

Department of Private Law



LPL4801

**Statutory Regulation regarding the
Law of Sale and Lease**
Study Guide 3

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Printed and published by the
University of South Africa
Muckleneuk, Pretoria

LPL4801/3/2017–2019

70508895

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FOREWORD

STATUTORY REGULATIONS REGARDING CERTAIN CONTRACTS OF SALE AND LEASE

This section of your study material deals with statutory regulations regarding certain contracts of sale and lease: The Alienation of Land Act 68 of 1981, the National Credit Act 34 of 2005 and lastly, but most importantly for purposes of this module, the Consumer Protection Act 68 of 2008. We first discuss the Alienation of Land Act 68 of 1981 (study units 1 & 2) and, thereafter, the National Credit Act 34 of 2005 (study units 3–17). Lastly we give you an outline of the Consumer Protection Act 68 of 2008 (study units 18–23).

Wherever you find yourself in the legal profession one day, you will need a thorough understanding of this legislation. You need to understand how it has changed the existing common law in the field of sale and lease. More importantly, you need to be able to integrate the provisions of the legislation with the common law to enable you to give sound legal advice to your clients.

You need to understand that common law and legislation cannot be studied or applied in isolation. The activity below illustrates some of the “integration challenges” a lawyer faces every day in practice.

The following activity illustrates the importance of integrating all legal sources to solve a legal problem:

ACTIVITY

Your client builds high density housing in Pretoria and comes to see you about a development that he built two years ago. Suddenly all the owners are complaining about large cracks appearing on the inner walls of the town houses. Your client has received threats from some of the owners that they will hold the developer liable for the structural defects. Your client feels that he did not hide any defects from the initial buyers of the town houses, and that all the deeds of sale contained the *voetstoots* clause. Note that the developer did not sell the town houses on credit to the owners. You now need to give legal advice to your client.

FEEDBACK

- The **law of sale** is applicable here and, more specifically, the aspects dealing with latent defects. You could advise that it is usually possible for a seller to exclude the common law warranty against latent defects with a *voetstoots* clause, provided that the seller does not deliberately conceal a latent defect. But in drafting your legal opinion, this is not where you should stop. **You have to ask yourself, is there any legislation applicable that could influence this legal position?**

FOREWORD

- First of all, you need to determine what legislation is applicable to and appropriate for the given set of facts. After you have studied this study guide in conjunction with study guides 1 and 2, you will be able to conclude that the National Credit Act 34 of 2005 is not applicable, because the developer didn't sell the town houses on credit. Although the Alienation of Land Act 68 of 1981 is applicable to the sale of town houses, it is not relevant here because this is not a credit sale and the town houses have already been transferred to the respective buyers' names. After studying this guide, you will, however, realise that the Consumer Protection Act 68 of 2008 is applicable, because a town house is sold by a supplier to a consumer in the normal course of business. You should further advise that, because of various provisions in this Act, it is no longer possible for a seller to exclude the warranty against latent defects by means of a *voetstoots* clause, and that the liability of the seller/supplier has been extended immensely by this Act. (Many building regulations and other legislation might also be applicable, but will not be explained here for purposes of this module.)
 - What we are trying to illustrate at this stage, is not a detailed answer to the legal problem, but the point that your legal advice would have been incomplete if you failed to integrate the common law with the relevant legislation. Although we have briefly indicated in study guides 1 and 2 where the aforesaid legislation has amended the common law, we advise you to keep this critical and analytical stance displayed in the activity feedback above, when working through study guides 1 and 2, and to incorporate the contents of this study guide 3 where relevant.
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STUDY UNIT 1

Formalities required for the conclusion of a binding contract of sale

Xavier buys a house from Tsepiso for R500 000. The contract is not expressed in writing. He realises that he does not want to buy the house any more, but he has already paid a R50 000 “non-refundable” deposit. Does he have any remedy?

OVERVIEW

The statutory formalities for the conclusion of a binding contract of sale are discussed or briefly referred to in this study unit. The Alienation of Land Act 68 of 1981 is the most important legislation in this regard.

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- 1.3 FORMALITIES PRESCRIBED FOR THE SALE OF LAND ON INSTALMENTS

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- understand that formalities are only one of the requirements for a valid contract
 - explain the formalities prescribed by the Alienation of Land Act 68 of 1981
 - determine the types of contract the provisions of the Alienation of Land Act apply to
 - describe the concepts of “land” and “deed of alienation”
 - describe the contents of the deed of alienation that must appear in any document that purports to deal with the alienation of land
 - describe the requirements for alienation through a representative
 - determine who are representatives for the purpose of the alienation of land
 - determine who are the representatives of companies
 - explain the formalities for sales of land by public auction
 - discuss how the variation and revival of deeds of alienation can take place
 - set out the requirement that the contract must refer to the “cooling-off” right of certain purchasers or prospective purchasers
 - discuss the consequences of non-compliance with formalities
 - apply the rules discussed here, to practical problems
-

1.1 INTRODUCTION

requirements for a valid contract

The requirements of a valid contract of sale in order to give rise to rights and duties, are the well-known requirements for the validity of any contract, namely, capacity to act, consent, possibility of performance, lawfulness and compliance with formalities. Most of these requirements have been dealt with at length in the course on the general principles of the law of contract, and we shall, therefore, not repeat those discussions here. **In this chapter, we deal only with the formalities that are prescribed by statute in respect of contracts of sale of land or interests in land.**

1.2 FORMALITIES PRESCRIBED FOR CONTRACTS IN TERMS OF WHICH LAND OR INTERESTS IN LAND ARE BOUGHT AND SOLD

sections 2 and 3

Since the beginning of the 20th century, formal requirements for contracts for the sale of land have been prescribed by current statute. Sections 2 and 3 of the Alienation of Land Act 68 of 1981 (hereafter referred to as “the ALA” in this study unit), as amended, currently regulate the formal requirements. These sections read as follows:

S 2(1) **No alienation of land** after the commencement of this section shall, subject to the provisions of section 28, **be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto** or by their agents acting on their written authority.

S 2(2) The provisions of subsection (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.

S 3(1) The provisions of section 2 do not apply to the sale of land by public auction.

S 3(2) If, in terms of a sale of land by public auction, the purchase price or any other charges is or are payable by the purchaser in more than two instalments over a period exceeding one year:

- (a) the provisions of this Act apply to that sale as if it were a sale under a contract;
- (b) in such application of section 6, the conditions of sale determined in terms thereof shall be read in public immediately before the auction; and
- (c) the seller shall forthwith after the auction furnish the purchaser with a copy of the contract, failing which the purchaser may cancel the sale.

purpose The purpose of the ALA is to attain **certainty** concerning the provisions of the contract and to **avoid disputes** and possible **malpractices**.

1.2.1 The types of contract to which the provisions of the ALA apply

deed of alienation Every **alienation** of land must be contained in a **deed of alienation**. A “deed of alienation” is defined in section 1 of the ALA as “a document or documents under which land is alienated”, and “to alienate (alienation)” is defined as “to **sell, exchange or donate**, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolute condition”.

conditional contracts The reference to conditional contracts was probably inserted to counteract the view often expressed by our courts (*Soya (Pty) Ltd v Tucker's Land and Development Corporation (Pty) Ltd* 1981 3 SA 314 (A)) that a contract of sale that is subject to a suspensive condition does not become a contract of sale until the condition has been fulfilled and, therefore, does not have to be in writing.

exchange “Exchange” in the definition of “alienate” has a wider meaning. As a result, any contract in terms of which one party undertakes to deliver land while the other undertakes to deliver an asset in a person's estate as counter-performance, will qualify as a contract of exchange (*Hoeksma v Hoeksma* 1990 2 SA 893 (A) 897, Van Rensburg & Treisman *Alienation of Land Act* 33). Once the counter-performance is money, there is, of course, a contract of sale.

1.2.2 The concept of “land”

ordinary meaning In terms of the definition, “land” (in s 1) is, in the first place, to be given its ordinary (common law) meaning, but also includes the following:

additional meaning

- (1) any unit as defined in the Sectional Titles Act 95 of 1986,
- (2) any right to claim transfer of land,
- (3) any undivided share in land,
- (4) any interest in land (i.e. any interest other than a right or interest registered or capable of being registered in terms of the Mining Titles Registration Act 16 of 1967), and
- (5) initial ownership referred to in section 62 of the Development Facilitation Act 67 of 1995.

Any contract of sale, exchange or donation in terms of which a piece of land, a unit, the right to claim transfer of land, an undivided share in land or a real right to land is alienated must, therefore, be contained in a deed of alienation.

1.2.3 “Deed of alienation”

document(s) In terms of section 2(1) of the ALA, any alienation of land must be contained in a deed of alienation. A deed of alienation may consist of more than one document.

1.2.4 The contents of the deed of alienation

required contents Section 2(1) of the ALA requires every alienation of land to be contained in a deed of alienation, which must be signed by the parties thereto or by their agents acting on their written authority. In effect, the following must appear in any document that purports to deal with the alienation of land:

- (1) the identity of the parties,
- (2) the *essentialia* of the contract in question, whether it be a contract of sale, exchange or donation,
- (3) the other material terms on which the parties have agreed, and
- (4) the signature of every party to the contract, or that of his/her agent.

1.2.4.1 *The identity of the parties*

apparent from deed The identity of the parties must be apparent from the deed of alienation, which means that it must be clear from the document who the alienator/alienor (e.g. the seller) of the land is and who the alienee (e.g. the purchaser) is. Consequently, if one has to consult sources other than the deed of alienation to establish either who the alienator or who the alienee is, the alienation will be void.

contract with each other It is also not sufficient that one person has signed the document as alienator (e.g. as seller) and another has signed it as alienee (e.g. as buyer). It must also be evident from the document that the parties intended to contract with **each other**. Therefore, an alienation will also be void if it emerges from the deed of alienation that the offer that it embodies was accepted by somebody other than the offeree: If P makes a written offer to S to buy a farm which he (wrongly) believes belongs to S, and the offer is “accepted” by the true owner, O, who affixes his signature to the document as “seller”, no valid contract will come into existence (*Hersch v Nel* 1948 3 SA 686 (A); *Baker v Crowie* 1962 2 SA 48 (N)). See, however, *Godfrey v Paruk* 1965 2 SA 738 (D)). However, the document may make it clear that the offer is, in fact, intended for (made to) someone other than the person to whom it is addressed, and that the latter’s only function is to transmit the offer to the person for whom it is intended. One may thus address a written offer to buy a property to an estate agent, but indicate that it is one’s intention that she/he should submit the offer to the owner of the land for acceptance. In such a case, the owner can validly accept the offer, which is, in fact, intended for him/her (*Hill v Faiga* 1964 4 SA 594 (W) 597).

1.2.4.2 *The essentialia of the alienation*

meaning of essentialia As you already know, an alienation of land may take the form of a sale, exchange or donation. Therefore, for a deed of alienation to be valid, it must embody the *essentialia* of a contract of sale, exchange or donation. The *essentialia* of a contract of sale are discussed in study guide 2, study unit 2. In short, there must be an undertaking to transfer land against the payment of the purchase price.

performance not clear That a deed of alienation must embody the *essentialia* of one of the three types of contract is self-explanatory. If it does not appear from a purported deed of alienation

that there has been a sale, exchange or donation of land, there can have been no valid alienation, and, consequently, there is no valid deed of alienation. **The real problem that arises is usually to determine whether the performance to which the parties intended to bind themselves, has been set out clearly enough in the deed of alienation to comply with the formal requirements.**

description of land	As far as the land that is being alienated is concerned, the general principle is that such land must be described in the deed of alienation in such a manner that it is capable of objective identification, that is, without recourse to extrinsic evidence such as evidence relating to their negotiations to establish the real intention of the parties. The test was applied by the court in <i>Clements v Simpson</i> 1971 3 SA 1 (A) 7.
objective identification	Objective identification can be achieved either: • by means of a description that is in itself sufficiently definite to be capable of being related to a particular entity of immovable property, or • by indication of a person (who may be either one of the parties or a third person), who has the right to select a particular portion of property from a larger whole, or has the right to select one of a number of portions, for example, one erf out of all the erven in a township.
title deed	It will obviously always be safer to rely on the description of the land that appears in the title deed, for example, “Erf 1435 Wierdapark Extension 1, Registration Division IR, Province of Gauteng, measuring 2016 (two thousand and sixteen) square metres”. The following descriptions have, however, also been accepted as sufficient to identify the land in question: • a reference to the physical location of the property, for example, its street address, • a reference to the popular name of the entity, for example, “the farm Blaaubank” or “Ideal Bungalow, 1st Beach, Clifton”, • a reference to an objectively determinable relationship between the land and a particular person, for example, “X’s farm”, • a reference to a plan or diagram on which the boundaries of the land are marked, • a description that refers to existing beacons, • a reference to a description of the land, which is contained in a particular deed of transfer, or even in another contract—the description referred to is then regarded as having been incorporated into the deed of alienation by reference, and/or • the reference to “the farm property” in an option to purchase in a lease agreement, where the farm can be identified from the rest of the lease agreement read with the title deed (<i>Van Aardt v Galway</i> 2012 2 SA 312 (SCA)).
examples	
not in deed of alienation	Identification of the land cannot, however, depend upon an agreement that is not reflected in the deed of alienation, or, obviously, on an agreement still to be entered into. Consequently, formulations such as “the portion pointed out to the buyer” or “the portion that was agreed upon” are not sufficient.
counter-performance	Not only the land that is being alienated must be identifiable by reference to the deed of alienation, but also the nature and extent of any counter-performance that is to be rendered (e.g. a sum of money or a thing) must also appear from the deed of alienation itself, or be capable of determination by reference to objective criteria reflected in the deed of alienation. Once again, extrinsic evidence is inadmissible to prove the intention of the parties.

1.2.4.3 Other material terms

material terms in writing	In terms of section 2(1) of the ALA, all the material terms of a sale, exchange or donation must be contained in a deed of alienation, that is, such terms must be in writing. This means that all the material terms must be contained in the document. It is a further requirement that the terms in question must appear in the document when it is signed. A deed of alienation is, therefore, not valid if it is signed when blank and completed at a later stage.
unclear what are material terms: <i>essentialia</i>	Although it is unclear what exactly is meant by “a material term”, it is at least certain that all the <i>essentialia</i> of the alienation are material terms, as discussed above. A document that contains no more than the <i>essentialia</i> of a contract of sale, exchange or donation, and has been signed by the parties, will generally constitute a valid deed of alienation if the parties intended, for their agreement, to have no other material terms. All the requirements for a valid contract (consensus, possibility of performance, etc) should also be complied with. In such a case, the duties of the parties are partly determined by the <i>naturalia</i> of the contract that they have entered into.
<i>incidentalia</i> : two approaches	In most cases, however, parties do not want to have their relationship determined solely by operation of law (i.e. in terms of the <i>naturalia</i> of the contract in question). Instead, they prefer to spell out the incidental terms (<i>incidentalia</i>) of their relationship themselves and, most importantly, they wish to change some of the <i>naturalia</i> of a contract of sale. Apart from the <i>essentialia</i> upon which they agree, they, therefore, also agree on a number of <i>incidentalia</i>. Two approaches can be discerned with regard to the question as to which <i>incidentalia</i> should be regarded as material terms, namely, the broad and the narrow approach.
broad approach: all terms agreed to	A. The broad approach regards all the terms on which the parties have agreed as the material terms of their contract and includes every term relating to the following: • the content and characteristics of each performance that is to be rendered, • when, where and how the performance is to be rendered, • the cooperation required by each person regarding the performance by the other, and • the remedies available to the parties in a case of breach of contract, as well as the requirements for the enforcement of the remedies.
test	In <i>Jones v Wykland Properties</i> 1998 2 SA 355 (C), the court formulated the following test to determine whether a term is material: • Did the parties apply their minds to the term? • Did they agree, either expressly or tacitly (a) that the term should form part of their contract and (b) be binding on them? According to this approach, if the answer is “yes” to the above questions, and the parties omitted to insert such a clause in the contract, the contract will be void for non-compliance with statutory requirements.
information only	In terms of this broader approach, a non-material term is thus one that contains information only and is not intended to bind the parties, for example, an address.

restrictive approach

- B. In terms of the more **restrictive approach**, not all the terms the parties have agreed to are material. All *essentialia* are regarded as material, **but other terms should be subjected to an objective test of materiality**. The court held in *Trustees, Mitchell's Plain Islamic Trust v Weeder* [2001] 2 All SA 629 (C) that the materiality of terms is an objective test by the court, although in some borderline cases the court will make a value judgment.

Examples of material terms, according to the courts, are the date of registration or occupation, the contractual duty to renovate the premises or render them in a certain condition prior to transfer, and terms fixing liability for certain costs, such as transfer or survey costs.

It is, however, readily conceivable that there will be cases where the materiality of a particular term may be moot. In determining in such borderline cases whether a particular term is material or not, the court will consider the object of the formalities legislation and also weigh the apparent importance of the term in the context of the detailed scheme of the particular agreement under consideration (*Mitchell's Plain Islamic Trust*).

In the above-mentioned case, the court regarded a term determining which of the parties had the power to appoint the conveyancer as non-material, which term could, therefore, be informally varied between the parties. The court decided that “in the general scheme of the agreement” the identity of the conveyancer was not material, and allowed the informal variation of such term.

1.2.4.4 *The signatures of the parties or their agents*

mark

In *Van Niekerk v Smith* 1952 3 SA 17 (T), the court considered the meaning of a “signature” and concluded that the full name and surname is not required to be written, but that any “mark” representing the contracting party, and made by that party, will suffice. Therefore pencil signatures, signatures by initials or by means of a stamp or by a mark, or by a party’s writing below a printed heading, are all sufficient.

affixing

The ALA is silent on **where in the agreement** the signatures should appear in the document. They may, therefore, apparently be affixed anywhere as long as it is clear that they were intended to cover the whole document. Normally the parties sign at the end of the agreement. If the deed of alienation consists of more than one page, it is not necessary (although it is advisable) that each page be signed or initialled. If the seller inadvertently signs in the space left for the purchaser’s signature, and vice versa, the deed can be rectified, because *prima facie* there is a valid contract (see below at 1.2.5 for rectification). However, a person, who signs a deed of alienation as an agent on behalf of another, must indicate that she/he is acting in a representative capacity.

The ALA is also silent on **when** the signatures of the parties or their authorised representatives should be affixed to the document. In *Just Names Properties 11 CC v Fourie* 2008 1 SA 343 (SCA) it was held that the function of the signatures is to indicate agreement on the terms. As such, the signatures must be affixed after the terms of the contract have been reduced to writing or at least before the contract containing the terms is released to the other party. **This means that one party cannot sign the document when blank and authorise the other party to complete the contract.**

1.2.5 Rectification

prima facie valid

In spite of what has just been said in 1.2.4 above, a deed of alienation may nevertheless be rectified if it does not correctly reflect the common intention of the parties. However, before it can be rectified, it must be a *prima facie* valid deed of alienation. A *prima facie* valid agreement should at least

- contain the *essentialia* of the type of contract in question,
- disclose the identity of the parties, and
- be signed by the parties or their agents.

application

If an **essential term** has merely been **incorrectly reproduced** in the document (e.g. “Erf 283” instead of the correct “Erf 238”), the contract is, of course, *prima facie* valid and capable of rectification, provided that all the requirements for rectification have been complied with. If a material term **that is not one of the *essentialia*** is inadvertently **omitted**, or is incorrectly reproduced, the contract is *prima facie* valid and capable of rectification.

However, a document in which one or more of the *essentialia*, or the signature of one or both parties, has been omitted, is *prima facie* invalid and cannot be rectified. This is according to the approach adopted by the Appellate Division in *Magnaza v Heenan* 1979 2 SA 1019 (A), which was followed by many subsequent decisions.

1.2.6 Alienation through an agent (representative)

1.2.6.1 Definition of “agent”

meaning of “agent”

Section 2(1) of the ALA requires a deed of alienation to be signed by the parties thereto “or by their agents acting on their written authority”. But what is meant by the term “agents”? Although the term may sometimes bear a different and wider meaning, within the context of the ALA it means a person who has been authorised by another, the principal, to conclude the contract of alienation on his/her (the principal's) behalf. In terms of section 2(1) of the ALA, the agent may conclude the alienation only if the principal has authorised her/him **in writing** to do so.

persons who don't need written authorisation

The following persons, although acting on behalf of others, are not agents for purposes of section 2(1) of the ALA and consequently **do not** require the written authority of the persons or entities whom they represent:

- a father as the natural guardian of his child,
- the guardian of a minor,
- the husband or wife who is married in community of property,
- a partner who acts on behalf of his co-partners,
- the curator of a person who is unfit to manage his/her own affairs,
- the executor of a deceased estate,
- the trustee of an insolvent estate, and
- the liquidator of a company.

authority derived from law

The persons listed above all derive their authority to act on another's behalf either through our common law or from a statutory provision. An attorney or advocate, however, has no *ex lege* authority (authority derived directly from the law) to enter into a deed of alienation on behalf of his/her client and, consequently, requires written authority to do so.

1.2.6.2 *Manner of appointment of agent and ratification of unauthorised agents*

form of authorisation	Although the agent's authority must be in writing, its form is immaterial. As long as the authorisation has been legibly written, typed or printed , the requirements of section 2(1) of the ALA have been complied with. It may, for example, be contained in a formal power of attorney or in an informal document, letter, telegram, radio telegram, phonogram, telex printout, written resolution of the board of directors of a company (provided that such resolution has been duly minuted), and, apparently even in an office file.
signature	The document in which the authority is granted apparently need not be signed . Section 2(1) of the ALA does not expressly require a signature, and there seem to be no grounds for a presumption that the legislature intended a signature to be a requirement for the validity of the authority.
identity determinable	The agent need not be named. It is sufficient if his/her identity can be objectively determined, for example, as a member of a named firm of attorneys.
aware	An agent can "act on written authority" only if she/he is aware that the written authority exists . The agent need not, however, have the authority in his/her possession when signing the deed of alienation, in fact, it is not necessary for that agent to have seen the authority. It is sufficient that the written authority exists and that the agent knows that it exists.
general or specific authorisation	The agent may derive the authority to act on behalf of the principal from a general authorisation, or she/he may be specially authorised to conclude a particular alienation. A special authority need contain no more than the basic information required to identify the transaction that the agent is to conclude on behalf of the principal. An authorisation to sell land must describe the land in such a way that it can be identified. The description need not, however, be as precise as that required in respect of the deed of alienation. The purchase price may be left to the discretion of the agent and need not be stated in the authority. If the deed of alienation exceeds the authority of the agent, the principal is not bound.
no ratification	In view of the fact that the agent must "act" on the principal's written authority, the principal cannot ratify a deed of alienation that was entered into on his/her behalf by a person who did not have the necessary written authority when signing the deed, or who exceeded his/her authority when he/she signed.
undisclosed principal	The doctrine of the "undisclosed principal" cannot find application in regard to the alienation of land. This means that if an agent enters into a deed of alienation without disclosing that she/he is acting as a representative, the undisclosed principal cannot derive any direct benefit from the contract. The reason is that the identity of every party must appear from the deed of alienation itself, and that extrinsic evidence aimed at showing that there was another party to the contract is inadmissible. Consequently, if an agent does not indicate that he/she is an agent, he/she will be personally bound by the deed of alienation. The principal will, however, be entitled to a cession of the rights that the agent has acquired, provided that she/he compensates the agent for any expenses the latter has incurred in connection with the transaction.

1.2.7 Agents and representatives of companies

organs	When a company acts through its organs, the act is that of the company itself, therefore, the organs of a company are not agents of the company and, consequently,
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do not require written authority when they enter into a deed of alienation of land on the company's behalf. However, a company, like a natural person, can also act through an agent, and when that happens, the agent will have to have the written authority required by section 2(1) of the ALA.

unincorporated company

It is a general principle of the law of agency that no one can act as a representative of a non-existent principal. This would mean, of course, that it is impossible to act as a representative of a company that has not yet been incorporated, because before incorporation there is no company. In terms of section 21 of the Companies Act 71 of 2008, however, it is possible for a person to conclude a contract as agent for a company that is still to be incorporated, and section 2(2) of the ALA provides that section 2(1) shall not derogate from the provisions of any law (which also includes the Companies Act) relating to the conclusion of a written contract by a person professing to act as the agent or trustee of a company not yet formed, incorporated or registered. This means that, if a person who is a party to an alienation of land professes to act as "agent" or "trustee" for a company that is still to be incorporated, she/he does not need the written authority required by section 2(1) of the ALA. This is understandable as the company is not yet in existence, so it is unable to grant authority.

1.2.8 Sales of land by public auction

oral

Section 3(2) of the ALA provides that section 2 of the Act does not apply to the sale of land by public auction. Therefore, an oral agreement for the sale of land by public auction may be considered valid.

copy of sale: land sold in instalments by public auction

However, certain formalities are prescribed in instances where land is sold in instalments by public auction, that is, instances where the land is sold by public auction, but the purchase price, or any other charge payable by the purchaser, is payable in more than two instalments over a period of more than one year. One of these formalities is that the seller must provide the purchaser with a copy of the contract of sale immediately after the auction. The contract of sale comes into existence when a bid is knocked down to the buyer. The buyer, however, then has the right to cancel the contract if the seller fails to furnish the buyer with a copy of the contract.

1.2.9 The variation and revival of deeds of alienation

variation

If the parties to a deed of alienation enter into a subsequent agreement that has the effect of varying any of the material terms of the deed of alienation, the subsequent agreement must also be reduced to writing and must be signed. An informal (oral) variation of the deed of alienation ought to be regarded as without effect and ought not to affect the validity of the original deed. There are, however, a few *obiter dicta* that support the view that the result of such (informal) variation will be that the whole contract will not meet the formality requirements, namely, of being reduced to writing, and that the deed of alienation will consequently become invalid.

waiver

cancellation

A unilateral waiver by one party to a deed of alienation of a right that he/she derives from the deed is not a variation of the deed and, therefore, **need not be in writing**. For example, where a buyer waives the condition that building plans need to be furnished to him/her, this will probably not have to be in writing. Similarly, an agreement in terms of which a deed of alienation is cancelled and one releasing a party to the deed from some of his duties do not amount to variations of the deed. Thus, such agreements are not required to be in writing either.

revival	The possibility also exists that a cancelled deed of alienation may be revived informally by the parties. This may happen, for example, where the party who cancelled waives the rights he/she derived from the cancellation when the other party requests him/her to do so.
1.2.10 The “cooling-off” right of the prospective purchaser, or purchaser, to revoke the offer or terminate the contract of sale	
revocation or termination	Section 2(2A) of the ALA requires that the deed of alienation must contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A of the Act. Section 29A of the ALA confers on certain purchasers or prospective purchasers of residential land the right to terminate a deed of alienation or to revoke an offer to purchase land within five days after signing the alienation or offer by sending a written notice to the seller. The written notice will be effective only if it is signed by the purchaser, identifies the offer or deed of alienation that is being revoked or terminated, and is unconditional (s 29A(3)).
refund	Where an offer is revoked or a deed of alienation is terminated, every person who received any amount from the purchaser or prospective purchaser in respect of the offer or deed of alienation must refund the full amount of such payment to the purchaser within 10 days of the date on which the written notice was delivered to the seller (s 29A(4)). No person will be entitled to any remuneration payable in respect of an offer or deed of alienation that the purchaser or prospective purchaser has revoked or terminated, and no such person or agent will be entitled to claim damages from any person (s 29A(6)).
no remuneration	
no damages	
“cooling-off” right	A peremptory <i>naturale</i> has, therefore, been created by the ALA. A purchaser or prospective purchaser cannot validly waive the rights conferred upon him/her in terms of section 29A of the ALA, and any such waiver will, therefore, be void (s 29A (7)(b)).
purpose	The purpose of section 29A of the ALA is to protect purchasers against high-pressure selling techniques, their own inexperience in property transactions, and their irrational and emotional decision making. The “cooling-off” right is confined to persons who are in need of protection.
residential land	Section 1 of the ALA defines land for the purposes of section 29A of the Act by confining its meaning to residential land and extending its meaning to all forms of residence. Agricultural land is specifically excluded and is defined as any land used, or intended to be used, mainly for commercial farming operations (s1). Section 29A of the ALA is applicable to: • land, whether registerable or not, that is used, or intended to be used, mainly for residential purposes, • any housing interest as defined in section 1 of the Housing Development Schemes for Retired Persons Act 65 of 1988, and any proposed housing interest, • any share in a share block company as defined in section 1 of the Share Blocks Control Act 59 of 1980, and any proposed share that confers on the holder of such share the right to occupy land owned or leased by the share block company and which is used, or intended to be used, mainly for residential purposes, and • any unit as defined in section 1 of the Sectional Titles Act 95 of 1986, and any proposed unit.

limits	The “cooling-off” right is not available (s 29A(5)) where • the purchase price of the land, or the price offered for the land, exceeds R250 000, or such higher amount as the Minister may prescribe, • the purchaser or prospective purchaser is a trust or a person other than a natural person, • the purchaser has purchased the land at a publicly advertised auction, • the seller and purchaser have previously entered into a deed of alienation of the same land on substantially the same terms, • the purchaser or prospective purchaser has reserved the right, in terms of the deed of alienation or offer, to nominate or appoint another person to take over the rights and obligations of the purchaser as stipulated in the offer or deed of alienation in question, and • the purchaser purchases the land by exercising an option that was open for exercise for a period of at least five days.
automatic exercise	A purchaser or prospective purchaser who signs a deed of alienation in respect of land (the later transaction) within five days after having signed an offer or a deed of alienation in respect of other land (the earlier transaction) before he/she has exercised his/her “cooling-off” right in respect of the earlier transaction, will, on signature of the later transaction, be deemed to have exercised his/her “cooling-off” right to revoke or terminate the earlier transaction (s29A(8)). Such purchaser or prospective purchaser must, however, notify the seller in the earlier transaction of the revocation of that transaction in writing (s 29A(8)). Failure to do so is a criminal offence and the civil remedies of the seller continue to exist (s 29A(9)). This automatic exercise of the “cooling-off” right does not apply to a purchaser or prospective purchaser who <i>bona fide</i> intends to purchase both pieces of land (s 29A(10)).

1.2.11 The consequences of non-compliance with formalities

1.2.11.1 Failure to comply with section 2(1) of the ALA

void	Section 2(1) of the ALA provides that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority. This means that an alienation that does not comply with the formal requirements is void and that neither party is bound by it. It may easily happen, however, that one or both parties render partial or full performance before they become aware that the formal requirements have not been properly complied with. Section 28 of the ALA regulates the position as follows:
valid retrospectively: full performance	(1) If the person to whom the land has been alienated has rendered full performance and the land has been transferred to her/him, the alienation is valid from the beginning in every respect, notwithstanding the fact that the formal requirements were not complied with. In such a case, neither party can reclaim her/his performance. A void contract is not enforced: it is rather a contract which, in terms of the ALA, has become completely valid with retrospective effect.
statutory enrichment claim: partial performance	(2) If the person to whom the land has been alienated has rendered only partial performance, or has rendered full performance, but the land has not yet been transferred to him/her, each party is entitled to reclaim from the other that which he/she has performed. In addition, the alienee (purchaser) is entitled to interest on any amount that he/she may have paid in terms of the deed of alienation, calculated from the date of payment to the date of recovery at a

rate prescribed by regulation by the Minister. She/he is also entitled to reasonable compensation for necessary and useful expenses that may have been incurred in connection with the land. The alienator (seller), on the other hand, is additionally entitled to reasonable compensation for the occupation, use or enjoyment that the alienee may have had of the land, as well as to compensation for any damage intentionally or negligently caused to the land by the alienee or any third person for whose actions the alienee may be liable.

1.2.11.2 Failure to comply with section 2(2A) of the ALA

no express determination	The ALA fails to state expressly the consequences of failing to incorporate the “cooling-off” right in the contract of sale.
conflicting decisions	The intention of the legislator has to be determined by taking into consideration the language of the ALA, its nature and scope and the consequences of visiting invalidity upon the contract. The courts hold conflicting views. In <i>Sayers v Khan</i> 2002 5 SA 688 (C) the court held that such contracts are void. The normal position would then be that the any party who has rendered a performance in terms of a void contract may reclaim his/her performance. In <i>Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre</i> 2007 3 SA 100 (SCA), however, it was held that the contract was voidable at the instance of the purchaser.
Unisa’s opinion	The latter decision seems to be correct, because the “cooling-off” right is exclusively to the benefit of the purchaser. Where the purchaser cancels the contract, the contract comes to an end from that moment, and the parties must give back the performances they have received.

