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**The consumer's rescission right in terms of the National Credit Act
34 of 2005: A comparison with similar rights in terms of other
consumer protection legislation**

by

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CHAPTER 1

GENERAL INTRODUCTION

1 1 Introduction and background

This dissertation concerns the right to rescind or cancel certain credit agreements in terms of section 121 of the National Credit Act,¹ the main enactment currently regulating the consumer credit industry in South Africa. The right to rescind a credit agreement, also known as the “cooling-off right”, in a nutshell, means the right to cancel a credit agreement² without having to provide reasons for the cancellation. In addition, because a statutorily afforded right is involved, the cancellation does not amount to a breach of contract.³ Section 121 of the NCA provides which credit agreements may be rescinded, and under which conditions or circumstances. The section also regulates the consequences of the cancellation. Section 121 must be read with regulation 37,⁴ prescribing how the consumer must exercise his cooling-off right in terms of the Act. If the consumer exercises the cooling-off right and the goods are returned to the credit provider, section 121 also provides that the credit provider be compensated, *inter alia* for the use of the goods and their depreciation in value.

South Africa has a long history of consumer credit protection legislation. The first enactment that applied on national level was the 1926 Usury Act, which was replaced by the Limitation and Disclosure of Finance Charges Act.⁵ The LADOFCA, which was renamed the Usury Act in 1986, regulated the financial aspects of the credit agreements

¹ Act 34 of 2005, “NCA” or “Act”. Any reference that is made to any section or regulation hereafter will be made in terms of the Act, unless the contrary is indicated.

² For the purposes of this dissertation the concepts “right to rescind”, “rescind”, “cancel”, “cancellation”, “cooling-off right”, and “cool-off” are used interchangeably and will have the same meaning, unless the contrary is indicated.

³ Otto and Renke in Scholtz (ed) “Commentary” *Guide to the National Credit Act* (2008) (“Scholtz (ed)”) par 9.5.2.1.

⁴ Of the Regulations in terms of the NCA. See GN R489 GG 28864, 31 May 2006, “NCA regulations”.

⁵ 73 of 1968, “LADOFCA” or “Usury Act”.



it applied to. The Hire-Purchase Act,⁶ the first consumer credit enactment regulating hire-purchase agreements of movable goods, was repealed and replaced by the Credit Agreements Act,⁷ which became effective on 2 March 1981.⁸ The Credit Agreements Act regulated the contractual aspects of the credit agreements subject to that Act. Of importance is that the Credit Agreements Act⁹ introduced the cooling-off right into South African consumer credit legislation.

The NCA became effective on 1 June 2007 and repealed and replaced the Usury Act and the Credit Agreements Act.¹⁰ According to Scholtz¹¹ the Act is not “merely an amendment of the Usury Act and the Credit Agreements Act: it is a wholesome replacement” of its predecessors. The NCA is being criticised occasionally for drafting errors in the Act or being unclear.¹² Section 2(1) is therefore important and provides that the NCA must be interpreted “in a manner that gives effect to the purposes set out in section 3”. Although section 3, the “Purpose of the Act” provision, does not contain any purpose¹³ or sub-purpose¹⁴ in respect of the cooling-off right, its overall impact on the NCA and the courts’ interpretation of the Act is important. Scholtz¹⁵ remarks that the NCA is “a piece of legislation with pronounced socio-economic aims”, such as making credit more accessible to everybody. The Act also has pertinent transformation aims.¹⁶

The provisions in section 121 of the NCA is susceptible to criticism. The Act for instance provides that the particular credit agreement may be rescinded within a certain number of days after the agreement was signed. Although signature is not a specific formality requirement in terms of the NCA, the Act must be interpreted to give effect to its provisions

⁶ Act 36 of 1942.

⁷ Act 75 of 1980, “Credit Agreements Act”.

⁸ Scholtz (ed) par 1.3.

⁹ S 13.

¹⁰ See Proc 22, 2006 in GG 28824 of 2006-05-09. See s 172(4). The NCA also repealed the Integration of Usury Laws Act 57 of 1996.

¹¹ Scholtz (ed) par 2.1.

¹² See eg. *Du Bruyn v Karsten* 2019 (1) SA 403 (SCA) par 1.

¹³ In the sentence introducing s 3.

¹⁴ In s 3(a)-(i).

¹⁵ In Scholtz (ed) par 2.3.

¹⁶ See Scholtz (ed) par 2.3.1.



and to the intention of the legislature. A comparison with the cooling-off rights in other legislative enactments may assist in this regard. Otto and Otto¹⁷ remark that it is inevitable to make a comparison between different legislative enactments when dealing with the same subject matter.

The Alienation of Land Act¹⁸ deals with the sale of residential property on instalments, a popular form of credit.¹⁹ This Act, which was hugely influenced by the NCA when the latter became effective, also provides for a cooling-off right in section 29A. The same holds for the Electronic Communications and Transactions Act²⁰ which applies to electronic transactions or data messages. Scholtz²¹ mentions that the NCA “forms part of a raft of contemporaneous legislation...aimed at protecting consumers”. The Consumer Protection Act,²² forming part of this body of laws and affording general consumer protection, also makes a cooling-off period available to consumers subject to the CPA.²³ Due to the statutory nature of the right to rescind it may happen that various cooling-off rights may simultaneously be involved where different legislative enactments apply to the same credit agreement.²⁴

It is important to realise that the cooling-off right in terms of the aforementioned pieces of legislation only applies to a particular credit agreement if the particular Act applies to that agreement. It is further important to note that even if a particular Act applies to a credit agreement, the right to cool-off is not necessarily available to the consumer, because of limitations that may be imposed on the application of the right by the legislature.

If the NCA applies to a credit agreement, that contract is subject to the Act, the rules of the common law and other pieces of legislation that apply to the agreement. However, if

¹⁷ See Otto and Otto *The National Credit Act Explained* (2013) 4.

¹⁸ Act 68 of 1981, “ALA”.

¹⁹ Scholtz (ed) par 1.3.4.

²⁰ Act 25 of 2002, “ECT Act”, s 4(1).

²¹ In Scholtz (ed) par 2.1.

²² Act 68 of 2008, “CPA”.

²³ S 16.

²⁴ Barnard “The virtue of cooling-off rights to consumers: ‘be in the habit of choosing the mean’ – a comparative discussion of South Africa, the United Kingdom and Belgium”2016 *Comp & Int’l LJ SA* 7.



the NCA is not applicable to the particular agreement, only the rules of the common law and other Acts (if applicable) will regulate the contract. The NCA, if applicable, influences the rules of the common law, for instance by affording rights to the consumer to terminate the credit agreement in advance, before the date agreed on for the termination of the agreement. The rights to rescind the credit agreement, settle the agreement,²⁵ and surrender the goods,²⁶ are pertinent. The right to cool-off, which forms the focus of this dissertation, enjoys the status of a fundamental right in the CPA.²⁷ In terms of the common law principles of the law of contract, the general rule is that one party to a contract may not unilaterally terminate the contract without providing any valid reason.²⁸ The unilateral termination of a contract by one party may potentially result in a breach of the contract.²⁹ The consumer's early termination rights of rescission and surrender thus alter the common law.

1 2 Research statement

The aim of this dissertation is to investigate the consumer's right to rescind a credit agreement in terms of section 121 of the NCA, read with regulation 37. A desktop research of the Act's provisions, court decisions, textbooks and journal publications will be conducted. Importantly, a brief overview of the origins of the cooling-off right and section 13 of the Credit Agreements Act, which introduced the right into our credit laws, will be considered. The same holds for the cooling-off rights in the ALA, the ECT Act, and the CPA. The aim is to compare the NCA's right with similar rights in consumer protection legislation, with the eventual aim to suggest ways in which section 121 of the NCA could be improved to render the cooling-off right in terms of the current consumer credit enactment more effective. Due to the importance of the fields of application of the aforementioned Acts, their fields of application will also be considered briefly.

²⁵ S 125 NCA.

²⁶ S 127 NCA.

²⁷ Barnard 2016 *Comp & Int'l LJ SA* 1.

²⁸ Scholtz (ed) par 9.5.2.1.

²⁹ Barnard 2016 *Comp & Int'l LJ SA* 1.



1 3 Research objectives and overview of chapters

The research objectives of this dissertation, and the chapters in which they will be dealt with, are as follows:

- (a) The purpose of Chapter 1 is to introduce the dissertation and to set out the objectives of the research. Chapter 1 also delineates to scope of the research and provides explanations of certain frequently used concepts in the dissertation.
- (b) Chapter Two's aim is to provide a brief overview of the origins and purposes of the cooling-off right and to discuss section 13 of the Credit Agreements Act, which introduced the right into the South African consumer credit legislation.
- (c) Chapter 3's purpose is to give an exposition of the right to rescind a credit agreement in terms of the NCA.
- (d) Chapter 4 has the aim to discuss the cooling-off right in terms of the other aforementioned consumer protection enactments, the ALA, ECT Act and CPA.
- (e) In Chapter 5, after a comparison between the cooling-off rights in the Credit Agreements Act, NCA, ALA, ECT Act and the CPA, conclusions, remarks and recommendations will be made.

1 4 Delineations

Although the focus of the dissertation, the cooling-off right in terms of consumer protection legislation and in particular in terms of the NCA, is related to the general principles of the law of contract, the latter principles will not be addressed in the dissertation. The same holds for the credit consumer's other early termination rights in terms of the NCA, the right to settle the agreement or surrender the goods. The relevance of the fields of application of the legislative enactments discussed in this dissertation has already been indicated.³⁰

³⁰ Par 1 1 above.



However, only brief overviews of the fields of application of the different Acts under discussion will be provided.

1 5 Terminology

The concepts “credit”, “consumer”, “credit provider” and “credit agreement”, frequently used in the dissertation, are defined in section 1. Credit is the deferral of payment of money owed to a person, or a promise to defer the payment. It also includes a promise to defer or pay money to another person, or at the direction of another person. A credit agreement for purposes of the NCA is an agreement that meets the criteria set out in section 8 of the Act.³¹ The consumer on the one hand is the party to a credit agreement to whom credit is granted in terms of the agreement, for instance the buyer or lessee in terms of an instalment agreement or lease agreement respectively. The credit provider on the other is the party to the credit agreement providing the credit, for instance the seller or lessor in terms of the aforementioned agreements respectively.

³¹ See par 3 2 below.



CHAPTER 2

ORIGINS AND PURPOSES OF THE COOLING-OFF RIGHT AND SECTION 13 OF THE CREDIT AGREEMENTS ACT

2 1 Introduction

In this chapter the origins of and the underlying purposes or reasons for the right to rescind credit agreements will be investigated. Thereafter, the field of application of the Credit Agreements Act will be briefly discussed, followed by a discussion of the cooling-off right in terms of the said Act. The primary purpose of this chapter is to sketch a broader picture of the cooling-off right to provide background information to the NCA's right to rescind particular credit agreements subject to the Act.

