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# Tacit responsibilities assigned to the drafter of a credit agreement by the *National Credit Act 34 of 2005* with particular emphasis on contractual consensus: A critical analysis

## Summary

The *National Credit Act 34 of 2005* came into full operation on 1 June 2007, effectively replacing the *Credit Agreements Act 75 of 1980* and the *Usury Act 73 of 1968*. The main aim of this piece of legislation is to prevent the granting of so-called "reckless credit" to consumers, and in doing so protecting consumers from credit which may be, or may become, unmanageable. However, the act has placed some heavy responsibilities on certain areas of the law, especially the law of contract. The reason for this is that the relationship between the grantor of credit and the recipient thereof is almost entirely governed by contracts. If the recipient of credit enters into a contract, the contents which he or she is oblivious or uncertain of, it would not be too bold to state that consensus would be lacking in such a case, and no valid contract would come into existence. This article aims to identify specific obligations placed upon the drafter of a contract of credit specifically by the *National Credit Act*, but also exposes some problems that may arise from the Act, as far as consensus as prerequisite for a valid contract is concerned.

## Versweë verantwoordelikhede toegeken aan die opsteller van 'n kredietooreenkoms deur die *Nasionale Kredietwet 34 van 2005* met spesifieke nadruk op kontraktuele wilsooreenstemming: 'n Kritiese analise

Die *Nasionale Kredietwet 34 van 2005* het op 1 Junie 2007 in volle werking getree, en sodoende effektiewel die *Wet op Kredietooreenkomste 75 van 1980* en die *Woekerwet 73 van 1968* vervang. Die hoofdoel van hierdie stuk wetgewing is die voorkoming van die toestaan van sogenaamde "reckless credit", om sodoende verbruikers te beskerm teen krediet wat onbestuurbaar is of mag word. Nietemin het die wet groot verantwoordelikhede op sekere gebiede van die reg geplaas, veral die kontraktereg. Die rede hiervoor is dat die verhouding tussen die verlener van krediet en die ontvanger daarvan feitlik geheel en al gereguleer word deur kontrakte. Indien die ontvanger van krediet 'n kontrak aangaan waarvan die inhoud vir hom of haar onseker is, sal dit geregverdig wees om te meld dat wilsooreenstemming ontbreek, en geen geldige kontrak derhalwe tot stand kom nie. Hierdie artikel poog om die verantwoordelikhede wat spesifiek aan die opsteller van 'n kredietooreenkoms toevertrou word deur die *Nasionale Kredietwet* te identifiseer, maar openbaar ook sekere probleme wat deur die Wet veroorsaak word, spesifiek met betrekking tot wilsooreenstemming as voorvereiste vir 'n geldige kontrak.

## 1. Background

The *National Credit Act*<sup>1</sup> came into full operation on 1 June 2007, effectively replacing the *Credit Agreements Act*<sup>2</sup> and the *Usury Act*.<sup>3</sup> The reason for this replacement is important and should foremost be analysed. Otto<sup>4</sup> states that some legislation specifically aim at protecting “consumers”, while other legislation have a broader application-field. The *Credit Agreement Act* and the *Usury Act* protected consumers, or rather contracts entered into by these consumers, up to a certain amount of debt extended by the creditor.<sup>5</sup> When the amount of debt exceeded the “ceiling” for the relevant legislation’s field of application, the extended credit (debt) was no longer considered consumer credit, and it was left to the contracting parties to “determine their relationship in their contract subject to the rules of the common law”.<sup>6</sup> The new Act aims at protecting consumers more extensively than would normally have been the case with credit legislation,<sup>7</sup> by removing the credit “ceiling” for private individuals and thereby equalising the field of credit-granting.

According to Renke *et al*<sup>8</sup>:

the need for legislative reform in the field of consumer credit law arose *inter alia* because of the ineffectiveness of previous consumer credit legislation<sup>9</sup> to deal with the demands of a complex consumer market.

This view is supported by Temkin in *Business Day*, stating that:

the Act has its origins in the long-held belief by various market participants that SA’s existing credit legislation is ineffective in dealing with the needs of a complex consumer market.<sup>10</sup>

Otto adds that the *Credit Agreement Act* and the *Usury Act* “had to be applied jointly to credit agreements”, which inevitably led to a situation that both acts might have applied to one credit agreement, or only one of the two.<sup>11</sup>

In August 2004, the Department of Trade and Industry of the Republic of South Africa issued a policy framework for the granting of consumer credit.<sup>12</sup> In the framework, the need for a simple and transparent regulatory credit system was established.<sup>13</sup> Furthermore, one of the objects of a new consumer credit policy was described as “improving the understanding of the market and helping

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1 Act 34 of 2005, hereinafter referred to as “the Act”.

