
CONSUMER LAW

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Introduction

When you go into the market place and buy goods or services for cash or on credit, you are a consumer. When a seller agrees to sell goods or services and a consumer agrees to pay for these, they have entered into a contract. Consumer law is therefore all about contracts. Until recently, as a consumer in South Africa, the relationship between you (the consumer) and the company, was most often an unequal one – they drew up the contract which mostly benefited the company, and you either signed the agreement on their terms or you decided not to buy. The problem was that the next company also had a similar contract, so if you wanted the goods or service, you just had to agree to their terms.

There are many abusive practices against consumers in many industries, from overcharging, to poor quality, to overselling. And up until now if consumers wanted to challenge these practices they would have to pay a lot to do this.

The laws up until now which related to consumer issues were also old and out of date, and did not take account greater access to credit and a constitution based on human dignity and respect.

The laws have now been revised into two acts, the *National Credit Act*, and the *Consumer Protection Act*, which are based on the international principles of the United Nations Consumer Rights. All consumers should know their rights in these two laws.

What is a contract?

A contract is an agreement between two (or more) people where one person offers to do something and another person accepts that offer.

It is important to understand how a contract is made and how it can affect the rights of the buyer or the seller.

WHAT ARE THE REQUIREMENTS FOR A CONTRACT?

There must be an **agreement** between the people about what each person must do in terms of the contract. In other words, there must be an offer by one person and an acceptance by the other. The offer must be **serious and definite**, not vague. For example, Khanya says to Anne, 'I will buy your car some time in the future if it suits me.' Anne agrees to this. There is no contract because the offer was not serious or definite.

The person making the contract must have the **legal power** to enter into the contract. Examples of people who don't have legal power to enter into contracts are:

- Children under 7 years
- People who are insane
- People who are very drunk or drugged

A person cannot enter into a contract if it is **impossible** to carry out what is in the agreement. For example, someone agrees to sell you a house and you agree to buy that house. But the house gets washed away in a flood before you sign the agreement. So, it is impossible for the contract to be enforced because there is no house.

The contract should be **legal** and not *contra bonos mores*. In other words, it should not be illegal or go against the morality of society. For example, if a person agrees to hijack a vehicle in return for money, the contract is void. It is not a proper contract.

It is always better to have a contract written down. This is because it can be difficult for parties to prove the terms of a verbal (spoken) agreement. In the event of verbal agreement, it is advisable to have a third party present.

CAN A MINOR ENTER INTO A CONTRACT?

According to the *Children's Act (No 38 of 2005)* which came into effect on 1 July 2007, a minor is someone under the age of 18 years. A minor who enters into a contract without the consent of the parents or guardian does not have to keep to the contract. But, if the minor says he or she is older than 18, then the person who entered into the contract with the minor can sue for damages.

(See page 519 Problem 1: Minor entering into a contract)

MARRIED PEOPLE & CONTRACTS

Men and women must say what their marital status is when they fill in forms. Married people who are married in **community of property** have joint administration of the things the couple own. To protect each spouse, the other partner's written permission is necessary for big things like buying or selling a house, signing credit agreements, withdrawing money from accounts in the other spouse's name. In a marriage out of **community of property**, the husband controls his own separate estate and the wife controls hers. *(See page 337 The rules of civil marriage)*

BREAKING A CONTRACT

Breaking a contract is called breach of contract. A breach of contract happens when one person does not do what she or he promised to do in the contract. The other person can then choose to end the contract. For example, a seller agrees with a buyer that the seller will deliver goods on a certain day. On that day the goods don't arrive. The delay was not the buyer's fault. This means that the seller 'breached the contract'.

There is also a breach of a contract if a person says or does something which makes it clear that they will not carry out their part of the contract. For example, a person promises to sell something to you and then sells it to another person.

There is also a breach if a part of the contract takes place, but something else in the contract is not carried out. For example, a customer orders certain goods and when they arrive it is clear that the goods are of a poor quality. The seller broke the contract because he or she sent poor quality goods instead of the good quality ones agreed on. *(See page 519 Problem 2: Breaking a promise)*

WHAT HAPPENS IF THERE IS A BREACH OF CONTRACT?

The law will help the innocent person if there is a breach of contract. The legal options are *specific performance, interdict, suing for damages, and cancellation and damages*.

SPECIFIC PERFORMANCE

Specific performance means the court orders the guilty person to do what was promised. For example, the court orders a builder to finish building a house. Sometimes the court will not order specific performance. This will happen if:

- It is impossible for the guilty person (the person who broke the contract) to do what was promised
- Paying money is a better way of compensating the innocent party
- It would be unreasonable or unjust to make the guilty person carry out the contract

If the court orders the guilty person to carry out the contract, then the person must do this. If the person does not do what the court orders, he or she will be in 'contempt of court'. The person could get a fine or a prison sentence.

INTERDICT

You can get an interdict from the court against a person who broke a contract with you. An interdict is a court order which prevents the guilty person from doing something or orders the guilty person to do something. *(See page 156 Interdicts)*

SUING FOR DAMAGES

Instead of cancelling the contract, the innocent person can decide to sue the other person for damages. This means you can claim money if you lost out in any way because the contract was broken.

CANCELLATION AND DAMAGES

One person can cancel a contract if the other person has not carried out an important part of the contract. Once the contract is cancelled nobody has to carry it out. The innocent person can also sue for damages. (See page 519 Problem 3: Breach of contract)

WHEN DOES A CONTRACT END?

A contract ends when each person in the contract: does what they promised to do; each person agrees to end the contract; one person in the contract breaks or cancels the contract; or one of the people in the contract dies.

The National Credit Act (NCA) No 34 of 2005

The *National Credit Act (NCA)* came into effect on 1 June 2007 and it sets out what the law is when consumers take loans or buy goods on credit. It also provides for the establishment of the National Credit Regulator (NCR), which monitors activities in the credit market and ensures that credit providers, for example, banks, microlenders or companies selling goods on credit, comply with the NCA.

The *National Credit Act (NCA)*, 2005 has had a major impact on protecting the rights of South African consumers who have entered into credit agreements since this time. The NCA put controls in place which restrict credit marketing practices, ensure that assessments regarding a consumer's ability to afford buying goods on credit, are undertaken when they apply for credit, penalise companies who grant credit recklessly, limit interest rates and the total amount that credit providers can charge for other fees including when an account goes into arrears, and regulate credit bureaus and debt counsellors.

CHANGES TO THE NATIONAL CREDIT ACT

The *National Credit Amendment Act* was enacted on the 19 May 2014. The effective date has not yet been tabled. The amended act was made after an assessment on the effectiveness of the NCA performed by the Department of Trade and Industry.

The assessment revealed that certain gaps in the NCA need to be addressed in order for the NCA to reach its full potential, and that the regulation of credit providers needed to be improved.

The following amendments (Government Gazette 36889 of 30 September 2013) should be noted;

- Provision for the automatic reversal of adverse consumer information:
Section 71A, in terms of which credit providers and credit bureaux must remove any adverse credit information of a consumer once the consumer has paid the debt in full, giving the consumer a 'clean slate'.
- Changing the requirements for getting clearance certificates:
The Amendment Act has changed to allow consumers to be issued with a clearance certificate if the consumer has paid up all other debt and the only outstanding debt is a mortgage agreement.
- Providing clarity on the method of delivery of notice in terms of Section 129:
The extent to which a credit provider must go in order to bring a Section 129 Amendment Act clarifies this and provides that a credit provider must deliver the notice to the consumer by registered mail or personal service on the consumer. Proof of delivery will be evidenced by written confirmation from the postal service or the signature of the consumer.

THE NATIONAL CREDIT REGULATOR (NCR) AND THE CONSUMER TRIBUNAL (CT)

The Act provides for the establishment of the NCR to regulate the credit industry and ensure that credit grantors comply with the NCA. The NCR has a complaints division where consumers can complain, and they have an investigation unit which investigates alleged contraventions of the Act. The NCR refers cases which have merit to the Consumer Tribunal. All credit providers, credit bureaus and debt counselors must register and report to the NCR.

The Consumer Tribunal has also been established with the same status as a high court, to hear cases where companies have allegedly not complied with the NCA. They can also grant consent orders.

RULES WHEN MARKETING TO CONSUMERS

Certain practices of agents canvassing for loans are now unlawful or restricted, for example, door to door selling, canvassing at workplaces and homes without an invitation.

Marketing practices and advertisements are also more controlled to protect consumers, for example, credit facility limits may not be automatically increased, and negative option marketing is unlawful ("if you do not refuse the offer, we will assume you agree").

Consumers must also be given a quote, valid for 5 days, with all the details about the loan, so that consumers can shop around and compare prices.

PUTTING A CEILING ON INTEREST RATES, FEES AND CHARGES

There is now a maximum interest rate which credit providers can charge, depending on the type of credit and when the credit was granted. The rate in most cases is based on a formula which is dependent on the South African Reserve Bank repurchase (repo) rate at the time that the credit was granted. The repo rate is regularly adjusted over an 18-month cycle, so check with the Reserve Bank for the repo rate at the time that the agreement was signed. Currently the S.A Reserve Bank repo rate is 5.75% per year and the commercial banks' lending rate is 9.25%.

TYPES OF CREDIT AGREEMENTS

Consumers are still not fully informed about the various credit agreements and the maximum interest rates that apply to each. This makes borrowers vulnerable. The two most common types of loans are explained below.

MICROLOAN

The NCA defines a micro-loan as a 'short-term credit transaction'. This can be any amount below R8 000 and must be repaid over a period of not more than 6 months. The interest rate on micro loans is usually very high.

(See page 516 Microlending and Microlenders)

UNSECURED LOAN

An unsecured loan (also called a personal loan) is usually for an amount above R8 000, where you don't have any assets (own anything to the value of the loan, such as a house or a paid-up car) that the credit provider can claim from you if you stop paying the monthly installments that you agreed to in the contract.

Some banks and credit providers offer unsecured loans of up to R230 000 which must be paid back over a period of not more than 7 years. But the interest rate can be as high as 32% per year, which makes it difficult for many consumers to honour their contractual agreements. When applying for a loan always make sure that the interest rate is in line with the NCA limit.

The NCA also places a maximum amount that can be charged on other fees, for example, initiation fees, service fees, default fees and collection costs.

Insurance cover on loans is allowed but the charge must "be reasonable" and the consumer has the right to use or cede an existing policy instead of taking out a new policy.