2 2 The origins of and underlying reasons for the cooling-off right

The principle of cooling-off has already been entrenched in legislation for more than half a century.³² But why this right? It is important to trace the origin of the cooling-off right as catered for in different legal systems around the world.³³ The origin of the right to cool-off in legislation can fairly be traced as far back as the nineteen-sixties in Europe and particularly, in Austria.³⁴ The 1961 Austrian Act, also known as the Instalment Act, applied to instalment sales involving more than two payments.³⁵ The Instalment Act required that in instances where a contract is concluded away from the seller's regular office, the buyer may rescind it within five days of receiving the instalment document or of the execution date of the contract.³⁶ The passing of a law catering for a cooling-off right in Austria served

³² See Van Eeden "Rescission of consumer contracts" 1976 *THRHR* 315-335; Otto "Die beginsel van "cooling-off" by Kredietooreenkomste" 1981 *De Jure* 101-112 and 259-273; Otto "Die afkoelreg vir kopers, huurders en geldleners word stelselmatig uitgebrei" 2003 *TSAR* 332-339; Otto "Die afkoelreg in die Nasionale Kredietwet en die Wet op Verbruikersbeskerming" 2012 *Litnet Akademies* 23-54.

³³ The history of and the development and evolution of the cooling-off right worldwide has been fully discussed elsewhere and for purposes of this discussion, only a few key developments will be highlighted. For more on the origin of the cooling-off right, see Van Eeden 1976 *THRHR* 315-335; Otto 1981 *De Jure* 101-112; Otto 2003 *TSAR* 332-339; Otto 2012 *Litnet Akademies* 23-54.

³⁴ Otto 2003 *TSAR* 332; Otto 2012 *Litnet Akademies* 24.

³⁵ Van Eeden 1976 *THRHR* 320.

³⁶ Van Eeden 1976 *THRHR* 320.



as a precursor by setting an example to other similar legislation around the world. Accordingly, many other countries in Europe³⁷ followed the Austrian footsteps and began introducing regulations on cooling-off.³⁸ However, this was not limited to only countries in Europe, but countries in other continents such as Oceania³⁹ and North America⁴⁰ also followed suit in adopting the cooling-off right into their legal systems.⁴¹

Although the time frame between the first countries that introduced the cooling-off rule is not far apart, the origin of the idea of the cooling-off rule under the Austrian legislation was the first modern regulation of this nature. Although the measures of each of the countries differ from one country to another concerning the content of the cooling-off, for example, the respective countries' cooling-off period varies between three to ten days, they share a commonality.⁴² All those countries are aimed at the protection of consumers by allowing them to reconsider their contracts within a certain number of days and to elect to cancel their contracts without giving any reasons and without causing any breach of contract.⁴³ According to Otto, the origin of the cooling-off right is linked to door-to-door sales.⁴⁴ As such, the cooling-off right as it is known to this day owes its existence to the need for the protection of consumers that arose from door-to-door sales. South Africa also adopted the cooling-off right into its legal system.

Although in most other parts of the world the regulation of the cooling-off right can be traced back to the nineteen-sixties and nineteen-seventies,⁴⁵ there was a delay in introducing cooling-off as a statutory right in South Africa. It was during the early nineteen-eighties, described by Otto⁴⁶ as the most significant years for the development of

³⁷ These countries included Sweden, Belgium, Netherlands, Denmark, Finland, Norway, West Germany, Switzerland, France, England, and Scotland. See Van Eeden 1976 *THRHR* 319-326.

³⁸ Otto 2012 *Litnet Akademies* 24.

³⁹ New Zealand and Australia.

⁴⁰ The United States of America and Canada.

⁴¹ Van Eeden 1976 *THRHR* 326-331.

⁴² Otto 2003 *TSAR* 333.

⁴³ Otto 2003 *TSAR* 333.

⁴⁴ Otto 2012 *Litnet Akademies* 26.

⁴⁵ See Otto 1981 *De Jure* 101-112.

⁴⁶ Otto "The history of consumer credit legislation in South Africa" 2010 *Fundamina* 266.



consumer credit law in South Africa, that South Africa finally introduced legislation that afforded consumers a cooling-off right in the Credit Agreements Act.⁴⁷

In South Africa, the rationale behind the adoption of the cooling-off right into legislation was necessitated by the need to counter the basic principles of the common law of contract which provide that a person who entered into a contract may not unilaterally terminate that contract on the ground that the person wishes to do so.⁴⁸ In the event of unilateral termination of a contract, a person is required to provide a valid reason for taking such a drastic step, for instance, if the other person to the contract has committed a material breach of contract.⁴⁹ Accordingly, under common law, the powers of a contracting party to terminate a contract is an extraordinary remedy that is only available under limited circumstances such as the existence of a material breach on the part of one party to the contract.⁵⁰ Contrary to the general principles of the law of contract, a cooling-off right enables a consumer to terminate a contract without having to advance any reasons for setting aside the contract and without committing breach of contract.

Notwithstanding the influence of other legal systems, the idea of cooling-off rights in South Africa was necessitated by the need to afford some form of protection to vulnerable consumers against door-to-door sales. This was done by affording consumers a right of reflection in the case of sales agents visiting their homes, and by preventing consumers from being pressured to enter into agreements.⁵¹ According to Otto, these reasons are still valid to this day.⁵² In this regard, various authors, past and present share commonality regarding the reasons behind the creation of the statutory right of cooling-off in that the rationale is based on door-to-door sales where pressure is arguably higher than in the

⁴⁷ Otto 1981 *De Jure* 259-273. See also Otto 2003 *TSAR* 333.

⁴⁸ Generally, the common law prohibits a person from unilaterally cancelling a valid contract because of having second thoughts. See Scholtz (ed) par 9.5.2.1.

⁴⁹ Scholtz (ed) par 9.5.2.1. See also Mudimeli "The early termination of credit agreements in terms of the National Credit Act 34 of 2005: An evaluation" LLM mini-dissertation UP (2018) 8.

⁵⁰ Mudimeli LLM mini-dissertation 8.

⁵¹ Otto 2003 *TSAR* 332-333.

⁵² Otto 2003 *TSAR* 332-333; Otto 2012 *Litnet Akademies* 24.



case of a sale taking place at the seller's business premises.⁵³ Thus, a number of authors argue that cooling-off rights exist in order to protect consumers from the difficulty to resist selling techniques employed by credit providers or their agents that accompany door-to-door sales.⁵⁴

Amongst these authors, Otto⁵⁵ argues that the initial reason for the creation of the cooling-off right was to protect a consumer whose goods were sold by a credit provider at the home of the former during what could be described as an ambush, employing high-pressure sales techniques such as door-to-door sales. Moreover, Otto further argues that the purpose for the creation of the right of cooling-off is to afford a consumer, in circumstances which the legislature considers having merits, an opportunity to reflect on the decision to enter into a contract and to terminate it.⁵⁶ Otto⁵⁷ opines that it is easy for a consumer to walk out of a store when he is unsure about a transaction, but a consumer cannot be expected to leave his own home when a salesman visits to sell a product. Kelly-Louw⁵⁸ similarly argues that the cooling-off right was initially created to protect credit consumers against the skill and sophisticated techniques of persuasion of door-to-door salespersons. Accordingly, the statutory right to cooling-off was necessitated by the need to protect consumers from high-pressure sales by credit providers or their agents which can influence consumers' ability to make informed decisions. It is submitted that these reasons still exist to date.

2 3 Credit Agreements Act

2 3 1 Introduction

The Credit Agreements Act was promulgated during a period in the early nineteen-eighties which marked a significant period in the development of South African consumer

⁵³ Otto 1981 *De Jure* 102.

⁵⁴ See also Otto 1981 *De Jure* 102.

⁵⁵ Otto 2003 *TSAR* 332-333.

⁵⁶ Otto 2003 *TSAR* 333. See also Otto and Otto 73.

⁵⁷ Otto 2012 *Litnet Akademies* 26;

⁵⁸ Kelly-Louw (assisted by Stoop) *Consumer credit regulation in South Africa* (2012) 223.



credit law.⁵⁹ The year 1981 in which the Credit Agreements Act became effective and replaced the Hire-Purchase Act is important for purposes of this dissertation, because that was the year the cooling-off right was introduced into South African credit legislation.

2 3 2 Overview: Field of application

Section 2(1) of the Credit Agreements Act⁶⁰ served as the departure point for its field of application, in that it specifically provided that the provisions of the Act applied to those credit agreements⁶¹ or categories of credit agreements determined by the Minister from time to time in the Government Gazette.⁶² Therefore, the Credit Agreements Act applied to only those items listed in the Gazette by the Minister, and did not apply automatically to all the agreements that fell in the definition of a credit agreement in terms of the Act.⁶³ However, the Minister was not empowered to render the Act applicable to credit agreements in terms whereof a person purchased or hired goods for business purposes, or where the credit provider was the State.⁶⁴

⁵⁹ Otto 2010 *Fundamina* 266.

⁶⁰ For a summary of the field of application of this Act, see Renke "An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005" LLD thesis UP (2012), "Renke LLD thesis" par 6 7 1.

⁶¹ S 1 of the Act defined the concepts "credit agreement", "credit transaction", "instalment sale transaction" and "leasing transaction". A credit agreement was defined as: (a) a credit transaction or a leasing transaction; (b) a transaction which or transactions which together have the same import as a transaction referred to in paragraph (a), irrespective of the form of the first-mentioned transaction or transactions and irrespective of whether any such transaction or transactions are subject to a resolutive or suspensive condition. "Credit transaction" included "instalment sale transactions". Both were contracts of purchase and sale of movable goods, in terms whereof payment had to take place in future. What distinguished the instalment sale transaction from other credit transactions was a clause in the agreement that the purchaser would not become the owner of the goods merely by the delivery of the goods to the consumer (or because of the use and enjoyment of the goods by the consumer). All credit transactions were contracts of purchase and sale of movable goods, against payment in future. The "leasing transaction" involved leases of movable goods, also against payment in future. Leases in terms whereof it was provided that the lessee would become the owner of the goods upon the expiration of the lease did not qualify as leases for purposes of this Act. See Renke LLD thesis par 6 7 1.

⁶² S 2. See also Renke LLD thesis 372.

⁶³ See Otto 1981 *De Jure* 259.

⁶⁴ S 2(1)(a) and (b).



The Credit Agreements Act dealt primarily with credit agreements that at the time involved a cash price that was not in excess of R500 000.⁶⁵ Therefore, a statutory threshold existed in respect of the transactions subject to the Credit Agreements Act.

It has already been mentioned above that the Credit Agreements Act did not apply automatically to every transaction that was regarded as a credit agreement. The Minister, who was responsible for determining whether the Credit Agreements Act applied to a particular credit agreement, never caused the Act to be applicable to transactions concerning the rendering of services on credit (although the definition of credit transaction made provision for that).⁶⁶

2 3 3 Cooling-off right

As mentioned,⁶⁷ the Credit Agreements Act was the credit legislation that formally introduced the cooling-off right in South Africa.⁶⁸ Section 13 is pertinent in this regard. It has already been mentioned⁶⁹ that the aim of the cooling-off right under the Credit Agreements Act was to counter the contract law principles relating to the prohibited unilateral termination of an agreement by the consumer. In this regard, Renke points out that this right implied that a consumer was statutorily entitled to terminate the credit agreement concluded with the credit provider subject to meeting specific requirements.⁷⁰ Thus, considering that certain requirements were satisfied, the consumer was entitled to a right to terminate a contract within a certain period of time and without stating the reasons for such conduct.⁷¹

⁶⁵ Kelly-Louw (assisted by Stoop) 11; Otto and Otto 4; Vessio "The National Credit Act 34 of 2005: background and rationale for its enactment, with a specific study of the remedies of the credit grantor in the event of breach of contract" LLD thesis UP (2015), "Vessio LLD thesis" 179.