2 Act 75 of 1980.

3 Act 73 of 1968.

4 Otto 2006:1.

5 Otto 2006:1.

6 Otto 2006:1.

7 Otto 2006:2.

8 Renke *et al* 2007:1.

9 Most notably the *Credit Agreements Act* 75 of 1980 and the *Usury Act* 73 of 1968.

10 Temkin 2006:1.

11 Otto 2006:2.

12 Department of Trade and Industry Framework (“DTI”): 2004.

13 DTI:1.14.

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consumers make informed choices”.<sup>14</sup> It was mentioned that the consumer credit market was opaque, which resulted in consumers frequently signing credit agreements the contents of which they were oblivious of.<sup>15</sup> The credit regulatory framework, which consisted mainly of the the *Usury Act* and the *Credit Agreements Act*, was described in the document as being “outdated and largely ineffective”.<sup>16</sup> The credit market was described as being a dysfunctional one “that under-serves the historically disadvantaged and is characterized by a lack of effective competition, inadequate transparency and the high cost of credit”.<sup>17</sup> One of the aims of this article is to establish how the new Act addresses the problem of credit agreements that are not “transparent” and understandable. In the Minister of Trade and Industry’s address to the National Assembly on 13 October 2005,<sup>18</sup> he made mention of the “market (referring to the credit market) that is characterised by a lack of transparency, limited competition, the high costs of credit and limited consumer protection”.<sup>19</sup> The Minister also mentioned the need for a credit act that secured a consumer’s right to “information in plain and understandable language”.<sup>20</sup>

This article will evaluate and discuss how the abovementioned problems were dealt with in the *National Credit Act 34 of 2005*. It also evaluates the potential problems that may arise in practice from the new Act. Ultimately, the article will indicate the important role of the drafter of the credit agreement (and of the law of contract in general) within the regulation of the new credit system in South Africa.

## 2. The *National Credit Act*<sup>21</sup>

Since the Act came into full operation, unofficial statistics and partly-informed opinions have indicated a severe influence on the granting of credit (mentioned in the broadest sense of the word) by so-called “credit providers”<sup>22</sup> to so-called “consumers”.<sup>23</sup> Numerous articles have been written, memorandums have been drafted, and papers have been delivered regarding the influence of the new Act, not least of all on the property market. Financial institutions registered as “credit providers” have gone out of their way to educate attorneys, estate agents and (to a lesser extent) the broad public on the basic content and requirements of the new Act.

An area of law from which the new *National Credit Act* expects a substantial amount of expertise, a fair amount of craftsmanship and an agreeable amount

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14 DTI:3.

15 DTI:3.

16 DTI:2.10 and 2.11.

17 DTI:4.1.

18 Address of the Minister of Trade and Industry: 13 October 2005.

19 Address of the Minister of Trade and Industry: 13 October 2005:1.

20 Address of the Minister of Trade and Industry: 13 October 2005:2.

21 Act 34 of 2005.

22 As defined in Section 1 of the *National Credit Act 34 of 2005*.

23 As defined in Section 1 of the *National Credit Act 34 of 2005*.

of insight, is the law of contract. The reason for this is the fact that the Act places the following responsibility on the National Credit Regulator:<sup>24</sup>

The National Credit Regulator is responsible to-

- (a) promote and support the development, where the need exists, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of-
    - (i) historically disadvantaged persons;
    - (ii) low income persons and communities; and
    - (iii) remote, isolated and low density populations and communities,
- in a manner consistent with the purposes of this Act ...

In order to promote and support the development of a “fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market”, the agreements that govern and control this market should likewise be fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible. It is important, therefore to investigate the *type* of contract that is required to regulate and to perform this important task.

According to the Act<sup>25</sup>:

an agreement constitutes a credit agreement for the purposes of this Act if it is-

- a credit facility, as described in subsection 3;<sup>26</sup>
- a credit transaction, as described in subsection 4;<sup>27</sup>
- a credit guarantee, as described in subsection 5,<sup>28</sup> or
- any combination of the above.<sup>29</sup>

The flip-side of the coin, in other words contracts which do *not* constitute credit agreements, are the following:

- a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance,<sup>30</sup>
- a lease of immovable property;<sup>31</sup> or
- a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel.<sup>32</sup>

Furthermore, the following transactions are also regulated by (and therefore considered) credit agreements, according to the Act:

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24 *National Credit Act* 34 of 2005: Sec 13.

25 *National Credit Act* 34 of 2005: Sec 8(1).

26 *National Credit Act* 34 of 2005: Sec 8(1)(a).

27 *National Credit Act* 34 of 2005: Sec 8(1)(b).

28 *National Credit Act* 34 of 2005: Sec 8(1)(c).

29 *National Credit Act* 34 of 2005: Sec 8(1)(d).

30 *National Credit Act* 34 of 2005: Sec 8 (2) (a).

31 *National Credit Act* 34 of 2005: Sec 8(2)(b).

32 *National Credit Act* 34 of 2005: Sec 8(2)(c).

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- An agreement whereby a credit provider undertakes to supply goods or services or to pay an amount or amounts ... to the consumer or on behalf of the consumer,<sup>33</sup> defer the consumer's obligation to pay any part of the costs of goods or services,<sup>34</sup> or bill the consumer periodically for any part of the costs of goods or services.<sup>35</sup>
- An agreement which constitutes a pawn transaction or a discount transaction,<sup>36</sup> an incidental credit agreement,<sup>37</sup> an instalment agreement,<sup>38</sup> a mortgage agreement or secured loan,<sup>39</sup> a lease<sup>40</sup> or any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred and any charge, fee or interest is payable to the credit provider in terms of the agreement<sup>41</sup> or the amount deferred.<sup>42</sup>

Having established what is meant by a "credit agreement" in terms of the Act, it should be borne in mind upon whom these agreements will have a significant effect. The answer to this is of course, (amongst others), the consumer. The consumer, in most cases, will be a member of the general public: A person who has applied for a home loan, cash loan or any imaginable type of credit. The law of contract has a duty to protect this person, who in all probability will be a layman in the legal field. But why is it so important for a consumer to know *exactly* what he or she is getting him- or herself into? The reason is quite simple: Without knowing *exactly* what the rights and obligations are in terms of the credit agreement, it is arguable whether a valid agreement is indeed established between the contracting parties. Van der Merwe *et al*<sup>43</sup> list the elements of *consensus* as:

- (a) the contractants must agree on the consequences they wish to create;
- (b) they must intend to bind themselves legally; and
- (c) they must be aware of their agreement.

