

**The legal protection afforded to the consumer  
under current South African law with emphasis  
on the legal position in specific credit agreements  
contained in standard-form contracts**

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

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by

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# Declaration

Except for references specifically indicated in the text, and such help as I have acknowledged, this thesis is wholly my own work and has not been submitted for degree purposes at any other university.

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January 2001

## Abstract

The thesis covers the field of the contract law known as the consumer credit law. It deals with the legal protection afforded to the consumer under current South African law with emphasis on the legal position in specific credit agreements contained in standard-form contracts. The thesis focuses on those credit contracts in which the legal relationship between the consumer and the dominant party is contained in the standard-form contracts, specifically credit agreements relating to money lending transactions in which the credit grantor's rights are secured either by means of mortgage agreement, a suretyship contract, or a deed of cession.

In South Africa the right to equality and human dignity, as opposed to the classical theories of contract: *pacta sunt servanda* and the principle of freedom of contract, are supported by the Constitution of the Republic of South Africa Act 108 of 1996 which entrenched democratic values permeating all areas of the law including contract law. In this thesis the harmonisation of these classical theories of contract law and the constitutional values of human dignity and equality have been considered.

As has been shown in a number of cases, notably those relating to the contracts of suretyship, cession *in securitatem debiti*, and mortgage, the current law regulating the relationship between the credit grantors and the credit receivers is in need of law reform to fall in line with the constitutional values of equality and human dignity.

The greatest difficulty inherent in this area of the law is the reluctance of the courts to intervene at the instance of consumers. The courts would only intervene in the clearest of the cases, and would only do so in the public interest.

In this thesis the current South African Law is considered in the light of the developments elsewhere. The tendency of credit providers to alter the terms of the contracts unilaterally and the growing number of conflicting decisions of the Provincial Divisions of High Court has also been considered. The writer also considers the role of the newly created Consumer Affairs Court.

# Contents

Abbreviations.....	xiii
Abstract.....	v
Acknowledgements.....	xii
Contents.....	vi

## CHAPTER 1: INTRODUCTION

1.1 Purpose of the Study.....	1
1.2 Background to the Study.....	1
1.3 Methodology.....	5
1.4 Chapters Arrangement.....	6

## CHAPTER 2: GENERAL CONSIDERATIONS

2.1 Problem Areas.....	8
2.2 Meaning of Consumer.....	11
2.4 Credit Agreement.....	12

## CHAPTER 3: THE STATUTORY REGULATION OF CREDIT TRANSACTIONS IN SOUTH AFRICA

<b>A. CREDIT AGREEMENT ACT 75 OF 1980.....</b>	<b>16</b>
3.1 Regulated Credit Agreements. ....	17
3.2 Formal Requirements.....	18
3.2.1 Requirements as to Contents.....	19

3.2.1.1 Personal Details of the Contracting Parties.....	19
3.2.1.2 Prohibited Provisions.....	21
3.3 Miscellaneous Provisions.....	25
3.3.1 Deposit and Manner of Payment.....	25
3.3.2 Period of Payment.....	26
3.3.3 Cooling-off Period.....	27
3.3.4 Vicarious Liability of the Credit Grantor for the acts of his or her Employees.....	29
3.4 Cancellation of the Contracts and Repossession of Goods.....	30
3.4.1 Cancellation of the Contract.....	30
3.4.2 Repossession of Goods.....	30
3.4.3 The Rights of Credit Receiver upon non-compliance with the Credit Agreement.....	32
3.4.4 Valuation of the Returned Goods.....	33
3.4.5 Court Orders.....	33
<b>B. USURY ACT 73 OF 1968.....</b>	<b>34</b>
3.5.The Scope and application of the Act.....	34
3.5.1 Money-Lending Transactions.....	35
3.5.2 Credit Transaction.....	36
3.5.3 Leasing Transaction.....	37
3.5.4 Transactions in respect to which the Act does not Apply.....	37
3.5.5 Transactions Exempted from the Application of the Act.....	38
3.6 Limitation of Finance Charges.....	40

3.7 Variable and Non-variable Finance Charge Rate.....	41
3.8 <i>Mora</i> Interest.....	43
3.9 Compulsory Disclosure of Finance Charges.....	44
3.10 The Legal consequences for non-compliance with Disclosure Provisions.....	46
3.11 Instrument of Debt.....	46
3.12 Delivery of Instrument of Debt and Statements.....	47
3.13 Recovery of Overpayment.....	48

#### **CHAPTER 4: CONSUMER CREDIT IN PRACTICE**

4.1 Cession.....	50
4.1.1 Cession <i>in Securitatem Debiti</i> .....	50
4.2 Mortgage.....	54
4.3 Suretyship.....	55
4.4 The Regulation of Mortgage and Suretyship contracts in Foreign jurisdictions.....	56
4.5 The Consumer Protection under the South African Common Law.....	65
4.5.1 Common Law Remedies and Doctrines .....	67
4.5.1.1 Good Faith.....	67
4.5.1.2 Public Policy.....	72
4.5.1.3 Duress.....	78
4.5.1.4 Undue Influence.....	80
4.5.1.5 Misrepresentation.....	81

#### **CHAPTER 5: UNILATERAL ALTERATION OF CONTRACT TERMS AND THE CHARGING OF INTEREST**

5.1 The Problem of Unilateral Alteration of Contractual Terms.....	85
5.2 The Consumer and <i>In duplum</i> Rule.....	96

## **CHAPTER 6: CONSUMER PROTECTION AND THE CONSUMER AFFAIRS COURT**

<b>6.1 Office for the Investigation of Unfair Business Practices.....</b>	<b>104</b>
6.1.1 Functions of the Office.....	104
6.1.2 Investigations by the Office.....	105
6.1.3 Powers of the Office (Consumer Protector).....	106
6.1.4 The Outcome of an Investigation into an Unfair Business Practice.....	108
<b>6.2 Consumer Affairs Court.....</b>	<b>111</b>
6.2.1 Composition of the Court.....	111
6.2.2 Initiation of the Proceedings in the Court.....	112
6.2.3 Quorum of the Court.....	113
6.2.4 Functions and Duties of the Court.....	114
6.2.5 Powers of the Court.....	120
6.3.6 Penalties.....	122
6.2.7 Appeal.....	123
<b>6.3 The Consumer Affairs Committee.....</b>	<b>124</b>
6.3.1 Composition of the Committee and the Appointment of Subcommittees.....	124
6.3.2 The Functions of the Committee.....	125
6.3.3 Powers of the Committee.....	126
6.3.4 Investigation of Unfair Business Practices.....	127

6.3.5 Conclusion.....133

**CHAPTER 7: CONSUMER PROTECTION AND THE BILL OF RIGHTS**

7.1 Freedom of Contract, *Pacta Sunt Servanda* versus the Bill of Rights.....135

7.2 Waiver of a Constitutional Right.....143

**CHAPTER 8: THE NEED FOR REFORM.....145**

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## Abbreviations

A	=Appellate Division Reports (SA)
AC	=Law Reports, Appeal Cases (UK)
AD	=Appellate Division Reports (SA)
AJ	=Acting Judge
AJA	=Acting Judge of Appeal
All ER	=All England Law Reports
All SA	=All South African Law Reports
Art	=Article
BCLR	=Butterworth Constitutional Law Reports
BSC	=Bophuthatswana Supreme Court
CA	=Credit Act (Australia)
CC	=Constitutional Court (SA)
cf	=compare
CH	=Chancery Division (UK)
CJ	=Chief Justice
CLR	=Colombia Law Review
Co	=Company
CP	=Consumer Protector
CPD	=Cape Provincial Division (SA)
DCJ	=Deputy Chief Justice
DM	=Deutsch Mark
ECCA	=English Consumer Credit Act (UK)

ECD	=Eastern Cape Division (SA)
ECPA	=English Consumer Protection Act (UK)
ed	=editor
eds	=editors
EEC	=European Economic Community (Now EU)
etc	=etcetera
EU	=European Union
EUCTA	=English Unfair Contract Terms Act
fn	=foot note
GG	=Government Gazette
GN	=Government Notice
GDC	=Gazankulu Development Corporation
HC	=High Court
HL	=House of Lords
Ibid	=Ibidem
i.e	=that is
J	=Journal
J	=Judge
JA	=Judge of Appeal
KO	=Consumer Ombudsman (Sweden)
LAWSA	=Law of South Africa
LJ	=Law Journal
LR	=Law Review

LQR	=Law Quarterly Review
Ltd	=Limited
MEC	=Member of Executive Council
N	=Decisions of the Natal Provincial Division
No	=Number
NO	=Nomine Officio
NPD	=Natal Provincial Division
NW	=North West Province
O	= Decisions of the Orange Free State Provincial Division
OBITER	=House Journal of the University of Port Elizabeth Law Faculty
OFPD	=Orange Free State Provincial Division
OPD	= Orange Free State Provincial Division Reports
QLD	=New Consumer Credit Code (Australia)
p	=page
P	=Judge President
para	=Paragraph
pp	=Pages
P.S.	=Pennsylvania
PTY	=Proprietary
R	=Rand
R	=Regulations
s	=section
SA	=South Africa Law Reports

SCA	=Supreme Court of Appeal
SALJ	=South African Law Journal
SA Merc LJ	=South African Mercantile Law Journal
ss	=sections
T	=Decisions of the Transvaal Provincial Division
THRHR	=Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TPD	=Transvaal Provincial Division Reports
TS	=Transvaal Supreme Court Reports
TSAR	=Tydskrif vir Suid-Afrikaanse Reg
UCC	=Uniform Commercial Code
UK	=United Kingdom
US	=United States of America
v	=volume
vol	=volume
W	=Decisions of the Witwatersrand Local Division
WLD	=Witwatersrand Local Division
WLR	=Weekly Law Reports
WPD	= Witwatersrand Provincial Division
Z	=Decisions of the Zimbabwean Supreme Court
1 <sup>st</sup>	=First series
2d	=Second series
3d	=Third series
5 <sup>th</sup>	=Fifth series

## CHAPTER 1

**INTRODUCTION****1.1 Purpose of the Study**

The overriding objective is to demonstrate the need for reform of the law that governs the legal relationship between credit grantors and credit receivers in specific consumer credit contracts so as to be in line with developments in other developing countries. It is thought that the newly created Consumer Affairs Court could play the envisaged reformist role in a creative way and that the new court system could be created in all other provinces of the Republic of South Africa as is envisaged in the North-West Province. This study recommends a harmonisation of the common law principles of *pacta sunt servanda* and freedom of contract with the constitutional values of human dignity and equality in this branch of the law.<sup>1</sup>

**1.2 Background to the Study**

As has been shown in a number of cases, notably those relating to contracts of suretyship, cession *in securitatem debiti* and mortgage contracts, the current law regulating the

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<sup>1</sup> See Christie 2000: 8 at 3H-22. The author opines that s 10 of the Republic of South Africa Constitution Act 108 of 1996 serves as a useful cross-check on some of the other sections of the Bill of Rights "... if the results are such as to impair the weaker party's right to human dignity this would point strongly towards the necessity to intervene. The German Constitutional Court noted by Strydom proceeded on these lines." See also Chackalson P in *S v Makwanyane* 1995 (6) BCLR 665 (CC) at 722.

relationship between credit grantors and credit receivers (consumers) is in urgent need of reform. In the leading case of *Zietsman v Allied Building Society*<sup>2</sup> Farlam AJ made the following instructive remarks concerning mortgage contracts: “probably the most striking feature about the mortgage forms used by the banks is that they are remarkably long, and at first sight, complicated documents. The main reason for this is that they have been drafted by the banks’ legal advisers in such a way as to confer every possible advantage upon the banks and to deprive the customers (so far as it is legal possible to do so) of every conceivable benefit which would otherwise have been secured to them at common law or by statute.”<sup>3</sup> The same can be said with regard to the manner in which cession contracts are often drafted. The clearest example in this regard is provided by the contract considered by the court in *Coopers & Lybrand and others v Brayant*.<sup>4</sup> In this case a cession contract was vaguely drafted. The deed provided for the cession *in securitatem debiti* of the respondent’s ‘right, title and interest to all book debts and other debts and claims of whatsoever nature’ to the bank.

The greatest difficulty inherent in standard-form credit agreements is the reluctance of the courts to intervene at the instance of consumers. The current judicial attitude is demonstrated in decisions such as *Tamarrillo (PTY) Ltd v BN Aittken (PTY) Ltd*,<sup>5</sup> and

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<sup>2</sup> 1989 (3) SA 166 (OPD); See also *NBS Boland Bank v One Berg River Drive CC* 1998 (3) SA 765 (W), *Eerste National Bank of Suid Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA). All these cases are illustrative of undue hardship which results from the harsh operation of suretyship agreements. In the light of these eventualities the minority judgement in Saayman’s case, *supra*, proposed the introduction of equity as a specific requirement for the validity of this type of contracts (at 323 G-I).

<sup>3</sup> At 169 F.

<sup>4</sup> 1995 (3) SA 761 (A).

<sup>5</sup> 1982 (1) SA 398 (A).

*Sasfin (PTY) Ltd v Beukes*.<sup>6</sup> In the latter case, the Supreme Court of Appeal held that the court would only intervene in the clearest of the cases, and would only do so in the public interest.

This thesis will focus on those contracts in which the legal relationship between the consumer and the dominant party is contained in the so-called standard-form contracts, specifically credit agreements relating to money lending transactions in which the credit grantor's rights are secured either by means of mortgage agreement, a suretyship contract, or a deed of cession. The tendency of credit grantors to vary the terms of contract unilaterally will also be considered. A cause for concern in this area of the law is the growing number of conflicting decisions of the Provincial Divisions of the High Court. The following judgments are worth-noting: *Investec Bank (PTY) v GVN Properties CC and others*;<sup>7</sup> *ABSA Bank Ltd v Deeb*;<sup>8</sup> *Standard Bank of Southern African Ltd v Friedman*;<sup>9</sup> *Boland Bank Bpk v Steel*;<sup>10</sup> and *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK and another*.<sup>11</sup>

The advent of the Republic of South Africa Constitution Act 200 of 1993 which has now been superseded by the Republic of South Africa Constitution Act 108 of 1996 with a set

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<sup>6</sup> 1989 (1) SA 1 (AD).

<sup>7</sup> 1999 (3) SA 490 (WPD). See chapter 5, pp 94-97 below.

<sup>8</sup> 1999 (2) SA 656 (N). See chapter 5, pp 88, 94.

<sup>9</sup> 1999 (2) SA 456 (C). See chapter 5, pp 94.

<sup>10</sup> 1994 (1) SA 259 (T). See chapter 5, pp 88, 93, 97.

<sup>11</sup> 1998 (3) SA 729 (WLD). See chapter 5, pp 88, 91, 94.

of values entrenched in chapter 3, (now chapter 2) containing the Bill of Rights, has made it possible for contract lawyers to recommend a review of the principle of *pacta sunt servanda* and freedom of contract in order that the effect thereof should be harmonisation of those principles with the core values of human dignity and equality as has been achieved in Germany with regard to the determination of the consumer's right in a suretyship agreement.<sup>12</sup>

In this study the current South African statutory protection is compared with the legal position in other foreign jurisdictions especially in those countries where the state has deemed it necessary to intervene to achieve a fair balance between the contracting parties.<sup>13</sup> Emphasis will be on the current consumer credit legislation, and will endeavour to identify not only the shortcomings of these statutes but also those provisions that need to be improved in order to address the perennial consumer problems. Some of these problems have been highlighted, *inter alia*, in scientific journals;<sup>14</sup> textbooks;<sup>15</sup> case law<sup>16</sup>

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<sup>12</sup> See Strydom 1995: 696 at 696, Van Aswegen 1995: 50 at 51.

<sup>13</sup> Consistent with the central theme of this study the statutory protection refers to the Usury Act 73 of 1968 and the Credit Agreement Act 75 of 1980.

<sup>14</sup> Van Aswegen 1995: 448 at 452 and 1995: 50 at 65-69; Strydom 1995: 696 at 697; Hawthorne 1995: 157 at 163; Christie 1999: 6 at 3H-11, 3H-15; Christie 2000: 8 at 3H-7; Cockrell 1999: 6 at 3A-15 to 3A-17; Harker 1984: 121 at 127-131; Hahlo 1981: 70 at 70; McQuoid-Mason 1989: 32 at 39-40; Cassim 1984: 311 at 312; Van Loggerenberg 1987/88: 401 at 424; Aronstam 1979: 21 at 27; Kotz 1986: 405 at 410-411; Zimmermann 1998: 174 at 174; Woolfrey 1988/92: 109 at 119; Otto 1998: 603 at 611; Bright 1995: 65 at 65; Brown 1989: 524 at 524 and Ramsay 1995: 177 at 194.

<sup>15</sup> Kerr 1998: 9; Christie 1996: 15; McQuoid-Mason (ed) 1997: 26, 133; Aronstam 1979: 9, 13, 49, 50; Van der Mrewe et al 1993: 159, 231; Atiyah 1971: 3, 4; Cheshire, Fifoot, & Furmston 1976: 145; Chitty 1999: 733-734; Beatson 1998: 291-3; Deutch 1976: 19-20; Hondius 1978: 599; Corbin 1962: 1-27; Williston & Lord 1998: 89-92; Cavanagh & Barnes 1988: 591 and Duggan, Begg & Lanyon 1989: 536.

<sup>16</sup> See cases referred to in fn 2.

and various commission reports.<sup>17</sup> An important development in the area of consumer protection in this country has been the establishment of the Consumer Affairs Court,<sup>18</sup> and the creation of the Consumer Affairs Committee and Unfair Contract Terms Committee.<sup>19</sup> Another exciting development is the proposal for the creation of the Market Court in the North-West Province.<sup>20</sup>

### 1.3 Methodology

The research method was, in the main, an analysis of the legal principles as contained in the textbooks, journals, relevant legislations, case law, regulations and other relevant materials. Interviews were conducted with a wide-range of consumer interests groups and the officers of the Consumer Affairs Court in order to determine the type of cases

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<sup>17</sup> South African Law Commission on *Unreasonable Stipulations in Contracts and the Rectifications of Contracts* (1998), Project Report 47 (hereinafter referred to as Project Report 47); South African Law Commission *Usury Act and Related matters* (1993), Project Report 67 (hereinafter referred to as Project Report 67); United Kingdom, *Report of the Committee on Consumer Credit* (the Crowther Commission) 1971, Report 234-235 (hereinafter referred to as the Crowther Commission); Law Council of Australia, *Report to the Attorney-General for State of Victoria on Fair Consumer Credit Law* (the Molomby Commission) 1971-1972, par 5 (hereinafter referred to as the Molomby Commission); The New Zealand Law Commission *Unfair Contracts* Preliminary Paper No 11 1990 at 13-18 ( hereinafter referred to as the New Zealand Law Commission) and English Law Commission and Scottish Law Commissions *Exemption Clauses: Second Report (Law Com No 69 (Scot Law Com 39)* London: Her Majesty's Stationary Office 1975 at 101-109 (hereinafter referred to as the English Law and Scottish Law Commission).

<sup>18</sup> The Consumer Affairs Court was created under the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

<sup>19</sup> The Unfair Contract Terms Committee is the committee created under the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 as a subcommittee to the Business Practice Committee (now Consumer Affairs Committee).

<sup>20</sup> The Market Court for North-West Province proposed by the Bophuthatswana Consumer Affairs Act 34 of 1984 (Bophuthatswana). This Act has been amended by the North-West Consumer Affairs Amendment Act 11 of 1994 (NW) which was signed by the Premier of the North-West Province of South Africa on 30 April 1994.

that come before this court and amount of caseload. Information technology has also been executed in order to acquire quality comparative analysis.

#### **1.4 Chapters Arrangement**

This thesis has been arranged in the following chapter headings: an introduction, six discursive chapters and a proposal for reform of the consumer credit contract law. The first discursive chapter deals with general considerations, i.e. identifying problem areas and definitional issues. The second discursive chapter focuses on the current credit regulation in South Africa. This chapter provides a comprehensive consumer protection provisions under the Credit Agreement Act<sup>21</sup> and the Usury Act.<sup>22</sup> In this chapter the writer has identified the shortcomings of these statutes and has suggested solutions to the problems that have been identified.

The third discursive chapter looks at specific consumer issues and the legal position of consumer under the South African common law. The fourth discursive chapter deals with the tendency of credit grantors to unilaterally alter the contract terms. In this chapter, suggestions for creative ways to curb the abuse of the common law powers by the credit grantors have been explored. The conflicting decisions of the Provincial Divisions of the High Court in relation to aforementioned problem (alteration of terms) have been considered.

The fifth discursive chapter examined the role of the Consumer Affairs Court, Consumer Affairs Committee and Unfair Contract Terms Committee as well as the proposed Market

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<sup>21</sup> Act 75 of 1980.

<sup>22</sup> Act 73 of 1968.

Court and compared them with similar tribunals elsewhere. The last discursive chapter examines the constitutional implications of the Bill of Rights in consumer credit contracts. The final chapter deals with proposals for reform.

## CHAPTER 2

**GENERAL CONSIDERATIONS****2.1 Problem Areas**

Over the centuries different types of contracts and commercial practices have resulted in a great deal of exploitation and malpractices that prompted ancient law makers to lay down rules aimed at ameliorating the legal position of those who were considered to be economically weak.<sup>1</sup> With regard to credit agreements, exploitation and malpractice can be attributed to the inherent nature of such contracts, that is, the fact that they are often embodied in complex documents that are not intelligible to the less sophisticated consumers.<sup>2</sup> This means that here we are dealing with contracts that are not consensual in the strict sense of the word, in that, the parties do not bargain from an equal footing. Since time immemorial there has been persistent calls for the regulation of the credit markets.<sup>3</sup> It was for this reason that during the Middle Ages, usury and the charging of exorbitant

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<sup>1</sup> See in this regard Seagle 1947: 13-21 where the author considers the measures adopted by Hammurabi the King of Babylon to protect the poor at the hands of unscrupulous moneylenders. At 13-14, *supra*, it is recorded that the ancient King of Babylon reserved the right to interfere in the local administration of justice. "Above all, he appears to have devoted great energy to combating the extortions of moneylenders." In the prologue to the code Hammurabi speaks of his conquests and his concern for justice... "to establish justice on the earth, to destroy the base and wicked, and to hold back the strong from oppressing the feeble."

<sup>2</sup> See Zietsman's case, *supra*, at 169 par F and Hannis 1998: 1 where the author observes: "Credit contracts are often complex documents making it difficult for consumers to understand the information contained in them and to compare different lenders' offers."

<sup>3</sup> See Hannis *op cit* at 2.

interest were widely condemned.<sup>4</sup> In the light of the above the present writer fully supports the proposal for some kind of regulatory mechanisms to prevent contractual injustice.<sup>5</sup> The harsh reality is that in the majority of cases unsophisticated borrower has a Hobson's choice because of poverty and the high cost of living. It goes without saying that the borrower under these circumstances will always find herself or himself on the receiving end in the consumer credit markets.<sup>6</sup> Moreover this type of borrower is more likely to be a recipient of less reputable credit products, which are being offered by non-mainstream credit providers who have no incentive to comply with the law and who are always eager to take advantage of the credit receiver's poor economic circumstances.<sup>7</sup> Closely associated with this is the whole question of credit receiver's access to justice, that is, the fact that he may not be in a position to use the appropriate legal remedies.<sup>8</sup> In addition there is a real problem of inability to comprehend the contractual terms due to illiteracy. In many foreign jurisdictions consumer credit contracts are regulated by legislation specifically designed to

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<sup>4</sup> See in this regard Galbraith 1987: 1, where he states: "Aristotle strongly condemned the taking of interest ... for the same reason that interest was an unworthy exaction from the less fortunate arising from the possession of money by the more fortunate—interest continued to be strongly condemned throughout the Middle Ages... Only when interest was redefined as a payment for productive capital—when it became compellingly evident that the one who borrowed money made money out of doing so and should, in all justice, share some of the return with the original lender—did it become reputable... But the taking of interest on loan for personal need or use continued to have a slightly unwholesome, even suspect, reputation. Here the very distant past has echoes in the present: interest for personal loans remains even today subject to a certain measure of opprobrium and is thought to require regulation. The loan shark is excoriated and is widely assumed, not without reason to be unduly prone to criminal association." See also Hahlo 1981: 70 at 72.

<sup>5</sup> See the South African Law Commission, Project Report 47 at 1.

<sup>6</sup> This means that the borrower has to choose between homelessness and unfair terms or a choice of going hungry or inability to provide for the children's education and the onerous terms. See also New Zealand Ministry of Consumer Affairs 1996: 23 where it is stated: "Consumer and community groups consider credit to be the most widespread and severe of all problems faced by consumers."

<sup>7</sup> This is why the New Zealand Ministry of Consumer Affairs, *supra*, did not regard competition between financial institutions as satisfactory protection for consumers and thus suggested the review of the credit law.

<sup>8</sup> The borrower may not have money to engage the services of a lawyer to assist him/her to challenge the unfair terms.

address unfair contract terms.<sup>9</sup> I am in agreement with Kerr that an authority such as the legislature that is in a position to make changes and to impose controls should keep legal rules and institutions under review to protect the less sophisticated consumers.<sup>10</sup> A cause for concern is the apparent reluctance of the state to provide the necessary statutory provisions that will complement the common law remedies<sup>11</sup> by strengthening the existing statutory provisions.<sup>12</sup> It should be noted that consumer credit is functionally different from commercial credit which is used by business borrowers who are well informed and experienced in matters of credit and are therefore unlikely to need measures designed primarily for the protection of more vulnerable consumers. Consumer credit, on the other hand, is used by individuals who need the protection of the law.<sup>13</sup>

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<sup>9</sup> These developments have been dealt with in detail in chapter four below, pp 56-64 and 84-87.

<sup>10</sup> See Kerr 1998: 9; See also the following comments attributable to Senator Murphy, the Australian Attorney General: "In consumer transaction unfair practices are widespread. The existing law is still founded on the principle known as caveat emptor-meaning "let the buyer beware." That principle may have been appropriate for transactions conducted in village markets. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by law," quoted with approval by Goldring 1974-75: 228. See further Christie 1996: 15; Aronstam 1979: 21 at 27; Harker 1981: 15 at 18; Cassim 1984: 311 at 312; Van Loggerenberg 1987/88: 401 at 424 where the learned author makes a strong plea that our legal system should follow the examples of foreign jurisdictions and set up a system of statutory control whereby the contents of the contracts have to conform to the general equitable standard contained in the concepts of reasonableness and equity, or good faith. See generally Van der Walt 1993: 65.

<sup>11</sup> These common law remedies include, justifiable mistake; duress; undue influence and misrepresentation.

<sup>12</sup> These are, in the main Credit Agreements Act 75 of 1980 and Usury Act 73 of 1968.

<sup>13</sup> Consumer credit is credit provided to an individual who uses it predominantly for personal, domestic, or household purposes. Consumer credit is concerned with consumption. The consumer credit helps to finance the satisfaction of immediate personal desires and needs out of future income (Scott 1989: 744-45). Commercial credit, on the other hand, can be broadly divided into merchandise credit, which is used to obtain goods, raw materials, and inventory for processing or resale and financial capital which is borrowed money that is needed to start, maintain and operate a business (New Zealand Ministry of Consumer Affairs 2000:13). Commercial credit, therefore, involves production and is the integral part of business activity.

## 2.3 Meaning of Consumer

A consumer is a person who buys goods or services from another.<sup>14</sup> This is an all-embracing definition since it includes citizens entering into exchange relationships with institutions such as hospital, libraries, police force and various government agencies as well as businesses.<sup>15</sup> The supplement to the Oxford English Dictionary (1972) and Random House Dictionary of English Language (1966) defines consumer as one who purchases goods or pays for services or one who uses a commodity or service.<sup>16</sup> The legal and commercial dictionaries define consumers as ‘individuals who purchase, use, maintain, and dispose of products and services,’ or as ‘a member of that brand or class of people who are affected by pricing, policing, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices.’<sup>17</sup>

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<sup>14</sup> Arbetman, McMahon, & Brien 1982: 3.

<sup>15</sup> McQuoid–Mason (ed) op cit at 1; See also Cranston 1984: 7. Cranston adopts the wider view of consumer interest and equates the term ‘consumer’ with the term citizen. This approach was first adopted by Nader Ralph in United States of America. See also Aaker & Day 1974: pxii; UK *Consumer Protection Approval order* 1988: 2078 where consumer has been defined as anyone who might want goods, services accommodation or facilities.

<sup>16</sup> See McQuoid–Mason (ed) op cit at 1.

<sup>17</sup> Ibid. Contrast this definition with the one contained in the English Fair Trading Act 1973 where consumer is defined as one who does not contract in the course of a business carried on by him but who deals with someone who does (Section 137(3)). See also s 12(1) (c) of the English Unfair Contract Terms Act 1977; Harvey & Parry 1994: 5; UK *Consumer Protection Regulations* 1987: 2117 where the consumer has been defined as a person other than a corporate, who in making a contract is acting for purposes which can be regarded as outside his business. See also EEC Directive 1986: 87/102/EEC (now EU); Salter 1997: 2; cf s 1 of the Swedish Prohibiting Improper Contract Terms Act 1971, SFS 1971: 112. Section 20 (6) of the English Consumer Protection Act 1987 defines consumer (a) in relation to any goods, as any person who might wish to be supplied with the goods for his own private use, (b) in relation to any services or facilities, as any person who might wish to be provided with the services or facilities otherwise than for the purposes of any business of his, and (c) in relation to any accommodation, as any person who might wish to occupy the accommodation otherwise than for the purpose of any business of his. In *Standard Credit Corporation Ltd v Strydom* 1991 (3) SA 644 (W) at 652, Cloete AJ stated: “In my view, the credit receiver ceases to be a consumer (as opposed to a trader) where he does not intend to use the goods himself. If he sells or leases them, then he becomes a trader in them albeit in respect of one isolated transaction.”

In many instances the term 'consumer' will depend on the nature of the goods or services involved, for example, in South African statutes the term has been defined according to the nature of the goods and services.<sup>18</sup> The concept 'consumer' has a far reaching meaning, which includes not only persons who bought or hired goods or services, but also those who are affected by the use of goods and services bought or hired.<sup>19</sup> The courts have adopted a very wide approach with regard to the definition of the consumer as can be demonstrated with reference to the approach in *Blore v Standard General Insurance Company Ltd.*<sup>20</sup>

## 2.4 Credit Agreement

Credit agreement has been defined by the Credit Agreements Act<sup>21</sup> as (a) a credit transaction or a leasing transaction; (b) a transaction which has the same import as a leasing transaction or credit transaction irrespective of whether such transaction is subject to a

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<sup>18</sup> The South African Trade Practices Act 76 of 1976 defines consumer to include any person who makes use of service. In the Harmful Business Practices Act 71 of 1988 consumer has been defined as a person to whom any commodity is offered, supplied or made available. The Gauteng Consumer Affairs (Harmful Business Practices) Act 7 of 1996 defines consumer as a person (a) to whom any commodity is offered, supplied or made available, or (b) from whom is solicited, or who supplies or makes available any investment. In the Water Act 54 of 1956 consumer has been defined as a person supplied or entitled to be supplied with water by a water board or local authority. In relation to consumer credit law, consumer can be defined as a person to whom credit is supplied or sought to be supplied by another in the course of a business carried on by him.

<sup>19</sup> See McQuoid (ed) op cit at 2, 5.

<sup>20</sup> 1972 (2) SA 89 (O). In this case the court defined consumer broadly to include third parties who have not bought, used, or hired goods or service themselves but who happen to be injured by some defect in such goods or services. One is here reminded of the approach of Lord Atkin in the leading English decision of *Donoghue v Stevenson* 1932 AC 562 where the consumer was defined as anyone who is so closely and directly affected by the manufacture's acts that he ought to have them in contemplation as being so affected when directing his mind to the acts or omissions called in question.

<sup>21</sup> Act 75 of 1980.

resolutive or suspensive condition.<sup>22</sup> This definition encompasses a credit transaction in terms of which movable goods are sold or services are rendered on credit, as well as a leasing transaction in terms of which movable goods are leased and prices are paid in instalments.<sup>23</sup> It would seem that in terms of this definition the underlying fact is that the agreement must have the same import as credit or leasing transaction.<sup>24</sup>

In terms of the Act credit transaction means:

(a) “a transaction, including an instalment sale transaction, in terms of which goods are sold by the seller to the purchaser against payment by the purchaser to the seller of stated or determinable sum of money at a stated or determinable future date either in whole or in part in instalments over a period in the future;

(b) a transaction in terms of which a person renders a service against payment to the person to whom the service is rendered of a stated or determinable sum of money at a stated or determinable future date either in whole or in part in instalments over a period in the future.”<sup>25</sup>

This means that any agreement, in terms of which movable goods are sold for a sum of money, payable in whole or in part by means of future instalments, constitutes a credit transaction and consequently a credit agreement.<sup>26</sup> The first part contained in (a) above is said to include the common law idea of a sale on credit whose ownership would pass on

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<sup>22</sup> Section 1.