⁶⁶ Renke LLD thesis 372.

⁶⁷ See pars 2.2 and 2.3.1 above.

⁶⁸ S 13. See also Otto 1981 *De Jure* 259; Otto 2012 *Litnet Akademies* 27; Otto and Otto 72.

⁶⁹ See par 2.2 above.

⁷⁰ Renke LLD thesis 380.

⁷¹ Otto 2003 *TSAR* 332.



Accordingly, for a consumer to have enjoyed the full protection of section 13, it was first required for the Credit Agreements Act to have applied to the particular transaction. It was further required in terms of section 13(1) for the initiative that resulted in the conclusion of the agreement to have originated from either the credit provider, or its manager, agent, or employee. It was also required for the contract to have been signed by the consumer at a place other than the business premises where the credit provider ordinarily operated its business.⁷² This requirement reiterates the fact that the Credit Agreements Act introduced the cooling-off right to protect consumers against door-to-door sales.

Moreover, in order for the consumer to have enjoyed the protection afforded by section 13(1) of the Credit Agreements Act, it was required for the termination to have occurred within five days after the conclusion of the agreement.⁷³ In order to terminate the agreement, the consumer was required to ensure that the credit provider was given a written notice which had to either be delivered or sent via registered mail.⁷⁴ Lastly, section 13(1) required that the consumer tender the return of any goods that were delivered to him under the credit agreement. Once the above had taken place, the credit provider was required to refund the consumer the amounts already received from the consumer within ten days of the date of the notice of cancellation provided in terms of section 13(1).⁷⁵

Importantly, it must be stressed that section 4 imposed a duty on the part of a prospective credit provider, or its manager, agent, or employee, to bring the provisions of section 13 to the attention of the prospective consumer before entering into a credit agreement at a place that is not the business premises of the credit provider.⁷⁶ Put differently, in instances where an agreement was entered into at a place other than the credit provider's usual business place, the credit provider or the credit provider's representative was obliged to draw the provisions of section 13 to the attention of the prospective consumer in writing.

⁷² S 13(1). See Otto 2003 *TSAR* 333.

⁷³ In terms of s 13(2) the period of five days excluded the day the credit agreement was concluded and Saturdays, Sundays, or public holidays. This means that 'business days' were involved.

⁷⁴ S 13(1). See Renke LLD thesis 380.

⁷⁵ S 13(3).

⁷⁶ S 4. See Otto 2003 *TSAR* 334; Vessio LLD thesis 190.



Moreover, it was a requirement for the particular credit agreement itself to contain a reference to the provisions of section 13.⁷⁷

It is noteworthy that section 13 did not apply without any limitations. The section did not apply in instances where the official state postal service was used in the initiation and conclusion of the agreement.⁷⁸ Otto correctly argues that despite the cooling-off right in section 13 appearing to afford comprehensive consumer protection, the ambit of its protection was not so wide because the right only applied to those movable goods prescribed by the Minister in the Gazette.⁷⁹

2 4 Preliminary remarks

The introduction of the cooling-off right in international and national legislation must be welcomed. This is in particular true for consumer credit legislation, which has the protection of the consumer as one of its main aims. The underlying reasons or rationale for the inclusion of the right to cool-off in credit legislation is understandable. Consumers must be protected in respect of door-to-door sales, because of the consumer's vulnerable position. The credit provider or its representative takes the initiative for the marketing of the credit and entering into the particular credit agreement. The high-pressure selling techniques employed by oftentimes unscrupulous salespersons who want to make a sale at all costs must be guarded against. However, consumers concluding credit agreements at the credit provider's place of business may also be susceptible to pressure to buy, for instance by a salesperson on the shop floor.

It is especially to be welcomed that the South African legislature followed suit and introduced the cooling-off right into our credit laws. The protection afforded in terms of section 13 of the Credit Agreements Act is very similar to that afforded in terms of the NCA, which is discussed next. However, the limitation of the section 13 right to only those goods to which the Credit Agreements Act was rendered applicable by the Minister,

⁷⁷ S 5(1)(g). See also Otto 2003 *TSAR* 334; Vessio LLD thesis 190.

⁷⁸ Otto 2003 *TSAR* 334.

⁷⁹ Otto 2003 *TSAR* 334.



caused this Act's right to be less effective from a consumer protection perspective. Section 13, as was to be expected if international trends are considered, only protected consumers where the credit agreement was entered into at another place than the credit provider's place of business. The said provision specifically required that the initiative for entering into the credit agreement should have emanated from the credit provider or its representative. Section 13 applied to sales and leases of movable goods. However, in the case of the latter, if the consumer became the owner of the leased goods at the expiration of the lease, no leasing contract for purposes of the Credit Agreements Act was pertinent.



CHAPTER 3

THE NCA'S COOLING-OFF RIGHT

3 1 Introduction

Although the NCA was only passed into law in 2007⁸⁰ the idea for comprehensive and effective credit legislation can be traced back to almost a decade earlier. It all began in the wake of a call for the reviewing of the existing consumer credit legislation of the time.⁸¹ As such, by 2002, the reviewing task was left to the Department of Trade and Industry, as it was known then,⁸² which is mandated to oversee the credit market.⁸³ Consequently, the Policy Framework was published in 2004.⁸⁴ The 2004 Policy Framework recommended legislation that is comprehensive and capable of addressing the complex consumer issues which the existing legislations of the time were ineffective to deal with.⁸⁵ According to Kelly-Louw the credit market of the time was dysfunctional and characterised by discriminatory and ineffective consumer protection measures, also lacking transparency.⁸⁶ Following a finding that the consumer credit legislations of the time were out of date and ineffective, the NCA was enacted and repealed and replaced its predecessors, amongst others the Usury Act and the Credit Agreements Act.⁸⁷

The NCA has a broad field of application and seeks to regulate all aspects of the granting of credit in South Africa. Indeed, this was confirmed by the decision in *Nedbank Ltd and*

⁸⁰ See par 1 1 above.

⁸¹ Otto 2010 *Fundamina* 270; Kelly-Louw "Introduction to the National Credit Act" 2007 *JBL* 147.

⁸² Now the Department of Trade, Industry and Competition.

⁸³ Kelly-Louw 2007 *JBL* 147; Boraine and Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act (Part 1)" 2007 *De Jure* 223. Kelly-Louw (assisted by Stoop) 3.

⁸⁴ The Department of Trade and Industry of South Africa *Consumer Credit Law Reform: Policy Framework for Consumer Credit* 2004 (hereafter "the 2004 Policy Framework").

⁸⁵ Renke, Roestoff and Haupt "The National Credit Act: New parameters for the granting of credit in South Africa" 2007 *Obiter* 230; Kelly-Louw (assisted by Stoop) 14.

⁸⁶ Kelly-Louw (assisted by Stoop) 14.

⁸⁷ See Ch 2 of the 2004 Policy Framework. See also Myburgh "The field of application of the National Credit Act 34 of 2005: A critical overview of the agreements it effects" LLM mini-dissertation UP (2013) 2.



Others v National Credit Regulator and Another,⁸⁸ where it was held that the Act is not a mere amendment of the consumer credit legislation of the past, but an overall replacement of the credit laws that governed consumer credit for almost three decades.⁸⁹ To a certain extent, the same holds true for the right to rescind a credit agreement.

3 2 Overview: Field of application

The Credit Agreements Act enjoys a broader field of application than its predecessor, the Hire-Purchase Act. The same holds for the NCA when compared with its predecessor, the Credit Agreements Act.⁹⁰ Section 4(1) serves as the point of departure in determining the field of application of the NCA and provides that the Act applies to credit agreements concluded at arm's length, in South Africa (or having an effect in South Africa), unless an exclusion is applicable.⁹¹

The NCA applies to three main categories of credit agreements, the credit facility, credit transaction and credit guarantee.⁹² The credit facility is defined in section 8(3). Section 8(4)(a) to (f), in turn, lists eight types of credit transactions.⁹³ All these transactions are defined in section 1 of the Act, with the exception of the "other credit agreement", which is defined in section 8(4)(f). The credit guarantee is defined in section 8(5). Only the credit agreements mentioned in section 121, providing for the cooling-off right, or that could potentially have been included in the said section, will be dealt with. It must be noted that the deferral of payment and the charging of interest, fees or charges are common characteristics of these agreements.

The section 121 right to rescind a credit agreement in terms of the NCA only applies to two credit transactions subject to the Act, the instalment agreement and the lease. The

⁸⁸ 2011 (3) SA 581 (SCA), "*Nedbank*".

⁸⁹ *Nedbank* par 1.

⁹⁰ Renke LLD thesis par 10 2 1; Kelly-Louw (assisted by Stoop) 19 and 28.

⁹¹ S 4(1). For a complete discussion of the NCA's field of application, see Van Zyl and Otto and Renke in Scholtz (ed) chs 4 and 8 respectively; Kelly-Louw (assisted by Stoop) ch 2; and Renke LLD thesis ch 7.

⁹² S 8(1).

⁹³ The pawn transaction, discount transaction, incidental credit agreement, instalment agreement, mortgage agreement, secured loan, lease, and other agreement.



instalment agreement⁹⁴ is a contract of purchase and sale of movable goods. The possession and use of the goods are immediately made available to the consumer. However, in terms of the agreement the consumer either only becomes the owner of the goods upon the fulfilment of a condition, or immediately, with the credit provider having the right to repossess the goods, should the consumer fail to comply with any of his obligations in terms of the credit agreement. The latter option is very seldomly used in practice.⁹⁵ A typical example of the first option is where the sale agreement contains an ownership reservation clause, in terms whereof the seller retains the ownership in the thing sold until the fulfilment of a condition, which is usually the payment of the final instalment in terms of the agreement. The ownership reservation clause serves as the credit provider's security to ensure the payment of the purchase price, which renders this agreement popular in practice for the selling and buying of consumer goods such as cars, farming equipment, and furniture.

It is difficult to distinguish the lease agreement⁹⁶ in terms of the NCA from the instalment agreement. Movable goods are once again involved, which are placed in the consumer's possession immediately for his use and enjoyment. However, it is a condition of the NCA's lease that the consumer must become the owner of the leased goods upon the expiration of the lease. This means that ownership is retained by the lessor until, for instance, the residual value in terms of the agreement is paid. The NCA therefore does not apply to the typical common law lease agreement in terms whereof the leased goods must be returned to the lessor upon the expiration of the agreement.⁹⁷ The NCA's lease agreement is probably not very prevalent in practice, due to the fact that ownership must transfer to the consumer.

⁹⁴ Scholtz (ed) par 8.2.3.4; Kelly-Louw (assisted by Stoop) par 2.4.3.3; and Renke LLD thesis par 7 2 2 3 5.