In a typical credit agreement, it may be accepted that (b) and (c) above will be readily complied with. The consumer has, after all, applied for credit with the credit provider, and would expect some sort of agreement to be concluded between them. Both contractants will consequently be aware of the contract or agreement potentially existing between the two of them, and will obviously have the intention to be legally bound. Element (a) mentioned above may prove to be more problematic, the reason being that a consumer, who in most cases will also be a layman as far as the law of contract is concerned (not even to mention credit agreements) will have to be educated thoroughly on the *consequences*

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33 *National Credit Act 34 of 2005*: Sec 8(3)(a)(i).

34 *National Credit Act 34 of 2005*: Sec 8(3)(a)(ii)(aa).

35 *National Credit Act 34 of 2005*: Sec 8(3)(a)(ii)(bb).

36 *National Credit Act 34 of 2005*: Sec 8(4)(a).

37 *National Credit Act 34 of 2005*: Sec 8(4)(b).

38 *National Credit Act 34 of 2005*: Sec 8(4)(c).

39 *National Credit Act 34 of 2005*: Sec 8(4)(d).

40 *National Credit Act 34 of 2005*: Sec 8(e).

41 *National Credit Act 34 of 2005*: Sec 8(4)(f)(i).

42 *National Credit Act 34 of 2005*: Sec 8(4)(f)(ii).

43 Van der Merwe *et al* 2007:23.

that will be created by the signature of the relevant credit agreement. If the consumer is uncertain or ignorant of exactly what the *consequences* of the credit agreement are, it will not be too bold to state that *consensus* would be lacking, and no valid contract is created.

### 3. Consensus as requirement for a valid contract

As mentioned above, where consensus is not present, in other words where *dissensus* exists, no valid contract is created. This is exactly what the appellant depended upon in the well-known case of *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd*.<sup>44</sup> In this case, the appellant claimed that he was prompted to hurriedly sign the contract in question under significant pressure from the respondent's agent.<sup>45</sup> What is relevant to the current discussion is that the appellant claimed furthermore that "the parties were not at the relevant time *ad idem* as to the relevant terms of the contract. Therefore the required *consensus* had been lacking".<sup>46</sup> Pressure is not a pre-requisite for a contractant to be left oblivious of the nature of the contract, yet it is self evident that such pressure may exaggerate the possibility of *dissensus*. In the case of *Preller and Others v Jordaans*<sup>47</sup> the Appellate Division of the High Court made the following quote:

The grounds of *restitutio in integrum* in the Roman-Dutch Law are wide enough to cover the case where one person obtains an influence over another which weakens the latter's resistance and makes his will pliable, and where such a person then brings his influence to bear in an unprincipled (gewetelose) manner in order to prevail upon the other to agree to a prejudicial (skadelike) transaction which he would not normally have entered into of his own free will.<sup>48</sup>

It would suffice to say that the drafter of the contract has a responsibility to contribute to the existence of *consensus* by creating a contract which is easily understandable and transparent. Unfortunately, this is not the situation in legal practice at the moment. Mitchell<sup>49</sup> states that textualist interpretation currently faces two major problems:

The first is that lawyers, rather than the contracting parties, draft many formal contractual documents, so there may be doubt about how far the contractual text is authoritative as a statement of the parties' intentions. Interpretative difficulties often turn on the 'small print' of standard terms and conditions, which usually go unread by the contracting parties. The second is that the documents may be an unreliable record of the parties' agreement. The contractual text may not reflect all the parties' understandings about their obligations and their relationship, and may be written in fairly technical 'legal' language.<sup>50</sup>

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44 1986 (1) SA 303 (A).

45 *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd*: 303.

46 *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd*: 303.

47 1956 (1) SA 483 (A).

48 *Preller and Others v Jordaans* 1956 (1) SA 483 (A): 483:A.

49 Mitchell 2007:12.

50 Mitchell 2007:12.

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In the Department of Trade and Industry's policy framework for consumer credit,<sup>51</sup> it is said that:

in most cases, consumers do not even attempt to read credit contracts before signing, as their eagerness to obtain the finance overrides concerns about the terms and conditions.

This is a situation that should be prevented. Yet, in most instances, the legal language contained in the contract is vague and unfamiliar to the contractants. The Department of Trade and Industry qualifies this by stating the following:

- 5.6 It is not sufficient to ensure that there is full disclosure, while leaving it up to the consumer to struggle with unfamiliar contractual language and information that makes little sense to them. Consumers' rights are frequently undermined by the inclusion of complex and compromising clauses into contracts. Credit providers also commonly attempt to reduce the consumer's common law rights through certain contractual clauses.<sup>52</sup>
- 5.7 The consumer is frequently intimidated by the language and presentation of the information, and consumers have indicated that sales staff and intermediaries are generally unwilling or unable to explain the meaning of the contractual clauses.<sup>53</sup>
- 5.8 Irregular contract clauses can undermine the court's ability to protect consumer's rights in the case of legal action following late payments or defaults.<sup>54</sup>
- 5.10 Contracts should be written in plain language, and be available in writing, before any transaction is concluded.<sup>55</sup>

#### 4. The responsibilities of the credit provider in relation to "pre-agreement disclosures" and "education"

Otto<sup>56</sup> refers to an important responsibility of the credit provider towards the consumer, namely that of providing the latter with a quotation and a statement prior to the conclusion of a credit agreement. This responsibility is placed upon the credit provider by Section 92 of the Act.<sup>57</sup> The details of these "Pre-agreement disclosures" as described by Otto, are of financial nature (including the amount of credit provided, the instalments payable, the interest rate, the initiation fee, the deposit required, credit insurance and the service fee available),<sup>58</sup> as well as the most important rights and obligations involved<sup>59</sup> and applicable

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51 DTI 2004:5.2.

