

# *Section 127 of the National Credit Act: a form of statutory repudiation – how it modifies the common law*

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## SECTION 127 OF THE NATIONAL CREDIT ACT: A FORM OF STATUTORY REPUDIATION – HOW IT MODIFIES THE COMMON LAW

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### 1 INTRODUCTION

The National Credit Act 34 of 2005<sup>1</sup> has now been in vigour for ten years. The interpretative and practical implications of its 173 sections, the schedules and regulations are still being seen and will be seen for many years to come, especially as the legal environment absorbs various amendments and regulations in relation to the Act.

S 127 of the Act provides the consumer with a right of statutory repudiation without the usual accompaniment of breach of the agreement. The section regulates the procedure from the time the consumer decides to repudiate and surrender the goods that are the subject of the credit agreement, as well as the rights and duties of both the consumer and credit provider once the consumer has repudiated.

### 2 REPUDIATION

Repudiation, a form of anticipatory breach,<sup>2</sup> occurs when a party indicates by words or positive conduct that he does not intend to perform or fully perform, be bound or be fully bound by the contract.<sup>3</sup>

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<sup>1</sup> Hereinafter ‘the Act’.

<sup>2</sup> Or breach of contract *in anticipando*. The other form is prevention of performance. In *Tuckers Land and Development Corporation v Hovis* 1980 1 SA 645 (A), the court identified repudiation as the most typical but not only form of anticipatory breach: “It should therefore be accepted that in our law anticipatory breach is constituted by the violation of an obligation *ex lege*, flowing from the requirement of *bona fide* which underlies our law of contract” (652). For a full discussion cf Christie and Bradfield *Christie’s The Law of Contract* 6 ed (2011) 538 ff.

<sup>3</sup> Repudiation may occur prior to performance being due but may also take place where performance is due, for example by insistence on the fulfilment of a term that does not form part of the contract (Christie and Bradfield (2011) 539). Interestingly, repudiation was a form of breach of contract, received by South African law through English Law (its *locus classicus* being the 1853 case of *Albert Holchester v Edward Frederick de la Tour* (1853) 2 El and Bl 678) as Roman-Dutch Law did not recognise it as a form of breach of contract. The creditor would have to rely on remedies for *mora* or positive malperformance. Accordingly, if the debtor repudiated prior the date for performance, the creditor had to wait for that date to arrive and either claim performance or cancellation and damages (Joubert 1987 210). The following from *Nash v Golden Dumps (Pty) Ltd* 1985 3 SA 1 (A) 22 is an apt description: “Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to ‘repudiate’ the contract [...] Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated”.

The fact that repudiation entails positive conduct distinguishes it from *mora*.<sup>4</sup> Further, the courts have held that a requirement for repudiation is wrongful conduct.<sup>5</sup> The test for wrongfulness is objective and the enquiry would be whether it is reasonable to conclude that performance will not take place or defective performance will take place in the future. The courts have repeatedly stated that the test for repudiation is not subjective but objective.<sup>6</sup>

Repudiation is demonstrated by a party indicating by words or by conduct that he or she does not intend to honour all their obligations in terms of the contract. For example, he or she may deny the existence of the contract,<sup>7</sup> try without justification to withdraw from the contract,<sup>8</sup> give notice that they cannot or will not perform;<sup>9</sup> or may indicate that they do not intend to honour all of the obligations, for example by tendering defective or incomplete performance as proper performance.<sup>10</sup>

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<sup>4</sup> LAWSA para 322.

<sup>5</sup> *Culverwell v Brown* 1988 2 SA 468 (C) 477A and *Van der Merwe et al.* 2012 308.

<sup>6</sup> In *Schlinkman v Van der Walt* 1947 2 SA 900 (E), the court held that the debtor must have the intention to repudiate as the courts have held that the debtor's real or subjective intention is not relevant to the question of wrongfulness. Cf also *Ponisammy and another v Versailles Estates (Pty) Ltd* 1973 1 SA 372 (A) 387, *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (A) 953, *Van Rooyen v Minster van Openbare Werkeen Gemeenskapsbou* 1978 2 SA 835 (A) 845-6, *Tuckers Land and Development v Hovis* 1980 1 SA 645 (A) 653, *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and another* 1993 3 SA 471 (A) 480-1, *Highveld 7 Properties (Pty) Ltd and other v Bailes1* 1999 4 SA 107 (A) 1315ffn and *Metamil (Pty) Ltd v AECl Explosives and Chemicals Ltd* 1994 3 SA 673 (A) 684-5. Per Nienaber in *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 1 ALL SA 581 (A) 591: "Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intention at the time. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach."

<sup>7</sup> *Wood v Oxendale and Co* 1906 23 SC 674, *Machanick v Bernstein* 1920 CPD 380, *Cohen v Orłowski* 1930 SWA 125 and *Strachan and Co Ltd v Natal Milling Co (Pty) Ltd* 1936 NPD 327.