⁹⁵ Renke and Pillay "The National Credit Act 34 of 2005: The passing of ownership of the thing sold in terms of an instalment agreement" 2008 *THRHR* 641ff pars 4 and 5.

⁹⁶ Scholtz (ed) par 8.2.3.7; Kelly-Louw (assisted by Stoop) par 2.4.3.7; and Renke LLD thesis par 7 2 2 3 8.

⁹⁷ See *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid a House* 2013 (3) SA 426 (SCA) par 31.



If the transactions to which the NCA's right to rescind credit agreements are considered, it is clear that only transactions relating to movable property are pertinent. The only other credit transactions that could have qualified for inclusion under section 121 is the sale of movable goods under section 8(4)(f), the catch-all provision in the Act. This is a sale that neither contains an ownership reservation clause nor involves revolving credit,⁹⁸ and is therefore neither an instalment agreement nor a credit facility under the Act. However, because an amount owed by one person to another is deferred, and if interest, fees, or charges are charged by the credit provider in respect of the agreement or the deferral, another agreement in terms of section 8(4)(f)⁹⁹ is pertinent.¹⁰⁰ Finally, before considering the other steps that must be complied with in order for the NCA to apply to a particular credit agreement: it must be observed that the credit transactions forming part of the NCA's rescission right are similar to the transactions that formed part of section 13 of the Credit Agreements Act.¹⁰¹ However, the leasing transactions in terms of the NCA and its predecessor differ materially as far as the ownership of the thing leased is concerned.

Section 4(1) requires the parties to a credit agreement to conclude the particular credit agreement "at arm's length" in order for the NCA to apply to the agreement. This means that the parties concluding the credit agreement must be independent of each other. Section 4(2)(b) provides for arrangements where the parties are not independent of each other, and consequently, the Act does not apply. An example is a credit agreement entered into by family members who are co-dependent or one is dependent on the other.¹⁰²

Finally, in order for the NCA to be applicable, the particular credit agreement must have been concluded in South Africa, or it must have an effect in the Republic,¹⁰³ and no

⁹⁸ This concept means that the payment of instalments by the consumer creates additional credit available for use by the consumer. See Grové and Otto *Basic principles of consumer credit law* (2002) 80.

⁹⁹ Scholtz (ed) par 8.2.3.8.

¹⁰⁰ Scholtz (ed) par 8.2.3.8. S 8(4)(f) applies in the case of any other credit agreement than the credit facility, credit guarantee, or any of the credit transactions mentioned in s 8(4)(a) to (e).

¹⁰¹ See par 2.3.2 above.

¹⁰² See Scholtz (ed) par 4.2.

¹⁰³ Scholtz (ed) par 4.2.



exclusion to the Act's field of application must be applicable.¹⁰⁴ The Act importantly excludes big juristic persons¹⁰⁵ (having an asset value or annual turnover of R1 million or more)¹⁰⁶ or smaller juristic persons (with an asset value or annual turnover of less than R1 million) that conclude large credit agreements¹⁰⁷ from its ambit.¹⁰⁸

The NCA has a wide field of application, much wider than that of its predecessor. The Act applies to basically all types of credit agreements, irrespective of the amount or type of goods (or services) involved unless exempted by the legislature. The section 8(4)(f) catch-all definition of the other agreement contributes to the Act's extensive scope of application. The wide ambit of the NCA's field of application must be welcomed as a bigger group of consumers accordingly qualify to make use of the NCA's rights, including the right to cool off.

3 3 Cooling-off right

The NCA, similar to the Credit Agreements Act,¹⁰⁹ also provides an exception to the general principles of contract and common law by affording credit consumers a right to rescind a credit agreement without having to have or provide any reasons for the cancellation. If this statutory right is available to the credit consumer and exercised by the latter, a breach of contract is not committed.¹¹⁰ Section 121 in a nutshell provides that in instances where an instalment or lease agreement is entered into at any location other than the registered business premises of the credit provider, a credit consumer may

¹⁰⁴ See Scholtz (ed) par 4.3 for the exclusions in terms of ss 4(1) and 8(2) of the NCA.

¹⁰⁵ "Juristic person" is defined in s 1 and includes partnerships, associations of persons, incorporated or not, and trusts having three or more natural persons as trustees, or a juristic person as a trustee.

¹⁰⁶ S 4(1)(a) read with the updated Determination of Threshold Regulations in GN 513 in GG 39981, 11 May 2026, "Threshold regulations".

¹⁰⁷ Mortgage agreements and other credit transactions (except pawn transactions) with a principal debt of R250 000 or more. See s 9(4) read with the Threshold regulations.

¹⁰⁸ S 4(1)(b) read with the Threshold regulations.

¹⁰⁹ Par 2.3.3 above.

¹¹⁰ S 121. See also Kelly-Louw (assisted by Stoop) 223; Otto and Otto 72.



terminate such an agreement within five business days after the conclusion of the agreement. Subsequently, reciprocal restitution takes place.¹¹¹

It must be remembered that in order for the cooling-off right in terms of the NCA to be available to a consumer, the Act must apply to the particular credit agreement. However, as mentioned already,¹¹² the application of section 121 is restricted to two types of credit transactions only, the instalment agreement and lease agreement.¹¹³ Both involve movable goods, and the retention of ownership is required by the legislature, until the fulfilment of the consumer's obligations in terms of the agreement. It is noteworthy that alienation of land transactions are not included in section 121.¹¹⁴ The first restriction on the NCA's rescission right thus pertains to the type of credit agreement involved.

Section 121(1) also restricts the consumer's right to cancel his credit agreement with reference to the place of conclusion of the credit agreement and requires that in order for the right to be applicable the particular instalment or lease agreement must have been "entered into at any location other than the registered business premises of the credit provider". The implication is that if the agreement is entered into at the credit provider's registered place of business, the consumer cannot cool off.¹¹⁵ Otto opines that the test that should be used for purposes of determining the existence of the cooling-off right should be the place where the parties have reached an agreement of will.¹¹⁶ The term "registered business premises" is not defined in the Act. However, "premises" is defined in section 1 to include "land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container". It is submitted that effect must be given to the intention of the legislature to exclude the applicability of section 121 if and when the credit agreement is entered into at the credit provider's place of business. Therefore, a wide interpretation must be

¹¹¹ S 121. See in general Scholtz (ed) par 9.5.2; Kelly-Louw (assisted by Stoop) par 8.5.2; Otto and Otto 72ff; Renke, Roestoff and Haupt 2007 *Obiter* 257.

¹¹² Par 3 2 above.

¹¹³ S 121(1).

¹¹⁴ Otto 2012 *Litnet Akademies* 34.

¹¹⁵ See also Otto 2012 *Litnet Akademies* 34; Otto and Otto 72; Mudimeli LLM mini-dissertation 13.

¹¹⁶ Otto 2012 *Litnet Akademies* 34.



afforded to the concept “registered business premises” to include any premises where a credit provider conducts business. The cooling-off right is available to the consumer if the credit agreement was concluded at the consumer’s private residence, place of work, at a house or work party, etcetera.¹¹⁷ Although the section 121(1) restriction on the place of entering into the contract appears to be discriminatory against consumers who conclude agreements at the business premises of the credit provider, it must be kept in mind that the cooling-off right was created initially mainly to protect consumers in instances of door-to-door sales. However, as indicated above,¹¹⁸ door-to-door sales, and the high-pressure sales techniques accompanying such sales, are no longer the only underlying reason for the right. The underlying purposes behind the inclusion of the right in legislation broadened over time to also include consumer protection against “unsolicited contracts consumers would not have concluded otherwise, and agreements initiated by the creditor or his agents under circumstances that are not always conducive to clear thinking by the consumer”.¹¹⁹ It is noteworthy that unlike its predecessor the NCA does not specifically require that the initiative must emanate from the credit provider or its agent. However, this is implied in the section 121(1) restriction in respect of the place of the conclusion of the agreement (to any other place than the credit provider’s place of business).

The NCA, similarly to the Credit Agreements Act,¹²⁰ affords the consumer only five business days “after the date on which the agreement was signed by the consumer” to exercise his rescission right.¹²¹ The concept “business days” is defined in section 2(5) and excludes Saturdays, Sundays and public holidays. If a number of business days has to be calculated between two events, the first day is disregarded and the last day is included. This is represented by the acronym “LIFO”. In the case of the cooling-off right, the first day is the date after the consumer has signed the contract, and the last day is the fifth business day. If a consumer for instance signs the agreement on a Thursday, the

¹¹⁷ Scholtz (ed) par 9.5.2.1.

¹¹⁸ See the discussion in par 2.2 above.

¹¹⁹ Scholtz (ed) par 9.5.2.1.

¹²⁰ See par 2 3 3 above.

¹²¹ S 121(2).



last day to exercise the right is the next Thursday, provided that there are no public holidays in between falling on a weekday. In the latter instance, the last day to cool-off is then the Friday. The implication of section 121(2) is that once the five business days have lapsed, the consumer can no longer rely on the cooling-off right for the cancellation of the agreement and the general principles of contract will apply. Thus, the consumer will have to advance valid reasons for the cancellation of the contract.

According to Otto¹²² section 121(2) poses a challenge to the interpretation and application of the consumer's rescission right. The NCA contains no provision that requires the consumer to sign the agreement, and it is therefore possible for a consumer to conclude a credit agreement subject to the Act verbally.¹²³ It is submitted that in order to give effect to the legislature's intention in instances where the contract was not signed by the consumer, the cooling-off right must be exercised within five business days after the date on which the parties concluded the agreement. The date of reaching consensus (meeting of wills) and not the signing of the agreement should thus be relevant if the consumer did not sign the agreement.

Under circumstances where the consumer qualifies to cancel his credit agreement in terms of section 121(1) and (2) (in other words where either an instalment agreement or a lease agreement is involved that was concluded at a place other than the credit provider's place of business, and five business days after entering into the agreement have not expired yet), "the consumer may terminate [the] credit agreement... by delivering a notice in the prescribed manner to the credit provider". Regulation 37 of the NCA regulations provides that the notice of termination must be in writing and delivered to the credit provider's address by means of hand-delivery, fax, email, or registered post. It is noteworthy that the consumer using any of these prescribed forms of delivery will be able to submit proof of delivery, for instance, a fax report, which protects the consumer. However, if the consumer does not adhere to the prescriptions of regulation 37, and for

¹²² Otto 2012 *Litnet Akademies* 34.

¹²³ See Scholtz (ed) par 9.2.4 for the lack of formality requirements in terms of the NCA.



instance terminates the agreement verbally, or sends a written notice of termination to the credit provider per ordinary mail, the section 121 right is not exercised effectively. The implication is that the consumer will remain bound to the terms of the agreement and that the normal rules of the law of contract will be applicable.

The consumer must simultaneously with the written notice of termination tender “the return of any money or goods, or paying in full for any services, received by the consumer in respect of the agreement”.¹²⁴ Tendering the return of money seems to cater for moneylending contracts, which are not covered by section 121(1). The same holds for requiring the consumer to pay in full for services. Although credit agreements in terms whereof services are rendered to the consumer are subject to the Act,¹²⁵ such agreements are not included in section 121.