52 DTI 2004:5.6.

53 DTI 2004:5.7.

54 DTI: 2004:5.8.

55 DTI: 2004:5.10.

56 Otto 2006:40.

57 Otto 2006:40.

58 Otto 2006:40.

59 Otto 2006:40.

(specifically) to the consumer. The purpose of this “quotation” is to provide the consumer with the opportunity to consider the intended agreement, and to shop around for a better credit deal.<sup>60</sup> But the question is whether these pre-agreement disclosures contribute to the presence of *consensus* at the eventual conclusion of the credit agreement. The objective of the Act in requiring the credit provider to provide the “pre-agreement disclosures” would certainly be to enlighten consumers on what exactly they are entering into, and in doing so to contribute (at least) to the presence of consensus at eventual conclusion of the credit agreement.

In for example the case of a loan for purchasing fixed property, the important task of “educating” a consumer, who has applied for such loan from a financial institution does not rest upon the specific financial institution *per se*, but upon the conveyancer responsible for registering the subsequent bond in the Deeds Office. Because conveyancers have been educated thoroughly by most financial institutions on what exactly is required from both of them in terms of a credit agreement, a thorough explanation of what exactly a specific agreement entails should not present a problem. It is expected that the conveyancer would thoroughly explain to consumers what is expected from them in terms of the credit agreement at hand. If the consumer in question understands the contents of the agreement, it is signed, and a valid contract is created. The requirement of *consensus* is assured by the disclosure of certain “pre-agreement documentation”.

## 5. Consensus and the responsibilities in relation to the language in which the credit agreement is drafted

A potential problem may arise where a consumer wants to make use of the right provided in terms of section 63 of the Act. According to this section, a consumer has the right to receive any document issued in terms of this Act in “*an official language that the consumer reads or understands ...*”.<sup>61</sup> A potential practical problem presents itself to the conveyancer who is unable to explain the rights and duties of the consumer in terms of the credit agreement, in a requested official language. A consumer may, for example, require that the document be explained in Sesotho, with which language the conveyancer is not acquainted. The document’s content is then explained in English. The consumer signs the agreement, and three months later becomes aware of an unsuitable clause. The fact is, after all, that whilst the pre-agreement disclosures certainly aid the consumer in reaching a thorough (or at least fair) understanding of the credit transaction at hand, the credit agreement itself is the document that will be regulating the legalities between the consumer and the credit provider. *Consensus* must be reached on the “particulars” of the contract, such as its content and subsidiary features.<sup>62</sup> The question is whether consumers attack the validity of contracts on the grounds that they were not made aware of the exact consequences of the credit agreement, and therefore no consensus had been reached?

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60 Otto 2006:40.

61 *National Credit Act* 34 of 2005: Sec 63 (1).

62 Van der Merwe *et al* 2007:21.



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Van der Merwe *et al*<sup>63</sup> state that:

... one of the parties or both may be unaware of the dissensus because of a mistaken impression of the intention of the other contractant. Such a party is said to be labouring under a mistake or error, which in general means a wrong impression of the actual state of affairs.

If this “mistake” happens to exclude *consensus*, it is regarded as material of nature, because it bears on the contents of an obligation.<sup>64</sup> Even if the agreement should contain a clause stating that one of the parties cannot be bound to or held responsible for a misrepresentation regarding any aspect of the agreement, a court of law will most probably disregard such a clause if the party in question indeed made a *mala fide* misrepresentation. In the case of *Du Toit v Atkinson Motors*<sup>65</sup> the appellant bought a motor vehicle that was advertised as a 1979-model. After three months he realised that the vehicle was in fact a 1976 model. The court *a quo* decided that the appellant (plaintiff) was bound to the contract he had signed without looking at any of its contents.<sup>66</sup> However, the decision of the court *a quo* was reversed on appeal, as the appellant had depended upon the correctness of the advertisement, which clearly stated the vehicle in question to have been a 1979-model.<sup>67</sup> The relevance of the court’s decision in this case, is the fact that *consensus* had been lacking because of an *error in corpore*.<sup>68</sup> The drafter of a contract should take note of the fact that in this example, there indeed existed a clause excluding liability based on a misrepresentation. The Appellate Division overrode the existence of this clause as a misrepresentation had been made in a separate advertisement. This case places a responsibility on the law of contract to protect both contracting parties to such agreements.

Is it fair to assume that the “pre-agreement disclosures” distributed by the credit providers to the consumers in the case of home loans, provide necessary information for the credit provider to presume that once the consumer (or mortgagee in this example) signs the credit agreement, the exact details and prerequisites of the agreement are understood? If the consumer had indeed been acquainted with these prerequisites, and subsequently signed the credit agreement, surely *consensus* cannot be absent? Once again section 63 of the Act places a “burden” on the credit provider and its agent, the conveyancer:

If the producer of a document that is required to be delivered to a consumer in terms of this Act is, or is required to be, a registrant, that person must<sup>69</sup>

- (a) make a submission to the National Credit Regulator proposing to make such documents available in at least two official languages;<sup>70</sup> and

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63 Van der Merwe *et al* 2007:25.