<sup>8</sup> *Dettmann v Goldfain* 1975 3 SA 385 (A) and *Walker v Minier and Cie (Pty) Ltd* 1979 2 SA 474 (W).

<sup>9</sup> *Ullman Bros Ltd v Kroonstad Produce Co* 1923 AD 449 at 449: "Where a contract for the sale of goods has been entered into between two parties the seller may, although the sale be on credit, protect himself where before delivery the buyer has manifested an inability to pay." Cf the comments of Lord Esher in *Johnstone v Milling* 55 LJQB 162: "When one party refuses by anticipation to perform the contract, that is equivalent to a declaration by him, that he thereby rescinds the contract as far as he can. But he cannot rescind it by himself. He says, I will not perform the contract; but that is not a rescission of the contract. By doing that wrongfully, he entitles the other party, if he pleases, to agree to its rescission, subject to this that at the same time he can bring an action for the wrongful rescission. The other party may elect to adopt it as a rescission, by acting upon it, and by treating the contract as at an end, except for the purposes of bringing an action upon it as if it has been rescinded".

<sup>10</sup> *Cilliers v Papenfus and Rooth* 1904 TS 7, *Tuckers Land and Development Corporation (Pty) Ltd v Aleco Investments* 1981 1 SA 852 (T), *Janowsky v Payne* 1989 2 SA 562 (C) and *Havenga et al.* 1995 114. In *Executors of Alfred Winter Evans v John William Stranack* 1890 11 NLR 12, the court held that the attempt to add conditions to a contract, which had previously not been contemplated by the parties, amounted to

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Repudiation was traditionally accepted to consist of two parts: The act of repudiation by the guilty party, demonstrating a deliberate and unequivocal intention to no longer to be bound by the agreement, and the act of the other contracting party of ‘accepting’ and thus completing the breach. However, the “better view” held in the courts<sup>11</sup> is that repudiation is a breach in itself<sup>12</sup> and that the intention does not in truth have to be either deliberate or subjective<sup>13</sup> but simply descriptive of conduct heralding non-performance on the part of the repudiator, and that the so-called acceptance does not complete the breach but is simply the exercise by the aggrieved party of his or her right to terminate the agreement.<sup>14</sup>

Repudiation, however, will not necessarily entitle the aggrieved party to rescind, and this right will depend on the seriousness of the breach which the repudiation heralds.<sup>15</sup> If the

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repudiation of the contract: “[When] one party to a contract, endeavour[s] to force upon the other party a term not compromised in the contract. There, I should say, that though the other side may have a right to insist on the contract’s being performed according to its terms, yet that he has also a right to say to the other side, as you refuse to perform the contract without addition material in its nature, I elect to rescind the contract; I am not obliged either to submit to your terms, or to bring an action to compel you to submit to mine; and I elect to break off from the contract, and to be done, with you. [...] If a party to a contract insists on a new term’s being added to the contract, the case, is analogous to a repudiating or abandoning by such party of the original contract, as he will not abide by it.”

<sup>11</sup> *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd supra* 584 and Nienaber “The Effect of Anticipatory Repudiation: Principle and Policy” 1962 *Cambridge LJ* 213 222.

<sup>12</sup> *Tuckers Land and Development v Hovis supra* 653.

<sup>13</sup> *Van Rooyen v Minster van Openbare Werkeen Gemeenskapsbou supra* 845-6: “Om ‘n ooreenkomsterepudieer, hoef daarnie, [...] ‘n subjektiewebedoelinge wees om ‘n einde aan die ooreenkomste maak nie. Waar ‘n party, by, weier om ‘n belangrikebepaling van ‘n ooreenkomsnatekom, sousyoptrederegrens op ‘n repudiering van die ooreenkoms kon neerkom, al sou hy ook meen dat hy verpligtine behoerlik nakom” (De Wet en Yeats 1947 117).

<sup>14</sup> *Stewart Wrightson (Pty) Ltd v Thorpesupra* 953, this view was supported by the court in *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd supra* 584.

<sup>15</sup> “The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, i.e. not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is a ‘serious matter’ requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed” (*Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd supra* 591, cf *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 2 SA 863 (Nienaber ‘Enkele Beskouingeoor Kontrakbreuk in Anticipando’ 1963 *THRHR* 1963 19 34; De Wet and Van Wyk 1947 171 and LAWSA para 5 324). Joubert, drawing from *Tuckers Land and Development v Hovis supra*, states that the reason for allowing the aggrieved party to cancel the contract before the date fixed for performance is that a repudiation “undermines the confidence of the creditor in the promise of the debtor and brings with it an element of uncertainty which is too dangerous to allow to continue inevitably”. He further states: “A prudent man cannot be expected to wait for the day of performance and then discover that he will not get performance as promised. Nor can a prudent man be expected to make only tentative alternative arrangements to cater for this possibility. The sensible course for a prudent man to take may be to take the debtor at his word, cancel the contract and make other firm arrangements or, if so inclined, take the risk that the debtor will yet perform and insist on performance” (1987 210-11). While the court in the *Datacolour supra* matter did not note the test formulated in *Street v Dublin* 1961 2 SA 4 (A), the words by Williamson J could amount to an echo of the phrasing in that matter: “The test as to whether the conduct amounts to such a repudiation [as justifies cancellation] is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound”.