Once the consumer has exercised the cooling-off right and complied with section 121(2)(a) and (b), the agreement is officially terminated and the credit provider “must refund any money the consumer has paid under the agreement”.¹²⁶ The latter must be done within seven business days after the date of the delivery of the notice of termination.¹²⁷ The consumer’s right to a refund is not unqualified. In terms of section 121(3)(b)(i) and (ii) the consumer may be required to pay for the reasonable costs to have the goods returned to the credit provider, and to be restored to a resaleable condition. In addition, the consumer may also be required to pay a reasonable rent to the credit provider for the time the goods were in the consumer’s possession. The consumer is exempted from this obligation if the goods are still in the original packaging, and it is clear that the goods have not been used.

Otto¹²⁸ correctly remarks that the requirements relating to the repair costs and rental costs of returned goods are cumulative in that if an item was not packaged, such as a vehicle,

¹²⁴ S 121(2)(b). See also Otto and Otto 73.

¹²⁵ See par 3.2 above.

¹²⁶ S 121(3)(a). See also Otto and Otto 73.

¹²⁷ S 121(3)(a).

¹²⁸ Otto 2012 *Litnet Akademies* 35.

the credit provider will irrespective of whether the item was used, still be entitled to demand reasonable rent. Likewise, it is expected that when new goods that are sold or let to a consumer have to be returned to a credit provider, they will experience a sudden depreciation in their value on the grounds of the mere fact that they have left the credit provider's premises.¹²⁹ Section 121(4) and (5) therefore makes provision for the resolution of a dispute over a depreciation in value of the goods whilst in the consumer's possession. The credit provider must first attempt to resolve the dispute directly with the consumer by means of the alternative dispute resolution procedure provided for in Part A of Chapter 7 of the Act.¹³⁰ If this is not successful, the credit provider may approach a court for an order in terms of section 121(5). If the particular court is of the opinion that the "actual fair market value of the goods depreciated" while they were in the consumer's possession, the court may order the consumer to pay an additional amount (to the section 121(3) amount mentioned above) to the credit provider. This amount may not exceed the difference between the depreciation in the market value of the goods (as determined by the court) and the section 121(3) amount.¹³¹ According to Otto and Renke¹³² these arrangements by the legislature are "very reasonable".

The consequence of exercising the NCA's cooling-off right is thus reciprocal restitution, rendering this right very useful under circumstances where the consumer has for instance over-hastily bought goods he cannot or do not really want to use. If the consumer has paid a deposit or first instalment at the time of entering into the agreement, the consumer gets his money back. The cooling-off right is the only early termination right in terms of the Act giving rise to reciprocal restitution.

The NCA does not contain a similar measure to section 4 of the Credit Agreements Act,¹³³ obliging the credit provider to specifically draw the consumer's attention to the cooling-off

¹²⁹ Otto and Otto 65; Kelly-Louw (assisted by Stoop) par 8.5.2.

¹³⁰ S 121(4).

¹³¹ S 121(5)(a) and (b). See Scholtz (ed) par 9.5.2.3.

¹³² Scholtz (ed) par 9.5.2.3.

¹³³ Par 2 3 3 above.



right under circumstances where the credit agreement is entered into at another place than the credit provider's place of business. However, in terms of section 93(2) and 3, respectively read with regulations 30 and 31, a credit agreement subject to the NCA must contain a reference to the consumer's rights, including the cooling-off right. This is similar to section 5(1)(g) of the Credit Agreements Act.

Finally, it is important to mention that the section 121 right to rescind a credit agreement is the consumer's second chance to consider the terms of his credit agreement. Section 92 provides for a compulsory credit quotation which must set out the terms of the proposed credit agreement to the prospective consumer. The section 92 credit quotation is binding on the credit provider for a period of five business days, with the implication that once the quotation is issued to the prospective consumer, the credit provider is obliged to enter into the credit agreement with the consumer on the same terms as those stipulated in the quotation. The quotation thus already affords the consumer the opportunity to consider the terms of his credit agreement before entering into the agreement.

3 4 Preliminary remarks

The NCA's cooling-off right is very similar to the right provided for in section 13 of its immediate predecessor, the Credit Agreements Act.¹³⁴ However, there are also important differences. The main similarities are the types of credit agreements which could/may be rescinded, the five business days' period afforded to the consumer to rescind the credit agreement and reciprocal restitution that follows upon the cancellation of the contract. The main differences are the following: the Credit Agreements Act specifically required that the initiative for the conclusion of the credit agreement must have emanated from the credit provider or its representative. Although the same is not true for the NCA, the NCA's provision restricting the cooling-off right to those instances where the contract has been entered into at another place than the credit provider's place of business, implies a similar

¹³⁴ See pars 2 3 3 and 3 3 above.



requirement. It has already been mentioned that the Credit Agreements Act also provided for reciprocal restitution. However, the Credit Agreements Act did not contain measures to compensate the credit provider for the return of the goods to the credit provider and for their restoration to a resaleable condition. It also failed to provide for a reasonable rent for the goods whilst in the consumer's possession and for compensation to the credit provider in the case of a depreciation in the value of the goods.

The NCA's provisions are thus not only more extensive if compared to those of its predecessor, but also fairer towards the credit provider. Section 121(3)(b), (4) and (5) creates a balance between the rights and responsibilities of the credit provider and the consumer, which is in line with the provisions of section 3(d) of the NCA. This subsection provides that the main aims in the sentence introducing section 3 (consumer protection, etcetera) must be achieved *inter alia* by "promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers".¹³⁵ Importantly, although the NCA's cooling-off right enjoys limited application and is restricted in respect of the type of credit agreement involved, the place of entering into the credit agreement and the time period within which the right must be exercised, the NCA enjoys a broad, general field of application, which means more consumers potentially qualify for section 121's protection. This is in line with one of the main purposes of the Act, namely consumer protection.¹³⁶ Linked to this is the fact that the right to rescind his credit agreement is the consumer's second chance to consider the terms of his credit agreement. It is a *lacuna* in the NCA not to require the credit provider to specifically draw the consumer's attention to the cooling-off right in writing under circumstances where the right may potentially find application. As a final preliminary observation, it is apparent the NCA's cooling-off right is very limited.

¹³⁵ See Scholtz (ed) par 2.3 for the purposes of the NCA.

¹³⁶ See the sentence introducing s 3. See also *Sebola and another v Standard Bank of SA Ltd* 2012 (5) SA 142 (CC), par 40, where Cameron J remarked that the protection of the consumer is the NCA's main objective.



CHAPTER 4

THE COOLING-OFF RIGHT IN TERMS OF OTHER CONSUMER PROTECTION LEGISLATION

4 1 Introduction

The focus of this dissertation is on the NCA's right to rescind a credit agreement in terms of section 121 of the Act, read with regulation 37 of the NCA regulations. However, a proper evaluation of this right, which was discussed in the previous chapter, can only be done in comparison to similar rights in other pieces of legislation. With this purpose in mind, the NCA's right has already been compared with the cooling-off right that existed in terms of section 13 of the Credit Agreements Act.¹³⁷ In this chapter, the cooling-off rights in terms of the ALA, the ECT Act and the CPA, consumer protection enactments effective in South Africa, will be discussed, once again with the aim to compare these rights with the NCA's right. The fields of application of each Act will also be briefly considered. Similar to the NCA, the specific legislative enactment providing for the cooling-off right must be applicable and the ambit of the right contained in each must be determined with reference to the provisions of the particular Act. This chapter will conclude with preliminary remarks.

4 2 The ALA

4 2 1 Introduction

As already mentioned,¹³⁸ the nineteen-eighties marked a significant period in the development of consumer credit law. During this period the NCA's one predecessor, the Usury Act, was extensively revised, and its other predecessor, the Credit Agreements

¹³⁷ See par 3 4 above.

¹³⁸ Par 2 2 above.



Act, became effective. The same holds for the ALA, which was put into operation on 19 October 1982.¹³⁹ The situation was as follows:

“The contractual aspects of instalment transactions relating to movable goods were regulated by the Credit Agreements Act, the financial aspects of these contracts and of moneylending contracts by the [Usury Act] and contracts for the purchase of land on instalments primarily by the Alienation of Land Act.”¹⁴⁰

The ALA, which is still operative, is aimed at the protection of consumers and affords amongst others, a consumer cooling-off right in certain instances.¹⁴¹ Chapter I of the ALA regulates the formalities that apply in respect of deeds of alienation and Chapter II the sale of land on instalments. The last chapter contains general provisions, and also the cooling-off right, which was not part of the initial Act. Section 29A was inserted in the ALA in 1998 in terms of the Alienation of Land Amendment Act 103 of 1998,¹⁴² which became effective on 27 November 1998. It must be remembered that although the ALA co-existed with the Credit Agreements Act until the latter’s repeal by the NCA in 2006, the cooling-off right in terms of the Credit Agreements Act did not apply to immovable property transactions. This means that from 1982 until 1998 no cooling-off right was available to consumers in respect of immovable property transactions. Although the NCA applies to immovable property transactions, its right to rescind a credit agreement does not apply to immovable property transactions, and therefore the consumer must rely on section 29A of the ALA.

4 2 2 Overview: Field of application

It has already been mentioned that the ALA governs the sales of land on instalments, which is primarily done in Chapter II of the Act. The scope of application of Chapter II is thus important. Chapter II applies to the alienation of land transactions on instalments under circumstances where the land is used or intended to be used for residential

¹³⁹ Renke LLD thesis par 6.1.

¹⁴⁰ Renke LLD thesis par 6.1.

¹⁴¹ S 29A. See also par 4.2.3 below. See also Barnard “The influence of the Consumer Protection Act 68 of 2008 on the common law of sale” LLD thesis UP (2013), “Barnard LLD thesis” 173.

¹⁴² “ALA Amendment Act”.



purposes, and the purchase price is payable in three or more instalments over a period exceeding 12 months.¹⁴³ Section 4 of the ALA provides that Chapter II shall not be applicable to contracts where the seller is the State, the Community Development Board established in terms of section 2 of the Community Development Act,¹⁴⁴ the National Housing Commission as per section 5 of the Housing Act,¹⁴⁵ or a local authority. Moreover, Chapter II does not apply to amongst others, agricultural land, and land held by the State or Minister in trust on behalf of any person.¹⁴⁶ Otto and Otto opine that “Ch[apter] II constitutes consumer credit legislation in its own right”.¹⁴⁷

4 2 3 Cooling-off right

The purpose of the ALA Amendment Act was to confer on the purchaser or prospective purchaser of land the right to revoke an offer of purchase or to terminate the deed of alienation under certain circumstances. Accordingly, in terms of section 29A, a prospective purchaser or a purchaser¹⁴⁸ of residential land has the right to revoke an offer or terminate a deed of alienation, provided that the purchaser meets the requirements set out in section 29A.

