

A CRITICAL ANALYSIS OF DEBTOR'S RIGHT TO REINSTATE A CREDIT AGREEMENT & RESUME POSSESSION OF PROPERTY

Hlako Choma *, Tshegofatso Kgarabjang **

* Head of Department Public Law, University of Venda, School of Law, South Africa

** Department of Communications, Legal Services, Pretoria, South Africa



Abstract

How to cite this paper:

Choma, H., & Kgarabjang, T. (2018). A critical analysis of debtor's right to reinstate a credit agreement & resume possession of property. *Risk Governance and Control: Financial Markets & Institutions*, 8(1), 59-68.
<http://doi.org/10.22495/rgcv8i1art6>

Copyright © 2018 The Authors

This work is licensed under the Creative Commons Attribution-NonCommercial 4.0 International License (CC BY-NC 4.0).
<http://creativecommons.org/licenses/by-nc/4.0/>

ISSN Online: 2077-4303

ISSN Print: 2077-429X

Received: 02.02.2018

Accepted: 27.03.2018

JEL Classification: E5, F53

DOI: 10.22495/rgcv8i1art6

In terms of section 129(3)(a) of the South African National Credit Act 34 of 2005 a consumer may reinstate a credit agreement that is in default by paying all the money that is overdue together with default charges incurred by the credit provider and also the costs of enforcing the agreement until the agreement is reinstated. A consumer should pay costs of reinstating agreement if the credit provider has not yet cancelled the agreement. A consumer who paid the required costs will also resume possession of goods that were repossessed by the credit provider pursuant to attachment order.

However a consumer is prohibited from reinstating a credit agreement after the property is sold pursuant to attachment order or surrender of property in terms of section 127 (section 129(4)). A consumer is also prohibited from reinstating a credit agreement after the execution of court order enforcing that agreement or after termination of agreement in terms of the NCA (section 129(4)).

Therefore a question arise as to whether a consumer who fell in arrears can reinstate a credit agreement by paying the arrears and preclude a credit provider from proceeding to sell the property. In other words whether a consumer who paid arrears on credit agreement can reinstate such credit agreement and disentitling the credit provider from selling the property. This was the crisp question put to the court in the recent decision in *Nkata v Firstrand Bank Limited and Others* (CCT73/15) [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC) (21 April 2016).

The purpose this article is to critically analyse the decision in *Nkata v Firstrand Bank Limited and Others* (CCT73/15) [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC) (21 April 2016) in view of the application and interpretation of section 129(3) and (4) of the NCA.

Keywords: Reinstatement, Arrears, Credit Agreement, Execution, Credit Provider

1. INTRODUCTION

In terms of section 129(3)(a) of the National Credit Act 34 of 2005 (hereafter "NCA") a consumer may reinstate a credit agreement that is in default by paying all the money that is overdue together with default charges incurred by the credit provider and costs of enforcing the agreement until the agreement is reinstated. A consumer is required to pay the aforesaid money before the credit provider cancels the agreement (section 129(3)(a)). The provisions of section 129(3)(b) of the NCA permits a consumer who complied with section 129(3)(a) to obtain possession of the property that was

repossessed by a credit provider before an attachment order (see the discussion on section 129(3)(a) and (b) by Otto *National Credit Act Explained* 3ed (2013) 124-125; Scholtz (eds) *Guide to the National Credit Act* (2008) par 12.8.4.1; *SA Taxi Securitisation (Pty) Ltd v Soya* 2012 ZAGPJHC 210 (26 October 2012). A consumer is prohibited from reinstating a credit agreement after the sale of property but before attachment order or surrender of property in terms of section 127 (see section 129(4)). A consumer is also prohibited from reinstating a credit agreement after the execution of court order enforcing that agreement or after termination of agreement in terms of section 123 of the NCA (section 129(4)). Thus a question arise as to

whether a consumer who fell in arrears can reinstate a credit agreement by paying the arrears and preclude credit provider from proceeding to sell the property or whether a consumer who paid areas on credit agreement can reinstate such credit agreement and disentitling the credit provider from selling the property. This was a crisp issue put top the court in the decision in *Nkata v FirstRand Bank Limited* [2016] ZACC 12. Before this case reached the Constitutional Court, the Western Cape High Court and Supreme Court of Appeal were requested to pronounce on the same question (*Nkata v FirstRand Bank Ltd* 2014 (2) SA 412 (WCC) hereafter "High Court decision" and *FirstRand Bank Limited v Nkata* 2015 (4) SA 417 (SCA) hereafter "SCA decision"). The purpose of this note is to critically analyse the decision in *Nkata v Firstrand Bank Limited and Others* (CCT73/15) [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC) (21 April 2016) in view of the application and interpretation of section 129(3) and (4) of the NCA.