debtor conveys the intention not to perform only a minor part of the obligation, it may amount to malperformance and this form of breach will then only entitle the aggrieved party to the remedies available in such instances.<sup>16</sup>

### 3 SECTION 127 OF THE NATIONAL CREDIT ACT AS A FORM OF STATUTORY REPUDIATION

S 127 of the National Credit Act gives a consumer the right<sup>17</sup> to terminate the agreement and to surrender the goods to the credit provider by giving written notice to the credit provider whether or not he or she is in default, under an instalment, secured loan or lease agreement.<sup>18</sup> This is not a common law right that is ordinarily available to a credit consumer – unilateral termination of a contract by one party in the absence of breach by the other is a form of anticipatory breach, namely repudiation, and is usually followed by a claim for damages by the other party.<sup>19</sup> It is submitted that s 127 entitles the consumer to repudiate certain credit agreements without the presence of the element of wrongfulness normally associated with anticipatory breach. Further, s 127 entitles consumers to statutorily repudiate instalment agreements, secured loans and lease agreements at any stage and for any reason. This is a dramatic alteration of common law principles which state that the obligations imposed by the terms of an agreement must be honoured and if they are not, the person who has the duty to perform is said to have committed breach of contract.<sup>20</sup> Furthermore, if the consumer exercises his/her right of repudiation in terms of s 127, the credit provider is not entitled to be put in the position it would have been in had the contract been performed. This is in contrast to the common law rule for damages which states that the innocent party (here the credit provider) must be placed in as good a position financially had the breach not occurred.<sup>21</sup>

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<sup>16</sup> McCardie J's comments in *Re Rubel Bronze and Metal Co and Vos* 1918 1 KB 315 22 are apt: "[T]he question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intentions indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case." This matter was cited with approval in *Sclinkmann v Van der Walt and others* 1947 2 SA 900 (E) 922, *Van Rooyen v Minster van Openbarewerkeen Gemeenskapbou* 1978 2 SA 85 (A) 845, and *Inrybelange (Eiendoms) Bpk v Pretorius en 'n ander* 1966 2 SA 416 (A) 427.

<sup>17</sup> Otto and Otto refer to it as an "extraordinary right" (2013 75).

<sup>18</sup> S 127 (1).

<sup>19</sup> However, this is not the first time that South African statutes have reflected such a consumer right. In terms of s 14 of the repealed Hire-Purchase Act, the consumer was empowered to terminate the agreement at any time and return the goods or tender their return. The buyer could claim a refund of a portion of the payments that he had made. The onus was then on the seller to establish the value of the goods at the time of their return. The seller could also prove any other rights it wished to claim under the Hire-Purchase Act (s 15 (1) of the Hire-Purchase Act and cf *Parow Motorhandelaras (Edms) Bpk v Hansen* 1976 3 SA 146 (C)).

<sup>20</sup> See discussion of obligations and breach above.

<sup>21</sup> *Versveld v South African Citrus Farms Ltd* 1930 AD 452.

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A consumer exercises their right of voluntary surrender by notifying the credit provider in writing to terminate the agreement<sup>22</sup> and if the goods are already in the credit provider's possession, the consumer must instruct the provider to sell the goods.<sup>23</sup> If the goods that are subject of the credit agreement<sup>24</sup> are not in the credit provider's possession then the consumer must return the goods to the credit provider's place of business during ordinary offices hours within five business days after the date on the notice to terminate.<sup>25</sup> Otherwise the credit consumer may make such an arrangement with the credit provider with regards the period within which and the place where the goods are to be handed over.<sup>26</sup>

Within ten business days after receiving the notice from the consumer to sell the goods which are in the provider's possession or within ten business days of receiving the goods tendered, the credit provider must give the consumer written notice setting out the estimated value of the goods.<sup>27</sup>

Within ten business days after having received the notice of valuation of the goods from the provider, the consumer has the right to unconditionally withdraw the notice to terminate the agreement and thereafter resume possession of the goods which may be in the possession of

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<sup>22</sup> S127 (1)(a) of the Act.