<sup>23</sup> Fouche (ed) 1995: 172.

<sup>24</sup> Ibid.

<sup>25</sup> Section 1.

<sup>26</sup> Fouche (ed) op cit at 172.

delivery of the goods.<sup>27</sup> The definition of credit agreement also refers to the 'instalment sale transaction.' In terms of s 1 of the Act, 'instalment sale transaction' falls within the definition of the credit transaction. There are, however, two characteristics of 'instalment sale transaction' which are different from other credit transactions. These characteristics are:

- a) The parties agree that the purchaser does not become owner of the goods merely by virtue of delivery or of the use, possession or enjoyment of the goods by him or her;  
or
- b) The parties agree that the seller is entitled to the return of the goods if the purchaser is guilty of breach of contract.<sup>28</sup>

The Act also defines credit agreement as a 'leasing transaction.' "Leasing transaction is a transaction by the lessee to the lessor of a stated or determinable sum of money, at a stated or determinable future date, or in whole or in part, in instalments over a period in the future, but does not include a transaction in which it is agreed at the time of the conclusion thereof that the debtor or any person on his behalf, shall at any stage during or after the expiry of the leased or after the termination of that transaction, become the owner of those

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<sup>27</sup> McQuoid-Mason (ed) op cit at 135; Grove & Jacobs op cit at 12.

<sup>28</sup> Ibid.

goods, or after such expiry or termination, retain the possession or use or enjoyment of those goods.”<sup>29</sup>

The EEC Directives defined credit agreement as an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation.<sup>30</sup> This definition is too wide and encompasses a plethora of credit transactions.

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<sup>29</sup> Section 1. This means that, the parties to a lease should not, in any manner whatsoever, have agreed that the lessee at some stage or at the termination of the lease contract would be the owner of the leased goods, retain the possession, use or enjoyment of the leased goods. In case the parties have such an agreement the contract ceases to be lease. It has been submitted that instalments are a *conditio sine qua non* for a transaction to qualify as a credit transaction (Grove & Jacobs op cit at 11 and Fouche (ed) op cit at 171).

<sup>30</sup> Article 1 of the EEC Directive (now EU) Directives, supra.

## CHAPTER 3

**THE STATUTORY REGULATION OF CREDIT TRANSACTIONS IN SOUTH AFRICA**

In this country the consumer credit transactions are regulated by a number of statutes,<sup>1</sup> some of which fall outside the scope of this study.<sup>2</sup> In the light of the specific focus of this study this chapter will deal with the legal position of the 'consumer' in the context of the Credit Agreement Act and the Usury Act.

**A. CREDIT AGREEMENT ACT 75 OF 1980**

This Act replaced the Hire-purchase Act.<sup>3</sup> It operates in conjunction with the Usury Act<sup>4</sup> and the two Acts compliment each other. In some transactions both Acts would sometimes apply, while in others only one of them would be applicable.<sup>5</sup> In the light of the problems

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<sup>1</sup> Credit Agreements Act 75 of 1980; Usury Act 73 of 1968; Alienation of Land Act 68 of 1981; and Lay-by Regulations of 1980.

<sup>2</sup> Lay-by Regulations and Alienation of Land Act fall outside the scope of this study.

<sup>3</sup> Act 36 of 1942.

<sup>4</sup> See Grove & Jacobs 1993: 5, 11; Greenbaum 1997: 131-2; Fouche (ed) 1995: 170. Different Government departments previously administered these Acts: Credit Agreement Act was administered by the Department of Trade and Industry whilst the Department of Finance administered the Usury Act. Since 19 March 1993 one Government department, i.e. Department of Trade and Industry has been responsible for the administration of these Acts.

<sup>5</sup> See further Greenbaum op cit at 131-2. See also The South African Law Commission, Project Report 67 at 104 and Grove & Jacobs op cit at 5; Fouche (ed) op cit at 176.

that have been experienced in the administration of these Acts the South African Law Commission has made a proposal for a single Credit Act.<sup>6</sup>

### **3.1 Regulated Credit Agreements**

The provisions of the Act apply to such credit agreements or categories of credit agreements as the Minister may determine from time to time by notice in the Government Gazette.<sup>7</sup> The Act applies to credit agreements which involve movable goods. It is evident that the Credit Agreement Act does not regulate all credit agreements. The Act also applies to “credit and leasing transactions in which the price is paid in instalments at a fixed or determinable future date.”<sup>8</sup> A transaction which involves payment in cash is excluded from the ambit of the Act.<sup>9</sup> The same applies to the transaction where the price will be paid by the way of lump sum payment.<sup>10</sup>

The Minister of Trade and Industry determines the transactions that are governed by the Credit Agreement Act. The Minister has extended the scope of the Act to include the

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<sup>6</sup> The South African Law Commission, Project Report 67.

<sup>7</sup> Section 2 (1). This section differs materially with s 2 (1) (d) of the South African Law Commission (Draft Bill), in that, in terms of the draft Bill the Credit Act shall apply to all credit contracts concluded after the commencement of the Act and also in terms of the Bill the Minister’s power to determine the credit contracts which may be governed by the Act should be exercised after consultation with the Advisory Board (Section 2 of the draft Bill).

<sup>8</sup> See chapter 2, pp 14-15 above.

<sup>9</sup> See the definition of credit transaction and leasing transaction.

<sup>10</sup> Otto LAWSA 1991: 109 at par 7. Some writers, however, pointed out that it matters not whether payment is made in the future in one lump sum or whether the future payments are divided into instalments (Diemont & Aronstam 1982: 48). This position is based on the phrase “or in whole or in part” in the first part of the definition of credit transaction. There are, on the other hand, those who argue that the phrase “or in whole or in part” should not be given its literal meaning, because it only qualifies instalments (Grove & Jacobs op cit at 11). The present writer prefers the former view, as it is not as restrictive as the latter.

leasing or selling of goods which are specified in the Regulations.<sup>11</sup> For a transaction to be regulated by the Act, it must be concluded for a period of not less than six months.<sup>12</sup> The Minister has discretion to exempt any person or type of credit agreement from the operation of the Act. Consequently a number of development organisations are exempted from the application of the Act.

### 3.2 Formal Requirements

The Act provides formal requirements to be complied with by parties in the credit contract. The underlying aim of the Act in prescribing formal requirements is to ensure that credit grantors provide fully fair and accurate information about the credit he or she is offering to the credit receiver.<sup>13</sup> It should be noted that general contractual principles would also apply to the formation of contracts, although these are, to a certain extent, have been modified by the statutory provisions.<sup>14</sup>

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<sup>11</sup> See GN R402 GG 7440 of February 1981 (as amended by GN R989 GG 13900 of 27 March 1992). Since 27 March 1992, the items covered by the Act include durable and semi durable goods, (eg. household furniture, including garden furniture); mattresses; floor carpets and floor rugs; electrical and non-electrical appliances for domestic use; camping equipments including tents; jewellery; clocks; watches; photographic and cinematographic cameras; projectors; television; receivers and accessories; radios and gramophones; sound recorders and reproducers; tape decks; loudspeakers and amplifiers; video cassette recorders and video tape recorders and players; video cassettes and video tapes; etc. The Act applies to these transactions only if the cash price of the goods does not exceed R500 000. The amount may be changed from time to time by notice in the Government Gazette.

<sup>12</sup> The following transactions are excluded from the ambit of the Act: Agricultural machinery and tractors as well as goods sold or leased with the sole purpose of selling or leasing to others or using the goods in connection with mining, engineering, construction, road building or manufacturing process. Also excluded from the ambit of the Act are transactions in which the state is a credit grantor.

<sup>13</sup> See Greenbaum op cit at 137.

<sup>14</sup> Ibid. See also Grove & Jacobs op cit at 22.

In terms of the Act, a credit agreement must be in writing and signed by, or on behalf of, every party to such contract.<sup>15</sup> In case an agent signs the credit agreement, he need not have his principal's written authority to sign the agreement on his behalf.<sup>16</sup>

Failure or non-compliance with formal requirements does not automatically render the contract invalid.<sup>17</sup> Non-compliance would merely expose the guilty party to a criminal offence.<sup>18</sup>

### 3.2.1 Requirements as to Contents

#### 3.2.1.1 Personal Details of the Contracting Parties

The Act makes it compulsory for parties in a credit agreement to provide the following details:

- (a) the names of the credit grantor and the credit receiver and their business or residential addresses, or if they do not have such addresses, any other address in the Republic;<sup>19</sup>

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<sup>15</sup> Section 5 (1).

<sup>16</sup> See Grove & Jacobs op cit at 23.

<sup>17</sup> Section 5 (1).

<sup>18</sup> Section 23. Pursuant to this section “any person who contravenes or fails to comply with any provisions of the Act is guilty of an offence and liable upon conviction to a fine not exceeding R5 000 or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.”

<sup>19</sup> Section 5 (1) (b). The addresses set out serve as the *domicilium citandi et executandi* of the parties and may be changed by giving notice within 14 days. The notice must be in writing and must be delivered by hand.

- (b) the amount paid or to be paid as an initial payment or as initial rental (the deposit);<sup>20</sup>
- (c) a description whereby the goods or services to which that credit agreement relates, and any goods delivered to the credit grantor, and any goods delivered to the credit grantor as payment (trade-in goods), may be readily identified;<sup>21</sup>
- (d) the contract must specify when ownership of the goods passes, if it is an instalment sale transaction<sup>22</sup>
- (e) if it is an instalment sale transaction or a leasing transaction, state the conditions, if any, as to the right of the credit grantor to the return of the goods to which the credit agreement relates;<sup>23</sup> and
- (f) the cooling-off right as contained in s 13 of the Act must appear word for word on the face of the contract in bold type capital letters with a clear space of not less than one centimetre from any other wording on the same page.<sup>24</sup>

The Act requires that the credit agreement must be in whichever official language requested in writing by the credit receiver.<sup>25</sup>

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<sup>20</sup> Section 5 (1) (c). In terms of s 6 (5) of the Act “no credit contract will be binding until the credit receiver has paid at least the deposit.” In terms of s 3 (1) (b) the Minister has discretion to prescribe the deposit (cf Greenbaum op cit at 138).

<sup>21</sup> Section 5 (1) (d).

<sup>22</sup> Section 5 (1) (e).

<sup>23</sup> Section 5 (1) (f).

<sup>24</sup> Section 5 (1) (i) read with section 13.

<sup>25</sup> Section 5 (1) (b).

### 3.2.1.2 Prohibited Provisions

The Credit Agreement Act, like its predecessor ‘Hire-purchase Act’<sup>26</sup> is aimed at protecting consumers against harsh and unconscionable terms found in standard-form agreements.<sup>27</sup>

To achieve this broad aim, the Act prohibits the inclusion of various provisions in the credit agreement which include the following:

A provision to the effect that a person agrees to enter into a credit agreement<sup>28</sup> and a provision by which a person who acts on behalf of credit grantor in concluding a credit agreement or during the negotiations preceding the conclusion of the credit agreement, to be appointed as, or deemed to be, the agent of the credit receiver.<sup>29</sup> This is intended to protect the credit receiver against misrepresentation because credit grantors could easily exempt themselves from liability for misrepresentation made by their agents by simple appointing agents to conclude credit agreements on their behalf.<sup>30</sup> Also prohibited is the inclusion of an exemption clause against any act, omission or representation by any person acting on behalf of the credit receiver.<sup>31</sup> However, this restriction does not prevent the credit grantor from inserting a provision that has the effect of exempting him or her from

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<sup>26</sup> Act 36 of 1942.

<sup>27</sup> In *Smit and Venter v Fourie and another* 1946 SA 9 (WLD) Millin J said that the Hire-Purchase Act tries to remedy “the mischief of poor persons being enticed into shops and being sold goods of more or less value at prices which they can ill-afford to pay and on terms which are harsh and unconscionable, and it was intended to give protection to such persons against their own improvidence and folly” (at 13). See also Diemont & Arontsam op cit at 32; Greenbaum op cit at 141.

<sup>28</sup> Section 6 (1) (a). For example, an option granted by one person to another to enter into a credit agreement.

<sup>29</sup> Section 6 (1) (b).

<sup>30</sup> Grove & Jacobs op cit at 25. See also Greenbaum op cit at 141.

<sup>31</sup> Section 6 (1) (c).

liability for his own actions or misrepresentations.<sup>32</sup> A credit agreement may not include a provision by which the liability of the credit grantor in terms of any guarantee or warranty that would, but for such provision, be implied in a credit agreement, is excluded or restricted.<sup>33</sup> This limitation ensures that goods may not be sold *voetstoots* and it also makes it impossible to exclude the common law warranties against eviction.<sup>34</sup>

The Act also excludes a provision to the effect that the credit grantor or any person acting on his or her behalf is authorised to enter upon any premises for the purpose of taking possession of goods to which a credit agreement applies, or is exempted from liability for any such entry.<sup>35</sup> This prohibition is intended to prevent credit grantor from taking the law into his or her hands. Any provision to that effect will be regarded as *pro non scripto*.<sup>36</sup> In terms of s 23 such conduct will at least amount to an offence.<sup>37</sup> It seems that such conduct also amounts to a repudiation of the contract and as such entitles the credit receiver to use

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<sup>32</sup> Diemont & Aronstam op cit at 111-2. See also Grove & Jacobs op cit at 25; Greenbaum op cit at 141.

<sup>33</sup> Section 6 (1) (d). It should, however, be noted that this section prohibits the exclusion of implied warranties. For example, if the written contract excludes the credit grantor's liability for any express warranties that he might have made during the negotiation stage (that may include, of course, an aspect not covered by implied warranties), the exemption clause will be valid. This is in accordance with the decision in *Jela v Godwana* 2000 (2) All SA 557 (E) at 562.

<sup>34</sup> See *Godwana's* case, supra, at 561. This case was an appeal from the Magistrate's court. The appellant sold and delivered a motor vehicle to the respondent in terms of written agreement to which the Credit Agreement Act was applicable. The agreement provided that the said vehicle was sold *voetstoots* without any guarantees whatsoever. After first instalment the respondent fell into arrears and the appellant instituted action for payment of the outstanding balance and for the return of the vehicle. The respondent's defence was that the vehicle had certain serious latent defects at the time of the conclusion of the agreement and that the appellant had been aware of the defects, but had fraudulently concealed then the court was of the opinion that the *voetstoots* provisions purported to exclude or restrict the appellant's liability in terms of warranty against latent defects in the vehicle sold and that the purported exclusion violated provisions of s 6 (1) (d) and was consequently void and unenforceable.

<sup>35</sup> Section 6 (1) (e).

<sup>36</sup> Grove & Jacobs op cit at 25.

<sup>37</sup> Ibid.

possessory remedies.<sup>38</sup> In addition the credit receiver would be able to cancel the contract and claim back all amounts that he or she has already paid and may as well claim damages.<sup>39</sup> The Act further prohibits the inclusion of a provision to the effect that the credit receiver chooses a *domicilium citandi et executandi* at any address other than the one referred to in s 5 (4).<sup>40</sup> Also prohibited is a provision by which a credit receiver agrees to forfeit any money paid by him or her in terms of a credit agreement or waive any claim in respect of the goods or services in question if he or she fails to comply with any term of the credit agreement before such goods are delivered or such service are rendered to him or her.<sup>41</sup> The Act further prohibits the inclusion of a clause preventing the credit receiver from withdrawing from the agreement where delivery of the goods or services has not been made within thirty days after the date of the credit agreement, provided that there has been no resistance by the credit receiver to accept performance in accordance with such credit agreement.<sup>42</sup> This restriction confirms the credit grantor's right to cancel the contract on the basis of *lex commissoria* had the credit receiver failed to perform after thirty days. It also confirms any right that the credit receiver may have, based on other contractual grounds, if the credit grantor fails to perform after thirty days. In terms of s 6 (2), this prohibition does not apply to any credit agreement in terms of which the credit receiver

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<sup>38</sup> Ibid. In other words the credit receiver may rely on a spoliation order to restore his or her possession of the goods

<sup>39</sup> Ibid. See also Greenbaum op cit at 142.

<sup>40</sup> Ibid.

<sup>41</sup> Section 6 (1) (f).

<sup>42</sup> Section 6 (1) (g).

ordered goods to be imported or manufactured according to his or her requirements.<sup>43</sup> The Act also excludes a provision to the effect that the period of the credit agreement is left undetermined.<sup>44</sup> Also prohibited is a clause by which the credit receiver 'guarantees' and 'warrants' that the credit agreement was signed on the business premises of the credit grantor.<sup>45</sup> According to Grove & Jacobs<sup>46</sup> such a clause would exclude the credit receiver's right to use the remedy of the 'cooling off' period contained in s 13 of the Act. The Act also prohibits the inclusion of a clause by which the credit receiver acknowledges that the credit grantor or any person on his behalf did not make any representations or give any warranties before the conclusion of or in connection with the credit agreement.<sup>47</sup> Finally a credit agreement may not include a provision to the effect that the credit receiver acknowledges that he or she has inspected any goods to which such credit agreement

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<sup>43</sup> See Grove & Jacobs op cit at 26 and Greenbaum op cit at 142-3.

<sup>44</sup> Section 6 (1) (i).

<sup>45</sup> Section 6 (1) (i).

<sup>46</sup> See Grove & Jacobs op cit at 26.

<sup>47</sup> Section 6 (1) (k).

relates.<sup>48</sup> Again it would seem that this provision has been inserted for the benefit of the credit receiver and it prevent him or her from being denied a remedy where he or she has accepted defective goods.<sup>49</sup> In terms of the decision in Godwana's case, supra, a term in credit agreement which violates s 6 (1) of the Act will not affect the validity of the contract as such a term is severable.

### **3.3 Miscellaneous Provisions**

#### **3.3.1 Deposit and Manner of Payment**

A credit agreement does not have legal force until the credit receiver has paid the initial payment or initial rental prescribed by the regulation.<sup>50</sup> In a regulated credit agreement, the credit receiver must pay the minimum deposit as prescribed by the Minister in the

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<sup>48</sup> Section 6 (1) (k). Other prohibitions in the Act and the Regulations include the following:

(a) A provision whereby a person is made a party to a credit agreement or any other agreement or document which has the effect that an earlier credit agreement is cancelled and substituted by a later credit agreement, in terms of which the goods or service or any part thereof, to which the earlier agreement relates, are sold, rendered or leased to the credit receiver concerned, and any money or other consideration paid or delivered in terms of this earlier credit agreement to the credit grantor, must serve as an initial payment, or as an initial rental, in respect of the goods or services to which that later credit agreement relates;

(b) A credit agreement should not contain provisions by which instalments differ by more than 10% (Regulation 5 of GN R401 in GG 3147 of 1981-02-27);

(c) In terms of the Act, no person should enter into a credit agreement with someone who is under any administration order and whose income is less than R500 per month, unless his administrator consents to the credit agreement concerned. This provision only applies if the price payable in terms of the credit agreement is more than R2000, 00 (Section 20);

(d) Section 7 prohibits any prospective credit grantor or his manager, agent or employer from inducing directly or indirectly the prospective credit receiver into entering in a contract by offering him certain benefit unless such offers or benefits are made in the ordinary course of events.

(e) No credit grantor must require or induce any credit receiver to acknowledge the receipt of any goods or services to which any credit agreement relates unless those goods have in fact been delivered or such services has in fact been rendered by the credit grantor to the credit receiver (Section 6 (3)).

<sup>49</sup> Section 6 (1) (a).

<sup>50</sup> Section 6 (5) read with section (3) (b).

regulation.<sup>51</sup> The deposit is calculated as a percentage of the cash price and it varies according to the nature of goods purchased. The payment of the deposit may be effected wholly or partly in goods.<sup>52</sup> This means that goods are traded-in for other goods in terms of a credit agreement. The example of this is an old television set being traded-in as a deposit when a new kitchen set is bought. This deposit will be valid if the value placed on the trade-in goods does not exceed what would be a reasonable price for the goods.<sup>53</sup> In addition, the goods should be traded-in by the owner and if the credit receiver is not the owner, he or she must have obtained the authority from the true owner to trade the goods in.<sup>54</sup> It is important that the goods being traded-in be clearly described in the contract. In terms of s 10 of the Act a post-dated cheque may not constitute a valid deposit. The credit grantor is not allowed to lend the credit receiver a deposit or arrange with anyone else to advance money to the credit receiver in order to enable him or her to pay the deposit.<sup>55</sup>

### 3.3.2 Period of Payment

The Minister of Trade and Industry, from time to time, prescribes the periods within which goods under contracts that are regulated by the Credit Agreement Act have to be paid off.<sup>56</sup>

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<sup>51</sup> According to Fouche failure to pay deposit renders the contract void. The parties to contract may resile from the credit agreement at any time before payment of the deposit (Fouche (ed) op cit at 179. See also Diemont & Aronstam op cit at 117).

<sup>52</sup> See Fouche (ed) op cit at 179

<sup>53</sup> The South African Law Commission, Project Report 67 at 75.

<sup>54</sup> See Fouche (ed) op cit at 181.

<sup>55</sup> Section 6 (7) (c). The credit receiver may arrange with a financial institution for financial assistant for the payment of the deposit.

<sup>56</sup> Section 3 (1) (a).

It is an offence under the Act for the parties to agree to a longer period.<sup>57</sup> It is also incumbent upon the parties to determine the period of the credit agreement.<sup>58</sup> Certain transactions are exempted from complying with the minimum deposits and maximum periods of payments.<sup>59</sup> These include credit agreements for the purchase of radio equipment, videocassette recorders and television sets where payments represent a deduction under the Income Tax Act No. 58 of 1962.<sup>60</sup> Equally exempted are credit transactions and leasing transactions relating to motor vehicles in which the payments provide a deduction in terms of the Income Tax Act.

### 3.3.3 Cooling-off Period

The Act protects consumers from the door-to-door sales. It allows the credit receiver to cancel the credit agreement unilaterally without having to state any reasons for doing so and without committing breach of contract in the process.<sup>61</sup> This is the case if the credit agreement has been entered into at a place other than the credit grantor's business place. The credit receiver has to do so within five days of signing such a credit agreement.<sup>62</sup> This

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<sup>57</sup> Section 6 (6) and section 23.

<sup>58</sup> Section 6 (1) (i). The parties are not allowed to leave the period of the credit agreement undetermined.

<sup>59</sup> See Government Notice R401 GG 7440 of 27 February 1981, as amended by GN R3218 GG 14425 of 27 November 1992 and GN R496 GG 14672 of 26 March 1993. See also Grove & Jacobs op cit at 31-2; Greenbaum op cit at 139.

<sup>60</sup> Ibid.

<sup>61</sup> Section 13.

<sup>62</sup> Ibid. The computation of five days period must exclude the day on which the credit agreement has been entered into, Saturdays, public holidays and Sundays which fall within the period.

is called 'cooling-off right.'<sup>63</sup> The credit receiver may cancel the credit agreement by notice in writing delivered or sent by prepaid registered mail to the credit grantor and by tendering the return of any goods delivered to him or her in terms of the credit agreement.<sup>64</sup>

The following prerequisites for the existence of the 'cooling-off right' should be noted:

- (a) The credit grantor, his or her manager, agent or employee must have entered into the credit agreement with the credit receiver at a place other than the credit grantor's ordinary place of business;
- (b) The initiative for entering into the agreement must have emanated from the credit grantor, his or her manager, agent or employee;
- (c) The credit receiver has delivered, or sent by pre-paid registered mail, his or her written notice of cancellation of the credit agreement to the credit grantor within five days after signing it;
- (d) The credit receiver has returned any goods delivered to him or her in terms of the credit agreement to the credit grantor.<sup>65</sup>

The 'cooling-off' right cannot be utilised where the official postal service of the state has been used to initiate and conclude the contract. This right is also not available to transactions which are not regulated by the Credit Agreement Act. The credit grantor must refund the credit receiver the amount received in respect of all payments made to him or her in terms of the credit agreement within ten days of receiving the notice of termination

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<sup>63</sup> This right applies particularly to door-to-door sales, but it is not limited only to such sales. See also Cassim 1984: 311 at 316.

<sup>64</sup> Ibid.

<sup>65</sup> Section 13.

of the transaction.<sup>66</sup> Similarly the credit grantor should collect from the credit receiver any goods delivered by him or her in terms of the credit agreement.<sup>67</sup> In addition s 4 of the Act requires that any prospective credit grantor or his or her manager, agent or employee must, before entering into a credit agreement at a place not being his or her business premises, in writing, draw the attention of a prospective credit receiver to the provisions of s 13.<sup>68</sup> Failure on the part of the credit grantor to make the credit receiver aware of the above provisions would render credit grantor liable to a criminal action, but will not affect the legality of the agreement.<sup>69</sup>

#### 3.3.4 Vicarious liability of the Credit Grantor for the acts of his Employees

The Credit Agreement Act imposes liability on the credit grantor for acts or omissions of any manager, agent or employee, which have been committed in the course of their duties.<sup>70</sup> The credit grantor may only escape liability if he or she can prove the following:

- (a) that the agent or employee acted without the connivance or the permission of the credit grantor;<sup>71</sup>

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<sup>66</sup> Section 13 (2) (a).

<sup>67</sup> Ibid. It has been suggested that in interpreting the term 'business premise' the approach must be wide enough so as to extend the protection of s 13 to the consumers in the most positive ways (Otto 1986: 134 (b) at 119 and Greenbaum op cit at 146).

<sup>68</sup> The credit grantor should make the prospective credit receiver aware of 'cooling-off right.'

<sup>69</sup> See Cassim op cit at 317.

<sup>70</sup> Section 24.

<sup>71</sup> Section 24 (1) (a).

(b) that all reasonable steps were taken by the credit grantor to prevent any such act or the omission to do any such act or omission;<sup>72</sup> and

(c) that the employee acted beyond the scope of authority.<sup>73</sup>

This means that in such a case the employee himself or herself could be held personally liable.<sup>74</sup>

### **3.4 Cancellation of the Contracts and Repossession of Goods**

#### **3.4.1 Cancellation of the Contract**

Common law principles will also apply where one of the parties commits breach of contract.<sup>75</sup>

#### **3.4.2 Repossession of Goods**

Most contracts usually contain provisions which authorises the credit grantor to cancel the transaction if the credit receiver fails to perform at the time fixed for performance. This

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<sup>72</sup> Section 24 (1) (b).

<sup>73</sup> Section 24 (1) (c). According to Greenbaum the credit grantor would not escape liability if he or she merely issued an instruction forbidding such act or omission (Greenbaum op cit at 148).

<sup>74</sup> See also the criminal penalties stipulated in terms of s 24 (2).

<sup>75</sup> The common law position with regard to consumer protection will be dealt with in the chapter 4 below.

right is known as *lex commissoria*.<sup>76</sup> The exercise of this right is subject to the provisions of s 11 which requires the credit grantor to issue the credit receiver a notice of his failure to comply with his obligations under the transaction and calling him to perform his obligation on or before the stipulated date and also warning him of the consequences of the failure to perform.<sup>77</sup> The Act requires that the notice must be in writing and be delivered to the credit receiver in person. The Act also requires that there should be an acknowledgement of receipt of such notice or else the notice must be posted by pre-paid registered mail.<sup>78</sup> The credit receiver is allowed thirty days within which to perform his contractual obligations after the receipt of the notice. Any action that may be brought against the credit receiver before the expiry of that period is not enforceable. This means that issuing of summons before the expiry of the thirty-day period will be premature.<sup>79</sup> The credit receiver may make use of possessory remedies for the restoration of the status quo if the credit grantor seeks to recover the goods by using ways other than the court order to obtain the possession of the goods, and the credit receiver has not terminated the agreement.<sup>80</sup> Greenbaum<sup>81</sup> has observed that in a large number of repossessions the credit grantor repossessed the goods in

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<sup>76</sup> See also Christie 1996: 567-8; Kerr 1998: 554. In *Nel v Cloete* 1972 (2) SA 150 (A) at 160 D-E it was held that the credit grantor is not entitled to cancel the contract capriciously merely because he has the right to do so.

<sup>77</sup> According to Greenbaum where the credit grantor is already in possession of the goods this notice is not necessary. The thirty-day period is necessary for the notice of the intention to recover the goods (Greenbaum op cit at 149).

<sup>78</sup> The notice must be sent to credit receiver's residential address as furnished in the credit agreement. In case he has changed the address, to his new address of which he has given notice. If the credit receiver failed on two or more previous occasions to comply with his obligations and has received a letter on each occasion, then the next notice is reduced to a 14-day period.

<sup>79</sup> Otto op cit at 131 and Grove & Jacobs op cit at 38.

<sup>80</sup> See Greenbaum op cit at 150.

<sup>81</sup> Ibid.

contravention of the Act. In terms of the Act, the credit grantor should retain possession of the repossessed goods for a period of thirty days following their surrender and within that time the credit receiver may make payment of the amount owed, together with any reasonable costs incurred by the credit grantor.<sup>82</sup> The credit grantor is not allowed to induce or require the credit receiver to sign any documents in terms of which the credit receiver terminates a credit contract and in which he agrees to return the goods to which such credit contract relates before expiry of the thirty-day notice period.<sup>83</sup>

#### 3.4.3 The Rights of Credit Receiver upon Non-compliance with the Credit Agreement

If the credit receiver fails to carry out his contractual obligations or if any other contingency occurs which in terms of such agreement entitles the credit grantor to take action against him and such credit agreement still exists, the credit receiver may not be obliged to make any payment, or perform any other act, which would place the credit grantor in a better financial position than that in which he would have been if the credit receiver had carried out that obligation in question or if such contingency had not occurred.<sup>84</sup>

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<sup>82</sup> Section 12 (1). The reasonable costs incurred by the credit grantor may include storage costs or transportation costs, etc. If credit receiver pays the amount owed and the costs, which the credit grantor incurred, he is then entitled to recover the possession of goods and to be reinstated in his rights.

<sup>83</sup> Section 12 (3).

<sup>84</sup> Section 14.

#### 3.4.4 Valuation of the returned Goods

The Act requires that when goods are repossessed, some evaluations thereof must be made to ascertain the liability of the credit receiver. If the credit transaction relates to an instalment sale transaction, the credit grantor is required to designate a competent and unbiased person to do the valuation of the goods.<sup>85</sup> Such person need not be a sworn valuer. If the value of the goods at the time exceeds the amount still owing in terms of the credit agreement, the credit grantor must pay the difference of the amount to the credit receiver.<sup>86</sup> If the credit grantor fails to cause the valuation to be done in accordance with the provisions of s 16 (1), the court is competent to determine the value of the goods.<sup>87</sup> If the returned goods are thereafter sold or leased at a higher price, the higher price is deemed to be the value of the goods.<sup>88</sup> The credit receiver will receive the difference between the amount received on the sale of the goods and the amount still outstanding on the goods purchased.<sup>89</sup>

#### 3.4.5 Court Orders

The availability of different court orders depends on the nature of the transaction in question. For example, where the transaction relates to an instalment sale, ordinary legal

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<sup>85</sup> Section 16.

<sup>86</sup> Section 15. The onus of reclaiming the difference of the amount rests with the credit receiver.

<sup>87</sup> Section 16 (2).

<sup>88</sup> The South African Law Commission, Project Report 67 at 79.

<sup>89</sup> Section 15.

remedies are not available to credit grantor in the Magistrate's court.<sup>90</sup> The only right of recourse open to the credit grantor is to sue the credit receiver in the normal way and to obtain an order for payment of the amount owing. Failure by the credit receiver to pay in terms of the order may cause the credit grantor to apply for the attachment of his assets. The credit grantor retains his rights under the Act to apply for an interdict and an interim attachment order, relating to the disputed goods in a credit transaction, after the expiry of the thirty-day notice period.

## **B. USURY ACT 73 OF 1968**

### 3.5 The Scope and application of the Act

The Usury Act<sup>91</sup> applies to the financing aspects of the sale (credit transaction) and the leasing of movable goods (leasing transaction) as well as the money lending transactions. It should be noted that the definitions of credit and leasing transactions contained in the Usury Act do not correspond to those contained in the Credit Agreement Act.<sup>92</sup> The primary object of the Usury Act is to provide for the limitation and disclosure of finance charges levied in respect of money lending transactions, credit transactions as well as

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<sup>90</sup> Section 65 (1) of the Magistrate's courts Act 32 of 1944. For example, the court does not make an order for committal; for contempt of court; an emolument attachment order; a garnishee order or the typical orders against debtors in Magistrate's court against credit receiver. However, these orders are possible if the goods are lost or have been destroyed or if they have been seized in terms of the Customs and Excise Act 91 of 1964.

