the prior or contemporaneous cancellation of the agreement. For this contention applicant, in particular, relies upon the provisions of section 131, read with section 127, of the NCA.

[21] Section 131 is headed "Repossession of Goods" and reads as follows:

> *"If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127 (2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order."*

[22] Section 127 confers an extraordinary right on the consumer, whereby he or she can rid himself or herself of an instalment agreement,

by unilaterally returning the goods which are the subject of the agreement, to the credit provider. The section then prescribes the procedure to be followed for the recovery, by the credit provider, of the outstanding balance due in terms of the instalment agreement. The section reads as follows:

"127 ***Surrender of goods****.-(1) A consumer under an instalment agreement, secured loan or lease-*

(a) may give written notice to the credit provider to terminate the agreement ; and

(b) if-

(i) the goods are in the credit provider's possession, require the credit provider to sell the goods; or

(ii) otherwise, return the goods that are the subject of that agreement to the credit provider's place of business during ordinary business hours within five business days after the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.

(2) Within 10 business days after the later of-

(a) receiving a notice in terms of subsection (1) (b) (i); or

(b) receiving goods tendered in terms of subsection (1) (b) (ii), a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.

(3) Within 10 business days after receiving a notice under subsection (2), the consumer may unconditionally withdraw the notice to terminate the agreement in terms of subsection (1) (a), and resume possession of any goods that are in the credit provider's possession, unless the consumer is in default under the credit agreement.

(4) If the consumer-

(a) responds to a notice as contemplated in subsection (3), the credit provider must return the goods to the consumer unless the consumer is in default under the credit agreement; or

(b) does not respond to a notice as contemplated in subsection (3), the credit provider must sell the goods as soon as practicable for the best price reasonably obtainable.

(5) After selling any goods in terms of this section, a credit provider must-

(a) credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods; and

(b) give the consumer a written notice stating the following:

(i) The settlement value of the agreement immediately before the sale;

(ii) the gross amount realised on the sale;

(iii) the net proceeds of the sale after deducting the credit provider's permitted default charges, if applicable, and reasonable costs allowed under paragraph (a); and

(iv) the amount credited or debited to the consumer's account.

(6) If an amount is credited to the consumer's account and it exceeds the settlement value immediately before the sale, and-

(a) another credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the Tribunal, which may make an order for the distribution of the amount in a manner that is just and reasonable; or

(b) no other credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the consumer with the notice required by subsection (5)(b), and the agreement is terminated upon remittance of that amount.

(7) If an amount is credited to the consumer's account and it is less than the settlement value immediately before the sale, or an

amount is debited to the consumer's account, the credit provider may demand payment from the consumer of the remaining settlement value, when issuing the notice required by subsection (5) (b).

(8) If a consumer-

(a) fails to pay an amount demanded in terms of subsection (7) within 10 business days after receiving a demand notice, the credit provider may commence proceedings in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement; or

(b) pays the amount demanded after receiving a demand notice at any time before judgment is obtained under paragraph (a), the agreement is terminated upon remittance of that amount.

(9) In either event contemplated in subsection (8), interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider in terms of subsection (7), from the date of the demand until the date that the outstanding amount is paid.

(10) A credit provider who acts in a manner contrary to this section is guilty of an offence".

[23] I should mention that section 128, which is also referred to in section 131 and deals with the situation where a consumer is not satisfied with the sale of the goods, is not applicable in the instant case.

[24] Mr. Coetsee submitted that by incorporating the provisions of section 127 (2) to (9) in section 131, the legislature intended to create a procedure for the attachment of goods where a consumer is in breach of his contractual obligations in terms of an instalment agreement, while the agreement remains extant. In fact, he argued that the credit provider is precluded from cancelling the instalment agreement, as the legislature intended to keep the agreement alive, to enable the parties to deal with the repossessed goods in accordance with the provisions of section 127 (2) to (9). Mr. Coetsee accordingly submitted that the NCA has introduced a procedure at variance with the common law concept of the cancellation of an instalment agreement, upon breach thereof by the consumer. He contended that it is evident from section 127, that the relevant instalment agreement is only terminated in accordance with the provisions of section 127 (6) (b) or section 127 (8) (b). Therefore, Mr. Coetsee submitted, the repossession of goods which are the subject of an instalment agreement, is no longer dependent on a cancellation of the instalment agreement.

[25] In sum, it is applicant's case that in the event of the consumer defaulting, section 131 of the NCA provides for the granting of a final order attaching the goods which are the subject of an instalment agreement, whereupon the credit provider has to realise same in accordance with the provisions of section 127 (2) to (9). Applicant contends that, in such event, the credit provider only has to prove compliance with the requirements set out in section 130 (1) of the NCA. There is, according to applicant, no need for the issuing of a summons claiming cancellation of the relevant credit agreement, either prior to, or simultaneously with, the application for an attachment order in terms of section 131 of the NCA. Such application, applicant submits, may be brought ex parte by the credit provider in terms of section 30 of the Magistrates' Courts Act No. 32 of 1944.