64 Van der Merwe *et al* 2007:25.

65 1985 (2) SA 893 (A).

66 *Du Toit v Atkinson Motors*: 894.

67 *Du Toit v Atkinson Motors*: 895.

68 A mistake regarding the object of performance.

69 *National Credit Act 34 of 2005*: Sec 63(2).

70 *National Credit Act 34 of 2005*: Sec 63(2)(a).

- (b) offer each consumer an opportunity to choose an official language in which to receive any document, from among at least two official languages determined in accordance with a proposal that has been approved by the National Credit Regulator.<sup>71</sup>

The same scenario presents itself where a client arrives at a conveyancer's office in order to sign the mortgage loan agreement (in other words a credit agreement), only to realise that the "pre-agreement disclosures" provided by the mortgagee bank are only available in English and Afrikaans. According to Section 63(2)(b), a consumer is entitled to be offered an "opportunity to choose an official language in which to receive any document, from at least two official languages ...".<sup>72</sup> The disclosures distributed by the bank certainly fall under the description of *any document* as contemplated in the Act. From the realm of a conveyancer's practice, the latter acts on behalf of the mortgagee bank for the explanation and education of the consumer as far as the credit agreement is concerned. The conveyancer is further responsible to provide the consumer with the relevant "pre-agreement disclosures", which have been received by the conveyancer from the mortgagee bank. If the consumer requests the pre-agreement disclosures in Setswana, but the conveyancer is only able to provide it in English, (which the consumer readily accepts due to the fact that there is no other option), the question arises whether *consensus* is present if the consumer continues to sign the credit agreement, without a thorough knowledge of the contents thereof. The chances are extremely good that if in a few months' time, it is discovered that the terms of the credit agreement are not beneficial to the consumer, it may be argued that the actual state of affairs were clouded by the non-comprehension of the document. This can be reverted back to the acting under the mistake or error as quoted by Van der Merwe *et al*<sup>73</sup> earlier.

The question of section 63 of the Act and the consumer's right to receive documentation and information regarding a credit agreement in an official language of his or her choice, is but one unique responsibility placed on the drafter of a credit agreement. The right created by section 63 is a Constitutional one,<sup>74</sup> and should therefore be viewed by any drafter of a contract as extremely important and enforceable.

## 6. Consensus and the responsibilities in relation to the legalese of the contract

What about the consumer's basic knowledge and understanding of the contents of the agreement that is about to be signed? Explaining the contents of a credit agreement in a language that the consumer feels comfortable with is one thing, but really grasping the legal and administrative prerequisites required from such a consumer might prove to be more difficult, even when explaining it to such a consumer in the language of choice. Why does the

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71 *National Credit Act* 34 of 2005: Sec 63(2)(b).

72 *National Credit Act* 34 of 2005: Sec 63(2)(b).

73 Van der Merwe *et al* 2007:25.

74 *Constitution of the Republic of South Africa* 108 of 1996: Sec 30.

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drafter of a credit agreement have a responsibility to draft the agreement in terms understandable to the consumer? The answer is found in section 64 of the Act, which reads as follows:

The producer of a document that is required to be delivered to a consumer in terms of this Act must provide that document-<sup>75</sup>  
in the prescribed form, if any, for that document;<sup>76</sup> or  
in plain language, if no form has been prescribed for that document.<sup>77</sup>

The drafting of legal documents in “plain language”, that is to say, language understandable by at least the parties to such legal documents, is a matter that has long since received a significant amount of attention. What exactly constitutes “plain language” is, however, debatable.

Botha<sup>78</sup> states that “ideally, plain language is easily understood”.<sup>79</sup> The Plain Language Movement<sup>80</sup> targets not only legislation, but all legal documents, including contracts, to be drafted in simple, yet professional language.<sup>81</sup> Botha continues:

It is the golden rule of the Plain Language Movement that authors of legal texts must write clearly and comprehensibly. Legislation (and also contracts) must be drafted in such a way that the readers (and contractants) know what the law expects of them. Plain language is a writing style aimed at the needs of the reader: the author (drafter) must convey the message of the text as clearly as possible to the reader. All language sources and aids should be utilized to ensure good, ordinary language is used to bring the message promptly and clearly to the reader.<sup>82</sup>

One has to agree with Botha that the use of plain, easy understandable language within a legal document will contribute to legal certainty. To answer the question surrounding plain language, Botha states that:

[T]he ‘plain’ in ‘Plain Language’ does not mean monosyllabic words and single clause sentences: the emphasis is on comprehensible language. It is not the ideas that are simplified, but the language used to convey those ideas.<sup>83</sup>

Botha concludes by making this very logic, but very important statement: “The law cannot fulfill its role to regulate and to order if it cannot be understood”.<sup>84</sup>

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75 *National Credit Act 34 of 2005*: Sec 64(1).

76 *National Credit Act 34 of 2005*: Sec 64(1)(a).

77 *National Credit Act 34 of 2005*: Sec 64(1)(b).

78 Botha 1998:5.

79 Botha 1998:5.

80 The Plain Language Movement is described by Botha as “an effort to eliminate overly complex language from academia, government, law and business ...”.

81 Botha 1998:5.

82 Botha 1998:5.

83 Botha 1998:6.

84 Botha 1998:6.

Once again, a great responsibility is placed upon the drafter of a contract, not only by the Act, but by movements such as the “Plain Language Movement”, which unofficially requires that the drafter of a contract should consciously avoid “overly complex language”. The above description by Botha of what constitutes “plain language” is a very simple, yet very comprehensive one.