<sup>91</sup> Act 73 of 1968.

<sup>92</sup> Act 75 of 1980.

leasing transactions and also for matters incidental thereto.<sup>93</sup> The writer intends to make a brief comment on the following salient aspects of the Usury Act in so far as they relate to the subject matter of this study.

### 3.5.1 Money-lending Transactions

In terms of the Act ‘money-lending transaction’ is a transaction which, whatever its form may be, and whether or not it forms part of another transaction, that is substantially one of money lending.<sup>94</sup> These transactions include:

- (a) any agreement in terms of which goods are sold under a condition of repurchase of such goods at a higher price, in which case the lower price at which the goods are sold must, for the purpose of the Act, be deemed to be a sum of money lent. This has been described as a ‘money lending transaction’ in disguise.<sup>95</sup> The lower price at which the goods are sold is deemed to be a sum of money lent.<sup>96</sup>

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<sup>93</sup> See preamble of the Act.

<sup>94</sup> Section 1.

<sup>95</sup> *S v Friedman Motors (PTY) Ltd and another* 1972 (3) SA 421 (AD) at 429. This case was a further appeal from Transvaal Provincial Division. In this case a company and one of its directors had been convicted in a Magistrate’s court of four contraventions of the Usury Act, s 2 (1) in particular. Under that subsection, read with s 17, it is an offence for a moneylender in money-lending transaction to stipulate for, demand or receive finance charges at an annual finance charge rate greater than the rate laid down in the statute for a transaction of that type. In a further appeal it appeared that four prospective borrowers had each agreed to sell his car to the company for an amount fixed by the director and agreed to repurchase it under a hire-purchase agreement for a greater amount. Out of the purchase price payable to him each borrower received the amount he had wished to borrow, and left the balance with the company as the initial payment under the hire-purchase agreement. None of the borrowers would have sold their cars unless they could retain possession of them and continued to use them, so that the practical effect of the transaction was the same as if each borrower had borrowed the sum of money required by him and repaid it over a period together with finance charges thereon in excess of those prescribed in the section. The court was of the view that these transactions were money-lending transactions as defined in s 1 of Act 73 of 1968.

<sup>96</sup> See Diemont & Aronstam op cit at 282.

- (b) any transaction in terms of which goods are purchased, services are rendered to, or any amount of cash is obtained by credit card holder in terms of the credit card scheme, in which case the price at which the goods are so purchased or such services are so rendered or such amount of cash is so obtained, must for the purpose of the Act be deemed to be a sum of money lent by the manager concerned to such credit card holder;<sup>97</sup>
- (c) any transaction in terms of which immovable property is sold on credit and payment is made in instalments over a period in the future;<sup>98</sup>
- (d) any transaction in terms of which alterations or improvements to immovable property are carried out and are paid for in instalments over a future period.<sup>99</sup>

### 3.5.2 Credit Transaction

Section 1 of the Act defines, a credit transaction as “any transaction, whatever its form may be, and whether or not it forms part of another transaction, by which –

- (a) a credit grantor sells or supplies to a credit receiver movable property or services against payment by the credit receiver to the credit grantor of a sum of money; or
- (b) a credit grantor transfers or grants to a credit receiver the use or enjoyment of movable property or services against payment by the credit receiver to the credit grantor of a sum of money.”

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<sup>97</sup> Section 1.

<sup>98</sup> Section 1. The Usury Act does not apply to transactions where land is sold and the purchase price is payable in a lump sum against registration of transfer. See also Otto 1991: 24 par 10.

<sup>99</sup> Section 1. See also Otto op cit par 112.

Grove and Jacobs<sup>100</sup> are of the view that the first paragraph of the definition of a credit transaction includes a cash sale. According to Greenbaum<sup>101</sup> the second paragraph of the definition include definition of a common law lease.

### 3.5.3 Leasing transaction

In terms of the Act a 'leasing transaction' is "any transaction, whatever its form may be, and whether or not it forms part of another transaction, by which a lessor leases movable property to a lessee, and the amount which is owing or will be owed by a lessee to a lessor in connection with a transaction is payable or will be payable after the date of the conclusion of the said transaction."<sup>102</sup>

### 3.5.4 Transactions in respect to which the Act does not apply

Several transactions are specifically excluded from the ambit of the Act. In terms of s 15 the Act does not apply to the following transactions:

- (a) any money-lending transaction, credit transaction or leasing transaction entered into before the amendment in 1980 of the Limitations and Disclosure of Finance Charges Act except if the principal debt is increased or the transaction is renewed;
- (b) transactions of the Land and Agricultural Bank of South Africa;

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<sup>100</sup> See Grove & Jacobs op cit at 16.

<sup>101</sup> See Greenbaum op cit at 153. Grove & Jacobs observed that lump sum payments fall within the definition of a credit transaction in the Act and that the legislature intended a permanent transfer of the use or enjoyment of property in regard to the second part of the definition.

<sup>102</sup> Section 1.

- (c) transactions of the South African Reserve Bank;
- (d) a money-lending transaction in terms of which a moneylender who is outside the Republic, grants a loan of an amount of money which is outside the Republic to a borrower who is within the Republic;
- (e) deposits with and loans to banks and building societies;
- (f) any transaction in which the principal debt exceeds R500 000, 00;<sup>103</sup>
- (g) a leasing transaction which is less than three months and which is not renewed at the expiry of the lease. This also include a transaction in which the principal debt and the finance charges calculated on it are to be paid on or before the date of the expiry of the lease; and
- (h) a debenture quoted on the stock exchange.<sup>104</sup>

### 3.5.5 Transactions Exempted from the Application of the Act

The Minister of Trade and Industry is empowered by the Act to exempt certain categories of transactions from any or all of the provisions of the Act, on such conditions and to such an extent, as he deems fit.<sup>105</sup> He may do so by way of notice in the Government Gazette.

The following transactions are exempted:

- (a) a leasing transaction in which parties to it agree that the Act will not apply if the cash price or market value of the goods, less any deposit and less the present value

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<sup>103</sup> Section 15 (g). The Minister of Trade and Industry has discretion to vary the amount by way of regulation in the Government Gazette.

<sup>104</sup> Section 15.

<sup>105</sup> Section 15A.

of the book value of the goods, exceeds R100 000, 00. The lessee is obliged to sign a waiver clause if parties to a lease transaction have reached such an agreement. In case the lessee fails to sign the waiver clause, the agreement is not enforceable and therefore the exemption does not apply.<sup>106</sup>

- (b) a leasing transaction, in which the lessee, by giving ninety-days notice may terminate the contract without making additional payments for the termination.<sup>107</sup>
- (c) a leasing transaction where the lease payments are wholly or partially deductible for income tax purposes and where the lessee will never become the owner of the goods, and will also not be liable for the value of the goods or guarantees to it;<sup>108</sup>
- (d) a money-lending transaction in respect of which (i) the borrower is a natural person or an ‘association of natural persons;’ and (ii) the loan amount does not exceed R6 000, 00 in the case of a loan to a natural person or R6 000, 00 per member of the association.<sup>109</sup>

However, the exemption does not apply to debit balances in cheque accounts and credit card transactions.<sup>110</sup> In order for the exemption to be effective, the ‘loan amount,’ ‘finance

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<sup>106</sup> According to Grove & Jacobs this exemption include operational and financial leases.

<sup>107</sup> See par 2 (2) of the Schedule to GN R2262 GG 11563 of 4 November 1988 as amended by GN R1697 in GG 12040 of 01 August 1989.

<sup>108</sup> Ibid.

<sup>109</sup> In addition to the aforementioned transactions the Minister has recently exempted categories of money lending transactions in respect of which (a) the loan amount does not exceed R10 000, 00; (b) together with the total charge of credit which is owing by the borrower, shall be paid to the lender, whether in instalments or otherwise, within a period not exceeding thirty-six months after the date on which the sum of money has been advanced to the borrower; and (c) is not paid in terms of a credit card scheme or withdrawn from a cheque account with a bank registered in terms of the Banks Act 1990 (Act No. 94 of 1990), or a Mutual bank registered in terms of the Mutual Banks Act 1993 (Act No. 124 of 1993), so as to leave such account with a debit balance (Government Gazette of Pretoria, 1 June 1999 Vol. 408).

<sup>110</sup> GN R3451 GG 14498 of 31 December 1992.

charges' and other 'costs' must be disclosed to the borrower.<sup>111</sup> The disclosure must be reduced to writing before the conclusion of the transaction. It should be noted that this exemption does not apply unless the agreement makes provision for the loan to be repaid within thirty-six months.<sup>112</sup>

### 3.6 Limitation of Finance Charges

The original object of the Usury Act is to limit the finance charges which a creditor may levy on a debt, and the disclosure of those finance charges that are recoverable. The Act provides that finance charges must be calculated and disclosed as an 'annual finance charge rate.'<sup>113</sup> Annual finance charge rate is a "rate calculated by multiplying the finance charge rate per period by a number of such periods in one year."<sup>114</sup> The Act further defines 'finance charge rate per period' as the rate at which finance charges are levied at the end of a period on the balance of the principal debt then owing.<sup>115</sup> The annual finance charge rate amounts to a nominal annual rate.<sup>116</sup> From time to time finance charges are published in the Government Gazette in terms of the Usury Act.<sup>117</sup> The Act requires that no

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<sup>111</sup> See Grove & Jacobs op cit at 18.

<sup>112</sup> Other exemptions are provided for in s 15 (g) of the Act. It provides that where the credit receiver enters into a number of transactions with the same credit grantor amounting to a total principal debt exceeding R500 000, 00, then the Act does not apply to those transactions by which the R500 000, 00 limit is exceeded.

<sup>113</sup> Section 2.

<sup>114</sup> Section 1.

<sup>115</sup> Ibid.

<sup>116</sup> See Grove & Jacobs op cit at 61.

<sup>117</sup> Section 2.

moneylender, in connection with any money-lending transaction, may demand or receive finance charges at a rate higher than that which applies to the transaction in question at a particular stage. The maximum annual finance charge rate varies according to the amount of the principal debt.<sup>118</sup>

### 3.7 Variable and Non-variable Finance Charge Rate

The Act allows the distinction between a variable and a non-variable finance charge rate. In terms of the variable finance charge rate, a rate is agreed upon in the credit contract. There may be a further clause that it may be changed during the substance of the contract. If a variable finance charge rate has been agreed to, the creditor may not recover an annual finance charge rate which is in excess of what has been agreed by the parties for that period.<sup>119</sup> The non-variable rate is a fixed rate that applies for the full period of the contract. If a non-variable rate has been agreed to, only this rate may be recovered.<sup>120</sup> It would seem that if the rates fluctuate in terms of the Usury Act, the creditor might still recover the agreed rate even if it is higher than the new rate promulgated. It should be noted that the contract must provide for either the non-variable rate or the variable rate.

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<sup>118</sup> The present maximum annual rates are:

(a) in respect to money lending, credit and leasing transactions where the principal debt is less than R6 000: 28% of the annual finance charge rate(GN R385 GG 14644 of 12 March 1993). However the Minister of Trade and Industry exempted money-lending transactions which the loan amount does not exceed R10 000, 00 (Government Gazette of Pretoria, 1 June 1999 Vol. 408).

(b) with regard to money lending, credit and leasing transaction, which the principal debt exceeds, R6 000: 25% of the annual charge rate.

<sup>119</sup> Section 2B (3).

<sup>120</sup> Section 2B (2).

The Act also allows for the recovery of interim finance charges where the money-lending transaction is secured by certain mortgage bonds required on immovable property and payment takes place only after registration of the bond.<sup>121</sup> The interim charges are recoverable from the date on which the moneylender approved the loan, until the date immediately preceding the date on which the sum of money is paid to the borrower.<sup>122</sup>

The creditor may recover the agreed rate less the rate that applies to treasury bills; or if the moneylender has to furnish guarantees on behalf of the borrower, he may recover the difference between the agreed rate and the rate that is recovered by money deposited for purposes of the guarantee.<sup>123</sup>

There is, however, no uniform way of calculating finance charges in terms of the Usury Act. The Act does not provide clear guidelines on how the finance charges must be calculated in the case of revolving credit.<sup>124</sup> The definitions of 'principal debt,' 'finance charge rate per period,' and 'period' are very complex and unintelligible to the less sophisticated consumer. Another cause of concern with regard to credit transactions is the trade practice of unilaterally changing the rates of interest by the credit grantors. This matter has been a subject of conflicting decisions of the Provincial Divisions of the High Court.<sup>125</sup> The Usury Act provides for the maximum rates that are permissible but leaves open the question whether or not the credit provider may alter the rates unilaterally.

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<sup>121</sup> Section 2A (1).

<sup>122</sup> Section 2A (1) (a).

<sup>123</sup> Section 2A.

<sup>124</sup> The South African Law Commission, Project Report 67 at 108.

<sup>125</sup> See the cases referred in chapter 5, below.

### 3.8 Mora Interest

In terms of the Act, if a moneylender, a lessor or a credit grantor has entered into an agreement with the debtor to defer the payment of a debt or when the borrower or lessee fails to pay any amount owing on due date, the creditor is entitled to recover from the debtor an additional amount in respect of finance charges, which is based upon the total amount which is payable but remains unpaid; the term during which the default continues or the term for which payment is deferred, as the case may be; and the annual finance charge rate at which finance charges on outstanding balance of the principal debt, are calculated during such term.<sup>126</sup> It has been observed that ‘interest on interest’ is not necessarily to be equalled to compound interest.<sup>127</sup> Under certain circumstances accrued *mora* interest may be added to the total amount payable but which remains unpaid.<sup>128</sup> This can happen when the debtor is required to make regular payments or equal instalments, but fails to do so at the relevant time.<sup>129</sup> Accrued *mora* interest would also be added where there is a debit balance in a cheque account with a banking institution.<sup>130</sup> The compounding of *mora* interest is also possible where the credit is a revolving one and where a money loan is payable on demand. This would, of course, depend entirely on the

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<sup>126</sup> Section 4 (1) (a)-(c). It should be noted that previously additional finance charges on unpaid interest was not claimable *ex leg* in terms of the South African common law. This was held in *United Building Society v Labuschagne* 1950 (4) SA 651 (W). However the provisions of s 4 have changed this position. It should further be noted that *mora* interest could either be simple or compound interest.

<sup>127</sup> Grove & Jacobs op cit at 64. The common law protection (*in duplum* rule) with regard to charging interest on interest will be dealt with in chapter 5 below.

<sup>128</sup> Greenbaum op cit at 158.

<sup>129</sup> Ibid; Section 4 (3) (b).

<sup>130</sup> See Greenbaum op cit at 158.

parties to the credit agreement. It is necessary that they must agree to do so and the agreement must be included in the instrument of debt. In addition to the aforementioned limitations on the credit grantor's rights the Act also regulates the maximum amount he or she may recover from the consumer.<sup>131</sup>

### 3.9 Compulsory Disclosure of Finance Charges

If the moneylender or credit grantor lent money or granted credit to the consumer, in the normal course of business, the Act requires certain additional information to be disclosed in the instrument of debt if finance charges will be payable.<sup>132</sup> Greenbaum<sup>133</sup> is of the view that the disclosure is for the benefit of the borrower and this enables him or her to shop

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<sup>131</sup> Section 5 of the Act lays down the maximum sum that a credit grantor may recover from the consumer. The maximum amount may not exceed the following: (a) the principal debt; (b) in the case of a money loan where there is a bond registered over immovable property as security, the credit grantor may not recover amounts which exceed, disbursements for maintenance and repair and renewal premiums on any first insurance policies over the property as well as amounts spent for the valuation of the property; (c) the credit grantor may also not recover amounts which exceed finance charges on the principal debt at the annual finance charge rate; (d) the credit grantor is restricted from recovering more than additional finance charges (*mora* interest) in terms of s 4; (e) the credit grantor may not recover amounts which exceed legal costs actually incurred after legal proceedings where instituted by the creditor for the payment of the principal debt or finance charges owing thereon and where judgement for the payment of the principal debt or finance charges has been taken; (f) the creditor may not claim an amount and legal costs incurred after instituting legal proceedings, where the amount has been paid without judgement having been obtained; (g) the Act prohibits the creditor from receiving an amount which is more than reasonable ledger fees; (h) the creditor may not recover more than the reasonable underwriting fees; (i) the creditor may not recover an amount which is more than the costs of repair and maintenance of leased goods; (j) the credit grantor may not recover an amount which is greater than the amounts payable for services rendered by attorneys or public accountants acting as intermediates; and (k) finally, the creditor's claim is restricted to administration fees in respect of housing loans and he or she is not allowed to claim an amount more than this fee. The Act makes it an offence to recover more than what is stated above. A person who contravenes s 5 of the Act as a whole is liable to a maximum fine of R10 000, 00 or three years imprisonment or both (Section 17). The Act allows any person who has paid an amount, which is in excess of what is stated to recover that amount within three years (Section 7).

<sup>132</sup> Section 3 (1), 2 and 2A requires certain information to be disclosed in the instrument of debt.

<sup>133</sup> See Greenbaum op cit at 159.

around and ensures that the charges are market related. Diemont and Aronstam<sup>134</sup> are of the view that the underlying purpose is to assist the borrower to use credit in the best possible manner considering his or her unfortunate personal circumstances. To this end the Act has determined that accurate information, including the lists of finance charges, as well as the details that make up the principal debt should be given. The kind of disclosure required would vary according to the kind of transaction involved.<sup>135</sup> The information must be disclosed separately, distinctly, and in writing to the prospective borrower. The disclosure must be made before the conclusion of the relevant transaction in question.

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<sup>134</sup> See Diemont & Aronstam op cit at 289.

<sup>135</sup> With regard to the money lending transaction the following information must be disclosed by the moneylender to the prospective borrower: (a) the cash amount in money actually received, or which will be received, by or on behalf of the borrower or prospective borrower; (b) all other charges, shown separately, which will form part of the principal debt (this is equivalent to what is commonly understood as 'capital') (Greenbaum op cit at 161); (c) the principal debt; (d) the amount in rands and cents of the finance charges, calculated at the annual finance charge rate; (e) the annual finance charge rate; and (f) the date upon which, or the number of instalments in which the principal debt, together with finance charges, must be paid; (g) the amount of each instalment, and the date upon which each instalment is due, or the manner in which that date is to be determined (Section 3 (1) (a)-(g)).

In relation to credit transactions the following information must be furnished: (a) the selling price of the goods sold or to be sold, or the sum of money charged or the amount of money charged for use and enjoyment of the goods; (b) all other charges, shown separately, forming part of the principal debt; (c) any deposit or the reasonable value of goods traded-in; (d) the principal debt; (e) the amount, in rands and cents, of the finance charges; (f) the annual finance charge rate; and (g) finally, the date upon which, or the number of instalments in which the principal debt together with finance charges must be paid, the amount of each instalment, and the date upon which each instalment must be paid or the manner in which that date is determined (Section 3 (2) (a)-(g)).

In respect to leasing transactions, the following information must be disclosed: (a) the cash price at which the movable property leased or to be leased is normally sold by the lessor on the date on which such a transaction is concluded, or the market value of the property leased or to be leased, in case the lessor is not a trader; (b) the cash amount of any deposit or the reasonable value of goods traded-in; (c) the present value of the book value of the property; (d) the book value (on the book value see further Grove 1993: 2B at 35. The book value of the leased property is determined by the lessor at the time the transaction is entered into); (e) in so far as the same is known and determinable:

- (i) all other charges forming part of, or which will form part of the principal debt
- (ii) the principal debt
- (iii) the amount, in rands and cents, of the finance charges
- (iv) the annual finance charge rate
- (v) the date with effect from which finance charges are to be paid by the lessee; and
- (vi) the date on which the debt is payable or the size and date of the instalment (Section 3 (2A) (a)-(f)).

Compulsory disclosure must be made whether or not any such demand is made and must be included in every instrument of debt.<sup>136</sup>

### 3.10 The Legal consequences for non-compliance with Disclosure Provisions

Although non-compliance with the legal requirements regarding the disclosure of the information referred to, in the disclosure provisions does not lead to the nullity of the contract, it nevertheless, involves serious legal consequences as the culprit might be exposed to a criminal prosecution.<sup>137</sup> The same applies to any person who wilfully makes or executes an instrument of debt, which contains misrepresentation.<sup>138</sup> Moreover, in terms of s 2 (9) of the Act finance charges which are not disclosed in an instrument of debt cannot be recovered at all, except in respect of a debit balance in a cheque account with a banking institution.

### 3.11 Instrument of Debt

The Usury Act makes provision for the instrument of debt which should contain the following information: (a) the maximum period, not exceeding ninety days, which should expire between the date when the borrower informs the moneylender, credit grantor, or

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<sup>136</sup> Section 3 (1). However the disclosure requirement does not apply to the following transactions:  
 (a) a bill of exchange when such bill is executed or discounted by the Corporation for Public Deposits, the South African Reserve Bank, or a banking institution;  
 (b) when there is a debit balance in an account with a banking institution;  
 (c) a money loan given by a life insurer to the 'owner' of a policy.

<sup>137</sup> Section 3 (8).

<sup>138</sup> Section 3 (7).

lessor, in writing, of his intention to pay the outstanding balance before due date, and the date upon which the borrower may, in fact, make early payment; (b) the maximum period, not exceeding ninety days, which should lapse after the date in which such transaction was entered into, before any such notice may be given by the borrower; (c) a notice, in writing, regarding early repayment, stating the date on which the borrower intends to pay the outstanding balance; and (d) a clause containing the date stated in the notification must be the date on which outstanding balance of the principal debt and the finance charges become due.<sup>139</sup>

### 3.12 Delivery of Instrument of Debt and Statements

A moneylender carrying on business of money-lending or a credit grantor or lessor who, as the case may be, transacts credit transactions or leasing transaction in the normal course of his business, is obliged, within fourteen days after the conclusion of the contract, to provide or deliver or send through the post to the consumer, a duplicate or true copy of the instrument of debt or the signed document.<sup>140</sup> The duplicate or copy should contain all the particulars mentioned above in 3.9. Failure by the lender to deliver the document is an offence.<sup>141</sup> The Usury Act requires a creditor to furnish a debtor with periodical

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<sup>139</sup> Section 3A (a)-(d).

<sup>140</sup> Section 10 (1). The provisions of s 10 (1) do not apply where: (a) the obligation of the debtor is secured wholly by a bond registered in the deeds registry; (b) a debit balance in an account with a banking institution from which withdrawals may be made by cheque; and (c) the borrower in the money-lending transaction is a banking institution.

<sup>141</sup> Section 10 (4).

statements.<sup>142</sup> The statements must provide the total amount already paid, and the amount still payable, and must be sent to the debtor within three months of the conclusion of the contract and, after that, at intervals not exceeding three months. The creditor may deliver the statement in person or send it by post.<sup>143</sup> If the agreement provides for variable finance charges, the creditor must within three months after the date when the rate has been altered, advise the borrower of such change and date upon which change occurred.

### 3.13 Recovery of Overpayment

Any borrower or credit receiver or lessee who, in connection with a money-lending transaction or a credit transaction or a leasing transaction, has paid an amount in excess of that payable in terms of the Act may, at any time within the period of three years from the date of such payment, recover the overpayment.<sup>144</sup> According to Grove and Jacobs<sup>145</sup> a debtor is *ex lege* entitled to claim *mora* interest on any such overpayment.

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<sup>142</sup> Section 10 (3).

<sup>143</sup> Ibid. In terms of s 10 (3) the right to periodical statements does not apply to any debenture; a bill of exchange when such bill is executed or discounted by the South African Reserve Bank, Corporation for Public Deposits or a banking institution; a debit balance in an account with a banking institution; a money loan given by a life insurer to the owner of a policy in terms of which such insurer is subject to any obligation, where such loan is secured by the pledge of that policy.

<sup>144</sup> Section 7.

<sup>145</sup> See Grove & Jacobs op cit at 84.

## CHAPTER 4

**CONSUMER CREDIT IN PRACTICE**

In this chapter it is intended to examine briefly the legal position of a consumer who is a party to the following credit contracts: cession, mortgage and suretyship. The protection afforded under the South African law will be compared with the legal protection in other jurisdictions. In respect to cession contracts attention will be given to cession *in securitatem debiti*. In mortgage contracts we are going to take a bird's eye view of the mortgage bond over immovable property. The same approach will be adopted with regard to suretyship contracts. In line with the central theme of this study emphasis will be on the problem of unfair contract terms. As already alluded to, a cause for concern in this area of the law is the perennial problem of the inclusion of unconscionable terms in standard-form contracts by the so-called dominant parties. These harsh and onerous terms serve to defeat the whole underlying idea for which contracts are made.<sup>1</sup> The writer shall now briefly consider the legal protection of the consumer in respect of these specific contracts serially below.

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<sup>1</sup> The underlying idea of the law of contracts is that "the co-ordination and co-operation for common purposes is best achieved in a society by allowing individuals and legal entities to make for their own accounts and on their own responsibility, significant decision on the production and distribution of goods and services by entering into enforceable agreements based on freely given consent" (Kotz 1986: 405 at 405; See also Kerr 1998: 8)

## 4.1 Cession

Cession is a particular method of transferring rights in a movable incorporeal thing in the same manner in which delivery (*traditio*) transfers rights in a movable corporeal thing.<sup>2</sup> This means that, cession is a contract whereby a debtor (cedent) transfer or cedes to its creditor (cessionary) incorporeal rights such as rights of action as a security for the repayment of debt.<sup>3</sup> No formalities are required for a cession and a cession may be validly executed either orally or in writing. The consent of the debtor is unnecessary where a debt is ceded. However the debtor's consent will be necessary if the cession is of part of a debt only or has as its effects the splitting of the debt for a number of cessionaries.<sup>4</sup> The change of identity of the contracting parties may sometimes be highly prejudicial to the consumer.<sup>5</sup>

### 4.1.1 Cession in securitatem debiti

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<sup>2</sup> *First National Bank of SA Ltd v Lynn NO and others* 1996 (2) SA 339 AD at 346 B-F. It should be noted that out-and-out cession does not fall within the scope of this study.

<sup>3</sup> See Scott 1991: 1-2; See also Moojen & Truiden (eds) 1995: 355; Kerr 1998: 451; Christie 1996: 523. A cession means the transfer or making over by the cedent (the debtor) to the cessionary (the creditor) of the incorporeal rights such as rights of action. It is in substance an act of transfer by means of which the transfer of a right from the cedent to the cessionary is achieved (*First National Bank of SA Ltd v Lynn NO and others*, supra, at 346).

<sup>4</sup> See Scott op cit at 1-2.

<sup>5</sup> The case in point is *Van Zyl v Credit Corporation of SA. Ltd* 1960 (4) SA 582 (A). In this case appellant had sued, in the court a quo, the respondent as the first defendant and the Tweeling Garage (Pty) Ltd. as second defendant for cancellation of a hire-purchase agreement relating to a motor car which he had concluded with the second defendant, and for repayment by the first defendant, against tender of delivery of the motor car, of an amount of 80 pounds. From the second defendant he had further claimed the repayment of an amount of 423 pounds, as well as redelivery of the second-hand motorcar which had been traded in to the second defendant, or the payment of the value thereof, that was 300 pounds. In the alternative he had claimed reduction of the purchase price as stated in the hire-purchase agreement. The plaintiff was unsuccessful on technical grounds because it was said he had used incorrect remedies.

This type of cession is analogous to a pledge of personal rights and has been judicially recognised as such. The effect is that the cessionary will recede the rights to the cedent on payment of the principal debt.<sup>6</sup> The cedent remains vested with the bare dominium in the right.<sup>7</sup> The Sechold Financial Services' case clearly illustrates the relevance of the principle of good faith in this type of transaction. The case concerned cession of investments policies by the Gazankulu Development Corporation (the GDC) to a company known as Severn as a security for a loan of R5 million it had concluded with Severn. The cession was concluded before the GDC had received the R5 million due to it. Severn then managed to persuade the GDC to hand the policies and deeds of cession to Severn's attorneys and to register them in Severn's name in order to enable it to obtain the finances to pay the GDC the R5 million due to it in terms of the loan agreement. Shortly, thereafter, Severn concluded a loan agreement of R19 million with the appellant (Sechold) and the policies, worth R19, 3 million at the times, were with the GDC's consent ceded *in securitatem debiti* to Sechold. Of the R19, 3 million, Severn paid R5 million to the GDC, the remaining R14 million was allegedly misappropriated by the Severn's attorneys. When Severn later defaulted on the loan from Sechold, the later sought to exercise its rights with regard to the proceeds of the policies. The major dispute was whether Sechold was entitled to recover from the proceeds of the policies, the amount of R19 million plus interest, or only the R5 million actually received by the GDC. The court a quo found that Severn's rights in respect of the policies were restricted

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<sup>6</sup> *Sechold Financial Services (PTY) Ltd v Gazankulu Development Corporation Ltd* 1997 (3) SA 391 (A) at 406 C-E; See also Christie op cit at 523; Kerr op cit at 451; Scott (ed) 1989: 158; Moojen & Truiden op cit at 355.

<sup>7</sup> Sechold Financial Services' case.

to the application of their proceeds to the payment of its claim against the GDC. On appeal Olivier JA said that a third party wishing to obtain the policies free from this restriction would have had to obtain cession of the GDC's remaining rights from the GDC. With regard to the second dispute, which concerned the effect of the GDC's letter of 13 November 1991, the court explained that the legal principles underlying the onward cession of a cession *in securitatem debiti* with the consent of the cedent was analogous to that pertaining to the case where the pledgee delivered the pledged object to a third party with the consent of the pledgor in order to secure the pledgee's debt to the third party. The court further held that in above circumstances, the third party, in the absence of a restrictive agreement between himself and the pledgee, became the sole pledge to the full extent of his claims against the first pledgee.<sup>8</sup>

In *State Consolidated Gold Mines Corporation Bpk v Sam Flanges Mining Supplies Bpk*<sup>9</sup> the court reaffirmed that a cession *in securitatem debiti* was sometimes regarded as a 'pledge' of the right so ceded. The court also found that the dominium of the right ceded remained with the cedent and, upon insolvency of the cedent, vested in the trustee of the insolvent estate who administers the dominium in the interest of the creditors, with due regard to the specific rights of the cessionary.<sup>10</sup> The pledge construction has been

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<sup>8</sup> At 406 C-E.

<sup>9</sup> 1997 (4) SA 644 (O).

<sup>10</sup> At 654 G-J. See also *Van Zyl NO v Look Good Clothing CC* 1996 (3) SA 523 (SE) at 526 B-G; *National Bank of South African Ltd v Cohen's Trustee* 1911 (AD) 235 at 246-8; *Incorporated General Insurances Ltd v Gush and Another* 1990 (4) SA 573 (W) at 578 F-580 C; *Millman NO v Twiggs* 1995 (3) SA 674 (A) where the court also reaffirmed the principle that a cession made with the object of securing a debt amounts to a pledge of the right ceded, and that ownership remains with the cedent, such that on his insolvency it vests in the trustee.

criticised on the grounds, *inter alia*, that it affects an attractive balance between the interests of the cedent's trustee on insolvency and those of the cessionary.<sup>11</sup>

In the light of the cedent's precarious position the law has laid down the following principles which apply to all cessions:

- (a) The parties must be clearly defined in the cession document;
- (b) The subject matter of the agreement must be clearly established and defined namely, the rights to be ceded must be defined;
- (c) The cession documents exhibits the following features:
  - (i) the so-called obligatory agreement which constitutes the agreement between the parties to cede the rights and which creates the rights and duties between the cedent and the cessionary and
  - (ii) the so-called transfer agreement whereby the subject matter of the obligatory agreement is described (the personal right transferred or pledged).<sup>12</sup>

It is essential that the *causa* for and in respect of the obligatory agreement must be stated.<sup>13</sup> It is equally important that the document or documents embodying the right or rights being transferred must be delivered.<sup>14</sup>

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<sup>11</sup> See Domanski 1995: 427 at 429.

<sup>12</sup> See Scott op cit at 158.

<sup>13</sup> In cession as security the *causa* is to be given as the security for the principal debt.

<sup>14</sup> See Scott op cit at 158.