1.3 FORMALITIES PRESCRIBED FOR THE SALE OF LAND ON INSTALMENTS

The formal requirements dealt with above apply to **all alienations of land**. However, when such alienation takes the form of a sale on instalments (i.e. a sale in terms of which the buyer must pay a sum of money in more than two instalments over a period of more than one year), there are further requirements relating to the language of the contract (s5), contents of the contract (s6), invalid terms (s15), the recording of the contract against the title deed of the land (s20), and the relief the court may grant if the contract does not substantially comply with the provisions of sections 5 and 6 of the ALA (s24). These sections are dealt with in study unit 2 below.

ACTIVITY

1. Name the two instances where the law will give effect to an oral contract for the sale of land.
2. Tomas sells his house to Luanda for R300 000. The written contract of sale identifies Tomas as the seller and Luanda as the purchaser. Luanda signs the contract at the end with her full signature, but Tomas only initials the contract at the end. The parties are correctly identified as the purchaser and seller respectively. The purchase price is incorrectly reflected in the written contract as R290 000. The house is simply described as Tomas's house. There is only one house registered in Tomas's name. The written contract refers to the purchaser's “cooling-off” right. The written contract contains no further terms, although the parties have orally agreed on the date on which Tomas has to give Luanda occupation.

- (a) Does a valid contract of sale come into being?
 - (b) Can Tomas apply to have the contract rectified so as to reflect the correct price the parties agreed upon and the date on which Tomas has to give Luanda occupation?
3. Susan sells her house to Peter for R250 000. Their contract is not reduced to writing. Peter undertakes to pay Susan R100 000 immediately and the balance of the purchase price on the date of registration. Peter pays Susan the R100 000 and immediately takes occupation of the house. Before the sale, Susan let her house for R2 000 per month. The roof of the house leaks terribly and Peter pays a builder R10 000 to fix the roof. Susan avers that the oral contract of sale is invalid and institutes a claim against Peter to evict him from the house. Advise Peter.
 4. Reread the scenario at the beginning of the study unit on page 1. Then advise Xavier accordingly.

FEEDBACK

- (1) The first instance is land sold by public auction and the second is a sale where the person to whom the land has been sold has rendered full performance and the land has been transferred to him.
 - (2)
 - (a) This question deals with the two formalities required by the ALA. The first is the requirement of writing. The parties are correctly identified in the written contract as seller and purchaser. The *essentialia* are both in the written contract. Although the price is stated in the contract, it is incorrect. By identifying the thing sold as Tomas' house, the parties have identified the thing sold with an objectively determinable relationship between the land and the seller. If Tomas owned more than one house, no such relationship would have existed and we would have had to resort to the parties' agreement to determine which house they meant. Both signatures are acceptable. It does refer to the required cooling-off right. Both approaches to the question as to whether a term should be regarded as material would consider the date of occupation as material. The contract thus does not comply with the requirement of being in writing.
 - (b) Rectification is possible if the contract is *prima facie* valid. The contract contains the *essentialia*, correctly identifies the purchaser and seller, and is signed by both parties. The contract is thus *prima facie* valid and can be rectified.
 - (3) The contract of sale is void, because it is not in writing, nor have the "parties" performed in full. Susan can, therefore, evict Peter and claim reasonable compensation from Peter for his occupation of the house. The rent that Susan got is a good indication of such compensation. Peter may claim reasonable compensation from Susan for the repair of the roof, because it is a necessary expense. He may also claim interest on the R100 000 plus interest from Susan (s 28 of ALA).
 - (4) Because the contract is not reduced to writing it is void and Xavier can reclaim his deposit. Apply sections 2 and 28 of the ALA.
-

STUDY UNIT 2

Alienation of Land Act regarding the sale of immovable property on credit

Cassandra buys a town house from ChopProp. The purchase price of R500 000 is payable as follows: She pays R100 000 in cash upon signing the contract. The balance of the purchase price is payable over five years in monthly instalments of R10 000. Three years after signing the contract, she has paid 80% of the purchase price. Cassandra has been advised that ChopProp is experiencing financial difficulties and she is anxious about losing the amount paid without receiving transfer of the town house in time. Does Cassandra have any remedies?

OVERVIEW

In this study unit we look at the various applicable statutory terms where immovable property is sold on credit. In particular, we investigate the protection that Chapter II of the ALA offers to purchasers who have bought land on credit. These statutory measures are largely consumer protection measures aimed at preventing the abuse of consumers. You are also introduced to the statutory measures created by the ALA in protecting buyers from unscrupulous practices by sellers when selling immovable property on credit.

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- 2.1 INTRODUCTION
- 2.2 BASIC CONCEPTS
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- 2.8 GENERAL
 - 2.8.1 Restrictions on the receipt of counter-performance
 - 2.8.2 The right of a purchaser to claim transfer on partial payment
 - 2.8.3 Sundry provisions

LEARNING OUTCOMES

Having studied the material for this study unit you should be able to:

- briefly explain under which circumstances Chapter II of the ALA will apply to a contract
- explain the basic concepts such as “land”, “registerable”, “remote purchaser”, “contract” and “intermediary”, which are used in the ALA
- explain the rights and duties of the purchaser under Chapter II of the ALA and apply the principles to practical examples

- explain the rights and duties of the seller under the ALA and apply these principles to practical examples
-

2.1 INTRODUCTION

history of Chapter II

Malpractices often occur in connection with the sale of immovable property on credit and, more particularly, in connection with the sale of residential erven on credit. For example: a purchaser may pay off his property diligently, only to discover when he/she wants to take transfer at the end of the term that the seller is sequestrated and the property now falls into the insolvent estate. Chapter II of the ALA addresses these malpractices.

In this study unit we only address Chapter II of the ALA, which is titled “Sale of Land on Instalments”.

property time-sharing

Similar provisions for the protection of consumers are also to be found in the Property Time-Sharing Control Act 75 of 1983. In property time-sharing, the use of a holiday flat or cottage is sold to consumers in segments of a week, and this has become a popular form of holiday making. A combination of unscrupulous developers, the vulnerability of consumers and a gap in the law has since necessitated legislative intervention to make provision for this type of transaction. However, this form of sale will not be dealt with in this module.

2.2 BASIC CONCEPTS

You will not be able to understand Chapter II of the ALA unless you are thoroughly conversant with the following basic concepts:

definition of land

The word “land” is dealt with in study unit 1 above. For the purpose of Chapter II of the ALA, however, this definition is qualified to the extent that it only applies to land (as defined) that is used or intended to be used mainly for **residential purposes**.

definition of a contract

“Contract” is defined as “a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in **more than two instalments over a period exceeding one year**”.

limited scope

Chapter II of the ALA, therefore, applies only to sales of land mainly for **residential purposes** and not to other forms of alienation. Furthermore, it applies only to sales in terms of which the purchase price (plus other amounts payable in terms of the contract) **is payable in more than two instalments over a period of more than one year**.

definition of a remote purchaser

A remote purchaser of land is any person who purchases land in terms of a contract from **a person who is not (yet) the owner of the land**. A person ceases to be a “remote” purchaser as soon as the land that he/she has bought, is registered in the name of the person who sold it to him/her.

definition of an intermediary

An intermediary is any person who **sells land to a remote purchaser**, as well as any person who has alienated land that, after such alienation, is sold by another person to a remote purchaser at a time when the land has not yet been transferred to the first-mentioned person.



EXAMPLE

Peter is the owner of a property. He sells the land to Steve. Before the property has been registered in Steve's name, Steve sells the property to Helen. Before the property is registered in her name, Helen sells the property to Yvonne. In this example, Steve is an intermediary, whilst Helen and Yvonne are remote purchasers.

definition of
registrable

"Registrable" means that the land is capable of being registered as the subject of a separate title deed in a deeds registry office, in that the requirements of any law relating to such registration have been complied with.



EXAMPLE

When an owner subdivides his/her property, the subdivided portion will only become "registrable" once the subdivision diagram has been approved by the surveyor general, and the subdivision has been approved by the town council, and all the conditions of subdivision have been complied with.

2.3

LAND SOLD MUST BE REGISTRABLE WITHIN FIVE YEARS

latest date of
registration

Section 6(1)(g) of the ALA requires that any contract where land is sold, which land at the time of sale is not the subject of a separate title deed, must contain a clause stating the latest date at which the land shall be registrable in the name of the purchaser. This date may not be later than five years from the date of conclusion of the contract.

rights of the seller
in the case of
non-registration

If the seller is unable, for whatever reason, to give transfer on the stated contracted date against simultaneous payment of all the amounts payable to her/him by the purchaser in terms of the contract, the purchaser has a choice of either cancelling or upholding the contract. If she/he cancels the contract, the provisions of section 28(1) of the ALA take effect and each party is then entitled to the return of that which she/he has performed, as well as to the payment of those additional amounts determined by that section. If the purchaser elects to uphold the contract, no interest is payable by her/him from the date stated in the contract as the registrable date until the date on which transfer is tendered. If the seller is in breach of contract by virtue of her failure to tender transfer on or before the stated date, the purchaser, furthermore, retains her/his **normal contractual claim for damages**.

The abovementioned provisions in terms of section 6 of the ALA prevent (in particular) township developers in particular from postponing the transfer of erven to their purchasers and claiming interest on the "outstanding" purchase price until transfer takes place. It is no longer possible to hold buyers liable for an unlimited time, in terms of contracts where the development gets delayed for any reason.

2.4

RECORDING OF THE CONTRACT

recording against
title deed

In terms of section 20 of the ALA, a seller of land, whether he/she is the owner of the land or not, must cause the contract in terms of which the land was sold to be recorded against the title deed of the land. The reason behind this is so that any interested third party will be informed that a sale agreement is or sale agreements are in place relating to the specific property. If the seller fails to cause the contract to be so recorded, the purchaser may cancel the contract within a prescribed time, in which case the provisions of section 28(1) of the ALA regarding restitution and compensation take effect, without detracting from any claim for contractual

damages that the purchaser may have. The purchaser may, however, elect to abide by the contract, in which case he/she may personally apply to the Registrar of Deeds concerned to have it recorded.

preferential claim on insolvency

The recording of a contract also confers a claim on the purchaser if the land is sold in execution or sold on the owner's insolvency. Such claim ranks in preference immediately after any claim of a mortgagee whose mortgage bond over the land was registered prior to or on the date of the recording of the contract.

If a mortgage bond is registered after the contract has been recorded, the mortgagee is deemed to have consented irrevocably and unconditionally in favour of the purchaser whose contract was recorded or any person to whom the land is subsequently alienated, to the discharge of the mortgage bond or the release of the land from the mortgage bond.

2.5 THE RIGHTS OF THE PURCHASER OR REMOTE PURCHASER AND INTERMEDIARY TO TAKE TRANSFER

rights of remote purchaser

A remote purchaser herself/himself is entitled to claim transfer of the land if

- her/his obligations in terms of the contract under which she/he purchased the land **and the obligations of every intermediary** between her/him and the owner of the land have been fulfilled or fulfilment thereof is tendered, **and**
- the land is **registrable**.

right to transfer in case of insolvency

The remote purchaser is entitled to such transfer even if any intermediary between him/her and the owner is insolvent at the time the land is to be transferred. If the owner of land that has been alienated under a contract becomes insolvent, or if a judgment creditor of the owner attaches the land, the land must be transferred to any purchaser who purchased it under a contract, or who is an intermediary in respect of that contract, provided satisfactory arrangements have been made for the payment of all transfer costs.

2.6 THE PURCHASER'S RIGHT TO BE INFORMED OF AMOUNTS PAYABLE

mortgage certificate

If the land that has been sold under a contract is encumbered by one or more than one mortgage bond, the seller must, within 30 days after the conclusion of the contract, supply the purchaser with a certificate by each mortgagee in which the amount required by the mortgagee to discharge the bond or to release the land from the bond, as well as the rate or rates at which interest will be levied as from the date of the certificate, is indicated. A mortgagee is obliged to furnish such a certificate to the seller within the prescribed period after being requested to do so. The certificates concerned must be drawn up and dated no more than four months before the conclusion of the contract and must either be handed over to the purchaser by the seller or be sent to the purchaser by registered mail. Any such certificate binds the mortgagee by whom it was drawn up or her/his successor in title for a period of four months. Should the seller fail to supply the purchaser with the required certificate(s) within the period of 30 days, or if the aggregate amounts reflected in the certificates exceed the purchase price, the purchaser is entitled to cancel the contract within 14 days, in which case the parties are once again entitled to the restitution and compensation provided for in section 28(1) of the ALA. **This provision once again protects the purchaser from liability under a contract**

where the purchase price does not cover the current mortgage on the property, which will probably cause a delay in the transfer process. The purchaser is, therefore, provided “an escape route” under these circumstances.

buyer should be informed in the case of legal proceedings

When land that is encumbered by a mortgage bond is sold in terms of a contract, the purchaser must notify the mortgagee of the conclusion of the contract, her/his address and any other particulars in respect of the contract as the mortgagee may reasonably require. When a mortgagee who has been thus notified institutes legal proceedings against the mortgagor, he/she must give the purchaser 21 days prior written notice of his/her intention to institute the proceedings. Any purchaser of land that is encumbered by a mortgage bond is entitled to request the mortgagee in writing at any time (but no more than three times a year) to furnish him/her with a certificate reflecting the amount that is required for the discharge of the bond (or the release of the land from the bond) and the rate or rates at which interest is payable.

intermediary's certificate

If land is sold by an intermediary, the intermediary must, within 30 days of conclusion of the contract, hand (or send by registered mail) to the purchaser a certificate or certificates in which the alienator of the land to the intermediary, and every other alienator who alienated the land to another intermediary prior to the conclusion of the final contract, has indicated the amount that was, at the date of the certificate, still owing to her (i.e. to the person who issued the certificate). If the seller fails to furnish the purchaser with the required certificate(s) within 30 days, or if the amount reflected in the certificate exceeds the purchase price, the purchaser may cancel the contract within 14 days, upon which the parties are entitled to the restitution and compensation provided for in section 28(1) of the ALA.

right to information of remote purchaser

A remote purchaser may, in addition, by written notice, require the owner or an intermediary to furnish her/him with particulars of the outstanding balance under the deed of alienation in terms of which the owner or intermediary alienated the land, and of any amount that in terms of the deed of alienation is due and unpaid.

annual statements

While a contract is in force, the seller must furnish the purchaser with a statement at least once a year reflecting, inter alia, the amounts owing at that stage to mortgagees and to prior alienators of the land.

2.7 THE RIGHT OF THE PURCHASER OR REMOTE PURCHASER TO FULFIL OBLIGATIONS OF PREVIOUS OWNERS OR SELLERS

right to make payment to any predecessor

In terms of section 11 of the ALA, a remote purchaser is entitled to fulfil the obligations of an owner to its mortgagee or an intermediary to its seller in instances where the owner or intermediary have defaulted in their obligations towards the mortgagee or the seller. Such fulfilment will be deemed to have been fulfilled by the remote purchaser to its seller and all the intermediaries.

EXAMPLE



For example, if the owner O owes R40 000 to the mortgagee M, and Intermediary (1) owes R45 000 to O in terms of their sales contract, and Intermediary (2) owes R42 000 to Intermediary (1) in terms of their contract, and the remote purchaser owes R60 000 to Intermediary (2) in terms of their contract, and O should default in his/her obligations to M by failing to pay an amount of R10 000, then either the remote purchaser, Intermediary (1) or Intermediary (2) may make payment of the R10 000 to M. This arrangement will potentially “save” all the contracts involved.

practical example If the remote purchaser should make the payment to M, then it will be deemed that the remote purchaser has paid R10 000 to I (2), that I (2) has paid R10 000 to I (1), that I (1) has paid R10 000 to O and that O has paid R10 000 to M. They will then each owe their respective creditors the following amounts: the remote purchaser to I (2), R50 000; I (2) to I (1), R32 000; I (1) to O, R35 000; and O to M, R30 000.

2.8 GENERAL

In paragraphs 2.1 to 2.7 above we dealt with those provisions of the ALA that relate solely to the sale of land on instalments, that is, the provisions contained in Chapter II of the ALA. However, the ALA also contains important provisions in Chapters I and III, which are of general application in regard to alienation of land, that is, they apply to the sale of land on instalments as well as to other forms of alienation. The provisions of Chapter I of the ALA relating to the formal requirements with which deeds of alienation must comply are dealt with in study unit 1 above. However, there remain a few provisions of Chapter III of the ALA to which we must devote some attention.

2.8.1 Restrictions on the receipt of counter-performance

section 26 of the ALA

The most drastic measure for the protection of purchasers and other transferees of land is to be found in section 26 of the ALA. This section provides that no person may, by virtue of a deed of alienation relating to an erf or unit, receive any consideration of whatever nature, until

- such erf or unit is registrable, and
- where the deed of alienation is a contract required to be recorded (see 2.4 above), such recording has been effected.

This provision does not, however, apply to an amount that an alienee pays in terms of the deed of alienation into the trust account of an estate agent or attorney, or to an amount that she/he pays to the alienator after the alienator has furnished her/him with a guarantee by a bank, building society or insurance company that the amount paid will be repaid if the erf or unit is not registrable within the contracted time-frame and, where applicable, a contract is not recorded within a period specified in the guarantee for its recording.

2.8.2 The right of a purchaser to claim transfer on partial payment

A purchaser who, in terms of a deed of alienation, has undertaken to pay the purchase price of land in instalments and who has paid to the seller at least 50% of the purchase price in such instalments, is, if the land is registrable, entitled to demand transfer of the land from the seller against simultaneous registration of a first mortgage bond in favour of the seller, to secure the balance of the purchase price plus interest. If, in such a case, the seller is unable or fails to tender transfer within three months of the receipt of the purchaser's demand, the purchaser may cancel the contract, in which case restitution and compensation must take place in terms of section 28(1) of the ALA. With reference to *Botha v Rich* 2014 4 SA 124 (CC), this right to claim transfer of the land even applies to the purchaser where the purchaser was in default of the agreement and the seller purported to cancel the agreement, based on the strength of a forfeiture clause.

2.8.3 Sundry provisions

Please also take note of the following provisions:

- (a) Section 29 of the ALA, which invalidates a waiver by the purchaser of any right conferred on him/her by the Act.
- (b) Section 30 of the ALA, which appears to indemnify the state conveyancers and public servants against liability when they have acted in good faith.
- (c) Section 32 of the ALA, which renders certain sections of the Act applicable to contracts concluded before the commencement of the Act, but which are still in force at the date of commencement.

overlap of statutes

Keep in mind that both Chapter II of the ALA and the National Credit Act 34 of 2005 may apply to the same sale of land where the purchase price is payable in instalments over a period exceeding a year and interest is payable to a credit provider in respect of the deferred amount and the land is intended to be used for residential purposes. We will now introduce the National Credit Act 34 of 2005 and its impact on the law of sale.

ACTIVITY

1. A is developing land in the Tshwane district. A plan has been drawn up showing the different erven in the development as well as parklands, schools and business areas. The plan has been approved by all the relevant authorities. None of the erven has been registered as yet. B is a bank that has granted a loan of R5 million to A and has registered a bond over the property for that amount. C is a speculator who has bought five of the erven (no 91–95) at R80 000 each. C has sold Erf 91 to D at R100 000 and Erf 92 to F at R105 000. In the meantime, F has sold her erf to G for R101 000. The contract price in each case is payable by the buyer as follows: payment of a deposit of 20% and the balance of the purchase price in equal instalments over three years at an interest rate of 10% per annum.
 - (a) Discuss whether Chapter II of the ALA is applicable to any of the above sales agreements.
 - (b) Determine the status of each of the parties in the above agreements in terms of the definitions contained in the ALA.
 - (c) C has failed to record her contracts with D and F as required after more than a year. Advise D and F on any remedies they may have.
2. Reread the scenario at the beginning of the study unit on page 15 and advise Cassandra accordingly.

FEEDBACK

- (1)
 - (a) In your answer you had to discuss the application of the ALA with reference to the definitions of “contract” and “land” above. In applying those definitions, it is clear that what is being sold is land, and that the sales agreements are “contracts” within the meaning of the ALA, rendering the Act applicable.
 - (b) See the definitions of a remote purchaser and an intermediary. From these definitions it is clear that A is the owner of the properties; C is a buyer but also an intermediary as she has sold properties to D and F while still not owner of the erven. D, F and G are purchasers, but also remote purchasers as they are buying from someone who is not the owner.

- (c) An intermediary is obliged to record her contract with the remote purchaser against the title deed of the property as this registration confers certain rights and benefits on the remote purchaser. Failure to do so entitles the remote purchaser either to abide by the contract and have the contract recorded, or to cancel the agreement and reclaim payment in terms of section 28 of the ALA.
 - (2) Cassandra has paid more than 50% of the purchase price; therefore, she can demand that the land is transferred to her with a simultaneous registration of a mortgage bond in favour of ChopProp.
-

STUDY UNIT 3

Introduction to consumer credit

OVERVIEW

In this study unit you obtain an overview of the statutory regulations regarding consumer credit legislation, the background to this legislation and the reason for its implementation.

CONTENTS

- 3.1 INTRODUCTION: BACKGROUND TO THE NATIONAL CREDIT ACT
- 3.2 AIM OF THE NCA
- 3.3 COMMENCEMENT

LEARNING OUTCOMES

Having studied the material for this study unit you should be able to:

- explain the need for consumer credit legislation
 - write a brief history of consumer credit regulation in South Africa
 - describe the aims of the NCA
 - indicate the commencement date of the NCA
-

3.1 INTRODUCTION: BACKGROUND TO THE NATIONAL CREDIT ACT

background of the NCA

The control of charging excessive interest on money loans has been part of our legal tradition since ancient times. The previous national legislation for this purpose was the Usury Act 73 of 1968. The sole purpose of the latter was the control and regulation of interest rates for loans and other credit agreements. Over the years, with more and more amendments, it became more and more intricate and very difficult to understand and interpret.

Towards the end of the 20th century, microfinance became a vibrant new industry in the money market, focusing on short term loans to consumers who did not have access to loans and finance in the main stream banking and financing sector. This sector was rife with abuse of consumers and questionable lending and collection practices. Interest rates on these small loans were exorbitant with annual interest rates of up to 150%. The Usury Act Exemption Notice was promulgated in 1999. In terms of this exception, the microfinance industry would be exempt from the provisions of the Usury Act 73 of 1968 and micro lenders became subject to the conditions laid down by the Micro Finance Regulatory Council.

Hire-purchase agreements also became a popular trend in terms of which sellers or financing houses would extend credit to consumers to buy new goods such as cars,

furniture and other high priced items that consumers could not ordinarily buy for cash. The security of the seller or lender consisted in the ownership of the goods bought. This was achieved by either retaining ownership of the goods or entitling the seller or lender to cancel the agreement when the consumer was in default and repossess the goods. Malpractices in this industry soon led to the promulgation of the Credit Agreements Act 75 of 1980.

Both the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980 came under fire during the latter part of the 20th century for a variety of reasons. The acts were deemed to be too complicated to be understood and to be effectively administered, and ought ideally to be contained in one piece of legislation. Furthermore, the two acts were too limited in scope and were out-dated, not making proper provision for modern conditions and requirements.

The enactment of the National Credit Act 34 of 2005 repealed and replaced the abovementioned legislation. The promulgation of the National Credit Act 34 of 2005 (hereafter referred to as “the NCA” for purposes of study units 3–17) aims to address the following problematic issues: fragmented and out-dated legislation; ineffective consumer protection in particular with regards to the low income groups; limited access to credit; high cost of credit; rising levels of over-indebtedness; reckless behaviour by credit providers and consumers and exploitation by banks, micro-lenders, debt collectors and debt administrators.

Further important amendments to the NCA were introduced on 13 March 2015, with the promulgation of the National Credit Amendment Act 19 of 2014 (“the 2014 Amendment Act”), tightening the rope of credit providers even further.

3.2 purpose of the NCA

AIM OF THE NCA

The NCA aims to **prohibit unfair contractual terms and practices, curb the provision of reckless credit, provide measures to assist over-indebted consumers, regulate information** acquired and reported by the Credit Bureau, create a **central register** of debt obligations and, lastly, establish a **regulator** and tribunal for **effective enforcement**. In short, it creates a consumer credit regulatory system to administer the credit industry.

Concomitant to the NCA’s main objective is the aim to encourage **responsible borrowing**, to **avoid reckless lending** and to provide for a system of **debt restructuring** and enforcement.

The NCA is intended to inform consumers in depth on the content and full consequences of the transaction that they are about to enter into, to help them make an informed decision. Many of the provisions of the NCA are aimed to ensure **proper disclosure** by the credit provider prior to the conclusion of the contract. However, it should also become apparent to you that there are also many new provisions that result in the regulation of this industry.

3.3 commencement date

COMMENCEMENT

The NCA came into partial effect on 1 June 2006, except for a few sections that only became operational a year later, on 1 June 2007.

ACTIVITY

1. Explain the need for consumer credit law reform, which resulted in the promulgation of the NCA.
2. Briefly describe the objectives of the NCA.

FEEDBACK

- (1) See 3.1 above. Reread the paragraph and try to rephrase in your own words.
 - (2) See 3.2 above. Reread the paragraph and try to rephrase in your own words.
-

STUDY UNIT 4

Application of the NCA in terms of section 8 of the NCA

Lesedi is the sole owner of a business called Green Gardening, which provides residential gardening services. Green Gardening's annual turnover is about R250 000 and it has capital assets worth R40 000. Lesedi wants to buy a second-hand Ford Bantam bakkie on credit to use in his business. Motor Finance (a division of SA Bank Ltd) agrees to sell the bakkie to Lesedi on credit. The agreement makes provision for the sale of the bakkie *voetstoots* at a price of R43 200 payable in monthly instalments over three years, and provision is made for the payment of fees and interest. The agreement contains a clause that ownership of the bakkie will only pass to Lesedi once he has satisfied all his financial obligations under the contract. Lesedi holds a business cheque account with SA Bank Ltd for transactions related to Green Gardening, but his other accounts (including a personal cheque and mortgage loan account) are with another bank. As SA Bank Ltd had access to the Green Gardening business cheque account, it did not present Lesedi with any pre-contractual documentation to complete or consider for the credit sale of the bakkie.

OVERVIEW

In this study unit we deal with the various persons protected by the NCA as well as the various transactions covered and excluded from the NCA. This is an extremely important study unit for obvious reasons, but easily forgotten by students and sometimes even legal practitioners! **Before you can apply the provisions of the NCA, you must first ascertain whether the NCA applies to the transaction at hand.**

CONTENTS

- 4.1 CREDIT AGREEMENTS
- 4.2 CATEGORIES OF CREDIT AGREEMENTS IN TERMS OF SECTION 8 OF THE NCA
 - 4.2.1 A credit facility
 - 4.2.2 A credit transaction
 - 4.2.3 A credit guarantee
- 4.3 TWO NEW CATEGORIES (SS 10 & 11 OF THE NCA)
- 4.4 APPLICATION OF THE NCA TO IMMOVABLE PROPERTY TRANSACTIONS
- 4.5 SIZE OF AGREEMENTS (S 9(3) OF THE NCA)
- 4.6 EXCLUSIONS FROM THE DEFINITION OF A CREDIT AGREEMENT (S 8(2) OF THE NCA)
- 4.7 PERSONS PROTECTED BY THE NCA (S 4 OF THE NCA)
- 4.8 LIMITED APPLICATION OF THE NCA (S 6 OF THE NCA)
- 4.9 CONTRACTUAL AGREEMENT THAT THE NCA APPLIES

LEARNING OUTCOMES

Having studied the material for this study unit you should be able to:

- discuss which agreements constitute credit agreements and identify these agreements

- identify the distinguishing characteristics of the different credit agreements
 - distinguish between the different types of credit agreements
 - distinguish between a small, intermediate and large agreement
 - explain which transactions are specifically or indirectly excluded from the NCA
 - recognise that certain sections of the NCA have limited application
 - identify those persons protected by the NCA
 - recognise that certain sections of the NCA do not apply to certain credit agreements
-

4.1 CREDIT AGREEMENTS

elements of a credit agreement

Subject to certain exemptions, **the NCA applies to all credit agreements**. An agreement will be a credit agreement for the purposes of the NCA, if **two elements** are present, namely:

- some **deferral of repayment** or prepayment, **and**
- there is a **fee, charge, or interest** imposed with respect to a deferred payment, or a discount given when prepayments are made.

The fact that both requirements should be met is evident from the following case law:

case law on two elements of credit agreements in terms of the NCA

In *Voltex (Pty) Ltd v Chenleza CC* 2010 5 SA 267 (KZP) the High Court held that an agreement of sale that provides for the purchase price to be paid after delivery of the goods, but with no interest, charge or fee payable for the credit extended, does not constitute a credit agreement as defined in section 8 of the NCA.

If these two elements are present an agreement qualifies to be a “credit agreement” in terms of the NCA.

arm’s length

Section 4 of the NCA provides that the Act applies to every “credit agreement” between parties who deal “at arm’s length” which is made within, or has an effect in SA, unless an exception applies. (The exceptions are discussed in para 4.6 below.)

“Credit agreement” is defined in section 8 of the NCA a credit facility, credit transaction, a credit guarantee or any combination of them. In the next paragraph we will discuss these types of credit agreements.

4.2 CATEGORIES OF CREDIT AGREEMENTS IN TERMS OF SECTION 8 OF THE NCA

categories of credit agreements

The NCA distinguishes between the following **four categories of credit agreements**:

- a credit facility,
- a credit transaction,
- a credit guarantee, and
- any combination of the above three.

Section 8 of the NCA reads as follows:

8. Credit agreements

- (1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is –*
- (a) a credit facility, as described in subsection (3);*
 - (b) a credit transaction, as described in subsection (4);*
 - (c) a credit guarantee, as described in subsection (5);*
 - or*
 - (d) any combination of the above.*
- (2) An agreement, irrespective of its form, is not a credit agreement if it is –*
- (a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance;*
 - (b) a lease of immovable property; or*
 - (c) a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel.*
- (3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)(b), constitutes a credit facility if, in terms of that agreement –*
- (a) a credit provider undertakes –*
 - (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and*
 - (ii) either to –*
 - (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or*
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and*
 - (b) any charge, fee or interest is payable to the credit provider in respect of –*
 - (i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or*
 - (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.*

- (4) *An agreement, irrespective of its form, but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is –*
- (a) *a pawn transaction or discount transaction;*
 - (b) *an incidental credit agreement, subject to section 5(2);*
 - (c) *an instalment agreement;*
 - (d) *a mortgage agreement or secured loan;*
 - (e) *a lease; or*
 - (f) *any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –*
 - (i) *the agreement; or*
 - (ii) *the amount that has been deferred.*
- (5) *An agreement, irrespective of its form, but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.*

4.2.1 A credit facility

A credit facility is where

credit facility

- (a) the credit provider undertakes to supply goods or services or to pay an amount or amounts to the consumer or on behalf of the consumer, or at the direction of the consumer, and either to defer the consumer's obligation to pay any part of the cost of the goods or services or to repay any amount advanced or bill the consumer periodically for any part of the goods or services or advance; **and**
- (b) any charge, fee or interest is payable to the credit provider in respect of the agreement or amounts deferred or billed.

EXAMPLE

examples of credit facilities



Typical examples of credit facilities are as follows:

- bank overdrafts
- credit cards
- accounts at clothing and other shops

In terms of section 4(6)(b) of the NCA, agreements between consumers and municipalities in respect of payment for municipal services do not constitute a “credit facility”, but any overdue amount constitutes “incidental credit” to which the provisions of section 5 of the NCA apply.