Whilst a fair amount of responsibility rests on the “consumer” in the case of a credit agreement to make sure that the content of the agreement is properly understood, the objective of the law of contract should still be to create contracts that are both legally correct and binding, and easily understandable by the broader public.

The Act under discussion provides a clear indication of what a credit agreement entails, what should be disclosed in such an agreement and that it should be drafted in “plain language”.<sup>85</sup> It also mentions what type of agreements would be considered to be unlawful, and which provisions within an agreement would be considered similarly unlawful. However, a closer look at what type of language, clauses or descriptions within a credit agreement would make for an *invalid* clause, description or even a whole contract, is desirable. This is one that has been discussed often by academics, and has provided numerous problems in practice.

Another aspect that places responsibility upon the drafter of a credit agreement is the one regarding “unlawful agreements” in terms of the Act.

According to the Act, the following agreements are considered unlawful:

- (a) Agreements with a consumer who is an unemancipated minor assisted by a guardian;<sup>86</sup>
- (b) Agreements with persons who have been declared mentally unfit;<sup>87</sup>
- (c) Agreements with persons under an administration order without the administrator’s consent;<sup>88</sup>
- (d) Agreements resulting from negative option marketing;<sup>89</sup>
- (e) Supplementary agreements;<sup>90</sup>
- (f) Agreements concluded by an unregistered credit provider who was supposed to be registered;<sup>91</sup> and
- (g) Agreements concluded by a credit provider who was subject to a notice by the National Credit Regulator or a provincial regulator to stop extending credit.<sup>92</sup>

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85 *National Credit Act* 34 of 2005: Sec 64(1)(b).

86 *National Credit Act* 34 of 2005: Sec 89(2)(a).

87 *National Credit Act* 34 of 2005: Sec 89(2)(a)(i).

88 *National Credit Act* 34 of 2005: Sec 89(2)(a)(ii).

89 *National Credit Act* 34 of 2005: Sec 89(2)(b).

90 *National Credit Act* 34 of 2005: Sec 89(2)(c).

91 *National Credit Act* 34 of 2005: Sec 89(2)(d).

92 *National Credit Act* 34 of 2005: Sec 89(2)(e).

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According to Otto,<sup>93</sup> section 90 (2) of the Act further declares some specific provisions unlawful. For the purposes of this article, the following unlawful provisions are important:

- (a) Provisions which deceive the consumer;<sup>94</sup>
- (b) Provisions which subject the consumer to fraud;<sup>95</sup> and
- (c) Provisions purporting to waive the consumer's statutory rights or depriving him thereof.<sup>96</sup>

Once again, the responsibility is placed primarily on the drafter of the contract to avoid including the above-mentioned type of clauses in a credit agreement. The consumer should be considered a reasonable contractant, and it should be accepted that he or she does not possess intricate knowledge of complex legal terms and definitions contained in the agreement. The drafter should therefore aim not only to exclude maliciously deceptive provisions, but also negligently included provisions, which may be deceptive to the consumer.

For the purposes of a credit agreement, however:

[A] document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort, having regard to<sup>-97</sup>

- the context, comprehensiveness and consistency of the document;<sup>98</sup>
- the organization, form and style of the document;<sup>99</sup>
- the vocabulary, usage and sentence structure of the text;<sup>100</sup> and
- the use of any illustrations, examples, headings, or other aids to hearing and understanding.<sup>101</sup>

Otto<sup>102</sup> explains that Regulation 31 of the Act states that the requirements for the credit agreements relating to the parties' rights and duties are "extremely detailed and comprehensive".<sup>103</sup> He continues to state that:

[T]hey (the requirements) include the financial aspects of the agreement in great detail and just about every conceivable right that the National Credit Act has on consumers. This will, no doubt, lead to a very lengthy and verbose credit agreement. The underlying idea is a sound one, namely to disclose fully to consumers what they are letting themselves in for.<sup>104</sup>

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93 Otto 2006:43.

94 Otto 2006:43.

95 Otto 2006:43.

96 Otto 2006:43.

97 *National Credit Act 34 of 2005*: Sec 64(2).

98 *National Credit Act 34 of 2005*: Sec 64(2)(a).

99 *National Credit Act 34 of 2005*: Sec 64(2)(b).

100 *National Credit Act 34 of 2005*: Sec 64(2)(c).

101 *National Credit Act 34 of 2005*: Sec 64(2)(d).

102 Otto 2006:41.

103 Otto 2006:41.

104 Otto 2006:41.

The following sentence by Otto is a significant, but concerning one:

By the nature of things, however, few people read these documents, particularly when they contain too much information.<sup>105</sup>

It must be agreed with Otto. Very few consumers are interested in the fine print of the credit agreement they have signed or are about to sign. It seems that the Act places a lot of responsibility on the drafter of the credit agreement,<sup>106</sup> the conveyancer who has to explain the contents of the credit agreement<sup>107</sup> as well as, of course, the credit provider itself.<sup>108</sup> Obviously, the consumer, as applicant for the relevant credit, needs to bring something to the party as well (in a manner of speaking). After all, the consumer carries a responsibility, although not expressly provided for in the Act, to acquaint him- or herself with the requirements and prerequisites of the credit agreement. Some Marxist literary theorists such as Pierre Macherey feel that the reader should bring some of his or her own “knowledge” to a literary work, in order to allow the work to reach its full potential.<sup>109</sup> Likewise, it is expected of a consumer to contribute to the establishment of a valid credit agreement, that is to say, one that has been concluded because the necessary *consensus* existed. The point is that whilst the primary responsibility to ensure a legal document that constitutes a “fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market”<sup>110</sup> rests upon the drafter of the contract, it would be disastrous to assume that the consumer — the very person applying for the credit — carries no personal responsibility towards the reaching of *consensus*.<sup>111</sup>

As mentioned by the court *a quo* in the case of *Du Toit v Atkinson Motors*<sup>112</sup>:

[T]he appellant was bound by the provisions of the document even if he had not read the printing on it, and he was bound because of his negligence in not reading the printing on the document.<sup>113</sup>

If a court held a contractant bound by a contract (even if, in this particular case, the appeal against the court *a quo*'s decision was upheld) while the contractant had not even read through the contract, chances are that a different court will hold a contractant bound to a credit agreement, even if such a contractant should afterwards claim that the contract was signed in error.