## 4.2 Mortgage

The essence of a mortgage bond is to use the mortgagor's (the borrower's) property as security for a loan by the mortgagee (the lender).<sup>15</sup> In other words a mortgage bond over land or a special mortgage is the means whereby a debtor secures the repayment of a debt to the creditor by hypothecating the immovable property. If the mortgagor defaults, the mortgagee can recover the loan as well as outstanding interest by realising the mortgaged property. A mortgage bond constitutes two separate entitlements or rights, firstly the personal right, (the principal debt), and the real right (mortgage) which secures the personal right.<sup>16</sup> The mortgage bond and cession in *securitatem debiti* share the following similarities, namely, the dominant party determines the terms of the contract,<sup>17</sup> for example, as is the case with the security cession a mortgage contract invariably includes a penalty clause defining mortgagee's rights in the event of the mortgagor's default. In most mortgage contracts the creditor (mortgagee) has the right to claim payment of the outstanding debt in full and to have the immovable property which is the subject matter of the mortgage bond declared executable.<sup>18</sup>

It is important that the bond be registered against the title deeds of property in the deeds office for the area in which the property is situated. Such a bond after being prepared by

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<sup>15</sup> See further Scott & Scott 1987: 4.

<sup>16</sup> See Scott op cit at 129. The essentials of the mortgage are: (a) there must be an obligation, which need to be secured; (b) by property of another (debtor) to which the mortgage is to attach and (c) the creation of the real right.

<sup>17</sup> See *Zietsman v Allied Building Society* 1989 (3) SA 166 (OPD) at 169 F.

<sup>18</sup> Moojen & Truiden op cit at 356.

a conveyancer must be lodged for registration within two months of the incurring of the debt otherwise it will not confer any preference if the estate of the debtor or mortgagor is sequestrated within a period of six months after the lodging of the bond.<sup>19</sup> A mortgage over immovable property must be registered in respect of a specific amount and if the claim of the creditor on insolvency is in excess of the amount for which the mortgage bond was registered, the creditor will not be secured in respect of the excess.<sup>20</sup> A special mortgage bond is an ancillary obligation and if the principal obligation is extinguished the rights in terms of a special mortgage would also cease.<sup>21</sup>

### **4.3 Suretyship**

Suretyship is the general term given to a contract by which one person (the surety) agrees to stand surety in respect of the debt of another (the principal) to a third person (creditor). In other words suretyship is a method whereby a creditor can obtain further security for the repayment of moneys owing. A third party stands as surety on behalf of the principal debtor. Unlike mortgage or cession contracts, suretyship is not security per se, in that, it is not proprietary in character but is in the nature of personal obligation. In terms of the General Law Amendment Act<sup>22</sup> it is required that the suretyship agreement be reduced to writing and must be completed in all material respects at the time at which

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<sup>19</sup> Section 88 of the Insolvency Act 24 of 1936.

<sup>20</sup> Section 89 of the Insolvency Act 24 of 1936.

<sup>21</sup> See Moojen & Truiden op cit at 356. It should be noted that any terms in the mortgage contracts which provides for the continuing of the mortgage bond after the termination of the principal debt will be invalid. The court has the power to set aside such terms. See further Scott op cit at 129-130.

<sup>22</sup> Act 50 of 1956.

the surety executes the suretyship.<sup>23</sup> In terms of the aforementioned Act the written document should fully set out the terms of the contract.<sup>24</sup> However, the Act is not entirely clear as to which terms must be included. In *Sapirstein v Anglo Shipping Co SA Ltd*<sup>25</sup> the Supreme Court of Appeal explained that the terms of the contract of suretyship, referred to in the Act are the identity of the parties (the creditor and the debtor); the identity of the surety; and the nature and amount of the principal debt. In terms of our law if more than one surety signs a suretyship undertaking, the liability of the sureties is joint except where the sureties sign as sureties and co-principal debtors and in which the sureties renounce the benefit of excussion.<sup>26</sup>

#### **4.4. The Regulation of Mortgage and Suretyship contracts in Foreign jurisdictions**

It would seem that the measures that our financiers use to secure the repayment of debt are similar to those used in other jurisdictions. However in most foreign jurisdictions the state plays a paternalistic role through legislative intervention to ameliorate the position of the consumer. Such measures are mostly aimed at regulating unconscionable contract terms. The Australian Credit Act<sup>27</sup> is particularly instructive in this regard. Part IV of

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<sup>23</sup> Section 6 of the Act provides that no contract of suretyship shall be valid unless the terms thereof are embodied in a written document signed by or on behalf of the surety. However this is enforceable if writing requirement will not affect the liability of the signer of an *aval* under the laws relating negotiable instruments. See also Forsyth & Pretorius 1991: 57; Gering 1997: 231.

<sup>24</sup> Section 6.

<sup>25</sup> 1978 (4) SA 1 (A).

<sup>26</sup> *Ibid*

<sup>27</sup> Act 1984 (commonly known as CA in Australia).

this Act which seems to have been heavily influenced by the provisions of Article 9 of the American Uniform Commercial Code<sup>28</sup> regulates secured transactions. The Australian government has, in addition to the above Act, introduced two further protective measures, namely, New Consumer Credit Code<sup>29</sup> and the Contract Review

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<sup>28</sup> Article 9 of the Uniform Commercial Code requires the substance of a security transaction, not its form. As a general rule, it regulates all transactions intended as security, whether in the form of a mortgage or a title retention device. The parties may adopt whatever form of transaction they desire, but the form adopted is not determinative of the legal outcome. Article 9 deals with every phase of a security agreement, from its creation to its enforcement. In terms of Article 9, the security agreement must be in writing and the debtor must sign it. However, Article 9 is silent with regard to the corresponding signature by the secured party but general principles of law outside the Code determine the extent to which a non-signing secured party is bound (According to these principles if the secured party is not bound, there is no secured transaction, i.e. there is no contract). Article 9 does not require the signature to be under seal. Where an agent makes the signature of the debtor, the general common law concept of the law of agency will determine whether the signature is effective. The Consumer Credit Protection Act supplements Article 9 of the UCC. The Act contains various individual parts, *inter alia*, the Truth-in-Lending Act of 1969 which ensure meaningful disclosure of credit terms so that consumers will be able to compare more readily the various terms available and avoid the uninformed use of credit (Fonseca 1986: 95-98; Bailey 1981: 58); Consumer Leasing Act of 1976 which is intended to ensure meaningful and accurate disclosure of the terms of personal property leases for personal, family, or household use and etc.

Contrast this legal position with the recent developments in China. In terms of the China Security law the guarantee (contracts of suretyship) must be in writing. The China Security law sets forth certain requirements for the contents of the guarantee. The guarantee must contain the type and amount of the principal obligation guaranteed; it must further contain the deadline for fulfilment of the principal obligation by the debtor. Under the China Security law the form of the guarantee (general or joint and several) must be provided in the guarantee contract. The China Security law requires the guarantee contract to state clearly the scope of the security; the time period of the guarantee and other matters which the parties consider necessary to agree upon. However, a guarantee that does not contain the prescribed content is not automatically invalid and unenforceable. It may be supplemented and corrected. The China Security law allow the creditor to charge interest as provided by law or as agreed upon by the parties in their contract, but it does not allow the charging of usurious rates of interest (Norton & Andenas 1998: 415).

In relation to the mortgage contracts, the China Security law extends its consumer protection by limiting the mortgage amount. In terms of Article 35 the obligation secured by the mortgage may not exceed the value of the mortgage property. The China Security law is consumer-friendly with regard to the enforcement of the mortgage contract. It requires the creditor to have the debtor's agreement if he or she wants to enforce his or her security rights (Article 41). Insofar as forfeiture is concerned the China Security law unlike the China's common law does not allow consumer to forfeit the mortgage property (Article 53). The reason is to 'protect the interests of the mortgagor (consumer), who is usually the weaker party in terms of bargaining power when negotiating the mortgage (Norton & Andenas op cit at 426). The China Security law has been observed to be based on the principles of fairness and justice (Norton and Andenas op cit at 426).

<sup>29</sup> Consumer Credit (QLD) Act 1994.

Act.<sup>30</sup> The Credit Act and the Consumer Credit Code regulates security contracts, which are ancillary to the consumer credit contracts.<sup>31</sup> Both the Act and the Code stipulate that where a mortgage is entered into in relation to the credit contract which is regulated by them, the credit provider should within fourteen days forward the debtor with a copy thereof.<sup>32</sup> In terms of the Code this protection is applicable where a mortgage is in the form of a written mortgage document and is not part of a credit contract. The two Acts also prohibit the inclusion of terms in the mortgage contract, which require or purport to secure payment or performance under the contract by the debtor or by a guarantor (of the debtor) of a debt or other pecuniary obligation or other obligation of an amount or to an extent that exceeds the payment or performance required by the contract or the contract of guarantee, or permitted by it.<sup>33</sup> Any such terms in the consumer mortgage contract would be invalid. Any mortgagee who enters into a contract that includes a clause that violates the above prohibition is guilty of an offence.<sup>34</sup> The two Acts further prohibit the taking of blanket security. The inclusion of terms in the mortgage which purport to charge all the mortgagor's property or assets is prohibited.<sup>35</sup> A mortgagee who enters

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<sup>30</sup> Act 1980 (New South Wales). The Credit Act and Contract Review Act are complementary to each other with regard to the regulation of unfair terms.

<sup>31</sup> Cavanagh & Barnes 1988: 437. The regulated mortgage is the consensual one, i.e. the one given by the mortgagor other than a body corporate to secure the payment of a debt or other pecuniary obligation, or the performance of any other obligation under credit transaction.

<sup>32</sup> See Duggan Begg & Lanyon 1989: 388; See also s 39 of the Consumer Credit (QLD) Act.

<sup>33</sup> Section 90 (1) of the Credit Act and Section 45 (1) of the Code.

<sup>34</sup> Section 90 (1) of the Credit Act.

<sup>35</sup> Section 98 (1) of the Credit Act and Section 40 (1) and (2) of the Code.

into a contract, which is void *ab initio* is guilty of an offence.<sup>36</sup> A provision in a mortgage to the effect that the mortgagor creates or agrees to create a mortgage over or in respect of property not yet in existence is equally void.<sup>37</sup>

The Consumer Credit Code has also improved the format of the mortgage form used under the Credit Act. The Code stipulates that a mortgage should be in the form of a written mortgage document that is signed by the mortgagor.<sup>38</sup> A mortgage that does not comply with this provision is void and unenforceable. The Code also prescribes the form of the contracts of guarantee (suretyship). In terms of the Code a guarantee must be in writing and signed by the guarantor.<sup>39</sup> The Code requires a contract of guarantee to be contained in a mortgage signed by the guarantor.<sup>40</sup> A guarantee that is not in writing is not enforceable.<sup>41</sup> It is a statutory requirement that the credit provider must give to the prospective guarantor a copy of the contract documents containing the credit contract or proposed credit contract and a document in the form prescribed explaining the rights and obligations of a guarantor.<sup>42</sup> As is the case with the mortgage contract, a credit provider is required, within fourteen days after a guarantee has been signed to give to the guarantor a copy of the guarantee signed by the guarantor. It would seem that the legal

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<sup>36</sup> Section 98 (3). A mortgagee will be liable for 20 penalty units or 2,000 Australian dollars. In case the mortgage is a body corporate it will be liable for 10,000 Australian dollars.

<sup>37</sup> Section 99 (1) of the Credit Act. See also section 41 (1) of the Code.

<sup>38</sup> Section 38 (1).

<sup>39</sup> Section 50 (1).

<sup>40</sup> Section 50 (2).

<sup>41</sup> Section 50 (4).

<sup>42</sup> Section 51 (1) (a) and (b).

position of the consumer under the Australian law is stronger than his or her counterpart under the English law.<sup>43</sup> It should be mentioned that over the centuries English courts have responded well when called upon to assist a consumer who is the victim of unfair contract terms. Paternalism in the form of judicial control under English law can be demonstrated with reference to the following landmark decisions: *Cityland and Property (holdings) Ltd v Dabrah*<sup>44</sup> and *Multiservice Bookbinding Ltd v. Marden*<sup>45</sup> which clearly show the determination of the English courts to set aside oppressive and unconscionable terms in consumer contracts.<sup>46</sup> In Dabrah's case the Chancery Division ordered the terms of the mortgage to be rewritten. The facts of the case are worth recalling. A property

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<sup>43</sup> In England the Consumer Credit Act of 1974 largely governs secured transactions. The English Consumer Credit Act gives courts the power to reopen extortionate credit bargains (Section 137). The Act does not extend to loans above 15,000 pounds or to mortgage transactions entered into with a local authority or building society as creditor(s), and therefore does not apply to the majority of mortgages of residential property. In terms of the Consumer Credit Act the court can set aside, in whole or in part, any obligations imposed by credit bargain upon the debtor, or otherwise alter the terms of the credit bargains where the bargain is extortionate (Section 139). The Act contains many detailed regulations regarding the form and content of the loan and security documentation and the provision of information to customers. All forms of security provided under a consumer credit agreement must be in writing, and must be in the form and content prescribed. Section 105 (2) provides for the making of regulations to prescribe the form and content of the relevant documents. In terms of subsection (3) any such regulations may require specified information to be included in the prescribed manner in documents, and other specified material. These requirements seek to ensure that specified information is clearly brought to the attention of the surety. The security instrument has to express fully the terms of the security, omitting only implied terms (Hill-Smith 1995: 183). The security instrument must, of course, be legible and the surety must sign it (Section 4). Moreover, the surety should be given a copy of the credit or hire-agreement to be secured. The copy of the agreement must be given within seven days of the credit or hire-agreement being executed. At present the regulations which govern the English consumer credit contracts are the Consumer Credit (Guarantees and Indemnities) Regulations 1983 (SI 1983 No 1556) as amended by SI 1984 No 1600, SI 1985 No 666 and SI 1988 No 2047 (Judge 1999:299). In terms of these regulations the document must contain the names and postal address of the creditor, debtor and surety, and a description of the subject matter of the security (Reg. 3 (1) (a)). The instrument of debt must also set out a statement of the rights of the surety (Reg. 3 (1) (a)). Other legislative innovations that protect the interests and rights of consumers in this regard are the Unfair Contract Terms Act of 1977 (which deals with the unfair exemption clauses) and the Fair Trading Act of 1973.

<sup>44</sup> 1968 CH 166.

<sup>45</sup> 1979 CH 84.

<sup>46</sup> The English court can set aside any mortgage transaction that contains oppressive and unconscionable terms. The protection is more important where the mortgagee is an individual, a credit company or some foreign financial institution (Judge op cit at 299).

Company known as Cityland and Property (holdings) Ltd were owners and lessors of a dwelling house registered at the Land Registry with absolute title. At the expiration of the lease in April 1965, they sold the property for 3,500 pounds to the tenant (James Dabrah). The latter had lived there as tenant for 11 years. Mr Dabrah had undertaken to pay a premium or bonus that represented either no less than 57 per cent of the amount of the loan or interest at 19 per cent. The charge did not provide for the payment of interest. The plaintiff argued that the main questions was whether interest was payable on the principal moneys although no express provision was made for it in the charge, and also whether the court ought to decline to enforce the charge beyond repayment of the original advance plus interest, on the grounds that the terms have been unreasonable and oppressive. Regarding the unreasonableness or otherwise of the terms of the charge, the plaintiff referred to a long line of cases to the effect that an advance coupled with the payment of premium as agreed in that case, was not unreasonable.<sup>47</sup> The defendant's counsel, on the other hand, argued that the defendant had been deprived of the possibility of redemption because the proviso in the mortgage gave rise to uncertainty. The defendant further argued that the large premium imposed was in itself harsh and unconscionable and that the terms of the mortgage ought not to be enforced. Delivering the judgement of the Chancery Division, Goff J acknowledged that reasonableness, fairness and conscionability depend on all the circumstances of the case. The learned judge said that the credit or loan in instant case was not an unsecured one and that the security was being offered with a reasonable margin. The court indicated that 600 pounds provided by the defendant was reasonable to secure the property in the

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<sup>47</sup> At 169. The plaintiff referred the Chancery Division to *Halsbury's laws of England* 3<sup>rd</sup> ed. Vol. 27 (1959) p 238.

circumstances. The learned judge conceded that the plaintiff would have been entitled to charge a higher rate of interest than the normal market rate, or a reasonable premium comparable therewith, but nothing like the extent of 19 per cent looked at as an interest rate, or 57 per cent looked at as a capital sum. The learned judge went further and pointed out that the premium was so large that it forthwith destroyed the whole equity and one that made it a completely deficient security.<sup>48</sup> Goff J, therefore, held the charge to be unreasonable, and the one that compelled him on equity to interfere. The learned judge ordered the mortgage contract to be rewritten and declared that the plaintiffs were entitled only to repayment of the principal sum advanced of 2,900 pounds with interest at 7 per cent per annum from the date of that advance upon such principal sum from time to time outstanding and that each payment heretofore made by the defendant should be treated as having been applied first in keeping down any such interest for the time being outstanding and as to any surplus applied in repayment of the balance of the principal money from time to time outstanding.<sup>49</sup> The court further ordered that the defendant should deliver to the plaintiff possession of the property.<sup>50</sup>

In Marden's case the court stressed that the mortgagor must show, *inter alia*, that the bargain was unfair and not merely unreasonable. That would be the case where the dominant party has imposed objectionable terms in a morally reprehensible manner. The facts of the case were fairly simple. The plaintiff company and its two directors acting

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<sup>48</sup> At 181.

<sup>49</sup> At 183.

<sup>50</sup> *Ibid.*

as sureties, executed a mortgage charging their business premises as security for a loan from the defendant for the amount of 36,000 pounds. By the terms of the mortgage the capital advanced was repayable with interest thereon at two per cent per annum above the bank rate. This was subject to the proviso that the company paid the interest due by quarterly instalments and made annual capital repayments in accordance with a scale set out in the first schedule thereto and that the defendant would accept such payment and not seek to enforce the mortgage. In terms of the contract, interest was to be payable throughout the period of the loan on the whole sum of 36,000 pounds notwithstanding any repayments of capital made. Other important terms of the contract included the following: arrears of interest were to be capitalized after 21 days and were themselves to bear interest as from such due date; that the loan could neither be called in nor redeemed during the first 10 years; that the provisions of clause 6 for revalorising the loan, which was conveniently called the Swiss Franc uplift, applied not only to principal debt but also to interest and other moneys secured by the mortgage. On March 16, 1956 the plaintiffs approached the court seeking clarification of two questions arising from the transactions, namely (a) whether the provision for the Swiss Franc uplift in clause 6 was void and unenforceable as being contrary to public policy; and (b) whether the rest of the terms of the mortgage taken were unenforceable.

On the question of unconscionability or unreasonableness of the mortgage terms, Brown-Wilkinson J referred with approval to the case of *G and C Kregliger v NewPatagonia Meat and Cold Storage Co Ltd.*<sup>51</sup> The court considered the test applied in that case where the court held that for the plaintiffs to be excused from complying with any of the terms

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<sup>51</sup> 1914 AC 25.

of the mortgage they should show that the term was unfair and unconscionable. The court indicated that the test was not one of reasonableness. Relying on the above case, the court ruled that in order for the party to be exempted from complying with all the terms of the mortgage, he or she should show that the bargain, or some of its terms, was unfair and unconscionable. It is not enough to show that, in the eyes of the court, it was unreasonable. The court found that the bargain had been hard but not unfair. It would seem that the English courts are more determined to come to the aid of the victim of unfair contract terms.<sup>52</sup>

The present writer is convinced that our law of contract could benefit tremendously from the progressive developments that have taken place in the countries referred to above.

The present writer is also in agreement with the proposal for a single credit law to regulate the financial markets and consumer credit industry.<sup>53</sup> It is felt that the proposed credit law would hopefully address the needs of consumers and will also bring our consumer credit law in line with the exciting developments in foreign jurisdictions as have been shown above. The draft Bill seeks to alleviate the complexity of the credit regulation created by the Credit Agreement Act and the Usury Act.<sup>54</sup> Hopefully the

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<sup>52</sup> In English credit law the consumer is protected in different ways. In addition to the above measures the consumer in the mortgage contracts have the right to redeem his or her property at any time on payment of the principal, interest and costs, irrespective of any contractual date for repayment laid down in the mortgage. Any term or terms purporting to exclude the right to redeem property is not allowed (*Samuel v Jarrah Timber and Wood Paving Corporation, Ltd* 1904 AC 323). Under English law any terms which have or which purport to have the effect of making the mortgage irredeemable is void. In other words a mortgage cannot be made irredeemable. In *Fairclough v Swan Brewery Company Ltd* 1912 AC 566 the House of Lords reaffirmed that equity would not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. The court, therefore, arrived at the conclusion that the mortgage cannot be made irredeemable (Judge op cit at 299).

<sup>53</sup> The South African Law Commission, Project Report 67 at 401.

<sup>54</sup> See chapter 3 above.

proposed legislation will succeed in addressing the problems canvassed in this study.<sup>55</sup> It is felt that the proposed law should also include a provision which will regulate the related contracts which are ancillary to credit contracts such as mortgage and suretyship. This would have the beneficial effect of making the law simpler and intelligible to the ordinary consumers. The regulation of related contracts and credit contracts in the same legislation is important because in practice the credit contracts and the related contracts are often included in one document. The suggested improvement would avoid a situation where a single credit document would be regulated by four different pieces of legislations.<sup>56</sup>

#### **4.5 The Consumer Protection under the South African Common Law**

For a long time, influenced by the doctrine of ‘freedom of contract,’ our courts have enforced contractual terms or clauses which were harsh and oppressive on the basis that they have been voluntarily undertaken by the parties.<sup>57</sup> The genesis of this approach is attributable to sir George Jessel MR in *Printing and Numerical Registering Co v Sampson*<sup>58</sup> where the learned judge made the following observation:

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<sup>55</sup> With regard the proposed legislation see chapter 3 above.

<sup>56</sup> For example, one credit document can be regulated by the Usury Act, Credit Agreements Act and Regulations passed by Minister, Deeds Registry Act 47 of 1937 (if the credit document includes related mortgage contract) or Section 6 of the General Law Amendment Act 50 of 1956 as amended (if the credit document includes related surety-ship agreement).

<sup>57</sup> See *Standard Bank of SA Ltd, v Wilkinson* 1993 (3) SA 822 (C); *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (AD); *First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council* 1995 (2) SA 855 (BSC)

<sup>58</sup> (1895) LR 19 Eq 462.

“...If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred...”

Hahlo<sup>59</sup> describes this approach as the law of jungle where only the fittest survive:

“Provided a man is not a minor or a lunatic and his consent is not initiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just to bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of marketplace.”

The doctrine of freedom of contract presupposes that both contractants are bargaining on an equal footing. It is submitted that this doctrine overlooks the fact that in the majority of cases the consumer credit market is generally based on standard-form contracts, in which the scope for negotiation is virtually nonexistent and that the borrowers (consumers) are often driven to such contracts by economic need.<sup>60</sup> It is the aim of this study to plead for the harmonisation of the classical theories of contract, namely, the

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<sup>59</sup> Hahlo 1981: 70 at 70; See also Deutch 1976: 19-20. The quoted comments have four distinct senses. First, the parties in a contract should be free to negotiate the terms of their contracts without legislative interference. Secondly, where the parties have concluded a contract the terms of the contract should not be interfered with and should be given full effect. Thirdly, that a person should be free to select the parties he or she contracts with and Lastly, a person should be free to decide not to contract (Hawthorne 1995: 157 at 163; Aronstam 1979: 9-11.

<sup>60</sup> See Cassim 1984: 311 at 312.

principles of freedom of contract and *pacta sunt servanda*, with the constitutional values of human dignity and equality so as to ensure contractual justice.<sup>61</sup>

#### 4.5.1 Common Law remedies and doctrines

Our courts have used a variety of techniques in addressing the needs of consumers. The following contractual remedies and doctrines that have been used in this regard will be briefly commented upon serially below: the doctrine of good faith, public policy, duress, undue influence, misrepresentation and principles of interpretation of contracts.

##### 4.5.1.1 Good faith

In most legal systems whether common law or civilian in nature the doctrine of good faith is recognised as one of general principles of contract law.<sup>62</sup> This doctrine is used as a means of ensuring fairness in the operation of contracts.<sup>63</sup> The doctrine of good faith ensures honesty in the creation as well as the termination of the contracts. Our courts have used good faith to ensure contractual justice in the enforcement of the rights of the

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<sup>61</sup> This is in line with the approach advocated by, among others, Professors Hawthorne, Van Aswegen, Christie as indicated in chapter 7 below. Furthermore on the shortcomings of the principle of freedom of contract, see Atiyah 1979: 693-4; Strydom 1995: 697-8; Van der Merwe et al 1993: 10; Kerr 1998: 8; Friedman 1972: 126. See also the recent case of *FNB of SA Ltd v Bophuthatswana Consumer Council* 1995 (2) SA 853 (BGD) at 863.

<sup>62</sup> Bronsword, Hird & Howells (eds) 1999: 1. See also Hillman 1998: 129. However this does not imply that the doctrine of good faith is applied in just the same way in all legal systems that expressly accept it.

<sup>63</sup> For example, the concept of reasonableness with regard to performance and counter-performance.

parties to the contract.<sup>64</sup> It is matter of regret that our courts have not been consistent in the application of this doctrine particularly in the interpretation of contracts containing unconscionable terms or where the dominant party has embarked on a course of conduct which exhibits bad faith on his part.<sup>65</sup> Before the landmark decision of the Supreme Court of Appeal in the Bank of Lisbon's case it was possible for a party who suffered as a result of the other party's unconscionable conduct to raise the defence of *exceptio doli*.<sup>66</sup> For example, in the two cases under review the dominant parties attempted to use the contract for purposes for which it was not intended by the parties.<sup>67</sup>

The Bank of Lisbon's case illustrates the extent to which the dominant party could abuse his economic strength. In this case the respondents Antonio de Ornelas and Jorge De Costa Ornelas who were joint managing directors of Ornelas Fishing Company (PTY) Ltd, had approached the bank for overdraft facilities. The bank gave them the facilities in the amount of R75 000, 00. The facilities were secured by a deed of suretyship entered

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<sup>64</sup> Van der Merwe et al 1993: 231.

<sup>65</sup> See, *inter alia*, *Bank of Lisbon and South African Ltd v De Ornelas and another* 1988 (3) SA 580 (A); *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (WLD) both involving suretyship contracts. See also Lewis 1990: 26 at 35.

<sup>66</sup> In *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) the respondent (Union Corporation Ltd) in the court a quo applied successfully for an order preventing the appellant (Zuurbekom Ltd), the owner of the land, a farmer holding mineral rights, for a period of eight years from performing agricultural holdings on the land. The reason for such interdict was that such agricultural holdings would damage mining operations in the future. Zuurbekom appealed unsuccessfully against the decision. During the proceedings Mr. Pollak for appellant expressly disclaimed that *estoppel* or waiver had been established and rightly so. He contended further that Union Corporation's claim to an interdict was barred by its *laches*, (to use the terminology of English law) or so it was contended, by the *exceptio doli* (to use the terminology of the Roman law and the commentators thereon). Tindall JA rejected the proposition that the *laches* was part of our law he stated: "I can find no justification for saying that the doctrine, as expounded in the English decisions, is part of our law" ... "I am not prepared to hold that it is." In his point of departure he stated: "For our law on this subject we must turn to the *exceptio doli*." However it should be noted that this defence is no longer available at the instance of parties as the Bank of Lisbon's case has jettisoned it.

<sup>67</sup> Zuurbekom case and Bank of Lisbon's case, *supra*.

into by Antonio; a second mortgage bond passed by Antonio on his dwelling for R50, 000, 00; a deed of suretyship entered into by Jorge and a second mortgage bond passed by Jorge on his dwelling for R25 000, 00. Subsequently the overdraft limit was increased to R125 000, 00 on the additional security of a third mortgage bond passed by Antonio on his dwelling for R50 000, 00. The overdraft facility was again raised in June 1984, to R146 000, 00. On 24 December 1984 the company sent a negotiable certificate of deposit to the value of R25 300, 00 on its maturity date. On 26 September 1984 the company asked the limit be raised to R200 000, 00.

When the bank turned down the request the company discharged its entire indebtedness under the overdraft and closed its account with the bank. The company, thereafter, demanded from the bank the return of the negotiable certificates of deposit and the cancellation of the deeds of suretyship and mortgage bonds. The bank refused, arguing that it had a claim against the company for R624 197, 00 damages for breach of contract. The bank claimed that on 7 September 1984 it had concluded with the company a contract for the forward purchase of dollars between December 1984 and March 1985. The bank also claimed that the company had unlawfully repudiated the contract. The respondents, in the language of Joubert JA, “in effect by way of replication alleged that the bank’s conduct amounted to *dolus generalis*.” The learned judge of appeal proceeded to say that *exceptio doli generalis* has never formed part of Roman-Dutch law, and, that the time has arrived, once and for all, to bury the *exceptio* as a superfluous defunct anachronism.

The conclusion of the court has not been welcomed in some quarters.<sup>68</sup> Sadly the judgment of the court said nothing about the importance of good faith in our law of contract. This regrettable omission underscores the need in our legal system to have a system of statutory control whereby the contents of contracts have to conform to the general equitable standard contained in the concepts of reasonableness and equity, or good faith.<sup>69</sup>

The justification for equitable standard in contracts is provided by the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*<sup>70</sup> in which Olivier JA who wrote a

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<sup>68</sup> See *inter alia*, Lewis 1990: 26 at 35. See also 1997 Annual Survey of South Africa at 185 where the learned author opines that “the attempt by a judge of the Supreme Court of Appeal to avoid the harsh consequences of De Ornelas case is also encouraged, however more analysis and justification is required: slipping equity under the cover of public policy is not enough.” Van der Merwe et al stated: “The need for substantive Justice between parties in a contract - which also underlay the *exceptio doli generalis* - remains extant despite the fact that a particular technical remedy does not exist” (Van der Merwe et al 1993: 232). See also Zimmermann and Visser (eds) 1996: 256; Zimmermann 1998: 174.

<sup>69</sup> See also Van Loggerenberg 1988: 407 at 424 who is in support of this approach. In the United States of America there is Uniform Commercial Code (Adopted in 1954 as the Law of Pennsylvania (12A P.S) which protect buyers of goods and services against contractual abuse. The Code gives courts the discretion not to enforce the contracts on the ground of unconscionability at the time it was made. Section 2-302 provides:

“If a court as matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clauses as to avoid the unconscionable results.”

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties should be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and the effect to aid the court in marking determination. The basic test is whether, in the light of the general commercial background and commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of marking of the contract.

Contrast the legal protection afforded by the Code with Article 55 of the Brazilian Consumer Code (Law No 8078 of September 1990). The Consumer Code requires that Federal Government, the States, the Federal District and the Municipalities must monitor and control the production, manufacture, distribution and advertising of products and services, the consumer market in order to safeguard the consumer’s life, health, safety, information and well being and issue any guidelines that may be necessary therefore. The Brazilian Code allows consumers and suppliers to participate in the drafting, review and updating the guidelines and this epitomise consumer protection (The South African Law Commission Project Report 47).

<sup>70</sup> 1997 (4) SA 302 (SCA).

separate majority judgment attempted to reintroduce equity as a specific requirement for the validity of a contract. In this case an aged, ill woman had signed a suretyship contract in favour of, and ceded shares to the First National Bank (hereinafter referred to as appellant Bank) securing her son's debts. Her daughter, who was her *curatrix bonis* had sought an order in the court a quo declaring the contracts entered into by her mother not legally enforceable because of the elderly woman's lack of contractual capacity by reason of ill health. The court a quo gave judgment in her favour. In an appeal by the First National Bank the majority of the court confirmed the decision of the court a quo, but Olivier JA reached the same conclusion on a different basis. The learned judge of appeal held that where a surety was obviously weak and confused and was the debtor's parent, public policy required that the creditor should ensure that the surety understood the consequences of her action - something that the bank had failed to do. The necessary bona fides was thus absent and the resultant contract invalid.

Olivier JA's approach with regard to the role of the good faith in contracts is to be welcomed. One commentator has expressed himself in this regard as follows: "The fact that Olivier JA used the doctrine of *bona fides* as the cornerstone of his judgment is particularly significant in that it resembles the proposals contained in the South African Law Commission: *Unreasonable Stipulations in Contracts and Rectification of Contracts* (Project 47)."<sup>71</sup> According to Zimmermann and Visser<sup>72</sup> it is unlikely that *Bank of*

*Lisbon and South African Ltd v De Ornelas and another* will remain the last word on the

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<sup>71</sup> Glover 1998: 329 at 334.

<sup>72</sup> Zimmermann and Visser (eds) 1996: 256. See also Zimmermann 1998: 174. However, Cockrell has warned that a subjective concept of good faith is valueless, and further opines that the objective concept of good faith will be equally valueless if it is allowed to "collapse into a malleable notion of reasonableness" (Cockrell 1997: 26 at 41-43). See also Neels where he warned against too lavish application of the concept of good faith (Neels 1999: 684).

matter of good faith and contract law. The reluctance of the Supreme Court of Appeal to clearly define the role of good faith in our law of contract strengthen our proposal for some kind of legislative intervention in this area of the law.