The example table below sets out the rates per category of credit agreement.

| CATEGORY | MAXIMUM INTEREST FORMULA | EXAMPLE: IF THE REPO RATE IS 5% |
|---|------------------------------|---------------------------------|
| 1. MORTGAGE AGREEMENT | (Repo rate x 2.2) + 5%] p.a | 17.1% |
| 2. CREDIT CARDS/FACILITIES | (Repo rate x 2.2) + 10%] p.a | 22.1% |
| 3. UNSECURED CREDIT TRANSACTIONS | (Repo rate x 2.2) + 20%] p.a | 32.1% |
| 4. SHORT-TERM CREDIT TRANSACTIONS (loans not more than R8 000 and payable in 6 months or less) | 5% per month (60% p.a) | |
| 5. DEVELOPMENTAL CREDIT AGREEMENTS | (Repo rate x 2.2) + 20%] p.a | 32.1% |
| 6. OTHER CREDIT AGREEMENTS | (Repo rate x 2.2) + 10%] p.a | 22.1% |
| 7. INCIDENTAL CREDIT AGREEMENTS (cash transactions that are not paid and the account goes into arrears e.g doctor's bills, clothing etc) | 2% per month (24% p.a) | |

The NCA also places a maximum amount that can be charged on other fees, for example, initiation fees, service fees, default fees and collection costs.

Insurance cover on loans is allowed but the charge must "be reasonable" and the consumer has the right to use or cede an existing policy instead of taking out a new policy.

The example table below sets out the rates per category of credit agreement.

PROTECTION WHEN MAKING A LOAN APPLICATION

Contracts must be in simple language, available in at least two languages and consumers must receive a copy.

Consumers are entitled to a reason when credit is refused.

All credit providers must assess whether a consumer can afford the loan, and all loans must be recorded on a register so that a consumer will not become over-indebted.

RECKLESS LENDING

Any credit provider that gives credit without considering whether a client can afford to repay the loan, may be guilty of reckless lending. There could be severe penalties and the credit provider may even lose the right to recover the debt.

A consumer will not be protected if they did not answer questions fully and honestly in the loan application process, for example, about existing debts and expenses. In such cases the credit grantor will not be guilty of reckless lending.

DEBT COUNSELLING

When you are in trouble with repaying debt, contact the creditors immediately in order to make an acceptable arrangement.

When a consumer cannot pay their debts, they will have the right to approach a debt counselor for assistance. The counselor will help the consumer to restructure or rearrange their debt repayments if the consumer is deemed to be over-indebted – this arrangement can be made an order of court.

Debt counsellors must be registered with the National Credit Regulator and do charge for their services (there are guidelines as to what these fees are). Interest continues to be charged on the debt.

Consumers should make sure that they understand exactly what will happen under counselling and should know upfront what the charges and payments will be.

Once a consumer has signed for debt counselling, this is noted on the credit bureau's consumer profile and s/he is not allowed to obtain further credit until the counselling process is finalised or withdrawn.

Debt counsellors also take ownership of property in some instances and consumers lose their assets if they are unable to stick to an agreement.

(See page 515 Using a debt counsellor)

ADMINISTRATION ORDER

If you are unable to repay your debts and have no assets to sell, you can apply to a court to be put under administration. This means that a court will appoint someone (an administrator) to run your financial affairs until your debts are paid.

The administrator will receive your wages/salary, give you a basic amount to live on, and then use the rest to pay back your creditors. You will be charged up to 12.5% of the amount paid to your creditors.

Once you are under administration you will not be able to apply for credit for the next 10 years and your creditors will only be paid a portion of your deductions once every three months.

If you are already under administration and you want to rescind (cancel) it, you have to apply to the same court where the administration order was granted. If the administrator co-operates, a 74Q document is issued to you. You submit this document to the credit bureaus for removal of the notice.

If you get no co-operation from the administrator, you need to take it upon yourself to rescind the administration order and remove it from your records. To do so, you need to compile an affidavit in which you have to convince the magistrate that you have good reason to set aside the administration order and still maintain the payments to the creditors.

The most popular and acceptable reason would be to show that your financial position has since improved. Drafting the affidavit can be a complex process, so you might want to consider asking a professional to assist you. The next step will be to serve the affidavit to the clerk of the court (who will give you a court date), the administrator and your creditors. You then argue your case in front of a magistrate and if successful, the administration order will be removed from your credit record within 20 days.

(See page 514 Being under administration)

ROLE OF CREDIT BUREAUS

If you do not meet your credit obligations your creditors could have you blacklisted by a credit bureau. Blacklisting means that negative information has been placed on your credit profile. You can check your credit status online at <http://creditrecords.co.za/how-to-clear-your-name-when-blacklisted>.

All credit bureaus must be registered with and submit reports to the National Credit Regulator. They must ensure that data is accurate, and that inaccurate information is immediately removed without cost to the consumer after the consumer has lodged a complaint.

The NCA regulations determine how long information should remain on a consumer's profile (see *table below*). Every person is entitled to receive one free copy of their credit record each year.

| CATEGORY | DESCRIPTION | PERIOD INFORMATION IS RETAINED ON THE BUREAU |
|-------------------------|--|--|
| 1. ENQUIRIES | Enquiries made on consumer's record | 2 years |
| 2. PAYMENT PROFILE | Factual information about the payment record/profile of a consumer | 5 years |
| 3. ADVERSE INFORMATION | Negative information about a consumer's default on payments | 1 year |
| 4. DEBT RESTRUCTURING | An agreement where debts are restructured | Until a clearance certificate is issued (when all payments are settled as agreed) |
| 5. JUDGEMENTS | | The earlier of 5 years or when the judgement is rescinded/the creditor abandons the judgement in special circumstances |
| 6. ADMINISTRATON ORDERS | | The earlier of 10 years or when the order is rescinded by a court |
| 7. SEQUESTRATIONS | | The earlier of 10 years or when a rehabilitation order is granted by a court |

WHERE CAN CONSUMERS LODGE A COMPLAINT?

The Act encourages consumers to resolve their complaints directly with the company, and failing that to use "alternative dispute resolution" mechanisms such as ombuds offices.

If the consumer has tried to resolve the complaint with the company and they do not give him/her the required response, then you can help the consumer to contact the following offices:

FOR ANY COMPLAINT ABOUT A BANK

The Ombudsman for Banking Services
 Tel: 0860 662837, Fax: (011) 8380043, Email: info@obssa.co.za
 Website: www.obssa.co.za

FOR ANY NON-BANK CREDIT, CREDIT BUREAU OR DEBT COUNSELING COMPLAINT

Credit Ombud
 Tel: 0860 662 837, Fax: 011-781 0589, Email: info@ndma.org.za
 Website: www.creditombud.org.za

FOR ANY COMPLAINTS ABOUT DEBT COUNSELLORS/DEBT COUNSELLING

Before contacting the credit ombud about a credit bureau complaint, contact the credit bureaus first. The four major credit bureaus are:

Compuscan Tel: 021 888 6000, Website: www.compuscan.co.za

Experian Tel: 0861 105 665, Website: www.experian.co.za

Transunion ITC Tel: 0861 482 482, Website: www.itc.co.za

XDS Tel: 011 645 91000, Website: www.xds.co.za

Consumer Rights under the Consumer Protection Act, 2008 (CPA)

The CPA came into effect on 1 April 2011. It sets out what the law is when consumers buy goods and/or services for cash or sign fixed term contracts. It also provides for the establishment of the National Consumer Commission (NCC), which oversees compliance of the Act by companies and service providers.

When you assist a consumer, always check the date that the contract was signed. To be able to use these laws the contract will have to be signed on or after 1 June 2007 (NCA) and 1 April 2011 (CPA). For consumers the CPA means that there is guaranteed respect and fairness when they buy goods or services, or have repairs done, or enter into gym contracts, or buy on auction. Consumers can now insist on a pre-quote for repairs, and not pay for shoddy work, return defective goods, and have goods replaced if they are repaired and remain defective. Consumers can even stop those unwanted daily calls offering loans or cellphones or insurance.

And when they do not get the respect and fairness that the Act requires, consumers now have access to numerous free complaints mechanisms from existing and possibly new ombuds offices, to the new Consumer Commission which is established in terms of the Act to oversee compliance with the CPA (similarly as the National Credit Regulator oversees the National Credit Act). Consumers will also in some cases be able to have their cases referred to the National Consumer Tribunal which will hear cases in terms of breaches of both the consumer laws.

In this section some of the key rights and remedies that the Act provides to consumers are discussed. The Act is detailed and sometimes complicated, as with all laws, so if you have a specific issue, you may need to read the law itself to understand exactly what the rights and remedies are in a particular situation.

THE RIGHT TO PRIVACY

RESTRICTING UNWANTED COMMUNICATIONS - AN 'OPT-OUT' REGISTER

Consumers have the right to 'opt-out' or refuse to receive unwanted sms's, telephone calls or correspondence relating to marketing of products, by registering a 'pre-emptive block' on an opt-out register which will be overseen by the Consumer Commission.

Once a person has registered, it is the responsibility of companies to ensure that these consumers are not contacted for marketing purposes.

Currently the Direct Marketing Association does have a similar register where consumers can opt out: <http://www.dmsa.org/> www.facilities.co.za/dcm

THE RIGHT TO CHOOSE (INCLUDING THE RIGHT TO CHOOSE TO CANCEL)

FIXED-TERM CONTRACTS

Consumers can cancel a fixed term contract (for example, gym, cellphone, subscription contracts) at the end of the term. The supplier must notify them between 40 to 80 days before the term ends, of the date of termination and of any changes that would apply if they renewed the contract. The onus is then on the consumer to tell the supplier to terminate the agreement on the expiry date, or agree to renew the contract on the new terms, failing which the contract will continue on a month on month basis on the new terms.

So, it is important that consumers keep a record of when the contract ends, so that they are in control of what happens at the end of the term.

Consumers can also cancel a contract before the term has expired by giving 20 business days notice, but will be liable for "a reasonable cancellation penalty".

THE COOLING-OFF PERIOD AND CANCELLATIONS FROM DIRECT MARKETING

Consumers can cancel an agreement which they entered into as a result of direct marketing, within FIVE BUSINESS DAYS without penalty or charges with no explanation needed. If they have paid, they must be refunded in full within 15 business days of cancelling the agreement.

CANCELLING ADVANCE BOOKINGS OR ORDERS

- When making advance reservations, eg airlines/accommodation or placing orders in advance, the supplier has the right to require a deposit depending on the nature of the specific circumstances.
- Consumers do have the right to cancel such booking or order and will be liable for a "reasonable charge" depending on general industry practices, the length of time of the cancellation before the event, and whether an alternative consumer can be found. No charge may apply if the cancellation is due to death or hospitalisation.
- The above does not apply to specially made orders.

KEEPING AND NOT PAYING FOR UNSOLICITED GOODS AND SERVICE

Have you ever received books or Christmas cards in the post with an invoice, when you never ordered these? Or had a door salesman leave his goods with you to test out, and the company then sent you an invoice even though you never confirmed that you wanted to buy the goods?

To discourage these unethical business practices, the Act allows consumers to have unsolicited (not asked for) goods returned at the suppliers risk and expense. This includes where they received a greater quantity than they asked for (a consumer needs to pay only for what they asked).