<sup>23</sup> S 127 (1)(b)(i) of the Act. The provider would be in possession of the goods if they had been pledged to him in terms of a secured loan agreement, for example. See the matter of *MFC (a division of Nedbank Ltd) v Botha* (2013) ZAWCHC 107, where the consumer returned the goods that were the subject of an instalment agreement (here a vehicle) on the basis of s 56 (2) of the Consumer Protection Act 68 of 2008 as he claimed that he was not satisfied with the vehicle on account of its allegedly defective condition (para 2). The MFC wished to deal with the return of the vehicle in terms of s 127 of the Act and brought an application on account that it was entitled to do so (para 3). The court found that “[t]he applicant was misdirected in characterising the surrender of the vehicle as having been in terms of s 127 of the NCA. That provision applies in a case of the surrender of goods by a consumer who wishes voluntarily to terminate a credit agreement on the basis of the further provisions of the section, that is that the goods will be realised by the credit provider and the proceeds applied in reduction of the consumer's outstanding liability under the contract. The provision is in no way the equivalent of s 56 of the CPA. The latter provision contemplates a return of *defective* goods, with a consequent termination of any pertinent contractual relationship between the supplier and consumer, effectively on the basis of a *restitutio in integrum*; whereas the former provides for a regulated basis for a credit provider to recover contractual damages upon the statutorily permitted voluntary termination of a credit agreement by a consumer. The consumer is able to effect such a voluntary termination by giving notice in terms of s 127 (1)(a) of the NCA” (para 11).

<sup>24</sup> Coetzee submits that the phrase ‘goods that are subject of that agreement’ encompasses two instances, namely (1) where moveable goods are financed under a credit agreement irrespective of whether ownership passed or had been retained, and (2) where movable goods are used as security for payment of amounts due under a credit agreement (‘Voluntary Surrender, Repossession and Reinstatement’ 2010 73 *THRHR* 569 575). The phrase ‘goods that are subject of that agreement’ is used only in s 127 (1)(b)(ii) and not in s 127 (1)(b)(i) – it is assumed that this was a legislative oversight and that both subsections refer to the goods that are the subject of the agreement.

<sup>25</sup> S 127 (1)(b)(ii) of the Act.

<sup>26</sup> *Ibid.*

<sup>27</sup> S 127 (2) of the Act.

the provider.<sup>28</sup> The consumer may only exercise such right if at that time he/she is not in default under that credit agreement.<sup>29</sup> There is no limit to how many times a consumer may do this under one credit agreement.

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<sup>28</sup> S 127 (3) of the Act. Conceptually, this is a reverse form or adaptation of a cooling-off right. It is also potentially a great inconvenience for the credit provider who will have probably initiated processes to receive the goods and onward sell or dispose of them.

<sup>29</sup> Coetzee submits that the words “unless the consumer is in default” in s 127 (3) do not mean that such consumer can only exercise such right of reinstatement if he had never been in default under that agreement. She suggests that s 127 (3) should be interpreted to mean that if such consumer remedied the default, he would so be entitled (2010 *THRHR* 569 574). The view is concurred with; it may be very likely that the consumer defaults, for example, shortly after giving notice of his intention to cancel. One may use the following scenario as an example: Mr X, a credit consumer under an instalment credit agreement, realises that due to economic circumstances he may not be able to afford the leather lounge suite he has purchased from ABC Suppliers on credit. The lounge suite instalments are due on or before the 29<sup>th</sup> of every month. On the 25<sup>th</sup>, Mr X sends a notice in terms of s 127 (1) to ABC Suppliers and tenders return of the goods. On the 29<sup>th</sup> of that month he defaults on his payment. On the 1<sup>st</sup> of the following month, Mr X is offered a promotion with a salary increase by his employer. Mr X accepts the offer and now reconsiders his financial commitments. On the 3<sup>rd</sup> of that month he receives the notice from ABC Suppliers in terms of s 127 (2) which sets out the prescribed information. Mr X immediately settles his arrears with ABC Suppliers and sends them a notice in terms of s 127 (3) unconditionally withdrawing the notice to terminate the agreement. It is submitted that after curing his arrears he may legitimately use his right in terms of s 127 (3) and resume possession of the goods. However, using the above example, if Mr X was already in default at the time of sending the s 127 (1)(a) notice but soon after was in a position to settle all the arrears interest, would s 127 (3) prevent him from withdrawing his repudiation? It is submitted that the legislature simply intended to empower the credit provider to be able to prevent the consumer from reinstating the agreement and regaining possession of the goods where he was in arrears; however, where the consumer tenders the outstanding amount, the consumer should be entitled to reinstatement and return of the goods. It is further submitted that the consumer would then also have to tender (and pay) any expenses that the credit provider may have incurred (in both scenarios discussed above) from the date of receipt of the notice in terms of s 127 (1)(a), for example, costs of a valuator it may have employed to evaluate the goods or for collection or storage of the goods, if these had already been returned. Otto states that s 127 of the Act “stands in stark contrast to s 12 of the Credit Agreements Act” (Scholtz *Guide to the National Credit Act* (2015) para 9.5.4.3). In terms of the former s 12 of the Credit Agreements Act, the credit receiver was entitled to be reinstated in his contract if the goods had been returned to the credit grantor provided that the credit receiver had not himself cancelled the contract and had paid the arrears amount within thirty days, “this last proviso implies that he had indeed been in default” (*ibid*). In terms of s 12 of the Credit Agreements Act, the consumer was entitled to be reinstated in his contract if the goods had been returned to the credit grantor provided that, among other things, the credit receiver had not himself cancelled the contract and had paid the arrears amount within thirty days. This last proviso implies that he had indeed been in default. Otto is of the view that in terms of s 127 (3) of the Act, a consumer may cancel the contract, return the goods and thereafter void his cancellation and reinstate the contract (*ibid*). Coetzee argues that s 127 (3) can be construed to resemble s 12 of the Credit Agreements Act as the agreement is not terminated upon provision of the consumer’s initial written notice, as ss127 (6)(b) and 127 (8)(b) provide that the agreement is only terminated upon remittance of a surplus amount to the consumer in the case where s 127 (6)(b) is applicable or when the consumer remits the shortfall to the credit provider in circumstances to which s127 (8)(b) applies (2010 *THRHR* 569 574). There does appear to be some confusion as to when the contract is terminated in terms of s 127. S 127 (1) provides that the consumer gives written notice to the credit provider “to terminate the agreement” – seemingly the consumer is giving notice that by virtue of such notice he has terminated the agreement. This interpretation poses a problem due to the conflict with ss127 (6)(b) and 127 (8)(b) which provide that the agreement is only terminated by the remittance of the surplus of the sale by the credit provider to the consumer or remittance of the deficit by the consumer to the provider. Accordingly, it is submitted that the consumer by exercising his right in terms of s 127 (1) is requesting the credit provider to terminate the agreement. The wording of s 127 (1)(a) appears to fall in line with this interpretation that is the consumer “may give written notice to the credit provider to terminate the agreement”.