The ALA requires the delivery of a written notice of cancellation to the seller¹⁴⁹ within five days of signing the offer to purchase or deed of alienation.¹⁵⁰ When calculating the five days in section 29A(1), the day on which the offer was made or the deed of alienation was concluded and any Saturday, Sunday, or public holiday must be excluded from the calculation.¹⁵¹ In other words, similar to the NCA, business days are involved. In order for the written notice to have an effect, it must have been signed by the purchaser or his

¹⁴³ See Kelly-Louw (assisted by Stoop) 540; Otto and Otto 124; Delpont “Cancelling an instalment sale of land *Merry Hill (Pty) Ltd v Engelbrecht* 2008 2 SA 544 (SCA) *Van Niekerk v Favel* 2008 3 SA 175 (SCA)” 2008 *Obiter* 302.

¹⁴⁴ Act 3 of 1966.

¹⁴⁵ Act 4 of 1966.

¹⁴⁶ See the definition of “land” in s 1(c) of the ALA.

¹⁴⁷ Otto and Otto 124.

¹⁴⁸ Hereafter the “purchaser”.

¹⁴⁹ Or the agent of the seller.

¹⁵⁰ S 29A(1). See also Barnard LLD thesis 197.

¹⁵¹ S 29A(2).



authorised agent, acting on the purchaser's written authority,¹⁵² identify the offer or deed of alienation that is the subject of revocation or termination¹⁵³ and be unconditional.¹⁵⁴ Once the offer is revoked or the deed of alienation is terminated in terms of section 29A, the purchaser must be refunded the full amount of the purchase by each person who received any amount within ten days after the notice given by the purchaser in terms of section 29A(1).¹⁵⁵ This is an indication that not only the seller must refund the purchaser, but also the agent, if the agent has received any commission subsequent to the sale of the immovable property. However, neither compensation nor damages may be claimed from the purchaser of the immovable property considering that the deed of alienation is terminated in terms of a statutory cancellation right.¹⁵⁶

Section 29A(5) contains the exceptions to the purchaser's cooling-off right. If the purchase price or price offered for the land is more than R250 000, or higher than the amount determined by the Minister, section 29A is not applicable.¹⁵⁷ The same holds where the purchaser is not a natural person, but a trust or a juristic person.¹⁵⁸ Other exceptions are *inter alia* where the land was purchased in terms of a publicly advertised auction, where the seller and purchaser have previously entered into a deed of alienation in respect of the same land on more or less the same conditions, and where the land was purchased by exercising an option that was open to be exercised for at least five business days.¹⁵⁹

It is clear from the wording of section 29A(5), and in particular the cap of R250 000 imposed in section 29A, that the cooling-off right conferred by ALA aims to protect a certain category of purchasers, particularly those living in low-cost housing.¹⁶⁰ This was

¹⁵² S 29A(3)(a).

¹⁵³ S 29A(3)(b).

¹⁵⁴ S 29A(3)(c).

¹⁵⁵ S 29A(4).

¹⁵⁶ S 29A(6). See Stoop "Artikel 29A van die Wet op Vervreemding van Grond" 2008 *JSAL* 747.

¹⁵⁷ S 29A(5)(a).

¹⁵⁸ S 29A(5)(b).

¹⁵⁹ S 29A(5).

¹⁶⁰ See Stoop 2008 *JSAL* 747. See also Barnard thesis 197.



confirmed by the court in *Gowar Investment (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC and Another*,¹⁶¹ which held that the purchaser the legislature intended to protect can be deducted from the definition of “land” in section 1 and from the provisions of section 29A(5).¹⁶² The legislator clearly had small buyers of residential property in mind. The court in *Gowar* further held that the ALA “is aimed at protecting vulnerable uninformed small buyers of residential property.”¹⁶³ Stoop correctly argues that the consumers the provision aims at protecting, are those who purchase low-cost housing and do not have access to legal relief.¹⁶⁴

In terms of the ALA any provision in a document, agreement, or undertaking concluded by a purchaser that tends to waive the purchaser’s cooling-off right or whereby a penalty fee is imposed or levied directly or indirectly in the event the purchaser exercises the right, shall be considered void.¹⁶⁵ The signing of a new offer to purchase or deed of alienation within business five days of signing another offer to purchase or a deed of alienation of land and before exercising the section 29A right of revocation is deemed to be a revocation or cancellation of the first offer or deed of alienation.¹⁶⁶ Once the signature on the later transaction is complete, the purchaser is required to notify the seller in terms of the earlier transaction in writing of the revocation or termination of that transaction.¹⁶⁷ Non-compliance with subsection 8(b) constitutes an offence.

Importantly, it will not be complete to discuss section 29A without mentioning section 2(2A) which requires the deed of alienation to contain the purchaser’s cooling-off right in terms of section 29A.¹⁶⁸ The purpose of section 2(2A) is to ensure that the purchaser is made aware of the existence of his cooling-off right or to recognise the existence of the

¹⁶¹ 2007 (3) SA 100 (SCA) (hereafter “*Gowar*”).

¹⁶² *Gowar* par 9.

¹⁶³ *Gowar* par 9.

¹⁶⁴ Stoop 2008 JSAL 744.

¹⁶⁵ S 29A(7)(a) and (b).

¹⁶⁶ S 29A(8)(a).

¹⁶⁷ S 29A(8)(b).

¹⁶⁸ Stoop 2008 JSAL 747.



right.¹⁶⁹ It can be argued that this, therefore, places an obligation on the part of the seller to draw the attention of the purchaser to the availability of the right under section 29A. However, it must be noted that this does not mean that an offer that does not contain a reference to section 29A is invalid on the face of it. Stoop points out some of the shortcomings of section 2(2A) and argues that the validity of the offer is not determined by the fact whether or not the offer contains the cooling-off right in terms of section 29A.¹⁷⁰ As such, the offer will remain valid even if it does not contain a cooling-off right in terms of section 29A. Although section 2(2A) requires that the cooling off right be contained in the deed of alienation, the ALA does not stipulate the penalty for non-compliance with section 2(2A).¹⁷¹ In this regard, the effect of non-compliance with section 2(2A) was left to be decided by the courts.

The first reported case to deal with the effect of non-compliance with section 2(2A) was *Sayers v Khan*.¹⁷² In dealing with the non-compliance with section 2(2A), the court applied semantic guidelines and held that the non-compliance with section 2(2A) resulted in the deed of sale being null and void.¹⁷³ In doing so, the court upheld the special plea raised by the defendant and held that the deed of sale was null and void. The court in *Sayers* did not consider any possibility of voidability at the instance of the purchaser. This resulted in the decision being contradicted by the court in *Section 3 Dolphin Coast Medical Centre CC v Gowar Investments (Pty) Ltd*.¹⁷⁴ The court in *Section 3* held that the effect of non-compliance with section 2(2A) will result in voidability at the instance of the purchaser whose cooling-off right was enacted.¹⁷⁵ Section 2(2A) does not create any rights, but aims to bring the purchaser's existing rights in terms of section 29A under his attention.¹⁷⁶

¹⁶⁹ Stoop 2008 JSAL 747.

¹⁷⁰ Stoop 2008 JSAL 747.

¹⁷¹ Stoop 2008 JSAL 747.

¹⁷² [2002] 1 ALL SA 57 (C) (hereafter "*Sayers*").

¹⁷³ *Sayers* pars 63 and 64.

¹⁷⁴ [2006] 2 SA 15 (D) (hereafter "*Section 3*").

¹⁷⁵ *Section 3* par 16. See also Löt, Nagel and Joubert *Specific contracts in court* (2010) 26.

¹⁷⁶ *Section 3* par 24.



According to Löt, Nagel and Joubert¹⁷⁷ the court's decision in *Section 3* meant that an offer which does not comply with the provision of section 2(2A) should not be rendered void without considering voidability at the instance of the purchaser. Importantly, on appeal, the *Gowar* case provided much-needed clarity on the effect of non-compliance with section 2(2A) given the contradictory judgments in *Sayers* and *Section 3*. The Supreme Court of Appeal found that the non-compliance with section 2(2A) does not result in nullity but voidability at the instance of the purchaser. In other words, the seller's failure to comply with section 2(2A) by not referring to the cooling-off right in section 29A in the offer to purchase or deed of alienation will render the agreement of sale voidable at the instance of the purchaser.¹⁷⁸

4 3 The ECT Act

4 3 1 Introduction

The ECT Act was promulgated to address the sudden increase in the use of electronic data messages, mostly in the business environment.¹⁷⁹ The ECT Act was signed into law and became operational on 30 August 2002. In terms of the ECT Act's preamble, it was enacted to facilitate and regulate aspects of electronic communications and transactions for public interest in South Africa.¹⁸⁰ Before the implementation of the ECT Act, electronic transactions in South Africa were largely unregulated in legislation, which caused legal uncertainties in the business environment. However, since its inception, the ECT Act has been playing a pivotal role in the development and promotion of consumer protection in the field of e-commerce. This is in line with one of the objectives of the ECT Act, which is to develop and create a safe, secure, and effective environment within which the consumer can utilise electronic transactions.¹⁸¹ The ECT Act specifically states that it aims at promoting the development of electronic transaction services that are responsive

¹⁷⁷ Löt, Nagel and Joubert 27.

¹⁷⁸ See also Stoop 2008 *JSAL* 747.

¹⁷⁹ Snail "Electronic contracts in South Africa – a comparative analysis" 2009 *JILT* 1.

¹⁸⁰ See also s 2.

¹⁸¹ S 2(1)(j).



to consumers' needs.¹⁸² This piece of legislation is concerned with consumer protection and focuses on ensuring that a variety of consumer rights are protected where the Act applies.¹⁸³

4 3 2 Overview: Field of application

Section 4(1) of the ECT Act is titled "Sphere of application" and sets out the Act's general field of application. Section 4(1) provides that the ECT Act applies to any electronic transaction or data message, subject to any provision that is contrary to section 4. Chapter VII, which specifically deals with "Consumer protection", contains the ECT Act's cooling-off right, which is provided for in section 44. Section 42 provides for the scope of application of Chapter VII in particular and makes it clear that Chapter VII only applies to electronic transactions.¹⁸⁴ Section 42(2) subsequently excludes certain electronic transactions from the ambit of the cooling-off right in section 44. Finally, section 1 defines "consumer" as "any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier". The aforementioned can be thus summarised as follows:¹⁸⁵

"The [ECT] Act applies to electronic transactions or data messages. However, it should be noted that section 44 only applies if the consumer in terms of the electronic transaction is a natural person and the end-user of the goods or services offered by the supplier under the transaction."¹⁸⁶

4 3 3 Cooling-off right

Section 44 of the ECT Act sets out its cooling-off right. In terms of section 44(1), a consumer has the right to cancel any transaction and any related credit agreement for the supply of goods or services without stating any reason or becoming liable for a penalty, within seven days after the date of the receipt of the goods¹⁸⁷ or, in the case of supply of

¹⁸² S 2(1)(k).

¹⁸³ See Chapter VII of the ECT Act.

¹⁸⁴ S 42(1).

¹⁸⁵ Renke LLD thesis par 9 3 5 3.

¹⁸⁶ S 4(1) read with the definition of "consumer" in s 1.