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105 Otto 2006:41.

106 *National Credit Act* 34 of 2005: Sec 64.

107 *National Credit Act* 34 of 2005: Sec 63.

108 *National Credit Act* 34 of 2005: Sec 92.

109 Forgacs 1986:224.

110 *National Credit Act* 34 of 2005: Sec 13.

111 According to Van der Merwe *et al*, “acceptance is a declaration of will, which indicates assent to the proposal contained in the offer and which is communicated to the offeror”. Van der Merwe *et al* 2007:47.

112 1985 (2) SA 893 (A).

113 *Du Toit v Atkinson Motors*: 894.

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According to Christie,<sup>114</sup> the court in the case of *Levenstein v Levenstein*<sup>115</sup> concluded that a contract will be considered “void for vagueness” in a case “where the vague and uncertain language justifies the implication that the parties were never *ad idem* ...”.<sup>116</sup> Christie states that “the general approach of the courts to questions of vagueness is to seek for reasons to uphold the contract rather than to destroy it”.<sup>117</sup> Christie continues to quote an important guideline, prescribed by Nienaber JA in the case of *CTP Ltd v Argus Holdings Ltd*:<sup>118</sup>

Three points need to be made. One, the words in the contract must not be interpreted in the abstract and out of context. Two, a restraint which in general may be unduly wide or imprecise can be trimmed to fit the common understanding and perceptions of the parties in the light of the circumstances prevailing at the time of its enforcement. Three, a conclusion of invalidity will only be reached as a last resort.<sup>119</sup>

It is obvious that the court in the abovementioned case supported the view that a contract should be upheld by all means necessary. However, in the English case of *Hillas & Co Ltd v Arcos Ltd*,<sup>120</sup> as discussed by Christie,<sup>121</sup> the court had the following to say:

Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete and precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects, but, on the contrary, the court should seek to apply the old maxim of English law *verba ita sunt intelligenda ut res magis valeat quam pereat*.<sup>122</sup>

Note the words from the above quote, “it is accordingly the duty of the court to construe such documents fairly and broadly ...”. The point should be made that if the drafter of the initial contract had excluded the use of “crude and summary”<sup>123</sup> expressions in the first place, the abovementioned duty would have weighed much lighter on the court. The first duty and responsibility to draft and interpret contracts that are not “crude and summary”<sup>124</sup> rests upon the drafter of these contracts. It is no excuse to argue, as Lord Wright argued in the case discussed above, that “business men often record the most important agreements in crude and summary fashion”.<sup>125</sup> The purpose of this

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114 Christie 1996:104.

115 1955 (3) SA 615 (SR).

116 *Levenstein v Levenstein*: 619.

117 Christie 1996:105.

118 1995 (4) SA 774 (A).

119 Christie 1996:106.

120 (1932) 147 LT 503 (HL).

121 Christie 1996:106.

122 Christie 1996:106.

123 Christie 1996:106.

124 Christie 1996:106.

125 Christie 1996:106.

article is to indicate that an Act such as the *National Credit Act* places a great responsibility on the drafter of a contract, whether this drafter be an attorney or any other business man, to ensure that the contract is drafted in language that is easily understood by a reasonable contractant.

Up until this point, the terms “contract” and “agreement” have been used in general terms. However, the Act mentions specific types of credit agreements, and for the purposes of this article, it is essential to mention and discuss these, as they will definitely contribute to the statement that the *National Credit Act* places a significant amount of responsibility upon the law of contract in general and drafters of these credit agreements in particular.

Firstly, the Act distinguishes between three categories of credit agreements, namely small, intermediate and large agreements.<sup>126</sup> Different rules apply to these categories, and therefore the drafter of a credit agreement should take special notice of them. According to Otto:

[A] credit agreement is a small agreement if it is a pawn transaction, a credit facility with a credit limit of no more than R15 000, or a credit transaction (except a mortgage agreement or a credit guarantee) and the principal debt under the credit transaction or guarantee does not exceed R15 000.<sup>127</sup>

Furthermore, Otto states that:

[A] credit agreement is an intermediate agreement if it is a credit facility with a credit limit above R15000, or a credit transaction (except a credit guarantee or a pawn transaction or mortgage agreement) and the principal debt under the credit transaction or guarantee falls between R15000 and R25 000.<sup>128</sup>

Lastly:

[A] credit agreement is a large transaction if it is a mortgage agreement (regardless of the size), or a credit transaction (except a pawn transaction or a credit guarantee) and the principle debt under the credit transaction or guarantee equals or exceeds R250 000.<sup>129</sup>

The Act continues to create different types of credit agreements. Once again these types are mentioned and discussed, in order to prove just how big an influence the Act has on the area of law of contract.