[26] Mr. Coetsee pointed to the following provisions of section 127, to substantiate his submission that the legislature has introduced this procedure whereby the credit provider is entitled to the return of the goods, without cancelling the relevant instalment agreement. Firstly, sub-section 127 (3), which allows the consumer a window period of 10 business days after receiving a written notice from the credit provider regarding the value of the repossessed goods, within which he or she can resume possession of the goods by purging his or her default. Mr. Coetsee

submitted that, had there been a prior cancellation of the instalment agreement, there would be no basis for the consumer to resume possession of the goods. Secondly, subsections 127 (6) and (8), which provide for the "termination" of the instalment agreement pursuant to the sale of the goods. These subsections state that upon the remittance of any excess by the credit provider to the consumer, or the remittance of any shortfall by the consumer to the credit provider, the instalment agreement terminates. Mr. Coetsee submitted that the termination of an instalment agreement in terms of these subsections, is irreconcilable with the concept of the prior cancellation of the instalment agreement by the credit provider, as such cancellation would have resulted in the prior termination of the instalment agreement. He contended that the "termination" of the instalment agreement in terms of sub-sections 127 (6) (b) and 8 (b), would then not make any legal sense, as the instalment agreement had already been cancelled prior to the repossession of the goods.

[27] In interpreting the relevant provisions of the NCA, one should remind yourself that a purposive construction is called for. As emphasised in **Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd**, 2007 (6) SA 199 (CC) at paragraph 52-3, it is necessary that the provisions of the NCA should be read in the light of the

subject matter with which they are concerned, to enable the court to arrive at the true intention of the legislature. In view of the submission of applicant, that the NCA has done away with the right of a credit provider to cancel an instalment agreement, the presumption of our common law, that the legislature does not intend to alter the common law unless it is clear from the language of the statute that the very object is to alter or modify it, should also be borne in mind. (See **Stadsraad van Pretoria v Van Wyk** 1973 (2) SA 779 (A) at 784). However, as pointed out by J R de Ville, **Constitutional and Statutory Interpretation**, page 172, the common law also needs to be critically re-evaluated in the light of the values of the Bill of Rights, before it is allowed to influence the interpretation of legislation. As stated in **Du Plessis and Others v De Klerk and Another** 1996 (3) SA 850 (CC) at paragraph 86, the common law "needs to be revisited and revitalized with the spirit of the constitutional values defined in Chapter 3 of the Constitution and with full regard to the purport and object of that Chapter".

[28] In my view, applicant's interpretation of the relevant sections of the NCA, and, in particular sections 131 and 127 (2) to (9), does not take proper account of the purpose for which the provisions of section 127 (2) to (9) were incorporated in section 131. I hold the view that, upon a proper construction of this legislation, all that the legislature intended was

to prescribe, with reference to section 127 (2) to (9), the execution and realisation process of goods attached by the credit provider in terms of a court order. The relevant court order would be obtained upon cancellation of the agreement by the credit provider, pursuant to the breach thereof by the consumer, which cancellation terminates the respective obligations of the parties. Thereafter the execution and realisation procedure prescribed by section 127 (2) to (9), is to be followed. I do not agree with the submission on behalf of applicant, that the legislature intended, by incorporating section 127 (2) to (9) in section 131, to change the common law by doing away with the requirement of the cancellation of an instalment agreement prior to the repossession of the goods. If this is what the legislature intended, I would have expected it to have been conveyed in clear and uncertain terms and not by means of a process of inferential reasoning, as contended for by applicant.

[29] I am of the view that applicant's interpretation fails to pay sufficient regard to the restriction imposed by section 131, ie that section 127 (2) to (9) should be "read with the changes required by the context". If this is borne in mind, it appears to me that the legislature intended to provide the following with regard to the execution and realisation of goods attached by virtue of a court order in terms of section 131 of the NCA:

(a) Within 10 business days after receiving the goods that are the subject of the instalment agreement, the credit provider must give the consumer written notice setting out the estimated value of the goods and other prescribed information. (Section 127 (2) (b)).

(b) Section 127 (3), which deals with the right of the consumer, who is not in default, to unconditionally withdraw his or her notice to voluntary terminate the agreement, obviously does not find application, as the goods have not been voluntarily surrendered, but attached in terms of section 131. For the same reason section 127 (4) (a), which allows for the return of the goods to the consumer, will not apply.

(c) If the consumer fails to respond to the notice in terms of section 127 (2) (b), advising him or her of the estimated value of the goods, the credit provider must sell the goods as soon as practicable for the best price reasonably obtainable. (Section 127 (4) (b)).