¹⁸⁷ S 44 (1)(a).



services, the date of the conclusion of the agreement.¹⁸⁸ The ECT Act's right to cool-off therefore applies to transactions for the supply of movable goods or services to a consumer and must be exercised within a period of seven days. The period of seven days must be interpreted to mean "calendar days", in other words with the inclusion of Saturdays, Sundays, and public holidays. In terms of the Interpretation Act,¹⁸⁹ the LIFO principle applies, in other words, the first day is excluded and the last day is included (unless the last day falls on a Sunday, in which case the Sunday will also be excluded). It has already been seen that the NCA and the ALA provide for a cooling-off period of five business days.¹⁹⁰ The same holds for the cooling-off period in terms of the CPA, discussed below.¹⁹¹ The "seven days" amounts to the same number of days as five business days.

If a consumer uses his cooling-off right, the only charge that the consumer may be levied may be the direct cost of returning the goods.¹⁹² In other words, if the consumer exercises his cooling-off right within the allowable seven-day period, the consumer will not be liable to pay any penalty, but may still be responsible to pay a charge that may be charged for the cost of returning the particular goods to the supplier.

Section 44 further provides that, if at the time of the consumer exercising his cooling-off right the payment for the goods or services has already been effected, the consumer will be entitled to a full refund of such payment. The refund must take place within thirty days of the date of cancellation of the agreement.¹⁹³ In terms of section 44(4), the provisions of section 44 may not be construed as to infringe on any other right of the consumer in terms of any other law. It is submitted that section 44(4) aims to substantiate any other

¹⁸⁸ S 44(1)(b).

¹⁸⁹ Act 33 of 1957 s 4.

¹⁹⁰ Pars 3.3 and 4.2.3 respectively.

¹⁹¹ Par 4.4.3.

¹⁹² S 44(2).

¹⁹³ S 44(3).



available right of the consumer in terms of any other law, including any other provision of the ECT Act concerning consumer protection.

It has already been mentioned that section 42(2) provides that section 44 of the ECT Act does not apply to certain electronic transactions. These *inter alia* include transactions for financial services, goods for everyday consumption, such as foodstuffs, personalised goods or goods made to the consumer's specifications, the provision of gaming or lottery services, and electronic transactions concluded way of auctions.

4 4 The CPA

4 4 1 Introduction

The CPA¹⁹⁴ affords general protection to consumers and became fully effective on 1 April 2011. Stoop¹⁹⁵ remarks that the CPA “serves as a comprehensive source of consumer law and, together with the National Credit Act, forms a South African body of consumer law”. Chapter 2 of the CPA introduces eight fundamental consumer rights, *inter alia*, the right of equality in the consumer market, the consumer's right to privacy, and the consumer's right to choose. The latter fundamental right, which includes the consumer's right to a cooling-off period in the case of direct marketing, is contained in Chapter 2 Part C. Chapter 3 *inter alia* deals with the protection of the consumer's fundamental rights.

4 4 2 Overview: Field of application

The CPA has a wide field of application.¹⁹⁶ In order to determine this Act's field of application, a number of definitions contained in the provisions on the CPA's field of application are important, such as “transaction”, “goods”, “service”, “supplier”, and “consumer”. A transaction is an agreement concluded between two or more persons for

¹⁹⁴ For an overview of the CPA, including its interrelationship with the NCA, see Kelly-Louw (assisted by Stoop) ch 21 and Scholtz (ed) par 20.11.

¹⁹⁵ Kelly-Louw (assisted by Stoop) par 21.1.

¹⁹⁶ S 5(1). For the Act's field of application, see Kelly-Louw (assisted by Stoop) par 21.4 and Barnard LLD thesis par 3.5. See also Jacobs, Stoop and Van Niekerk “Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” 2010 *PER/PELJ* 9.



the supply of goods or services for consideration. The concept “goods” means anything marketed for human consumption and is thus very wide. The latter also holds true for “service”, which includes work performed by a person to directly or indirectly benefit another person. Basically, any service is included, for instance, the provision of education, information, advice, financial services, and the transportation of goods or people. “Supplier” includes juristic persons¹⁹⁷ or natural persons who market goods or services. “Market” in turn means to supply or promote. “Consumer” is any person, including juristic persons.¹⁹⁸ Stoop summarises the CPA’s field of application as follows: “[I]n essence the [CPA]... applies to every *transaction* occurring within South Africa for the *supply of goods or services* or the *promotion* of goods or services and the goods and services themselves unless the transaction [is] exempted from... the [CPA].¹⁹⁹

The CPA excludes bigger juristic persons from its ambit. If the consumer is a juristic person whose asset value or annual turnover exceeds the current threshold of R2 million, the CPA is not applicable.²⁰⁰ In terms of section 5(2)(d) of the CPA, the Act is in general not applicable to a credit agreement that is subject to the NCA.²⁰¹ However, as stated by Stoop,²⁰² the “Consumer Protection Act affords protection to consumers of all goods and services purchased by consumers, irrespective of whether the goods or services are the subject of a credit agreement or not”. Of importance in respect of the interplay between the CPA and NCA for purposes of this dissertation is that the CPA’s cooling-off period after direct marketing does not apply to credit agreements subject to the NCA.²⁰³

¹⁹⁷ The concept “juristic person” has the same extended meaning it has in terms of the NCA. See par 3.2 above.

¹⁹⁸ See below.

¹⁹⁹ Kelly-Louw (assisted by Stoop) par 21.4. See also Barnard “An appraisal of a consumer’s cooling-off right in terms of section 16 of the Consumer Protection Act 68 of 2008” 2016 *THRHR* 497; Barnard “The role of comparative law in consumer protection law: A South African perspective” 376.

²⁰⁰ Kelly-Louw (assisted by Stoop) par 21.4.7.

²⁰¹ See in general Melville and Palmer “The applicability of the Consumer Protection Act 2008 to credit agreements” 2010 *SA Merc LJ* 272-278; and Stoop “The overlap between the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005: a comparison with Australian law” 2014 *THRHR* 135-144.

²⁰² Kelly-Louw (assisted by Stoop) par 21.1.

²⁰³ Kelly-Louw (assisted by Stoop) par 21.4.8. See par 3 2 above for an overview of the NCA’s field of application.



4 4 3 Cooling-off right

As already mentioned,²⁰⁴ Chapter 2 of the CPA sets out the fundamental rights afforded to consumers and Part C contains the consumer's right to choose.²⁰⁵ The cooling-off right conferred to consumers in terms of section 16 forms part of the right to choose.²⁰⁶ The cooling-off right provided to consumers under the CPA is only applicable to transactions that resulted from the direct marketing²⁰⁷ and are subject to the CPA.²⁰⁸ Section 16(1) specifically excludes transactions which are subject to section 44 of the ECT Act. However, if section 16 applies to a transaction or an agreement, the CPA's cooling-off right applies in addition to any other right to rescind available to the consumer in terms of the law existing between the parties, and not as a replacement of such a right.²⁰⁹

Importantly, under the CPA a consumer is entitled to rescind a transaction that resulted from any direct marketing without having to provide a reason and without being liable for a penalty. The consumer must deliver a notice²¹⁰ in writing or another recorded manner to the supplier or another person within five business days after the later date on which the transaction or agreement was concluded, or the goods forming the subject of the transaction were delivered to the consumer.²¹¹ Therefore, it is clear that in terms of section 16 a cooling-off period will only be available to a consumer if the transaction in question resulted from direct marketing and it is not a transaction falling within the ambit of section 44 of the ECT Act. Furthermore, the consumer must ensure that the notice is delivered before the expiry of five business days from the date of the conclusion of the transaction.

²⁰⁴ See par 4 4 1 above.

²⁰⁵ Ss 13-21.

²⁰⁶ S 16. See also Barnard 2016 *Comp & Int'l LJ SA* 7.

²⁰⁷ See def of "direct marketing" in s 1. Direct marketing is regulated, and it occurs in instances where a person is approached either in person, through mail, or by means of electronic communication for purposes of directly or indirectly promoting or offering to supply goods or services or requesting a person to make a donation of any kind, and for any reason.

²⁰⁸ Barnard 2016 *THRHR* 496.

²⁰⁹ S 16(2).

²¹⁰ Annexure C to the Regulations provides the format in which the notice must set out the consumer's cooling-off right to the supplier.

²¹¹ S 16(3)(a) and (b).



Once the consumer has timeously exercised his cooling-off right, the supplier is required to return any payment received from the consumer in terms of the transaction within 15 business days after receiving notice of the rescission from the consumer. This applies in the instance where no goods were delivered to the consumer. If goods were delivered to the consumer, the return of any payment received must take place 15 business days after the goods were received back from the consumer. Reciprocal restitution therefore takes place. A supplier is not permitted to make any attempt to collect any payment in terms of a transaction where the consumer exercised his cooling-off right, unless such is permitted by section 20(6).²¹² This subsection provides for compensation to the supplier under certain circumstances. If the goods were returned to the supplier in their original, unopened packaging, no charge is pertinent. If the goods were still in their original condition and repackaged, a reasonable amount for the use of the goods may be charged, or for any consumption or depletion of the goods. A supplier is also entitled to charge the necessary restoration costs to restore the goods to a condition to be re-stocked.²¹³

4 5 Preliminary remarks

In this chapter, the cooling-off rights in terms of the ALA, ECT Act and the CPA were considered.²¹⁴ The aim is to compare the provisions of the NCA with those in the aforementioned enactments and to ultimately suggest improvements to the NCA's right. There are similarities and differences between the rights discussed in this chapter. The time periods within which the rights must be exercised correspond. A consumer who concludes an immovable property transaction has no choice but to rely on the ALA's right in section 29A. This is due to the fact that the right to revoke an offer or to terminate a deed of alienation in terms of the ALA applies to immovable property transactions only. If a consumer concludes a credit agreement electronically, it is submitted that the cooling-off right in terms of the NCA or the ECT Act could be used by the consumer, provided that the consumer qualifies for the right in terms of section 121 or section 44. If the NCA

²¹² S 16(4)(b).

²¹³ S 20(6)(a)-(c).

²¹⁴ Pars 4 2 3, 4 3 3 and 4 4 3 above.



applies to a credit agreement, the CPA's cooling-off period in section 16 is excluded. The cooling-off rights in terms of the NCA and the other consumer protection enactments discussed in this chapter will be compared in the next chapter.



CHAPTER 5

COMPARISON, CONCLUSIONS, RECOMMENDATIONS, AND FINAL REMARKS

5 1 Introduction

The focus of this dissertation was on the consumer's statutory right to rescind or cancel a credit agreement in terms of the NCA. The secondary focus was on the similar right contained in other pieces of consumer protection legislation currently effective in South Africa, the ALA, ECT Act, and CPA. The ultimate aim was to draw a comparison between the cooling-off right in the NCA and the other aforementioned consumer protection enactments, to ascertain if any improvements can be made to the NCA's right. With this same purpose in mind, attention was also paid to the NCA's immediate predecessor which protected credit consumers in respect of the contractual aspects of credit agreements, the Credit Agreements Act. The aim in the comparison that follows is to focus on main trends, similarities and differences.