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If the credit provider receives a notice from the credit consumer advising of the withdrawal of the termination, the provider must then return the goods to the consumer.<sup>30</sup> The credit provider is only obliged to do so if the credit consumer is not in default.<sup>31</sup> Where the credit consumer does not respond to the credit provider's valuation notice then the provider must sell the goods as soon as practicable for the best price reasonably obtainable.<sup>32</sup> It has been suggested that what is to be regarded as a practicable time and best price reasonably obtainable will depend on the facts of each case, being influenced by the types of goods, their marketability, their condition and the trend in the industry.<sup>33</sup>

Once the goods are sold, the credit provider must credit or debit the consumer with either a payment or a charge equivalent to the proceeds of the sale less any expenses which the provider may have reasonably incurred in connection with the sale of the goods.<sup>34</sup> The provider must then give the consumer a written notice advising of the settlement value of the credit agreement immediately before the sale, the gross amount realised on the sale, the net proceeds of the sale,<sup>35</sup> and the amount credited or debited to the consumer's account.<sup>36</sup>

If the amount credited to the consumer's account exceeds the settlement value immediately before the sale and another credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the Tribunal, which may make an order for the distribution of the amount in a manner that is just and reasonable.<sup>37</sup> Where no other credit provider has a registered credit agreement with the

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<sup>30</sup> The Act does not stipulate a time within which the goods need be returned, accordingly it would be expected that same be done within a reasonable time.

<sup>31</sup> S 127 (4)(a) of the Act.

<sup>32</sup> S 127 (4)(b) of the Act.

<sup>33</sup> Van Heerden and Otto 'Debt Enforcement in Terms of the National Credit Act 34 of 2005' *TSAR* (2007) 655 657.

<sup>34</sup> S 127 (5)(a) of the Act.

<sup>35</sup> This would be the gross proceeds less the reasonable expenses incurred in connection with the sale and the provider's permitted default charges. Cf s 100 of the Act with reference to prohibited charges.

<sup>36</sup> S 127 (5)(b) of the Act.

<sup>37</sup> S 127 (6)(a) of the Act. This section appears to place a responsibility on the first credit provider to "hunt down" the consumer's alternative commitment relating to those goods. This is an onerous task for the credit provider, especially in light of s 127 (10) which exposes the credit provider to an offence if he acts contrary to s 127. Furthermore, the wording "registered credit agreement" is strange in that credit agreements *per se* are not registered but it is credit providers that are registered. It is submitted that a credit provider would meet its obligations in terms of this section by advising the consumer of this statutory obligation and requesting information from the consumer with reference to other commitments in relation to credit agreements. It would then be up to the consumer to provide the requisite information.

same consumer in respect of the same goods, the credit provider must remit the excess amount to the consumer and the agreement is thereby terminated.<sup>38</sup>

#### 4 A S 129 (1)(A) NOTICE OR A S 127 (7) NOTICE?

Where the amount rendered by the sale of the goods, that have been surrendered by a consumer to a credit provider in terms of s127 of the Act, is less than the settlement value of the agreement immediately before the sale, the credit provider may in terms of s 127 (7) simultaneously demand payment from the consumer of the remaining settlement value when he issues the notice to the consumer advising of the results of the sale.<sup>39</sup> This leaves open the question whether a credit provider may approach a court if he has made demand in terms of s 127 (7) or whether he is subsequently obliged to follow the procedure as prescribed in s 129.