#### *4.5.1.2 Public policy*

As indicated in the leading case of *Sasfin (PTY) Ltd v Beukes*<sup>73</sup> our courts use the doctrine of public policy to declare as void contracts containing unconscionable terms on the ground that they are contrary to public policy. In *Sasfin's* case the court added a rider that the power to declare such contracts invalid would be exercised sparingly and in the clearest of the cases. In this case the appellant (*Sasfin*), a company carrying on a business as a financier entered into a discounting agreement with the respondent (*Beukes*), a specialist anaesthetist. In terms of this agreement *Beukes* was obliged to offer for sale to *Sasfin* any book debts he wished to sell. The purchase of such book debts was to be governed by the provisions of the discounting agreement. On the same day *Beukes* executed a deed of cession in favour of *Sasfin* and two other creditors. In the cession contract *Beukes* ceded to the creditors "all claims and rights of actions and receivables which are now and which may at any time hereafter become due to me or us by all persons without exception, from any cause of indebtedness whatsoever ('the claims') as continuing covering security for the due and proper performance of all obligations which I or we may have in the past owed or incurred or may at any time present or in the future owe or incur to all or any of the creditors from whatsoever cause

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<sup>73</sup> 1989 (1) SA 1 (AD).

and whenever arising...,” on the terms and conditions contained in the deed of cession. Both the suretyship and the discounting agreements were entered on behalf of Beukes by one Smit of Computerised Management Applications (PTY) Ltd. From time to time Sasfin purchased certain book debts offered for sale by Beukes. Eventually a dispute arose between the parties. Sasfin claimed that Beukes had breached certain warranties contained in the discounting agreement, and purported to cancel the agreement. Sasfin further alleged that Beukes was indebted to it in the sum of R108, 575, 80 at the time of the purported cancellation. Sasfin accordingly claimed to be entitled to enforce its rights under the deed of cession. Beukes disputed all claims by Sasfin and counter-claimed that Sasfin had breached certain of the terms of the discounting agreement. As a result of the dispute Sasfin instituted proceedings in the Witwatersrand Local Division for an order interdicting and restraining the respondent from collecting either from his patients and from any medical aid society(ies) or from any person, any of the debts ceded by him to the applicant. The application in the court a quo was dismissed with costs, on the grounds that the deed of cession was contrary to public policy and therefore invalid and unenforceable.

On appeal against the judgment the question was whether there were provisions in the deed of cession which offended against public policy and, if so, whether those provisions were severable from the remainder of the deed of cession. Quoting with approval the statement of the law in *Eastwood v Shepstone*,<sup>74</sup> Smalberger JA reaffirmed the power of the High Court to treat as void and to refuse to recognize contracts and transactions which are against public policy and contrary to good morals. The learned judge of appeal

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<sup>74</sup> 1902 TS 294 at 302.

held, however, that the power to declare void contracts that offend against public policy was one that should not to be hastily and rashly exercised, but only in the clearest of the cases. In Smalberger JA's view the courts have to look at the tendency of the proposed transaction, not its actually proved result and no court should shrink from the duty of declaring a contract contrary to public policy void when the occasion so demands. "The power to declare contracts contrary to public policy should, however, be exercised sparingly, and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy mostly because its terms (or some of them) offend one's individual sense of propriety and fairness."<sup>75</sup>

The caution sounded by Smalberger JA in Sasfin's case is illustrative of the reluctance of the courts to come at the aid of consumers in this regard. This reluctance might, in the present writer's opinion, create opportunity for unscrupulous credit providers to exploit unsophisticated consumers.<sup>76</sup> The Sasfin's case leaves open contracts which are not aimed at providing security for indebtedness, but only those whose object is to ensure maximum protection of creditors' rights and which at the same time will subject consumers to most stringent burdens and restrictions.

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<sup>75</sup> At 9. See also Christie *op cit* at 387 where the learned author expressed the view that the Sasfin and Botha (now Griessel)'s cases make it clear that the courts should declare contracts contrary to public policy only in the clearest cases, but should not regard themselves as bound by the existing heads of public policy because human devilment and foolishness knows no limits and the courts cannot set themselves limits which disable them from combating such things. On the criteria and factors relevant to ascertaining public policy for the purpose of Sasfin's case, see Neels 1999: 684.

<sup>76</sup> Therefore a creditor who can cover every conceivable legal loophole will still be free to enter into a contract which severely curtails the rights of his or her fellow contractant.

In Botha (now Griessel)'s case<sup>77</sup> the court endorses the cautious approach exhibited in the Sasfin case. In Botha's case the respondent company had obtained a judgment in the court a quo against Mrs. C E Botha (now Griessel) and Verwoerdburg Beleggings (PTY) Ltd., jointly and severally, with costs. The defendants appealed against the whole of the judgment of the court. In the court a quo the plaintiff's action was based upon two deeds of suretyship undertaken on 1 May 1973 by the defendant and VBL respectively. In each deed of suretyship the principal debtor was a company known as Pretoria Aardwerke and Kontrakteurs (Edms) Bpk ('Aardwerk'). In each suretyship the surety bound herself or itself to the plaintiff as creditor, in *solidum* with Aardwerke "...and all such other persons, who may be or become indebted or owe obligations to the creditor as a result of claims of whatsoever nature acquired from the principal debtor/s (such others hereinafter referred to as the debtor/s) and in respect of which the principal debtor/s remain liable in any way, for the due and punctual payment of all amounts of whatever nature and/or in performance of any obligation, all of which may now or in future become owing by the principal debtor/s and/or the debtor/s for any reason whatsoever." On appeal counsel for the appellants contended that provisions of clause 7 of the suretyships were so gratuitously harsh and oppressive that public policy could not tolerate them. In terms of clause 7 the deed of suretyship would not be cancelled save with written consent of the creditor. Hoexter JA was not persuaded that the provisions of clause 7 of the suretyships were plainly improper and unconscionable. In so doing he followed the approach of Smalberger JA in Sasfin's case. Hoexter JA added the following general observations: (a) that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between

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<sup>77</sup> Supra.

man and man, and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which impropriety of the transaction and the element of public harm are manifest.<sup>78</sup> The plain reading of both the Sasfin and Botha's cases seems to suggest that the court's power to intervene would only be possible when the contract in question involves an element of public harm or moral outrage.<sup>79</sup>

The shortcomings inherent in the current common law position were highlighted in Bophuthatswana Consumer Affairs Council's case.<sup>80</sup> In the former 'state' of Bophuthatswana (now North West Province), a Consumer Affairs Act<sup>81</sup> requires that any standard-form contract be registered with Consumer Affairs Council. In the Bophuthatswana Consumer Affairs Council's case the First National Bank pursuant to section 22 (1) of the Act submitted the forms that it intended to include in the standard-

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<sup>78</sup> This judgment has resulted in a series of propositions: (a) Public policy generally favours the utmost freedom of contract; (b) Public policy properly takes into account the necessity for doing simple justice between man and man; (c) The power to declare a contract or a term in a contract contrary to public policy and therefore unenforceable should be exercised sparingly and only in the clearest of cases; (d) A contract or a term in a contract may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to social or economic expedience, or is plainly improper and unconscionable, or unduly harsh or oppressive (Christie 2000: 8 at 3H-10).

<sup>79</sup> Another decision which shows the cautious attitude of the courts to come at the instance of consumers, is the Wilkinson's case, supra at 64. In this case the court found that in deciding whether provisions of the contract are contrary to public policy, regard must be given to three considerations: the embrace of public policy; the nature and ambit of the contract under consideration, and the maxim '*pacta sunt servanda*' which this court made it clear is still the cornerstone of the law of contract (at 826 F-G). The court applied the words of Smalberger JA (in Sasfin's case) that: "power to declare a contract contrary to public policy should be exercised sparingly and only in the clearest of cases...and where the impropriety of the transaction and the element of public harm are manifest." After analyzing the role of suretyships in commercial life the court concluded that freedom of contract and "the voluntary acceptance by a surety of the burdens of suretyship drove it to the conclusion that a surety-ship agreement or any of its provisions would be unenforceable on the ground of public policy only when they were inimical to the interest of the community as a whole."

<sup>80</sup> Supra at 64.

<sup>81</sup> Act 34 of 1984 (B). The Act has been amended by North West Consumer Affairs Amendment Act 11 of 1994 (NW) and now applies to the North West Province.

form contracts, for registration with the Director of Consumer Affairs Council. The Council refused to register certain standard-form contracts of loan, credit and suretyship, as it found them unacceptable. The offending terms, among other things, included renunciation by the borrower of important common law rights such as the benefit of excussion. The Bank appealed against the decision of the Council in terms of s 23 (4) (a) of the Act, which provides:

“Any supplier whose application has been refused and who feels aggrieved by such refusal, may lodge an appeal against such refusal with the Market Court within 21 days as from the date of notice referred to in subsection (3), which court shall hear and decide such appeal within 10 days as from such date of lodgment, and that court may confirm, amend, set aside or substitute the decision of the Director or Officer, contemplated by subsection (2), as it deems fit.”<sup>82</sup>

In considering the application Friedman JP, made reference to Sasfin’s case and compared it with the instant case. The learned judge, therefore, found nothing in the instant case that could be construed as illegal or *contra bonos mores* or unconscionable or deceptive.<sup>83</sup>

Although the public harm was apparent in the instant case, it is obvious that it failed to meet the requirements laid down in Sasfin’s case. One fails to see how the court could reach the conclusion that the terms were not *contra bonos mores* as they contained elements that would have the effect of leaving the borrower completely helpless.<sup>84</sup>

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<sup>82</sup> It should be noted that even though the Act referred to the Market Court, such kind of court is not yet in existence.

<sup>83</sup> At 871 H.

<sup>84</sup> The approach of the court in this case does not admit the possibility that some suretyship, mortgage contracts and cessions and some provisions in these contracts are undertaken only because the parties are

It should, however, be noted that Friedman JP's judgment conceded the possibility that our courts could develop a doctrine of unconscionability when he accepted that contracts might be contrary to public policy on the grounds that they are unconscionable.<sup>85</sup> In this regard, Friedman JP took the view that the Supreme Court of Appeal was ready, in Sasfin's case to forbid or condemn contracts in which public harm is manifest on the ground that they are *contra bonos mores*.<sup>86</sup> The learned judge expressed the view that the said approach may well revive the equitable jurisdiction, which the Bank of Lisbon's case removed by jettisoning the *exceptio doli generalis*.<sup>87</sup>

#### 4.5.1.3 Duress

In cases where the decision of the contractant to enter into a contract was secured by duress, the resultant contract is *voidable* and could be declared of no force and effect at the instance of innocent party. The party who suffered in that event may also claim restitution.<sup>88</sup> The kind of duress the present writer is discussing is the economic one. This form of duress is associated with poverty. For example, in Wilkinson's case from

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not bargaining on an equal footing, and because commercial realities, rather than freedom of will, dictates their terms.

<sup>85</sup> At 870 (H).

<sup>86</sup> See 1995 Annual Survey of South Africa at 135.

<sup>87</sup> *Ibid.* In this regard see also *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* supra.

<sup>88</sup> See Kerr op cit at 297. In case of the improper pressure the alleged pressure must be one, which is recognized by law and the party alleging duress bears the onus of proof. The party alleging duress must prove the existence of the elements of the delict. In *Broodryk v Smuts* 1942 TPD 47, the court held that the elements necessary to set a side a contract on the grounds of duress are as follows: (a) Actual violence or reasonable fear; (b) The fear must be caused by the threat of some considerable evil to the party or his family; (c) It must be a threat of an imminent or inevitable evil; (d) The threat or intimidation must be *contra bonos mores*; (e) The moral pressure must have caused the damage.

the nature of the contract and surrounding circumstances there was the possibility of economic duress. However, despite that kind of economic pressure the court applied the Sasfin's case test and arrived at the conclusion that freedom of contract and "the voluntary acceptance by surety of the burdens of suretyship, drove it to the conclusion that a suretyship agreement or any of its provisions would be unenforceable on the ground of public policy where they were 'inimical to the interests of the community as a whole.'"<sup>89</sup> The Wilkinson's case highlighted the cautious approach of South African courts to allow duress as remedy in economic spheres of life. Hawthorne<sup>90</sup> advocates, quite rightly, for the transformation of duress by inclusion of economic duress in addressing the problem unequal bargains. It is felt that although there was no physical threat at the surety, the court should have considered commercial realities as an overriding factor.<sup>91</sup> The English common law has since 1976 recognized the doctrine of economic duress. Under English common law economic duress has the effect of either to render a contract *voidable* or to provide a remedy for restitution.<sup>92</sup> The party alleging

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<sup>89</sup> This conclusion overlooked the fact that most suretyship contracts are not the outcome of consensus.

<sup>90</sup> Hawthorne 1995: 157 at 169-170. See also chapter 7 below, pp 141-2.

<sup>91</sup> See also the 1993 Annual Survey of the South Africa at 148. Of course this kind of duress is regulated by statute in cases of door-to-door sales in terms of s 13 of the Credit Agreements Act.

<sup>92</sup> The doctrine of economic duress has its origin in the case of *Universe Tankships v I.T.F* 1982 (2) WLR 803. In this case the appellants were a Liberian company, which owned the Universe Sentinel, a vessel registered in Liberia and flying the Liberian flag. In 1978 the vessel was on time Charter to Texaco and she arrived at Milford Haven on July 17, 1978. After the vessel discharged her cargo the respondent trade union ('the I.T.F') blacked her so as to prevent her from leaving port. The I.T.F regarded the ship as sailing under a flag of convenience and were waging a campaign against Flag of Convenience ships and their owners. The protest action continued until July 29, by which time the owners had acceded to two I.T.F demands as to the price of lifting blacking. As a result, the owners of the vessel enter into a written agreement and paid some payment as demanded. On 10 August the owners demanded return of the sum of the money paid. They sought to recover this sum on two alternative grounds. The Second alternative raised refund from I.T.F because the money had been paid under the economic duress. With regard to this alternative, the House of Lords had to decide whether the economic pressure exerted by the I.T.F was illegitimate. The House of Lords was unanimous that there was a form of commercial, economic pressure, which the common law would stigmatize as duress. The House of Lords agreed on two fundamental

duress must prove the following requirements: Firstly, that there must be a coercion or a compulsion of the victim's will, and secondly the coercion or a compulsion must have been induced by pressure which the law does not regard as legitimate.<sup>93</sup>

#### 4.5.1.4 Undue Influence

In our law a contractant who has been induced to enter into a contract by means of undue influence has right to apply for the rescission of the contract.<sup>94</sup> Our law has been influenced by English law on this type of remedy.<sup>95</sup> The party who wants to have the contract set aside on the grounds of undue influence bears the onus of proof, unless there is a special relationship between the parties, which give rise to a presumption of undue influence. In *Preller's* case the court held that anyone who wishes to rescind a contract on the grounds of undue influence should prove the following: (i) that the other party obtained an influence over him; (ii) that the influence weakened his powers of resistance and made his will pliable; (ii) that the other party to the contract used the influence in an unconscionable manner to persuade him to agree to a transaction which (a) was to his

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ingredients of economic duress. Firstly, that there must be a coercion or a compulsion of the victim's will, and secondly the coercion or a compulsion must have been induced by pressure which the law does not regard as legitimate.

<sup>93</sup> These two requirements also applies in South African common law. It should, however, be noted that our law does not extend duress as a remedy in economics spheres.

<sup>94</sup> On this remedy see, *inter alia*, Van der Merwe et al op cit at 91; Kerr op cit at 304; Christie op cit at 346 and the leading case of *Preller v Jordaan* 1956 (1) SA 483 (AD).

<sup>95</sup> In English law the party who wants rescission on the grounds of undue influence, must prove that influence was excessive, so as to exert improper pressure on him in such a manner that he was incapable of the free exercise of independent will (Kerr op cit at 304; Christie op cit at 346; Van der Merwe et al op cit 91).

detriment, and (b) he would not have concluded the agreement if he had enjoyed normal freedom of will.<sup>96</sup>

#### 4.5.1.5 Misrepresentation

In our law misrepresentation is a remedy to a party who have been misled. A representation has been defined as a statement made by one party to the other before or at the time of the contract of some matter or circumstance relating to it.<sup>97</sup> It is important that the misrepresentation must have induced the other party into the contract,<sup>98</sup> and the onus rests on the party relying on the misrepresentation to prove that the presentation by

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<sup>96</sup> See the case of *Patel v Grobbelaar* 1974 (1) SA 532 (A) at 534. In Germany Article 138, 157 and 242 of the Germany Civil Code (*Bürgerliches Gesetzbuch*) are particularly instructive in this regard. The Code provides protection against unfair contract terms. Article 138 of the Germany Civil Code provides that a legal transaction is invalid if it is *contra bonus mores*. It further provides:

“Invalid, more particularly is a legal transaction in which one of the parties, exploiting the pressure under which the other party labours, or the other party’s inexperience, lack of judgement or weakness of will, induces the other party to promise or grant him or a third party financial benefits which are excessively large in proportion to the value of his own presentation.”

Article 157 protects consumers through legal interpretation. It requires contracts to be interpreted in accordance with good morals and good faith, and with due regard to customary usage, while Article 242 obliges the debtor to perform in good faith.

Contrast with the Israel Restrictive Trade Practices Board. In Israel the standard-form contracts are regulated by the Standard-Form Contracts Act 1964 (as amended by the Standard-Form Contract Law of 1982). The Act proposes two remedies for unfair standard contracts: Judicial review and Administrative review. The Act requires that the retailers may submit a proposed standard-form contracts to the Board of Restrictive Trade Practices. If the board approves the proposed standard term contract, such terms would not be challenged for unfairness for the next five years. The court may regard the terms, which are not approved by the board to be void if having regard to the terms of the contract and other circumstances it is found that a restrictive term is prejudicial to a customer or gives a supplier an unfair advantage. The Standard-Form Contract Law of 1982 protects the franchisee against a franchiser who, relying on substantially bargaining power, inserts oppressive terms into the franchise contract. In terms of ss 4 and 5 oppressive terms may include those unduly restricting the liability of the franchiser or the franchiser’s denial of franchisee’s right to apply to the court should a dispute arise between the parties.

<sup>97</sup> Kerr op cit at 247.

<sup>98</sup> *Poole and Mc Lennan v Nourie* 1918 AD 404 and *Christie* 1994: 61.

other party was 'false in fact.'<sup>99</sup> It is also important that misrepresentation be in the context of, or has been incorporated into the context of, a contract.<sup>100</sup> Misrepresentation can only lead to cancellation of contract if the defendant made it.<sup>101</sup> Misrepresentation may take different forms, namely, fraudulent misrepresentation, negligent misrepresentation and simple misrepresentation.<sup>102</sup>

The effectiveness of this remedy in consumer contracts is illustrated by unreported judgment of Gauteng Consumer Affairs Court in *Fazlyn Salie v Birnam Business College*.<sup>103</sup> In this case the claimant had approached the Respondent with a view to registering for an Executive Secretarial course. Certain information relating to the course were faxed to her and upon examining the course offerings the claimant decided to register for the course if certain subjects (i.e. Excel and Microsoft) were substituted by the following subjects- (a) Corel-Draw, (b) Access and (c) typing on p.c. The claimant discussed the proposed changes with the respondent's consultant who told her that it was

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<sup>99</sup> See Kerr op cit at 247.

<sup>100</sup> The party in a contract cannot rely on misrepresentation unless he can prove that he was induced by the misrepresentation to enter into the contract which he would not have entered had been no misrepresentation. The party relying on misrepresentation has a remedy if he had no mind to contract at all until he was influenced by the misrepresentation and he thereafter contracted on the faith of it alone (*Patel v Grobbelar* case; Christie op cit at 316).

<sup>101</sup> In case of a representation by the third person, he must have been an agent of the defendant or acted in collusion with, the defendant. This does not prevent the plaintiff to proceed against the third person if he is pursuing another remedy other than the cancellation of the contract.

<sup>102</sup> Fraudulent misrepresentation is prevalent when the person giving representation knows that his representation is incorrect and has no belief in its truth. Negligent misrepresentation happens where the representative honestly believes that his statement is correct, but his conduct during the period leading up to the formation of his honest belief was negligent. Simple misrepresentation may be one where a misrepresentation was made without fraud and without negligence (Kerr op cit at 247; Christie op cit at 316).

<sup>103</sup> Case No. G cc 01/18/00.

possible to change. On 26 January 1999 the respondent's consultant sent her a contract that did not include the requested amendments. She was told that the amendments would be effected after she had signed the agreement. On the strength of that advice she signed the agreement. On 29 January 1999 she paid an amount of R5 936, 00 into the Birnam bank account. The claimant averred that this payment was for the Executive Secretarial course as amended. The respondent's consultant, through a hand-written letter, advised her that the changes had been effected. The claimant after waiting without receiving any service from the respondent approached the court for an order to compel the respondent to refund her the money she had paid.

During the proceedings the principal of the respondent testified to the effect that the respondent's consultant (Sandra Dlodlo) is a student consultant and careers consultant and was thus not empowered to effect any changes. The respondent's principal went on to say that the consultant's duty was only to explain to the students the subjects as they appear on their calendar. She further disclosed that respondent's consultant and the other employee (Ms Lynn) had been charged for misconduct and would appear before the College's Disciplinary Committee. She further testified that they had had meetings with the complainant and in one of these meetings the complainant was told that she would never receive any refund as she had signed a binding contract. She also told the court that the College would under no circumstances give a refund to any one, except where a person had died. Anyone who has paid the money after signing a contract is compelled to do the course failing which he or she would forfeit the money paid. Another exception where a refund would be made is where a course has been cancelled.

The respondent's consultant testified to the effect that she had told the complainant that it would not be possible to change the subjects and that she would ask one of her colleagues, Ms Lynn, to do so. She told the court that they (Ms Lynn and herself) had agreed to change the subjects. She further testified that the complainant would not have entered into the contract unless the subjects were changed as she had requested.

The court held that the complainant signed the contract under a false impression that Ms Sandra Dlodlo (respondent's consultant) would be able to effect the changes requested and that the misrepresentation of the actual position, created by Ms Dlodlo, was material to the contract. The court also held that the respondent committed an unfair business practice by: (a) inducing the complainant through misrepresentation, to act to her detriment and/or (b) by accepting a payment from the claimant, by refusing to refund the same when no services had been rendered. The court awarded judgment to the claimant.

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## CHAPTER 5

**UNILATERAL ALTERATION OF CONTRACT TERMS AND THE CHARGING OF INTEREST**

One of the major problems associated with the standard term contracts is the trade practice in terms of which banks as credit providers often, when they deem it fit, act unilaterally by altering the terms of the contract. This matter has been a subject of conflicting decisions of the Provincial Divisions of the High Court.<sup>1</sup> In the light of these conflicting decisions the matter was finally referred to the Supreme Court of Appeal in *NBS Boland Bank v One Berg River Drive CC, Deeb v Absa Bank Ltd, Friedman v Standard Bank of SA Ltd*<sup>2</sup> where the court found in favour of the banks' right to change the terms of the contract in this regard.

**5.1 The Problem of Unilateral Alteration of Contractual Terms**

The question whether the creditor may vary the terms of the contract unilaterally first arose in *Nedbank Ltd v Capital Refrigerated Truck Bodies (PTY) Ltd*.<sup>3</sup> In that case the court decided that parties might decide to grant the creditor the authority to vary the

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<sup>1</sup> For example, the case of *Nedbank Ltd v Capital Refrigerated Truck Bodies (PTY) Ltd* 1988 (4) SA 73 (N); *Investec Bank (PTY) Ltd v GVN Properties cc and others* 1999 (3) SA 490 (WPD) and *Absa Bank v Deeb and others* 1999 (2) SA 656 (N) support the unilateral alteration of contract on the one hand, while *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste Bpk and another* 1998 (3) SA (WLD) and *NBS Boland Bank v One Berg River Drive CC* 1998 (3) SA 765 (W) held unilateral alteration of contract terms unenforceable.

<sup>2</sup> 1999 (4) SA 928 (SCA).

<sup>3</sup> See full citation in f n 1 above.

finance charge rate unilaterally. The case involved the application for default judgment by the plaintiff against the second defendant as surety and co-principal debtor with the first defendant on an overdraft agreement. The plaintiff pleaded that it was an implied term of their agreement that “plaintiff would also be entitled to debit such account with interest on any debit balance from time to time at a rate fixed by plaintiff from time to time at its discretion, provided such rate would not be greater than the maximum permissible rate possible from time to time by the Usury Act 73 of 1968, such debit balance being comprised of capital debts, disbursements, charges and interest previously debited, which interest would be calculated on daily balance.” Milne JP raised the question whether the provision for the plaintiff to fix interest at its discretion was enforceable. The learned judge President, quoted with approval, the principle enunciated by Wessels J, in *Davidowitz v Van Drimmelen*<sup>4</sup> where he stated: “If I say, for instance, ‘I will buy your horse for what it is worth’ or ‘for what I choose to pay for it’ there is no sale. This principle applies to every form of contract. If the person who claims that he has made a contract proves that it depends wholly upon his will what part of it he should perform, then according to my view there is no contract, it is void for vagueness.”<sup>5</sup>

Milne JP went on to quote the following passage from *Corbin on Contract*:<sup>6</sup> “An agreement that provides that the party to be paid, or other performance to be rendered, shall be left to the will and discretion of the parties has been held not enforceable. This is supportable if the party having such discretion makes no real promise to pay or to perform. An illusory promise is no promise at all and is not sufficient consideration for a

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<sup>4</sup> 1913 TPD 672.

<sup>5</sup> At 74 A-B.

<sup>6</sup> Vol. 1 s 98.

return promise. But the fact that one of the parties reserves the power of fixing or varying the price or other performance is not fatal if the exercise of this power is subject to possible or implied limitations, as that the variation must be in proportion to some objectively determined base or must be reasonable.”<sup>7</sup> The learned Judge President conceded that the principle applied in Davidowitz’s case has no application in the instant case because there is no question of parties to the contract having discretion to pay or to perform. The basis of his argument was a passage which he quoted from Joubert<sup>8</sup> which states: “...it would be contrary to the nature of an obligation that the debtor should be able to determine what he should perform, if at all. This does not however, exclude the possibility that one party can determine the subject matter within defined limits.”<sup>9</sup>

After referring to Christie,<sup>10</sup> where the learned author expressed the view that a contract which reserves an unlimited option to the promisee as opposed to the promisor is not void for vagueness but is valid, the learned judge held that in the present case it was the creditor who was entitled to fix the rate of interest.<sup>11</sup> The learned judge further pointed out a provision in an overdraft agreement between a banker and his customer to the effect that the banker might increase the rate of interest from time to time up to a stated maximum, such being not more than the maximum prescribed by the Usury Act 73 of 1968, was valid and enforceable since the maximum was prescribed by law and, in addition, the discretion might have to be exercised reasonably in the sense that the bank

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<sup>7</sup> At 74 C-D.

<sup>8</sup> *General Principles of Law of Contract*, at 180.

<sup>9</sup> At 74 I-J.

<sup>10</sup> *The Law of Contract in South Africa*, at 89.

<sup>11</sup> At 75 A.

would take into account the rate of interest customarily levied by it at the particular time in respect of that class of consumer.<sup>12</sup>

However, in the subsequent decision in *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste Bpk and another*<sup>13</sup> Stegmann J reached a different conclusion and held that the clause that gave banker authority to unilaterally vary the interest rate was unenforceable. In this case the only difference from the Nedbank's case was the allegation by the NBS Bank that in the particular bonds concerned there was a clause providing for the NBS to give written notice to the defendant of its intention to vary the terms and then to do so in accordance with the notice. The learned judge rejected this allegation and said that, if indeed the bonds had contained such a provision, it would have been unexceptionable and it would then have been a contract analogous to that in *Diners Club SA (PTY) Ltd v Thorburn*.<sup>14</sup>

In reaching his conclusion the learned judge made the following observation: "It is trite law that when either the existence of the scope of the parties' obligations under a 'contract' are made subject to the whim of one of them, no legally enforceable contract comes into being. An example would be a 'sale' where it is stipulated that the purchaser may pay the price when he wishes (cf. *Patel v Adam* 1977 (2) SA 658 (A))...". He then continued:

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<sup>12</sup> At 75 B-D.

<sup>13</sup> 1998 (3) SA 729 (WLD).

<sup>14</sup> 1990 (2) SA 870 (C).

“The loan of a sum of money at interest is analogous to the letting of moveable property for a rental. Is it not fundamental to the validity of the contract that the rate of interest, like rental, should be determined by agreement between the parties, either at a particular rate or at least at a rate which can be ascertained without reference to some objective criterion which meets the test provided by the maxim *certum est quod certum redid potest*? If the rate of interest is to vary during the term of the loan, is it not essential that, just as in the case of a lease which contemplates future variations of the rental, the variations in the rate of interest should be determined by agreed criteria which are independent of the wills of either of the contracting parties? They could be linked, for example, to variations in the bank rate determined by the Governor of the Reserve Bank, or to variations in the prime overdraft rate of some banking institutions other than the lender, and so on.”<sup>15</sup>

The learned judge was of view that the contract between banker and customer pertaining to overdraft facilities was unique and dependent upon banking practices by which the customer agrees to be bound, even though he might not know what they were.<sup>16</sup> In his opinion the unique feature of this type of contract does not justify the conclusion that every moneylender is free to stipulate for the right to make a unilateral determination of the rate of interest to be paid by the borrower from time to time.<sup>17</sup> The court held further that money-lending contracts, like contracts of lease and other contracts in general, should consist of essential provisions that were certain in themselves, or which could be

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<sup>15</sup> At 734 E-G.

<sup>16</sup> At 735 I.

<sup>17</sup> At 736 A-B.

ascertained from an outside source not involving any future exercise of will on the part of any party to the contract. The court stressed that in the case of money-lending contracts, the rate of interest was such an essential provision that these contracts would be void for vagueness if the rate of interest was not made certain. While the Usury Act recognizes that money-lending transactions often concerned agreements for a 'variable finance charge rate' the court found nothing in the Act, which justified giving to the money-lender exclusive discretionary power unilaterally to vary the interest rate. The court then declared clause which purported to invest the moneylender with the power to determine unilaterally when and by how much to vary the interest rate, unenforceable, but severable from the main contract.<sup>18</sup>

The above case was followed in the related case of *NBS Boland Bank v One Berg River Drive CC*<sup>19</sup> which dealt with a substantially similar factual situation.<sup>20</sup> Southwood J, delivering judgment, found that clause (14) gave an unfettered discretion to the bank to determine the obligations of the defendant by varying the interest rate applicable to the loans. He also found that the discretion was not intended to be exercised or was unrelated to the objective criterion. He arrived at this conclusion after considering the use of the words 'at any time and from time to time' and also from the fact that any

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<sup>18</sup> At 737 B-D.

<sup>19</sup> 1998 (3) SA 765 (W).

<sup>20</sup> *Counsels*, referred to *NBS Bank Ltd* in which an identically worded clause in another NBS bond had been declared null and void, and *Boland Bank BPK v Steele* 1994 (1) SA 259 (T) in which the court invoked the principle that contracts had to be interpreted in favour of their validity and had held that a similar clause was valid subject to the limitation that the powers it conferred had to be exercised in a reasonable manner.

increase might be brought about subject only to the maximum provided for.<sup>21</sup> The court therefore found clause (14) unenforceable.

It would seem that the approach of the court in NBS Bank and NBS Boland Bank's case was fair for both the creditor and the debtor in that it required both of them to agree on the variation of terms of the credit contract. On the contrary there are views which support the banking practice and these views are backed by economic realities of long established banking practice. In the light of this, subsequent decisions deviated from the approach adopted in NBS Bank and NBS Boland Bank and preferred the approach adopted in Nedbank's case, *supra*.<sup>22</sup> The *Investec Bank Ltd v GVN Properties CC and others*<sup>23</sup> is of fundamental importance in this regard. In this case the offending provision provided: "finance charges on all amounts secured in terms of this bond will, if not otherwise especially agreed, be reckoned at the current rate charged by the bank from time to time in respect of relevant facility." The court referred with approval to the two previous judgments of the court.<sup>24</sup> The court pointed out that Stegmann J, in NBS Bank's case did not refer to the judgment of Van Dijkhost J in *Boland Bank Bpk v Steele*<sup>25</sup> and that in Steele's case the power to vary interest rates was upheld. The court further

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<sup>21</sup> At 774 C-D.

<sup>22</sup> See, *inter alia*, *Absa Bank v Deeb and others* 1999 (2) SA 656 (N); *Standard Bank of SA Ltd v Friedman* 1999 (2) SA 456 (C); *Investec Bank (PTY) Ltd v GVN Properties CC and others* 1999 (3) SA 490 (WPD). See also *Boland Bank Ltd v Steele* 1994 (1) SA 259 (T); *Nedbank Ltd v Capital Refrigerated Truck Bodies (PTY) Ltd* 1988 (2) SA 73 (N).