The present discussion will refer to all three decision.

2. NKATA V FIRSTRAND BANK LIMITED

2.1. Facts

Ms Nkata was a businesswoman. She purchased the property in March 2005. The property which she purchased was at the time of sale underdeveloped. It was financed by FirstRand Bank. The property is situated at 35 Vin Doux Crescent, Durmonte, Durbanville, Western Cape (bond) and was registered in 2005 and the second bond in May 2006. After buying the property, Nkata build a home and took occupation with her two daughters in 2007. She chose the first bond as her fist *domicilium citandi et executandi* for the service of all notices and in the second bond she chose C/04 Devonshire Hill, Rondebosch, Cape Town, 7700 (Rondebosch apartment) the flat in which she was residing prior to the completion of the house at Durbanville Property. The loan in which both mortgage bond are secured is a credit agreement in which the NCA applies (par [3]). During the course of 2010 Nkata fell into arrears with mortgage bond. During the period of March to November 2010 the bank made numerous call to Ms Nkata and sent two section 129(1) notices but without a success (par [4]). On 1 June 2010 the bank sent a letter to Nkata in terms of section 129(1) of the NCA but was delivered to 27 instead of 35 Vin Doux Crescent, Durmonte, Durbanville. This letter was sent to the address elected by Ms Nkata in the first mortgage bond. During this period Ms Nkata's arrears were R30 186.19 (par [4]).

On 4 June 2010 the bank sent another letter to the address that Nkata chose in the second bond and this letter was retrieved by CSF on 14 June 2010 as uncollected item. The bank sent this letter to "c/o 4 Devonshire Hill" instead of C/04 Devonshire Hill. At the time of sending second letter, arrears were R42 257.01. Ms Nkata alleged that even the second letter did not reach her (par [5]).

On 5 July 2010 the Bank issued summonses. On 9 July 2010 the sheriff attempted to serve the summonses but were returned as unsuccessful. On 27 July 2010 sheriff effected a service by affixing

summonses on the outer door at Durbanville address. Nkata did not enter into appearance to defend the matter. She approached debt counsellor on 4 August 2010 and subsequent to that she made application for debt review on 20 August 2010. The Bank alleges that she applied for a debt review because she received summonses. Ms Nkata denies this allegations.

On 28 September 2010 the Bank obtained default judgment through the Registrar and on the same day writ of attachment and execution was issued for an amount of R1 472 506.89 together with interests from 1 June 2010 to the date of payment. Nkata alleges that she heard for the first time in October 2010 by telephone call from the bank that her property is sold in execution and the sale was scheduled for 10 December 2010 (par [7]). Therefore after Nkata heard about default judgment she urgently applied to High Court for rescission of default judgment. Nkata and the bank negotiated settlement and they agreed that Nkata will pay arrears. This settlement/agreement was not made an order of court. The bank also cancelled execution. As the terms of the agreement Nkata agreed to pay an amount of R10 000.00 as monthly instalments and if she fails to honour payment a bank would be entitled to sell the property in execution. During March 2011 Nkata paid lump sum of R87 000.00 and proceeded with monthly instalments and her credit agreement was reinstated (par [9]).

During February 2011 the bank debited an amount of R6 498 and R8 000 from Nkata for legal fees. According to the bank this is an amount of attorney's fees and counsel's day fee for unsuccessful rescission application. Nkata avers that this costs were not given to her and she was not invited to pay them (par [10]).

Nkata fell in arrears for the second time but brought the account up to date on March 2012. She also extinguished arrears and brought her account up to date on March and May 2012 (par [11]). She also tried to rescind judgment and in March 2011 after settling arrears she intended to make settlement agreement an order of court. The court queried the application because the bank was not informed. She asked the bank to agree on rescission of judgment but the bank refused (par [12]). She also requested the bank to pay less instalment for five years but the bank refused and contended that she should sell her property (par [13]).