The NCA is the currently effective consumer credit protection enactment in South Africa, and has as one of its main aims the protection of credit consumers.²¹⁵ The ALA's aim is also the protection of the consumer, but in respect of the alienation of residential land transactions. The ALA protects credit consumers who buy immovable residential property on instalments.²¹⁶ The ECT Act protects natural persons as consumers to whom goods or services are supplied in terms of electronic transactions, provided that the particular consumer is the end user of the goods or services.²¹⁷ Finally, the CPA, the last of these Acts to become effective, affords general consumer protection to South African consumers.

The dissertation briefly investigated the nature and purpose of the cooling-off right in consumer protection legislation.²¹⁸ The cooling-off right is a statutory right to cancel an

²¹⁵ Par 3 4.

²¹⁶ Par 4 2 2.

²¹⁷ Par 4 3 2.

²¹⁸ Pars 1 1, 2 1, and 2 2.



agreement and changes the common law principle that an agreement may only be cancelled if good reasons exist for the cancellation, for instance a material breach of contract was committed. In the case of the cooling-off right, which provides an 'extraordinary' right to a consumer to rescind his contract, no reason is required for the cancellation. A consumer who qualifies for and exercises a cooling-off right may not be penalised for using the right. In addition, the credit provider, seller or supplier may not charge any money in respect of the goods or services provided to the consumer in terms of the agreement if the cooling-off right is invoked.²¹⁹

The underlying reasons for the cooling-off right were discussed in Chapter 2.²²⁰ The initial reason for the establishment of this right in consumer protection legislation was to provide a statutory right to consumers who became the 'victim' of high-pressure selling techniques in a door-to-door sales scenario to cancel the agreement, in spite of the fact that the credit provider, seller or supplier did not commit breach of contract. This is different from the situation where the consumer decides to go to the credit provider's place of business, for instance to buy something, such as a car. In this case the consumer has probably already made up his mind what to buy, and had time to consider whether he can enter into the prospective agreement and afford the to purchase the goods (on credit). In contrast to the consumer who is subjected to door-to-door sales the consumer who goes to the shop is, at least in theory, not subjected to the same high-pressure selling techniques. Although these reasons are still valid for the existence of the cooling-off right, the commercial landscape has changed over the years. Modern day consumers are for instance subjected to electronic marketing and sales. The basis for the existence of the statutory right to cancel has thus become broader, and *inter alia* includes the reasons mentioned by Otto and Renke for the cooling-off rights discussed in this dissertation, *inter alia* protection against unsolicited contracts.²²¹

²¹⁹ See eg. par 4 4 3.

²²⁰ Pars 2 1 and 2 2. See also par 3 3.

²²¹ Par 3 3.



5 2 Comparison between the Acts and cooling-off rights

The cooling-off right in terms of a particular enactment is only available to the consumer if the Act, in accordance with its own rules, finds application in general. Therefore, if an Act has a broader rather than narrower field of application, more consumers theoretically qualify for the right to rescind. In this respect the NCA, with its broad field of application,²²² is to be commended. The exclusion from the Act of bigger juristic persons, or smaller juristic persons that concludes large credit agreements, makes sense. These persons can fend for themselves. The CPA also excludes big juristic persons from its ambit.²²³

The fields of application of the ALA, ECT Act, and CPA were briefly considered.²²⁴ The same holds for the Credit Agreements Act.²²⁵ If compared to the latter, it is commendable that the NCA does not only apply to selected consumer goods which are subjected to the Act by the Minister. It is important to take notice of the fields of application of the ALA and the ECT Act. A credit consumer who enters into an immovable property transaction, can only rely on the ALA's right in section 29A, and not on the NCA's right in section 121. It has already been mentioned that the cooling-off rights in the NCA and in section 44 in the ECT Act may find application to a credit agreement subject to the NCA, if concluded electronically.²²⁶ The NCA does not contain a conflict resolution measure between these two Acts. However, if my argument is incorrect, such consumer Acts is undoubtedly covered by the ECT Act's right. Although the CPA enjoys wide application,²²⁷ its cooling-off right is not applicable to a credit agreement which is subject to the NCA.²²⁸

As ascertained from the discussion of the various cooling-off rights or periods,²²⁹ each Act contains its own rules and imposes its own restrictions on the cooling-off right it

²²² Par 3 2.

²²³ See par 4 4 2.

²²⁴ Pars 4 2 2, 4 3 2 and 4 4 2.

²²⁵ Par 2 3 2.

²²⁶ Par 4 5.

²²⁷ Par 4 4 2.

²²⁸ Pars 4 4 2 and 4 5.

²²⁹ Pars 2 3 3, 3 3, 4 2 3, 4 3 3 and 4 4 3.



provides for. The scope of application of the right in terms of the NCA and Credit Agreements Act is very similar and involved/involves movable goods. In the case of the lease agreement in terms of the NCA, in contrast to the lease in terms of the Credit Agreements Act, ownership in the goods is retained by the lessor until a condition is met. However, the definition of the lease in the NCA requires that the consumer must become the owner of the goods. It may be considered by the legislature, which was probably not done when the Act was drafted, to also extend the cooling-off right in the NCA to section 8(4)(f) sales.²³⁰ It may also be considered to extend the right to other types of agreements, such as credit agreements in terms whereof services are rendered. The legislature seems to have made provision for this possibility in section 121(2)(b), by using the words “paying in full for any services”.

The insertion of section 29A to revoke an offer or terminate a deed of alienation in respect of immovable property in the ALA in 1998 must be endorsed. For a number of years (1982 to 1998) the consumer concluding an immovable property transaction had to do without this right. The cooling-off right in the Credit Agreements Act did not cater for immovable property transactions.²³¹ However, the section 29A right is restricted to a purchase price of R250 000, to cater for the needs of buyers of low-cost housing, or small buyers of residential property, who do not have access to legal relief.²³² Other buyers of immovable property, for instance buyers in the middle-class market, are thus excluded from a cooling-off right. The NCA only provides a right to rescind a credit agreement to movable goods transactions, in spite of the NCA also applying to immovable property transactions.²³³ It should also be considered extending the NCA's right to these types of transactions.

²³⁰ See par 3 2.

²³¹ Par 4 2 1.

²³² Par 4 2 3.

²³³ Pars 3 2 and 3 3.



The NCA's right to rescind a credit agreement is contained in section 121, read with regulation 37 of the NCA regulations.²³⁴ It is submitted that these provisions are fairly well drafted, in spite of the courts' and academics' criticism of the way in which the NCA was drafted.²³⁵ Two drafting 'errors' in the Act in connection with the right is the legislature's failure to define the credit provider's "registered business premises" and the requirement that the right must be exercised within five business days after the signing of the credit agreement. However, it has already been submitted that the NCA must be interpreted to give effect to these provisions, and how. The aim of the NCA is mainly to protect the consumer, and this aim must be adhered to in the interpretation of the Act.²³⁶

The NCA's cooling-off right is restricted in respect of the type of credit agreement subject to the right,²³⁷ the place of entering into the contract, and the period within which the right must be exercised. The requirement that the credit agreement must be concluded at another place than the credit provider's place of business, reiterates the fact that the aim is still to protect the consumer *inter alia* in respect of door-to-door sales, or contracts concluded under high-pressure situations, where the initiative for the agreement (which is implied) originates from the credit provider or its representative. Examples were mentioned, such as credit agreements concluded at the consumer's place of work, or at a house party.

The five business days afforded to the consumer to cool-off is in line with the time periods afforded to consumers in terms of the other enactments discussed in this dissertation. Although five business days are fairly short, it must be remembered that the cooling-off right in terms of the Act is the consumer's second opportunity to consider the terms of his credit agreement. The first opportunity in this respect is the credit quotation received by the consumer in terms of section 92, which is binding on the credit provider for five

²³⁴ These provisions were discussed in par 3 3 above.

²³⁵ Par 1 1.

²³⁶ S 2(1). See par 1 1 above.

²³⁷ See above.



business days.²³⁸ In addition, the interests of the consumer must be balanced with that of the credit provider.²³⁹ It is therefore submitted that the NCA affords a sufficient cooling-off period to credit consumers.

It is submitted that the NCA, similar to its predecessor, should have contained a provision specifically requiring the credit provider to draw the right to rescind a credit agreement to the consumer's attention in writing.²⁴⁰ The consequences of non-compliance with such an obligation should be made clear, to avoid unnecessary litigation.²⁴¹ The requirement that the credit agreement must refer to the cooling-off right is in line with the other enactments discussed and is endorsed, but it is not sufficient. The consumer must be made aware of this important right, in particular due to the limited time within which the right can be exercised.

It is to be commended that the prescribed manners for delivery of the written notice of cancellation to the credit provider were chosen to enable the consumer to submit proof of compliance. This protects the consumer.²⁴²

The consequences of exercising a cooling-off right is reciprocal restitution, which, although regulated in the enactments discussed, is a natural consequence of the cancellation of a contract. The compensation measures build into the NCA after the right to rescind the agreement has been exercised by the consumer²⁴³ are to be welcomed, and is an extension of the provisions of the Act's predecessor, the Credit Agreements Act. Otto and Renke are correct in stating that these measures are "very reasonable". By enacting these measures the legislature creates a balance between the rights and obligations of the consumer and the credit provider, which gives effect to section 3(d).²⁴⁴

²³⁸ Par 3 4.

²³⁹ See s 3(d), mentioned in par 3 4.

²⁴⁰ S 4 Credit Agreements Act, discussed in par 2 3 3.

²⁴¹ See the discussion of s 2(2A) ALA in par 4 2 3.

²⁴² Reg 37 of the NCA regulations. See par 3 3.

²⁴³ S 121(3), (4) and (5) See par 3 3.

²⁴⁴ See above.



5 3 Concluding remarks and recommendations

The question may be asked whether the comparison between the cooling-off rights in the NCA and the other legislative enactments discussed in the dissertation was worthwhile. It is submitted that it was. The remark by Otto and Otto²⁴⁵ that a comparison between Acts dealing with the same subject matter is inevitably endorses this. The same holds for the fact that the NCA's cooling-off provisions compare favourably to those in the other Acts discussed in the dissertation.

The following is recommended in respect of the NCA's cooling-off provisions:

- a. The legislature could consider extending the ambit of the NCA's right to section 8(4)(f) sales, service contracts, and even immovable property transactions.
- b. The drafting 'errors' in section 121 must be corrected. The concept of "registered business premises" must be clarified and the requirement that the right must be exercised within five business days after signing must be changed to five business days after entering into the particular credit agreement.
- c. Importantly, the credit provider should be obliged in the Act to draw the attention of the consumer to the cooling-off right in writing under circumstances where the credit agreement was entered into at another place than the credit provider's place of business (similar to section 4 of the Credit Agreements Act). In addition, the consequences of non-compliance with such an obligation should be made clear in the Act.

The NCA's right to rescind certain credit agreements affords a very important consumer protection measure to consumers, which is in line with one of the main purposes of the Act, namely to protect consumers. Although the Act's provisions in respect of the right is not susceptible to major criticism, they can be improved, to ensure even greater protection

²⁴⁵ Par 1 1.



to credit consumers subject to the Act. However, consumers must be made aware of this important right, and must exercise the right in accordance with the NCA's provisions in the Act and NCA regulations. Non-compliance with these prescriptions will result in the right not being exercised effectively, and the consumer being bound by the agreement in terms of the principles of the common law of contract.

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