<sup>23</sup> *Supra*.

<sup>24</sup> *NBS Boland Bank v One Berg River Drive CC and NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste Bpk and another*, *supra*.

<sup>25</sup> *Supra*.

pointed out that Stegman J again overlooked Nedbank's case where the court upheld a discretionary variation power in the case of an overdraft.

The court also found that Southwood J in NBS Boland Bank's case was not satisfied that the decision in NBS Bank's case<sup>26</sup> was wrong and declined to follow the reasoning in Steele's case. Wunsh J quoted with approval statement from Friedman's case, where the learned judge described the bank practice as realistic. In Friedman's case the court made the following observation:

“With the financial markets being subject to volatility and fluctuations it is obvious that the cost of money to the banks will differ from time to time depending on the prevailing market conditions. It is, of course, possible that wild fluctuations in market conditions could take place, as has occurred over the last several months. Each time the market conditions change and the cost of the money to the bank changes, the bank would want to adjust the rate of interest. Failure or any inability to do so would place an unbearable burden on the bank, which could threaten the very existence of the financial or banking industry. I am accordingly of the view that the words ‘at any time or from time to time’ must be read in the context of the economic fluctuations which could occur several times during the lifespan of a 20 year mortgage bond with the objectively ascertainable criteria being the changing economic circumstances, the cost of money in the general market place and the rate of interest charged by other banks and financial institutions for bonds in a similar class.”<sup>27</sup>

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<sup>26</sup> Supra.

<sup>27</sup> At 494 E-G.

The court continued: "...(T)he mortgagee makes a commitment to lend for a long period of time and will only be able to reclaim the capital and interest if the mortgagor does not strictly comply with the terms of the bond: The rate of interest that is charged is invariably the ruling rate payable for the class of bonds into which it falls at the time of inception of the bond; the mortgagee will insure the property at the expense of the mortgagor, it will from time to time adjust and inspect the property to make sure its security is adequate; it will from time to time adjust the rate of interest payable subject to the limitation that the annual rate of interest will not violate the Usury Act 75 of 1968. These practices have been developed for many years, in fact, since man is known to have acquired fixed property with mortgage finance advanced by a financial institution. These practices have also become industry norms through their long usage...

If our courts do not adopt this approach, particularly in the area of a long term mortgage finance, as is the case here, one will soon find the entire housing market undermined. Banks will be slow to lend, especially during times of economic prosperity when interest rates are invariably low. If they do, it will be on a short-term basis, so that they could quickly recover their money and re-lend it at higher rates as soon as the market changes. On the other hand, they may be more inclined to lend during lean times when interest rates are higher and only do so with limited escape opportunities for the mortgagor. This would result in general uncertainty in the market and adversely influence the economy of the country. It would also give rise to additional costs, which the borrower invariably will have to pay and such costs, in my view, will be disproportionate to the legal effect it is intended to achieve.

Banks will only adjust the rate of interest payable to the extent that it is justified on reasonable grounds, a justification which, if disputed, has to be proved by the bank. Furthermore, competition between financial institutions is a more than adequate protection to the consumer against charging of unreasonable interest. It follows that in a competitive environment banks will almost act in concert in determining the rate of interest payable and thus will not exercise their discretion in an unfettered manner.

...<sup>28</sup>

The court held that the rate of interest to be charged from time to time will not be arbitrarily determined by the mortgagee, and would be guided by the rate of interest chargeable for the class of bonds into which the bond falls, but also the rates of interest charged by other financial institutions for a bond in that particular category.

Wunsch J was satisfied with the conclusion reached in Friedman's case that in this type of case the parties contemplate to contract with each other on the basis that the mortgagee would charge interest in the manner and at the rate usually required by the bank for the kind of transaction in question.<sup>29</sup> He therefore found that in the instant case it was evident from clause 3.4 of the mortgage bond that any increase of the interest rate would be in accordance with the prevailing rate charged by the plaintiff for the type of loan which had been made. He was convinced that even if such a qualification did not appear, it was, nevertheless, clear that in the standard type of bank loan interest rate variation would be in conformity with the rate charged to the borrowers in the same category to whom loans of the same type were made. Wunsch J held that this would be the case even

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<sup>28</sup> At 495 A-F.

<sup>29</sup> At 495 I.

if the loan agreement was taken on its own. The court said that the plaintiff does not have an unqualified right to capriciously or unreasonably increase the rate of interest.<sup>30</sup> The question whether a clause in a mortgage bond conferring upon the mortgagee the right to unilaterally increase the original rate of interest payable by the mortgagor is valid or invalid was finally referred to the Supreme Court of Appeal for consideration in *NBS Boland Bank v One Berg River Drive CC, Deeb v Absa Bank Ltd, Friedman v Standard Bank of SA Ltd*<sup>31</sup> where Van Heerden DCJ raised a question whether the essential provisions of a contract may be determined by one of the parties. Without answering the question the learned Deputy Chief Justice held that a term in a loan relating to the payment of interest is not an essential provision of the contract.<sup>32</sup> In conclusion the Deputy Chief Justice expressed himself as follows:

“I revert to a stipulation which confers on one of the parties the power to fix the purchase price or rental, as the case may be. In the light of what has already been said there does not appear to be any logical rationale for drawing a distinction, in the contract under consideration, between such a stipulation and other similar stipulations conferring on a party to a contract a discretion to determine a prestation...”

The effect of this decision would be that a provision in a mortgage bond conferring upon the mortgagee the authority to unilaterally increase the original rate of interest payable by the mortgagor is enforceable.<sup>33</sup> This judgment endorses the reasoning of Gihwala AJA in

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<sup>30</sup> At 499 F-G. The court concluded that the decisions in *NBS Bank Ltd* and *NBS Boland Bank Ltd* were clearly wrong and should not be followed. The court subsequently upheld the decision in the *Nedbank Ltd, Steele, Friedman and Deeb's* cases, *supra*.

<sup>31</sup> 1999 (4) SA 928 (SCA).

<sup>32</sup> See *Kerr & Glover* 2000: 201 at 201 for comments on this case.

<sup>33</sup> See also *Otto* 2000: 1.

Friedman's case that consumer protection would best be served by the competition between financial institutions. Both judges in Friedman's case and on appeal overlooked the fact that mortgage contracts are often one sided. Most consumers in our country come from disadvantage background and do not bargain on equal terms with the credit providers.

## 5.2 The Consumer and *In duplum* rule

According to common law, interest whether agreed by the parties or unilaterally varied by the creditor, ceases to run when it equals the unpaid capital.<sup>34</sup> This common law protection flows from the *in duplum* rule. The *in duplum* rule is founded on public policy and is intended to protect consumers from unreasonable charging of interest by the financial institutions.<sup>35</sup> The *in duplum* rule is intended to prevent the creditor from receiving or charging further interest when the prevailing interest equals the unpaid capital. Because the rule is based on public policy any contract of loan in which a debtor agrees to waive his or her rights in terms of the *in duplum* rule beforehand is invalid.<sup>36</sup> In other words the rule cannot be waived by borrowers or altered by banking practices.<sup>37</sup> In

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<sup>34</sup> *Standard Bank of South Africa Ltd v Oneanate Investments (PTY) Ltd (in liquidation)* 1998 (1) SA 811 (SCA)

<sup>35</sup> *Ibid.*

<sup>36</sup> It has, however, been suggested, in obiter, that when interest had accumulated the debtor may agree with his or her creditor, for example to avoid litigation, that he or she would not rely on the *in duplum* rule (*F & I Advisors (Edms) Bpk v Eerste National Bank van SA Bpk* 1999 (1) SA 515. See also Schulze 1999: 109 at 112).

<sup>37</sup> See *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 at 781. See also *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 719 AD at 734-5; Schulze 1999: 109 at 113; *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (PTY) Ltd & others* 1997 (2) SA 261 (Z) where it has been held that an agreement that sought to waive the *in duplum* rule would be one contrary to policy aimed at

the case of the appropriation of debts, the debtor may not appropriate any part of his or her payment to capital while the *in duplum* rule has frozen interest as such conduct would be inequitable and therefore not permitted.<sup>38</sup> According to the *in duplum* rule the interest begins to run again whenever the outstanding amount of interest drops below the unpaid capital. In other words when due interest drops below the outstanding capital, interest again begins to run until it once again equals that amount.<sup>39</sup> It should be noted that interest on interest is not necessarily to be equated with compound interest.<sup>40</sup>

In the leading case of *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*<sup>41</sup> the interest debited by Standard Bank to the overdrawn current account of Oneanate exceeded the capital amounts. The defendant (Oneanate) accordingly raised the *in duplum* rule and asked the court to invoke it. The plaintiff's response was that it was accepted as part of our law that the practice of bankers is to capitalise unpaid interest by periodically adding it to the capital sum owed, with the result that it becomes part and parcel of the capital and thereby losing its identity as interest. It was common cause that interest on the overdraft would be calculated daily and debited monthly. The defendant

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protecting a debtor, who had not serviced his loan, from an unconscionable claim for accumulated interest, and at enforcing a sound discipline upon the creditor. The court decided that to allow an agreement waiving the rule in advance would have left those abuses unchecked. See also *Standard Bank of South Africa Ltd v Oneanate Investments (PTY) Ltd (in liquidation)* 1998 (1) SA 811 (SCA); *Leech & others v ABSA Bank Ltd* 1997 (3) All SA 308 (W).

<sup>38</sup> *Standard Bank of SA Ltd v Oneanate Investments (PTY) Ltd*, supra, at 575 I-J.

<sup>39</sup> *L T A Construction Bpk v Administrateur, Transavaal* 1992 (1) SA 473 (A).

<sup>40</sup> See Botha 1989: 1 at 13, where he stated: "The compounding of interest at regular intervals means the capitalising of interest at regular intervals, that is, the adding of interest at the end of a period to the capital sum available at the end of a period to the capital sum available at the beginning of the period. The 'interest on interest' concept used is... not the same as the capitalising (or compounding) of interest. In granting an order in terms of interest on interest, the court (with reference to the judgment in *Davehil (PTY) Ltd v Community Development Board*) merely granted *mora* interest on a 'liquidated' amount which ... happens to be interest." See also Grove & Jacobs 1995: 64-5.

<sup>41</sup> 1995 (4) SA 510 (CPD).

admitted that it was a tacit term of its agreement with the bank that interest would be calculated daily on the debit balance of the account and that such balance would be computed by including, *inter alia*, interest previously debited to the account. The plaintiff further argued that it was a matter of South African banking practice in general, and the practice of the bank in particular, for interest to be debited to overdrawn accounts at approximately monthly intervals, as being money due and payable to the bank and that the interest was thereupon capitalised. The question was whether, when interest was debited and added to the outstanding balance in the overdrawn account, it ceased to be interest and thus could no longer be treated as such. Selikowitz J conceded that the issue could have serious ramifications in determining not only the effect and application of the *in duplum* rule but also the question of, *inter alia*, prescription, usury and the appropriation of payments.

The learned judge found that the term ‘capitalisation’ was capable of two possible meanings, broad meaning and narrow or literal meaning. His view was that in a narrow or literal sense, capitalisation connotes the process whereby a debt for unpaid interest is substituted by a new debt for capital. In terms of narrow sense the interest liability ceases to exist and only the substitutes capital would be owing.<sup>42</sup> The learned judge said that it was the latter meaning that was relied upon by the plaintiff in answer to defendant’s invocation of the *in duplum* rule. According to the learned judge judicially narrow or literal capitalisation could only occur if the debtor, instead of pursuing his claim for unpaid interest, agreed to advance to his creditor- albeit only notionally - an amount of capital sufficient to enable the debtor to discharge his interest debt. When this occurred

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<sup>42</sup> At 560 I-J.

the debit that was added to the balance represents a fresh advance of capital rather than unpaid interest.<sup>43</sup> The court found that there was no basis for saying that the interest debited by a bank to an overdrawn current account and added to the total amount outstanding lost its character as interest and becomes capital or anything else. The court went on to say that the debit balance shown in a customer's bank statement was made up of separate debits, each one of which had its own identity and origin. Some of those charges arose from monies lent and advanced and others arose from the bank's service charges or commissions, etc. The court further pointed out that the lumping together of all the amounts which were owed to the bank and which remained unpaid does not change their origin or their nature. "Words like 'capitalisation' were used to describe the method of accounting used in banking practice. However, neither the description nor the practice itself affects the nature of the debit. Interest remains interest and no method of accounting can change that."<sup>44</sup> In the result the court upheld defendants plea that the *in duplum* rule be applied to prevent plaintiff recovering more than the unpaid capital lent together with interest equal to that unpaid capital.<sup>45</sup>

On appeal the Supreme Court of Appeal referred with approval to the Zimbabwean case of MM Builders and Suppliers (PTY) Ltd and others as well as Leech's case, where it was decided that the *in duplum* rule protection could not be waived.<sup>46</sup> The court stressed

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<sup>43</sup> At 560 I -561 A.

<sup>44</sup> At 572 A-D.

<sup>45</sup> At 572 E.

<sup>46</sup> However, the *ex post facto* waiver of the *in duplum* rule is possible. In MM Builders & Suppliers' case the court held that the mere fact that a waiver of the *in duplum* rule in advance would be contrary to public policy did not necessarily entail that parties would be unable to agree on *novation* of the debt *ex leg post facto*, that is, once the debt was called up. The court gave the example of the parties who agreed on a new loan in terms of which money was advanced by the creditor in the amount of the outstanding capital and

the fact that the rule is one based on public policy and is aimed at protecting borrowers from exploitation by the lenders.

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accrued interest up to the double so as to permit the repayment of the outstanding amount. In this kind of agreement the new debt would then be repayable on agreed terms and it would constitute a true capitalisation of the interest on the previous debt. In support of *novation* the court said: "Whereas an agreement in advance to waive the rule leaves the debtor exposed to precisely those perceived evil which the rule is formulated to combat, a *novation* after the event permits the debtor the informed choice of increasing his possible indebtedness or of taking advantage of the cessation of accrual of interest" at 322 D. The second circumstance in which waiver is possible has been outlined in the Leech's case, where it has been held that it is a well established principle that any person may waive the benefit of a provision intended for his protection provided such waiver is not contrary to public policy.

## CHAPTER 6

**CONSUMER PROTECTION AND THE CONSUMER AFFAIRS COURT**

The complexity and the diverse nature of consumer-related issues can be demonstrated with reference to both the global developments reflected in the interventionist legislative reforms discussed in chapter four above and in this country, with reference to the emergence of a vast number of statutory bodies,<sup>1</sup> including a tribunal, under the auspices of the Director of Economic and Consumer Affairs,<sup>2</sup> all having the common objective of protecting the interests of consumers. The Office of the Director of Economic and Consumers Affairs in the Department of Finance and Economic Affairs plays a supervisory role in respect of the activities of some of these bodies.<sup>3</sup> This chapter will focus on the role of the newly established Consumer Affairs Court in the Gauteng Province.<sup>4</sup>

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<sup>1</sup> These include, the Consumer Protector (The Office for the Investigation of Unfair Business Practices), Micro Finance Regulatory Council, North-West Consumer Affairs Council, the Bureau of Standards, the Public Protector, the Statutory Professional bodies, the Consumer Affairs Committee and the Provincial Government Departments of Consumer Affairs. See also the former South African Coordinating Consumer Council. Apart from the abovementioned bodies there are also private consumer protection bodies, for example, the South African National Consumer Union and the National Black Consumer Union (McQuoid-Mason (ed) 1997: 334-6).

<sup>2</sup> The Consumer Affairs Court (Gauteng Province). In terms of s 13 (1) of the Gauteng Consumer Affairs (Unfair Business Practice) Act 7 of 1996 the Member of the Executive Council (MEC) for Economic Affairs and Finance has the power to establish more Consumer Affairs Courts for the Province of Gauteng. The establishment of the Consumer Affairs Court is made by notice in the Government Gazette.

<sup>3</sup> These are the activities of the Consumer Affairs Court and the Office for the Investigation of Unfair Business Practices.

<sup>4</sup> It should be noted that the Provincial Departments of Consumer Affairs are now the main governmental bodies responsible for the enforcement of the consumer protection legislation in South Africa. The provincial legislatures have the concurrent power with national legislature to deal with consumer protection issues. The provincial legislatures are entrusted with these powers by s 104 (1) which read with Schedule 4 Part A of the Constitution of the Republic of South Africa Act 108 of 1996 (McQuoid-Mason 1997: 334-6).

Gauteng Province is the only Province which has established the Consumer Affairs Court.<sup>5</sup> It would seem that in dealing with these matters South Africa is following the trends elsewhere.<sup>6</sup>

In Denmark the government has established the Office of the Consumer Ombudsman. The

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<sup>5</sup> The court has been established pursuant to the Gauteng Consumer Affairs (Unfair Business Practice) Act 7 of 1996. Another exciting tribunal is the Market Court proposed by the Bophuthatswana Consumer Affairs Act 34 of 1984 (B) aimed at regulating unfair contract terms. The Act has been amended by the North-West Consumer Affairs Amendment Act 11 of 1994 (NW) which was signed by the Premier of the North-West Province of South Africa on 30 April 1994. This Act empowers the Premier to establish a Court, to be known as the Market Court, which shall be a Court of record and shall consist of the following members, namely,

(a) The Commissioner, who shall be a judge of the General Division of the Supreme Court (Bophuthatswana) and shall preside over the proceedings before the said Market Court; and

(b) Two additional members, being appropriately qualified and experienced, one of whom shall be representative of the consumer interest, and the other to represent the interest of suppliers and the business sector.

However, the Act is silent on the powers, duties and functions of the Market Court.

The Consumer Affairs Act also established the Council for Consumer Affairs in North-West Province. In terms of the Act this Council is responsible for promoting and protecting the interest of consumers by, *inter alia*, investigating complaints and initiating enquiries into practices reasonably suspected to be deceptive or unconscionable or otherwise prejudicial to consumers interests. The Council may also bring any deceptive, abusive, unfair or unconscionable practices to an end by negotiation or, in its discretion, by arbitration or, by civil or criminal proceedings in a court of law. The Council protects consumers against unfair contract terms through registration process set out in s 22 (2). Section 22 (1) of the Act requires that whenever the terms and conditions that are to govern any consumer transaction to be included, whether wholly or in part, in a standard-form contract, such contract must be registered with the Director of the North-West Consumer Affairs Council. The procedure relating to the registration of standard-form contracts are regulated by s 23. In terms of s 23 (2) the Director or any officer of the Council acting under his authority, must after due consideration of any application for the registration of standard-form contract, grant such application and effect the registration sought, unless he is satisfied that the standard-form contract or prospective terms and conditions in question (as the case may be) is or are substantially or in any material respect incomplete, vague, deceptive or unconscionable, either in the terms or in the effect thereof, in which event, he must refuse to effect such registration. If the standard-form contract is not registered with the Director in terms of the above procedure, the said standard-form contract is null and void *ab initio*, notwithstanding the intent of the parties thereto (Section 23 (2)).

<sup>6</sup> An important development in this area of the law has been the emergence, in most countries, of administrative tribunals created solely for the purpose of addressing the problem of consumer protection. Thus in Sweden, for instance, the legislature passed the Market Court Act 70 in 1970 which makes provision for the creation of a Market Court and a Consumer Ombudsman (KO). The latter is the Director-General of the National Board for Consumer Policies (*Konsumentverket*) and is empowered to implement and supervise the protection of Swedish consumers. Side by side with the Consumer Ombudsman there is a Market Court which has discretion to prohibit use of improper terms in the standard terms contracts.

The Consumer Ombudsman represents the consumers in consumer affairs related to the business and is competent to institute legal proceedings on their behalf. The Ombudsman's powers extend as far as ensuring that companies abide by the laws and ground rules which are applicable in the consumer field, and to ensure that consumer's rights are respected. The Ombudsman enjoys a very wide powers which include the power to issue a 'cease and desist' order against the continued use of the term judged to be unfair. To be effective the order must be signed by the entrepreneur and he or she must contain the promise not to violate the provisions of the order. The entrepreneur's signature gives the order the legal force. Negotiation is the Ombudsman's valuable weapon. He would negotiate the suitable terms with retailers and would often try to find an amicable solution. When negotiations fail the only course of action open to the Consumer Ombudsman is to resort to the Market Court which would deal with the question of fairness.

Consumer Ombudsman is responsible for ensuring that public business practices and private practices are conducted with a view to achieving good marketing practices.<sup>7</sup> The concept ‘good marketing practice’ is aimed at regulating unfair contract terms. Good marketing practices are a standard norm and the Consumer Ombudsman gives special attention to consumer interests on the basis of this norm and in most cases he tries to balance those interests with business and society interests. Where the Consumer Ombudsman deems it necessary, he may intervene in a civil action to support an individual consumer, where the case is of fundamental importance. He can also claim restitution on behalf of the individual consumer who is a victim of illegal marketing practice. Another important institution in Denmark is the Consumer Complaints Board (*Forbrugerklagenævnet*) which operate under the auspices of the Ministry of Business and Industry (*Erhvervsministeriet*).<sup>8</sup> The Board makes use of mediation and negotiation to resolve consumer-retailer disputes and deals mainly with complaints concerning goods and services. The Board can be seen as a mechanism for alternative disputes resolution.<sup>9</sup>

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<sup>7</sup> The South African Law Commission op cit at 77-80.

<sup>8</sup> See the Danish Marketing Practices Act as amended by s 1 in Act No. 164 of March 2000 and s 2 in Act No. 542 of 31 May 2000.

<sup>9</sup> This can be contrasted with the powers entrusted to Australian Contract Review Tribunal under the Credit Act 1984 and the Contract Review Act 1980. In terms of the Credit Act the Review Tribunal has the power to reopen the transaction that gives rise to a credit contract or mortgage if it appears to the Tribunal that, in the circumstances relating to the contract or mortgage at the time it was entered into, it was unjust. The Tribunal may reopen the transaction at any time whether or not other proceedings are pending before a court of law. The Tribunal may reopen the transaction and may make orders not only in relation to such contract or mortgage but also in relation to any agreement made or mortgage given in connection with the transaction. Where a Tribunal reopens a transaction it may make one or more of the following orders: (a) it may reopen an account already taken between the partners; (b) it may relieve the debtor or mortgagor and the guarantor (if any) from payment of any amount in excess of such amount as the Tribunal, having regard to the risk involved and all other circumstances, considers to be reasonably payable, in the case of a credit sale contract or a loan contract, in respect of the amount financed and the credit charge or, in the case of a continuing credit contract, the amount owed by the debtor to the credit provider under the contract; (c) it may set aside either wholly or in part or revise or alter an agreement made or mortgage given in connection with the transaction; (d) it may give judgment for or make an order in favour of a party of such amount as, having regard to the relief (if any) which the Tribunal thinks fit to grant, is justly due to that party under the contract or mortgage; (e) it may give judgment or make an order against a person for delivery of goods to which the contract or mortgage relates and which are in the possession of that person.

Before examining the role of the Consumer Affairs Court it is necessary to deal briefly with the Consumer Protector whose role appears to be complementary, to that of the Consumer Affairs Court.

### **6.1 The Office for the Investigation of Unfair Business Practices (Consumer Protector)**

The Consumer Protector performs the functions of the Office for the Investigation of Unfair Business Practices.<sup>10</sup> The Consumer Protector is appointed by the Member of the Executive Council (MEC) of the province responsible for economic affairs and finance.<sup>11</sup> The MEC may, whenever the Consumer Protector is for any reason unable to perform official duties or while the appointment of a person as Consumer Protector is pending, appoint an acting Consumer Protector.<sup>12</sup>

#### **6.1.1 Functions of the Office (Consumer Protector)**

The office receives and investigates complaints of alleged unfair business practices<sup>13</sup> lodged by any person with regard to alleged unfair business practice.<sup>14</sup> If the complainant lodged is not in

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<sup>10</sup> Section 3 (2).

<sup>11</sup> Section 4 (1) (a).

<sup>12</sup> Section 4 (1) (b).

<sup>13</sup> In terms of s 1 of the Act “Unfair Business Practice” means any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting any consumer. This definition is wide enough to cover unfair terms in credit contracts.

<sup>14</sup> Section 5 (1) (a) read with section 6 (1).

writing, the office should reduce it to writing.<sup>15</sup> The office is also responsible for performing the other functions assigned to it by or under the Act.<sup>16</sup> The office is obliged to submit a report on its functions as soon as practicable after 31 December in each year to the Member of the Executive Council of the Province responsible for economic affairs and finance.<sup>17</sup>

#### 6.1.2 Investigations by the Office (Consumer Protector)

The office has discretion, where no complaint has been lodged to institute such investigation as it may deem fit. However, this discretion applies to unfair business practices in which there is reasonable suspicion that unfairness exists or may come into existence.<sup>18</sup> This power may also be exercised in respect of any business practice or type of business practice, in general or in relation to a particular commodity or investment or any kind of commodity or investment or a particular business or any class or type of business of a particular area, and which there is reason to suspect is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices.<sup>19</sup> In order to make the investigations known the office publishes them in the Provincial Gazette so as to allow the public to make written representation regarding the investigation to the office.<sup>20</sup> Moreover the office may, for the purposes of an investigation, have regard to any investigation, finding or measure taken by the Consumer

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<sup>15</sup> Section 6 (2).

<sup>16</sup> Section 5 (1) (b).

<sup>17</sup> Section 5 (2). The purpose is to ensure that the office is performing the intended aim.

<sup>18</sup> Section 7 (1) (a).

<sup>19</sup> Section 7 (1) (b).

<sup>20</sup> Section 7 (3).

Affairs Committee<sup>21</sup> or the Minister of Trade and Industry or by any other competent authority, including an authority in another province.<sup>22</sup> The office has been given very extensive powers to ensure that it executes its functions properly.

### 6.1.3 Powers of the Office (Consumer Protector)

#### 6.1.3.1 Summoning and Questioning of Persons and Production of Books and Documents

The Consumer Protector or his or her staff may, for the purposes of an investigation summon any person who is believed to be in position to furnish any information on the subject under investigation or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the office at a time and place specified in the summons, to be questioned.<sup>23</sup> The Consumer Protector or his or her staff may also require such person to produce those books, documents or other subject.<sup>24</sup> The person summoned may be asked to give the required information under oath or affirmation.<sup>25</sup>

#### 6.1.3.2 The Appointment of Investigating Officers

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<sup>21</sup> This committee has been established in terms of s 2 of the Harmful Business Practices Act No. 71 of 1988.

<sup>22</sup> Section 7 (4).

<sup>23</sup> Section 8 (1) (a).

<sup>24</sup> Ibid.

<sup>25</sup> Section 8 (1) (b).

The Consumer Protector may appoint persons in the service of the office or any other suitable persons as investigating officers.<sup>26</sup> The office must provide a certificate of appointment signed by or on behalf of the Consumer Protector to the appointed investigating officer.<sup>27</sup> The certificate of appointment should state that the appointed person is an investigating officer appointed in terms of the Act.<sup>28</sup> The investigating officer is required to be in possession of the certificate whenever he or she performs his or her functions under the Act.<sup>29</sup>

### *6.1.3.3 Search and Seizure*

If the office requires any information in relation to an investigation, investigating officer may enter any premises on or in which he or she suspects relevant books, documents or other objects are kept. The investigating officer may inspect or search those premises, and make the necessary enquiries in order to obtain information.<sup>30</sup> The investigating officer may examine any object found on or in the premises which has or might have a bearing on the investigation in question and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object.<sup>31</sup> The officer may make copies of or extracts from any book or document found on or in the premises which has or might have a bearing on the investigation in question, and request from any person who is suspected of

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<sup>26</sup> Section 9 (1).

<sup>27</sup> Section 9 (2).

<sup>28</sup> Ibid.

<sup>29</sup> Section 9 (4).

<sup>30</sup> Section 10 (1) (a).

<sup>31</sup> Section 10 (1) (b).

having the necessary information, an explanation of any entry therein.<sup>32</sup> The officer has the power to seize anything on or in the premises which has a bearing on the investigation in question.<sup>33</sup> This applies if the investigating officer needs to retain the object seized for further examination or for safe custody.<sup>34</sup> Ordinarily an investigating officer is required to enter the suspected premises and exercise the aforementioned powers only in terms of a search warrant issued by the Consumer Affairs Court.<sup>35</sup> If he or she wants to enter the premises without search warrant the owner's consent is necessary and must be in writing.<sup>36</sup> The Consumer Affairs Court may issue a search warrant only if there are reasonable grounds to suspect, on the basis of information given under oath or solemn affirmation, that an unfair business practice exists or may come into existence and that a book, document or other object which may afford evidence of such unfair business practice is on or in those premises.<sup>37</sup> Hawthorne<sup>38</sup> is of the view that for the purposes of impartiality, a search warrant issued by a Magistrate's court is preferable.

#### 6.1.4 The Outcome of an Investigation into an Unfair Business Practice

##### 6.1.4.1 Negotiation to Discontinue Unfair Business Practice

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<sup>32</sup> Section 10 (1) (c).

<sup>33</sup> Section 10 (1) (d).

<sup>34</sup> Ibid.

<sup>35</sup> Section 10 (2).

<sup>36</sup> Section 10 (2).

<sup>37</sup> Section 10 (2) (a) and (b).

<sup>38</sup> See Hawthorne 1998: 290 at 294.

The office may negotiate and conclude an arrangement with any person for the discontinuance or avoidance of an unfair business practice.<sup>39</sup> The office may also negotiate and conclude an arrangement for the reimbursement, with interest, to affected consumers or an arrangement for the discontinuance or avoidance of any aspect of an unfair business practice.<sup>40</sup> The office may also negotiate and conclude an arrangement for any other matter relating to the unfair business practice.<sup>41</sup> The said arrangements may be concluded at any time after the institution of an investigation, but before the making of a final order by the Consumer Affairs Court.<sup>42</sup> The negotiated arrangement should be in writing and signed by both parties.<sup>43</sup> The negotiated arrangement is subject to confirmation by the Consumer Affairs Court.<sup>44</sup> The Consumer Protector must apply for such confirmation.<sup>45</sup> The Consumer Affairs Court has discretion to confirm the arrangement<sup>46</sup> or to confirm the arrangement with such modifications as may be agreed to by the parties concerned.<sup>47</sup> The court may also set aside the arrangement if it is of the opinion or if it is satisfied that the arrangement will not ensure the discontinuance or avoidance of the unfair business practice in question.<sup>48</sup> In exercising its discretion the court must have due

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<sup>39</sup> Section 11 (1) (a).

<sup>40</sup> Section 11 (1) (b) and (c).

<sup>41</sup> Section 11 (1) (d).

<sup>42</sup> Section 11 (2) (a).

<sup>43</sup> Section 11 (2) (b).

<sup>44</sup> Section 11 (2) (c).

<sup>45</sup> See Hawthorne *op cit* at 294.

<sup>46</sup> Section 21 (2) (a).

<sup>47</sup> Section 21 (2) (b).

<sup>48</sup> Section 21 (2) (c).

regard to the interests of the affected consumers.<sup>49</sup> This does not mean that the interests of business are being undermined. Hawthorne<sup>50</sup> points out that the business interests are fully covered by the requirement that modification to the negotiated arrangement must be agreed upon by the parties concerned, i.e. the affected consumer and the business. The interests of business are also protected by the requirement that both the consumer and the business involved in the arrangement should be given an opportunity to be heard, before the arrangement can be set aside.<sup>51</sup>

#### *6.1.4.2 Institution of Proceedings after Completion of Investigation*

In the absence of a negotiated settlement, the Consumer Protector may institute court proceedings in the Consumer Affairs Court against the person alleged to be responsible for the unfair business practice in question,<sup>52</sup> or generally, with a view to the prohibition of any business practice or type of business practice, in general or in relation to a particular commodity or investment or any kind of commodity or investment or a particular business or any type of business or a particular area, and which is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practice.<sup>53</sup> If the office decides not to institute proceedings, the Consumer Protector should inform the complainant.<sup>54</sup> It should be

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<sup>49</sup> Section 21 (2)

<sup>50</sup> See Hawthorne op cit at 294.

<sup>51</sup> Ibid.

<sup>52</sup> Section 12 (a).

<sup>53</sup> Section 12 (1) (b).

<sup>54</sup> Section 12 (2).

noted that the institution of proceedings after completion of investigation is very rare. The office often relies on negotiation and as such most complaints that are lodged with the office are settled through negotiation.<sup>55</sup>

## **6.2 Consumer Affairs Court**

The seat of the current Consumer Affairs Court is in Matlotlo House, Marshalltown, Johannesburg.