She continued with instalments until February 2013 in which she fell in the arrears for R24 424.80. As a result the bank sent a notice of sale in execution to her registered mail. Ms Nkata failed to collect a notice and in March 2013 she was informed that her property will be sold in execution on 24 April 2013. On 24 April 2014 her property was sold at public auction to Kraaifontein Properties (par [14]). Nkata entered into lease agreement with Kraaifontein Properties pending renovation and re-sale of the property (par [16]).

These facts were trite and common to all three cases. The decision of the court in each of the cases will be discussed under separate headings below.

2.2. High Court

During May 2013 Nkata launched an application before Western Cape High Court for firstly

rescission of default judgment, secondly setting aside of the writ of attachment issued by the registrar on 28 September 2010 and thirdly an order declaring the sale of her property which took place on 24 April 2013 to Kraaifontein Properties to be invalid (par [2] of High Court decision). It was heard by Rogers J on October 2013. At this stage transfer and registration of property was suspended pending the outcome of this matter. Nkata raised criticism (technical defences) that firstly summonses were not properly served by the sheriff, secondly section 129(1) was not complied with, thirdly that summonses did not draw her attention to the provisions of section 26(3) of the Constitution Act 108 of 1996 which deals with right to housing and fourthly that summonses did not disclose that section 129(1) was sent to a to the address of Rondebosch which had not been collected (par [16]).

The court per Rogers J rejected Nkata first criticism on service of summons by the sheriff finding that sheriff's return is prima facie evidence of the truth of its content (par [17]). On the second criticism the court found in favour of Nkata that compliance with section 129(1) notice is a substantive legal prerequisite for the institution of valid legal proceedings on credit transaction to which the NCA applies (par [21] and [25]). The court rejected the third criticism on allegation to the effect that summons did not deal with the right to housing. The court held that at the time summonses issued (July 2010) the governing decision (precedent) was the judgement of the SCA in *Standard Bank of South Africa v Saunderson* 2006 (2) SA 264 (SCA) and according to this judgment summonses in this matter drew the attention of Nkata to section 26(1) of the Constitution. While on this aspect, the court also referred to the judgment in *Nedbank Ltd v Jessa* 2012 (6) SA 166 (WCC) par 21 per Bignaut J who amplified *Saunderson rule* (the object the rule is to alert the defendant of execution of immovable property that their right in terms of section 26 of the Constitution might be infringed). In this matter Bignaut J (par [12]) held that *Saunderson rule* should be amplified requiring the summonses to contain appropriate notification to a defendant that he or she is entitled to place information before the court pertaining to the relevant circumstances within the meaning of section 26(3) of the Constitution. The court also rejected the fourth criticism finding that at the time summonses issued it was sufficient for a credit provider to establish that section 129(1) notice has been despatched by registered post to the selected address and not that the section 129(1) had reached the consumer. This court also noted that decision in *Sebola v Standard Bank of South Africa* 2012 (5) SA 142 (CC) wherein it was held that the credit provider need to go further and indicate that the section 129(1) notice had probably come to the attention of the consumer. With regard to a prayer of condonation the court noted that an application was launched nearly two and half after Nkata became aware of the default judgment (par [26]) (see Fuchs MM "The impact of the National Credit Act 34 of 2005 on the enforcement of a mortgage bond: *Sebola v. Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC)". (2013) PER/PELJ 377).

The court remarked that rule 42(1) which deals with rescission application does not specify a time-

limit and it is discretionary and as such rescission must be brought within a reasonable time (*First National Bank of Southern Africa v Van Rensburg NO: In re First National Bank of Southern Africa Ltd V Jurgens* 1994 (1) SA 677 (T) 681 (par [27]). The court was not satisfied with the explanation by Nkata on the delay. The court noted that Nkata became aware of sale in execution in March 2013 which was scheduled for 24 April 2013 until she launched this application in May 2013. According to the court there would be a prejudice to the third party who purchased the house (par [28]). The court per Rogers J refused to grant condonation for non-compliance with the 20-day rule after becoming aware of the default judgment (par [29]). The bank argued that Nkata lost her right to rescission when she settle for the first rescission application. The court indicated that the conduct of Nkata in settling the first case on terms, it is inconsistent with a continued intention to have a case reopened by way of rescission (par 31)).