(d) After selling the goods, the credit provider must credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale, less any expenses reasonably incurred by the credit provider in connection with the sale of

the goods and give the consumer a written notice stating the following:

(i) The settlement value of the agreement immediately before the sale:

(ii) The gross amount realised on the sale;

(iii) The net proceeds of the sale after deducting the credit provider's permitted default charges, if applicable, and reasonable costs; and

(iv) The amount credited or debited to the consumer's account.

(Section 127 (5) (a) and (b)).

(e) If an amount is credited to the consumer's account and it exceeds the settlement value immediately before the sale, and another credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the National Consumer Tribunal established by section 26 of the NCA, which may make an order for the distribution of the amount in a manner that is just and reasonable. However, if no other credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the consumer with the

notice required by subsection (5) (b). (Section 127 (6) (a) and (b)).

(f) If an amount is credited to the consumer's account and it is less than the settlement value immediately before the sale, or an amount is debited to the consumer's account, the credit provider may demand payment from the consumer of the remaining settlement value, when issuing the notice required by subsection (5) (b). (Section 127 (7)).

(g) If a consumer fails to pay an amount demanded in terms of section 127 (7), within 10 business days after receiving the required demand notice, the credit provider may apply for judgment in terms of the Magistrates' Courts Act for the recovery of the remaining settlement value. If, however, the consumer pays the amount demanded after receiving the demand notice, judgment against him or her will be prevented. (Section 127 (8) (a) and (b)).

(h) In either event contemplated in terms of section 127 (8), interest is payable by the consumer at the rate applicable to the instalment agreement on any outstanding amount demanded by the credit provider in terms of subsection 7, from the date of the demand until the date that the outstanding amount is paid (Section 127 (9)).

[30] I should add, that when the provisions of section 127 (6) (b) and 127 (8) (b) are read with the changes required by the context, it is, in my opinion, clear that the references to the "termination" of the instalment agreement are to apply only in the case where the goods have been voluntarily surrendered. These references do obviously not find application where the goods have been attached in terms of section 131, pursuant to the cancellation of an instalment agreement by the credit provider. The "termination" of the instalment agreement would then have been brought about by the exercising of its right of cancellation by the credit provider.

[31] Mr. Coetsee argued that by incorporating the provisions of section 127 (2) to (9) in section 131, the legislature intended to keep the instalment agreement alive to ensure compliance with the provisions of section 127 (2) to (9). I am of the opinion that, upon a proper construction of the relevant provisions of the NCA, there is no basis for this conclusion of applicant. As I have already indicated, when section 127 (2) to (9) is read with the changes required by the context, it regulates the execution and realisation procedures to be followed by the credit provider after cancellation of the instalment agreement. The consumer is protected from disadvantageous practices during the realisation process, by the measures introduced by section 127 (2) to (9), which provide for the

orderly sale of the goods which are the subject of the instalment agreement. Put differently, there is no need to keep the instalment agreement "alive", to ensure that the protection of section 127 (2) to (9) is afforded to the consumer.

[32] In my view, the construction contended for by applicant, would impact negatively on the rights of the consumer. The credit provider would not be required to prove that the consumer has committed a breach of contract, justifying the cancellation of the instalment agreement and resultant repossession of the goods. Any breach, whether material or not, would, on applicant's interpretation of the relevant provisions of the NCA, entitle the consumer to approach the court on an ex parte basis to obtain a final order of repossession. I do not believe that, having regard to the objects of the NCA, the legislature intended to allow a credit provider to repossess the goods without showing that it is entitled to the cancellation of the instalment agreement, by virtue of a material breach, or at least a breach which the parties have considered to be material in terms of a *lex commissoria* incorporated in the instalment agreement.

[33] I also share the concern of second respondent, that applicant's interpretation will lead to an unfair result. On this interpretation the consumer is finally and permanently dispossessed of the goods, thereby

absolving applicant from performance in terms of the agreement. However, in view of the extant agreement, the consumer, while having been deprived of the goods, remains liable to pay the instalments due in terms of the agreement. It should be borne in mind, that in terms of section 127 (5) (b) (i) of the NCA, the settlement value of the agreement for purposes of the realisation process, is determined immediately before the date of the sale of the goods by the credit provider. Although section 127 (4) (b) provides that the goods are to be sold as soon as practicable, such a sale may, especially in difficult financial times, take some time to eventuate. This would mean that the consumer, although having being dispossessed of the goods, will remain liable for payment of the instalments which have fallen due since the date of the repossession of the goods. Once again, it seems to me that the legislature, who, by means of this legislation, intended to promote and advance the social and economic welfare of South Africans, would not have intended the consumer to be prejudiced in this manner.