However, goods delivered as a result of a genuine mistake are not unsolicited goods.

Where the supplier does not collect the goods within 20 business days of receipt by the consumer or the supplier being notified to collect the goods, the consumer can keep the unsolicited goods.

NOT PAYING FOR DAMAGING GOODS ON DISPLAY

A consumer is not liable for loss or damage to goods displayed by the supplier unless the consumer was grossly negligent or reckless, or their behaviour was malicious or done with criminal intent.

GETTING QUOTES FOR REPAIRS AND MAINTENANCE

A supplier must provide a consumer with a cost estimate without charge, for repair or maintenance work unless the consumer turns down the offer of an estimate and authorizes the work or gives the go-ahead for charges up to a specified maximum. It is in the consumer's interest to insist on receiving a written estimate.

A supplier may not charge more than the estimate, unless s/he has told the consumer of the estimated additional costs and s/he has approved this. A consumer also does not have to pay for services done without their approval.

Every new or reconditioned part that is installed during a repair or maintenance contract must have a warranty of a minimum of 3 months.

THE RIGHT TO GOOD QUALITY AND SAFETY

THE RIGHT TO ONLY PAY FOR QUALITY SERVICE AND REPAIRS

Consumers have the right to have services and repairs done "in a manner and quality that a person is generally entitled to expect", including within good time and with proper notice of "unavoidable" delays. A consumer also has the right to expect their property to be returned in at least as good a condition as before.

Where the service or repair is faulty and not up to standard, the consumer has the choice to either insist that the mistake be fixed or that s/he be refunded a reasonable part of the price paid ("reasonable" being linked to the extent of the failure).

THE RIGHT TO GOOD QUALITY PRODUCTS AND TO RETURN FAULTY GOODS

Consumers have the right to buy and receive goods that are good quality, in good working order and free of faults, which will last for a reasonable time, and are suitable for their intended purpose - UNLESS the consumer was told of a specific poor condition and knowing this still accepted the goods.

Where the goods do not meet the required standards, a consumer has the right to return the goods within SIX MONTHS of purchase, and have them replaced, repaired or get a refund.

If the goods are repaired, and a defect appears within a further 3 months, the supplier must replace or refund. In other words, it cannot go for repairs twice.

WARNINGS OF RISK AND CLAIMS FOR INJURIES OR LOSS CAUSED BY UNSAFE OR DEFECTIVE GOODS

Suppliers are required to inform consumers where goods may pose a risk (as specified in the Act) including one which a consumer may not be expected to be aware of. Packagers of hazardous or unsafe goods, must also provide notices including instructions for safe handling and use.

The Consumer Commission has to oversee this so as to reduce the risk of hazardous or defective goods and substances. This oversight role includes investigating and recalling products.

A consumer can claim damages from either the producer, the importer, the distributor or the retailer of a product where the consumer has suffered harm as a result of the supply of unsafe goods, product failure, defect, hazard or failure to give adequate warnings relating to the product. "Harm" includes death, injury, illness or loss of or damage to property. The Act also allows for the consumer to claim for indirect financial loss suffered, for example, loss of income as a result of the injury.

THE RIGHT TO RESPONSIBLE MARKETING

OVERSELLING AND OVERBOOKING

A supplier may not accept payment for goods or services if they do not intend to supply the goods or provide the service offered.

Where a supplier commits to supplying goods or services or accepts a reservation for a specific time and date, for example, an airline ticket, the supplier is penalized if they fail to deliver on their agreement. They must then refund the consumer, with interest and compensation for costs directly linked to the breach. This does not apply if the supplier offered comparable (similar) goods or service and the consumer either accepts this, or unreasonably turns it down. It would also not apply if the breach was due to circumstances beyond the suppliers control and the supplier took reasonable steps to inform the consumer.

TRADE COUPONS, LOYALTY PROGRAMS AND PROMOTIONAL COMPETITIONS

The Act sets out how promotional competitions, trade coupons and loyalty programs must be run. The offer must be genuine and available as advertised.

NEGATIVE OPTION MARKETING

A supplier may not create a sale or contract by advising the consumer that they are assumed to have accepted the offer if they do not advise that they are not taking it. Referral selling is also not allowed.

A person may not offer a consumer a rebate or commission on a purchase on condition that they assist in getting further sales, for example, by supplying names of other consumers.

CATALOGUE MARKETING - GETTING WHAT IS ORDERED

Where a consumer buys something without having an opportunity to inspect the goods, for example, by telephone or from a catalogue, s/he can refuse to accept the goods if they do not match the description in "all material respects and characteristics".

THE RIGHT TO INFORMATION

PRICES OF GOODS AND SERVICES MUST BE DISCLOSED AND A WRITTEN RECORD GIVEN

Prices of goods and services must be given, and in the case of goods, the price must be attached to the goods. A supplier may not charge more than the displayed price (unless it is an obvious mistake and the mistake is fixed or the consumer is informed). Where two different prices are displayed, the lower price must be charged (unless one price is completely hidden by the other).

A supplier must provide a written record of each item sold or service provided with details as required in the Act (for example, name, VAT number, address, date, description, unit price, quantity, total price).

HOW CAN CONSUMERS LODGE A COMPLAINT?

As with the *NCA*, the *Consumer Protection Act* encourages consumers to first try to resolve their disputes with the company or service provider concerned. If they are not successful, they can lodge a complaint with the National Consumer Commission on Tel: 012 761 3200, Fax: 086 151 5229, Website: www.nccsa.org.za.

Consumers can also lodge complaints with the provincial Consumer Affairs offices:

| | | |
|----------------------|----------------------------------|--|
| <i>EASTERN CAPE</i> | Tel 043 605 7022 0860 007 255 | www.dedea.gov.za |
| <i>FREE STATE</i> | Tel 051 400 9542 0861 102 185 | www.edtea.fs.gov.za |
| <i>GAUTENG</i> | Tel 011 355 8006 | www.ecodev.gpg.gov.za |
| <i>KWAZULU-NATAL</i> | Tel 033 264 2500 | www.kznded.gov.za |
| <i>LIMPOPO</i> | Tel 015 293 8300 | www.ledet.gov.za |
| <i>MPUMALANGA</i> | Tel 013 752 3761 | www.mpumalanga.gov.za/dedt |
| <i>NORTHERN CAPE</i> | Tel 053 839 8000 | www.economic.ncape.gov.za |
| <i>NORTH WEST</i> | Tel 018 387 7700 | www.nwpg.gov.za/economic |
| <i>WESTERN CAPE</i> | Tel 021 483 5065 | www.westerncape.gov.za/dept/edat |

Repaying debt

LEGAL CONSEQUENCES OF DEFAULTING ON DEBT OBLIGATIONS

If a consumer has any problems repaying their debts, the first thing to do is to contact the creditors immediately. If they do not make an alternative payment arrangement with the creditor, the creditor can hand the matter over to a debt collector or attorney who will take legal action against the consumer to recover the money owing. If this happens the consumer will end up paying much more for the debt, because of extra interest and legal charges, and will definitely be worse off than before.

For many consumers the experience of receiving legal letters and documents and visits from sheriffs and debt collectors is frightening, confusing and humiliating. Below describes a process that is usually followed when a consumer fails to pay a debt or to make an arrangement with a creditor.

STEPS TAKEN FOR REPAYING DEBT

STEP 1: PHONE CALLS AND LETTERS OF DEMAND

Some companies will phone a consumer when they default – this is the best option for the consumer who should take advantage of this and offer to pay as much as they can. Where there is an agreement, the consumer should confirm any telephonic agreement in writing and keep copies with fax coversheets as proof.

Also, they should make sure that they pay what they promise to pay as this will avoid their account being collected through a court process.

A consumer may instead or also receive a letter demanding payment. The National Credit Act now makes this letter (called a section 129 Letter) compulsory before a creditor can take any legal action. The letter also has to advise that the consumer has the right to approach a debt counselor for help if the consumer is over-indebted.

When a consumer receives a letter of demand they should then either:

- Contact the creditor and make an arrangement to pay, or
- If they cannot cope with all the debt that they have, contact a debt counselor

If the consumer disagrees with the claim or the amount that they say is owing, the consumer must act immediately to contact the creditor, confirm what the consumer disputes in writing and ask for proof of the debt/balance of the debt.

If the consumer is still unhappy after negotiating with the creditor, refer the complaint to the next level:

- If it is a Bank, contact the Ombudsman for Banking Services
- If it is any other creditor contact the Credit Ombud or the National Credit Regulator

NOTE: As a paralegal it is important to act immediately to assist the consumer – it becomes very costly if the debt lands up being collected through a legal process.

The creditor must wait 10 working days from the date that they send a letter of demand, before they can take the legal process further.

STEP 2: SIGNING SECTIONS 57 OR 58 DOCUMENTS OR RECEIVING A SUMMONS

If the consumer does not respond to the letter of demand, the creditor will usually send an agent to the consumer's home or workplace to ask them to sign either:

- a Section 57 Acknowledgement of Debt where the consumer signs that they owe the money (the amount will be stated), and that they promise to pay monthly instalments in that amount. They also sign that if they default again (do not pay)

on any instalment as agreed, the creditor can take the documents signed to court, have a judgment taken against the consumer, and get an emolument attachment order against the consumer's salary (see below);

OR

- a Section 58 Consent to Judgment where the consumer agrees that judgment can be taken in court immediately and that a deduction can be made against the consumer's salary.

The difference between a section 57 and 58 is that with a section 57 the consumer has a second chance. In other words, there is no judgment if the consumer keeps to the payment arrangement. With a section 58, the consumer agrees to judgment immediately.

After sending a letter of demand, instead of sending an agent to visit the consumer to sign a s57 or s58, the debt collector/attorney can get the Sheriff of the Court to serve a summons on the consumer – usually at home or work or at the address the consumer provided in the original contract (this is called the "domicilium" address). If the consumer receives a summons s/he has 5 working days to advise in writing that they want to defend the case.

If the consumer does owe the money there is no point in defending the case. The best way to respond is to call the attorney and make an arrangement to pay them monthly instalments. Suggest that they do not take judgment and ensure that the consumer keeps to this agreement. Also put what you have agreed in writing and send them a copy (keep proof).

If the consumer does not owe the money, or does not agree with the amount that they say is owing, the consumer should immediately contact the attorney and advise in writing that s/he disputes the claim or the amount.

Try to get this dispute resolved without going to court, but if the attorney is not co-operative, the consumer must give notice that s/he wants to defend the case. A Notice of Intention to Defend is attached to the back of the summons and must be filled in by the consumer, and taken to the address provided. Once they have signed receipt, s/he must take the original and a copy signed by the creditor to the Clerk of the Court.

At this stage it will be necessary to have an attorney to assist which can be expensive. Therefore is it always best to first try and negotiate a settlement or an agreement.