Boraine and Renke<sup>40</sup> submit that a s 129 (1)(a) demand notice is not required where the credit provider approaches the court for an order enforcing the remaining obligations of the consumer as s 129 (1)(b) provides that the requirement of issuing such a notice is subject to s 130 (2). S 130 (2) states that in addition to the circumstances contemplated in s 130 (1), in the case of an instalment agreement, secured loan or lease a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if all the relevant property has been sold pursuant to a surrender of property in terms of s127<sup>41</sup> and the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.<sup>42</sup> Van Heerden<sup>43</sup> posits a different view, indicating that amongst the allegations which a credit provider must make in his pleadings when he seeks to enforce the remaining obligations in terms of a credit agreement, he must allege that he sent the consumer a notice in terms of s129(1)(a). Van Heerden submits that before a credit provider can enforce payment of an outstanding balance demanded in accordance with s 127 (7), he first has to notify the consumer of the latter's rights in terms of s 129 (1)(a).<sup>44</sup> The reason being that compliance with s 129 (1)(a) is a required procedure before debt enforcement and the consumer cannot be deprived of, for

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<sup>38</sup> S 127 (6)(b) of the Act.

<sup>39</sup> That is a notice in terms of s 127 (5)(b) of the Act.

<sup>40</sup> Boraine and Renke 'Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in Terms of the National Credit Act 34 of 2005 (Part 2)' 2008 *De Jure* 1 6 fn 160.

<sup>41</sup> S 130 (2)(a)(ii) of the Act. S 130 (2)(a)(i) makes reference to attachment orders which are not being discussed here.

<sup>42</sup> S 130 (2)(b) of the Act.

<sup>43</sup> Scholtz 2015 para 12.8.3.1.

<sup>44</sup> Scholtz 2015 para 12.8.3.1 fn 335 and *MFC (A Division of Nedbank Ltd) v Botha* 2013 ZAWCHC 107).

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instance, his right to be notified that he can consult a debt counsellor, by the fact that he decided to terminate the agreement voluntarily.<sup>45</sup> It is submitted that the purpose of a s129 (1)(a) notice is intended to have the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date. It is further submitted that a s 127 (7) notice serves a different purpose, namely that it requires the consumer to settle the difference between the settlement value and the amount outstanding on the consumer's account prior to the sale. The credit agreement between the parties has then terminated. It is submitted that while both interpretations are resounding, Boraine and Renke's<sup>46</sup> view is the preferred one not only due to the wording of s 130 (2) but also the wording of s 130 (1) which states that it is subject to subsec (2). While s 130 (1) states that a credit provider may approach the court for an order to enforce a credit agreement only if it has complied with s 130 which includes a notice being sent out in terms of s 129 (1)(a) by the credit provider to the consumer in the event of default, it is submitted that the purpose and thus the legislature's intention of subjecting s 130 (1) to 130 (2) was to make an exception of s 127.<sup>47</sup>

In *Roussouw v Firstrand Bank Ltd*<sup>48</sup> the Supreme Court of Appeal held that in the three types of credit agreements mentioned (i.e. an instalment agreement, a secured loan and a lease), if the further requirements of the section are satisfied (i.e. all the relevant property has been sold, pursuant to an attachment order or the surrender of property in terms of s127 and the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement) then the credit provider is excused from complying with s130 (1), that is the credit provider does not have to send a notice and wait for the days to elapse.<sup>49</sup>

Furthermore, s 130 (3) specifically differentiates ss 127, 129 and 131 of the Act, providing that despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which the Act applies, the court may determine

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<sup>45</sup> *Ibid.* Coetzee suggests that "until a clear practise has emerged or case law has clarified the position, litigants should rather combine the two notices under these circumstances by including the prescribed content of the s 129 (1)(a) notice, and especially the consumer's rights contained therein, in a s 127 (7) notice" (2010 *THRHR* 569 575).

<sup>46</sup> Boraine and Renke (Part 2) 2008 *De Jure* 1 6 fn 160.

<sup>47</sup> And attachment orders.

<sup>48</sup> 2010 6 SA 439 (SCA) at para41.