4.2.2 A credit transaction

credit transactions

An agreement, irrespective of its form, constitutes a credit transaction if it is a **pawn agreement**, a **discount transaction**, an **instalment agreement**, an **incidental**

credit agreement, a mortgage agreement, a secured loan or a lease or any other agreement, other than a credit facility or credit guarantee, in terms of which **payment of an amount** owed by one person to another is **deferred**, and any **charge, fee or interest** is payable to the credit provider in respect of

- (a) the agreement, or
- (b) the amount that has been deferred.

case law on two requirements

In *Essa v Asmal* 2012 2 SA 576 (KZP), the High Court considered the interpretation of the word “charge” in section 8(4)(f) of the NCA, based on the facts presented before it. The inference drawn from this case is that a profit to be generated by the credit provider (over and above the loan amount payable by the consumer) will constitute a “charge” under the NCA, provided that the precise calculation of this profit is agreed to in advance. This ensures that the consumer is aware of the actual cost of the credit being advanced to him/her or it. In this case, the Supreme Court of Appeal confirmed the decision of the High Court, relating to a “charge” (*Asmal v Essa* 2016 1 SA 95 (SCA)). In terms of section 8(4)(f) of the NCA, this “charge” payable to the credit provider must be in respect of the agreement, or the amount that has been deferred.

In *ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC* 2013 3 SA 426 (SCA) the Supreme Court of Appeal held that the lease agreement in question would not fall under section 8(4)(f). The court held that the payment of the rental was not deferred, because the monthly rentals had to be paid in advance, and that there could not be a deferral of payment.

A few of the abovementioned forms of credit transactions deserve a short discussion. It is important to note that the different forms of credit transactions can overlap and the distinctions between them are not “clear cut”.

instalment agreements

An **instalment agreement** is defined as a sale of **movable property** where all or part of the **purchase price is deferred** and is paid by **periodic payments; possession and use of the property is transferred** to the consumer and, **ownership either passes** immediately, subject to a right of the credit provider to **repossess the property** if the consumer fails to satisfy his or her obligations under the agreement, or, **on satisfaction of all the consumer's financial obligations** under the agreement. This is perhaps the most common phenomenon of credit transactions.

EXAMPLE

example of instalment agreement



An example would be buying a television set from Makro, whereby you are given the television immediately, although you will be paying the purchase price in 20 monthly instalments. If there is a clause in the agreement that Makro will retain ownership until full payment, or that you will become the owner, but that Makro will retain the right to reclaim the television set in the event of you defaulting with the payments, the agreement will be an instalment agreement in terms of the NCA.

definition of a lease agreement

A lease in terms of the NCA covers a lease of movable things, provided that interest, fees or other charges are payable to the credit provider (lessor) and ownership of the goods passes to the consumer at the end of the term of the agreement.

The definition of a lease agreement and an instalment agreement overlaps to a large extent, but an instalment agreement has more specific requirements.

In *Michael's Bid A House*, the Supreme Court of Appeal confirmed that a common law lease (where ownership does not pass to the lessee, but the lessee is entitled to

the use and enjoyment and must deliver the thing back to the lessor after expiration of the lease) is not a “lease” as defined in the NCA, where ownership of the goods passes to the consumer at the end of the term of the agreement.

incidental credit agreement

An “incidental credit agreement” is any agreement in terms of which a charge is levied for payment of an invoice after a specific date, or where two prices are quoted to the consumer, the lesser applying if payment is made on or before a certain date, and the higher for payments thereafter.

In *Voltex (Pty) Ltd v SWP Projects CC* 2012 6 SA 60 (GSJ), the court held that where the buyer does not pay the purchase price as required in terms of the contract and the late payment attracts interest, such interest is not interest “in terms” of a credit agreement, but instead is payable as damages in consequence of the breach of the agreement. As such, the agreement would not constitute a credit agreement in terms of the NCA.

4.2.3 A credit guarantee

credit guarantee

An agreement constitutes a credit guarantee if, in terms of that agreement, **a person undertakes to satisfy on demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the NCA applies.**

From the judgments in *Ribeiro v Slip Knot Investments 777 (Pty) Ltd* 2011 1 SA 575 (SCA) and *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 5 SA 523 (GSJ), it is clear that a suretyship agreement will only be deemed a credit guarantee as defined in the NCA, if the original obligation (principal debt) arises from a credit agreement (credit facility or credit transaction) as defined in the NCA. Failing which, the NCA does not apply to the suretyship agreement.

Any agreement that is or contains any combination of the above transactions in paragraphs 4.2.1 to 4.2.3 is a credit agreement.

4.3 TWO NEW CATEGORIES (SS 10 AND 11 OF THE NCA)

new category credit agreements

Two new categories of agreements are provided for in the NCA, namely, “Developmental Credit Agreements” and “Public Interest Credit Agreements”, which agreements will not form part of this module.

4.4 APPLICATION OF THE ACT TO IMMOVABLE PROPERTY TRANSACTIONS

the NCA and its application to immovable property

A lease of immovable property is never a credit agreement for the purposes of the NCA (s 8(2)(b)). **However, an instalment sale of immovable property would qualify as a credit transaction in terms of section 8(4)(f) of the NCA, if the purchaser were to pay any charge, fee or interest in respect of the instalments.**

Mortgage bond agreements are specifically identified as credit transactions (s 8(4)(d)). It also always qualifies as a large agreement in terms of section 9(4) of the NCA.

Therefore, the NCA governs all instalment sales of immovable property where juristic persons are the purchasers, subject to section 6 of the NCA. Section 6 of the NCA states that certain provisions of the Act do not apply to credit agreements where the consumer is a juristic person (see discussion below).

If the NCA conflicts with any provisions contained in Chapter II of the ALA, the NCA enjoys preference in terms of Schedule 1 of the NCA.

4.5 SIZE OF AGREEMENTS (S 9(3) OF THE NCA)

size of credit agreements

To categorise the market by size and to facilitate effective regulation, the NCA provides for three classes of credit agreements, namely, small, intermediate and large agreements. You will also note later, in study unit 11, that the pre-contractual duties of the credit provider and the rights of the customer differ, depending on the size of the particular agreement.

A credit agreement can be small, medium or large, depending on the thresholds determined by regulation and the type of agreement involved:

small, intermediate and large agreements

- (a) A “small agreement” is any **credit facility** or **credit transaction** where the credit limit or principal debt falls at or below R15 000 and **all pawn transactions**, irrespective of the amount involved.
- (b) An “intermediate agreement” is a **credit facility** where the credit limit is over R15 000, or a **credit transaction** where the principal debt falls between R15 000 and R250 000.
- (c) A credit agreement is a “large agreement” if it is a **credit transaction** where the principal debt amounts to or exceeds R250 000. **A credit facility therefore cannot be a large agreement. All mortgage agreements are large agreements.**

4.6 EXCLUSIONS FROM THE DEFINITION OF A CREDIT AGREEMENT (S 8(2) OF THE NCA)

excluded transactions

Transactions that are specifically excluded from the definition of a credit agreement are

- a policy of insurance or credit extended by an insurer solely to maintain payment of premiums on a policy of insurance,
- a lease of immovable property, and
- a transaction between a stokvel and a member of that stokvel in terms of the rules of the stokvel.

Section 4(5)(a) of the NCA provides that the NCA will not apply to a debt owed to a cash seller of goods, after the cheque (or similar instrument) presented for full payment was dishonoured. Section 4(5)(b) provides that the NCA will also not apply to an agreement between a seller and a consumer where the consumer pays by means of a charge against a credit facility extended by a third party and the third party refuses to pay the seller of the goods. Finally, section 4(6)(a) states that if a consumer pays fully or partially for goods by means of a charge against a credit facility provided by a third party, the agreement between the seller and the consumer is not regarded as a credit agreement for purposes of the NCA.

4.7 PERSONS PROTECTED BY THE ACT (S 4 OF THE NCA)

persons protected by the NCA: natural persons and small juristic entities

The purpose of the NCA is to protect consumers. “Consumer” is widely defined in section 1 of the NCA read together with section 4 of the NCA and comprises the following persons and entities:

- all natural persons, and

- small juristic persons (a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, is below the threshold value determined by the Minister (defined as the person who is responsible for credit matters, who is currently the Minister of Trade and Industry) in terms of section 7(1) of the NCA. **The current threshold is set at one million rand.** The asset value or annual turnover of a juristic person at the time a credit agreement is made, is the value stated as such by the juristic person at the time it applies for or enters into that agreement (s 4(2)(a) of the NCA). **Therefore, consumers who are “large” juristic persons are excluded from the protection of the NCA.**

A “juristic person” in terms of the NCA includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees, or where the trustee itself is a juristic person. It does not include a stokvel.

excluded transactions in terms of section 4 of the NCA

The following transactions are excluded from the scope of the NCA:

- Agreements between parties dealing **closer than at “arm’s length”**. Consequently, loans between family members, shareholders, partners and friends on an informal basis will not be regulated by the NCA (s 4(1) read together with s 4(2)(b) of the NCA).
- Where the state, or any organ of state, is the consumer.
- Agreements where the credit provider is the Reserve Bank of South Africa.
- Where an agreement is a **large agreement** in terms of which the **consumer is a juristic person** whose asset value or annual turnover is, at the time the agreement is made, below the threshold value of one million rand (**therefore, any large agreement between the credit provider and any juristic person will be exempted from the operation of the NCA**).
- When the credit provider is situated outside the Republic (this exemption only applies upon successful application and approval by the Minister).

4.8 LIMITED APPLICATION OF THE NCA (S 6 OF THE NCA)

limited application of the NCA to small juristic persons

Several provisions do not apply where the borrower or consumer is a small juristic person. The most important exclusions here are the following:

- Chapter 4 (Parts C and D relating to marketing practices, over-indebtedness and reckless credit), and
- Chapter 5 (Part C relating to prohibited charges, cost of credit, fees or charges, interest, maximum interest rates and credit insurance.) This exclusion means that there are no prescribed maximum interest rates that may be charged where the consumer is a juristic person, resulting in the common law provisions applying to these contracts on these matters. However, the common law provisions are not very clear with regard to interest rates.

4.9 CONTRACTUAL AGREEMENT THAT THE NCA APPLIES

can parties determine in the contract that the NCA applies?

In *First National Bank, a division of FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2014 1 SA 23 (GNP), the court held that there was nothing that would prohibit parties from agreeing to the application of the NCA to a credit agreement that would ordinarily be excluded from the ambit of the Act. Considerations of contractual freedom, *pacta sunt servanda* and public policy would dictate the court should enforce such an agreement. However, this decision was reversed in the appeal case of

First National Bank, a division of FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd (1054/2013) [2015] ZASCA 6 (9 March 2015) because of the uncertainty that it would create in those particular circumstances.

ACTIVITY

1. Compare the definitions of the following credit agreements to which the NCA applies, pointing out the similarities and differences between the different agreements:
 - credit transaction
 - incidental credit agreement
 - credit facility
 - instalment agreement
 - lease
2. When would Chapter II of the ALA apply to a transaction that also qualifies as a credit transaction in terms of the NCA?
3. Reread the scenario at the beginning of this study unit on page 26 and advise Lesedi whether the NCA is applicable.

FEEDBACK

- (1) Credit transaction: see 4.2.2 above.
Incidental credit agreement: see 4.2.2 above. (It is a form of a credit transaction, therefore, shares the definition and characteristics of a credit transaction).
Credit facility: see 4.2.1 above. (Although not a credit transaction, it shares the characteristics of a credit agreement in terms of the NCA, because they are all types of credit agreements.)
Instalment agreement: see 4.2.2 above. (It is a form of a credit transaction, hence same definition and characteristics of credit transaction.)
Lease: see 4.2.2 above (it is a form of a credit transaction, hence same definition and characteristics of credit transaction). Also note the similarities when compared with an instalment agreement. How do they differ?)
 - (2) Chapter II of the ALA applies where the purchase price is payable in three instalments or more, over a period exceeding a year, and the land is intended for residential purposes. It will overlap with the NCA if it meets the requirements in terms of section 8(4)(f) in respect of a credit transaction. Please note that this transaction cannot be an “instalment agreement”, because the latter only pertains to movable goods.
 - (3) You should identify this transaction as an instalment agreement, which is a credit transaction, which is a credit agreement in terms of the NCA. You see how important it is to know the definitions of each from of agreement covered by the NCA to ascertain whether the NCA is applicable or not. Furthermore, Lesedi is a natural person and, therefore, deserves protection under the NCA. Remember to refer to the correct sections of the NCA in your answer.
-

STUDY UNIT 5

Consumer credit policy (ss 60–66 of the NCA)

Julia informs you that she applied for a loan of R10 000 from XYZ Bank on 1 December 2014. She was informed on the following day that her application was unsuccessful and that the loan had not been approved. The bank fails to explain why Julia was unsuccessful. Julia wishes to know what her remedies are in terms of the NCA as she would like to know why her loan was not approved.

OVERVIEW

In this study unit you deal with rights of consumers when applying for credit, for example, to buy a house by means of a mortgage loan or to open a clothing account.

CONTENTS

- 5.1 APPLICATION FOR CREDIT (SS 60 & 61 OF THE NCA)
- 5.2 OBLIGATION TO PROVIDE REASONS FOR REFUSAL OF CREDIT (S 62 OF THE NCA)
 - 5.2.1 Request of consumer
 - 5.2.2 Submission of consumer credit information to credit bureau (ss 70 & 71A of the NCA)
- 5.3 INFORMATION IN AN OFFICIAL LANGUAGE (S 63 OF THE NCA)
- 5.4 PLAIN AND UNDERSTANDABLE LANGUAGE (S 64 OF THE NCA)
- 5.5 PROTECTION AGAINST DISCRIMINATORY, RETALIATORY OR PUNITIVE MEASURES (S 66 OF THE NCA)
- 5.6 OBLIGATION ON CREDIT PROVIDER TO KEEP PERSONAL INFORMATION CONFIDENTIAL (S 68 OF THE NCA)
- 5.7 DUTY TO REPORT CERTAIN INFORMATION (S 69 OF THE NCA)

LEARNING OUTCOMES

Having studied the material for this study unit you should be able to:

- explain a consumer's right to apply for credit
 - explain the protection provided to the consumer against discrimination in terms of the NCA
 - explain the consumer's right to reasons for the refusal of credit
 - explain the consumer's right to information in an official language and plain and understandable language
 - explain the consumer's rights regarding consumer credit records
-

5.1 APPLICATION FOR CREDIT (SS 60 & 61 OF THE NCA)

unfair discrimination prohibited

Unfair discrimination is prohibited when evaluating a person's creditworthiness, when deciding whether to grant or refuse credit, in determining the cost of the agreement and in proposing or agreeing to the terms and conditions of the agreement.

objective credit assessment mechanisms

A credit provider can use its own point system to manage, underwrite or price credit risk, provided that the primary or predominant basis of the allocation of the points on the points system is not due to differentiation or discrimination on a prohibited ground. The NCA rather encourages credit providers to develop credit policy and credit assessment mechanisms that can be applied objectively. The provisions dealing with reckless credit (as discussed in study unit 9 below) require, the credit provider to assess each credit application individually. This can only be done in a responsible and justifiable manner if the credit provider has a credit policy and credit assessment mechanism in place.

remedies

A person alleging that there has been a contravention of the NCA in either the granting or refusing of credit on the basis of discrimination, may either institute proceedings in the Equality Court constituted by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, or lodge a complaint with the National Credit Regulator.

Significantly, the National Consumer Tribunal (an adjudicative body incorporated under s 26 of the NCA) or court may draw inferences of unfair discrimination.

Section 61(4) of the NCA governs that a refusal to extend credit to a minor, does not amount to discrimination.

5.2 OBLIGATION TO PROVIDE REASONS FOR REFUSAL OF CREDIT (S 62 OF THE NCA)

5.2.1 Request of consumer

right to receive reasons

At the request of a consumer, a credit provider must give the consumer, in writing, the main reasons for the following:

- (a) refusal to enter into a credit agreement,
- (b) granting a lower limit under a credit facility than that the consumer had applied for, or for reducing the credit limit on an existing facility,
- (c) refusal to increase a credit limit under an existing credit facility, or
- (d) refusal to renew an expiring credit facility or similar renewable credit facility.

details of credit bureau

If a credit provider has based its reasons on an adverse credit report received from a credit bureau, it must advise the consumer in writing of the details of the credit bureau from which it has obtained the information.

5.2.2 Submission of consumer credit information to credit bureau (SS 70 and 71A of the NCA)

credit information to be submitted to credit bureau

In terms of section 72(1) of the NCA read together with section 19(4) of the NCA, a credit provider must give a consumer at least 20 business days' notice of its intention to submit adverse credit information concerning the consumer to a credit bureau. A consumer may question the accuracy of any information that is the subject of a

proposed report to a credit bureau and require the credit bureaux or the National Credit Regulator to investigate the accuracy of such information without charge to the consumer. The consumer may be compensated by any person who reported incorrect information to a registered credit bureau.

automatic removal
of adverse credit
information

Section 71A of the NCA makes provision for the automatic removal of adverse credit information. This section provides that a **credit provider must** submit to all registered credit bureaux, within **seven days after a settlement** by a consumer of any obligation, information regarding the **settlement** where an obligation under such credit agreement was the subject of an **adverse classification, an adverse listing or a judgment debt**. The **credit bureau must then remove any adverse listing** within seven days after receipt of information regarding the listing from the credit provider.

5.3 INFORMATION IN AN OFFICIAL LANGUAGE (S 63 OF THE NCA)

official language
that consumer can
understand

Every consumer has the right to receive documentation in an official language that he/she can read or understand, to the extent that it is reasonable, having regard to factors such as usage and practicality.

A credit provider must indicate to the National Credit Regulator (hereafter referred to as “the NCR”) that it proposes to make documentation available in at least two official languages, and that it gives consumers the choice to receive any documentation in either of these two official languages. The NCR can approve the language proposal or reject the same, having considered the proposal, with regard to factors such as usage and practicality.

5.4 PLAIN AND UNDERSTANDABLE LANGUAGE (S 64 OF THE NCA)

plain and
understandable
language

Where credit forms are prescribed by regulation, a credit provider must make use of the prescribed forms. Where no form is prescribed, the document must be in plain language.

test for plain
language

A document is in plain language if it is reasonable to conclude that any ordinary consumer of the class of persons, for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance and import of the document without undue effort, having regard to the following:

- (a) the context, comprehensiveness, and consistency of the document,
- (b) the organisation, form, and style of the document,
- (c) the vocabulary, usage, and sentence structure of the text, and
- (d) the use of any illustrations, examples, headings, or other aids to reading and understanding.

The NCR may issue guidelines for assessing whether the documents satisfy the plain language requirements.

s 64 test
interpreted by the
courts

In *Standard Bank of South Africa Ltd v Dlamini* 2013 1 SA 219 (KZD), the court had to consider, amongst other things, the plain language requirements of the NCA. The court concluded that neither section 63 nor section 64 of the NCA assists **an illiterate person**. However, if these sections are purposively interpreted they embody the right of the consumer to at least be informed of the material terms of the documents

he/she signs. Unfortunately the court did not indicate what the material terms are that have to be explained to a consumer, nor did the court consider the practical and financial impact of its findings on suppliers (credit providers), for example, that suppliers will need to be trained to explain the material terms of an agreement to a consumer (See Otto 2014 *THRHR* 155).

5.5 PROTECTION AGAINST DISCRIMINATORY, RETALIATORY OR PUNITIVE MEASURES (S 66 OF THE NCA)

Consumers are protected against discriminatory, retaliatory or punitive measures, when seeking to exercise or amend their rights under the NCA or in terms of a credit agreement.

5.6 OBLIGATION ON CREDIT PROVIDER TO KEEP PERSONAL INFORMATION CONFIDENTIAL (S 68 OF THE NCA)

confidentiality Information given to a credit provider must be treated as confidential and only used for the purpose permitted or required by the NCA or other legislation. Any person who discloses confidential information in contravention of the NCA is guilty of an offence. Where the NCA requires the credit provider to make information available, as for instance with the duty to report credit agreements in section 69 of the NCA, there will be no breach of the duty to keep the information confidential.

prior permission Credit providers must ensure that they do not contravene any of these provisions by obtaining prior permission from the consumer to use the information he/she has provided for certain stated purposes. However, the information may only be used for purposes falling within the scope of such permission.

5.7 DUTY TO REPORT CERTAIN INFORMATION (S 69 OF THE NCA)

duty of credit provider to report certain information Upon entering into or amending a credit agreement, all credit providers (whether they are required to be registered or not) must report the following information to either the NCR, (for entry into the National Credit Register) or a credit bureau:

- the credit provider's name, principal address and registration number, if any,
- the name and address and ID or passport number of the consumer,
- if the agreement is a credit facility, the credit limit under that facility, and the expiry date of the agreement, and
- if the agreement is a credit transaction or a credit guarantee, the following must be provided:
 - the principal debt under the agreement,
 - the particulars of any previously existing credit agreement that was terminated or satisfied in connection with the making of the new agreement,
 - the amount and schedule of each payment due under the agreement, and
 - the date on which the consumer's obligations will be satisfied, if the agreement is fully complied with.

The credit provider must also report the particulars of the termination or satisfaction of any credit agreement reported, in the prescribed manner and form to either the NCR or a credit bureau.

Similarly, if the credit provider transfers its rights, such transfer must be reported and the person to whom such rights are transferred must satisfy any obligations of the credit provider.

ACTIVITY

Reread the scenario at the beginning of the study unit on page 35 and advise Julia accordingly.

FEEDBACK

See 5.2 above. In terms of the NCA, Julia is entitled to reasons for refusal of credit. See 5.1 for the possible remedies, too.

STUDY UNIT 6

Regulatory institutions

OVERVIEW

In this section you learn about the appointment of a National Credit Regulator, who is responsible for promoting the development of an accessible credit market, addresses the needs of previously disadvantaged consumers, controls the registration of credit providers and credit bureaux, promotes alternative dispute resolution and, most importantly, enforces compliance with the NCA.

CONTENTS

- 6.1 THE NATIONAL CREDIT REGULATOR (“THE NCR”) (S 12 OF THE NCA)
- 6.2 PROVINCIAL CREDIT REGULATORS (S 17 OF THE NCA)
- 6.3 THE NATIONAL CONSUMER TRIBUNAL (SS 26–34 OF THE NCA)

LEARNING OUTCOMES

Having studied the material for this study unit you should be able to:

- list the duties of the NCR
 - briefly explain the functions of the National Consumer Tribunal.
-

6.1 THE NATIONAL CREDIT REGULATOR (“NCR”) (S 12 OF THE NCA)

duties of the NCR

The NCA provides for the appointment of a NCR whose functions include promoting the development of an accessible credit market by addressing in particular the needs of historically disadvantaged persons, registration of credit providers and credit bureaux, cancellation or suspension of the registration of credit providers, dealing with complaints, promoting alternative dispute resolution, referring matters to the Competition Commission and generally enforcing compliance with the NCA.

6.2 PROVINCIAL CREDIT REGULATORS (S 17 OF THE NCA)

provincial credit regulators

The NCA provides for certain functions of the NCR to be performed by similar institutions in those provinces that have established such bodies, and further provides for the Minister of Trade and Industry to delegate functions of the Regulator to provincial MECs in those provinces that have not established or choose not to establish self-standing provincial entities. As yet there is no provincial legislation to put these provisions into operation.

6.3 THE NATIONAL CONSUMER TRIBUNAL (SS 26–34 OF THE NCA)

duties of National Consumer Tribunal

The National Consumer Tribunal's ("the Tribunal") functions include adjudicating on a wide variety of applications and granting declaratory orders and orders of costs. The Tribunal is aimed at providing consumers with a quick and cost-effective method of lodging complaints against credit providers and questionable credit practices without having to resort to costly litigation.

ACTIVITY

List the duties of the National Credit Regulator as explained in section 12 of the NCA.

FEEDBACK

See 6.1 above.

STUDY UNIT 7

Registration of credit providers

Thabo has entered into an instalment agreement with Easycash. Easycash is not registered as a credit provider, but has a credit of R800 000 on its books, which various consumers owe Easycash. Tabo falls in arrears and now alleges that he can escape liability in terms of this credit agreement.

OVERVIEW

In this study unit you will learn that credit providers are subject to strict control, and about the drastic sanctions imposed against them if they fail to conform to the requirements provided in the NCA to control their activities.

CONTENTS

- 7.1 APPLICATION FOR REGISTRATION (S 40 OF THE NCA)
- 7.2 EFFECT OF REGISTRATION (S 52 OF THE NCA)
- 7.3 CANCELLATION OF REGISTRATION (S 57 OF THE NCA)
- 7.4 REVIEW AND APPEAL
- 7.5 REGISTRATION OF DEBT COUNSELLORS AND CREDIT BUREAUX

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain which persons must be registered as credit providers
 - explain who may not be registered as a credit provider
 - explain who must be registered as a credit bureau
 - explain who may apply to be registered as a debt counsellor
-

7.1 APPLICATION FOR REGISTRATION (S 40 OF THE NCA)

who must register

Credit providers are required to register with the NCR if the total principal debt of all outstanding credit agreements concluded by the credit provider to which the NCA applies, exceeds the threshold in terms of section 42(1) of the NCA.

In terms of section 42(1) of the NCA, the Minister must determine the threshold at intervals of every five years.

threshold soon to be set at zero

Before the amendments came into operation through the 2014 Amendment Act, the threshold could not be less than R500 000. However, this is no longer a requirement and in terms of the notice in the *Government Gazette* of 4 February 2016 (GN158 GG 39663) it is clear that the Minister of Trade and Industry is in the process of setting the threshold to zero.

NCA applicable to once-off transactions	The current threshold is currently still set at R500 000. There is case law and authority that even credit providers who enter into “once off” credit transactions above the threshold amount have to register as credit providers (<i>Van Heerden v Nolte</i> 2014 4 SA 584 (GP)). When this new threshold is proclaimed, it will mean that all credit providers, dealing at arm’s length, will be obliged to register, irrespective of the amount of the debt.
NCA not applicable: no registration required	In <i>Paulsen v Slip Knot Investments 777 (Pty) Ltd</i> 2015 3 SA 479 (CC) the court correctly found that there can be no obligation imposed on a credit provider to register in terms of the NCA if the transaction he/she has entered into has been excluded from the operation of the NCA.
effect of non-registration	Before the 2014 Amendment Act became operational, any agreement concluded by a credit provider who was required to be registered, but who was not, was unlawful and a court was obliged to order that the credit agreement was void , that the credit provider had to refund the consumer any money paid under the agreement, and that all purported rights of the credit provider to recover any money paid or goods delivered to the consumer in terms of the agreement were either cancelled or forfeited to the State .
constitutional court’s stance on harsh sanction	This heavy sanction has, however, not survived the constitutionality test in <i>National Credit Regulator v Opperman</i> 2013 2 SA 1 (CC), where the court decided that it provides an unacceptable limitation of the right not to be deprived of property arbitrarily.
effect of the 2014 Amendment Act	In terms of section 89 of the NCA, the court is conferred an equitable discretion in terms of which the court may declare the agreement void, and make any just and equitable order.
factors taken into account by the NCR	In considering an application for registration, the NCR may take into consideration Black Economic Empowerment requirements and any commitments of the applicant to combating over-indebtedness, including subscription to any relevant industry code of conduct approved by a regulator or regulatory authority. Conditions of registration may also be imposed.

7.2 EFFECT OF REGISTRATION (S 52 OF THE NCA)

certificate of registration	The applicant will be issued with a certificate of registration setting out, among other things, the activities it may engage in. On registration the applicant must grant the NCR access to his, her or its place of business and further comply with legislation including the Financial Intelligence Centre Act 28 of 2001, post the certificate of registration at its premises, state its registered status and registration number in a legible type font on all its credit agreements and communications with consumers and, lastly, keep any records that may be prescribed.
specific duties after registration	

7.3 CANCELLATION OF REGISTRATION (S 57 OF THE NCA)

Tribunal may cancel registration	The Tribunal may cancel the registration at the request of the NCR if the credit provider repeatedly • fails to comply with any condition of its registration,
----------------------------------	---

effect of
cancellation

- fails to meet a BEE commitment or an over-indebtedness reduction commitment, or
- contravenes the NCA.

The obligations of both the consumer and the credit provider survive cancellation or suspension of registration. Voluntary cancellation of registration is also provided for.

remedies at
disposal of
dissatisfied credit
provider

7.4 REVIEW AND APPEAL

If a credit provider is disaffected or dissatisfied by the decision of the NCR relating to registration, conditions imposed on registration, or cancellation of registration, it may apply to the Tribunal for a review of that decision. The Tribunal may confirm or set aside the decision in whole or in part, including the conditions that the NCR may have imposed on the registration. A decision by the Tribunal may be appealed against or taken on review to the High Court in certain circumstances.

7.5 REGISTRATION OF DEBT COUNSELLORS AND CREDIT BUREAUX

The NCA provides for registration of debt counsellors and credit bureaux. The regulations provide for the training requirements and standards of experience of debt counsellors.

ACTIVITY

Reread the scenario at the beginning of this study unit on page 42. Please advise Thabo.

FEEDBACK

Easycash was obliged to register in terms of the NCA. (Why?) Also discuss the effect of non-registration. Reread 7.1 above.

STUDY UNIT 8

Credit marketing (ss 74–77 of the NCA)

Joe receives a parcel in the mail from one of the most prominent cellular phone companies in the country. Inside the parcel he finds an I-phone and a letter stating that, if he does not want the phone, he has to send it back to the sender. If not, a two-year cell phone contract will come into existence with the sender. Joe now wants to know whether he has to act in order to escape liability under this “agreement”.

OVERVIEW

In this section you will learn about marketing practices that are regarded as unlawful, because they place the consumer in an untenable position. **This study unit is of particular importance in the context of the law of sale, as it affects the many sale agreements concluded in a particular manner or place.**

CONTENTS

- 8.1 NEGATIVE OPTION MARKETING (S 74 OF THE NCA)
- 8.2 MARKETING AND SALES OF CREDIT AT HOME OR WORK (S 75 OF THE NCA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain what is meant with the phrase “negative option marketing”
- explain why negative option marketing is prohibited
- describe the rules regarding marketing and credit sales at home or work

8.1 NEGATIVE OPTION MARKETING (S 74 OF THE NCA)

negative option
marketing

effect of negative
option marketing

Negative option marketing refers to the scenario where the credit provider states that unless the consumer declines the offer, an agreement will automatically come into existence. Negative option marketing **is prohibited and if a credit agreement is concluded as a result of such marketing, the agreement is unlawful and void once the Tribunal or a court has declared it void.** In terms of section 89 of the NCA, agreements that result from negative option marketing are unlawful. In terms of section 89 of the NCA, the court is conferred an equitable discretion in terms of which the court may declare the agreement void, and make any just and equitable order. Unlawful terms and agreements are discussed in study unit 10 below.

Similarly, offers or any inducements to increase credit limits under a credit facility on the basis that the limit will be increased automatically unless the consumer declines such increase of the limit, will be unlawful and void. The same applies to

inducements or offers to amend or alter a credit agreement where the credit provider states that these amendments will take full effect if the consumer does not decline these amendments.

options for
consumer upon
entering into the
contract

Upon entering into a credit agreement, the credit provider must present to the consumer a written statement of the following options and give the consumer an opportunity to select any of those options:

- (a) to decline the option of pre-approved annual credit limit increases, if the agreement is a credit facility, and
- (b) to be excluded from any
 - (i) telemarketing campaign of the credit provider,
 - (ii) marketing or customer list that may be sold or distributed by the credit provider, other than as required by the NCA, or
 - (iii) any mass distribution of email or SMS messages.

The credit provider must maintain a register in the prescribed manner and form of all options selected by consumers and must not act in a manner contrary to an option selected by a consumer.

8.2 MARKETING AND SALES OF CREDIT AT HOME OR WORK (S 75 OF THE NCA)

marketing and
sales of credit at
the home of the
consumer

A credit provider must not harass a person to apply for credit.

A credit provider may not enter into a credit agreement at a private dwelling, except

- where such visit is pre-arranged by the consumer for that purpose,
- if the credit provider visited the home for the purpose of offering goods or services for sale, and incidentally offered to provide or arrange credit to finance the purchase of those goods or services, or
- if the credit agreement is of a prescribed category that is permitted to be entered into during a visit to a home.