The court focused on section 129(3). It referred to section 129(3) and (4) and acknowledged that depending on the proper interpretation of section 129(3) when Nkata made payments in March 2011 and March 2012 might have reinstated credit agreement (par [33] and [34]). As indicated above a consumer may reinstate a credit agreement that is in default if he/she pays all the money that is overdue together with default charges incurred by the credit provider and costs of enforcing the agreement until the agreement is reinstated (s 129(3)(a)). The court invoked a question as to what does a phrase "all amounts that are overdue" mean. It noted that a mortgage bond contained acceleration clauses (par [36]). According to the court in order to effect reinstatement in terms of section 129(3)(a) it was not necessary for Nkata to pay full accelerated debt buy only the arrear instalments which she paid in March 2011 and March 2012. The court indicated that this conclusion accords with a view expressed by Peter AJ in *Nedbank v Fraser* 2011 (4) SA 363 (SGJ) par 41 (par [38]).

The court acknowledged that a credit agreement will only be reinstated if it has not been cancelled by the credit provider. The court further indicated that where a credit provider invokes acceleration clause the contract will remain in force and the consumer will be obliged to make specific performance of the accelerated indebtedness (par [39]). According to the court the consumer must make payment to all the amount that is overdue and also credit providers permitted default charges in order to effect reinstatement (par [41]). The court assumed that costs of opposing rescission application, costs of obtaining default judgment thus forms part of reasonable costs of enforcing credit agreement and must be paid before a credit agreement is reinstated in terms of section 129(3). The court noted that the costs which the bank debited from Nkata bond were neither taxed nor quantified by agreement between parties and there were no evidence indicating that she agreed or was invited to agree on quantification of costs (par [42]). The court indicated that the bank did not present cost to Nkata to make payment but debited the amounts from her bond account (par [44]). According to the court enforcement costs which the consumer must pay in terms of section 129(3) in

order obtain reinstatement, are those costs which the credit provider is at the time requiring payments (par [44]). The court held that Nkata made payment with the intention of reinstating the credit agreement and the agreement was reinstated by operation of law in terms of section 129(3) unless precluded by section 129(4) (par [45]). The court confirmed that its view accords with that of Eksteen J in *Nedbank Ltd v Barnard* 2009 ZACPEHC 45 par 14-15.

The court observed the provisions of section 129(4)(a)(i) in which a consumer is prohibited from reinstating a credit agreement after the sale of property but before attachment order. In terms of section 129(4)(b) a consumer is also prohibited from reinstating a credit agreement after the execution of court order enforcing that agreement or after termination of agreement in terms of section 123 of the NCA. The court noted that the NCA did not contain definition of attachment of "attachment order". However the court holds a view that attachment order as used in section 129(3)(b), 130(2)(a)(i) and 123(1) envisages an order entitling a credit provider to take possession of movable goods which are subject to instalment agreement, secured loan or lease as indicated in the NCA (par [48]). The court also confirmed that its view accords with that of Peter AJ in *Nedbank v Fraser* 2011 (4) SA 363 (SGJ) par 39 (para [48]). The court also indicated that a writ of execution is not an order but a process which may be issued where an order to pay amount of money is made (par [49]). The court was not convinced that default judgment granted by the registrar constituted an order of the attachment of property and it consequently held that section 129(4)(i) is not applicable (par [50]).

The court enquired as to whether there had been execution of the default judgment by the time Nkata cleared the arrears in March 2011 and March 2012 (par [51]). The court observed that the steps of obtaining and causing the property to be attached are the steps taken towards execution and can be undone in terms of law provided that the debtor pays the judgment in full (par [53]). The court held that execution of judgment did not occur at the time Nkata made payment and brought the account up to date (par [54]). In view of the above the court concluded that the mortgage loan agreement was reinstated by 8 March 2011 when the arrears were cleared for the first time (par [55]). Thus the court suggested that by implication when reading section 129(3) in tandem with section 129(4) if a credit agreement is reinstated before execution of monetary judgment enforcing that agreement, accordingly that judgment cannot longer be enforced (par [55]). The court did not rescind the default judgment. The court declared the sale of property to be invalid and also restrained the transfer of property to Kraaifontein Properties (par [57]). Consequent to this the bank appealed to the SCA.