<sup>49</sup> However, it appears that the court was referring specially to a s 129 (1)(a) notice and that in fact by virtue of s 127 (7) as read with s 127 (8) the credit provider is obliged to send a notice to the consumer to demand the outstanding balance prior to commencing further proceedings.

the matter only if the court is satisfied that in the case of proceedings to which ss 127, 129 and 131 apply, the procedures required by those sections have been complied with. These three sections are clearly differentiated and, it is submitted, so too are the required procedures. Additionally, the wording in s 127 (8) indicates that ten days after the consumer has received a s 127 (7) notice and has failed to pay the amount demanded within ten business days, the provider may commence proceeding in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement. It is submitted that if the legislature had intended the credit provider to be obliged to then proceed with a s 129 (1)(a) notice it would have specifically stated so. While the drafting of the Act leaves much to be desired and makes no easy task for those having to apply and interpret the Act, the wording of s 127 (8) of the Act cannot be ignored.

Furthermore, the credit provider also carries the evidentiary burden of proving that the consumer has received the s 127 (7) notice; up until the coming into effect of the National Credit Amendment Act,<sup>50</sup> this was greater burden than had been required in terms of the previous s 129 (1)(a)<sup>51</sup> which requires the credit provider to simply deliver the notice. In writer's view, it is not reconcilable to oblige the credit provider to ensure that a consumer has received the s 127 (7) notice and thereafter have to issue a s 129 (1)(a) notice.

## **5 INTEREST, DISPUTING A SALE AND JUDGMENT**

If the consumer pays the amount demanded in terms of s 127 (7) at any time before judgment then the agreement is terminated upon remittance of that amount.<sup>52</sup> In either event interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider from the date of demand to the date of payment.<sup>53</sup>

S127 (8)(a) entitles a credit provider to pursue the credit consumer in the courts for any outstanding amounts in terms of the credit agreement where the proceeds of the sale of the

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<sup>50</sup> Act 19 of 2014 (hereinafter 'the National Credit Amendment Act').

<sup>51</sup> In terms of the National Credit Amendment Act, ss 129 (5)-(7) read as follows:- "(5)The notice contemplated in subsection (1)(a) must be delivered to the consumer – (a) by registered mail; or (b) to an adult person at the location designated by the consumer. (6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5). (7) Proof of a delivery contemplated in subsection (5) is satisfied by – (a) written confirmation by the postal service or its authorized agent, of delivery to the relevant post office or postal agency; or (b) the signature or identifying mark of the recipient contemplated in subsection (5)(b).".

<sup>52</sup> S 127 (8)(b) of the Act.

<sup>53</sup> S 127 (9) of the Act. Coetzee submits that by implication the credit provider's right to interest is suspended prior to such demand (2010 *THRHR* 569 572). It is submitted that this view is correct, as up until demand the consumer cannot be aware of whether there is any amount outstanding and what that amount is.

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goods do not exterminate the entire debt. The section provides that the credit provider may commence proceedings in terms of the Magistrates' Court Act for judgment<sup>54</sup> enforcing the credit agreement ten business days after receiving demand.<sup>55</sup>

S 128 provides a process whereby a consumer who disputes a sale and has been unable to resolve the disputed sale in terms of s 127 directly with the credit provider or through an alternative dispute resolution under Part A of Ch 7, may apply to the Tribunal to review the sale.<sup>56</sup> The Tribunal is approached on application and where it is not satisfied that the credit provider sold the goods as soon as reasonably practicable or for the best price reasonably obtainable, it may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of sale.<sup>57</sup> A decision by the Tribunal which is made in terms of s 128 is subject to appeal or review by the High Court.<sup>58</sup> If a credit provider acts in a manner contrary to s 127 it will be guilty of an offence.<sup>59</sup>

### 6 FUNCTIONS OF S127

S127 of the Act forces the consumer to practise economic discipline. A consumer who is conscious of his finances and realises that his pecuniary situation is such that he will not be able to meet his debts or debt repayments, may circumvent defaulting and having civil action taken against him by returning the goods which were purchased on credit to the credit

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<sup>54</sup> It has been held that this section does not give exclusive jurisdiction to magistrates' courts in these matters and a credit provider may approach a high court. It has been held that this section has the effect of creating additional jurisdiction for magistrates' courts with regard to these claims and not in any way ousting the jurisdiction of the High Court (*Nedbank Ltd v Mateman and another; Nedbank Ltd v Stringer and another* 2008 JOL 21191 (T) and *Otto in Scholtz* 2015 para 9.5.4.5 fn 146). The *Mateman* matter *supra* expressed a different view to the matter of *Absa Bank Ltd v Myburgh* unreported case no 31827/2007 – where Bertlesman J declared that the proceedings in terms of s 127 (8) to recover any outstanding amounts were stated to be “significantly, especially decreed to be instituted in the lower court, regardless of any jurisdictional limitation regarding the sum involved”.

<sup>55</sup> This section refers to ‘receipt’ as opposed to ‘delivery’, the latter being the terms used in relation to the s129 notice. It is submitted that this places a greater onus on the credit provider who may very well have to prove that the consumer has received the s 127 (7) notice.