JUDGEMENTS AND OTHER COURT ORDERS

If the consumer signs a section 57 and then defaults (doesn't pay in terms of the agreement), or signs a section 58, or if the consumer does not respond to a summons, the court will order judgment against the consumer for the amount owing plus interest and costs. The court can also award any of the following orders relating to how the creditor will recover the money from the consumer.

A WARRANT OF EXECUTION AGAINST THE CONSUMER'S PROPERTY

A sheriff will be sent to the consumer's house to list all the goods that they own (for example, furniture, kitchen equipment, motor car, etc). These goods, up to the amount owed plus costs, will then be sold on auction unless the consumer has the money demanded, and can pay it all. The sheriff may not attach beds, bedding and clothes.

After the items are sold, and the sheriff is paid, the balance is sent to the creditor. If the sale does not provide enough to cover the debt, and the consumer owns a home, this can also then be sold in execution. If there is a balance still owing after

the sale, the creditor can ask the court for an emolument (salary) attachment order as well.

AN EMOLUMENTS (SALARY) ATTACHMENT ORDER

This is one of the most common ways that a debt is collected from the consumer after judgment is granted. Here the court orders the consumer's employer to deduct the debt in specified instalments from the consumer's salary. It is sometimes incorrectly called a garnishee order. It is also unlawful for the employer to refuse to deduct the money because the instruction comes from the court.

A GARNISHEE ORDER

Here the court orders someone (usually the bank) who owes money to the consumer, to pay the creditor instead of the consumer. So for example, if the consumer had R5 000 savings in their bank account, and owed the creditor R3 000, the court would order the Bank to pay the R3 000 from the consumer's bank account to the creditor.

THE COSTS OF REPAYING DEBTS IN TERMS OF A JUDGMENT

It can cost a lot if an account is handed over to a legal collections department, especially for debt happening before the *National Credit Act*. Not only does the consumer have to pay the original debt, but they have to pay extra interest (it is taking them longer to repay, and interest is charged every day), extra charges to lawyers, to debt collectors, to sheriffs and even to the employer if they are involved in paying money to your creditors.

Before the *National Credit Act*, this meant that a small debt could end up being a huge burden. Even under the *NCA*, a consumer can pay much more than they signed the contract for.

EXAMPLE

Example of the costs and interest charged on a R4 000 loan taken in May 2007 (in other words, before the *NCA*), where judgment was taken for R7 200 and where the court ordered interest at 15.5% per year, and a monthly deduction from an emolument attachment order of R600 per month.

| | |
|---|------------|
| Amount owing according to the judgment | R7 200.00 |
| Interest at 15.5% over 18 months | R 809.21 |
| Legal Costs – legal process | R 800.00 |
| Collection Commission to attorneys (10% plus vat) R64.98 X 18 | R1 169.64 |
| Employer's deductions (5% of each instalment) = R30.00 x 18 | R 540.00 |
| TOTAL COSTS TO BE PAID | R 3 318.85 |
| TOTAL TO BE REPAYED including amount owing (18 x R600.00 per month) | R10 518.85 |

Some attorneys will charge more than the above, others charge additional costs for every telephone call and letter on the file. This can also add up to a lot extra (beware that you are not overcharged by the attorneys – this can happen!)

Note also that:

- *if the interest rate was higher e.g. 22% or 30%, you would end up paying much more in interest and other costs and for a longer time.*
- *if the monthly instalment that you pay is a small amount, the interest will also be higher as interest is charged on the balance at any point in time.*

Some attorneys will charge more than the above. Others charge additional costs for each telephone call.

When a warrant of execution is issued, most often the Sheriff's auction will result in the goods being sold for much less than they are worth and after the Sheriff takes his fees, the consumer could still end up owing quite a lot of money AND be without the furniture and other items sold.

So it is in the consumer's interest to contact the creditor or attorney as soon as they receive notice of anything and make arrangements to pay.

CONSUMER RIGHTS AND REMEDIES IN THE LEGAL PROCESS

There are many stories about consumers who have been badly treated by debt collectors who threaten them if they do not pay, about deductions from salaries which leave a consumer with no money to live on, and Sheriffs selling goods yet consumers still having to pay most of the debt. Below we provide you with some general guidelines and tell you what remedies consumers have in these and other situations.

GENERAL GUIDELINES FOR CONSUMERS

If a consumer owes money, they should always make some payment, however small and as much as they can. Never pay nothing. The more you pay the less interest you will pay in the long run.

Do not have the attitude that the balance is wrong so I won't pay anything. If you owe money you will be charged interest every day until the debt is settled in full.

Never sign any documents in blank. If a consumer is asked to sign a section 57 or 58, make sure that all the information is filled in, including amount due, interest rate to be charged, amount of the monthly instalment, when they must start paying and how.

Never sign a document that you do not agree with. What a person signs is binding and will have consequences. Always get a copy of the document signed as this is proof of the contract and helps the consumer to know what their obligations are.

Complain if there is a problem and get help if you cannot negotiate yourself.

Contact the credit provider and lawyer before they take any legal action (because of the costs) and always keep a record of who you spoke to, what time and what was discussed. Most important, record what was said in writing and send a letter or email to them (keep proof of this as you may need it in the future to solve the case).

DEFENCES – PRESCRIPTION AND IN DUPLUM

Consumers have two defences in common law that they can use if relevant.

PRESCRIPTION

If the last time that a consumer paid any money on the account is more than 3 years ago, and they have not admitted that they owe the money, the consumer can claim that the debt has prescribed. This means that the creditor has the right to ask for the money, but the consumer can raise the defence of prescription and refuse to pay the remaining balance on the debt.

So if a consumer receives a call or a letter on an old debt, always ask for a full statement to see when the last payment was made. Also ensure that the consumer does not pay any money until you have investigated if prescription applies – if they pay even R50.00, prescription will be "interrupted" and another 3 years will pass before the claim prescribes.

NOTE

Prescription does not apply if judgment has been taken for the debt.

If a claim has prescribed, the negative listing must be removed from the credit bureau records in terms of the *National Credit Act*.

IN DUPLUM

If the interest on an account is more than the amount owing at the time that the consumer defaults, s/he can claim that some interest must be written off in terms of the in-duplum principle that the interest may not be more than double the outstanding amount charged at the time of default.

So if a consumer takes a loan of R5 000 and defaults when the balance is R4 000, then the balance on this account may never be more than R8 000 (double R4 000). Under the common law (which applies to credit before the *National Credit Act*, i.e. before 1 June 2007), interest can continue to be charged on the account so long as the balance never goes above R8 000.

When a judgment is taken, in duplum starts to be calculated again. For example, if judgment was taken at R7 200 the balance may accumulate again until the consumer defaults, and then the in duplum rule will mean double the balance at the time of this new default.

The common law in duplum was not much help to consumers but you should look out for a balance which is over the in duplum maximum amount, so you can at least help to get the balance reduced.

Under the *National Credit Act*, the in duplum principle has been made part of the Act, and the new in duplum is much stricter. Now when a consumer *defaults, the consumer may not be charged more than double the balance* at the time of the default. For example, if the balance is R4 000 at the time of default, the consumer only needs to pay R8 000 more (*this includes for interest, legal fees, insurance and any other charges*). This is a big help in reducing the final amount that the consumer must repay, and it applies even if judgment has been taken.

IMPORTANT

When you are helping a consumer with an account, always ask for a full statement form the beginning and check for in duplum and prescription.

DEBT COLLECTOR'S RULES

Debt collectors may be used by credit providers to recover debts from consumers. Debt collectors are regulated by the *Debt Collector's Act (No 114 of 1998)* which provides for the exercise of control over debt collectors and legalizes the recovery of fees or remuneration by registered debt collectors. The overall goal of the Act is to monitor the conduct and professionalism of debt collectors and promote a culture of good governance within the profession. This will contribute to protecting consumers as well as creditors. The Council for Debt Collectors exercises control over debt collectors.

If a debt collector charges for his/her services, they must be registered with the Debt Collectors Council and they are not allowed to:

- Use force or threaten to use force against the consumer or their family
- Physically threaten the consumer or their family
- Give, or threaten to give information to the consumer's employer that may affect their opportunities as an employee
- Serve any false legal documents
- Present themselves as police officers, sheriffs or officers of the court
- Spread, or threaten to spread any false information about the consumer's credit worthiness
- Charge more than the tariff of fees which is set down by the Council

Debt collectors are allowed to charge for letters and notices that they send out to people. These costs usually have to be paid for by the debtor (person who owes the money). Debt-collectors are not allowed to issue a summons- this can only be issued by a court.

ADMISSION OF LIABILITY

In order to get a consumer to pay his or her debt, a debt-collector may get the consumer to sign a form, called an Admission of Liability. If the consumer signs this form, it means they agree that the money is now owed to the debt-collecting agency and NOT to the creditor.

By signing this form the consumer also agrees to pay all the extra administrative charges of the debt-collecting agency. The original amount that was owed to the creditor will now increase because of these add-on charges.

If the consumer signs this form and then refuses to pay the agency, the debt-collector can refer the debt to their lawyers. The consumer will then have to pay to the lawyers the original debt, the debt-collector's fee and the lawyer's costs. The consequences of signing such a form are therefore very serious.

If a consumer is finding it difficult to repay the debt, it is preferable for them to contact a debt counsellor who will work with the consumer and the credit provider to try and reach an agreement on how the debt should be repaid. This gives the consumer an opportunity to pay back the money through an agreed legal process, rather than wait until there are more serious consequences - like being called to court or having their goods repossessed. *(See page 501 Debt counselling)*

THE DEBT COLLECTOR'S ACT

The following are important provisions in the Debt Collector's Act:

- Establishment of a Council for Debt Collectors which is responsible for monitoring debt collectors and their work
- Registration as a debt-collector – No one, except for a lawyer, can act as a debt-collector unless they are registered as a debt collector under the Act. There is a prescribed code of conduct for debt collectors that is published in the government gazette.
- Complaints against debt-collectors can be referred to the Council who can withdraw a debt collector's registration if they are found guilty of improper conduct. An application can also be made to the court to deregister a debt-collector if they don't comply with the Act.
- Debt-collectors are only allowed to collect the following:
 - The amount of the original debt that wasn't paid, plus interest based on interest rates that are legal, for the period during which the debt wasn't paid
 - Necessary expenses and fees that are prescribed by the minister in the government gazette
- A debt-collector must open a separate trust account at a bank and any money deposited into this account must be dealt with according to specific procedures in section 20 of the Act
- If you are unhappy with the way that a debt collector has handled a matter, or if you believe that they are charging too much, complain to the Council for Debt Collectors on 012 804 9808/8483

Complaints about a debt collector, for example, about the way they have handled a matter or about their charges, can be made to the Council for Debt Collectors on 012 804 9808.