### **6.2.1 Composition of the Court**

Members of the Consumer Affairs Court are appointed by the MEC for Economic Affairs and Finance in concurrence with the Standing Committee of the Provincial Legislature responsible for consumer affairs.<sup>56</sup> The court has five members. The chairperson of the court should be a retired judge of the High Court<sup>57</sup> or an attorney, advocate, retired magistrate or lecturer in law at a university, with not less than ten years cumulative experience in one or more such capacity.<sup>58</sup>

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<sup>55</sup> In an interview with the Consumer Protector and the Director of the Economic and Consumer Affairs the present writer established that after 6 months of the inception of the Consumer Affairs Court, it had only handed down one judgment.

<sup>56</sup> Section 14 (1).

<sup>57</sup> Section 14 (2) (a) (i).

<sup>58</sup> Section 14 (2) (a) (ii).

The four additional members should have special knowledge or experience of consumer advocacy, economics, industry or commerce.<sup>59</sup>

### 6.2.2 Initiation of the Proceedings in the Court

The proceedings before the Consumer Affairs Court must be initiated by the Consumer Protector by a summons in the prescribed form which must be served on the person concerned in any manner prescribed and which may include service outside the Province. However, this procedure does not apply to the proceedings instituted by Consumer Protector after completion of investigation and to the proceedings for urgent temporary order.<sup>60</sup> The Act provides for all proceedings of the court to be open to the public.<sup>61</sup> The court may, however, direct that the public or any member thereof may not attend any proceedings or any portion thereof, if this is justified, in the interest of the conduct of proceedings or the consideration of the matters in question;<sup>62</sup> or the protection of the privacy of any person alleged to be involved in the unfair business practice in question or the confidentiality of any information pertaining to that person.<sup>63</sup>

The prosecuting officer is the Consumer Protector. The Consumer Protector may be represented

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<sup>59</sup> Section 14 (2) (b). No person may be appointed or remain a member of the Consumer Affairs Court if he or she is not fit and proper person; or (a) is not a citizen of the Republic resident in the Province; (b) is a public servant; (c) at the relevant time is, or during the preceding twelve months was, an office bearer or employer of any party, movement, organization or body of a party political nature; (d) is an un-rehabilitated insolvent; (d) has at any time been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury, an offence under the Unfair Business Practice Act 7 of 1996 or the Corruption Act 94 of 1992; (e) or any offence involving dishonesty; (f) has at any time been removed from an office of trust on account of misconduct (Section 15 (1) (a)-(f)).

<sup>60</sup> Section 18 (1).

<sup>61</sup> Section 18 (2).

<sup>62</sup> Section 18 (3) (a).

<sup>63</sup> Section 18 (3) (b).

or assisted by an advocate, attorney, or any other person approved by the MEC for Economic Affairs and Finance.<sup>64</sup> Any person who may be adversely affected by the proceedings is entitled to participate in the proceedings.<sup>65</sup> Any person against whom proceedings are instituted or who may be adversely affected by such proceedings may appear in person or be represented or assisted by an advocate, attorney or any other person.<sup>66</sup> The court must keep a record of its proceedings.<sup>67</sup> It should be noted that individual consumers do not have *locus standi* to present the matter on their own. As has been shown above, only the Consumer Protector can initiate proceedings on behalf of such persons. It is felt that this procedure for initiating the proceedings in this court is too stringent and might defeat the very purpose for which the court was established, in that, ordinary people are not able to initiate proceedings in the Consumer Affairs Court.<sup>68</sup>

### 6.2.3 Quorum of the Court

The quorum of the Consumer Affairs Court is three members.<sup>69</sup> Except where otherwise provided, a decision of the majority of members of the court present is the decision of the

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<sup>64</sup> Section 18 (4).

<sup>65</sup> Section 18 (5).

<sup>66</sup> Section 18 (6).

<sup>67</sup> Section 18 (7).

<sup>68</sup> In an interview with the Consumer Protector (July 2000), he conceded that the distinction between the Consumer Affairs Court's procedures and the ordinary court is a fine one. He also conceded that the procedure of the court makes it very difficult to dispose off matters quickly. It would serve the interest of justice if a tribunal such as the Consumer Affairs Court would be accessible, cheap and quick in disposing cases brought to it. The stringent procedures make the court to look like any other civil court and this perception might make people to think that this court is superfluous, because this will be a duplication of courts under different names.

<sup>69</sup> Section 16 (1).

court.<sup>70</sup> If a member of the court has any interest or association on the matter under discussion and his or her interest or association is likely to affect his or her impartiality in consideration of the matter he or she must recuse himself or herself from the proceedings.<sup>71</sup> If, at any stage during the proceedings before the court, the chairperson becomes incapable of acting or is absent, the proceedings must begin afresh.<sup>72</sup> If any other member becomes incapable of acting or is absent, the proceedings must continue before the remaining members.<sup>73</sup> The proceedings should also start afresh if two or more other members become incapable of acting or are absent, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of remaining members.<sup>74</sup> Where the proceedings continue before an even number of members and there is a split decision the chairperson's decision is decisive.<sup>75</sup>

#### 6.2.4 Functions and Duties of the Court

- (a) The court must hear, consider and make a decision on any matter which is before it in terms of the Act.
- (b) The court may award costs, on a scale to be prescribed or in an amount determined by the court, against any person found to have conducted the unfair business practice concerned and who is found to have acted fraudulently or grossly unreasonably.

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<sup>70</sup> Section 16 (2).

<sup>71</sup> Section 16 (3).

<sup>72</sup> Section 16 (4) (a).

<sup>73</sup> Section 16 (4) (b).

<sup>74</sup> Section 16 (4) (c).

<sup>75</sup> Section 16 (5).

(c) The court may generally deal with all matters necessary or incidental to the performance of its functions.

(d) The court must exercise any other powers and perform the functions and duties assigned to it by the Act.<sup>76</sup>

The process of the court runs throughout the Province and orders of the court have force of law throughout the Province.<sup>77</sup>

#### *6.2.4.1 Temporary Orders*

The Consumer Affairs Court may issue a temporary order, if it is satisfied from information placed before it by the Office for the Investigation of the Unfair Business Practices that circumstances relating to a particular matter which is the subject of an investigation render that matter urgent in that irreparable prejudice would be caused to a consumer or any group or class of consumers if the matter were only to be dealt with by the court in the ordinary way.<sup>78</sup>

The temporary order may prohibit any act connected with unfair business practice in question, relate to the attachment of any money or other property or assets and may authorize investigators to take any action specified in the order.<sup>79</sup> The court may also issue a temporary order which it deems fit to prevent the prejudice in question.<sup>80</sup> The Act requires that the order be made known by notice in the Provincial Gazette and in such other media as the court may

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<sup>76</sup> Section 17 (1) (a)-(d).

<sup>77</sup> Section 17 (2).

<sup>78</sup> Section 20 (1).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

deem appropriate.<sup>81</sup> According to Hawthorne<sup>82</sup> the risk of irreparable prejudice to a business does not produce the same urgency and temporary orders which are not provided for in this eventuality.

#### *6.2.4.2 Confirmatory Orders*

The office for the Investigation of the Unfair Business Practices may apply to the court for confirmation of an arrangement concluded in terms of s 11 and the court may issue an order confirming, modifying or setting aside such arrangement.<sup>83</sup>

#### *6.2.4.3 Prohibitory Orders*

If the court is satisfied that an unfair business practice exists or may come into existence, and has not confirmed the negotiated arrangement,<sup>84</sup> it may issue such order as may be necessary to ensure the discontinuance or prevention of the unfair business practice in question.<sup>85</sup>

Hawthorne<sup>86</sup> interprets this to mean that the court would in the process develop case law defining the parameters of unfair business practice and the ever-shifting grey area as to what is acceptable and indefensible. The order may direct any person concerned in an unfair

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<sup>81</sup> Section 20 (3).

<sup>82</sup> See Hawthorne op cit at 296.

<sup>83</sup> See pp 109 to 111, supra.

<sup>84</sup> Arrangement to end the unfair business practice entered into by the Consumer Protector and the person responsible for unfair business practices.

<sup>85</sup> Section 22 (1).

<sup>86</sup> See Hawthorne op cit at 296.

business practice to take such action, including steps for the dissolution of any body corporate or unincorporated, or the severance of any connection or form of association between two or more persons, including such bodies, as may be necessary to ensure the discontinuance or prevention of the unfair business practice.<sup>87</sup> The order may also direct a person to terminate agreements, understandings and omissions and to refrain from using, advertising, and to cease a scheme, practice, method of trading, etc. The order could be one which requires a person to refrain permanently from agreements, advertising, schemes, or from deriving income from a type of business.<sup>88</sup> The court may, if it is satisfied that money was accepted from consumers in the course of an unfair business practice, and it is necessary to limit or prevent financial loss to those consumers, order any person to repay money so received to the affected consumers, together with interest.<sup>89</sup> If the court is of the opinion that such an order has the effect of enforcing an unfair business practice, then, it may order that the consumer be restored to the position in which he or she would have been had no such unfair business practice taken place.<sup>90</sup> The above order may be corrected or clarified by a notice in the Provincial Gazette.<sup>91</sup> An order of the court in terms of subsection 22 (1) must be made known by notice in the Provincial Gazette,<sup>92</sup> and may also be made known in any other manner, including a notice in a newspaper or magazine or on the radio or television.<sup>93</sup>

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<sup>87</sup> Section 22 (1) (a).

<sup>88</sup> Section 22 (1) (b).

<sup>89</sup> Section 22 (2) (a).

<sup>90</sup> Section 22 (3).

<sup>91</sup> Section 22 (4).

<sup>92</sup> Section 22 (5) (a).

<sup>93</sup> Section 22 (5) (b).

#### 6.2.4.4 Appointment of Curator by the Court

The court may appoint a curator to perform certain functions, if it finds that money was accepted from consumers in the course of an unfair business practice, and it is necessary to limit or prevent financial loss to those consumers.<sup>94</sup> The curator has far-reaching powers. The curator may realise the assets of the person involved in the unfair business practice in question that is necessary for the reimbursement of the consumers concerned and distribute them among the said consumers.<sup>95</sup> The curator may also take control of and manage the whole or any part of the business of such a person, in which event the management of the business or affairs of the person involved in the unfair business practice will vest in the curator. This management will be subject to the supervision of the court, and any other person vested with the management of the affairs of the person responsible for unfair business practice before is to be divested of it.<sup>96</sup> The curator may suspend or restrict, as from the date of the right of creditors of the person involved in the unfair business practice to claim or receive any money owing to them by that person until due performance of the order of the court.<sup>97</sup> He or she may make payments, transfer property or take steps for the transfer of property of the person involved in the unfair business practice as he or she deems fit.<sup>98</sup> The curator may open and maintain banking or similar interest-bearing accounts.<sup>99</sup> The curator may also enter into agreements on behalf of the person involved in the

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<sup>94</sup> Section 22 (2) (b).

<sup>95</sup> Section 23 (1) (a).

<sup>96</sup> Section 23 (1) (b).

<sup>97</sup> Section 23 (1) (c).

<sup>98</sup> Section 23 (1) (d).

<sup>99</sup> Section 23 (1) (e).

unfair business practice<sup>100</sup> and he or she may convene, from time to time, a meeting of creditors of the person involved in the unfair business practice for the purpose of establishing the nature and extent of the indebtedness of that person to the creditors and for consultation with them.<sup>101</sup> The curator may also negotiate with any creditor of that person involved in the unfair business practice with a view of making the final settlement of the affairs of the creditor against that person.<sup>102</sup> The curator may also make and carry out, in the course of his or her management of the affairs of the person involved in the unfair business practice, any decision which in terms of the provision of Companies Act<sup>103</sup> would have been required to be made by way of a special resolution contemplated in s 199 of that Act.<sup>104</sup> The curator may, by public auction, tender or negotiation, dispose of any asset of the person involved in the unfair business practice, including any advance or loan;<sup>105</sup> or any asset for the disposal of which approval is necessary in terms of s 228 of the Companies Act;<sup>106</sup> and the curator may perform such further incidental or ancillary duties or functions as may be necessary to give effect to any orders of the court.<sup>107</sup> The court may, at any time, amend, withdraw or vary any power granted to a curator and any such amendment, withdrawal and variation may be made known by notice in the Provincial

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<sup>100</sup> Section 23 (1) (f).

<sup>101</sup> Section 23 (1) (g).

<sup>102</sup> Section 23 (1) (h).

<sup>103</sup> Act No 61 of 1973.

<sup>104</sup> Section 23 (1) (i).

<sup>105</sup> Section 23 (1) (J) (aa).

<sup>106</sup> Section 23 (1) (J) (bb).

<sup>107</sup> Section 23 (1) (k).

Gazette.<sup>108</sup> The curator must report to the court on his or her administration of the affairs of the person involved in the unfair business practice, and he or she must at the request of the court provide any other information set out in that request.<sup>109</sup> The curator must also keep a proper record of the steps taken by him or her in the performance of his or her functions and of the reasons why such steps were taken.<sup>110</sup>

### 6.2.5 Powers of the Court

#### 6.2.5.1 Summoning of Witness and Production of Documents

The court may summon any person, including the person alleged to have performed the unfair business practice, to appear before the court to give evidence and to produce any book, document or object in the possession, custody or under the control of such person and which may be reasonably necessary, material and relevant in connection with the proceedings.<sup>111</sup> The court may require such person to take an oath or make an affirmation,<sup>112</sup> and may also question such person and examine any book, document or object which he or she has been required to produce.<sup>113</sup> Any failure to comply with the summons of the court without sufficient cause or failure of the summoned person to remain in attendance until the conclusion of the proceedings

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<sup>108</sup> Section 23 (2).

<sup>109</sup> Section 23 (5).

<sup>110</sup> Section 23 (6).

<sup>111</sup> Section 19 (1) (a).

<sup>112</sup> Section 19 (1) (b).

<sup>113</sup> Section 19 (1) (c).

or until he or she has been excused by the court from further attendance will be an offence.<sup>114</sup>

The same applies to person who refuses to take the oath or make an affirmation;<sup>115</sup> or refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, any question lawfully put to him or her;<sup>116</sup> or a person who fails to produce any book, document or object in his or her possession or custody or under his or her control, which he or she was required to produce;<sup>117</sup> and a person who makes a false statement before the court knowing such statement to be false or not knowing or believing it to be true.<sup>118</sup>

#### *6.2.5.2 Declaration of certain Business Practices to be Unlawful*

If, as a result of proceedings instituted in the court in terms of the Act, the court is satisfied that it is in the public interest that any particular business practice or type of business which was subject of the proceedings in question should be declared unlawful, it may declare the business practice or type of business concerned unlawful, either generally or in respect of a particular area, depending upon whether the investigation was of a general nature or was undertaken in relation to a particular area.<sup>119</sup> Moreover the court may declare an agreement, accord or undertaking, or term thereof to be void.<sup>120</sup> The court may also prohibit any person from entering

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<sup>114</sup> Section 19 (2) (a).

<sup>115</sup> Section 19 (2) (b).

<sup>116</sup> Section 19 (2) (c).

<sup>117</sup> Section 19 (2) (d).

<sup>118</sup> Section 19 (1) (e).

<sup>119</sup> Section 24 (1) (a).

<sup>120</sup> Section 24 (1) (b).

into or being or continuing to be a party to an agreement, arrangement or understanding, or from using advertising, or from applying a scheme, practice or method of trading, or from committing an act or from bringing about a situation which was the subject of the proceedings, whether wholly or to the extent specified by the court or subject to a condition or exemption so specified or to an exemption contemplated in subsection (3).<sup>121</sup> The court may regulate any business practice or type of business practice which was the subject of the proceedings, by determining conditions or requirements which must be complied with in respect thereof.<sup>122</sup> The court may also grant exemption from these provisions and conditions or requirements to such extent and for such period and subject to such conditions as may be specified in the exemption.<sup>123</sup> The question whether the innocent person who entered into a transaction in execution of the unfair business practice will be able to claim back his or her performance will be determined on the basis of public interest.<sup>124</sup> According to Hawthorne<sup>125</sup> the declaration of unlawfulness raises the question whether the innocent party, the victim of the unlawful business practice will be successful in alleviating the imbalance created by the unfair business practice, since he or she has no contract on which to base any claim and will have to rely on unjustified enrichment and the concomitant rule of *in pari delicto potior est conditio possidentis*.

### 6.2.6 Penalties

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<sup>121</sup> Section 24 (1) (c).

<sup>122</sup> Section 24 (1) (d).

<sup>123</sup> Any person can do this upon application and after hearing the Consumer Protector and any other interested person (section 24 (3)).

<sup>124</sup> See also Hawthorne *op cit* at 298. See also section 24 (1) (a).

<sup>125</sup> See *Ibid*.

Any person who contravenes or fails to comply with an order of the court that has been made known by notice in the Provincial Gazette, is liable to a fine not exceeding R200 000, 00 or imprisonment for a period not exceeding five years or to both such fine and imprisonment.<sup>126</sup> In the light of the Constitutional Court decision in *Coetze v The Government of South Africa*<sup>127</sup> regarding the constitutional validity of civil imprisonment under s 64 (A)-65 (M) of the Magistrate's Court Act,<sup>128</sup> the validity of s 31 (a) is open to doubt.<sup>129</sup> It should also be borne in mind that the jurisdiction of the Consumer Affairs Court order is limited to Gauteng Province and does not extend to other provinces.<sup>130</sup> Any person, who contravenes or fails to comply with any other provision of the Act, is liable to a fine or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.<sup>131</sup> The Act is silent on the amount of fine to be imposed in this regard.<sup>132</sup>

### 6.2.7 Appeal

The party who is dissatisfied by the decision of the court may appeal to the Special Court established in terms of s 13 of the Harmful Business Practices Act.<sup>133</sup> It should be noted,

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<sup>126</sup> Section 31 (a).

<sup>127</sup> 1995 10 SA BCLR 1382 (CC).

<sup>128</sup> Act 32 of 1944.

<sup>129</sup> It should be noted that the Consumer Affairs Court has civil jurisdiction.

<sup>130</sup> See Hawthorne op cit at 298.

<sup>131</sup> Section 31 (b).

<sup>132</sup> In an interview with the Director of the Economic and Consumer Affairs he expressed the view that the current Act is badly drafted and that its amendment was being considered.

<sup>133</sup> Act No 71 of 1988.

however, that the High Court has an inherent jurisdiction to review cases where the Consumer Affairs Court has exceeded its power or acted in bad faith or where it appears that the court was biased or where there was gross irregularity or that the court used its powers for an ulterior motive or has breached the *audi alteram partem* rule.<sup>134</sup>

### **6.3 The Consumer Affairs Committee**

#### **6.3.1 Composition of the Committee and the Appointment of Subcommittees**

The Consumer Affairs Committee (formerly known as the Business Practices Committee) is established under the Consumer Affairs (Unfair Business Practice) Act.<sup>135</sup> The committee consists of nine members appointed by the Minister of Trade and Industry on the grounds of special knowledge or experience of consumer advocacy, economics, industry, commerce or law, taking into account the need to ensure equitable representation.<sup>136</sup> The committee must, with the consent of the Minister, appoint an executive committee, consisting of at least the chairperson or vice-chairperson and two other members of the committee.<sup>137</sup> The committee may also delegate any power conferred or duty imposed on it in terms of the Act to the executive committee, either in general or in a particular case or cases of a particular nature.<sup>138</sup> This delegation should be in

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<sup>134</sup> See also the grounds of review of the Administrative decision.

<sup>135</sup> Act 71 of 1988.

<sup>136</sup> Section 2 (1) (a).

<sup>137</sup> Section 3 (1) (a) and (b).

<sup>138</sup> Section 2 (b).

writing.<sup>139</sup> The delegation of work does not prevent the committee from exercising the power or performing the duty itself and may, at any time, withdraw the delegated power in writing.<sup>140</sup> The chairperson of the committee may appoint one or more liaison committees, which should advise the committee on such matters as the chairperson may determine and refer to a liaison committee for advice.<sup>141</sup> In 1995 an administrative body, namely the Unfair Contract Terms Committee was established as a subcommittee to advise the committee on issues relating to the terms of the contracts.<sup>142</sup>

### 6.3.2 The Functions of the Committee

The Consumer Affairs Committee or the sub-committee must, from time to time, make known information on current policy in relation to business practices in general and harmful business practices in particular,<sup>143</sup> to serve as general guidelines for persons affected thereby.<sup>144</sup> The committee or the sub-committee must receive and dispose of representations in relation to any matter with which it may deal in terms of the Act.<sup>145</sup> The committee or the sub-committee may make such preliminary investigations as it may consider necessary, or confer with any interested

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<sup>139</sup> Section 3 (4) (a).

<sup>140</sup> Section 3 (4) (b) and (c).

<sup>141</sup> Section 3 A (1) (b).

<sup>142</sup> This committee is empowered to remove inequitable terms from standard-form contracts. The committee removes, *inter alia*, the difficult *latin* maxims from contracts and it seeks to ensure that the contracts are easy to understand and do not contain one-sided and onerous terms.

<sup>143</sup> Harmful Business Practices includes unfair terms in contracts. cf section 1.

<sup>144</sup> Section 4 (1) (a).

<sup>145</sup> Section 4 (1) (b).

party in connection with, any harmful business practices which allegedly exists or may come into existence.<sup>146</sup> The committee may, as the case may be, perform any other function assigned to it by the Act. The committee must receive and dispose of the result of any investigations made by a competent authority in relation to any matter with which the committee may deal in terms of the Act.<sup>147</sup> The committee may, if necessary, assign any preliminary investigations in terms of the Act, or part thereof, to a competent authority.<sup>148</sup>

### 6.3.3 Powers of the Committee

For the purpose of a preliminary investigation or investigation required by the Act, the chairperson of the Consumer Affairs Committee may summon any person who is believed to be in a position to furnish any information on the subject of the preliminary investigation or the investigation, as the case may be, to appear before the committee at a time and place specified in the summons, to be questioned.<sup>149</sup> The chairperson of the committee may also summon any person who is believed to be in his or her possession or have under his or her control any book, document or other object which refers to the subject matter under consideration, to appear before the committee at a time and place specified in the summons to produce that book, document or other object.<sup>150</sup> Any person who has been summoned to appear before, or to produce a book, document or other object to the committee and who:

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<sup>146</sup> Section 4 (1) (c).

<sup>147</sup> Section 4 (1) (bA).

<sup>148</sup> Section 4 (a).

<sup>149</sup> Section 5 (1) (a).

<sup>150</sup> Ibid.

- (a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the chairperson from further attendance;
- (b) at his or her appearance before the committee, refuses to be sworn or to make an affirmation, after he or she has been asked by the chairperson to do so;
- (c) having been sworn or having made affirmation– (i) fails to answer fully and satisfactorily any question lawfully put to him or her; (ii) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce; (iii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true, is guilty of any offence.<sup>151</sup>

The guilty party is liable to a fine not exceeding R4000, 00 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.<sup>152</sup>

#### 6.3.4 Investigation of Unfair Business Practices

##### 6.3.4.1 Investigating Officers

The committee may appoint any person whom it considers suitable, as investigating officer.<sup>153</sup>

##### 6.3.4.2 Powers of the Investigating Officers

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<sup>151</sup> Section 5 (1) (b).

<sup>152</sup> Section 5 (4) (a)-(c).

<sup>153</sup> Section 7 (1).

For the purposes of ensuring that any person to whom it applies is observing the Act, or to obtain any information required by the committee in relation to a preliminary investigation or any investigation by it in terms of the Act, an investigation officer may, at all reasonable times, enter any premises on or in which any commodity or book, statement, document or other object connected with that observation or information is or is suspected to be.<sup>154</sup> For that purpose an investigating officer may inspect or search those premises.<sup>155</sup> An investigating officer may also examine the commodity or investment and request from the owner or person in charge of those premises, information regarding that commodity.<sup>156</sup> An investigating officer may examine or make copies of, or take extracts from any book, statement or document found in or upon those premises and which refers or is suspected to refer to any business practice which may be relevant to any such preliminary investigation or investigation by the committee, and request from the owner or person in charge of those premises or from any person in whose possession or charge that book, statement or document is, an explanation of any entry therein.<sup>157</sup> An investigating officer may also examine any object found in or upon those premises and which refer or is suspected to refer to any business practice which may be relevant at any such preliminary investigation or investigation by the committee, and request from the owner or person in charge of those premises or from any person in whose possession or charge that object is, information regarding that object.<sup>158</sup> An investigating officer may also seize, against the issue of a receipt, that book, statement, document or object, if it appears to provide proof of a

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<sup>154</sup> Section 7 (3).

<sup>155</sup> Section 7 (3) (a).

<sup>156</sup> Section 7 (3) (b).

<sup>157</sup> Section 7 (3) (c).

<sup>158</sup> Section 7 (3) (d).

contravention of a provision of the Act, or if he or she wishes to retain it for further examination or for safe custody.

The person from whom possession or charge that book, statement or document has been taken may, at his request, be allowed under the supervision of the investigating officer or any other person in the service of the committee to make copies or to take extracts there-from at any reasonable time.<sup>159</sup> The investigating officer should enter the premises and exercise any power only under a search warrant issued by the Magistrate, unless the owner or person in charge of the premises concerned has consented thereto in writing.<sup>160</sup> The investigating officer must do so if it appears to him or her from information given on oath or affirmation, that there are reasonable grounds to suspect that an unfair business practice exists or may come into existence; and a book, document or other object which may afford evidence of such an unfair business practice is on or in those premises.<sup>161</sup> Any person who obstructs or hinders an investigating officer in the performance of his or her functions under s 7; or any person who, when an investigating officer asks him or her for an explanation or information relating to a matter within his or her knowledge, refuses or fails to give that explanation or gives an explanation or information which is false or misleading, knowing it to be false or misleading; or who falsely represents himself or herself to be an investigating officer is guilty of an offence.<sup>162</sup> The penalty would be a fine not exceeding R4000, 00 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.<sup>163</sup>

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<sup>159</sup> Section 7 (3) (e).

<sup>160</sup> Section 7 (3A).

<sup>161</sup> Section 7 (3A) (a) and (b).

<sup>162</sup> Section 7 (5) (a)-(c).

<sup>163</sup> Section 15 (c).

### 6.3.4.3 *Investigations by the Committee*

The Consumer Affairs Committee may on its initiative, and on the direction of the Minister, make such investigations as it may consider necessary. The investigations may be made into any unfair business practice which the committee or the Minister, as the case may be, has reason to believe exists or may come into existence.<sup>164</sup> The investigations may also be into any business practice or type of business practice, in general or in relation to a particular commodity or investment or a particular business or any class or type of business or a particular area, which in the opinion of the committee or the Minister, as the case may be, is commonly applied for the purpose of or in connection with the creation or maintenance of unfair business practices.<sup>165</sup> The investigations may also be made into any unfair business practices referred to the committee in terms of any other law.<sup>166</sup> However, the committee cannot make or proceed with the investigations on its own initiative, if, in the opinion of the Minister such investigations are not in the public interest.<sup>167</sup> The committee should regularly make reports to the Minister on the results of the investigation, or any arrangement which will ensure the discontinuance of an unfair business entered by the committee and any person or body corporate or unincorporated who is responsible for unfair business practices.<sup>168</sup>

The Act requires the Minister, on the recommendation of the committee, to stay or prevent for a period not exceeding six months, any unfair business practice which is the subject of an

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<sup>164</sup> Section 8 (1) (a). As has already been indicated the Minister refers to Minister of Trade and Industry.

<sup>165</sup> Section 8 (1) (b).

<sup>166</sup> Section 8 (1) (d).

<sup>167</sup> Section 8 (2).

<sup>168</sup> Section 8 (3).

investigation.<sup>169</sup> The Act also empowers the Minister to attach money or property related to an investigation.<sup>170</sup> The Act enjoins the Minister to prohibit any person from withdrawing or otherwise dealing with any money or movable or immovable property attached.<sup>171</sup> However, in the unreported case of *Geherdus Francois Janse Van Resnburg NO v Die Minister van Handel en Nywerheid NO*,<sup>172</sup> Van Rensburg successfully challenged the constitutional validity of s 8 (5) (a) and s 8 (3) of the Act.<sup>173</sup> Van Dijkhorst J found that s 8 (5) (a) was a drastic and absolutely discretionary provision that did not provide for the application of the *audi alteram partem* principle, and that it empowered the Minister to act on untested allegations and a preliminary opinion. He, therefore, held that s 8 (5) (a) violated the provisions of ss 22, 25 (1), 33 of the Constitution of the Republic of South Africa Act 108 of 1996.

Van Dijkhorst J referred the case to the Constitutional Court for the confirmation of his order.<sup>174</sup> In the Constitutional Court, the Minister had requested that in the event the Constitutional Court confirming the order of invalidity, it should suspend the effect of the order and allow the legislature a period of one year to amend s 8 (5) (a). The basis for this request was that unscrupulous people might well take advantage of the chink in the armour of the committee and the Minister, to the detriment of members of the public. The Constitutional Court, after considering the purpose for which s 8 (5) (a) is designed for and the nature and effect and the irreparable harm that may be caused in the absence of s 8 (5) (a), conceded that the request by

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<sup>169</sup> Section 8 (5) (a).

<sup>170</sup> Section 8 (5) (a) (ii) (*aa*).

<sup>171</sup> Section 8 (5) (a) (ii) (*bb*).

<sup>172</sup> Case No. 22658/98, 22 October 1998 (TPD).

<sup>173</sup> Van Rensburg also challenged s 7 (3). However s 7 will not be considered in this study because the Harmful Business Practices Amendment Act 23 of 1999 had subsequently amended it.

<sup>174</sup> *Van Rensburg v Minister of Trade and Industry NO* case CCT 13/99, 29 September 2000.

the Minister was legitimate. The Constitutional Court, therefore, confirmed the order of the constitutional invalidity in respect of s 8 (5) (a) of the Act, but suspended this order for a period of 12 months from the date of the order to enable Parliament to correct the defects that have resulted in the declaration of invalidity. However, the order of the Constitutional Court barred the Minister from taking action under s 8 (5) (a) of the Act unless he or she:

- (a) has a reasonable suspicion that there exists an unfair business practice involving the person under investigation;
- (b) has a reasonable apprehension that without such action the public will be irreparably harmed;
- (c) is satisfied that there is no alternative remedy; and
- (d) is satisfied that, having weighed the foregoing factors, the prospect of harm to the public if the order were not granted outweighs the harm to the interest of the affected person or persons if the order were granted.<sup>175</sup>

#### *6.3.4.4 Discontinuance of Unfair Business Practices*

The Consumer Affairs Committee may negotiate with any person or body corporate or unincorporated, with a view to making an arrangement which, in the opinion of the committee, will ensure the discontinuance of an unfair business practice which exists or may come into existence and which is the subject of the investigation, either wholly or to such extent as, in the opinion of the committee, it is not justified in the public interest.<sup>176</sup> The Minister is empowered

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<sup>175</sup> On the possible replacement of s 8 (5) (a) of the Act 71 of 1988, see s 3 of the Consumer Affairs (Unfair Business Practices) Amendment Bill, 2000 (GN R4562 GG 21808).

<sup>176</sup> Section 9 (1).

by s 12 of the Act to declare the unfair business practice unlawful by notice in the Government Gazette, and to direct any person involved in such unfair business practice to take such action as the Minister may consider necessary to ensure the discontinuance or prevention of such practice. However the Minister may exercise this discretion if he or she is of the opinion that an unfair business practice exists or may come into existence and is not satisfied that the unfair business practice is justified in the public interest and has not confirmed an arrangement which may have been made between the committee and any person, body corporate or unincorporated or an arrangement in respect of the unfair business practice. The Minister's powers are very wide and include, for example, the power to dissolve any body corporate or unincorporated.<sup>177</sup> If money was accepted from consumers, the Minister may appoint a curator, with the concurrence of the Special Court, in order to realise the assets of the person involved in the unfair business practice and to distribute them between the consumers concerned and to take control of and manage the whole or any part of the business of such a person.<sup>178</sup>

#### 6.3.5 Conclusion

The establishment of the Office for Investigation of Unfair Business Practices and the Consumer Affairs Court is to be welcomed. This development is in line with the proposals contained in the South African Law Commission Project Report 47 and those contained in Project Report 67. Unlike the Magistrate's court the Consumer Affairs Court has an equitable jurisdiction. In addition the Consumer Affairs Court is a specialist court with access to technical expertise. The

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<sup>177</sup> Section 12 (1) (b).