<sup>56</sup> S 128 (1) of the Act. In *Methethwa v Absa Bank Ltd* 2013 ZANCT 50, the consumer made application to the Tribunal, in terms of ss128 (1) and (2) of the Act, on the grounds that Absa did not sell the goods in question, here a vehicle, as soon as reasonably practical, alternatively did not sell the goods at the best price reasonably obtainable. The Tribunal found that because the consumer had not attempted to resolve the disputed sale of goods directly with the credit provider, Absa, or through an alternative dispute resolution agent, the matter was not properly before the Tribunal, it refused to hear the merits of the matter and dismissed it (20 and 21).

<sup>57</sup> S 128 (2) of the Act.

<sup>58</sup> The appeal and review of an order by the Tribunal in terms of this section is subject to s148 which permits a participant in a hearing before a single member of the Tribunal to appeal a decision by that member to a full panel of the Tribunal. Whereas a participant in a hearing before a full panel of the Tribunal may apply to the High Court to either have the decision reviewed or appeal to the High Court against the decision. Both review and appeal procedures are subject to the rules of the High Court.

<sup>59</sup> S 127 (10) of the Act.

provider and having them sold.<sup>60</sup> The procedure in terms of s 127 does not prevent the credit provider from obtaining his settlement value and the provider is assured of recovering any costs that it may incur by on-selling the goods.<sup>61</sup> This assists consumers if, as stated above, they are fiscally disciplined and act timeously in maintaining a ‘clean’ credit record to avoid what can be expensive legal procedures.<sup>62</sup>

While s 127 gives consumers an opportunity to ‘unburden’ themselves by making use of the procedures prescribed by the section, it places credit providers in a precarious position in that it becomes difficult to make accurate financial forecasts based on future income, especially if there are grave shifts in interest rates or economic downturns prompting consumer withdrawal of use of credit. The solution, for example, would be for credit providers to ‘hedge’ against risk of cancellations by downloading the ‘risk’ costs onto the consumer by imposing higher interest rates. However, it must be noted that credit providers are prohibited from utilising contractual safeguards in this regard as the Act renders any provision purporting to defeat the purposes of the Act or directly or indirectly waiving or depriving a consumer of a right as set out in the Act unlawful.<sup>63</sup>

S 127 may also potentially force a credit provider to become a reseller of used goods where otherwise they would only trade in new goods. This may have financial implications for credit providers as they would be required to set up administrative machinery to manage such returns on a practical level, financially and from a legal perspective. Once again, the costs of which would be downloaded onto the consumers.

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<sup>60</sup> By exercising this right he can also circumvent adverse credit information being placed on his credit record.

<sup>61</sup> The following paragraph was reasoning provided for the implementation of a similar section in the Hire-Purchase Act; however, it is submitted that such justification is relevant in terms of s 127 of the National Credit Act: “Viewed against the economic policy deducible from the Act as a whole, the legislature’s purpose in enacting section 14 (a) is plain. It wished to enable a buyer who experienced difficulty in fulfilling his part of the bargain to resile from the agreement and return the goods, so reducing the amount that would have been payable by him if the agreement had run its course. The adoption of this course also makes it possible for the buyer to avoid legal proceedings being taken against him by the seller for the costs of which he, the buyer, would be liable” (Diemont and Aronstam *The Law of Credit Agreements and Hire-Purchase in South Africa* (1982) 56-7).

<sup>62</sup> It is submitted that while this amounts to early settlement of a credit agreement, the consumer would not, if it concerned a large agreement, incur penalties for early settlement as contemplated in s 125 of the Act. No penalty is allowed for early settlement of small and intermediate agreements (s 125 of the Act).

<sup>63</sup> SS 90 (2)(a)(i) and (b)(i) of the Act. For example, credit providers would not be able to incorporate a waiver of the rights of the consumer in terms of s127 of the Act, or fix the price of the goods in the event of a statutory repudiation by the consumer in terms of s 127.

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### **7 CONCLUSION**

S 127 of the Act entitles consumers to repudiate instalment agreements, secured loans and lease agreements without effectively breaching the contract, as breach is understood in our common law and therefore without eliciting the normal remedies that are available to a credit provider in such instances, namely specific performance, cancellation and damages. Further, s 127 promotes a ‘self-help’ stance by the consumer who can now, if feeling financially strained, simply return the goods he/she purchased on credit; definitely a form of statutory repudiation without, however, the presence of the element of wrongfulness.

It is a rather dramatic consumer right given the implications that it has for credit providers, especially in the event of a general national or global economic crisis leading to potential on masse statutory repudiations in terms of s 127 of the Act. Credit providers will also potentially have to develop a second-hand department in order to deal appropriately with the returned goods and abide by the statutorily mandated procedure, increasing their operational costs, which in turn will result in a download of such costs onto consumer goods. Presently, this appears to be an underutilised right by consumers generally; however, a spike could be seen in the event of economic turmoil, a situation credit providers may want to prepare themselves for.