[34] In the course of his argument, Mr. Coetsee was constrained to submit that it is only in the case of instalment agreements that the legislature introduced this procedure, which entitles a credit provider to repossess the goods in the absence of the cancellation of the instalment agreement. As I understand his submission, the legislature did not intend

to tamper with the common law remedy of cancellation with regard to other credit transactions, as defined in the NCA. I would have thought that, had it been the intention of the legislature to single out instalment agreements for this drastic departure from the normal principles of our law of contract, it would have been done in clear and unambiguous language. However, one searches the NCA in vain for a clear indication of such an intention.

[35] In view of the aforegoing, I conclude that applicant's reliance on the provisions of section 131, read with section 127 (2) to (9), as substantiation for the submission that the legislature has introduced a procedure whereby the credit provider is entitled to the return of the goods, without cancelling the relevant instalment agreement, is without merit.

[36] Mr. Coetsee further relied on section 123 of the NCA, as placing a limitation on a credit provider's right to cancel an instalment agreement. I do not agree. Section 123 (2) expressly provides that where a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6, to "enforce and terminate" the agreement. As mentioned previously, the use of the word "terminate", conveys the

legal notion of the extinguishing of contractual obligations, which would normally include the cancellation of an agreement.

[37] I also understood Mr. Coetsee to rely on section 129 (4) (a) (i) of the NCA, as support for the submission that the NCA has introduced a procedure at variance with the common law concept of the cancellation of an instalment agreement upon breach thereof. Section 129 (3) and (4) makes provision for the reinstatement of a credit agreement as part of the procedure available before debt enforcement. Section 129 (3) provides that, subject to section 129 (4), a consumer may at any time before the credit provider has cancelled the agreement, re-instate same by paying to the credit provider all amounts that are overdue. Section 129 (4), however, precludes the re-instatement of a credit agreement after:

(a) the sale of any property pursuant to-

(i) an attachment order; or

(ii) the surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123.

[38] I do not agree that section 129 (3) and/or (4), provides support for the argument of applicant. Section 129 (3) only deals with re-instatement prior to the cancellation of the relevant credit agreement, while, as pointed out by J W Scholtz *et al* at 12-37, the relevant instances referred to in section 129 (4), imply that the credit agreement has been cancelled (or terminated) and that such cancellation (or termination) constitutes a bar to re-instatement. The said sub-sections do not, in my view, serve as indications of an intention on the part of the legislature to introduce a procedure at variance with the concept of the cancellation of an instalment agreement upon breach thereof.

[39] I accordingly conclude that upon a proper interpretation of the relevant provisions of the NCA, the legislature has not done away with the requirement of a claim for the cancellation of an instalment agreement, prior to the granting of an attachment order in terms of section 131 of the NCA. This conclusion appears to be in accordance with the views expressed by Otto and J W Scholtz *et al*, as well as the authors of articles in law journals dealing with the NCA.

[40] I am of the view that, within the context of the issues in this matter, the legislature only intended encroaching upon a credit provider's common law rights in two respects. Firstly, by prescribing procedures to

be complied with prior to the enforcement of the debt (sections 129 and 130), and, secondly, by means of the prescribed execution and realisation process to be followed after cancellation of the instalment agreement by the credit provider (section 131 read with section 127 (2) to (9)).

[41] I am satisfied that the conclusion which I have reached, regarding the interpretation of the relevant provisions of the NCA, is in harmony with the declared purposes of the NCA. In my view the construction contended for by applicant, is not only foreign to the principles of our common law, but is, for the reasons furnished hereinbefore, inconsistent with the declared aim of the legislature to provide for a consistent and harmonised system of debt enforcement, in which the consumer's rights are protected.

[42] In my opinion the common law principle (as embodied in the instant instalment agreement), requiring the cancellation of the instalment agreement prior to the attachment and repossession of first respondent's vehicle, is a necessary requirement for a consistent and harmonised system of debt enforcement and for the protection of the consumer's rights. A critical re-evaluation of this common law principle, does not, in my view, show that the retention thereof will impact negatively on the values enshrined in our Bill of Rights. On the contrary, I reiterate that I

am of the opinion that the retention of this principle of our law of contract, is necessary for the protection of the rights of consumers.

[43] I accordingly agree with the finding of second respondent that, absent a claim for the cancellation of the instalment agreement, applicant was not entitled to a final order for the attachment of the vehicle in terms of section 131 of the NCA. It accordingly follows that the application for review cannot succeed. In view of my conclusion, it is not necessary to deal with second respondent's finding that the allegations in applicant's founding affidavit fell short of what is required for the granting of applications of this nature.

[44] In the result, the application for review is dismissed.

P B Fourie, J

I agree.

V Saldanha, J

I agree.

T S Madima, AJ