The restrictions on private dwellings do not apply in respect of developmental credit agreements as briefly referred to in study unit 4.3 above.

marketing at a
consumer's place
of work

A credit provider must not visit a person's place of employment for the purpose of inducing the person to apply for or obtain credit, or enter into a credit agreement at such a place, except

- to enter into a credit agreement with the employer, or
- if the visit results from either a formal arrangement between the credit provider, on one hand, and the employer and any representative trade union or employee, on the other; or a non-prompted invitation by the person being visited.

The effect of when the credit provider does not adhere to the above rules is not specifically provided for in the NCA. It is a matter that could be referred to the Tribunal for a suitable order.

ACTIVITY

1. Discuss when a credit provider may enter into a credit agreement at a private dwelling.
2. Reread the scenario at the beginning of this study unit on page 45 and advise Joe accordingly.

FEEDBACK

- (1) See 8.2 above.
 - (2) See 8.1 above. This “agreement” is void and Joe does not have to do anything to decline the “offer”. Joe will not be liable under the so-called agreement. You will note in study unit 10 below that such an agreement is deemed to be unlawful in terms of section 89 of the NCA. Also discuss the power of the courts in this respect, after you have studied study unit 10 below.
-

STUDY UNIT 9

Over-indebtedness and reckless credit

Susan has bought a new television set from Whifi Corporation on credit. It appears at a later date that Whifi Corporation extended the credit to Susan in spite of an assessment of Susan's financial position and debt re-payment history, which had indicated that Susan could not afford to incur the new debt. Susan is now struggling to pay her monthly instalments and comes to see you for advice.

OVERVIEW

The main aim of the NCA is to protect the consumer. **This is done not only by recognising that consumers have rights, but also by protecting them against over-indebtedness and undertaking obligations that could qualify as reckless credit.** The NCA offers relief to consumers who are over-indebted. What is more, if a credit provider has granted credit to a consumer who could not afford the credit and the credit provider failed to assess the consumer's ability to pay properly, the court may even set aside all the consumer's obligations in terms of the NCA.

CONTENTS

- 9.1 OVER-INDEBTEDNESS (SS 78–88 OF THE NCA)
- 9.2 RECKLESS CREDIT (S 80 & 81 OF THE NCA)
 - 9.2.1 Prevention of reckless credit (s 81 of the NCA)
 - 9.2.2 Assessment mechanisms and procedures (s 82 of the NCA)
 - 9.2.3 Effect of reckless agreement (s 83 of the NCA)
 - 9.2.4 Effect of a suspension order (s 84 of the NCA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain the concept of over-indebtedness
 - explain when an agreement will be considered to be reckless
 - explain the provisions made in terms of the NCA to prevent the granting of reckless credit
 - explain the effect a suspension order has on a credit agreement
 - explain how the NCA prevents over-indebtedness, as well as the provisions regarding the debt review process
-

9.1 definition of over-indebtedness

OVER-INDEBTEDNESS (SS 78–88 OF THE NCA)

A consumer is over-indebted if the preponderance of available information at the time that a determination is made, indicates that the particular consumer is or will be unable to satisfy timeously all the obligations under all the credit agreements to which the consumer is a party in time.

application to debt counsellor by consumer	A consumer may apply to a debt counsellor to be declared over-indebted.
credit provider must cooperate	The credit provider must comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's indebtedness.
debt counsellor's duties	The debt counsellor must notify all credit providers that are listed in the application for debt review, as well as every registered credit bureau, of the review application.
rejection of application	If the debt counsellor concludes that the consumer is not over-indebted, he/she must reject the application. If he/she finds that the consumer is not over-indebted, but is nevertheless experiencing (or is likely to experience) difficulty in satisfying all his/her obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt rearrangement.
debt counsellor finds that consumer is over-indebted	Should the debt counsellor conclude that the consumer is indeed over-indebted, he/she may issue a proposal recommending that the Magistrates' Court make either or both of the following orders, in terms of section 87 of the NCA: - that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor concluded that those agreements appear to be reckless; - that one or more of the consumer's obligations be rearranged by extending the period of the agreement and reducing the amount of each payment accordingly, or postponing the dates on which payments are due, or extending the period of the agreement and postponing the dates on which payments are due.
no reduction of interest rates is allowed	The above provisions of the NCA do not allow for the debt rearrangement proposal to be based on the reduction of the contracted interest rate (<i>Firststrand Bank Ltd v Adams and another</i> 2012 4 SA 14 (WCC); <i>SA Taxi Securitisation (Pty) Ltd v Lennard</i> 2012 2 SA 456 (ECG)).
court's role	If a debt counsellor made a proposal to the Magistrates' Court as set out above, or a consumer applies to the court to be declared over-indebted, the court must conduct a hearing and may thereafter reject the recommendations or application (as the case may be), or make an order declaring a credit agreement to be reckless, and/or issue an order rearranging the consumer's obligations in terms of section 87 (1) of the NCA.
consumer's conduct pending the application	A consumer who has filed an application to be declared over-indebted may not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, until one of the following events has occurred: - the debt counsellor has rejected the application, - the court has determined that the consumer is not over-indebted or has rejected a debt counsellor's proposal, or - a court having made an order or the consumer or credit providers having made an agreement rearranging the consumer's obligations, all the consumer's applications under the credit agreements as rearranged are fulfilled, unless the consumer fulfils the obligations by way of a consolidation agreement. Should a consumer apply for or enter into a credit agreement contrary to what has been said above, the consumer cannot apply to be declared over-indebted in relation to such an agreement.

if credit provider has already taken steps to enforce agreement	If the credit provider has already commenced legal action in terms of section 129 of the NCA (as discussed in study unit 16 below), the consumer may not approach the debt counsellor for such a declaration. In such a case, the court itself may declare the consumer over-indebted and declare the agreement as reckless and make an appropriate order in rearranging the debt of the consumer. Alternatively, the court may refer the matter to a debt counsellor for her/his recommendation as above.
consumer may approach the court directly	A consumer may, further, approach the court directly for such a declaration if his/her application is unsuccessful with the debt counsellor, provided that the credit provider has not yet instituted legal action, as discussed above.
powers of the court	Section 85 of the NCA empowers a court to declare and relieve over-indebtedness. If a credit agreement is the subject matter of court proceedings and it is alleged that the consumer is over-indebted, the court may refer the matter directly to a debt counsellor with a request that the latter evaluate the consumer's circumstances and make a recommendation to the court on the appropriate order to be made. Alternatively, the court may declare that the consumer is over-indebted and make any order mentioned in section 87 of the NCA to relieve the over-indebtedness.
credit provider's rights are frozen pending court procedure	A credit provider who receives notice of court proceedings in connection with the suspension of an agreement based on reckless credit or over-indebtedness, may not exercise or enforce by litigation any right or security under the credit agreement until the consumer is in default under the agreement and • the debt counsellor has rejected the application for debt review, • the court has determined that the consumer is not over-indebted, • the court has made a debt-restructuring order, or the consumer and credit providers have concluded a debt re-arrangement agreement and the consumer's obligations in terms of the agreement have been fulfilled, or • the consumer defaults in terms of the re-arrangement agreed between the consumer and the credit providers or ordered by a court or Tribunal (s 83(3) read with s 88(1) of the NCA. Refer to Otto <i>NCA</i> 108). In <i>Firststrand Bank Ltd v Kona and Another</i> 2015 5 SA 237 (SCA) the court decided that, as soon as the consumer is defaulting under the credit agreement as well as the debt restructuring order, the credit provider may take further steps without cancelling the debt restructuring order first.
consumer in default of agreement under review	In terms of section 86(10) of the NCA, where a consumer under debt-review defaults under the agreement under review, the credit provider may give notice to terminate the review to the consumer, the debt counsellor and the NCR at any time, but at least 60 business days after the date on which the consumer applied for the debt review. A credit provider must act in good faith when terminating a debt review (s 86(5)(b) read with <i>Mercedes Benz Financial Services v Dunga</i> 2011 1 SA 374 (WCC)). The credit provider can then proceed to enforce the credit agreement. However, in terms of section 86(11) of the NCA, the court hearing the debt review application has a discretion to order resumption of the debt review if the agreement is eventually enforced by the credit provider, but only if it is sensible and practical to do so (Otto <i>NCA</i> 110).
termination after referral to the court or Tribunal	After the decision of <i>Collet v Firststrand Bank Ltd</i> 2011 4 SA 508 (SCA) where the court held that a credit provider may even give notice to terminate a debt review where the application for debt review has already been referred to the court or Tribunal,

the 2014 Amendment Act introduced an important amendment in terms of section 86(10)(b), **which expressly states that no credit provider may terminate an application for debt review in terms of the NCA where such an application has already been filed in a court or with the Tribunal.**

If a credit provider grants credit to a consumer who has applied for a debt re-arrangement and the re-arrangement is still in force, this credit may be declared reckless credit in terms of section 88(4).

sequestration of
consumer's estate

In *Kona* the court decided that a debt restructuring agreement does not protect the consumer against a sequestration order against him/her at the request of the credit provider. In this case, the consumers were in default of their debt restructuring order and the credit provider filed an application for the sequestration of the consumers' joint estate. The court *a quo* stated that the debt restructuring order that was still in place barred the court from granting a final sequestration order. The SCA decided, however, that a sound interpretation of section 88(3) of the NCA boils down to the fact that a sequestration application does NOT constitute an enforcement by litigation of any right or security under the credit agreement itself, and that the credit provider could obtain a sequestration order despite the debt rearrangement agreement.

credit provider
must do proper
assessment

In light of the risk of a credit provider to be faced with an over-indebted consumer or, even worse, with an allegation that he/she provided reckless credit to the consumer, the credit provider must do a proper credit assessment on the application for credit by a consumer. There are many different steps that can be taken, **but at the minimum** the credit provider should adhere to the Affordability Assessment Regulations as set by the Minister in the National Credit Regulations, which became operational on 13 March 2015. The aim of these regulations is to tighten the ropes when it comes to the credit provider's assessment of whether the consumer can afford credit.

three months'
bank statements
and salary slips

The credit provider is now obliged to ask for three months' pay slips and three months' bank statements to reflect the payment of the salary. It is no longer possible to rely solely on the consumer's word regarding her/his income.

discretionary
income

The credit provider should calculate the consumer's discretionary income, which is calculated by subtracting from the applicant's gross income, statutory deductions (such as UIF and income tax), maintenance, necessary expenses (see discussion below) and other financial commitments that the consumer might have in terms of other credit agreements. The credit provider should investigate the latter by consulting the information from the credit bureau. The credit provider will base his/her decision on whether or not to grant credit on the discretionary income.

necessary
expenses

The amount of the necessary expenses is ascertained by a questionnaire completed by the consumer, but a minimum amount is set in terms of the **Minimum Expense Norms** calculator, calculating the consumer's minimum necessary expenses on a sliding scale according to the consumer's gross income. This is to prevent situations where the wrong information is provided to the credit provider by the consumer's agents, and to prevent the credit provider from relying solely on its correctness, offering further protection to the consumer.

If the consumer's necessary expenses are less than the monthly expenses in terms of the Minimum Expense Norms table, the credit provider may, in exceptional circumstances, work with the smaller amount of expenses. In this case, the consumer has to complete the Declaration of Necessary Expense Questionnaire. This questionnaire comprises the following information:

- The monthly accommodation expenses, transport fees, food expenditure, medical costs, water and electricity, educational fees and any amounts payable in terms of a maintenance order.

The credit provider is entitled to rely on the truth of the above information provided by the consumer and need not verify its correctness, provided that the credit provider has obtained the necessary information as discussed above and has acted strictly according to the Affordability Assessment Regulations. This will protect the credit provider against claims of reckless credit, but not against over-indebtedness. Therefore, if a credit provider has granted a consumer credit based on fraudulent information, the credit provider will not be found to have given reckless credit, but the consumer can still apply to be declared over-indebted.

9.2 RECKLESS CREDIT (SS 80 & 81 OF THE NCA)

definition of reckless credit

A credit agreement is reckless if, at the time that the agreement was made

- the credit provider failed to conduct an assessment as indicated above, irrespective of what the outcome of such an assessment might have been, or
- the credit provider, having conducted an assessment as required, entered into the credit agreement with the consumer despite the fact that the preponderance of information available to him/her indicated that the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement **at the time the agreement was entered into or that entering into that credit agreement, would make the consumer over-indebted.**

9.2.1 Prevention of reckless credit (s 81 of the NCA)

steps to be taken by credit provider to avoid reckless credit

The credit provider must not enter into a reckless credit agreement. In order to avoid entering into one, the credit provider must take reasonable steps to assess the following:

- whether the proposed consumer understands and appreciates the risks and costs of the proposed credit, and her/his rights and obligations under the agreement,
- the consumer's debt repayment history under credit agreements should be ascertained either from credit bureaux, the National Credit Register or from a credit questionnaire,
- his/her financial means, prospects and obligations, and
- whether there is a reasonable basis to conclude that any commercial purpose, if there is such a purpose, for which credit is applied, will be successful.

In *Absa Bank v De Beer* 2016 3 SA 432 (GP) the court decided that it was irrational to have taken the surety's income into account in assessing the consumers existing means; leading to a declaration of reckless credit. The court further found that the farming operations by the consumers could not have thought to be successful by the credit provider in the particular circumstances. One of the aggravating factors was that the consumers were already quite old when applying for the credit.

The agreement will be preserved or not deemed to be reckless if the court is satisfied that the consumer failed to answer any questions fully and truthfully, and such failure materially affected the ability of the credit provider to make a proper assessment.

9.2.2 Assessment mechanisms and procedures (s 82 of the NCA)

assessment mechanisms

The credit provider may determine his/her own evaluative mechanisms or models and procedures to meet these assessment obligations, provided that it meets the standards set in the National Credit Regulations and it further complies with the Affordability Assessment Regulations as determined by the Minister. The NCR may pre-approve the mechanisms or models or publish guidelines proposing evaluative mechanisms or models. From now on, the credit provider will have to comply with the Affordability Assessment Regulations proclaimed in 2015 by the Minister, as discussed above.

time frame taken into account when determining whether credit is reckless

When a determination is to be made whether a credit agreement is reckless or not, the person **making that determination must apply the evaluation criteria as they existed at the time the agreement was made, and not at the time that the determination is made.**

9.2.3 Effect of reckless agreement (s 83 of the NCA)

effects of reckless credit agreements

Before the 2014 Amendment Act became operational, reckless credit on its own was **a defence** that was available to the consumer. A consumer could not refer a matter of reckless credit to the NCR independently, but could use same as a defence when the credit provider attempted to enforce a credit agreement against her/him. Section 136 of the NCA has now been amended to such an extent that a consumer may now refer an allegation of reckless credit to the NCR.

setting aside the agreement or suspension

A court or Tribunal may declare that a credit agreement is reckless if it meets the requirements described above. **If a court or Tribunal makes such a declaration, it may grant an order setting aside all or part of the consumer's obligations under the agreement, or suspending the agreement for a period determined by the court.** It is obvious that these measures are very drastic, in that the credit provider will be unable to reclaim any performance rendered unless a court or Tribunal determines that the consumer would be unjustly enriched if allowed to retain performance. In *De Beer* the court decided that it was just and equitable given the circumstances to set aside the credit agreement in total; taking into account the severity of the recklessness on the part of the credit provider.

suspending and restructuring of debt

Once a court or Tribunal declares that a credit agreement is reckless, it must also decide whether the consumer is over-indebted, and if it finds him or her to be so, may grant an order suspending the agreement and restructuring the consumer's obligations under any other credit agreement, (as discussed above in terms of s 87 of the NCA) once it has considered the consumer's means and ability to pay.

9.2.4 Effect of a suspension order (s 84 of the NCA)

effect of suspension order

If a court or Tribunal makes an order suspending the agreement, the consumer's payment obligations are suspended, as well as the credit provider's right to payment and to interest, fees or charges under the agreement. Furthermore, the credit provider's rights under the agreement or under any law are unenforceable.

A suspended agreement remains in force, but cannot be enforced until the consumer is able to afford it. Once the suspension ends, the rights and obligations of both the credit provider and the consumer under the agreement are revived and enforceable,

except to the extent that a court provides otherwise. The credit provider cannot, however, recover or charge interest and fees that could not be charged during the suspension.

In addition to the suspension, the NCR may ask the Tribunal to impose an administrative fine or to make an order altering the credit provider's business practice.

ACTIVITY

Reread the scenario at the beginning of this study unit on page 48 and advise Susan accordingly.

FEEDBACK

Please see 9.1 & 9.2, above. **In broad terms**; Susan can apply to a debt counsellor to be declared over-indebted. If the debt counsellor is of the opinion that Susan is indeed over-indebted, she can approach the court recommending that the agreement with Whifi Corporation is declared as **reckless credit**, which has the effect that the agreement can be set aside by a court or that all or a part of the obligation she has incurred with the credit provider is suspended. The court can also declare that Susan's arrangements with her various credit providers should be **rearranged** in the various ways as provided for in the NCA, which you will also have to discuss here. Since the 2014 Amendment Act, Susan can now also refer the allegation of reckless credit to the NCR. If the NCR finds that it was indeed a case of reckless credit, drastic sanctions will apply. Please discuss these sanctions in detail. You also need to consider; in depth, what the effect of both such potential orders (reckless credit and over-indebtedness) will have on the credit agreement and what effect it will have to both the credit providers and consumer's rights and liabilities in terms of the credit agreement.

STUDY UNIT 10

Unlawful agreements and provisions

Reread the scenario at the beginning of study unit 4 on page 26. Lesedi now wants to know whether the *voetstoots* clause is allowed in terms of the NCA.

OVERVIEW

The NCA provides that certain credit agreements are unlawful in their entirety and that certain credit agreements will qualify as lawful but have unlawful provisions in them. This study unit is of particular importance for purposes of this module, as it modifies the common law regarding permitted clauses and conditions in certain sale agreements.

CONTENTS

- 10.1 UNLAWFUL AGREEMENTS (S 89 OF THE NCA)
- 10.2 EFFECT OF A CONTRACT BEING DECLARED UNLAWFUL (S 89 OF THE NCA)
- 10.3 UNLAWFUL PROVISIONS AND THE EFFECT OF THEIR INCLUSION (S 90 OF THE NCA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- note that section 89 of the NCA dealing with unlawful agreements does not apply to pawn agreements
- set out which credit agreements qualify as being unlawful
- explain why these agreements are unlawful
- set out the consequences of an unlawful credit agreement
- set out which provisions in a credit agreement are unlawful
- explain the consequences of an unlawful provision in a credit agreement

10.1 UNLAWFUL AGREEMENTS (SS 89 OF THE NCA)

unlawful terms
and unlawful
agreements

s 89 not applicable
to pawn
transactions
list of unlawful
agreements

The NCA distinguishes between credit agreements that are unlawful in their entirety (s 89) and credit agreements that are lawful, but contain unlawful provisions (s 90).

Section 89 of the NCA does not apply to pawn transactions.

In terms of the NCA, agreements (other than pre-paid transactions) are unlawful, where, among other things,

- the consumer is a minor, mentally unfit, or subject to a debt administration order, and the administrator has not consented to the agreement,
- the agreement results from negative option marketing,

- the credit provider, who was supposed to register, was not registered as a credit provider in terms of the NCA,
- the credit provider had been ordered to stop offering credit by notice from the NCR or the provincial regulator, and
- if the agreement consisted of split documentation whereby the unlawful provisions are set out in a separate agreement.

dishonesty by the consumer

If the court finds that the consumer induced the credit provider to believe that he/she had capacity to contract, or attempted to conceal the fact that the consumer was under an administration order or similar impediment, the validity of the agreement will not be affected.

10.2 EFFECT OF CONTRACT BEING DECLARED UNLAWFUL (S 89 OF THE NCA)

effect of unlawful agreement

void *ab initio*

In accordance with the Amendment Act 2014, if the court declares a credit agreement unlawful, the court must make a **just and equitable order**, including but not limited to an order that the credit agreement is void *ab initio* (s 89(5)). Before this amendment, the credit provider was obliged to return all money received from the consumer under the agreement, together with interest, and further forfeited its performance to the consumer. This amendment followed the decision of the court in *National Credit Regulator v Opperman and others* 2013 2 SA 1 (CC) that the previous harsh penalty was inconsistent with section 25(1) of the Constitution of South Africa and, therefore, invalid.

10.3 UNLAWFUL PROVISIONS AND THE EFFECT OF THEIR INCLUSION(S 90 OF THE NCA)

The NCA sets out a number of unlawful provisions of credit agreements. We are only mentioning some of the most important prohibitions. These include the following:

list of most important prohibited terms

- any “contracting out” of the NCA, setting aside or overriding any provision of the NCA, waiving a consumer’s right under the NCA, or avoiding a credit provider’s obligation under the NCA,
- an authorisation to the credit provider to do anything that it is unlawful under the NCA,
- a waiver of any common law rights that may be applicable to the agreement and that the Minister has prescribed in the Regulations. The Minister prescribed three rights that may not be waived. However, none of the *naturalia* applicable to contracts of sale and lease has been included in this prescribed list,
- a term that would exempt the credit provider from liability (or limit such liability) for (i) any act, omission or representation by a person acting on behalf of the credit provider or (ii) any guarantee or warranty that would, in the absence of such term, be implied in the credit agreement. Otto (NCA 54) argues that the second provision would refer to warranties that are implied by common law and would preclude the credit provider (as seller) from including a *voetstoots* clause or a *pactum de evictio non praestanda* in the credit agreement,
- any acknowledgement by the consumer that no representations or warranties were made by or on behalf of the credit provider,
- any agreement by the consumer to forfeit money to the credit provider if the consumer seeks lawfully to rescind the agreement,

- the appointment of the credit provider, or a person named by him/her to be the agent of the consumer for any purpose other than that expressly provided for in the NCA, under the agreement,
- any pre-authorisation by the consumer to the credit provider to enter premises for enforcement, granting a power of attorney to the credit provider, signing any enforcement documentation in advance, authorising the credit provider to do anything contrary to the NCA, or consenting to a pre-determined cost of enforcement,
- any agreement by the consumer to deposit with the credit provider or an agent, any identity document, PIN, bank access card or similar payment device, or give authority to a credit provider to use such a document or device on behalf of the consumer, or
- a statement that the interest rate is variable, unless the rate is tied to a fixed reference rate as stipulated in the agreement.

effect of an
unlawful provision
in a credit
agreement

If an agreement contains an unlawful provision, a court may either sever that unlawful provision from the agreement, alter the provision to the extent required to render it lawful if it is reasonable to do so (taking into account the agreement as a whole), or declare the entire agreement unlawful as from the date that the agreement took effect, and make any order which is just and equitable in the particular circumstances (s 90 (4)).

ACTIVITY

Reread the set of facts at the beginning of study unit 4 on page 26 and advise Lesedi on the validity of the *voetstoots* clause.

FEEDBACK

See 10.3 above. A term that would exempt the credit provider from liability (or limit such liability) for any guarantee or warranty that would, in the absence of such term, be implied in the credit agreement, is prohibited in terms of the NCA. In this context, according to Otto (*NCA*) (as well as Kelly-Louw *Consumer credit regulation* 202), the inclusion of a *voetstoots* clause is prohibited. A court may either sever that unlawful provision from the agreement, alter the agreement to the extent required to render it lawful, or declare the entire agreement unlawful as from the date that the agreement took effect. In this factual scenario the court will most probably sever the *voetstoots* clause from the rest of the agreement. Lesedi can, therefore, still hold the credit provider liable for the latent defects.



NB: A *voetstoots* clause is perfectly valid and enforceable in terms of the common law, but in this study unit you learnt that the NCA prohibits certain provisions. Later in this study guide, you will learn that the Consumer Protection Act 68 of 2008 contains similar prohibitions. At first, you have to identify that this agreement is an agreement regulated by the NCA. Is the Consumer Protection Act 68 of 2008 also applicable? Motor Finance can be seen as a supplier of goods, and Lesedi can be seen as a consumer, and this relates to a transaction where “goods” are supplied; but section 5(2)(d) of the Consumer Protection Act 68 of 2008 provides that it does not apply to transactions where the NCA applies to a specific transaction. **Therefore, in this instance, the NCA determines whether a *voetstoots* clause is allowed or not. This will become more dear to you after you have studied study unit 18 below.**

STUDY UNIT 11

Pre-agreement requirements (s 92 of the NCA)

Reread the factual scenario at the beginning of study unit 4 on page 26 . Lesedi wants to know what her pre-contractual rights are in terms of the credit agreement that she has concluded.

OVERVIEW

This constitutes an extremely important section of the NCA. **The requirements with regards to pre-agreements are aimed at avoiding reckless credit and over-indebtedness.** The NCA requires pre-agreement disclosure statements that include the main features of the proposed agreement, and a cost quotation of the credit, which is binding on the credit provider for five days.

CONTENTS

- 11.1 PRE-AGREEMENT DISCLOSURE REQUIREMENTS
- 11.2 FORM OF CREDIT AGREEMENTS (S 93 OF THE NCA)
 - 11.2.1 Small agreements
 - 11.2.2 Intermediate agreements and large agreements
- 11.3 EFFECT OF NON-COMPLIANCE

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- discuss and explain the provisions of the NCA regarding disclosure prior to the conclusion of credit agreements
 - set out, in very broad terms, the provisions in the NCA regarding disclosure for the different forms of credit contracts
 - set out the protection provided to consumers regarding disclosure of the cost of credit in terms of the NCA
-

11.1 PRE-AGREEMENT DISCLOSURE REQUIREMENTS

aim of pre-agreement disclosure

The requirements regarding pre-agreements are aimed at avoiding reckless credit and over-indebtedness. The NCA requires pre-agreement disclosure statements that include the main features of the proposed agreement, and a cost quotation of the credit, which is binding on the credit provider for five business days.

small credit agreements: Form 20

For a small credit agreement, the credit provider must give the consumer a pre-agreement statement and a quotation on the prescribed form. In terms of the published Regulations such statement must be in the format of Form 20 and must contain all of the information required on that form.

large and intermediate agreements: Regulation 31

For large or intermediate agreements, the credit provider must give the consumer a pre-agreement statement in the form of the proposed agreement or in another form, addressing the matters prescribed by the NCA and a quotation on the prescribed form. Regulation 31 prescribes an extensive list of information that must be in the proposed agreement, as discussed below.

content of quotation

In very broad terms, the quotation must set out the following:

- the principal debt, and the proposed distribution of that amount,
- the interest rate and other credit costs,
- the total cost of the agreement, and
- the basis of any costs that may be assessed if the consumer rescinds the contract.

five day period after quotation is presented

For a period of five business days after the date on which a quotation is presented

- in case of a small agreement, at the request of the consumer, the credit provider must enter into the contemplated credit agreement at or below the interest rate or credit cost quoted, subject only to certain exemptions, and
- with regard to an intermediate agreement, the credit provider must, at the request of the consumer, enter into the contemplated credit agreement at an interest rate or credit cost that is at or below the interest rate or credit cost quoted; or that is higher than the interest rate or credit cost quoted by a margin no greater than the difference between the respective prevailing bank rates on the date of the quote, and the date the agreement is made, subject to certain exemptions.

These provisions do not apply where the credit provider has only indicated to a prospective consumer a willingness to enter into a hypothetical future credit agreement generally or up to a specified maximum value.

11.2 FORM OF CREDIT AGREEMENTS (S 93 OF THE NCA)

11.2.1 Small agreements

Small agreements — the form of credit agreements is prescribed in Form 20.

FORM 20

PRE-AGREEMENT STATEMENT AND QUOTATION FOR SMALL CREDIT AGREEMENTS in terms of section 92 of the National Credit Act 34 of 2005

NCR number: Form 20	
Name of credit provider:	Name of consumer:
Physical address:	Physical address:
Contact number of credit provider:	Contact number of consumer:
Date: Id No/CIPRO/registration number:	

SUMMARY

Credit advanced/value of goods		Instalment, including interest, fees & credit life insurance,	
or services provided on credit	R	Excluding optional insurance	R
Deposit, to be paid & deducted	R	Number of instalments	
Instalments specify: <i>monthly/ payable weekly/other</i>		Total of all instalments, including interest, fees & credit life insurance, excluding optional insurance	
R	Initiation fee, charged up front:	R	Annual Interest Rate
%	Monthly service fee, included in instalment	R	Credit life insurance, included in instalment
R			

ADDITIONAL INFORMATION

PART A: Additional charges, per section 102(b)–(f)

Total of additional charges, which will be included in the account, and have been included in the calculation of the instalment:	R
Additional charges, per section 102(b) to (g)	

PART B: Optional items

OPTIONAL ITEMS, WHICH WILL BE ADDED TO INSTALMENT	
Additional monthly premium for optional insurance	R
Description of optional insurance:	

PART C: Security provided

PART D: Repayment arrangements

<i>{Description of security required & of conditions under which possession would occur}</i>	<i>{Information regarding payments, including method of payment, date of the first payment and date of last payment}</i>

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format and language

cost of credit on first page of agreement if no quotation is used

content required

cost of credit

LPL4801/3

- All the information must be clear, concise and easy to understand
- The credit agreement must be set out in a simple and plain language and must be given in a simple and plain language
- The lettering must be clear that it remains a credit agreement
- The lettering must be clear that it remains a credit agreement
- If the quotation is not a credit agreement, it must be clear that it is not a credit agreement
- In the Cost of Credit, the prescribed information must be given
- Intermediate information must be applicable: the registration must be clear

It is obviously clear that the total cost of credit must be reflected in the information.