For more information on the Council for Debt Collectors and a list of registered debt-collectors, go their website: www.cdfc.org.za

WHEN AND HOW TO HAVE A JUDGEMENT RESCINDED

A consumer can apply to court to have a judgment rescinded (set aside), either if it was granted in error or if the debt has been settled.

The court will only rescind a judgment in error if:

- The judgment was given without the consumer being present at court (i.e. the judgement was by default), and
- The consumer applies for the rescission within twenty (20) days after they become aware that the judgment was taken, and
- They want to defend the claim and can set out in an affidavit why they did not defend the case originally and what their defence against the claim is

If the consumer has settled their debt, the application to court must include a letter from the creditor confirming that the debt is settled and they have no objection to the consumer having the judgment rescinded.

Usually applications to court are done by an attorney. If the consumer wants to save on these costs, they can also do it by themselves.

APPLYING TO COURT TO HAVE AN EMOLUMENT (SALARY) ATTACHMENT ORDER RESCINDED OR AMENDED

Emolument (salary/wages) attachment orders are sometimes obtained unlawfully, for example, if the consumer signed an agreement to have this deduction from his/her salary at the same time as they applied for the loan. The court order can also be unfair if the consumer cannot afford the instalment.

The consumer can then apply to court to have the order set aside or amended (changed). The application will need to have a covering document called a Notice of Motion where the consumer states what they want, and they will need to submit an affidavit. This will set out the details of their case. If the consumer cannot afford the payments, they must state what they can afford to pay each month and must give full details of their income and expenses with proof attached (for example, account statements, rent receipts, salary advice). The court will then look at this and decide if the consumer's offer is reasonable.

It is in the consumer's interest to pay as much as possible as the less the instalment is, the more the consumer will pay in interest.

APPLYING TO COURT TO STOP THE SALE OF YOUR GOODS

If a Sheriff appears at the consumer's home after judgment and attaches their moveable property in order to sell it on auction, the consumer can apply to Court to have the sale in execution suspended.

The court will only order this if the consumer can prove that they can afford to pay reasonable regular instalments and/or agree to an emolument attachment order being made against their salary. Again, the consumer will need to make these regular payments or the order will be reinstated and the goods will then be sold.

If the attachment is unlawful or incorrect, the consumer can also apply to have the order rescinded.

ATTORNEY'S FEES AND CHARGES

There are many complaints from consumers that attorney's fees are very high and they do not know how to check what they can charge or how to challenge them.

Attorneys can also only charge fees according to the tariff set down in the Magistrate's Court Rules. There are two tariffs for the Magistrate's Court: a standard tariff and a higher tariff which only applies if the consumer agrees.

When the consumer signs a contract, there will usually be a clause which says that if the consumer defaults, the matter will be handed over to attorneys and the consumer will have to pay the attorney's fees "on an attorney and client" scale. This allows the attorney to charge for more items but the amount that they charge is still controlled.

If you think that the consumer may be overcharged, ask for a full breakdown of costs statement and if you are not happy ask for the Bill to be taxed at court (negotiate as the consumer may have to pay for this).

It is difficult for a consumer to act on his/her own when challenging the legal fees because this requires expert knowledge. You can report the matter to the Law Society which is a society for lawyers in the different provinces, but they are not as independent as the ombuds offices are – the best thing is to find a free counselor or advice office or law clinic to take on the case.

REMEMBER

With the *in duplum* principle of the *National Credit Act* on credit granted from 1 June 2007, legal fees are included in the calculations so they are more controlled than before.

BEING UNDER ADMINISTRATION

One of the major problems with debt is that there are many people who advertise and offer consumers a way to get out of debt, but these remedies often mean that the consumer pays for these services and ends up with more debt than before.

Many consumers pay an administrator an amount each month so that s/he can distribute the money to different creditors and this can add to the debt.

Administrators charge for their services, usually more than R1 000 to get the court order. They also take at least 12.5% of each instalment that is paid for their fees.

Usually the instalment that the consumer pays is much less than the total instalments they were required to pay on the debts combined, so each creditor receives much less than the original agreed instalment. However the consumer continues to pay interest on each account, and the administrator only distributes money once every three months, so often the balance on the debts may even go up instead of down because the creditor is receiving less than the interest that is being charged.

Some administrators also do not pay over on time, others do not pay over the money received at all.

Administrators are supposed to prepare distribution accounts every quarter, but most often consumers do not receive copies, so they do not know what the charges are, or how much each creditor is receiving. One case study showed that a consumer had to pay R49 050 on a debt that would have been R15 807 if the consumer had not paid the debt through the administrator.

If a consumer is in a situation where they have relied on one of these for-profit debt intermediators, as a paralegal you should ask for all the distribution accounts, contact the creditors to see if the consumer can make arrangements to pay them directly, and then go to court to have the administration order rescinded. If necessary contact a consumer advice office or not-for-profit debt counselor for help.

USING A DEBT COUNSELLOR

The *National Credit Act* encourages consumers who are "over-indebted" to approach a debt counselor or dispute resolution agent for help in developing a repayment plan for all debts to be repaid within a reasonable period of time.

Consumers can also approach a creditor for help in developing such an arrangement on an informal basis, or the court may refer the consumer to a debt counselor if the consumer appears in relation to a single debt.

When you are deciding who to refer the consumer to, it is important that the person whom the consumer approaches, has a good reputation, tells the consumer upfront what they charge, and that the charges are reasonable. You may find some NGOs who do not charge or charge very little and are committed to helping consumers. There are also creditors who are looking to help their clients in a similar way and will not charge for their services.

With debt counselors the process is formal and is set out in the *National Credit Act*.

The consumer will complete forms which will include details and proof of all their debts, as well as their income and other expenses. They will look at whether any of the debts were granted "recklessly", for example, if at the time that the consumer applied for credit, whether the creditor properly assessed that the consumer could afford to repay the loan (the court can order a remedy if the loan was granted recklessly but the consumer would have to have given full disclosure of all their debts and expenses or else no remedy is available). The counselor will work out a plan as to how the debts will be settled and what the monthly repayment will be. If the repayment plan is accepted, it is made an order of court. If the creditors do not accept the proposed plan, they can oppose the plan and the court will then decide whether to grant the order or not. Once the order is granted, the consumer's monthly payments are paid either directly by the consumer to the creditors or most often, to a payment distribution agency who also charges for their services, and who distributes the portions to the creditors. The arrangement will be listed on the credit bureaus and the consumer will not be allowed to take further credit until they have paid off their debts.

If you need a debt counsellor or if you have a debt counselor that you are not happy with and need to complain about, contact:

The National Debt Mediator's Association
Tel 086 111 6362, email info@ndma.org.za

The National Credit Regulator Tel 0860 627 627

HANDING BACK (SURRENDERING) GOODS BOUGHT ON CREDIT

The *National Credit Act* also provides extra protection for consumers who have purchased goods on credit, and default on paying their instalments or who want to cancel the agreement.

For consumers with credit agreements signed from 1 June 2007, consumers can now return the goods to the credit provider within 5 days after they have given written notice that they are cancelling the agreement. The credit provider must then give the consumer a written estimate of the value of the goods. They can then either keep the goods and continue with the contract or allow the creditor to sell the goods for the best possible price. Once the goods are sold the credit provider must give the consumer written notice with details of the sale and any amount that they may owe if there is a shortfall. This shortfall must be paid or the creditor can obtain a judgment against the consumer for the balance outstanding.

If the consumer is unhappy about the sale, they should approach the creditor or get the help of a mediator or approach the Provincial Consumer Court.

MICROLENDING AND MICROLENDERS

WHAT IS MICROLENDING?

Micro lending is an agreement between two people in terms of which one person agrees to lend money to another person. The person who is lending the money (the lender) will usually charge an extra amount called interest that is added onto the main loan. This is the lender's fee for lending the money.

REGISTRATION OF MICROLENDERS

In terms of the National Credit Act (NCA), all microlenders (as credit providers), must be registered with the National Credit Regulator. The NCA controls the amount of interest that microlenders can charge on money that has been borrowed by a consumer and all aspects of microlending.

Remember the following when making a loan from a microlender:

- A microlender may not charge an up-front fee with the application, in other words, a fee when the person signs the document.
- A microlender may not keep the identify book or bank card or pin number as a collection method.
- Do not sign a document where there are blank spaces where the microlender can fill in information after you leave the office.
- Do not sign a 'Consent to judgment' form when you take a loan.
- Find out the benefits of any 'membership' fees charged by some microlenders before signing the agreement.

THE CONTRACT/LOAN AGREEMENT WITH A MICROLENDER

A microlending agreement is drawn up when a lender offers to lend a consumer money and the consumer agrees to accept the terms of the repayment. When the consumer signs the contract he or she is agreeing to pay back the money and the interest according to the terms in the contract.

The consumer should always keep a copy of the contract and all the forms that have been signed. The contract must include the following information and details:

- The amount of the loan
- The interest rate
- Amounts repayable
- The number of instalments
- If there is insurance, the type of insurance, the name of the insurer and the amount that may be included
- The period within which the loan must be repaid
- The penalties that will be charged if you miss a repayment (also called defaulting on your payments)

Any amount that is deducted from the loan amount reduces the principal debt.

Insurance

WHAT IS INSURANCE?

Insurance is financial protection that people get when they pay a certain amount of money every month to an insurance company. Then if something is lost or stolen, the insurance company pays the person – also called a claimant – out.

Remember, if a person who is insured does not lose anything, or if their property never gets stolen, or if they never claim from the insurance company, then they cannot claim back the money that has been paid to the insurance company.

There are many different kinds of insurance. It is useful to get a salesperson from a reputable and well-established insurance company to explain what the options are and what would be best for your requirements. Ask the following questions:

- What do I get for the money that I pay every month?
- If I need to get the money back that I have paid, can I get it? All of it? How much? How long will it take?
- Can I afford this insurance?

LIFE ASSURANCE

ASSURANCE is different from INSURANCE because it is to do with **life** instead of **possessions**. Life assurance is a monthly amount paid by someone so that when they die, a certain amount of money will be paid over to the family.

It is not a good idea for someone to cash in their life assurance while they are still alive. If they do this, then the amount that they will be paid will be very small compared to what they contributed every month. The longer the policy continues, the more money will be paid out.

SHORT-TERM ASSURANCE

Short-term assurance is a policy that can be taken out over a certain period of time (for example, 10 years). If something happens to the policy-holder during that time, then the insurance company pays a set amount to his or her family. But if the person does not die within that time, then at the end of the time of the policy, the contract with the insurance company is over and the policy-holder **CANNOT** get any of the money back.

INSURING A MOTOR VEHICLE

Every person who buys a vehicle should make sure that it is insured. Insurance is taken to cover a vehicle for the event of accidental loss, theft or damage. People who take out insurance have to pay the insurance company a certain amount of money each year. Insurance companies provide compensation when people are injured or property is damaged.