<sup>178</sup> Section 12 (1) (d).

court can also declare certain harmful business practices unlawful. Failure to comply with the court orders would result in a criminal prosecution.<sup>179</sup> In the present writer's view it is necessary that both the Office for Investigation of the Unfair Business Practices and the Consumer Affairs Court be empowered in the same way as the Israel Restrictive Trade Practices Board, that is, they should have the power to approve business practices (which are not inimical to public interest) to be used for a certain period without being challenged on the ground of unfairness.<sup>180</sup>

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<sup>179</sup> See *McQuoid-Mason* op cit at 315.

<sup>180</sup> See chapter 4, pp 81 below, on the functions of the Israel Restrictive Trade Practices Board.

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## CHAPTER 7

**CONSUMER PROTECTION AND THE BILL OF RIGHTS**

In this chapter the writer intends to examine the implications of the Bill of Rights in consumer credit contracts particularly in the light of the foregoing discussion relating to the dominant party's right to alter the terms of the contract.

**7.1 Freedom of Contract, *Pacta Sunt Servanda* versus the Bill of Rights**

Christie when commenting on the Interim Constitution expressed himself as follows:

“...The purpose of section 8, and of the Constitution as a whole, is to achieve justice and equality, and on this interpretation of section 8 (2) and (3) it seems clear that the court must weigh each provision of the Bill of Rights against any other right that may, on the facts of the case, compete with it. Whenever the competing right happens to be a contractual right it will almost certainly come under the umbrella of freedom of contract or *pacta sunt servanda*. One party to the contract will almost certainly be relying on these principles for the enforceability of the contract while the other party will be relying on a provision of the Bill of Rights to challenge its enforceability.”<sup>1</sup>

According to Hawthorne<sup>2</sup> freedom of contract originally emerged as a fundamental human rights and was considered to be a solution to all social and economic problems,

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<sup>1</sup> Christie 2000: 8 at 3H-7.

<sup>2</sup> See Hawthorne 1995: 157 at 166.

suddenly lost its respect when it failed to deliver and attention focused increasingly on the societal ills of unlimited freedom.

With reference to the decision in *Ferreira v Levin*,<sup>3</sup> Christie<sup>4</sup> has expressed the view that our courts have recognised that in different cases greater or lesser weight must be given to the principle of the freedom of contract. Christie<sup>5</sup> expressed himself as follows:

“In *Ferreira v Levin*<sup>6</sup> Ackerman J referred to rights of contractual freedom protected by the Constitution and in *Knox d’Arcy Ltd v Shaw*<sup>7</sup> Van Schalkwyk J indicated some reasons why these rights are weighty: It must be understood that there is a moral dimension to a promise which is seriously given and accepted. It is generally regarded as immoral and dishonourable for a promisor to break his trust and, even if he does so to escape the consequences of a poorly considered bargain, there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand, the enforcement of a bargain (even one which was ill considered) gives recognition to the important constitutional principle of the autonomy of individual.”

Christie referred with approval to the approach of eminent writers such as Strydom<sup>8</sup> and Hawthorne<sup>9</sup> in this regard. The learned author has demonstrated that further guidance on

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<sup>3</sup> 1996 (1) SA 984 (CC).

<sup>4</sup> See Christie op cit at 3H-7.

<sup>5</sup> Ibid.

<sup>6</sup> Supra.

<sup>7</sup> 1996 (1) SA 651 (W) at 660I-661A, 1995 (12) BCLR (CC) 1702.

<sup>8</sup> Strydom 1995: 52.

<sup>9</sup> Hawthorne 1995: 157

the weighing up of these complex rights can be obtained from foreign law in terms of s 39 (1) (c) of the Constitution. In Christie's view in practice the right to performance of a contract does not stem from an unfettered application of the principles of freedom of contract and *pacta sunt servanda*, as these principles are far from being immutable rules and that it might not even be necessary to weigh them against a provision of the Bill of Rights if, in the circumstances of the case, the common law of contract already treats the contractual right as unenforceable.<sup>10</sup>

Christie supports Hawthorne's view that the present principle of *pacta sunt servanda* should be interpreted to conflict as little as possible with the fundamental rights such as equality or freedom from servitude or forced labour.<sup>11</sup>

Strydom<sup>12</sup> is in agreement with this approach and is also of the opinion that if agreements affect a person's human dignity, it is a situation which calls for redress.

The constitutional protection in consumer credit contract has been achieved in German in the case of *BverfG*.<sup>13</sup> In this case the German Constitutional Court grappled with a case involving the fundamental principles of human dignity and the consideration of the right to the free development of the human personality in a case concerning a civil obligation to scrutinise contracts of suretyship which resulted in undue hardship on the debtor's guarantor. The facts of the case disclose that the defendant a 21- year- old woman signed

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<sup>10</sup> Christie op cit at 3H-8.

<sup>11</sup> Hawthorne op cit at 157. The author cautions, however, that he does not mean that where the effect of an application of a rule or principle amounts to a limitation of fundamental rights as between private individuals, the protection of fundamental rights will necessarily take precedence over subjective rights of performance validly acquired. It would seem that each case would depend on its own merits.

<sup>12</sup> 1995 op cit at 52.

<sup>13</sup> 89 (1993) 214.

a contract of suretyship to secure her father's loan from a bank. At the time of signing the contract, the guarantor was often unemployed and she was relying on a salary of 1150 DM for working in a fish factory. After a few years the bank terminated the credit facilities, which it was providing to the guarantor's father and held the guarantor liable for 100, 000 DM.

The guarantor tried unsuccessfully in a State Court to have her obligation cancelled. Then she finally approached a State Court of Appeal. The State Court of Appeal held that the bank failed to comply with its duty to inform the applicant about the possible consequences of the contract of suretyship and the extent of her liability and therefore the guarantor's liability was annulled. This was based on the fact that the bank official allegedly said that the signature of the guarantor would not lead her to any serious obligation and that he merely needed it for records.

On a further appeal the Federal Court of Germany reversed the decision and held that the applicant was of full age and that it could be assumed that such a person should be aware of the liabilities attached to suretyship. In that court the applicant raised a constitutional complaint, in which she relied on ss (1) and 2 (1) of the German Constitution. She argued that the contract of suretyship infringed her right to human dignity as she was forced to accept living conditions reducing her to an object and restraining her financial freedom to such an extent that she could not maintain a dignified existence. In relation to s 2 (1) the applicant argued that freedom of contract should not be allowed to obscure a misuse of power by market-controlling enterprises against subordinate contractual

parties. In the Constitutional Court the applicant's case was based on ss 138<sup>14</sup> and 242<sup>15</sup> of the German Civil Code. The Constitutional Court pointed out that where civil courts were called upon to concretise general clauses, they should seek guidance from the principles in the fundamental rights sections of the Constitution as they contain decisive guidelines for all areas of the law. The court held that these principles override all areas of law through general clauses such as ss 138 and 242 of the German Civil Code. The Constitutional Court also held that if the civil court fails to take into consideration the fundamental rights sections of the Constitution to the detriment of a party to a legal process, this would be a violation of fundamental rights.

With regard to the nature of the contract of suretyship, the court found that the applicant's risk was exceptionally high and her obligations under the contract were also found to be strikingly disproportionate to her income. On this basis the court found that the bank should have foreseen that the guarantor would not be able to meet her obligations. The court said that in the light of the risk involved the bank should have advised the applicant properly about the nature and scope of her obligations. The bank's failure negated the principle of contractual equity in that one party (the bank) obtained such a superior position that it could one-sidedly determine the contents of the contract, causing the applicant to overburden herself. The court reasoned that civil courts' power to interfere in the circumstances flow, *inter alia*, from the guarantee of a person's private autonomy in s 2 (1) of the German Constitution. In the opinion of the Constitutional Court there is

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<sup>14</sup> Section 138 states that all contracts that are in conflict with the *boni mores* are null and void.

<sup>15</sup> Section 242 obliges the debtor to perform in good faith.

an infringement of constitutional provisions when the issue of contractual equality has been ignored or where it has been addressed with inappropriate measures.<sup>16</sup>

### 7.1.1 Human Dignity

In *S v Makwanyane*<sup>17</sup> Chaskalson P said:

“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”<sup>18</sup>

According to Christie s 10 of the Republic of South Africa Constitution Act 108 of 1996 serves as a useful cross-check on some of the other sections of the Bill of Rights “... if the results are such as to impair the weaker party’s right to human dignity this would point strongly towards the necessity to intervene.”<sup>19</sup> Apart from serving as a cross-check on the constitutional rights, s 10 may also be decisive in contractual disputes.<sup>20</sup> Christie has expressed the view that the bases for intervention on public policy grounds would

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<sup>16</sup> See Strydom 1995: 699 at 696-8.

<sup>17</sup> 1995 (6) BCLR 665 (CC) at 722.

<sup>18</sup> The learned judge President referred to chapter 3 (now chapter 2).

<sup>19</sup> Christie op cit at 3H-22.

<sup>20</sup> Ibid. For example, a party to a contract which infringes his or her rights may choose not to perform on the ground of infringement to the right to human dignity. See also the example given in Christie op cit at 3H-22.

also be the fact that a particular contractant infringed the other party's right to human dignity.<sup>21</sup>

### 7.1.2 Equality

Hawthorne<sup>22</sup> argues that the fact that the principle of equality has been made part of the positive law will have a significant effect on the development of the law of contract particularly the fact that in regulating the market transactions the law of contract constitutes the market order and as such largely determines the order of wealth and power. "To provide relief from hardship and poverty, legislative intervention in the law of contract has become a common occurrence and the right to equality presents two challenges: the evaluation of the distributive scheme created by the law of contract, and the opportunity to examine the redistribution of wealth."<sup>23</sup>

The question whether inequality of bargaining power can be considered under s 9 of the Constitution as well as under Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has not yet been entertained.<sup>24</sup> Hawthorne is of the view that the common law doctrines of duress and undue influence may be transformed by the courts by means of inclusion of economic duress, as well as the shortage of resources

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<sup>21</sup> For example, the freedom of expression (Christie op cit at 3H-22).

<sup>22</sup> Hawthorne op cit at 157-8.

<sup>23</sup> Ibid.

<sup>24</sup> On the words of s 9 and definition of equality, see Christie op cit at 3H-18.

caused by poverty and ignorance to redress inequality in contracts.<sup>25</sup> Lord Denning MR adopted this approach in England in *Lloyds Bank Ltd v Bundy*<sup>26</sup> when he stated:

“English law gives relief to one who, without independent advice, enters into a contract upon terms that are very unfair, or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired because of his needs or desires, or his ignorance or infirmity coupled with undue influences or pressures brought to bear on him by or for the benefit of other.”<sup>27</sup>

The principle of inequality of bargaining power was also considered in the Australian case of *Commercial Bank of Australia Ltd v Amadio*.<sup>28</sup> In this case the Australian High Court held that a contract may be set aside when one party is under a special disadvantage or disability of which the other party knew or ought to have known, and that other party takes unfair advantage of superior bargaining power.<sup>29</sup>

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<sup>25</sup> Hawthorne op cit at 169-170. The learned author cautions that this observation, of course, would require courts to determine the ordinary inequality in the market and the kind of inequality for which the law of contract can and should provide relief for because the introduction of elements such as resources, poverty, ignorance and so on would hamper many everyday contracts, since many consumers lack resources to make informed choice; the tenant has the choice between high rent and homelessness. According to Christie: “Acceptance of the general right of effective equality before the law leads naturally to the amalgamation and expansion of the present doctrines of duress and undue influence to counter inequality of bargaining power...” (Christie op cit at 3H-20).

<sup>26</sup> 1975 QB 326 3 All ER 757.

<sup>27</sup> This approach was, however, rejected in England by the House of Lords in *National Westminster Bank PLC v Morgan* 1985 1 AC 686.

<sup>28</sup> 1983 151 CLR 447.

<sup>29</sup> See Christie op cit at 3H-21. The learned author opines that our courts should use s 9 of the Constitution against unfair contract terms as is in line with the progressive approach of Lord Denning in the Bundy’s case and the Australian decision in the Amadio’s case.

The constitutional protection would require civil courts to examine whether legal transactions, of whatever nature, comply with the constitutional criteria as far as contents and procedure are concerned, provided that the distinctive nature of each transaction received due consideration.<sup>30</sup> The application of constitutional rights in private law relationships would also make financial institutions more meticulous about obtaining a meaningful choice, based on proper information, from the client and in considering the reasonableness of the terms of the contract. The direct or indirect application of constitutional protection would also ensure that the principles of the law of contract are interpreted as far as possible in accordance with the values underlying fundamental rights and this will ensure the adequate protection of consumer rights in this country. In terms of s 8 (2) of the Bill of Rights the Constitution binds natural and juristic persons if the court is satisfied, after looking at the nature of the right and the nature of any duty imposed by the right, that the constitutional intervention is necessary.

## 7.2 Waiver of a Constitutional Right

The question whether a party to a contract may waive a constitutional right is not crystal clear. In *ABBM Printing and Publishing (PTY) Ltd v Transnet Ltd*<sup>31</sup> the court was not persuaded that a constitutional right could be waived.<sup>32</sup> Christie is of the view that in every case the nature of the constitutional right and the nature and the extent of waiver

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<sup>30</sup> This is one of the important things which the BverG's case brought in the law of contract in German.

<sup>31</sup> 1998 (2) SA 109 (W), 1997 (4) All SA 94 (W), 1997 (10) BCLR 1429 (W).

<sup>32</sup> It should be noted however, that this case was concerning the right to be given written reasons under s 33 (2). See also *Goodman Bros (PTY) Ltd v Transnet Ltd* 1998 4 SA 989 (W), 1998 (8) BCLR 1024 (W).

must be taken into account because common sense and a concern for justice will sometimes require that effect be given to a waiver.<sup>33</sup>

In Germany the question of waiver of constitutional rights is well settled. The party to a contract cannot waive a constitutional right unless he or she is aware of it.<sup>34</sup>

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<sup>33</sup> Christie op cit at 3H-9.

<sup>34</sup> See Ackermann J's Judgment in *Du Plessis v De klerk* 1996 (3) SA 850, 1996 (5) BCLR 658 (CC).

## CHAPTER 8

**THE NEED FOR REFORM**

This concluding chapter will focus on the plea for the reform<sup>1</sup> of this branch of the law. In many countries this has been done by legislation after courts started developing doctrines of unconscionability (e.g unfair contract terms statutes in the UK, Australia and the USA.<sup>2</sup> Some writers advocate the extension to this area of the law of the concept of distributive justice.<sup>3</sup> There are also views which question the effectiveness of the law of contract as a mechanism for achieving a fair distribution of wealth in society and as a method of protecting consumers in the low income bracket.<sup>4</sup> The following comments by Ramsay<sup>5</sup> in this regard are apt:

“(A)low income consumer is profoundly different from a middle class consumer who awoke one day ill-housed, ill-fed and ill-informed. Underlying his problems ... is a crucial lack of motivation ... (the poor are) shy and unwilling to deal with strangers.”

“...(E)xisting evidence suggests that poor are hopelessly entangled in a complex web of psychological and cultural imperatives which deliberate an already vulnerable condition...(S)ome studies suggest that the poor have an unusually strong tendency to exhibit

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<sup>1</sup> By reform the present writer means the improvement of the law for the better. See also Farrar 1974: 2.

<sup>2</sup> See chapter 4, pp 81-84 above.

<sup>3</sup> Ramsay 1995: 177 at 194.

<sup>4</sup> Ibid. See also Hawthorne 1995: 157 at 175.

<sup>5</sup> 1995 op cit at 194.

psychoneurotic symptoms while other investigators have found an inability to engage in long term planning and a correlative predisposition towards impulsive action.”<sup>6</sup>

Goldring<sup>7</sup> takes the matter further by acknowledging that unfair practices are widespread in consumer transactions.

“...The existing law is still founded on the principle known as *caveat emptor*-meaning ‘let the buyer beware.’ That principle may have been appropriate for transactions conducted in village markets. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law.”

By way of reform the present writer suggests that there should be a consumer credit legislation which should focus on the following requirements as identified in the various Commissions already referred to earlier.<sup>8</sup> The first requirement is that the consumer credit legislation must address the consumer’s unequal bargaining position. This could be achieved by prohibiting certain clauses in contracts and making others compulsory and by providing for built-in contractual rights and by requiring disclosure of the debtor’s obligations and by prohibiting misleading practices.<sup>9</sup> The second requirement would be that the envisaged consumer credit

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<sup>6</sup> Ibid. See also *Zietsman v Allied Building Society* 1989 (3) SA 166 (OPD) at 9.

<sup>7</sup> See Godring 1974-75: 228.

<sup>8</sup> For example, The South African Law Commission Report Project 67, the Crowther Commission, the Molomby Commission, the New Zealand Law Commission and etc.

<sup>9</sup> See the Crowther Commission Report 234-235. See also South African Law Commission Report Project 67 at 61-2.

legislation should be able to curb malpractices in the commercial world. Identifying the malpractices and prohibiting them with the necessary sanctions could achieve this.

In this chapter the present writer pleads for the reform of the existing consumer law. The writer is in agreement with the South African Law Commission that the issue of unfair contract terms has to be addressed in a fundamental way instead of *ad hoc* reform to specific Acts.<sup>10</sup> It is felt that effect should be given to the Bill proposed by the South African Law Commission.<sup>11</sup> The suggested proposal will, hopefully, introduce equitable jurisdiction to enable courts to effectively curb economic abuses inherent in credit contracts.

With regard to statutory protection the consumers' rights to fair agreements are protected by the Credit Agreement Act<sup>12</sup> and the Usury Act.<sup>13</sup> However, as has already been shown, these Acts need to be improved by introducing single Act which will cover the credit agreements in compatible ways.<sup>14</sup> A cause for concern as has been shown in cases considered in chapter 5 is

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<sup>10</sup> South African Law Commission Project Report 47 at -xiii.

<sup>11</sup> South African Law Commission op cit at 213.

<sup>12</sup> Act 75 of 1980. As has already been shown the Credit Agreement Act attempts to remedy "the mischief of poor persons being enticed into shops and being sold goods of more or less value at prices which they can ill afford to pay and on terms which are harsh and unconscionable" (Chapter 3 above, p 21).

<sup>13</sup> Act 73 of 1968. The Usury Act seeks to protect consumers by limiting the finance charges and by compelling the credit grantor to disclose these charges.

<sup>14</sup> Among others, the Credit Agreements Act and the Usury Act operate in conjunction with each other, but their provisions do not satisfactorily complement each other. For example, there is a great deal of difference in the definitions in the two Acts. Both Acts use the terms 'leasing transaction' and 'credit transaction' but these terms have different meanings in each Act. Despite the fact that the two Acts operate in tandem, the exemptions by way of ministerial notices differ. To a large extent the two Acts fail to differentiate precisely between 'operating lease contracts,' 'financial lease contracts,' and 'residual value financial lease contracts.' S 15 (g) of the Usury Act complicate matters further, in that, it excludes transactions that the Act is supposed to apply to. It provides that where the credit receiver enters into a number of transactions with the same credit grantor with the results that the total principal debt owing exceeds R500 000, 00, the Act does not apply to those transactions by which the R500 000, 00 limit is exceeded. This lead to a situation where an ordinary consumer does not know whether or not the Act applies to a specific credit contract(s) which he or she is entering. This provision treats different and independent contracts as one contract. It excludes contracts which the Act would otherwise have included had they

the question of the credit grantor's power to vary unilaterally the terms of the contract, that is, the terms relating to the rates of finance charges. The proposed Credit Act would address the problems encountered in the application of the Usury Act and the Credit Agreements Act. Some of these problems were essentially issues of interpretation as well as the lack of mechanisms in the Act for speedy resolution of disputes. Another cause for concern is the lack of adequate sanctions that could be applied in the event of contravention, and the fact that the inspectorate of the Registrar of Financial institutions was often unsuccessful in instituting criminal proceedings.

In the present writer's view there is an urgent need to review the current consumer credit regulation and to produce a single law as proposed by the South African Law commission.<sup>15</sup> However, in addition to the Law Commission proposals, it is felt that the new credit legislation should include a provision which regulates related credit contracts which are ancillary to credit contracts. This will make credit law simpler and clearly intelligible to the consumers.<sup>16</sup> It is felt that the kind of reform suggested in housing and mortgage loan sector should be considered in all spheres of credit industry. In the sphere of housing loan and mortgage the Housing Consumers Protection Measures Act<sup>17</sup> adequately protect consumers' interests. The Act does so in its provision dealing with the establishment of the National Home Builders Registration Council (NHBRC) as a statutory body entrusted with extensive functions regarding the regulation of

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been concluded with different credit grantors even though the principal debt of the combined contracts exceeded R500 000, 00.

<sup>15</sup> See the South African Law Commission Project Report 67 at 401.

<sup>16</sup> The credit industry needs credit contract law which will "even up" the imbalances of powers between consumer borrowers and lenders because consumers are not easily able to comprehend the detailed and complex terms and conditions of credit contracts.

<sup>17</sup> Act 95 of 1998.

home-building contracts and the protection of housing consumers.<sup>18</sup> The Act has far reaching implications for contracts of sale that are governed by it. The contracts concluded by home-builders with a housing consumer for the construction or sale of a home shall be in writing and signed by the parties.<sup>19</sup> The written contract must also attach the specifications regarding all materials to be used in the construction of the home and the plans reflecting the dimensions and measurements of the home.<sup>20</sup> Non-compliance with the requirements of writing or to provide the annexures does not render the agreement invalid,<sup>21</sup> but prevent the home-builder from demanding or receiving from a home consumer any deposit for the construction or sale of a home.<sup>22</sup> The contract which contains any provision that excludes or waives any provision of section 13 is null and void.<sup>23</sup>

Warranties in favour of a housing consumer are imported into an agreement for the construction or sale of a home concluded between the consumer and a home-builder, and are enforceable in any court.<sup>24</sup> A significant provision is the one requiring the home-builder to rectify major structural defects in the home which occurred as a result of non-compliance with the NHBRC technical requirements.<sup>25</sup> The home-builder is, in addition, obliged to rectify non-compliance with the terms, plans and specifications of the agreement or deficiency related to design,

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<sup>18</sup> Section 2.

<sup>19</sup> Section 13 (1).

<sup>20</sup> Section 13 (1).

<sup>21</sup> Section 13 (3).

<sup>22</sup> Section 13 (7).

<sup>23</sup> Section 13 (6).

<sup>24</sup> Section 13 (2).

<sup>25</sup> Section 13 (2) (b) (i) read with section 1.

workmanship or material notified to him by the housing consumer within a period set out in the agreement, which shall not be less than three months as from the date of occupation.<sup>26</sup> In the present writer's opinion the above provisions safeguards the interests of a housing consumer as they give him a right of recourse even after the construction of a home or sale of a home.

Apart from this Act, Home Loan and Mortgage Disclosure Bill<sup>27</sup> proposes another exciting protection in this area of consumer protection. The proposed Bill is aimed, *inter alia*, at promoting fair lending practices among financial institutions which provide home loans; it also requires disclosure by financial institutions engaged in the provision of home loans of certain information in their reports and annual financial statements. The Bill also seeks to establish an Office of Disclosure to monitor compliance with the disclosure requirements of the Act. The functions of the Office are, *inter alia*, to receive and take into account public comments on financial institutions relating to home loans; to make available to the public information that indicates whether financial institutions are serving the housing credit needs of their communities; to assist in identifying possible discriminatory lending patterns and assist any statutory regulatory body in enforcing compliance with anti-discriminatory legislation.<sup>28</sup>

The developments in the housing loan and mortgage sector is to be welcomed and the present writer is of view that this kind of reform should be extended to other areas of consumer credit as well. The present writer is of the view that the statutory bodies created in the housing loan and mortgage sector are important to safe guard the interests of housing consumers and the same will be appropriate in the credit contracts industry.

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<sup>26</sup> Section 13 (2) (b) (ii).

<sup>27</sup> Government Notice R1147 GG 20977 of March 2000.

<sup>28</sup> *Ibid.*

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## Table of Cases

### South African Cases

<i>ABBM Printing and Publishing (PTY) Ltd v Transnet Ltd</i> 1998 2 SA 109 (W), 1997 (4) All SA 94 (W), 1997 (10) BCLR 1429 (W).....	143
<i>ABSA Bank Ltd v Deeb</i> 1999 (2) SA 656 (N).....	3, 85, 91
<i>Bank of Lisbon and South African Ltd v De Ornelas and another</i> 1988 (3) SA 580 (A).....	68, 69, 71
<i>Blore v Standard General Insurance Company Ltd</i> 1972 (2) SA 89 (O).....	12
<i>Boland Bank Bpk v Steele</i> 1994 (1) SA 259 (T).....	3, 85, 90, 94
<i>Broodryk v Smuts</i> 1942 TPD 47.....	78
<i>Botha (now Griessel) v Finanscredit (PTY) Ltd</i> 1989 (3) SA 773 (AD).....	65, 75
<i>Coetze v The Government of South Africa</i> 1995 (10) SA BCLR 1382.....	134
<i>Coopers &amp; Lybrand and others v Brayant</i> 1995 (3) SA 761 (A).....	2
<i>Davidowitz v Van Drimmelen</i> 1913 TPD 672.....	86
<i>Diners Club SA (Pty) Ltd v Thorburn</i> 1990 (2) SA 870 (C).....	88
<i>Du Plessis v De Klerk</i> 1996 (3) SA 850, 1996 (5) BCLR 658 (CC).....	144
<i>Eastwood v Shepstone</i> 1902 TS 294.....	73
<i>Eerste National Bank of Suid Afrika Bpk v Saayman NO</i> 1997 (4) SA 302 (SCA).....	2, 70, 78
<i>F &amp; I Advisors (Edms) Bpk v Eerste National Bank van SA Bpk</i> 1999 (1) SA 515 (SCA).....	97
<i>Fazlyn Salie v Birnam Business College, case No G cc 01/18/00</i> .....	81
<i>Ferreira v Levin</i> 1996 (1) SA 984 (CC).....	136
<i>First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council</i> 1995 (2) SA 855 (BSC).....	67, 76

<i>First National Bank of SA Ltd v Lynn NO and others</i> 1996 (2) SA 339 (AD).....	50
<i>Geherdus Francois Janse Van Resnburg NO v Die Minister van Handel en Nywerheid NO, case No 22658/98</i> (TPD).....	118
<i>Goodman Bros (PTY) Ltd v Transnet Ltd</i> 1998 4 SA 989 (W), 1998 (8) BCLR 1024 (W).....	143
<i>Incorporated General Insurances Ltd v Gush and Another</i> 1990 (4) SA 573 (W).....	52
<i>Investec Bank (PTY) Ltd v GVN Properties cc and others</i> 1999 (3) SA 490 (WPD).....	3, 85, 92
<i>Jela v Godwanna</i> 2000 (2) All SA 557 (E).....	22
<i>Knox d'Arcy Ltd v Shaw</i> 1996 1 SA 651 (W), 1995 (12) BCLR (CC) 1702.....	136
<i>Leech &amp; others v ABSA Bank Limited</i> 1997 (3) All SA 308 (W).....	97
<i>L T A Construction Bpk v Administrateur, Transavaal</i> 1992 (1) SA 473 (A).....	98
<i>Millman NO v Twiggs</i> 1995 (3) SA 674 (A).....	52
<i>Morrison v Anglo Deep Gold Mines Ltd</i> 1905 TS 775.....	97
<i>National Bank of South African Ltd v Cohen's Trustee</i> 1911 AD 235.....	52
<i>NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste Bpk and another</i> 1998 (3) SA 729 (WLD).....	3, 85, 89, 92
<i>NBS Boland Bank v One Berg River Drive cc</i> 1998 (3) SA 765 (W).....	2, 85, 91, 92
<i>NBS Boland Bank v One berg River Drive cc, Deeb v Absa Bank Ltd, Friedman v Standard Bank of SA Ltd</i> 1999 (4) SA 928 (SCA).....	81, 91, 92
<i>Nedbank Ltd v Capital Refrigerated Truck Bodies (PTY) Ltd</i> 1988 (4) SA 73 (N).....	85, 88, 91, 95
<i>Nel v Cloete</i> 1972 (2) SA 150 (A).....	31
<i>Patel v Grobbelaar</i> 1974 (1) SA 532 (A).....	81
<i>Preller v Jordaan</i> 1956 (1) SA 483 (AD).....	80
<i>Poole and Mc Lennan v Nourie</i> 1918 AD 40.....	81

<i>Rand Bank Ltd v Rubenstein</i> 1981 (2) SA 207 (WLD).....	68
<i>Ritch and Bhyat v Union Government (Minister of Justice)</i> 1912 AD 719.....	97
<i>S v Friedman Motors (PTY) Ltd and another</i> 1972 (3) SA 421 (AD).....	35
<i>S v Makwanyane</i> 1995 (6) BCLR 665 (CC).....	1, 140
<i>Sapirstein v Anglo Shipping Co SA Ltd</i> 1978 (4) SA 1 (AD).....	56
<i>Sasfin (PTY) Ltd v Beukes</i> 1989 (1) SA 1 (AD).....	3, 72, 74
<i>Sechold Financial Services (PTY) Ltd v Gazankulu Development Corporation Ltd</i> 1997 (3) SA 391 (A).....	51
<i>Smit and Venter v Fourie and another</i> 1946 SA 9 (WLD).....	21
<i>Standard Bank of Southern African Ltd v Friedman</i> 1999 (2) SA 456 (C).....	3, 92
<i>Standard Bank of SA Ltd v Oneanate Investments (PTY) Ltd</i> 1995 (4) SA 510 (CPD).....	97
<i>Standard Bank of South Africa Ltd v Oneanate Investments (PTY) Ltd (in liquidation)</i> 1998 (1) SA 811 (SCA).....	97, 88
<i>Standard Bank of SA Ltd v Wilkinson</i> 1993 (3) SA 822 (C).....	65, 76
<i>Standard Credit Corporation Ltd v Strydom</i> 1991 (3) SA 644 (W).....	11
<i>State Consolidated Gold Mines Corporation Bpk v Sam Flanges</i> <i>Mining Supplies Bpk</i> 1997 (SA) 644 (O).....	52
<i>Tamarrillo (PTY) Ltd v BN Aitken (PTY) Ltd</i> 1982 (1) SA 398 (A).....	2
<i>United Building Society v Labuschagne</i> 1950 (4) SA 651 (W).....	43
<i>Van Rensburg v Minister of Trade and Industry</i> , case No CCT 13/99.....	118
<i>Van Zyl v Credit Corporation of SA Ltd</i> 1960 (4) SA 582 (A).....	50
<i>Van Zyl NO v Look Good Clothing cc</i> 1996 (3) SA 523 (SE).....	52
<i>Zietsman v Allied Building Society</i> 1989 (3) SA 166 (OPD).....	2, 54, 146
<i>Zuurbekom Ltd v Union Corporation Ltd</i> 1947 (1) SA 514 (A).....	68

Zimbabwean Cases

<i>Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (PTY) Ltd and others</i> 1997 (2) SA 261 (Z).....	97
--	----

English Cases

<i>City Land and Properties (holding) Ltd v Dabrah</i> 1968 CH 166.....	60
<i>Donoghue v Stevenson</i> 1932 AC 562.....	12
<i>Fairclough v Swan Breweries Company Ltd</i> 1912 AC 566.....	64
<i>G and C Kregliger v NewPatagonia Meat and Cold Storage Co Ltd</i> 1914 AC 25.....	63
<i>Lloyds Bank Ltd v Bundy</i> 1975 QB 326 3 All ER 757.....	142
<i>Multiservice Bookbinding Ltd v Marden</i> 1979 CH 84.....	60
<i>National Westminster Bank plc v Morgan</i> 1985 1 AC 686.....	142
<i>Printing and Numerical Registering Co v Sampson</i> (1895) LR 19 Eq 462.....	65
<i>Samuel v Jarrah Timber and Wood Paving Corporation Ltd</i> 1904 AC 323.....	64
<i>Universe Tankships v I.T.F</i> 1982 (2) WLR 803.....	79

German Cases

<i>BverfG</i> 89 (1993) 214.....	137
----------------------------------	-----

Australia Cases

<i>Commercial Bank of Australia Ltd v Amadio</i> 1983 151 CLR 447.....	142
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# Table of Statutes

## South Africa

Alienation of Land Act 68 of 1981

Banks Act 94 of 1990

Companies Act 61 of 1973

Consumer Affairs Act 34 of 1984 (B) (Bophuthatswana, now North-West)

Consumer Affairs Amendment Act 11 of 1994 (NW)

Consumer Affairs (Unfair Business Practices) Act 71 of 1988

Consumer Affairs (Unfair Business Practices) Act 7 of 1996 (Gauteng Province)

Credit Agreements Act 75 of 1980

Deeds Registry Act 47 of 1937

General Law Amendment Act 50 of 1956

Hire-purchase Act 36 of 1942

Housing Consumer Protection Measures Act 95 of 1998

Income Tax Act 58 of 1962

Insolvency Act 24 of 1936

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