- A detailed breakdown of the information:
 - (i) The information must be in the form of a table, the principal information must be (aa) (bb) (cc) (dd)

cost of credit
on first page of
agreement if no
quotation is used

content required

cost of credit

LPL4801/3

- The credit agreement is set out in more detail in the prospectus, which must be given to investors.
 - The lettering must be in a font that it remains legible.
 - The lettering must be in a font that it remains legible.
 - If the quotation is not in a font that is required, the agreement of the issuer is required.
 - In the Cost of Credit, the issuer must prescribe in the prospectus the cost of credit.
 - Intermediate costs are applicable: the registration fee is applicable.
- It is obviously clear that the total cost of credit must be reflected in the prospectus.
- A detailed breakdown of the information:
 - (i) The issuer must provide in the prospectus the principal information:
 - (aa) The issuer must provide in the prospectus the principal information:
 - (bb) The issuer must provide in the prospectus the principal information:
 - (cc) The issuer must provide in the prospectus the principal information:
 - (dd) The issuer must provide in the prospectus the principal information:

content required

cost of credit

LPL4801/3

cost of credit

LPL4801/3

- [illegible]

LPL4801/3

- A detailed breakdown of the information:
 - (i) The total cost of the project in the first year of the project
 - (ii) The total cost of the project in the second year of the project
 - (iii) The total cost of the project in the third year of the project
 - (iv) The total cost of the project in the fourth year of the project
 - (v) The total cost of the project in the fifth year of the project
 - (vi) The total cost of the project in the sixth year of the project
 - (vii) The total cost of the project in the seventh year of the project
 - (viii) The total cost of the project in the eighth year of the project
 - (ix) The total cost of the project in the ninth year of the project
 - (x) The total cost of the project in the tenth year of the project

- (i) The
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(aa)
(bb)

(cc)
(dd)

- (ii) If the amount deferred in terms of the credit agreement is not ascertainable, the maximum amount deferrable.
 - (iii) The proposed distribution of the principal debt and to whom each amount is to be paid.
 - (iv) If the distribution of the amount deferred in terms of the credit agreement is subject to conditions, such conditions.
 - (v) If the credit is provided by the supplier of goods, immovable property or services, the cash price of such goods, immovable property or services.
 - (vi) The amount of any initiation fee.
 - (vii) The option of having the initiation fee paid upfront.
 - (viii) The amount of any service fee.
 - (ix) The basis upon which the service fee is payable, if annual, an indication that it will be added to the outstanding balance.
 - (x) The annual rate at which interest is levied in respect of the agreement, expressed as a percentage and calculated in accordance with Regulation 40.
 - (xi) The rand amount of interest charges over the term of the agreement, based on the rate at inception of the agreement in the case of a variable interest rate.
 - (xii) Whether the interest rate is fixed or variable and, if variable, the reference rate to which the interest rate is fixed.
 - (xiii) The nature of any insurance contract entered into, pursuant to section 106 of the NCA.
 - (xiv) The nature of any additional insurance contract entered into, pursuant to section 106 of the Act.
 - (xv) The cost to the consumer of the insurance provided.
 - (xvi) The amount of any fee, commission, remuneration or benefit receivable by the credit provider or any other person in relation to the insurance
 - (xvii) The consumer's right to waive a policy proposed by the credit provider and substitute a policy of the consumer's own choice, subject to section 106 of the NCA.
 - (xviii) The cost of additional insurance and whether such cost is charged by monthly or annual premiums.
 - (xix) The amount of any default administration charges, which may be imposed on default by the consumer, or the manner in which such charges will be calculated.
 - (xx) The circumstances in which such default administration charges will be imposed.
 - (xxi) The amount of any collection costs that may be charged in respect of the enforcement of a consumer's monetary obligations in terms of the credit agreement, or the manner in which such costs will be calculated.
 - (xxii) The circumstances in which such collection costs will be charged.
- All fees levied by the credit provider must be disclosed in the agreement, together with the date on which they will be levied and any other information relating to the charging of such fees.
 - If the amounts that have to be disclosed are not ascertainable, the credit provider must disclose such amounts based on estimated information, provided that such estimates are reasonable in the circumstances of the proposed credit agreement.
 - If the amounts disclosed are based on estimated information, the credit provider must clearly disclose this to the consumer by indicating which amounts are based on estimated information and disclosing such estimated information.

estimated fees

variable interest rates	• The sum of the amounts disclosed in respect of the initiation fee, service fee, interest and cost of credit insurance, provided that, to the extent that any amount is not ascertainable, the credit provider must clearly indicate the method of calculating the amount. • The sum of the principal debt, initiation fee, service fee, interest and cost of credit insurance, provided that, to the extent that any amount is not ascertainable, the credit provider must clearly indicate the method of calculating the amount. • If the interest rate or credit fees and charges that are payable in terms of the agreement may be changed, a statement to that effect must be disclosed, together with the manner and the time frames within which the consumer must be notified of any changes to the interest rate or fees and charges in accordance with section 104 of the NCA.
repayments	• The amount of the repayment(s) or, if not a fixed or determinable amount, the method of calculating the repayment amount. • If fixed or determinable: (i) the number of repayments, (ii) the frequency of the repayments, (iii) when the first repayment is due, (iv) if all repayment amounts are not equal, how will they differ, (v) the total amount of all repayments, and (vi) the term or duration of the agreement.
statements of account	• The frequency with which the consumer will be provided with a statement of account. • The manner in which the statement will be provided.
details of security of the loan	• If the credit provider has taken any form of security or mortgage in respect of the repayment of the loan, a description of the security or asset mortgaged.
default provisions	• Details of the implications of default by the consumer. • Details of the process that will be followed on default.
reporting procedures and consumer's right to view reports	• A statement notifying the consumer as comprehensively as reasonably possible about the information sharing practices in credit reporting, containing the following information: (i) confirmation by the consumer that the credit provider may transmit to the credit bureau, data about the application, opening and termination of an account, (ii) the fact that information on non-compliance with terms and conditions of the credit agreement is transferred to the credit bureau, (iii) the name and contact details of the credit bureau or credit bureaux to which the information is transferred, and (iv) the fact that the credit bureau provides a credit profile and possibly a credit score on creditworthiness of the person subject to the record. • A statement of the consumer's right to (i) contact the credit bureau, (ii) have the credit record disclosed, and (iii) correct inaccurate information.
section 121 and section 122 remedy: termination of agreement by consumer consumer's right to settle agreement	• If applicable, the consumer's right to rescind the credit agreement in terms of section 121 of the NCA (as discussed in study unit 14 below). • The right of the consumer to terminate the credit agreement in terms of section 122 of the NCA (as discussed in study unit 14 below). • A statement of the consumer's or guarantor's right to settle the agreement, together with an explanation of the manner in which the amount required to settle the credit agreement is calculated in terms of section 125 of the NCA, or to make

	prepayments of amounts in terms of section 126 of the NCA (as discussed in study unit 15 below).
section 123 of the NCA	• The right of the credit provider to terminate the credit agreement in terms of section 123 of the NCA (as discussed in study unit 14 below).
disputes	• A statement of the consumer's right to (i) resolve a complaint by way of alternative dispute resolution, (ii) file a complaint with the NCR, or (iii) make an application to the Tribunal. • Contact details of the National Credit Regulator and the Tribunal and, in the case of the credit provider being a regulated financial institution, the contact details of the adjudicator responsible for that institution.
location of goods, surrender of goods, reporting of theft	• If applicable, the consumer's obligations to disclose the location of goods in terms of section 97 of the NCA. • If applicable, the consumer's right to surrender goods in terms of section 127 of the Act together with a description of the process to be followed in surrendering goods in terms of section 127 of the NCA. • If applicable and as prescribed in terms of section 94 of the NCA, the contact number at which a consumer may report the loss or theft of a card, personal identification number or other device, and the extent of the consumer's liability for purchases charged to that facility after the card, personal identification code or number or other device has been lost or stolen.
consumer's right to apply to debt counsellor	• A statement of the consumer's right to apply to a debt counsellor to be declared over-indebted in terms of section 86 of the NCA, and the process to be followed.

11.3 EFFECT OF NON-COMPLIANCE

effect of non-disclosure?	In the instance of non-compliance of the above requirements, the validity of the agreement is not affected (Kelly-Louw <i>Consumer credit regulation</i> 206). However, the credit provider may receive a substantial fine (s 151; Kelly-Louw <i>Consumer credit regulation</i> 206) and risks cancellation of his/her/its registration with the NCR (s 57; Kelly-Louw <i>Consumer credit regulation</i> 206).
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ACTIVITY

Reread the scenario at the beginning of study unit 4 on page 26.

Please advise Lesedi on the following:

- whether the NCA is applicable to the agreement.
- his pre-contractual disclosure rights against Motor Finance (a division of SA Bank Ltd).

FEEDBACK

The logical starting point, before you attempt to answer this question, is to identify whether the NCA is applicable in this instance. After you have done this, you must identify the size of the agreement to determine the pre-agreement requirements, in order to identify the type of disclosure needed. Then briefly discuss the necessary disclosure requirements; as well as the effect of non-compliance.

STUDY UNIT 12

Rate of interest, fees and charges (s 100 of the NCA)

Anneke has bought a new hi-fi set from Music World. The purchase price is R5 000, which she will pay off in 24 monthly instalments. An interest rate of 30% per annum is payable on the outstanding amount. Anneke is told by a friend that such an interest rate is quite steep. Two days after signing the agreement she comes to see you as her attorney and wants to know from you whether this high interest rate is allowed in terms of the NCA.

OVERVIEW

This section deals with the consumer's liability for interest, charges and fees payable to the credit provider. These fees are strictly controlled in terms of the NCA. It is no longer possible for credit providers to charge extraordinarily high interest rates. The seller's contractual freedom is curbed to a certain extent.

CONTENTS

- 12.1 MAXIMUM RATE OF INTEREST, FEES AND CHARGES (SS100–105 OF THE NCA)
- 12.2 CREDIT INSURANCE (S 106 OF THE NCA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain which charges are prohibited
- explain the NCA's provisions regarding the cost of credit
- explain the NCA's provisions regarding the levying of interest
- explain the NCA's provisions regarding credit insurance

12.1 MAXIMUM RATE OF INTEREST, FEES AND CHARGES (SS 100–105 OF THE NCA)

maximum interest rates, fees and charges:
only applicable to natural persons

This part of the NCA is only applicable to consumers who are natural persons. Where the consumer is a small juristic person, these restraints do not apply at all (see s 6(d) of the NCA).

regulation of fees

The NCA is prescriptive regarding the fees that a credit provider may charge a consumer: **A credit agreement may not require payment by the consumer of any money or other consideration except the principal debt, initiation fee, service fees, interest and cost of credit insurance, default administration charges and collection costs.** The following definitions are provided in section 1 of the NCA:

definition of principal debt

“Principal debt” is the amount deferred in terms of the agreement (e.g., the cash amount lent to the consumer or the cash price of the thing sold in terms of an instalment agreement), but the credit provider **may**, in the case of **instalment**

agreements, leases, mortgage agreements and secured loans, include the following in the principal debt:

- (a) the initiation fee,
- (b) the cost of an extended warranty,
- (c) delivery, installation and initial fuelling charges,
- (d) connection fees, levies or charges, and
- (e) taxes or licence or registration fees; and credit insurance premiums (ss 101 and 102 of the NCA and *Otto NCA* 90).

These items should obviously only be added to the principal debt if the credit provider has himself/itself paid for these expenses in advance, or will pay for the same on behalf of the consumer (*Otto NCA* 91).



initiation fee

EXAMPLE

George and Ezra buy a new house and register a first mortgage bond over the house in favour of B Bank. The loan amount is R300 000, which equals the cost of the house. However, an additional initiation fee of R5 700 is charged by the bank, together with the bond registration costs of R3 700. B Bank can pay this in advance on behalf of George and Ezra, resulting in the principal debt now being R309 400.

- An “initiation fee” is defined as meaning “a fee in respect of costs of initiating a credit agreement, and—(a) charged to the consumer by the credit provider; or (b) paid to the credit provider by the consumer upon entering into the credit agreement”.



service fee

EXAMPLE

When buying a motor vehicle on credit, or when entering into a mortgage loan agreement with a bank, the credit provider usually charges an initiation fee for the administrative costs pertaining to the agreement.

- The NCA defines a “service fee” as “a fee that may be charged periodically by a credit provider in connection with the routine administration cost of maintaining a credit agreement”. The Regulations set the maximum monthly service fee for a credit agreement at R50.



interest rates

EXAMPLE

When entering into a mortgage loan agreement with a bank, the bank usually charges a monthly amount as service fees.

RR: “repo rate”

- In terms of the Regulations, the maximum interest rate that can be charged for a credit agreement is calculated according to a formula where RR is the reference rate, being the ruling South Africa Reserve Bank Repurchase Rate (the “**repo rate**”), as at the time that the credit agreement is entered into.

**do not confuse
repo rate with
prime rate**

In simple terms, this is the interest rate in terms of which the Reserve Bank lends money to the banks. Do not confuse this with “**prime rate**”, as this refers to the reference rate that the banks charge the public, when members of the public borrow money from the banks. The term originally indicated the interest rate at which banks lent to favoured customers with good credit standing, but this is no longer always the case. Some variable interest rates may be expressed as a percentage above or below prime rate. For instance, the bank may lend you money at prime plus 2%, and so on.



EXAMPLE

At the time of writing, the RR rate was 8% per annum, while the prime rate was set at 11.50% per annum.

default
administration
charge

- “Default administration charge” is defined to mean “a charge that may be imposed by a credit provider to cover administration costs incurred as a result of a consumer defaulting on an obligation under a credit agreement”. In terms of the Regulations, default administration charges are limited to the “amount payable in respect of a registered letter of demand in an undefended action in terms of the Magistrates’ Court Act 32 of 1944, in addition to any reasonable and necessary expenses incurred to deliver such letter”.

collection costs

- “Collection costs” mean an amount that may be charged by a credit provider in respect of enforcement of a consumer’s monetary obligations under a credit agreement, but does not include a default administration charge. In terms of the Regulations, “collection costs may not exceed the costs incurred by the credit provider in collecting the debt (a) to the extent limited by Part C of Chapter 6 (Debt enforcement by repossession or judgment) of the NCA and (b) in terms of the Supreme Court Act 59 of 1959, the Magistrates’ Court Act 32 of 1944, the Attorneys Act 53 of 1979 or the Debt Collector’s Act 114 of 1998” as applicable.

statutory *in duplum*
rule

In terms of section 103(5) of the NCA, the aggregate of the interest, initiation fee, service fees, credit insurance, default administration charges and collection costs that accrue during the time of a consumer’s default may not exceed the **unpaid balance of the principle debt** at the time of the default. This provision can be seen as an extension and codification of the common law *in duplum* rule. The common law rule states that arrear and unpaid interest on a debt ceases to accumulate once it reaches the amount of the **capital amount**. In other words, the outstanding balance (capital plus interest) **cannot exceed double the amount of the capital**.

In terms of the common law the *in duplum* rule operates as a moratorium, because as soon as the debtor makes payments reducing the balance to less than double the capital amount, interest accumulates until it once again equals the amount of the outstanding capital.

court’s
interpretation of
section 103(5) of
the NCA

In *National Credit Regulator v Nedbank Ltd* 2011 3 SA 581 (SCA), the court held that section 103(5) of the NCA does not merely provide for a moratorium on payments while the buyer is in default. The court held that once a consumer defaults with his scheduled repayments, and the total charges referred to in section 103(5) of the NCA equal in aggregate the amount of the unpaid balance, **no further charges or interest may be levied**. This is therefore a clear distinction from the common law principle. This means that the credit provider cannot levy any further interest or charges, even where the consumer makes further payments reducing the outstanding balance.

summons and *in
duplum*

The Constitutional Court has further made an important decision regarding the *in duplum* rule, namely, that when summons is issued in a litigation case, the *in duplum* rule is not suspended (*Paulsen* case). The NCA was, however, not applicable to the agreement before the court. Before this Constitutional Court ruling, when a summons was issued, interest could accumulate again, beyond the outstanding capital amount.

The Regulations prescribe the following maximum interest rates and fees:

Maximum prescribed interest and initiation fees

- (1) The following maximum rates of interest will apply:

Table A: Maximum Prescribed Interest Rates

Subsector	Maximum Prescribed Interest Rate
Mortgage agreements	RR + 12% per year
Credit facilities	RR + 14% per year
Unsecured credit transactions	RR + 21% per year
Developmental credit agreements for the development of a small business and for low income housing (unsecured)	RR + 27% per year

Short-term credit transactions	5% per month on the first loan and 3% per month on subsequent loans within a calendar year.
Other credit agreements	RR + 17% per year
Incidental credit agreements	2% per month

Where,

- (a) RR indicates the reference rate, being the ruling SA Reserve Bank Repurchase Rate, and
- (b) the interest rate on short-term credit transactions and incidental credit agreements must be disclosed as a monthly interest rate, in such disclosure as is required by the NCA and these regulations.

(2) The following maximum limits will apply to initiation fees:

Table B: Maximum Initiation Fee

Subsector	Maximum Initiation Fee
Mortgage agreements	(a) R1 100 per credit agreement, plus 10% of the amount of the agreement in excess of R10 000 (b) But never to exceed R5 250.
Credit facilities	(a) R165 per credit agreement, plus 10% of the amount of the agreement in excess of R1 000 (b) But never to exceed R1 050.
Unsecured credit transactions	(a) R165 per credit agreement, plus 10% of the amount of the agreement in excess of R1 000 (b) But never to exceed R1 050.

Developmental credit agreements for the development of a small business	(a) R275 per credit agreement, plus, 10% of the amount of the agreement in excess of R1 000 (b) But never to exceed R2 600.
Developmental credit agreements for low income housing (unsecured)	(a) R550 per credit agreement, plus, 10% of the amount of the agreement in excess of R1 000 (b) But never to exceed R2 600.
Short-term credit transactions	(a) R165 per credit agreement, plus, 10% of the amount of the agreement in excess of R1 000 (b) But never to exceed R1 050.
Other credit agreements	(a) R165 per credit agreement, plus, 10% of the amount of the agreement in excess of R1 000 (b) But never to exceed R1 050.
Incidental credit agreements	Nil

(Where the amount of the agreement is the amount deferred in terms of the agreement.)

12.2 CREDIT INSURANCE (S 106 OF THE NCA)

insurance for
security granted to
credit provider

A credit provider may require the consumer to maintain sufficient credit, life insurance or cover against loss or damage to property, to be pledged as security to the credit provider.

In addition to the insurance referred to above, a credit provider may offer a consumer optional insurance in relation to the obligations of the consumer under the credit agreement or relating to the possession, use, ownership or benefits of the goods or services supplied in terms of the credit agreement.

A credit provider must not offer or demand that the consumer purchase or maintain insurance that is unreasonable or at a cost to the consumer that is unreasonable, having regard to the actual risk and liabilities involved in the credit agreement.

The Minister may, in consultation with the Minister of Finance, prescribe the limit in respect of the cost of credit insurance that a credit provider may charge a consumer (s 106 (8)). At the time of writing this, the Minister has in fact published draft regulations in the *Government Gazette* in November 2015, which propose to limit and regulate insurance costs (GN1104 GG 39407)

consumer's policy
of choice

A credit provider must provide the consumer with the right to waive a proposed policy and substitute a policy of his/her own choice and inform him/her of that right. A policy offered by the credit provider must provide for the payment of premiums for the duration of the credit agreement on a monthly basis in the case of small and intermediate agreements and on either a monthly or annual basis in the case of large agreements.

Where a credit provider provides a policy of insurance to a consumer in respect of a credit agreement, the credit provider must not add any surcharge, fee or additional

premium above the actual cost of insurance and must disclose to the consumer the cost of the insurance supplied and the amount of any fee, commission, remuneration or benefit received by the credit provider. Furthermore, the terms and conditions of the policy must be explained to the consumer and the credit provider may only be a beneficiary under the policy up to the settlement value on the event of the insured contingency.

Where the consumer exercises his/her right to substitute an alternative policy, the credit provider may require the consumer to provide a valid direction permitting the credit provider to pay any premiums in terms of that policy and to recover such premiums paid from the consumer and a valid direction naming the credit provider as a beneficiary under the policy to the extent of the settlement value on the event of an insured contingency and requiring the insurer to settle the consumer's obligation under the credit agreement, as a first charge against the proceeds of that policy.

ACTIVITY

Reread the factual scenario at the beginning of this study unit on page 65. Then advise Anneke whether or not she has a remedy.

FEEDBACK

Please see 12.1 above.



HINT: You will first have to ascertain whether the NCA is applicable to this transaction. If you are satisfied, you then have to identify the type of credit transaction. After you have done this, you may look at the interest rate table to identify the highest interest rate that can be charged. It seems like the interest rate is within the accepted norm.

STUDY UNIT 13

Alteration of credit agreements (ss 116–120 of the NCA)

Grace receives an SMS on her cell phone that Better Clothing has extended her credit limit from R1 000 to R5 000. Are these practices allowed in terms of the NCA?

OVERVIEW

The NCA's protection extends to controlling amendments effected to signed credit agreements.

CONTENTS

- 13.1 GENERAL
- 13.2 CREDIT FACILITY (S 118 OF THE NCA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain the NCA's provisions regarding amendments to signed credit agreements
 - explain the NCA's provisions regarding reductions to credit limits in terms of a credit facility
 - explain the NCA's provisions regarding increases in credit limits in terms of a credit facility
-

13.1 GENERAL

alterations to credit agreements

Alterations made to a credit agreement after it has been signed are void, unless the change reduces the consumer's liability, or the consumer ratifies the change by either signing or initialling next to the amendment.

The credit provider and a consumer may also agree to alter the terms of a credit agreement.

13.2 CREDIT FACILITY (S 118 OF THE NCA)

reducing credit limit any time by consumer

A consumer may at any time, by written notice to the credit provider, request that the credit limit under his/her facility be reduced, and may stipulate a maximum credit limit. The credit provider must confirm in writing the new credit limit, which must not exceed the stipulated amount, and state the date on which the new limit will take effect.

reducing or
extending the
credit limit by the
credit provider

The credit provider may, subject to the protection against discrimination in respect of credit and the consumer's rights, by written notice to the consumer, reduce the consumer's credit limit.

The credit provider may not increase a credit limit under a credit facility unless the increase is temporary or the consumer agrees to the increase either orally or in writing.

There is one exception to the above discussed limitation on increases to credit limits. If the consumer, at the time of applying for the credit facility, or in writing at a later date, has specifically requested the option of having the credit limit automatically increased from time to time, the credit provider may unilaterally increase the credit limit under that credit facility at stipulated intervals.

ACTIVITY

1. Explain the consequences to amending a credit agreement after it has been concluded.
2. Reread the factual scenario at the beginning of this study unit on page 71. Advise Grace.

FEEDBACK

- (1) See 13.1 above. It will be null and void, unless ratified by signature by the consumer, or agreed upon by both parties.
 - (2) See 13.2 above. Note the different rules applicable to the consumer on the one hand, and the credit provider on the other.
-

STUDY UNIT 14

Rescission and termination of credit agreements (ss 121–123 of the NCA)

Joshua has bought a new vacuum cleaner from Swoop Scoop, a company selling vacuum cleaners door-to-door. Joshua and the agent of Swoop Scoop agree that the vacuum cleaner will be paid off in 12 equal instalments, which will include interest at 8% per annum on the outstanding amount. Joshua realises the next day that he has paid far too much for the vacuum cleaner, as he has now seen the same one at a popular retailer for far less. He, therefore, wants to know whether he can escape liability without breaching the agreement.

OVERVIEW

In this study unit you will learn that the NCA protects consumers in so far as they have a “cooling off” period regarding certain credit agreements, which means that a consumer sometimes has the opportunity to change his/her mind about concluding a credit agreement. This provision is a drastic amendment to the normal common law rules relating to the law of contracts. Normally, parties are bound to a contract they have voluntarily and willingly entered into. A similar cooling-off right is also created by the ALA (see study unit 1 above) and the Consumer Protection Act 68 of 2008 (see study unit 19 par 19.2 below).

CONTENTS

- 14.1 CONSUMER’S RIGHT TO RESCIND AND TERMINATE AN AGREEMENT (SS 121 & 122 OF THE NCA)
- 14.2 TERMINATION OF AN AGREEMENT BY THE CREDIT PROVIDER (S 123 OF THE NCA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain the consumer’s right to resile from a credit agreement in terms of the “cooling off” period
- explain the consumer’s right to terminate a credit agreement in general
- explain the credit provider’s right to terminate a credit agreement

14.1 CONSUMER’S RIGHT TO RESCIND AND TERMINATE AN AGREEMENT (SS 121 AND 122 OF THE NCA)

section 121:
consumer’s
cooling-off
right: instalment
contracts and
leases

Section 121 of the NCA makes provision for a “cooling-off” period regarding certain credit agreements: The consumer may terminate an **instalment contract** or **lease of goods** concluded at **any location other than the registered business premises of the credit provider** within **five business days** after concluding the agreement

by **delivering a notice** to the credit provider, and **tendering any goods** or the return of money to the credit provider or paying in full for any services received by the consumer. This section does not apply to non-returnable goods.

section 122:
consumer's
termination of any
other contract

A **consumer may terminate any other credit agreement at any time** by paying, with or without advance notice to the credit provider, the settlement amount or, in the case of an instalment contract and secured loans or leases, by surrendering the goods that are the subject of the agreement, or by paying the remaining amount demanded if the goods are returned and sold by the credit provider and the amount realised does not satisfy the outstanding debt.

14.2 TERMINATION OF AN AGREEMENT BY THE CREDIT PROVIDER (S 123 OF THE NCA)

section 123: credit
provider's right of
termination

no automatic right
of cancellation

Whether the credit provider is entitled to cancel or terminate the credit agreement will be determined by the general principles of the law of contract. The contract must either contain a clause entitling the credit provider to cancel the agreement in the event of a particular breach of the contract, or the breach must be material to the contract. In *ABSA Bank Ltd v Havenga* 2010 5 SA 533 (GNP) the court held that section 123 of the NCA prescribes further procedures that the credit provider must follow where the credit provider is entitled to cancel the agreement. As such, section 123 of the NCA does not afford the credit provider with a right of cancellation, but merely prescribes the necessary procedures that the credit provider must follow when he/she is entitled to cancel the agreement.

steps that credit
provider must
take in event of
cancellation

Where the credit provider has a right to cancel the agreement, section 123(2) of the NCA provides that the credit provider must take the steps set out in Part C of Chapter 6 of the NCA to enforce and terminate that agreement. The enforcement procedures contained in Part C of Chapter 6 of the NCA are discussed in study unit 16 below.

consumer's right
to re-instate the
agreement

Subject to certain restrictions, the consumer may re-instate any agreement that is in default by paying all amounts that are overdue together with default charges and reasonable costs that the credit provider may have incurred in enforcing the agreement.

In the case of a credit facility, the credit provider may suspend that credit facility if a consumer is in default under the agreement, or close that credit facility by giving written notice to the consumer at least ten business days before the credit facility will be closed or suspended.

The credit facility remains in effect to the extent necessary until the consumer has paid all amounts lawfully charged to that account.

The credit provider may not close or terminate a credit facility solely because:

- the credit provider has declined a consumer's request to increase the credit limit,
- the consumer has declined the credit provider's offer to increase the credit limit,
- the consumer has requested a reduction in the credit limit, unless that reduction would reduce the credit limit to a level at which the credit provider does not customarily offer or establish credit facilities, or
- the card, personal identification code or number, or other identification device used to access that facility has expired.

STUDY UNIT 14: Rescission and termination of credit agreements (ss 121–123 of the NCA)

Importantly, the unilateral termination of a credit agreement by the credit provider does not suspend or terminate any continuing or remaining obligations of the credit provider to the consumer under that agreement or in terms of the NCA.

ACTIVITY

Please reread the factual scenario at the beginning of this study unit on page 73. Then advise Joshua.

FEEDBACK

Identify whether the NCA is applicable to this scenario, and then determine whether Joshua can invoke section 121 of the NCA (please refer to par 14.1 above). Look carefully at the scenario to determine whether ALL the requirements of section 121 of the NCA have been complied with.

STUDY UNIT 15

Early payments and early settlement

Sibongile receives a good bonus from her employer and decides that she is going to pay it into her instalment contract account towards her car. The bank informs her that she is not entitled to make extra payments and that she has to pay the purchase price in the amount of instalments as determined in the agreement. She wants to know if she has any remedies at her disposal.

OVERVIEW

In this section you will learn that a consumer may pre-pay or pay his/her debt in terms of a credit agreement fully at any time.

CONTENTS

- 15.1 EARLY PAYMENTS (SS 125 & 126 OF THE NCA)
- 15.2 PAYMENTS UNDER PRESCRIBED CLAIMS (S 126B OF THE NCA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain the consumer's right to pre-pay any amount owed in terms of a credit agreement
 - explain the prohibition of payments in respect of prescribed claims
-

15.1 EARLY PAYMENTS (SS 125 AND 126 OF THE NCA)

early payments and settlements

The NCA allows the consumer to

- pre-pay any amount owing at any time, and
- to settle the account in full at any time.

penalty interest

With **large agreements**, a termination or penalty charge may be levied at either a prescribed charge or, if no charge has been prescribed, at a charge equal to no more than the interest that would have been payable under the agreement for a period equal to three months. However, if the consumer gives three months' notice, no penalty may be charged.



EXAMPLE

If the consumer gives less than three months' notice, penalty interest will only be charged for the three months minus the months that notice was in fact given. (For example, the banks always charge a termination fee or "penalty interest" when a client pays and cancels a mortgage bond (which is always a large agreement) without giving three months' notice. For example, if a consumer gives one month's notice to the bank that his mortgage bond should be cancelled, he/she will have to pay two months' penalty interest.)

allocation of
payments by
consumer under
credit agreements

The NCA prescribes the manner in which a credit provider must deal with any payment or prepayment made by a consumer under a credit agreement. The credit provider must credit each payment made under a credit agreement to the consumer as of the date of receipt of the payment in the following manner:

- at first, to satisfy any due or unpaid interest charges,
- secondly, to satisfy any due or unpaid fees or charges, and
- thirdly, to reduce the amount of the principal debt.

15.2 PAYMENTS UNDER PRESCRIBED CLAIMS (S 126B OF THE NCA)

s 126B of the NCA

In terms of this section, a prescribed debt may not be sold and no prescribed debt may be claimed or reactivated. This is to stop the practice where creditors demand debtors to pay R1 towards a prescribed debt. Upon payment of any amount, the claim revives in terms of the common law. However, this practice is no longer allowed under the NCA.

ACTIVITY

Reread the scenario at the beginning of this study unit on page 76. Then give advice to Sibongile.

FEEDBACK

See 15.1 above. According to section 125 and 126 of the NCA, a consumer may settle the full outstanding amount in terms of a credit agreement at any time, or alternatively make additional payments at any time.

STUDY UNIT 16

Enforcement of credit agreement

Whifi Corporation seeks to enforce an agreement against one of its customers, who bought a new fridge and failed to pay her last two instalments. The agreement is governed by the NCA. They have instructed their attorneys to issue summons immediately, but were advised that the consumer first needs to receive a notice of default.

OVERVIEW

In this section you will learn what procedures must be followed by a credit provider to enforce a credit agreement.

CONTENTS

- 16.1 ENFORCEMENT (SS 129 & 130 OF THE NCA)
- 16.2 SEARCHES (SS 153–155 OF THE NCA)
- 16.3 DISPUTE RESOLUTION (SS 134 & 135 OF THE NCA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain the credit provider's rights in terms of the NCA to commence legal proceedings to enforce a credit agreement
 - set out the procedures to be followed prior to debt enforcement
 - briefly explain the dispute resolution alternative in terms of the NCA
-

16.1 ENFORCEMENT (SS 129 AND 130 OF THE NCA)

Under the common law, the credit provider has certain remedies where the consumer has breached the contract, including a claim for specific performance or cancellation and damages. However, the NCA prescribes further requirements before a credit provider can enforce these remedies. For the purposes of this module, the most relevant requirements are dealt with below.

formal procedures when credit provider enforces credit agreement: section 129 of the NCA

When a consumer is in default under the credit agreement and the credit provider wants to enforce the debt by means of legal action, the credit provider must deliver a section 129 notice to the consumer, thereby drawing the **default to the attention of the consumer** in writing, and propose that the **consumer refer the credit agreement to a debt counsellor**, alternative dispute resolution agent, consumer court or an ombudsman with jurisdiction. In terms of section 129(3) of the NCA, prior to cancellation by the credit provider, the consumer is entitled to pay all the outstanding amounts plus any additional default charges in order to “save” the agreement.

In terms of section 130(1)(a) of the NCA, the credit provider may not enforce a credit agreement unless the consumer has been in default for at least 20 business days and at least 10 business days have lapsed since the credit provider delivered the section 129 notice. These two periods may run concurrently. In *National Credit Regulator v Nedbank Ltd* 2011 3 SA 581 (SCA) the court held that the section 129 notice is mandatory and, therefore, a requirement for enforcement of the debt. However, it was recently decided that a claim will not prescribe, or be deemed void, if summons was issued before prescription of the claim, but section 129 of the NCA was not adhered to (*Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA)).

method of delivery of notice

Section 129(5) of the NCA (as amended) prescribes the particular method for delivery of the notice. This amendment follows a line of contradictory case decisions following the prior version where no method of delivery was prescribed. (See, for instance, *Kubanya v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).)

A consumer must choose between registered mail and physical delivery. If he/she chooses registered mail, written confirmation by the postal service or its authorised agent of delivery to the relevant post office or postal agency will suffice.

notice not required in certain circumstances

It should be noted that section 129(1) of the NCA would not be applicable to a credit agreement where the agreement is subject to a debt restructuring order or court proceedings that may result in a debt-restructuring order. If the restructuring order has been granted, the credit provider cannot enforce the agreement as long as the consumer makes the payments as set out in the order. **If the consumer defaults in terms of the order, the credit provider may enforce the credit agreement without delivering a section 129 notice** (*Otto NCA* 113; *Ferris v First Rand Bank Ltd* and 2014 3 SA 39 (CC)).

effect on debt review

If a credit provider has sent a section 129 notice to the consumer in the prescribed manner before the consumer initiates a debt restructuring application, the consumer would not be able to apply for a debt restructuring order in respect of that particular credit agreement (s 129(1)(a) read with s 86(2) as interpreted by the court in *National Credit Regulator v Nedbank supra*). However, remember that the courts have the power to relieve debt and to declare credit agreements reckless. Please refer back to study unit 9, dealing with debt restructuring orders.