Insurance companies protecting people against **injuries** may give cover for medical bills, lost wages, pain and suffering and disfigurement (where a person's body becomes deformed).

If the insured person **dies**, an insurance company may pay medical and funeral expenses and compensate the people whom the dead person was supporting. Most motor accident insurance policies provide compensation for injury and death.

The Road Accident Fund automatically covers third party insurance. This does not cover damage to the person's property (including your car).

(See page 593 Third party claims)

Comprehensive insurance is not compulsory but it will cover you if your car is damaged in a motor accident. Comprehensive insurance gives all the benefits of balance of third party (in other words those costs that are not covered by a third party claim), fire and theft insurance as well as cover against damage to the vehicle no matter how the damage to your car was caused.

(See page 598 Comprehensive insurance)

INVESTMENT INSURANCE

This kind of insurance is money that you pay to the insurance company every month so that at the end of a specific period of time the policy-holder can be paid out a lump sum of money. Examples of this insurance are **Endowment Policies**.

RETIREMENT ANNUITY

A retirement annuity is money that a person pays to the insurance company which cannot by law be touched until they stop working due to old age (55 years minimum). The amount that is paid out becomes your pension. They can only take a third in a cash lump sum. The rest is used to pay a monthly pension.

PROBLEMS

1. Minor entering into a contract

Sizwe is 17 years old. Without telling them that he is under 18, he agrees to buy a music system on credit for R2 000 from Flash Music. He agrees to pay the money over a year. His father does not know that he has bought the music system. Sizwe runs into financial trouble and cannot pay back his monthly account for the music system. Flash Music decides to claim the remaining money from Sizwe's father because Sizwe is a minor.

WHAT DOES THE LAW SAY?

Sizwe is a minor, so he is not bound by the contract. Flash Music cannot sue Sizwe or his father for the debt.

Sizwe does not have to pay the remaining money that he owes. But he cannot keep the music system. *(See page 497 Can a minor enter into a contract?)*

WHAT CAN HE DO?

If Sizwe wants to keep the music system, he must pay the R2 000. If he wants to cancel the contract, he must return the music system and then also get back anything which he has already paid.

2. Breaking a promise

Jimmy offers to sell Thabo a piece of land for R50 000. Thabo sends Jimmy a letter offering to pay him R50 000 for the piece of land. But when Thabo next sees Jimmy he finds out that Jimmy has sold the land to someone else for R55 000. Thabo is upset with Jimmy and says he broke the contract between them.

WHAT DOES THE LAW SAY?

Thabo sent an offer to Jimmy to buy his land but Jimmy has not accepted his offer. A contract for the sale of land must be in writing.
(See page 496 Requirements for a contract)

Until there is a written offer and a written acceptance of that offer, there is no contract.

In this case there was no legally binding contract between Jimmy and Thabo.

WHAT CAN THEY DO?

There is nothing that Thabo can do to force Jimmy to sell him the land.

3. Breach of contract

Sarjid agrees to repair the roof of Veronica's house for R2 000. Veronica pays Sarjid a deposit of R500. Sarjid does not do the repairs.

WHAT DOES THE LAW SAY?

Veronica can cancel the contract because Sarjid's breach is serious. She can also claim back the R500 deposit which she paid. She can also claim damages for any loss she suffers because of Sarjid's failure to repair the house, for example, if it

starts to rain. Because Sarjid has not repaired the leaky roof, the rain damages Veronica's new carpet. The damage to this carpet costs her R500 to repair. She can claim this amount from Sarjid as damages.

Veronica can also try and get a court order for specific performance instead of cancelling the contract. In other words she can ask the court to make Sarjid repair her house.

(See page 497 What happens if there is a breach of contract?)

WHAT CAN SHE DO?

Veronica should approach a lawyer to help her try and decide on the best approach.

If she wishes to claim for damages, she could sue Sarjid through the Small Claims Court (for amounts up to R15 000).

(See page 150 Small Claims Court)

4. Something goes wrong with goods you have bought

Simon buys a TV set from a shop. As soon as he gets home, he finds that the TV set isn't working. What can he do?

WHAT DOES THE LAW SAY?

The law says that if you buy something which has a fault at the time that you buy it, and neither you nor the seller know about it, then you can get your money back.

WHAT CAN HE DO?

Simon must contact the seller immediately and give the seller all the necessary information, such as the sales receipt, the date that he bought the TV set and a description of what is wrong with the goods. Simon should keep the original documents for himself and give the seller copies.

If the seller refuses to help, send them a letter with the demands. Keep a copy.

If the seller still refuses to help, try contacting any trading affiliation that the store might be registered to (e.g. Furniture Traders Association), before going to the manufacturer.

If that does not work – send a letter to the manufacturer of the product or the headquarters of the chain store. Tell them what has happened and send copies of important documents, describing what is wrong with the TV and what Simon wants done.

Simon should keep the originals of the documents for himself. If Simon is still not satisfied, get help from one of the consumer protection agencies and organisations like the Consumer Protector or the provincial consumer affairs offices. If you cannot settle the problem in any of these ways then Simon can take the case to court. Simon should only go to court as a last resort because it can be an expensive process and it can take a long time.

- For claims of up to R15 000, Simon can sue in the Small Claims Court where no lawyers are allowed to represent him
(See page 150 Small Claims Court)
- For claims of up to R100 000, he can sue in the ordinary Magistrate's Court and should use a lawyer.
(See page 146 Civil claims)
- For claims over R100 000, he will need a lawyer and an advocate to sue in the High Court unless there is an agreement with the seller to use the jurisdiction of the magistrates court.

5. Helping a person assess his/her financial situation and drawing up a budget

Thabiso wants to buy a car on credit but does not know whether she will be able to afford to pay the monthly debt. She already has a number of other debts that she is paying off every month and she wants to know whether she can reschedule these debts so that she can pay less each month but over a longer period of time. She has already received a Written notice from a credit provider claiming that her monthly payments are irregular and she owes them money. She comes to you for advice on how to deal with her debt.

WHAT CAN YOU DO?

The steps on the opposite page explain the process of helping Thabiso manage her debt, including working out her expenses and a budget.

STEPS TO ASSESS A PERSON'S FINANCIAL SITUATION AND DRAW UP A BUDGET

1 EXPLAIN WHAT CAN AND CANNOT BE DONE TO HELP THE CLIENT

Explain what you can and cannot do to help Thabiso:

- Help her assess and manage her budget and debt responsibilities
- Help her understand the different legal actions that may have been taken against her if she fails to repay her debts
- Advise her of her rights and support her in claiming these rights
- Refer her to a registered debt counsellor as well as to the other institutions that govern the National Credit Act. Tell her that some credit providers choose only to work with debt counsellors, and may not want to talk with you.

You **cannot** make a recommendation to the court to declare her over-indebted so that the debt can be re-scheduled by the court unless you are a registered debt counsellor.

2 RECORD INFORMATION ABOUT THE CLIENT

- Thabiso's basic information
- Her debt and credit record
- Check if her income is more or less than her expenses
- Make as many copies of this as you need.

(See the table on the next page to see what details you need to get from Thabiso)

3 DRAW UP A MONTHLY INCOME AND EXPENDITURE BUDGET

Before offering to help the client draw up a monthly income and expenditure budget, check that s/he is willing to do this. People may or may not be too willing to share personal information.

4 DEALING WITH THE QUERIES

If the problem is related to dealing with your client's debt queries, go to *page 523 Problem 6: Helping a person who has a problem with repaying debt*. If the problem is related to dealing with your client's credit queries, go to *page 524 Problem 7: Helping a person who has a problem with getting credit*.

Based on the budget you have drawn up and the debt your client has already, you may need to advise your client as to whether you believe s/he is eligible for credit, and whether it would be wise for him/her to borrow money. This would take into account all the expenses and debts and whether s/he would be able to pay the debts.

- Summarise what the main issues are and what your plan of action is
- Write down the steps you have taken to deal with the problem and all actions taken

RECORDING A CLIENT'S BASIC AND FINANCIAL INFORMATION

CLIENT'S BASIC INFORMATION

Client's surname: First names

ID no:

Address:

Contact numbers: *home*: *work*: *Cell*:

Paralegal's name:

Start date:

THE CLIENT'S STORY

Ask why the client has come to the advice office
(Use a blank page to record the main points of the client's story)

CREDIT INFORMATION CHECKLIST

(Complete details for each individual debt)

Name of credit provider (organisation/person to be paid):

Department/person to be contacted:

Street address of the credit provider:

Postal address

Phone: Fax: E-mail:

Amount of initial loan: Period of loan:

Total amount still owing:

Amount to be paid monthly: Number of payments still to be made:

INCOME (Received each month)

R

R

R

R

EXPENSES (Must pay each month)

Rent:

Electricity:

Phone:

Airtime:

Transport:

Groceries:

Toiletries:

Clothes and shoes:

School expenses:

Support of family members:

Debt instalments:

Donation to church, mosque or synagogue:

Burial society or funeral policy:

Insurance:

Cigarettes:

Alcohol:

Sweets, cool drinks and other snacks:

School fees:

Religious festivals e.g. Christmas/Eid:

Birthdays:

Weddings:

Initiations:

Funerals:

Travel to visit family:

TOTAL MONTHLY INCOME: R

TOTAL MONTHLY EXPENSES: R :

MONTHLY INCOME LESS EXPENSES: R :

6. Helping a person who has a problem with repaying debt

Mandla has borrowed money from a microlender to buy furniture and also to pay off the new section he has added onto his house. For the past two months he has not been able to pay his monthly instalment due to other unexpected expenses. He has received two phone calls demanding payment and a letter of demand. He comes to you for help.

WHAT DOES THE LAW SAY?

The *National Credit Act* defines the steps that must be taken to deal with this problem. (See page 507 *Legal consequences of defaulting on debt obligations*)

WHAT CAN HE DO?

The following steps can be used to guide you in the way you would deal with Mandla's problem.

STEPS TO HELP A PERSON WHO HAS A PROBLEM REPAYING DEBT

1

FOLLOW STEPS 1, 2 AND 3 IN PROBLEM 5

(See page 521 *Problem 5: Helping a person assess their financial situation: drawing up a budget*)

These steps cover:

- What you can and cannot do for the client
- Recording information about the client's debt
- Drawing up a budget based on the client's monthly income and expenses (if appropriate).