2. 3. The Supreme Court of Appeal

The central issue at the appeal was the meaning of 'execution' in section 129(4)(b). As stated above, the High Court concluded The court held that execution of judgment did not occur at the time Nkata made payment and brought the account up to date.

The SCA did not agree with the High Court. The SCA upheld the appeal by the bank. Willis J acknowledged that the word 'execution' is not defined in the NCA. He indicated that civil execution is a process rather than an event (par [20] of SCA decision). He referred to the decision in *Reid v Godart* 1938 AD 511 where it was held that execution means "carrying out" or giving effect to "judgment". He also observed that at common law a debtor could redeem his attached property "up to the last moment before the actual sale" (par [22]).

Pertaining to redemption, the SCA was of the view that section 129(4)(b) alters the common law to the extent that redemption or reinstatement may occur not by payment of full debt but to the extent of arrears in tandem with related charges (par [24]). The SCA referred to the decision of *Simpson v Klein* 1987 (1) SA 405 (W) where Krigler J when referring to *Liquidators Union v Brown* 1922 AD 549 said "actual sale" as quoted by Kotze J were not intended to relate to the actual moment of sale but to delivery in terms of sale. The SCA found this to be unassailable and challenged it on the ground that the context to which he was referring to is different from the matter of Nkata (par [25]). Krigler J in *Simpson v Klein* was dealing with debtor's supervening insolvency after the sale of property but before execution of immovable property whereas Nkata request an order to set aside sale in execution in order to redeem her property (par [26]). According to the court section 129(4)(b) does not refer to perfection of sale (par [27]).

The SCA holds a view that civil execution is a "process oriented" instead of one single event but that single event denotes finality and there is no reversal (par [31]). The court referred to English cases of *Re Overseas Aviation Engineering (GB) Ltd* 1963 Ch 24 (CA) (1962) 3 All ER 12, *Fagot v Gaches* 1943 (1) KB 10 (CA); 1942 2 All ER 476 and came to a conclusion that judicially there is general consensus across the board not in South Africa only but also in England that execution refers to a process (par [31] to [33]).

The SCA was of the view that reinstatement of agreement entails revisiting, revision and amendment. It opined that in terms of section 116 of the NCA any alteration to agreement is void unless is in writing and signed by both parties (par [36]).

The SCA indicated that if the conclusion by the High Court stating that the execution' took place when the proceeds of sale in the execution were paid to judgment credit provider is correct, it would render the provisions of section 129(4)(a)(i) nugatory and superfluous (par [39]).

The court could not observe any possible inference from the NCA that a redemption can occur by paying full amount of debt after sale in execution but before registration (par [41]).

The SCA said a further reasons inducing that the decision of the High Court remains incorrect is that when a credit provider settles a matter to allow a debtor to reschedule arrangement for payment, it would therefore mean that the execution order which was obtained it lapses (par [42]). In view of the above the SCA concluded that the view by the High Court when indicating that execution only takes place when the proceeds of the sale in execution are paid to judgment creditor is erroneous (par [45]).

2. 4. The Constitutional Court

The crisp issue before the Constitutional Court as it was before the High Court and SCA was whether the High Court was correct in concluding that Nkata had reinstated the credit agreement by paying default charges and precluding a bank from selling the property (par [30] of Constitutional Court decision).

Nkata supported the decision of the High Court and also argued that a bank failed to provide her with section 129(1) notice (par [31]). The bank argued that she failed to pay permitted default charges and reasonable costs of enforcing a credit agreement. The bank also argues that Nkata was supposed to notify the bank that she is intending to reinstate a credit agreement. The bank maintains that reinstatement was precluded because of attachment and notice of publication of sale of property (par [32]).

In the Constitutional Court four separate judgments were delivered. Majority judgment was delivered by Moseneke (former Deputy Chief Justice) and other separate judgments by Nugent AJ, Cameron J and Jafta J.