16.2 SEARCHES (SS 153–155 OF THE NCA)

searches by police officers

A police officer or an inspector appointed in terms of the NCA may be granted authority to enter and search any premises in terms of a warrant issued by a judge or magistrate. The NCA circumscribes the entry and search procedures.

16.3 DISPUTE RESOLUTION (SS 134 AND 135 OF THE NCA)

dispute resolution

Ombudsmen, consumer courts and alternative dispute resolution agents may hear matters arising from the NCA. Any person, not only the parties to a credit agreement, may initiate a complaint to the NCR. The NCR may also initiate a complaint in its own name, to the Tribunal. The 2014 Amendment Act also introduced “alternative dispute resolution agents” to assist in dispute resolutions.

The NCR has the power to refer any matter to the National Prosecuting Authority if it believes that an offence has been committed in terms of the NCA.

ACTIVITY

Reread the scenario at the beginning of this study unit on page 78. Then advise Whifi Corporation.

FEEDBACK

See 16.1 above. Whifi Corporation should follow the procedures as set out in section 129 and 130 of the NCA. Discuss and advise in full.

STUDY UNIT 17

Offences

OVERVIEW

It is interesting to point out that non-compliance with parts of the NCA will constitute an offence and possible imprisonment.

CONTENTS

- 17.1 OFFENCES (S 156–160 OF THE NCA)
- 17.2 PENALTIES (S 161 OF THE NCA)
- 17.3 JURISDICTION TO IMPOSE PENALTIES

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- identify which acts constitute offences
 - identify what the possible penalties entail
-

17.1 OFFENCES (S 156–160 OF THE NCA)

Offences in terms of the NCA include the following:

- (a) disclosure of confidential information other than in the circumstances prescribed by the NCA,
- (b) hindering, opposing, obstructing, or unduly influencing any person who is exercising a power or performing a duty delegated, conferred, or imposed by the NCA,
- (c) failure to attend a hearing, or attending but refusing to be sworn in or failing to produce a document as ordered, as well as failing to answer a question fully or truthfully after being sworn in and the giving of false evidence,
- (d) failure to comply with an order of the Tribunal or attempting to influence the Tribunal or a regulator improperly concerning any matter connected with an investigation,
- (e) anticipating any findings of the Tribunal or the NCR concerning an investigation in a way that is calculated to influence the proceedings or findings,
- (f) interrupting the proceedings or misbehaving in a hearing, and
- (g) acting contrary to a warrant to enter and search.

17.2 PENALTIES (S 161 OF THE NCA)

Penalties under the NCA vary depending on the nature of the offence.

Where a person is convicted of an offence in relation to the NCR or the Tribunal, that person is liable to a fine, or imprisonment not exceeding 10 years, or both. For all other offences under the NCA, a convicted person is liable to a fine, or imprisonment not exceeding 12 months, or both.

17.3 JURISDICTION TO IMPOSE PENALTIES

The NCA specifically confers on a Magistrates' Court the jurisdiction to impose any penalties notwithstanding anything to the contrary contained in any other law.

ACTIVITY

State the different offences and the possible penalties.

FEEDBACK

See 17.1 and 17.2 above.

STUDY UNIT 18

General background, purpose, scope and application of the CPA

Victor bought a new motor cycle from Cyclink (Pty) Ltd and paid the full purchase price in cash. Two weeks later the engine collapses and Cyclink informs Victor that he has bought the motor cycle *voetstoots* and that it is “not afraid” of the Consumer Protection Act 68 of 2008 (hereafter referred to as “the CPA”), as the transaction was not subject to the CPA. Is Cyclink correct in its opinion?

OVERVIEW

In this study unit you will learn some background on the CPA and its purpose. You will further learn how the CPA should be interpreted. Most importantly, you will learn to which transactions the CPA applies. It is of utmost importance to be able to identify whether a transaction is subject to the CPA or not. The CPA recognises a number of **fundamental consumer rights** to give effect to its main purpose. You will be introduced to these fundamental rights.

CONTENTS

- 18.1 GENERAL BACKGROUND OF THE CPA
- 18.2 PURPOSE OF THE CPA
- 18.3 INTERPRETATION OF THE CPA
- 18.4 SCOPE AND APPLICATION OF THE CPA
 - 18.4.1 Definitions
 - 18.4.2 Specific exemptions
 - 18.4.3 Specific inclusions
 - 18.4.4 Interplay between the common law, the CPA and other statutes
- 18.5 THE FUNDAMENTAL CONSUMER RIGHTS IN TERMS OF THE CPA

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- give a short background of the CPA and know the commencement date of the CPA
 - explain the main purpose of the CPA
 - explain the interpretation clause of the CPA
 - explain the scope and application of the CPA
 - list the fundamental consumer rights in terms of the CPA
-

18.1 GENERAL BACKGROUND OF THE CPA

background and commencement

The CPA became fully operational on 31 March 2011. The CPA consolidates most of the previous consumer legislation in South Africa. The Minister of Trade and Industry also proclaimed the CPA regulations, which became operational on 1 April 2011 (“CPA Regulations”). The CPA (read with the CPA Regulations) has far-reaching consequences for sale agreements and, to a lesser extent, lease agreements that fall within the ambit of the CPA. The rights of consumers are protected through the courts and national consumer protection institutions, such as the National Consumer Commission and the National Consumer Tribunal, established under the CPA (s 4). Failure to comply with the provisions of the CPA may lead to the issuing of compliance notices and eventually the imposition of fines and criminal penalties. Contractual terms that are impermissible in terms of the CPA also may be declared void to the extent of non-compliance of the CPA. The protection and enforcement procedures contained in the CPA fall outside the scope of this module.

18.2 PURPOSE OF THE CPA

social and economic welfare of consumer

The main purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa (s 3(1)). This must be accomplished by establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible (s 3(1)(a)), by promoting fair business practices (s 3(1)(c)) and also by protecting consumers from unfair trade practices and conduct (s 3(1)(d)).

protection of vulnerable persons

Specifically, the CPA aims to protect the rights of vulnerable persons (s 3(1)(b)). Vulnerable persons would include persons from low-income and remote communities, minors, seniors, persons whose ability to comprehend an advertisement, agreement or any other visual representation is limited by a low literacy level, the visually impaired and persons who have limited fluency in the language in which the advertisement, agreement or other visual representation is presented.

18.3 INTERPRETATION OF THE CPA

section 2: interpretation clause

Section 2 of the CPA prescribes the manner in which the CPA should be interpreted. The following should be mentioned at this stage: Firstly, the CPA should be interpreted to give effect to the purposes as detailed in section 3 (s 2(1)). Secondly, when interpreting the CPA, the interpreter may consider appropriate international law, foreign law, international conventions, declarations or protocols relating to consumer protection (s 2(2)). **Finally, the CPA should not be interpreted in any way as to preclude a consumer from exercising any of his/her common law rights** (s 2(10)).

court's obligations in giving effect to CPA

When a matter is brought before a court, the court has the following obligations in terms of the CPA:

- Firstly, the court must develop the common law to improve the realisation and enjoyment of consumer rights generally and, in particular, to improve the position of the vulnerable persons referred to in paragraph 18.2 above (s 4(2)(a)).
- Secondly, the court must promote the spirit and purposes of the CPA (s 4(2)(b)(i)). Section 4(3) provides that if any provision in the CPA can have more than one meaning, the court has to prefer the meaning that promotes the spirit and purposes of the CPA best and will best promote the realisation and enjoyment

statutory *contra preferentem* rule

of consumer rights generally and, in particular, the position of the vulnerable persons, as mentioned above.

- Furthermore, section 4(4)(a) of the CPA provides that when the court interprets a document (including a contract or a standard form) prepared by the supplier and there are ambiguities in the document, the document must be interpreted to the benefit of the consumer. It has been argued that this is a confirmation (and possible extension) of the *contra preferentem* rule (Jacobs, Stoop & Van Niekerk 2010 *PELJ* 301–307).

Where the rights of the consumer are limited in this document, the court must interpret such limitation “to the extent that a reasonable person would ordinarily contemplate or expect” (s 4(4)(b)), with due regard to the following factors: the content of the document, the manner and form in which it was prepared and presented, and the circumstances of the transaction or agreement (s 4(4)(b)(i)–(iii)).

18.4 SCOPE AND APPLICATION OF THE CPA

18.4.1 Definitions

transactions occurring in South Africa

The CPA applies to every **transaction occurring** in South Africa, **unless it is exempted** from the operation of the CPA (s 5(1)(a)). The exemptions are discussed below.

The word “**occur**” is not defined in the CPA. Bradfield & Lehmann (*Sale and Lease* 8) argue that “occur” should be given its normal meaning, namely, “happen” or “take place”. As such, a sale or lease transaction would occur in South Africa if the contract for the sale or lease is concluded or the performance in terms of the agreement takes place in South Africa.

transaction

In section 1, a “**transaction**” is defined as follows:

[I]n respect of a person acting in the **ordinary course of business—**

- an agreement between or among that person and one or more other persons for the **supply** or potential supply of any **goods** or **services in exchange for consideration**.

goods

“**Goods**” have a very wide definition and include anything marketed for human consumption, any other tangible or intangible object (e.g., music or a photograph) or a licence to use an intangible object, a legal interest in land or any other immovable property, (**other than an interest that falls within the definition of a service**) gas, water and electricity (s 1).



services

EXAMPLE

A sale agreement of movable or immovable property will, therefore, constitute a “supply of goods”.

supply

Likewise, “**services**” also have a wide definition and include the provision of any accommodation or sustenance; access or a right of access to an event or any premises, activity or facility, **and access to or use of any premises or other property in terms of a rental** (s 1). A lease agreement of immovable property (and possibly also movable property) will, therefore, be a “supply of services”.

“**Supply**” (used as a verb) includes **selling, rental, exchange** or **hire**, relating to **goods** and the **granting of access to any premises**, event, activity or facility, relating to **services** (s 1). Such a supply must be for **consideration**.

consideration “**Consideration**” is defined in section 1 of the CPA as anything of value given and accepted in exchange for goods or services (including money) and, **therefore, the sale and lease of goods is a supply in terms of the CPA.**

ordinary course of business Furthermore, the supply must be in the **ordinary course of business**. The phrase “ordinary course of business” is not defined in the CPA. The same test that is applied in other fields of our law can be applied (see *Amalgamated Banks of South Africa Bpk v De Goede* 1997 4 SA 66 (SCA)), namely, whether the making of the contract falls within the scope of that business and whether ordinary business persons would have concluded the contract (Sharrock 2010 *SA Merc LJ* 295). **This means that, while the CPA will probably not affect once-off transactions for the sale of movable and immovable property (e.g. a private sale of a house or car), it will probably apply to the sale of land, units or houses by a developer or a car by a car dealer. With regards to lease agreements; this question is more difficult to answer. Please refer to Study Guide 1, study unit 3 in this regards.**

suppliers and consumers The CPA refers to the terms “suppliers” and “consumers”. A **supplier** is any person who markets (promotes or supplies) goods or services.

As mentioned above, “supply” includes the sale or rental of goods. Therefore, for the purposes of this module, the supplier will generally refer to the **seller** or the **lessor**.



IMPORTANT

We refer to “supplier” throughout this discussion, but keep in mind that it generally refers to the seller when dealing with sale or the lessor when dealing with lease.

specific inclusion of various suppliers Section 5(8) of the CPA provides that the Act also applies to transactions concluded by a supplier who

- resides or has its principal office within or outside the Republic,
- operates on a for-profit basis or otherwise,
- is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to supply goods or services, or a public-private partnership, or
- is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public.

consumer A **consumer** is any person to whom particular goods or services are marketed, promoted or supplied in the ordinary course of the supplier’s business, or any person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business (unless the transaction is exempt from the application of the CPA). In other words, in the context of sale and lease, “consumer” will generally refer to the **buyer** or the **lessee**.



IMPORTANT:

We refer to “consumer” throughout this discussion, but keep in mind that it generally refers to the buyer when dealing with a sale agreement or the lessee when dealing with a lease agreement.

18.4.2 Specific exemptions

exemptions from operation of the CPA

Although the CPA has a broad field of application to sale and lease agreements, the application of the CPA is limited by a number of exemptions set out in the CPA. The most important exemptions are discussed below.

- *Goods or services supplied or promoted to the State*

where the State is consumer

The CPA does not apply where the goods or services are promoted or supplied to the State. In other words, where the State is the consumer, the CPA will not apply (s 5(2)(a)).

- *Consumer is a juristic person with an asset value or annual turnover exceeding the prescribed threshold*

consumer is juristic person with specified turnover/asset value

The CPA does not apply where the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister, which is currently R2 million) (s 5(2)(b)). It is important to note that for purposes of the CPA; a juristic person includes a body corporate, a partnership, an association or a trust (s 1).

- *Transactions exempted by the Minister*

transactions exempted by the Minister

In terms of section 5(2)(c) of the CPA, the Minister may exempt certain transactions from the application of the CPA in accordance with the procedures and requirements detailed in section 5(3)–(4).

- *Credit agreements under the NCA*

credit agreements under the NCA

The CPA does not apply where the transaction constitutes a credit agreement under the NCA, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of the CPA (s 5(2)(d)).

It is not at all clear what is meant by the above exclusion: Where a transaction is subject to the NCA, the latter will govern the transaction primarily. For instance, to determine whether a specific term is allowed in the agreement, one will have to consult the NCA and not the CPA. However, what is meant by “the goods or services are not excluded from the ambit of the CPA”? For instance, does this mean that the consumer will still be protected by the CPA when it comes to provisions in the CPA relating to the product or service itself? For example, will the consumer be able to rely on the *ex lege* guarantees created in the CPA relating to a product? The wording of this section indicates that this was the intention of the legislature. However, the only case decision decided on this matter, decided otherwise.

MFC v Botha

The meaning of this provision was considered in *MFC (a division of Nedbank Ltd) v Botha* (6981/13) [2013] SAWCHC 107 (15 August 2013).

MFC v Botha clearly illustrates the difficulty experienced by the court when applying section 5(2)(d) of the CPA. In this case, the bank purchased a vehicle from a car dealership, with the purpose of selling it to Botha in terms of an instalment sale agreement, which qualifies as a credit agreement in terms of the NCA. The credit agreement excluded any warranty by the bank as to the condition of the vehicle. Botha returned the vehicle to the bank because the vehicle was defective. He argued that he was entitled to return the vehicle in terms of section 56(2) of the CPA. Section 56(2) of the CPA provides that the consumer may return goods to the **supplier** if the goods fail to satisfy the required standards of quality contemplated in the CPA, as discussed in detail in study unit 23 below.

The court criticised section 5(2)(d) of the CPA for the uncertainty that it created and held that the primary role of the bank in the sale was not as **supplier** of the vehicle but as **credit provider** and, therefore, Botha could not return the vehicle to the bank. Botha could also not return the vehicle to the car dealer (the actual supplier) because ownership of the vehicle vested in the bank, and it was the bank, and not Botha, who had paid the purchase price. Furthermore, the court held that Botha was not entitled to the relief in terms of section 56(2) of the CPA because the contract between Botha and the bank was a credit agreement in terms of the NCA and, therefore, excluded from the ambit of the CPA in terms of section 5(2)(d) of the CPA.

criticism

This decision is open to criticism. One could argue that, although the credit agreement itself is excluded from the application of the CPA, the **vehicle (which is the goods in this instance)** is subject to the provisions of the CPA, allowing Botha to rely on section 56(2) of the CPA. The bank purchased the vehicle from the car dealership and **supplied** it to Botha in terms of an instalment sale agreement. Therefore, the bank is a supplier for purposes of the CPA, and Botha would have been able to return the vehicle to the bank in terms of section 56(2) of the CPA. The bank would then have to pursue a further possible claim against the dealer. Although the part of the CPA dealing with fair, just and reasonable contract terms will not apply to credit agreements that are subject to the NCA, the goods and services should still have to comply with the CPA (Naudé & Eiselen *Commentary* 5–33). This section of the CPA is badly drafted and has created many uncertainties (Naudé & Eiselen *Commentary* 5–33–36).

In any event, the exclusion of any warranty by the bank as to the condition of the vehicle in the credit agreement would qualify as an unlawful provision in terms of section 90 of the NCA, and the bank would not be able to rely on this provision when Botha returned the vehicle to the bank (see study unit 10, par 10.3).

Another problematic aspect in this regard is that of incidental credit agreements.

incidental credit agreements

In terms of the NCA (ss 5(2) and 8(4)(b)) an agreement is only deemed to be an incidental credit agreement **20 business days after** the supplier of goods or services first charged interest or fees for late payment of an account. Otto (2010 *THRHR* 647) is of the opinion that the nature of the agreement within the 20-day period is uncertain, but that an agreement is certainly not a credit agreement during the 20-day period. If one accepts that during the abovementioned 20-day period, an incidental credit agreement does not constitute a credit agreement in terms of the NCA, the CPA applies to such an “incidental credit agreement” during that period, when it has not yet become a credit agreement in terms of the NCA (see also Kelly-Louw *Consumer credit regulation* 557–558 and Otto *NCA* 144–145). Practical issues such as disputes related to dates and times of transactions may occur in this regard. However, the solution probably lies in section 2(9) of the CPA, which prescribes rules to be applied in case of conflict between the CPA and other legislation such as the NCA.

• Further exemptions

certain contracts relating to labour law

The CPA also does not apply to a transaction pertaining to services supplied under an **employment contract** (s 5(2)(e)), or giving effect to a **collective bargaining agreement** in terms of section 23 of the Constitution of South Africa, 1996, and the Labour Relations Act 66 of 1995 (s 5(2)(f)) and giving effect to a **collective agreement** as defined in section 213 of the Labour Relations Act 66 of 1995 (s 5(2)(g)).

18.4.3 Specific inclusions

extended
application of
sections 60 and 61

The CPA provides for specific inclusions. **Firstly, where any goods are supplied within the Republic to any person in terms of an exempted transaction, those goods and the importer, producer, distributor and retailer of those goods are still subject to sections 60 and 61 of the CPA.** These provisions, which are dealt with in more detail below (par 23.3), relate to liability for harm caused by goods. This means therefore that the retailer, who buys from the producer and distributor, will be able to rely on these sections, although the CPA is not applicable to the transaction (because most retailers will have an asset value or turnover of over R2 million) (Naudé & Eiselen *Commentary* 5–40).

Secondly, the CPA provides that certain arrangements must always be regarded as a transaction in terms of the CPA (s 5(6)). These inclusions refer to goods and services supplied by voluntary associations (s 5(6)(a)) and various transactions in connection with franchise agreements (s 5(6)(b)–(e)).

18.4.4 Interplay between the common law, the CPA and other statutes

overlap between
various statutes

You already know by now that all sale and lease agreements are governed by specific common law principles (discussed in study guides 1 and 2). However, specific statutes modify or amend the common law principles in respect of sale and lease contracts governed by that specific statute. The CPA is an example of such a statute, but there are also other statutes that modify or amend the common law.

You should also notice from the above discussion, that although the CPA has a very wide scope of application in the law of sale and lease, **it does not apply to all contracts of sale and lease. It is, therefore, important firstly to determine whether the CPA is applicable to a given set of facts before you can apply the provisions of the CPA.**

Finally, you should remember that it is possible that the CPA may apply in conjunction with other statutes. For example, it is possible that both the CPA and the Rental Housing Act 50 of 1999 may apply to a specific lease. Where this is the case and a conflict arises between the provisions of the CPA and the other Act, section 2(9)(b) of the CPA provides that the Act that affords greater protection to the consumer will apply. To a certain extent, the CPA and the National Credit Act 34 of 2005 will also overlap, although it looks as if our courts are reluctant to allow such an overlap. (See again the discussion of *MFC v Botha* above.)

18.5 THE FUNDAMENTAL CONSUMER RIGHTS IN TERMS OF THE CPA

fundamental
consumer rights

The CPA recognises a number of **fundamental consumer rights** to give effect to its aims and, amongst other things, prohibits or limits certain terms in consumer contracts. This means that if the CPA applies to a specific sale or lease transaction, the **buyer** or **lessee** in that transaction is granted certain rights and remedies in terms of the CPA.

The fundamental consumer rights in the CPA are comprised of the right to

- (a) equality in the consumer market,
- (b) privacy,

- (c) choice,
- (d) disclosure and information,
- (e) fair and responsible marketing,
- (f) fair and honest dealing,
- (g) fair, just and reasonable terms and conditions, and
- (h) fair value, good quality and safety (Ch 2 Part A–H of the CPA).

For the purposes of this module, we deal only with the most relevant of the abovementioned rights, and also only the most relevant aspects of these rights. These are dealt with in study units 19 to 23.

ACTIVITY

Please reread the factual scenario at the beginning of this study unit on page 83, and advise Victor accordingly.

FEEDBACK

You must identify whether the agreement between Victor and Cyclinc is a transaction that is not excluded by the CPA. Revisit the definitions of “transaction”, “supplier”, “consumer”, “goods” and “ordinary course of business”. You will come to the conclusion that the CPA is most probably applicable.

STUDY UNIT 19

The consumer's right to choose

- (1) Vusi buys a vacuum cleaner from Vavavacu (Pty) Ltd. He bought the vacuum cleaner from a door-to-door salesman who came, without prior arrangement, to his home. Vusi immediately realises, after he has paid for the vacuum cleaner, that he should not have bought the vacuum cleaner.
- (2) Jennifer has signed a gym contract with Fitness Mania for a three-year period. After 18 months she now wants to terminate the agreement as she realises that she does not go to the gym that often.

OVERVIEW

In this study unit you learn about important sections of the CPA that relate to the consumer's freedom of choice. You learn about the new provisions regarding the expiry and renewal of fixed-term contracts, the consumer's right to a cooling-off period after direct marketing, the consumer's right to cancel an advance reservation, booking or order, the consumer's right with respect to delivery of goods and, lastly, the consumer's right to return goods.

CONTENTS

- 19.1 EXPIRY AND RENEWAL OF "FIXED-TERM CONTRACTS" (S 14 OF THE CPA)
- 19.2 CONSUMER'S RIGHT TO A COOLING-OFF PERIOD AFTER DIRECT MARKETING (S 16 OF THE CPA)
- 19.3 CONSUMER'S RIGHT TO CANCEL AN ADVANCE RESERVATION, BOOKING OR ORDER (S 17 OF THE CPA)
- 19.4 CONSUMER'S RIGHT WITH RESPECT TO DELIVERY OF GOODS **AND THE RISK RULE IN TERMS OF THE CPA** (S 19 OF THE CPA)
- 19.5 CONSUMER'S RIGHT TO RETURN GOODS (S 20 OF THE CPA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain the contents of section 14 of the CPA relating to the expiry and renewal of fixed-term contracts, and explain how this section amended the common law and how it interacts with other legislation
- explain the consumer's right to a cooling-off period in terms of section 16 of the CPA after direct marketing, and indicate how this section has amended the common law
- explain the consumer's right to cancel an advanced reservation, booking or order in terms of section 17 of the CPA, and explain its impact on the common law
- explain the consumer's right with respect to delivery of goods in terms of section 19 of the CPA and explain its impact on the common law, with specific emphasis on the new risk rule created by the CPA

- explain the consumer's right to return goods under certain circumstances in terms of section 20 of the CPA, and explain its impact on the common law
-

19.1 EXPIRY AND RENEWAL OF "FIXED-TERM CONTRACTS" (S 14 OF THE CPA)

limitation on fixed-term contracts	Although "fixed-term agreements" are not defined in the CPA, it can be accepted that this means agreements that will endure until a specified date. Examples in everyday commerce would include gym contracts, cell phone contracts and leases (Naudé & Eiselen <i>Commentary</i> 14–4, 14–5). This section does not apply to transactions between juristic persons at all, regardless of their annual turnover or asset value (s 14(1)). A fixed-term contract may not, as a general rule, be for a period longer than 24 months from the date of signature by the consumer, unless for instance, such longer period is expressly agreed between the consumer and the supplier, and the supplier can show a demonstrable financial benefit to the consumer (s 14(2)(a) and regulation 5(1) of the CPA Regulations). A supplier will meet this requirement if he/she has given discounts to customers because the agreement is of a longer duration (Naudé & Eiselen <i>Commentary</i> 14–6).
consequences of contravening this section	Although the CPA is silent on the consequences of breaching this particular section, it will most probably be prohibited in terms of section 51 of the CPA (as further discussed in study unit 22 below) as it would "set aside or override the effect of any provision of this Act", giving a court the discretion of various remedies. Naudé & Eiselen (<i>Commentary</i> 14–7) argue that the court would most probably reduce the term to 24 months.
cancellation of fixed-term contracts	The consumer may cancel the agreement at any other time before the expiry of the agreement by giving the supplier 20 business days' written notice (s 14(2)(b)(i)(bb)). However, the supplier may only cancel the agreement by giving 20 business days' written notice to the consumer who has committed a material failure to comply with the agreement, unless the consumer has rectified the failure within that time (s14(2)(b)(ii)). In both these instances of cancellation, the consumer remains liable to the supplier for any amounts owed to the supplier in terms of the agreement up to the date of cancellation together with a reasonable cancellation penalty (if the supplier has imposed one) with respect to any goods supplied, services provided, or discounts granted to the consumer in contemplation of the agreement enduring for its intended fixed term (s 14(3)). The supplier must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation (s 14(3)(b)). Regulations 5(2) and (3) of the CPA Regulations list the factors that determine the reasonableness of the credits and charges.
renewal of fixed-term contracts	At a certain stage before the expiry of the contract (not more than 80 days, but not less than 40 days), the supplier must notify the consumer in writing of the impending expiry date and any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date. The consumer must also be informed of the options available to him/her in terms of section 14(2)(d) (s 14(2)(c)). Section 14(2)(d) of the CPA provides that on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month-to-month basis, subject to any material changes of which the supplier has given notice, unless the

consumer expressly directs the supplier to terminate the agreement on the expiry date or agrees to a renewal of the agreement for a further fixed term. If the consumer chooses to cancel the agreement, he/she may do so without penalty or charge (s 14(2)(b)(i)(aa)), but remains liable for any amounts owed to the supplier in terms of the agreement up to the date of cancellation (s 14(3)(a)). A clause authorising a supplier to breach this section of the CPA will most probably be prohibited as a “black list” item as discussed in study unit 22 below, with the agreement subsequently being void (Naudé & Eiselen *Commentary* 14–7).

INFLUENCE ON EXISTING LAW

The common law places no limit on the duration of a fixed-term lease (see study guide 1, study unit 2, par 2.3.3). This provision will, therefore, potentially affect many residential leases, although Naudé & Eiselen are of the opinion that it was not intended by the legislature that this section should apply to common law leases, but rather to service agreements such as cell phone contracts and so on.

Section 14 of the CPA prescribes how a fixed-term lease agreement can be terminated by the consumer or the supplier, and provides for the automatic renewal of a fixed-term lease agreement. In this respect, these provisions have amended the common law position as discussed in Study Guide 1, study unit 18, paragraph 18.2.

It is possible that both the CPA and the Rental Housing Act (the “RHA”) can apply to the same transaction, and a potential conflict can arise between section 5(5) of the RHA (discussed in study guide 1, study unit 19, par 19.4.2.5) and section 14 of the CPA. Although both sections provide for the automatic renewal of a fixed-term lease agreement to a periodic lease on a month-to-month basis, the CPA provides the lessor with an opportunity to amend the terms of the agreement by giving appropriate notice to the lessee (which could include an increase in the rental). However, Bradfield & Lehmann (*Sale and lease* 198–199) argue that the variation provisions in section 14(2)(c) of the CPA would be subject to the unfair practice provisions in the RHA. This is because such an interpretation would afford greater protection to the consumer (i.e. the lessee) as required by section 2(9)(b) of the CPA. For example, in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) the Constitutional Court decided that the termination of a month-to-month lease agreement (with the requisite notice given), for the sole purpose to increase the rent, could constitute an unfair practice. The reference to an unfair practice is in accordance with the RHA. In this case, the court reasoned that this was *capable* of transpiring where, although the termination of a lease agreement is permitted by the common law, the escalation sought is inconsistent with the escalation clause relating to the existing agreement, or is in excess of what is considered reasonable. Also refer to Study Guide 1, study unit 19, paragraph 19.3.

19.2 CONSUMER'S RIGHT TO A COOLING-OFF PERIOD AFTER DIRECT MARKETING (S 16 OF THE CPA)

consumer's
cooling-off
right after direct
marketing

Section 16 of the CPA provides the consumer with a **right to a cooling-off period after direct marketing**. It is important to remember that this cooling-off right is **not available to all consumer sale contracts, but only those resulting from direct marketing** (Glover *Sale and lease* 270). Glover (*Sale and lease* 270) also mentions that it is important to keep in mind that section 16 of the CPA does not apply to sale

transactions concluded electronically, as section 40 of Electronic Communications and Transactions Act 25 of 2002 (the “ECTA”) will apply. Therefore, all “online” shopping will be excluded from the protection offered by this section.

direct marketing explained

“**Direct marketing**” means to approach a person, either in person or by mail or electronic communication (which includes telephone, fax, SMS, wireless computer access and email) for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or requesting the person to make a donation of any kind for any reason (s 1 of the CPA).

close enough link?

Naudé & Eiselen (*Commentary* 16–6) raise an important question, namely, how closely the conclusion of the contract must be connected to the direct marketing. They conclude that a **flexible approach** (as applied by our courts in the determination of legal causation in the law of delict and criminal law) founded in common sense should be utilised.



EXAMPLE

Take the example that when you receive junk mail at home advertising a product, and then you go all the way to the store, read the label and then buy the product, policy considerations will dictate that there is not a close enough link between the direct marketing and the conclusion of the contract, which means that you probably will not be able to rely on the protection offered by this section.

procedure and requirements in terms of section 16

Section 16(3) of the CPA provides that a consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by written notice to the supplier **within five business days** after the later of the dates on which the transaction or agreement was concluded, or the goods were delivered to the consumer.

A supplier must, in terms of section 16(4) of the CPA, return any payment received from the consumer within 15 business days after receiving notice of the rescission (if no goods were delivered to the consumer in terms of the transaction), or receiving from the consumer any goods supplied in terms of the transaction; and must not attempt to collect any payment in terms of a rescinded transaction (except as permitted in terms of s 20(6)).

return at consumer's risk and expense

Section 20(4)(a) of the CPA provides that goods returned to the supplier in terms of section 16 of the CPA must be returned at the **consumer's risk and expense**.

Section 32 of the CPA obliges any person who engages in direct marketing and concludes an agreement with a consumer to inform the consumer of the right to rescind that agreement in terms of section 16 of the CPA.

INFLUENCE ON EXISTING LAW

There is no common law equivalent to the cooling-off right in the CPA. The common law determines that once a sale or lease agreement is concluded, the parties are bound by the agreement (unless there is a legal ground for rescission, for instance a material misrepresentation). However, similar cooling-off rights have been created by other statutes, for example, the right to terminate certain credit agreements in terms of the NCA (see study unit 14, par 14.1 above) and the cooling-off right of certain purchasers of certain low cost housing in terms of the Alienation of Land Act 68 of 1981 (see study unit 1 par 1.2.10 above).

19.3 CONSUMER'S RIGHT TO CANCEL AN ADVANCE RESERVATION, BOOKING OR ORDER (S 17 OF THE CPA)

cancellation of
booking or order

Section 17(2) of the CPA provides the consumer with the **right to cancel an advance order for goods**. However, the supplier is entitled to require the payment of a reasonable deposit and may impose a reasonable charge for the cancellation of the order (s 17(3)). The factors that should be taken into account to determine whether the charge is reasonable are listed in section 17(4) of the CPA, namely, the nature of the goods ordered, the length of notice of cancellation provided by the customer, whether the seller might be able to find another buyer for the product and any trade practice in the relevant industry. Section 17(5) of the CPA states that a supplier may not charge any cancellation fee where the consumer is unable to honour the order because of the death or hospitalisation of the person for whom or for whose benefit the order was made. Section 17 of the CPA does not apply to a franchise agreement or an advance order for special-order goods (ss 17(1)).

INFLUENCE ON EXISTING LAW

As mentioned above, once a sale or lease agreement is concluded the parties are bound by the agreement in terms of the common law (unless there is some other ground for rescission). This provision grants a consumer an additional right to cancel an agreement under the specific circumstances and subject to the specific requirements mentioned, albeit with a cancellation fee.