2

ASSESS THE CREDIT PROVIDER'S ACTIONS

Check the following information regarding your client's credit providers:

- When was the contract signed – before or after the the NCA came into effect on 1 June 2007?
- Did the credit provider follow the correct processes in dealing with your client? Give details (*attach a separate page if necessary*) (See page 500 *Protection when making a loan application*)
- Do you think there may have been any reckless credit granting?
 - If yes, give details (*attach a separate page if necessary*) (See page 500 *Reckless lending*)
- Did the credit provider send your client a written notice (letter of demand) and did your client respond in any way?
 - If yes, give details (*attach a separate page if necessary*) (See page 507 *Legal consequences of defaulting on legal obligations*)
- Have legal procedures been instituted against your client?
 - Give details (*attach a separate page if necessary*)
- Were all legal processes followed correctly?
 - If no, give details (*attach a separate page if necessary*)
- Was your client refused credit?
 - Give details (*attach a separate page if necessary*)

3

DEAL WITH THE PROBLEM

From the information you have gathered in the previous steps, you will now have to assess how serious Mandla's situation is.

- If you think that Mandla is **over-indebted** or that a **credit provider may have been reckless in granting credit** then Mandla will need to see a registered debt counsellor. If you are not registered as a debt counsellor, you must refer your client to someone who is registered.
- If Mandla has received a **written notice (letter of demand)** from the credit provider, check if proper procedures have been followed. It is very important for Mandla to respond to a written notice. It is still not too late for him to see a debt counsellor.
- If **legal action** has been taken against Mandla. Check if legal procedures have been properly followed and advise him how to respond.
- If Mandla has been **treated unfairly or unlawfully** in any way, ask him for permission in writing to report this to a suitable institution
- If there have been **no faults in the process**, discuss with Mandla what the possible solutions could be to his situation. Your advice will be important in helping him to exercise his rights and to think of constructive ways of finding solutions. You can also refer Mandla to the Legal Aid South Africa (LASA) for appropriate legal support.

7. Helping a person who has a problem with getting credit

Sharon wants to buy a second hand car but needs to borrow money from a credit provider in order to pay for it. She goes to a microlender who says her name has been listed with a credit bureau so they will not give her the loan. Sharon does not know anything about this listing and thinks it is unfair that they will not give her the loan.

WHAT DOES THE LAW SAY?

The *National Credit Act* defines the steps that must be taken to deal with this problem. (See page 501 *Role of credit bureaus*)

WHAT CAN YOU DO?

These steps can be used to guide you in the way you deal with Sharon's problem:

STEPS TO HELP A PERSON WHO HAS A PROBLEM REPAYING DEBT

1

FOLLOW STEPS 1 AND 2 IN PROBLEM 5

(See page 521 *Problem 5: Helping a person assess his/her financial situation: drawing up a budget*)

These steps cover:

- What you can and cannot do for the client
- Recording information about the client's debt

2

ASSESS THE CREDIT PROVIDER'S ACTIONS

Check whether the correct processes were followed by the credit bureau and record the following details:

- Which credit bureau is your client listed at?
- Contact name and details:
- Is the bureau registered?
- Is the information correct?
- Are they holding information that they should not have?
 - Please give details:
- Have they had any difficulty getting information from the bureau?
 - If yes, please give details:

3

DEAL WITH THE PROBLEM

Sharon has the right to know the reasons for being refused credit and has been told that this is because her name is negatively listed with a credit bureau. (See page 501 *Role of credit bureaus*)

Remember that credit providers may refuse to lend money:

- If this would mean that the loan would be reckless
- When the credit provider is unable to check the consumer's credit record (and does not want to run the risk of reckless lending)
- When the consumer is negatively listed and is prohibited from borrowing any more money.

Given that the reasons given to Sharon for the microlender refusing to give her credit, you should now follow up with the credit provider and the relevant credit bureau.

8. Granting credit recklessly

Ms Adams has just finished her studies to become a teacher and still has some student loans to pay. In order to get a good job she wants to make a favourable impression during her interviews, so she wants to buy some smart new clothes. She goes to the clothing store and asks them if she can open an account. The customer service department gives her a form to fill in which asks for her personal details as well as how much she earns. She explains that she does not have a job yet. However, the customer service department tells her not to worry as she will be sure to get a job within the month and then will be able to pay the monthly instalments.

Even though Ms Adams knows she will have no money if she does not get a job, she decides to take a small loan from the store and opens the account. She buys clothes for R1 000. After three months, Ms Adams still does not have a job. She now has her study loan and a clothing account to pay and she is very worried. She goes to an advice office to see what she can do.

WHAT DOES THE LAW SAY?

Under the *National Credit Act*, credit providers have a responsibility to make sure that a consumer can afford to pay back the new debt. If not, then credit may have been granted 'recklessly'. (See page 500 *Reckless lending*)

WHAT CAN YOU DO?

You believe that Ms Adams was granted credit recklessly because she had clearly explained to the store that she did not yet have a job. You explain what this means to her and give her the name of a registered debt counsellor to contact. (See page 501 *Debt counselling*)

9. Going to a debt counsellor

Ms Siswe, a single parent, works as a domestic worker earning R1 500 a month. Every month she also gets R400 for maintenance from the father of her two children making her total income R1 900 per month. Ms Siswe's expenses are R2 400 per month. She comes to see you as she is unable to pay all her debts on time. She is particularly worried as she has just received a written notice from a clothing store to say she is behind with her payments.

WHAT DOES THE LAW SAY?

When consumers are unable to fulfil their repayment obligations, the NCA describes them as being 'over-indebted'. In such cases, they should apply to a debt counsellor to have the debt reviewed. The alternative to this is either to approach the credit provider to try and make an alternative repayment arrangement or for the credit provider to take legal action. (See page 501 *Debt counselling*)

WHAT CAN YOU DO?

- Make a list of her debts and draw up a budget with her (see page 521 *Problem 5: Helping a person assess their financial situation and drawing up a budget, Steps 1 – 3*).
- Ms Siswe is clearly over-indebted. Discuss her options:
 - Go and see the people she owes money to and ask for a change in the repayment terms so that she can pay smaller amounts over a longer period (but she is sure that they will not listen to her).
 - Apply to a registered debt counsellor to have her debt reviewed.
- Give her the details of a local reputable registered debt counsellor. Ms Siswe must make an appointment to see her.

APPLYING TO THE DEBT COUNSELLOR

At the debt counsellor Ms Siswe explains her situation. The debt counsellor does a debt review by asking about all her debts and her income – which she then assesses. Ms Siswe gives the counsellor a copy of her budget and list of debts.

The debt counsellor agrees that Ms Siswe is over-indebted according to the Act, and makes calculations of new repayments that Ms Siswe can afford.

The debt counselor agrees to approach the credit providers to try to reach a debt agreements with them. She does this but the creditors do not want to do this – so the debt counselor arranges to go to court.

The court declares Ms Sizwe over-indebted and orders that the debt be restructured.

Ms Sizwe is told that she may not borrow any more money until this debt has been paid off. She understands that the credit bureaus will have a record of her financial situation on their records until she has paid off her debts. Every month, she pays the agreed amount of money to her credit providers.

After Ms Siswe has paid all her debts she receives a **debt clearance certificate** from the debt counsellor to prove that she has finished paying all her debts. As she doesn't want her negative listing to remain on the record of the credit bureaus, she follows the debt counsellor's advice and **applies to have this information removed from the credit bureaus' records.**

10. Repossession of goods with a valid court order

Mr Mbuli bought a set of pots for R3 000 from Kitchen Essentials. The agreement was that Mr Mbuli would make monthly payments of R600 over six months. After two months of making the payments, Mr Mbuli was retrenched as a security guard where he had been working for three years. Mr Mbuli was now unable to make the monthly payments for the pots. Although he still owed R2 000, he did not report his retrenchment to Kitchen Essentials.

After failing to make his payment, Mr Mbuli received a written notice / letter of demand from Nkosi Debt Collectors – but he ignored the letter. The Sheriff of the court came to Mr Mbuli's house with a summons issued by the court and removed goods from his property. They also took goods belonging to Mr Mbuli's tenant. Mr Mbuli comes to the advice office for assistance.

WHAT DOES THE LAW SAY?

A credit provider may only begin legal proceedings against a consumer:

- After a section 129 letter of demand has been sent to the person owing the money, and
- after 10 working days have passed since delivery of the written notice.

(See page 507 Step 1: Phone calls and letters of demand)

If a consumer ignores a written notice/letter of demand, an agent of the creditor will be sent to the consumer's home or workplace to ask them to sign either a Section 57 or section 58 document. Alternatively, the creditor can get the Sheriff of the court to go to Mr Mbuli's house to serve a summons to pay the debt or to appear in court. A summons is an order of the court and should never be ignored.

(See page 507 Step 2: Signing Section 57 or Section 58 documents or receiving a summons)

If the consumer gets a summons, they have five working days to respond by –

- Making arrangements to pay the money they owe, or
- Consulting an attorney, or

- Informing the court that they intend to defend themselves (file a Notice of Intention to Defend).

If Mr Mbuli signs the section 57 document and then defaults on his payments (in other words, he doesn't stick to the agreement), or he signs the Section 58 or ignores the summons, then the credit provider is allowed to get a court order to repossess goods. A Sheriff of the Court brings the court order to the consumer's home. The Sheriff of the Court can take and sell as much property as is necessary to pay off the debt. The first time the Sheriff of the Court visits is for purposes of making a list of the consumer's possessions.

(See page 150 Warrant of execution against the consumer's property)

The second time the Sheriff comes, s/he will take possessions away. The Sheriff is the only person who can remove possessions and must have a court order to do this. In addition he or she must get the consumer's permission to enter his/her house or flat and should not come in the middle of the night or when the consumer is not at home.

(See page 507 Legal consequences of defaulting on debt obligations)

WHAT CAN YOU DO?

Check with Mr Mbuli that he received the letter of demand and that 10 working days have passed since it was delivered. .

If Mr Mbuli confirms that he did receive the letter of demand but ignored it, explain that the court therefore had a right to issue a summons. However, the Sheriff had acted improperly because of the following:

- He took goods from the house at the same time as issuing the summons (this meant that Mr Mbuli did not get the five days to respond after receiving the summons, before any court order was taken against him); and
- He had not listed the possessions that belonged to Mr Mbuli, and had taken goods that belonged to a tenant.

Advise Mr Mbuli to consult a lawyer and recommend someone who is an expert in this kind of case.

11. Repossession of goods without a court order

Mrs Arendse says that two men arrived at her house on the weekend and took her lounge suite away. They said her husband had not paid for the lounge suite and they had come to collect it. They said she should pay the full outstanding amount on Monday if she still wants the furniture. Mrs Arendse says she thought that the lounge suite was paid for by her husband.

WHAT DOES THE LAW SAY?

A shop can only repossess goods in a **lawful way**, that is:

- If the customer **consents** to the goods being repossessed
- If the shop has a **court order** to repossess the goods

This is what the shop should have done:

- Sent Mr Arendse (who signed the credit agreement) a written notice / letter of demand (section 129) to pay the outstanding instalment
- Applied to the courts to have a summons issued against Mr Arendse
- Applied to the court for a court order to repossess goods

Once the shop has the court order, only the Sheriff of the Court can go to the house to repossess the goods. They must show this court order before they can enter the house and repossess the goods. Therefore the shop did not repossess the Arendse's lounge suite in a lawful way.