Section 10 of the Act states that:

[A] credit agreement ... is a developmental credit agreement if-

- (a) at the time the agreement is entered into, the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in section 41;<sup>130</sup> and

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126 Otto 2006:26.

127 Otto 2006:27.

128 Otto 2006:27.

129 Otto 2006:27.

130 *National Credit Act* 34 of 2005: Sec 10(1)(a).



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- (b) the credit agreement is-
- (i) between a credit co-operative as credit provider, and a member of that credit co-operative as consumer, if profit is not the dominant purpose for entering into the agreement, and the principal debt under that agreement does not exceed the prescribed maximum amount;<sup>131</sup>
  - (ii) an educational loan;<sup>132</sup> or
  - (iii) entered into for any of the following purposes:<sup>133</sup>
    - (aa) development of a small business;<sup>134</sup>
    - (bb) the acquisition, rehabilitation, building or expansion of low income housing;<sup>135</sup> or
    - (cc) any other purpose prescribed in terms of subsection (2)(a).<sup>136</sup>

Obviously, the drafter of such an agreement will be expected to keep in mind the uniqueness of the developmental credit agreement when drafting it. Another specific form of agreement that the Act provides for, is the so-called “public interest credit agreement”. According to Section 11 of the Act,

[T]he Minister ... may declare that credit agreements entered into in specified circumstances, or for specified purposes, during a specific period or until the declaration or regulation is repealed, are public interest credit agreements.<sup>137</sup>

In determining whether a credit agreement constitutes a “public interest credit agreement”, the following criteria may be considered by the Minister:

- the relevant circumstances of public interest applicable;<sup>138</sup>
- the maximum principal debt permitted;<sup>139</sup>
- the maximum duration of the credit agreement permitted;<sup>140</sup> and
- the area wherein the specific consumer must reside or carry on business within the Republic.<sup>141</sup>

## 7. Conclusion

Having mentioned and explained this, it is clear to see why the prospective drafter of one of the above types of credit agreements should be acquainted with exactly what is being dealt with. Obviously, the drafter would not be able to create a template for a credit agreement in terms of this Act and merely

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131 *National Credit Act 34 of 2005*: Sec 10(1)(b)(i).

132 *National Credit Act 34 of 2005*: Sec 10(1)(b)(ii).

133 *National Credit Act 34 of 2005*: Sec 10(1)(1)(b)(iii).

134 *National Credit Act 34 of 2005*: Sec 10(1)(1)(b)(iii)(aa).

135 *National Credit Act 34 of 2005*: Sec 10(1)(1)(b)(iii)(bb).

136 *National Credit Act 34 of 2005*: Sec 10(1)(1)(b)(iii)(cc).

137 *National Credit Act 34 of 2005*: Sec 11(1).

138 *National Credit Act 34 of 2005*: Sec 11(4)(a).

139 *National Credit Act 34 of 2005*: Sec 11(4)(b).

140 *National Credit Act 34 of 2005*: Sec 11(4)(c).

141 *National Credit Act 34 of 2005*: Sec 11(4)(d).

“fill in the details” when receiving a mandate to draft a credit agreement. The drafter would have to apply every unique situation to the contract at hand.

Within the abovementioned statement lies the crux of this specific discussion. The *National Credit Act*<sup>142</sup> is a very recent piece of legislation, and whilst numerous (successful) attempts have been made at implementing the most vital parts of the Act in practice, very little has been said about just exactly what influence the Act has on the law of contract, and especially what responsibilities are placed upon drafters of contracts regulated by the Act. It may thus be concluded that the following are the main points of influence of the Act on the law of contract, and the main responsibilities the Act places upon the drafters of credit agreements, *albeit* not explicitly:

1. Firstly, the Act places a responsibility upon drafters of a credit agreement to consider the fact that the National Credit Regulator has a responsibility to serve the credit needs of “historically disadvantaged persons,<sup>143</sup> low income persons and communities”<sup>144</sup> and remote, isolated and low density populations and communities.<sup>145</sup> Due to this fact, drafters have a distinct responsibility to draft credit agreements that are “transparent, competitive, sustainable, responsible, efficient, effective and accessible”.<sup>146</sup>
2. Secondly, the law of contract in general has a responsibility to contribute towards the reaching of *consensus* between contracting parties to a credit agreement, by making credit agreements available in the official language of the consumers’ choice and preference.<sup>147</sup> Even if these agreements are available in the specific official languages, they should still be drafted in “plain language”,<sup>148</sup> that is to say language easily understandable to the relevant contractants.
3. Thirdly, the “pre-agreement disclosures” made available by credit providers to consumers should similarly be drafted in an official language of the consumer’s choice, but also in easily understandable language.
4. Fourthly, the consumer should do all that is necessary in order to be acquainted with what is exactly expected in terms of the credit agreement, considering that a court of law will do everything in its power to uphold a certain credit agreement, rather than declaring it void.
5. Fifthly and finally, the drafters of contracts have a responsibility to uphold the standard of the contract as a legal document, whilst at the same time maximising the effectiveness of contracts by making them more understandable to the people whose lives and business they govern.

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142 Act 34 of 2005.

143 *National Credit Act* 34 of 2005: Sec 13(a)(i).

144 *National Credit Act* 34 of 2005: Sec 13(a)(ii).

145 *National Credit Act* 34 of 2005: Sec 13(a)(iii).

146 *National Credit Act* 34 of 2005: Sec 13(a).

147 *National Credit Act* 34 of 2005: Sec 63.

148 *National Credit Act* 34 of 2005: Sec 64.

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## Address

Address of the Minister of Trade and Industry: 13 October 2005.