19.4 CONSUMER'S RIGHT WITH RESPECT TO DELIVERY OF GOODS AND THE RISK RULE IN TERMS OF THE CPA (S 19 OF THE CPA)

section dealing
with delivery of the
goods

This section deals with the supplier's duty to deliver the goods at the agreed time and place, the right of the consumer to examine the goods when delivery takes place, the consumer's rights if the supplier delivers a larger quantity of goods than the consumer agreed to buy, and the consumer's rights when the supplier delivers some of the goods the supplier agreed to supply, mixed with goods of a different description. We encourage you to read the whole section 19 of the CPA for valuable background.

Section 19(2)(a) of the CPA provides that the supplier is responsible to deliver the goods or to perform the services on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the agreement, at the agreed place of delivery, at the supplier's cost (in the absence of an express or tacit agreement to the contrary).

new statutory risk
rule

Section 19(2)(c) provides that the goods to be delivered remain the supplier's risk until the consumer has accepted delivery of the goods, unless otherwise expressly provided.

presumption of
acceptance of
delivery

Section 19(4) of the CPA determines that the consumer is presumed to have accepted delivery of any goods when

- the consumer communicates such acceptance to the supplier (expressly or implicitly), or
- the goods have been delivered to the consumer and the consumer does anything in relation to the goods that would be inconsistent with the supplier's ownership of the goods or, after the lapse of a reasonable time, the consumer retains the

goods without intimating to the supplier that he/she (the consumer) has rejected delivery of them.

interpretation of
section 19(2)(c)

The interpretation of section 19(2)(c) of the CPA is in many instances problematic. Glover (*Sale and lease* 314) points out that the wording of section 19 implies that the risk rule in terms of the CPA can be amended expressly by the parties. This would make it far too easy for suppliers to amend the risk rule in terms of their standard form contracts. To curb this situation, regulation 44(3)(g) was introduced, which is discussed below in study unit 22 (par 22.1), stating that a term “modifying the normal rules regarding the distribution of risk to the detriment of the consumer” will be presumed to be unfair. Glover (*Sale and lease* 315) argues that this was a “clumsy” way of resolving the potential problem of section 19(2)(c) of the CPA and suggests that it would be better to effect a statutory amendment to make it (the new risk rule) a compulsory provision standard that cannot be varied by the parties involved.

Glover (*Sale and lease* 315–316) goes further, saying that the CPA has also not explicitly stated that the rule applies to both risk **and** benefit, which creates legal uncertainty. However, it is generally accepted, also by international law, that risk and benefit should go together.

Naudé & Eiselen (*Commentary* 19–7) raise an interesting argument that section 19(2)(c) could also be unfair to suppliers where the consumer deliberately fails to accept delivery of the goods, and the risk will potentially never pass to the purchaser.

INFLUENCE ON EXISTING LAW

Generally, section 19 of the CPA codifies the seller’s common law duty to deliver the goods (see Study Guide 2, study unit 5) and provides for further rights and obligations. However, it is important to note that section 19(2)(c) changes the common law rule regarding the passing of risk in a contract of sale. Please compare the provision above with the common law principle of passing of risk discussed in Study Guide 2, study unit 9, where risk normally passes once the sale becomes *perfecta*. It is, therefore, a major impact on the common law of sale. Glover (*Sale and lease* 317) is of the opinion that the courts will have to reconsider the common law rule with regard to risk altogether. He contends (322) that the common law risk rule should be brought in line with the CPA and other modern jurisdictions such as Germany and the United States, to the effect that risk should pass upon transfer of possession of the goods sold.

19.5 CONSUMER’S RIGHT TO RETURN GOODS (S 20 OF THE CPA)

consumer’s right to
return goods

Apart from the right to return unsafe or defective goods (see s 56 of the CPA discussed in study unit 23 par 23.2 below) or any other right between a supplier and consumer to return goods and receive a refund, section 20 of the CPA provides that the consumer may return goods to the supplier, and receive a **full** refund of any consideration paid for those goods, if the supplier has delivered

- goods to the consumer in terms of an agreement arising out of direct marketing, and the consumer has rescinded that agreement during the cooling-off period, in accordance with section 16 of the CPA,
- goods that the consumer did not have an opportunity to examine before delivery, and the consumer has rejected delivery of those goods for any of the reasons given in section 19(5) of the CPA,

- a mixture of goods, and the consumer has refused delivery of any of those goods, as covered in section 19(8) of the CPA, or
- goods intended to satisfy a particular purpose communicated to the supplier as specified in section 55(3) of the CPA, and within 10 business days after delivery to the consumer, the goods have been found to be unsuitable for that particular purpose. There are, however, circumstances in which goods cannot be returned (e.g. for reasons of public health or where the goods have been altered, changed, affixed or combined with other goods).

risk of returning
the goods

These goods must be returned to the supplier within 10 business days after delivery to the consumer (s 20(4)). Where the consumer returns goods after rescission of the agreement arising out of direct marketing, the goods must be returned **at the consumer's risk and expense** (s 20(4)(a)). **In all other cases the goods must be returned at the supplier's risk and expense** (s 20(4)(b)).

Although the supplier must refund the consumer with the price paid for the goods, he/she may charge the consumer for certain costs (ss 20(5)). Such charges may include a reasonable amount for the use, consumption or depletion of the goods by the consumer and necessary restoration costs (see s 20(6) for more details). However, the supplier may not charge anything if unused goods are returned in their original packaging.

INFLUENCE ON EXISTING LAW

These provisions have amended the buyer's common law duty to take delivery of the goods (see Study Guide 2, study unit 8, par 8.3) in that they provide the consumer with the right to return the goods under certain circumstances. These are additional rights granted to the consumer in terms of the CPA.

ACTIVITY

Please reread the factual scenarios at the beginning of this study unit on page 91. Then advise Vusi and Jennifer, respectively. **YOU CAN ASSUME FOR PURPOSES OF THIS ACTIVITY THAT THE CPA DOES APPLY IN THESE TWO FACTUAL SCENARIOS.**

FEEDBACK

- (1) Refer to paragraph 19.2. This is an example of a transaction resulting from direct marketing and the consumer can avail herself/himself of the cooling-off right in terms of section 16 of the CPA. Also refer also to paragraph 19.5 regarding the consumer's general right to return goods.
- (2) Refer to paragraph 19.1. The contract should not be concluded for longer than 24 months unless there was demonstrable benefit to the consumer and the consumer has expressly agreed to such a longer term. So, when a period of 24 months lapses, she will probably be able to escape liability. In terms of section 14 of the CPA, she could also proceed to cancel the gym contract by immediately giving 20 business days' notice to the supplier, and incurring certain monetary consequences (including having to pay a reasonable cancellation penalty).

STUDY UNIT 20

The consumer's right to disclosure and information

Jenny goes to Grocery-Inn for her monthly grocery shopping. On the shelf, she sees that a special price is displayed for the Nespresso coffee machines, being R495. She takes one as she obviously regards it as a very good price. At the till the cashier informs her that the price is actually R4 950, and apologises for the store's mistake in omitting the extra 0. Jenny insists on paying the special price instead.

OVERVIEW

In this study unit you learn about the consumer's right to disclosure and information. Firstly, we look at section 22 of the CPA, which deals with the very important provision that a consumer is entitled to information in plain and understandable language. This aspect has far-reaching implications for all sale and lease agreements that are subject to the CPA. Secondly, we look at section 23 of the CPA relating to the disclosure of the price of goods or services.

CONTENTS

- 20.1 CONSUMER'S RIGHT TO INFORMATION IN PLAIN AND UNDERSTANDABLE LANGUAGE (S 22 OF THE CPA)
- 20.2 DISCLOSURE OF THE PRICE OF GOODS OR SERVICES (S 23 OF THE CPA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain the contents of section 22 of the CPA relating to the consumer's right to information in plain and understandable language, and explain how this section amended the common law and how it interacts with other legislation
- explain section 23 of the CPA relating to the supplier's duty to disclose the correct price of goods or services, and to indicate how this section has amended the common law

20.1 plain and understandable language test for plain language	THE CONSUMER'S RIGHT TO INFORMATION IN PLAIN AND UNDERSTANDABLE LANGUAGE (S 22 OF THE CPA) Section 22(1) of the CPA provides that any notice, document or visual representation made or displayed to a consumer in terms of the CPA or any other law, must be in the prescribed form in terms of the CPA or other legislation, or in plain language where no form has been prescribed. Section 22(2) of the CPA provides for a test for plain language: Whether an ordinary consumer from the class of persons for whom the document is intended, with average
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literacy skills and minimal experience as a consumer of those goods or services, could be expected to understand the content, significance and import of the document without undue effort. A number of factors should be taken into account, namely,

- the context, comprehensiveness and consistency of the document,
- the organisation, form and style of the document,
- the vocabulary, usage and sentence structure of the document, and
- the use of any illustrations, examples, headings or other aids to reading and understanding.

INFLUENCE ON EXISTING LAW

This right is similar to the right to plain language found in section 64 of the NCA (see study unit 5, par 5.4 above).

20.2 DISCLOSURE OF THE PRICE OF GOODS OR SERVICES (S 23 OF THE CPA)

Generally a supplier may not display goods for sale without **displaying a price** in respect of those goods (s 23(3)). There are a few exceptions to this rule, for example, where a supplier has provided an estimate or the consumer has waived such an estimate in terms of section 15 of the CPA or where the goods are displayed by the retailer predominantly as a form of advertisement for the supplier.

price in rands	There are detailed provisions relating to the circumstances where a price is adequately displayed (s 23(5)), but for purposes of our discussion it is important to remember that the price must be expressed in the currency of the Republic and should, therefore, refer to a monetary value . The price of the specific article should be clear to the consumer.
two different prices: lowest price	Section 23(6) of the CPA provides that a supplier may not require a consumer to pay a price higher than the displayed price or, where two different prices are displayed, more than the lower price displayed (e.g. where the price on the price ticket on the item differs from the price on the shelf). This would be the case irrespective of whether or not the supplier is obliged to display a price.
exceptions to this rule	There are a few exceptions to this rule, namely, if the price is determined by public regulation, if the price is covered completely by a second displayed price, if the displayed price contains an inadvertent and obvious error (provided the error has been corrected and reasonable steps were taken to inform consumers) and, lastly, if the displayed price was altered, covered or removed by an unauthorised person (s 23(7)–(10)).
the controversy around s 23	The above provisions have created legal uncertainty as to when a contract between the supplier and the consumer is deemed to be concluded. Please reread the scenario on page 98 at the beginning of this study unit. In terms of section 23(6) of the CPA, the store will be obliged to sell the Nespresso machine to Jenny at the lower price. However, the store could argue that it was an obvious error and that they have informed Jenny of this as soon as they became aware of this error. Is it may be too late to rectify the mistake at the time when Jenny places the machine on the counter? Some academic writers argue that the display of the merchandise at a specific price, constitutes an offer to sell (Du Plessis 2015 <i>SALJ</i> 150 154–160, 164–168). Melville & Wolker (2014 <i>Obiter</i> 644 657) conclude that a transaction is <i>perfecta</i> once a consumer

reaches or places the goods on the check-out counter and that the price is then binding despite any inadvertent or obvious error in the price and that the display of goods in a self-service setting equates to a binding offer on the part of the seller at the displayed price.

INFLUENCE ON EXISTING LAW

These provisions impose additional obligations on sellers to display a price for goods displayed for sale (except in certain circumstances). The question arises of whether this provision would preclude a contract of sale for a reasonable price, in which no price is stipulated, but where the price is determined by a third party or one of the contracting parties (see Study Guide 2, study unit 2, par 2.3.). Only time will tell how the courts will interpret this provision.

ACTIVITY

Please reread the factual scenarios at the beginning of this study unit on page 98. Then advise Jenny with regard to her legal position against the grocery store. YOU CAN ASSUME FOR PURPOSES OF THIS ACTIVITY THAT THE CPA DOES APPLY TO THIS FACTUAL SCENARIO.

FEEDBACK

Refer to paragraph 20.2. In terms of section 23(6) of the CPA, the consumer may not be asked to pay a higher price than the one displayed, unless one of the exceptions applies. In this scenario, Jenny was only told at the counter that the displayed price was incorrect. Is this too late? Is the store bound by the displayed price? It seems like many writers, as well as the Consumer Ombud, are of the opinion that the store will be bound by the lower price.

STUDY UNIT 21

The consumer's right to fair and honest dealing

Sally buys a new skin product from Forever Young. She is informed by the sales representative that it contains a new improved anti-aging ingredient, which is known to be very expensive. Sally buys the product, but when she gets home and reads the label, there is no mention of the special ingredient.

OVERVIEW

In this study unit you learn about the consumer's right to fair and honest dealing. You are introduced to section 40 of the CPA, which deals with unconscionable conduct, and section 41 of the CPA, which deals with false, misleading or deceptive representations and the effect if the supplier transgresses these two sections. You will also note that these sections largely coincide with the common law principles and remedies offered for duress, undue influence, material mistake, misrepresentation and *dictum et promissum*, but that the CPA goes even further than the common law in protecting the consumer.

CONTENTS

- 21.1 UNCONSCIONABLE CONDUCT (S 40 OF THE CPA)
- 21.2 FALSE, MISLEADING OR DECEPTIVE REPRESENTATIONS (S 41 OF THE CPA)
- 21.3 CONSUMER'S RIGHT TO ASSUME THAT THE SUPPLIER IS ENTITLED TO SELL THE GOODS (S 44 OF THE CPA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain the contents of section 40 of the CPA relating to certain forms of unconscionable conduct, and explain how this section codified and amended the common law and also understand the court's powers in cases of such unconscionable conduct
- explain section 41 of the CPA regarding false, misleading or deceptive representations, and understand that it codifies and extends the common law principles relating to these representations and to explain what the court's powers are when such representations occur

21.1
unconscionable
conduct

UNCONSCIONABLE CONDUCT (S 40 OF THE CPA)

Section 40(1) of the CPA provides that a supplier (or an agent of the supplier) **may not use physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct** towards a consumer in connection

with any marketing, or supply of any goods or services, or during the negotiation of the agreement for the supply, or in the enforcement of the agreement.

Some of these forms of unconscionable conduct do not have a technical meaning in South African law and deserve a short discussion. Naudé & Eiselen (*Commentary* 40-3–40-9) are of the opinion that the term “coercion” overlaps with duress and becomes superfluous. “Unfair tactics” also seems to be absorbed by all the other forms of unfair conduct, as does “pressure”. They aver that any form of sales technique includes some form of pressure, and that the conduct should amount to something more, such as duress or force, before it can be deemed to be unfair. “Harassment” possibly refers to the invasion of a consumer’s personal space or privacy. It therefore seems that many of these terms are superfluous and create uncertainty.

Section 40(2) of the CPA provides that, in addition to the above, **it is also unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect his/her own interests** because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement or any other similar factor.

remedies	Please refer to the discussion of section 52(1)–(3) of the CPA in paragraph 21.2 below (under the discussion of remedies), for the consequences if a supplier is guilty of unconscionable conduct.
statutory remedies	
common law remedies	Relating to unconscionable conduct, Naudé & Eiselen (<i>Commentary</i> 40–15) correctly state that the consumer will obviously also be able to rely on the common law remedies, for example, to apply for an interdict.

INFLUENCE ON EXISTING LAW

Section 40 of the CPA not only largely coincides with what under the common law would qualify as duress and undue influence but also goes further by prohibiting the supplier from taking advantage of entirely subjective factors relating to the consumer. **Potentially the supplier will have to take reasonable steps to ascertain whether the consumer is fully aware of the implications of the transaction.** Therefore, the supplier must also protect the interests of the consumer within a reasonable limit, whereas the common law mostly requires each party to look after his/her own interests within the ambit of contractual freedom.

21.2 FALSE, MISLEADING OR DECEPTIVE REPRESENTATIONS (S 41 OF THE CPA)

false, misleading or deceptive representations	Section 41(1) of the CPA provides that, in relation to the marketing of any goods or services, the supplier must not, by words or conduct • directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer, • use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception, • fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or • permit or require any other person to do the above three mentioned actions on behalf of the supplier.
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Naudé & Eiselen (*Commentary* 41–4–41–9) explain the above-mentioned categories. The first category could also include an opinion of a material fact. The second should be distinguished from mere puffery, which is sales talk that cannot be taken seriously. The third category will be determined by asking whether there was a relationship of trust between the parties involved, depending on the expertise of the parties, the nature of the information and so on.

Section 41(2) of the CPA provides **that a person acting on behalf of a supplier** of any goods or services must not falsely represent that the person has any sponsorship, approval or affiliation, or engage in any conduct that the supplier is prohibited from engaging in under section 41(1) of the CPA.

CPA examples of false, misleading or deceptive misrepresentations

Without limiting the generality of the provisions regulating misrepresentations, the CPA gives specific examples of false, misleading or deceptive misrepresentations. Section 41(3) of the CPA provides that it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer of a number of things, to the effect that

- the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have,
- any goods or services
 - (i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have,
 - (ii) are of a particular standard, quality, grade, style or model when they are not,
 - (iii) are new or unused, if they are not or if they are reconditioned or reclaimed, subject to subsection (4) (as explained below),
 - (iv) have been used for a period to an extent or in a manner that is materially different from the facts,
 - (v) have been supplied in accordance with a previous representation, or
 - (vi) are available or can be delivered or performed within a specified time, when they are not or cannot,
- any land or other immovable property
 - (i) has characteristics that it does not have,
 - (ii) may lawfully be used, or is capable of being used, for a purpose that is in fact unlawful or impracticable, or
 - (iii) has or is proximate to any facilities, amenities or natural features that it does not have, or that are not available or proximate to it,
- the necessary service, maintenance or repair facilities or parts are readily available for or within a reasonable period, where it is not the case,
- any service, part, replacement, maintenance or repair is needed or advisable, where it is not the case,
- a specific price advantage exists, where it is not the case,
- a charge or proposed charge is for a specific purpose, where it is not the case,
- an employee, salesperson, representative or agent has the necessary authority to negotiate the terms of, or conclude, an agreement, where it is not the case,
- the transaction affects, or does not affect, any rights, remedies or obligations of a consumer, where it is not the case,
- a particular solicitation of, or communication with, the consumer is for a particular purpose, where it is not the case, or
- the consumer will derive a particular benefit if they assist the supplier in obtaining a new or potential customer, where it is not the case.

**demonstration
models**

Section 41(4) of the CPA provides that a representation covered in section 41 (3) of the CPA to the effect that any goods are new, is not false, misleading or deceptive if those goods have been used only by or on behalf of the producer, importer, distributor or retailer and for the purposes of reasonable testing, service, preparation or delivery.

Section 48(2)(c) of the CPA provides that a term is unfair, unreasonable or unjust if the consumer relied upon a false, misleading or deceptive representation included in section 41 of the CPA, or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer. Refer to study unit 22 paragraph 22.1 p110 for the discussion of unreasonable terms.

remedies

Section 52(1) of the CPA provides that, if the court is dealing with a matter in terms of section 40, 41 or 48 of the CPA (the last-mentioned section is discussed in study unit 22 below) and the CPA does not provide for a remedy sufficient to correct the prohibited conduct, the court must consider the factors set out in section 52(2) of the CPA (as discussed in par 22.1 below). Thereafter, the court may make an order contemplated in section 52(3) of the CPA. Section 52(3) of the CPA provides that the court may declare the agreement (in whole or in part) to constitute a prohibited conduct and make any further order the court considers just and reasonable, taking into account the circumstances of each case. This may include an order to restore money to the consumer, to compensate the consumer for losses or expenses related to the transaction or the court proceedings, or requiring the supplier to cease or alter any practice or document to avoid a repetition of the supplier's conduct.

INFLUENCE ON EXISTING LAW

Section 41 of the CPA generally relates to what under the common law would qualify as culpable misrepresentation (negligent or intentional), innocent misrepresentation, and a *dictum et promissum* (see Study Guide 2, study unit 6, par 6.3 and 6.4). It is important to note that a misrepresentation can be either positive (e.g. a statement) or negative (failure to remove an incorrect impression). **In terms of the common law, a negative misrepresentation or non-disclosure will only give rise to a remedy where there was a legal duty to speak in the circumstances. Section 41 of the CPA, however, is phrased in such a way that conceivably it may go even further and encompass situations that would not normally provide a legal remedy in terms of the common law.** For example, **the supplier may not indulge in the use of “exaggeration, innuendo or ambiguity as to a material fact”** that might, in terms of the common law, be permissible as being mere puffery.

Furthermore, section 41 of the CPA does not indicate that the supplier must have acted with fault (Naudé & Eiselen *Commentary* 41–6). It would, therefore, be easier for a claimant to prove his/her claim based on a misrepresentation in terms of the CPA than in terms of the common law, where fault (albeit negligence) is still a requirement. Although fault is not, in terms of the common law, a requirement for the successful reliance on a *dictum et promissum*, the *aedilician* remedies offer limited protection. Future court decisions will show how broadly the courts are prepared to interpret section 41 of the CPA.

21.3 THE CONSUMER'S RIGHT TO ASSUME THAT THE SUPPLIER IS ENTITLED TO SELL THE GOODS (S 44 OF THE CPA)

eviction in terms of the CPA

Section 44 of the CPA provides that every consumer has a right to assume, and it is an implied provision in every transaction that the supplier of goods

- has the legal right, or the authority from the legal owner, to sell or lease the goods at the time that the title of the goods is to pass to the consumer (in the case of a sale) or at the time the consumer is to take possession of the leased property (s 44(1)(a)–(b)),
- is fully liable to the consumer for any charge or encumbrance pertaining to the goods in favour of any third party, unless such charge or encumbrance is disclosed in writing to the consumer prior to the conclusion of the agreement, or unless the supplier and the consumer have colluded to defraud the third party (s 44(1)(c)), and
- guarantees that the consumer is to have and enjoy “quiet possession” of the goods, subject to any charge or encumbrance disclosed in terms of section 44(1)(c).

remedies

These provisions have been criticised because they are silent on what remedy the consumer may rely on, if the required legal right or authority on the part of the supplier does not exist or does not come into existence (Sharrock *Business transactions law* 406). Bradfield & Lehmann (*Sale and lease* 94) argue that the normal remedies for breach of contract would be available to the consumer in such an instance. Naudé & Eiselen (*Commentary* 44–12) entertain the same thought, stating that the common law remedies for eviction should be invoked.

warranty against eviction cannot be excluded *inter partes*

Finally, Barnard has argued that these statutory provisions or the common law warranty against eviction cannot be excluded by agreement (Barnard *CPA and sale* 341).

This is based on the argument that excluding these provisions or the warranty against eviction would be prohibited by section 51(1)(a)–(b) or would be considered unfair in terms of section 48 of the CPA. (These provisions are discussed in more detail in par 22.1 and 22.4.) This is similar to the position in respect of credit sale agreements governed by the NCA, where such terms are also prohibited.

INFLUENCE ON EXISTING LAW

These provisions have resulted in some important changes to the common law position relating to the warranty against eviction regarding sale agreements (see Study Guide 2, study unit 7). Naudé & Eiselen (*Commentary* 44–8) highlight a few important changes: Actual eviction, being the actual disturbance in possession by a third party, is not required for section 44(1)(a)–(b) to be contravened. It has also been argued that, because these provisions are statutorily implied, it is not necessary for the consumer to comply with the common law requirements for liability for eviction when relying on these provisions (see Study Guide 2, study unit 7, par 7.3.2; and Barnard *CPA and sale* 339). It can be argued that section 44 of the CPA is not applicable to lease agreements, as this section is only applicable to the supply of **goods**, and not services.

ACTIVITY

Please reread the factual scenario at the beginning of this study unit on page 101, and advise Sally with regard to her legal position regarding the supplier of the facial cream. YOU CAN ASSUME FOR PURPOSES OF THIS ACTIVITY THAT THE CPA APPLIES IN THIS FACTUAL SCENARIO.

FEEDBACK

Refer to paragraph 21.2. It is clearly a directly misleading representation of a material fact to a consumer in terms of section 41(1) of the CPA. However, you should understand that, apart from the remedies in terms of the CPA, Sally also has the common law remedies in terms of misrepresentation and *dictum et promissum*. However, by availing herself to the CPA, she will not have to prove fault as one of the elements of a misrepresentation, and her remedies might be more extensive than in terms of a common law *dictum et promissum*. Remember to discuss her possible remedies in terms of section 52(1) and (3) of the CPA.

STUDY UNIT 22

The consumer's right to fair, just and reasonable terms and conditions, and the court's powers to enforce these rights

- (1) Richard concludes an agreement to buy a car from Vavavoom (Pty) Ltd on 12 August. The arrangement is made that Richard will collect the car from Vavavoom (Pty) Ltd on 13 August. However, the car is destroyed on the evening of 12 August in a hail storm. Richard is informed that, because there was a clause in the contract that risk passes when the contract becomes *perfecta*, the destruction of the car is Richard's loss.
- (2) Christopher bought a second hand Vespa scooter from Italbike (Pty) Ltd. Two days after he received delivery of the scooter, the engine explodes. A motor engineer examines the Vespa and is of the opinion that the explosion occurred due to a fault in the engine that existed before Christopher bought the scooter. However, Italbike relies on the *voetstoots* clause that is included in the contract, which excludes liability for latent defects.
- (3) Thabo fills his car at Mobilia Petrol. At the petrol station, there is a sign stating the following: "Mobilia Petrol will not be held liable for any loss to your vehicle due to the negligence of our staff." Thabo asks specifically for diesel as he parks next to one of the pumps. After his tank is filled, he pays and drives off. However, his car breaks down a few blocks away. The mechanic informs Thabo that the engine needs to be replaced as his tank was filled with petrol instead of diesel, damaging the engine severely.

OVERVIEW

In this study unit you learn about the general prohibition in the CPA against unfair terms and unfair pricing, and what the test is to determine whether a term is an unfair term. It also sets out that, before certain terms may be included in the agreement, the customer's attention should be drawn to these provisions in a satisfactory manner. Lastly, we explain that, in terms of the CPA, certain provisions are totally prohibited and may not be included in an agreement at all. This is an extremely important study unit.

CONTENTS

- 22.1 UNFAIR, UNREASONABLE OR UNJUST CONTRACT TERMS (S 48, READ TOGETHER WITH SECTION 52 OF THE CPA)
- 22.2 NOTICE REQUIRED FOR CERTAIN TERMS AND CONDITIONS (S 49 OF THE CPA)
- 22.3 WRITTEN CONSUMER AGREEMENTS (S 50 OF THE CPA)
- 22.4 PROHIBITED TRANSACTIONS, AGREEMENTS, TERMS AND CONDITIONS (S 51 OF THE CPA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain section 48 of the CPA regarding the general prohibition against unfair terms and unfair prices, and explain the CPA test for an unfair term, and also

explain and discuss the list of presumed unfair terms. You should also be able to explain the remedies available when an unfair term has been included in an agreement

- explain section 49 of the CPA, which requires that certain terms should be drawn to the attention of the consumer, and explain the remedies available to the consumer should these terms be included in the agreement without the consumer's knowledge
 - explain section 50 of the CPA, which sets out the requirements for when an agreement should be reduced to writing, and general arrangements regarding the format of the agreement
 - explain section 51 of the CPA, which contains a list of prohibited contractual terms and also the effect of including such a term in an agreement
-

22.1 UNFAIR, UNREASONABLE OR UNJUST CONTRACT TERMS (S 48, READ TOGETHER WITH S 52 OF THE CPA).

UNFAIR TERMS

General prohibition against unfair terms

general prohibition
against unfair
terms

Section 48(1)(a)(ii) of the CPA provides that a supplier may not offer to supply, supply or enter into an agreement to supply any goods or services, on terms that are unfair, unreasonable or unjust. Furthermore, section 48(1)(c) of the CPA provides that a supplier may not require a consumer to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, nor may the supplier impose any such terms as a condition for entering into the transaction.

Presumed unfair terms ("grey list" terms)

onus of proof on
the consumer

The CPA itself does not contain any provision dealing with the *onus* of proof when a consumer alleges that a term is unfair, therefore, the *onus* rests on the consumer to prove that the term is unfair. **However, there are some exceptions, because certain terms are presumed to be unfair (referred to as "grey list" terms).** These terms are contained in regulation 44(3) of the CPA Regulations, but regulation 44(1) of the CPA Regulations provides that this list only applies to a term in a consumer contract between a supplier operating on a **for-profit basis** and acting wholly or mainly for purposes related to his or her **business or profession**, and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her business or profession.

It is important to remember that a term listed **may be fair in view of the particular circumstances** of the case (regulation 44(2)(a)) and that the list is non-exhaustive (regulation 44(2)(b)). In other words, although a term is not listed in the regulations, it could still be unfair in terms of section 48 of the CPA, and the terms that are listed could be proven by the supplier to be fair (see discussion below). The most important grey list terms for purposes of this module are copied below:

list of presumed
unfair terms

A term is presumed to be unfair if it has the purpose or effect of

- it excludes or limits the supplier's liability for death or injury caused to a consumer by defective, unsafe or hazardous goods (regulation 44(3)(a) of the CPA Regulations,
- **excluding or restricting legal rights or remedies of the consumer against the supplier** or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement, including the right of the consumer to set off a debt owed to the supplier against any claim that the consumer may have against the supplier (regulation 44(3)(b) of the CPA Regulations),
- **modifying the normal rules regarding the distribution of risk to the detriment of the consumer** (regulation 44(3)(g) of the CPA Regulations),
- allowing the supplier to increase the price agreed with the consumer when the agreement was concluded, without giving the consumer the right to terminate the agreement (regulation 44(3)(h) of the CPA Regulations),
- enabling the supplier to unilaterally alter the terms of the agreement including the characteristics of the product or service (regulation 44(3)(i) of the CPA Regulations),
- giving the supplier the right to determine whether the goods or services supplied are in conformity with the agreement or giving the supplier the exclusive right to interpret any term of the agreement (regulation 44(3)(j) of the CPA Regulations),
- forces the consumer to pay even if the supplier has not performed (regulation 44(3)(m) of the CPA Regulations),
- permitting the supplier, but not the consumer, to avoid or limit performance of the agreement (regulation 44(3)(n) of the CPA Regulations),
- allowing the supplier an unreasonably long time to perform (regulation 44(3)(p) of the CPA Regulations),
- requiring any consumer who fails to fulfil his/her obligation, to pay damages that significantly exceed the harm suffered by the supplier (regulation 44(3)(r) of the CPA Regulations), or
- permitting the supplier, upon termination of the agreement by either party, to demand unreasonably high remuneration for the use of a thing or right, or for performance made, or to demand unreasonably high reimbursement of expenditure (regulation 44(3)(s) of the CPA Regulations).

Test for unfair termstest for unfair
terms

The test for unfairness is set out in section 48(2) of the CPA. **Section 48(2)(a) of the CPA provides that a term is unfair, unreasonable or unjust if it is excessively one-sided in favour of any person other than a consumer.** Section 48(2)(b) of the CPA states that if a term of an agreement is so adverse to the consumer as to be inequitable, the term will be unfair, unreasonable or unjust. As stated above, a term or agreement can be deemed unfair if the consumer relied on a deceptive misrepresentation in terms of section 48(2)(c) (see study unit 21, par 21.2 above). As will be discussed below, a transaction or agreement can also be unreasonable in terms of section 49(1) (see discussion below par 22.2).

Both substantive and procedural factors of fairness should be taken into account. It entails an "overall evaluation of the interests involved and would include considerations of public interest" (Naudé & Eiselen *Commentary* 48–26). Also, where the consumer relied upon a false, misleading or deceptive misrepresentation **or a statement of opinion** provided by or on behalf of the supplier to his/her detriment, the term or the agreement will be unfair, unreasonable and unjust (s 48(2)(c) of the CPA).