WHAT CAN THEY DO?

The shop used unlawful ways to repossess the goods. They did not get a court order to repossess the goods and the people who entered the Arendse's house did not have a right to do this. *(See page 147 Steps in a civil claim)*

So Mrs Arendse can go to the Magistrate's Court to get a spoliation order to have the goods returned to her immediately. She will need to get an attorney to advise and help her. *(See page 157 Spoliation orders)*

But the Arendses must immediately pay the outstanding instalments, or negotiate with the shop or contact a debt counsellor about paying the instalments. Otherwise the shop can follow the steps above to get a court order to repossess the goods. *(See page 526 Problem 10: Repossession of goods with a valid court order)*

12. How to respond to a summons

Mr Johannes receives a summons from Prep Stores saying that he owes them R1 200 and that he has not paid his account with them for four months.

WHAT DOES THE LAW SAY?

Mr Johannes is under contract to pay Prep Stores every month and he has an obligation to pay his monthly instalments as per the contract. He must respond to the summons immediately. There is no time to delay if a person receives a summons and it should never be ignored. After Mr Johannes receives the summons, he has five working days to respond in order to:

- Make arrangements to pay the money he owes, or
- Consult an attorney, or
- Inform the court that he intends to defend himself (file a Notice of Intention to Defend) in which case he will need to make a plea (plead guilty or explain why he believes he is not responsible for the debt).

Once a summons has been issued, Mr Johannes may no longer apply for a debt review with a debt counsellor. He should consult an attorney if he intends to go to court.

If Mr Johannes ignores a summons to appear in court about his debt, then a default judgment by the court will be made and he will be ordered to pay the money owing. This will include the outstanding debt plus the interest that has been added to it, plus the legal costs of the court order.

WHAT CAN YOU DO?

If Mr Johannes **agrees that he owes** Prep Stores (the credit provider) but he cannot afford to pay the outstanding amount, explain that he needs to try and make an arrangement with the shop's attorney to pay off the debt. You can help him do this or get the help of an attorney.

If Mr Johannes has agreed to pay a certain amount to the attorney, then this amount must be paid at the attorney's office – if that is the agreement. If he forgets to pay a single instalment, then the creditor can take him to court. If Mr Johannes is taken to court, he will have to pay the other side's legal costs. This can be very expensive.

If Mr Johannes **denies that he owes** the money, then he should inform the court that he intends defending himself. He can do this by contacting an attorney to act on his behalf or he can go to the court by himself and fill in a form which tells the court and the other side that he wants to defend the case. This form is on the back of the summons and is called a Notice of Intention to Defend. Ask the Clerk of the Court how to fill this form in. He will be informed when he has to appear in court. He will have to go to court and explain to the court why he doesn't think that he owes the shop the money. The court will then make a decision.

13. Repossessed goods are sold for less than the amount still owing on the goods

Fariel buys a second-hand car under a credit agreement for R60 000. He pays off R10 000 but then stops paying his instalments.

The seller gets a court order to repossess the car. After repossessing the car it is sold at a public auction for R45 000.

So far the seller has received R10 000 from Fariel plus R45 000 from the auction. This is a total of R55 000. Originally Fariel owed R60 000 for the car. So Fariel still owes the seller R5 000 for the car (R60 000 – R55 000 = R5 000).

The seller claims the R5 000 from Fariel but Fariel refuses to pay because he says that he has already paid R10 000 for the car and it has been repossessed.

WHAT DOES THE LAW SAY?

The law says that Fariel still owes the BALANCE of R5 000 that he has not paid. It does not matter that the seller has repossessed the car and kept the money from the auction. The seller must not lose out because Fariel has not paid his account.

WHAT CAN YOU DO?

Fariel must pay the R5 000 back to the seller. You can help him to try and negotiate with the seller so that he can pay the amount of R5 000 off in instalments (small amounts paid every week or month).

14. Getting a civil judgment in a criminal case

Tommy says he represents a company which builds and sells houses. Tommy sells John a new house and John pays him a deposit of R20 000. Two months later John has heard nothing from Tommy and the house has still not been transferred to John's name. A friend then tells John that Tommy has been in court on a number of fraud charges in the Regional Magistrate's Court. John wants to know what he can do.

WHAT DOES THE LAW SAY?

John cannot take his claim to the Small Claims Court because the amount is too big. He can make a civil claim against Tommy in the ordinary magistrate's court. But there is another way to recover the money rather than through a civil claim which can be expensive and can take a lot of time.

Tommy is guilty of fraud so John can lay a criminal charge of fraud against him. Section 300 of the *Criminal Procedure Act* says that a magistrate can make a civil judgment in a criminal case. This means that John can use the criminal court to help him get his money back from Tommy. If he follows certain procedures and if Tommy is found guilty of fraud in the criminal case then John will be able to recover his money after the criminal case.

(See page 116 Criminal and civil actions)

WHAT CAN HE DO?

John must sign an affidavit before a Commissioner of Oaths. The affidavit must say how he 'lost' the R20 000. He must then hand his affidavit to the public prosecutor who is dealing with the case.

The public prosecutor will then attach the affidavit to the criminal record. If Tommy is found guilty of fraud, the magistrate will not only sentence Tommy but also order him to pay back the R20 000 to John Clark.

Be careful of the following points when you advise anyone to take these steps:

- This procedure will only be useful if you are sure that the person against whom you are making the claim will be found guilty in the criminal case. If the person is not found guilty, then you will not be able to claim your money through the criminal court.
- Make sure that all the relevant information is in your affidavit before you hand it to the public prosecutor. For example, make sure that all relevant receipts have been attached to the affidavit. It is a good idea to show the public prosecutor your affidavit before you sign it to make sure that it has all the necessary details.
- Try to find out whether criminal charges have been finalised before filing an affidavit with the public prosecutor. If the police are still investigating, then it may be a long time before the case is heard and you get your money back.

15. Being robbed at an ATM machine

More and more people are being cheated and robbed when they draw money from a bank ATM machine using their bank cards. ATM fraud is becoming more and more common.

Your PIN is the code you type in which allows you to use your bank account at an ATM. It is a secret code and no-one can use your bank card without having this PIN number. Criminals trick you to get your card and your PIN number, and then they can use your bank card to draw money from your bank account.

WHAT CAN YOU DO?

If your card has been stolen or lost, take the following steps:

- Immediately telephone the lost card number of your bank from a call-box or from a friend's cellphone and ask them to cancel your card
- If you are at the bank, immediately report this to the person at the enquiry desk and ask them to cancel your card

REMEMBER!

Don't write your PIN number on a piece of paper that you keep with your bank card. If you can, just memorise your PIN number and don't have it on paper anywhere. Otherwise keep the PIN number in a safe place at home separate from your bank card.

Always carry your bank's 'lost card' telephone number with you in a safe place, separate from the place where you keep your bank card.

Here are some of the different ways that you can be tricked when you are drawing money from an ATM machine and what you could do to prevent this happening.

CARD-SWOPPING

A thief watches you typing in your PIN. The thief distracts you after you have drawn the money, for example, by asking you for help. While you are distracted, another thief takes your card and slips a different card into the machine. You then leave the machine and put the wrong card in your pocket. The thieves have got your card and your secret PIN.

- Stand close to the ATM when you key in your PIN, and try to use your hand and body to cover what you are typing in so no-one else can see it
- Don't let anything distract you when using an ATM
- Always check your card before you leave the ATM machine. To make this easier, put a spot of nail polish on the corner of the card. If someone has left with your card, report this to the bank immediately and ask the bank to cancel the card.

VANDALISING ATM MACHINES

Criminals put matchsticks or other items into the ATM card slot. You insert your card, and you key in your PIN. A criminal watches to see your PIN. The matches make your card get stuck – so you think your card has been swallowed by the ATM.

The person behind you offers to make a call for you on their cell phone, saying they've got the bank's lost card number. But the call goes through to an accomplice pretending to be a bank employee. This criminal says he needs your PIN number in order to cancel the card. You then leave thinking you have cancelled your card. The thieves then take out your card from the machine with a small tool, and they have got your PIN.

- Don't key in your PIN until the ATM machine asks for it
- Don't accept help from strangers at an ATM
- Never tell anyone your PIN. The bank never needs your PIN number for anything, including not for cancelling your card. So be very suspicious of anyone who asks you for your PIN for whatever reason.

16. Cell phone scams, e-mail scams and card cloning

TELEPHONE CALL FROM A FALSE BANK OFFICIAL

You get a telephone call from a so-called bank official. S/he explains that the bank needs to transfer your money to an account which will be safe, and gives a good reason for this. You are asked to confirm your ID and account number. Then your money gets transferred out of your account, never to be seen again.

E-MAIL ASKING YOU TO UPDATE OR CONFIRM YOUR BANKING DETAILS

There are a number email scams (called phishing), for example:

- You get an e-mail from your 'bank' asking you to click on a link to update or confirm your personal details. Often the message would say that it is because the 'bank' picked up a fraudulent transaction on your account.
- An email pretends to be from SARS, saying SARS owes you money and wants to pay you back, but needs your banking details in order to do so

Clicking on the link will take you to a website that looks exactly the same as that of your bank's or SARS's. When you enter your details you are in fact giving them to the fraudsters.

CARD CLONING

Card cloning can happen when, for example, you hand over your card to pay for petrol at a garage or a meal at a restaurant, or when you draw cash from an ATM. Criminals attach a card 'reader' to the card machine or ATM to copy the details on your card. They then transfer those details to a blank card using special equipment.

WHAT CAN YOU DO?

- *Never* confirm your personal details over the phone or by clicking on an e-mail link. None of the banks (or SARS) will ever phone you or send you an e-mail asking you to confirm your details. If you fall victim to such a scam it could be very difficult for you to claim your money back, because the banks could say that you were negligent in giving out your personal details.
- Never let your card out of your sight – rather ask for the card machine to be brought to you
- In some instances (like when you buy something over the internet or over the phone) the number on the back of your card will be needed to complete the transaction. Write this number down and keep it in a safe place (just as you would with your PIN), and black out the number on the card itself. This helps to protect you against fraud in the event that your card is lost or stolen.

CHECKLIST

Particulars to take for a consumer law problem

1. Have you signed a contract with anyone for the goods you have bought?
2. Has anyone tried to repossess the goods you have bought or any other goods in your house?
3. Have you received any letters or court orders in connection with your repayments on the goods?
4. If you have received any letters or court orders, how did you respond to them?
5. Have you tried to sort out the problem by yourself, for example, by speaking to the accounts department of the other party or to the other party's lawyer?
6. Did you make any arrangement with the other party to pay back the debt? What was the arrangement? Have you broken the arrangement, for example, by not paying your debt for a month?