The latter part of the section can have dangerous implications, especially to service providers such as doctors, attorneys and advocates who give opinions as part of their professions.

factors to be taken into account

s 52(2)

In determining whether a term is unfair, the court must consider all the factors listed in section 52(2) of the CPA, which are as follows:

- the fair value of the goods or services in question,
- the nature of the parties to that transaction, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position,
- those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred, irrespective of whether the CPA was in force at that time,
- the conduct of the supplier and the consumer, respectively,
- whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation,
- whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier,
- the extent to which any documents relating to the transaction or agreement satisfied the plain language requirements in section 22 of the CPA,
- whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any custom of trade, any previous dealings between the parties,
- the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier, and
- in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.

Naudé & Eiselen (*Commentary* 48–20) reason that most of the above factors refer to defects in the bargaining process.

Although section 52(2) of the CPA is silent on the issue, it has been argued that the list of these factors mentioned above is not exhaustive, and that the court should be able to consider any other relevant factors when deciding if a term is unfair (Sharrock 2010 *SA Merc LJ* 295 314).

Remedies

remedies and orders that the court may make

Section 52(1) of the CPA provides that, if the court is dealing with a matter in terms of section 48 (and section 40 & 41, see study unit 21 above) of the CPA and the CPA does not provide for a remedy sufficient to correct the unfairness, the court must consider the factors set out in section 52(2) of the CPA (as discussed above). Thereafter, the court may make an order covered in section 52(3) of the CPA (as discussed above). Section 52(3) provides for different remedies where the court determines that an agreement (in whole or in part) is unfair. **The court may declare the agreement (in whole or in part) unfair** and make any further order that the court considers just and reasonable in the circumstances. **This may include an order to restore money to the consumer, to compensate the consumer for losses or expenses related to the transaction or the court proceedings, or requiring the supplier to cease or alter any practice or document to avoid a repetition of the supplier's conduct.**

UNFAIR PRICE**unfair pricing**

In terms of section 48(1)(a)(i) of the CPA, a seller may not offer to supply, supply or enter into an agreement to supply, any goods at a price that is unfair, unreasonable or unjust. The test of unfairness in respect of terms contained in section 48(2) of the CPA referred to above is not applicable to the fairness of the price, and the test that must be used is not provided for in the CPA. The courts will, therefore, have to create a test that must be applied when determining whether the price is unfair. However, the factors listed in section 52(2) of the CPA, as listed above, must still be considered. The same remedies (see s 51(1)–52(3) of the CPA as discussed above) in respect of unfair terms will also be applicable to unfair pricing.

INFLUENCE ON EXISTING LAW

Adhering to the principle of contractual freedom, the courts have always shied away from concluding a contract on behalf of the parties. **In a radical departure from this approach, the courts have now been granted an equitable discretion to evaluate the substantive fairness of consumer agreements.** This means that the terms in a contract governed by the CPA will now be subject to a fairness test, in accordance with the above provisions. In addition, the price in a contract for sale governed by the CPA may not be unfair, unreasonable or unjust. This is also a departure from the common law position where there is no requirement that the price should be fair (see Study Guide 2, study unit 2, par 2.3).

22.2 NOTICE REQUIRED FOR CERTAIN TERMS AND CONDITIONS (S 49 OF THE CPA)

consumer's attention must be drawn to certain terms

Section 49(1) of the CPA provides that any notice to consumers or any provision of a consumer agreement that purports to:

- limit in any way the risk or liability of the supplier or any other person,
- constitute an assumption of risk or liability by the consumer,
- impose an obligation on the consumer to indemnify the supplier or any other person for any cause, or
- be an acknowledgement of any fact by the consumer

must be drawn to the attention of the consumer.

According to Naudé & Eiselen (*Commentary* 49–2) the four types of terms referred to in this section are clearly exemption clauses, which **limit the risk or liability** of the **supplier**, clauses by which the **consumer assumes risk** or liability, **indemnity clauses** requiring the consumer to indemnify the supplier or any other person for any cause, and **acknowledgements of any fact** by the consumer.

Hawthorne (2011 *SAPL* 431 441) argues that because the CPA has introduced a new default rule in respect of risk (s 19(2)(e) discussed above), any deviation from the new default rule would need to comply with the provisions of section 49 of the CPA.

manner of notifying the consumer

The fact, nature and effect of the provision or notice must be drawn to the attention of the consumer in a conspicuous manner and form, such that it is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances

(§ 49(4)(a) of the CPA). **It is submitted by Naudé & Eiselen (*Commentary* 49–3) that it will not be sufficient for these clauses to be printed on the reverse side of a contractual document, albeit in a bigger font or different colour.**

notice must be in plain language

The notice also has to be in plain language as described in section 22 of the CPA (§ 49(3)).

time of notification

Notice must be given **before the consumer enters into the transaction or agreement, or is required or expected to offer consideration** for the transaction or agreement, **whichever is the earliest** (§ 49(4)(b)). Naudé & Eiselen (*Commentary* 49–3) give the example that it is therefore no longer possible for adventure sports companies to book an adventure holiday for the consumer over the phone and to receive payment, and then to ask the consumer to sign an indemnity form when he/she arrives at the destination.

The consumer must be given **an adequate opportunity** in the circumstances to receive and comprehend the provision or notice (§ 49(5)).

Section 48(2)(d) of the CPA provides that a term or condition is unfair, unreasonable or unjust, if the agreement was subject to a term or condition, or a notice to a consumer considered in section 49(1) of the CPA, and the term, condition or notice is **unfair, unreasonable or unjust or unconscionable, or** the fact, nature and effect of that term, condition or **notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49(1) of the CPA.**

In short, this implies that even where notice was given appropriately, the term or condition itself could still be declared to be unfair or unreasonable, based on its content, for example.

notice of a provision does not necessarily mean that the provision is fair

Naudé & Eiselen (*Commentary* 49–4) explain that mere compliance with these notification requirements does not mean that a provision is indemnified and that it cannot be deleted from the contract because it is unfair, unreasonable or unjust. The court may still regard a provision as unfair even if it is made known to the consumer timeously and is clearly visible, because it may be found that such a provision is in any case unfair, unreasonable and unjust when tested against section 48 read together with section 52(2) (discussed under par 22.1 above).

remedies in the case of non-compliance

Section 52(4) of the CPA provides that if there has been no compliance with the above requirements relating to proper notice, a court may sever the provision or notice from the agreement or declare it to have no force or effect with respect to the transaction, and make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be.

Where the terms are found to be unreasonable, the remedies in terms of section 52(3) of the CPA (as discussed above) will also apply.

INFLUENCE ON EXISTING LAW

Under the reliance theory in the law of contract, a contracting party will, under certain circumstances, be held liable in terms of a contract if he/she signed a contract without reading it. However, the CPA now drastically changes the common law to the extent that certain terms have to be brought to the attention of the consumer before he/she will incur liability under that specific term (Naudé & Eiselen *Commentary* 49–6).

22.3 WRITTEN CONSUMER AGREEMENTS (S 50 OF THE CPA)

certain agreements
must be in writing

Although there is no general requirement in the CPA that consumer agreements must be in writing, the Minister may prescribe an agreement to be written down for certain categories of consumer agreements (s 50(1)). Where a consumer agreement is in writing (whether as required or voluntary), the signature of the consumer is not required for it to be binding on the parties (s 50(2)(a)). Furthermore, the supplier is obliged to provide the consumer with a free copy or free electronic access to a copy of the terms and conditions, which must satisfy the plain language requirements in section 22 of the CPA and set out an itemised break-down of the consumer's financial obligations under the agreement (s 50(2)(b)). Where the consumer agreement is not in writing, the supplier must keep a record of such transactions (s 50(3)).

INFLUENCE ON EXISTING LAW

Generally, under the common law no formalities are required to validly conclude a sale or lease agreement. However, various statutes contain formality requirements in respect of certain sale and lease agreements. In respect of lease, see Study Guide 1, study unit 10, paragraph 10.2.1 (dealing with long leases of land) and Study Guide 1, study unit 19, paragraph 19.4.1 (dealing with leases subject to the RHA). In respect of sale agreements, see study unit 1 above.

22.4 PROHIBITED TRANSACTIONS, AGREEMENTS, TERMS OR CONDITIONS (S 51 OF THE CPA)

prohibited terms
and transactions

Section 51 of the CPA contains a list of contractual terms that are specifically prohibited and **may not be included in any contract under any circumstances** (referred to as “**black list**” terms). The benefit of a black list is that it brings certainty, as the parties know in advance that such terms will be void.

Section 51 of the CPA provides that a supplier must not make a transaction or agreement subject to any term or condition, if

- **its general purpose or effect is to defeat the purposes and policy of the CPA**, mislead or deceive the consumer, or subject the consumer to fraudulent conduct (s 51(1)(a)),
- **it directly or indirectly purports to waive or deprive a consumer of a right in terms of the CPA**, avoid a supplier's obligation or duty in terms of the CPA, set aside or override the effect of any provision of the CPA, or authorise the supplier to do anything that is unlawful in terms of the CPA, or fail to do anything that is required in terms of the CPA (s 51(1)(b)),
- it purports to limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the **gross negligence** of the supplier or any person acting for or controlled by the supplier, constitute an assumption of risk or liability by the consumer for such a loss, or impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent that the loss or damage to displayed goods results from the consumer's conduct amounting to gross negligence or recklessness, malicious behaviour or criminal conduct (s 51(1)(c) and s 18(1)),

- it requires the consumer to enter into a supplementary agreement, or sign a document that contains a prohibited term or condition (s 51(e)),
- it falsely expresses an acknowledgement by the consumer that, before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or a false expression that the consumer has received goods or services, or a document that is required to be delivered to the consumer (s 51(1)(g)),
- it requires the consumer to forfeit any money to the supplier if the consumer exercises any right in terms of the CPA, or to which the supplier is not entitled in terms of the CPA or any other law (s 51(1)(h)),
- it expresses, on behalf of the consumer, an authorisation for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the agreement relates; an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed; a consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with the CPA (s 51(1)(i)), or
- it expresses an agreement by the consumer to deposit with the supplier, or with any other person at the direction of the supplier, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device or to provide a personal identification code or number to be used to access an account (s 51(1)(j)). However, this does not preclude a supplier from requesting possession of such an instrument for purposes of identification or making a copy thereof or asking a consumer to reveal any personal identification code where it is needed to facilitate a transaction that in the normal course of business necessitates the provision of such code or number (s 51(2)(b) and 51(4)).

**commentary on
prohibited terms**

Naudé & Eiselen (*Commentary* 51–4) are of the opinion that a clause that no representation on warranties have been made, as discussed above, should rather be a “grey list” term, as it makes sense commercially in certain circumstances that the parties agree that the signed agreement is the final agreement.

They also explain (51–4) that prohibiting exemption clauses for gross negligence, does not mean that exemption clauses for **ordinary negligence** will always be acceptable if the requirements of section 49 of the CPA have been met, as discussed in paragraph 22.2 above (see again, s 48(2)(d) of the CPA).

It could therefor still be seen as a term that could potentially be excluded by the grey item list (discussed above), being a term “excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event ...” (par 22.1 above), when the court will have to evaluate the fairness of the term.

**remedies in
the case of
non-compliance**

Section 51(3) of the CPA provides that a transaction or provision is void to the extent that it contravenes section 51 of the CPA.

Section 52(4) of the CPA provides that if such terms and conditions are included in an agreement, a court may **sever any part of the relevant agreement** or alter it to the extent required to render it lawful, if it is reasonable to do so (having regard to the transaction, agreement, provision or notice as a whole) or even **declare the entire agreement void** as from the date that it purportedly took effect. In addition, the court may make **any further order** that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be.

INFLUENCE ON EXISTING LAW

Adhering to the principle of contractual freedom, the courts have always shied away from concluding a contract on behalf of the parties. In a radical departure from this approach, certain terms and conditions are no longer allowed in a contract, whether it was agreed upon or not. An example would be the *voetstoots* clause, because it is a clause that would purportedly deprive a consumer of a right in terms of the CPA (**the right to goods of good quality in terms of section 56 of the CPA**, read with section 51(1)(b) of the CPA, as discussed in study unit 23). Many other standard terms that have been included in contracts to the detriment of the consumer, are now prohibited. The list of terms prohibited in the CPA is similar to the list of unlawful terms found in section 89 of the NCA, which is applicable to credit agreements governed by the NCA (see study unit 10 par 10.3 above).

ACTIVITY

Please reread the factual scenarios at the beginning of this study unit on page 107 and advise Christopher, Richard and Thabo accordingly. **YOU CAN ASSUME FOR PURPOSES OF THIS ACTIVITY THAT THE CPA DOES APPLY IN ALL THREE FACTUAL SCENARIOS.**

FEEDBACK

- (1) In terms of the common law regarding the law of sale, risk passes to the purchaser when the sale has become *perfect*. Therefore, in terms of the common law, Richard would not have had a remedy, because the sale agreement was already *perfect* at the time of destruction. However, the CPA has amended the risk rule significantly, stating that risk only passes to the buyer when the buyer has accepted delivery of the thing, unless the parties have agreed otherwise (section 19(2)(c) – see par 19.4 above). Therefore, if it were not for the risk clause that was inserted, Vavavoom (Pty) Ltd would have lost out. Nevertheless, **one has to determine whether such a clause (namely that the consumer will carry the risk before delivery) is enforceable**. Firstly, a term is presumed to be unfair if it has the purpose of modifying the normal rules regarding the distribution of risk to the detriment of the consumer (see list of presumed unfair terms, p109). It is also a term that has to be brought to the attention of the consumer timeously, in terms of section 49 of the CPA. A starting point would be to ask whether this clause was legitimately brought to Richard's attention. If not, the court will be able to declare the whole agreement void, or declaring it to have no force or effect with respect to the transaction in terms of section 52 (4) of the CPA. If it was legitimately brought to Richard's attention, the court would then have to decide whether this *prima facie* unfair term (on the grey list) is deemed to be unfair in this particular circumstance in terms of section 48 of the CPA. If the court deems the term to be unfair, the court has the power in terms of section 52(3) of the CPA to make an appropriate order (see par 22.1 under the remedies discussion).
- (2) Although the *voetstoots* clause is perfectly acceptable under common law, the CPA has now provided for certain terms to be completely forbidden. One of these prohibited terms, in terms of section 51(1)(b) of the CPA, is a term that directly or indirectly purports to waive or deprive a consumer of a

right in terms of the CPA (take note not the common law), or to set aside or override the effect of any provision of the CPA. Therefore, the *voetstoots* clause is unenforceable, because it will purport to take away his rights in terms of section 56 of the CPA. Christopher can exercise his statutory rights relating to the warranty against latent and patent defects in terms of the CPA.

- (3) Here you have to consider a few things. Firstly, you have to identify that this is an indemnity clause. These terms have to be brought to the attention of the consumer timeously. Was adequate notice given in terms of section 49 of the CPA? And even if adequate notice was given, does it mean that the term is fair or can a court still strike it out as unfair in terms of section 48 of the CPA? Also, is it possible that the garage was grossly negligent, and can liability for **gross negligence** be excluded in terms of section 51 of the CPA? These are the issues you must focus on for this question. You also have to consider the **various remedies** offered by the various sections.

From these examples you should now realise that you cannot view the various provisions of the CPA in isolation, nor can you look at the common law in isolation, without the relevant legislation.

STUDY UNIT 23

The consumer's right to fair value, good quality and safety

- (1) Vusi buys a vacuum cleaner from Vavavacu (Pty) Ltd. At home he tries it out. To his disappointment the suction is so weak that it can't even vacuum the dust from the floor. Vusi is obviously very disappointed as the vacuum cleaner was advertised as "super strong".
- (2) Julian buys a ladder from Build-for-U (Pty) Ltd. At home he uses the ladder to prune his big fig tree. The highest step breaks and he falls, sustaining severe physical injuries.

OVERVIEW

In this study unit you learn about the consumer's right to fair, good quality and safety. You learn about how the term "defect" is broadly defined in terms of the CPA. You will also learn about the two implied warranties created by sections 55 and 56 of the CPA relating to the quality of the goods. Most importantly, you will be introduced to the very effective remedy created by the CPA when defective goods are delivered by the supplier. Lastly you will be introduced to section 61 of the CPA, which protects the customer (and also the retailer-supplier) to a large extent when harm is caused where defective or defective goods have been supplied.

CONTENTS

- 23.1 DEFINITIONS OF "DEFECTS", "FAILURE", "HAZARD" AND "UNSAFE" (S 53 OF THE CPA)
- 23.2 THE CONSUMER'S RIGHT TO SAFE, GOOD QUALITY GOODS AND THE IMPLIED WARRANTY OF GOOD QUALITY (SS 55 & 56 OF THE CPA)
- 23.3 LIABILITY FOR DAMAGE CAUSED BY GOODS (S 61 OF THE CPA)

LEARNING OUTCOMES

Having studied the material for this study unit, you should be able to:

- explain the definitions contained in section 53 of the CPA
- explain the consumer's right to safe and good quality goods and the implied warranties of good quality
- explain the impact of section 61 of the CPA regarding liability for damage caused by goods

23.1 DEFINITIONS OF "DEFECTS", "FAILURE", "HAZARD" AND "UNSAFE"(S 53 OF THE CPA)

definition of defect The most important definition for purposes of this discussion is the term "defect" as used in this part of the CPA.

Section 53(1)(a) of the CPA defines a defect as follows:

- (i) Any **material imperfection** in the **manufacture** of the goods or components, or in **performance** of the services that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
- (ii) Any characteristic of the goods or components that renders the goods or components **less useful, practicable or safe** than persons generally would be reasonably entitled to expect in the circumstances.

Section 53(1)(b) of the CPA defines “failure” as the inability of the goods to perform in the intended manner or to the intended effect. “Hazard” is defined as a characteristic that (i) has been identified as, or declared to be, a hazard in terms of any other law or (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised (s 53(1)(c)). Section 53(1)(d) of the CPA defines “unsafe” as meaning that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.

INFLUENCE ON EXISTING LAW

This definition of “defect” in this part of the CPA seems to correspond to the common law requirement that there must be a defect in the article to hold the seller liable for latent defects (see Study Guide 2, study unit 6, par 6.5.2.). **However, it should be clear that the definition of “defect” in the CPA does not differentiate between latent and patent defects, as the CPA covers both. Patent defects are, according to the common law, the buyer’s responsibility, whereas in terms of the CPA, they are the seller’s responsibility. Once again the common law has been extended for the benefit of the consumer.**

23.2 THE CONSUMER’S RIGHT TO SAFE, GOOD QUALITY GOODS AND THE IMPLIED WARRANTY OF QUALITY (SS 55 & 56 OF THE CPA)

implied warranties regarding quality of the goods

Section 56 read with section 55 creates two implied warranties

First implied warranty

Section 56(1) of the CPA read with section 55(2) of the CPA provides that in any transaction or agreement pertaining to the supply of goods to a consumer, there is an implied provision that the **producer, importer, distributor and the retailer** each warrant that the goods

- are reasonably suitable for the purposes for which they are generally intended,
- are of **good quality, in good working order and free of any defects**,
- will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply, and
- comply with any applicable standards set under the Standards Act 29 of 1993, or any other public regulation.

The following definitions from section 1 of the CPA are relevant:

- (a) “**Producer**” is defined as a person who (a) grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business or (b) by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person as mentioned in paragraph (a).
- (b) “**Importer**” is defined as a person who brings those goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business.
- (c) “**Distributor**” is defined as a person who, in the ordinary course of business, is supplied with those goods by a producer, importer or other distributor and, in turn, supplies those goods to either another distributor or to a retailer.
- (d) “**Retailer**” is defined as a person who in the ordinary course of business, supplies those goods to a consumer. As an example, such a person could be the seller of goods in a supermarket.

It is evident that, in terms of the CPA, these possible responsible persons are broadly defined.

Second implied warranty

Section 56(1) of the CPA read with section 55(3) of the CPA creates a second implied warranty that the goods are **reasonably suitable either for the specific purpose for which the consumer wishes to acquire the goods, or for the use to which the consumer intends to apply those goods and of which the consumer has specifically informed the supplier**, and the supplier either ordinarily offers to supply such goods or acts in a manner consistent with being knowledgeable about the use of those goods.

altered goods /
acting contrary to
instructions

These implied warranties do not apply where the goods fail to meet the required standard because the goods have been altered contrary to the instructions, or after leaving the control of the producer, importer, distributor or retailer (s 56(1)). Naudé & Eiselen (*Commentary* 56–3) explain that “altered contrary to the instructions” could be where the goods are used in an unusual or unreasonable manner.

Section 55(4) of the CPA provides that, in determining whether any particular goods satisfy the requirements of the above two warranties, all of the circumstances of the supply of those goods must be considered, including but not limited to the following:

- (a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods,
- (b) the range of things that might reasonably be anticipated to be done with or in relation to the goods, and
- (c) the time when the goods were produced and supplied.

Section 55(5) of the CPA provides that for greater certainty in applying section 55(4) of the CPA **it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods**; and a product failure or defect may not be inferred in respect

of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.

**exceptions to
the statutory
warranties**

There are two exceptions to the above warranties and rights. Firstly, goods sold at auctions are excluded from both warranties (s 55(1)). Secondly, the first two bullet points relating to the first warranty (guarantee regarding suitability for purpose and the warranty of good quality) do not apply if the **consumer has been expressly informed that particular goods were offered in a specific condition, and the consumer has expressly either agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition (s 55(6)).**

**six month period
to return the goods**

Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the implied warranties are breached, and the supplier must, at the direction of the consumer, either repair or replace the failed, unsafe or defective goods, or refund to the consumer the price paid by the consumer for the goods (s 56(2)). If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must replace the goods or refund to the consumer the price paid by the consumer for the goods (s 56(3)).

Section 56(4) of the CPA further states that these implied warranties are in addition to (a) any other implied warranty or condition imposed by the common law, the CPA or any other public regulation, and (b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.

One of the more difficult questions created by these provisions is: does “the six-month period set in section 56(2) limit the implied warranty of goods under section 56(1) of the CPA itself to six months, or does the reference to six months only limit the consumer to exercise his remedies under section 56(2) within the time period of six months?” (Jacobs, Stoop & Van Niekerk 2010 *PELJ* 301 372). The preferred view is as follows (*idem* 373):

Under the latter interpretation, the consumer's remedies under Section 56(2) would still have to be enforced within six months after delivery of the goods, but the implied warranty of good quality will exist indefinitely, and the consumer would be able to rely on his/her common law rights to claim damages where breach of the implied warranty of quality occurred six months or longer after the delivery of the goods. The normal period of prescription for the institution of a claim for damages would apply. It is the authors' opinion that the latter interpretation would be followed, as it provides better protection to the consumer.

***Vousvounkis* case**

In the decision of *Vousvounkis v Queen Ace CC t/a Ace Motors* 2016 3 SA 188 (ECG), a few important and interesting aspects were raised regarding the application and provisions of the CPA. The plaintiff bought a second-hand BMW from the defendant on 13 September 2011. The engine collapsed a few months later, and a new engine was installed during February 2012. Although the plaintiff initially agreed to pay a portion of the price for the new engine, he never did. In July 2012, the vehicle broke down again, and the plaintiff wanted to rely on section 56 (2) of the CPA in order to return the car to the garage and claim back the purchase price that he paid for the BMW. The defendant argued that the six months period has lapsed. **The plaintiff averred that the installation of the second engine was a new supply of goods**, which entitled him to rely on section 56(2) of the CPA, as the engine broke

down within the six months period after its installation. However, the court decided differently: The court regarded the second installation of the engine was a repair to the BWM, rather than a supply of a new engine. Secondly, because the plaintiff did not pay for the second engine, it could not be regarded as a “transaction” in terms of the CPA, as there was “no exchange for consideration”. Lastly, the court decided that no extension to the six month period could be allowed as that would create legal uncertainty. The plaintiff could therefore not cancel the agreement in terms of this section. He could also not return the vehicle based on the *actio redhibitoria*, as the defect in the second engine (broken oil filter) was not serious enough to cancel the contract.

critique

The decision is open to criticism. Firstly, it is superficial to say that an installation of an engine is not a separate supply of goods. Secondly, although the plaintiff never paid for the second engine, a price was agreed upon. The defendant had to pursue this debt, but it can't be said that the transaction was without consideration.

INFLUENCE ON EXISTING LAW

These provisions have important consequences for the common law warranty against latent defects (see Study Guide 2, study unit 6).

- Firstly, the two implied warranties in the CPA are in addition to the common law warranty against latent defects (s 56(4) read with s 2(10). Therefore, the consumer would still be able to institute the common law remedies (namely, the *actio redhibitoria* or the *actio quanti minoris*), but then the common law requirements for these remedies would have to be met.
- Secondly, the warranties in the CPA have a wider application than the seller's liability for latent defects. It is not a requirement that the defect must be latent (both latent and patent defects are covered by the CPA). It is also irrelevant whether the defect could have been detected by a consumer before taking delivery of the goods, neither does the CPA require that the defect must have existed at the time the contract was entered into.
- Thirdly, section 56(2) of the CPA provides the consumer with the choice of asking the supplier for a repair, replacement or refund. This is not the case under the common law. The *actio redhibitoria* (the remedy that allows the contract to be set aside and subsequent restitution) would usually be available if the purchaser can prove that a reasonable person would not have bought the article had he/she been aware of the defects, and the *actio quanti minoris* (the remedy that only allows for a reduction of the purchase price) is intended for less serious cases, namely, where a reasonable person would still have bought the thing, but would merely have paid less for it had he/she been aware of the defect (Study Guide 2, study unit 6, par 6.5.3). Furthermore, the remedies under section 56, like the aedilician remedies would not include consequential damages that could be claimed with the *actio empti* in the case of manufacturers and dealers (Study Guide 2, study unit 6, par 6.6). However, such damages could possibly be claimed under section 61 (see below par 23.3).

- Fourthly, Barnard argues that this would mean that “a *voetstoots* clause will never become operational” (*CPA and sale* 391), when the CPA applies to a transaction. She further argues against the survival of the *voetstoots* clause, referring to the following sections: section 2(10) of the CPA, which provides that no provision of the CPA may be interpreted so as to preclude a right that a consumer has in terms of the common law (which would include the warranty against latent defects); section 56(4), which provides that the implied warranty in section 56(1) is in addition to any other warranty in terms of the common law; and section 51(1)(b)(i) (as discussed in par 22.4 above), which prohibits any term or condition if it directly or indirectly purports to waive or deprive a consumer **of rights in terms of the CPA** (Barnard *CPA and sale* 395).

This does not mean that the supplier cannot sell goods in a particular condition (e.g. second-hand goods). The supplier will just have to comply with section 55(6) (a) in that the consumer was expressly informed that the particular goods were offered in a specific condition and has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition. **This entails a shift from the *caveat emptor* (buyer beware) rule to a general duty to disclose defects to the consumer (buyer)** (Barnard *CPA and sale* 396–397).

23.3 SECTION 61 REGARDING LIABILITY FOR DAMAGE CAUSED BY GOODS

Section 61 of the CPA deals with liability for damage caused by goods. Firstly, it is important to remember that, save for a few limited exceptions, this section **applies to most sale transactions (whether the CPA applies to that specific transaction or not)**. In this respect, see paragraph 18.4.3 above. Secondly, the provision cannot be waived or limited by any contractual provisions (see again the discussion of s 51 in par 22.4 above). Where the CPA does not apply to a transaction, Naude & Eiselen (*Commentary* 61–3) explain that the defendant would have to be a producer, importer, distributor or retailer as defined in section 1 of the CPA, to attract liability under section 61.

Section 61(1) of the CPA provides that the producer or importer, distributor or retailer of any goods is liable **for any harm** caused wholly or partly as a consequence of (a) supplying any unsafe goods, (b) a product failure, defect or hazard in any goods, or (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer.

“Harm” includes (a) the death of, or injury to, any natural person, (b) an illness of any natural person, (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable, and (d) any economic loss that results from harm contemplated in (a), (b) or (c) (s 61(5)).

defences

Where more than one person is liable, their liability is joint and several (s 61(3)).

It is a defence if the above envisaged harm is wholly attributable to the compliance with any public regulation, or if the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied by the defendant to another person alleged to be liable, or harm arose from the defendant complying with

the instructions provided by the person who supplied the goods to the defendant, or if it is unreasonable to expect the distributor or retailer to have discovered the shortcomings in the goods, taking into account that person's role in marketing the goods to consumers (ss 61(4)(a)–(c)).

It is also a defence that the claim for damages is brought more than three years after the following: the death or injury of the person, the earliest time at which a person had knowledge of the material facts about the illness, (or) the earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to the property, (or) the latest date on which a person suffered the economic loss (s 61(4)(d)).

Glover (*Sale and Lease* 251) states correctly that it is not possible for the supplier and consumer to exclude the protection offered by this section, because of section 51 of the CPA, discussed above.

Glover also explains that it is not necessary to prove a contractual link between the parties in order to find liability, and that normal contractual and/or delictual liability will possibly also be applicable.

recent case law

It seems like the courts are inclined to interpret section 61 of the CPA very broadly. In *Halstead-Cleak v Eskom Holdings Ltd* 2016 2 SA 141 (GP), the plaintiff was severely injured when he, whilst riding with his bicycle, came into contact with a low hanging live power line adjacent to the road, which power line belonged to the defendant. The plaintiff invoked section 61 of the CPA in order to claim for his damage resulting from his physical injury. The defendant raised the defence that the plaintiff was not a consumer in the true sense, as he was not utilising electricity at his home.

The court found in favour of the plaintiff, saying that section 61 of the CPA explicitly offers protection to any person, and not only consumers.

criticism

It is true that section 61 of the CPA offers protection to “any person”, however, the court omitted to consider whether there was a “transaction” between the plaintiff and the defendant. This decision by the court could potentially open up a floodgate of litigation where no link is required between the supplier and the plaintiff. It could be argued that the plaintiff should have rather relied on the conventional delictual remedy.

INFLUENCE ON THE EXISTING LAW

Negligence is a requirement for establishing delictual liability under the common law. This has now been changed by this provision, which has introduced no-fault or strict liability. However, this liability is limited by the possible defences listed in section 61(4) of the CPA.

It is also possible that the liability created under section 61 could overlap with the common law warranty against latent defects and, especially, the liability of manufacturers and dealers for consequential damages caused by latent defects, although this common law liability has specific requirements (see study guide 2 par 6.6). It could also overlap with the implied warranty in respect of the quality of the goods in sections 55 to 56 of the CPA (discussed above). As the concept of harm under section 61 is very broad, it could possibly provide for more extensive remedies than those provided under the common law and section 56 of the CPA.

ACTIVITY

Reread the factual scenarios at the beginning of this study unit on page 117 and advise Vusi and Julian accordingly. YOU CAN ASSUME FOR PURPOSES OF THIS ACTIVITY THAT THE CPA DOES APPLY IN THESE TWO FACTUAL SCENARIOS.

FEEDBACK

- (1) At first Vusi will have the normal common law remedies at his disposal. He could argue that Vavavacu (Ltd) made a *dictum et promissum* (and not mere puffery), by advertising that the vacuum cleaner is “super strong”. The fact that the vacuum cleaner cannot vacuum light dust could also be seen as a latent defect, because it can be seen as a defect that destroys or impairs the usefulness of the thing sold for the purpose for which things of that kind are ordinarily intended to be used. If successful, the remedies in both instances will be the *aedilitian* remedies, where he could get back his purchase price or ask for a reduction of the purchase price. Possibly, one could also argue that the seller made a misrepresentation, if all the requirements are met, and claim damages. However, Vusi can avail himself of the remedies provided for in sections 55 and 56 of the CPA (based on the defect), and even the remedies provided for in section 52 (based on the false marketing; s 41) of the CPA. Discuss in detail and remember to apply the law to the facts.
 - (2) Although the ladder had a latent defect (go back and revise the requirements of a latent defect), the *aedilitian* remedies will not be of much assistance to Julian to claim his medical expenses from the seller, based on the common law. However, if he can prove that the seller was an expert dealer, he could possibly claim consequential loss issuing from the latent defect, based on the common law. However, for an easier litigious route, he now also has a remedy in terms of section 61 of the CPA, holding the retailer liable for any harm caused as a consequence of supplying any unsafe products, or a product failure, defect or hazard. Harm includes the injury to a natural person. Discuss in detail and remember to apply the law to the facts.
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