On the issue as to whether Nkata paid the “reasonable costs” of enforcing the credit agreement Cameron J observed that unchallenged evidence indicates that she did not (par [37]). He referred to the settlement agreement between the bank and Nkata which indicates the amounts owed by Nkata. He said this are arrears on mortgage bond, wasted costs incurred by cancellation of sale in execution and costs of rescission application as taxed or agreed. Cameron J indicates that it was not argued that the aforesaid costs are costs of enforcing the credit agreement in terms of section 129(3) (par 39)). Cameron J also stated that Nkata did not challenge the calculations in the affidavit and the High Court treated these as common cause that she paid her arrears on mortgage bond and not legal costs (par [42]). Cameron J rejected counsel’s submission that Nkata paid account statement including legal costs (par [43]).

Cameron J proceeded to examine the meaning of “payment” and noted that the approach by the High Court means enforcement costs that the consumer must pay in order to reinstate a credit agreement are those costs which the credit provider is requiring at the time (par [46]). Cameron is of the view that this approach is incorrect because it fails to give force to the wording of section 129(3) (par [47]). He said payment is understood within the law as delivery of something owed (par [48]) and it does not mean a promise to pay at a later stage. He referred to the decision in *Woudstra v Jekison* 1968 (1) SA 453 (T) 457 where it was indicated that payment means “the satisfaction or performance” of an obligation (par [49]). In rejecting the submission by Nkata that reinstatement occurred Cameron J concluded that:

“The argument cannot be sustained. Had the legislation meant that the consumer can make payment by agreeing to postpone payment, it would have said so. The provision doesn’t say that. It says instead that reinstatement can be effected by “paying” the costs in issue. This requires advance, not postponed, and complete, not partial, payment. On this basis it cannot be said that Ms Nkata successfully reinstated the credit agreement since

she failed to pay all the amounts section 129(3)(a) requires. This conclusion follows from the words of the statute, coupled with a consideration of its context and purposes. Narrowness doesn’t come into it” (par 51).

Cameron J referred to decision by Moseneke DCJ in finding that the bank failed to give notice of legal costs to Nkata (par [79] and [121]), that the costs were not taxed or agreed or reasonable and as such were not due and payable (par [123]) and Cameron J opines that the bank did not want to recover the costs of enforcing the credit agreement and it would not initiate the process of quantifying unpaid costs while it was Nkata who seeks reinstatement (par [55]). Cameron J in support of his view state that the NCA indicates that it is actually the consumer who must pay for arrears and further it does not impose obligation on credit provider to take steps in order to recover the costs of enforcing credit agreement (par [56]). He further indicated that the NCA does not state that the bank need to establish costs which are reasonable for the purpose of reinstatement and it rested on Nkata to establish what was reasonable in order to reinstate a credit agreement (par [57]).

Cameron J agreed with Moseneke DCJ in holding a view that a statute must be interpreted purposively and in the context within which is used and while doing so, a degree of caution is exercised (par [61]). He referred to the decision in *Kubyana v Standard Bank of South Africa Ltd* (CCT 65/13) [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) (20 February 2014) par 35 where it was said the purpose of NCA is to create ‘*harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*’ and para 38 where it said that the notion of a ‘*reasonable consumer*’ implies obligations for both credit providers and consumers. Cameron J concluded that since the NCA does require the bank to request for those costs, the consumer was required to pay them or tender payment (par [68] and [70]). He said Nkata did not reinstate the credit agreement on 7 or 8 March 2011 or before the bank sold the property in execution (par [71]). He therefore considers it unnecessary to determine whether execution occurred before reinstatement or even examine the meaning of “court order”, “sale” or “execution” (par 71)). He also deemed it unnecessary to determine whether section 129(3) would require a consumer to express her intentions to the bank to reinstate a credit agreement (par [72]).

Moseneke DCJ delivered majority judgment. He does not agree with the judgment of Cameron J and Nugent J as discussed (above and below) (par [75]). He holds the same view with the judgment of High Court per Rogers J that a credit agreement was reinstated, that warrant of execution and default judgment are of no legal force, that the sale at the public auction is set aside and Nkata property may not be transferred to Krainsfontein property (par [76] and [137]).

Furthermore Moseneke DCJ did not agree with Cameron J that the credit agreement was not reinstated. He is of the view that reinstatement occurred when Nkata paid arrears of R87 500. According to Moseneke DCJ legal costs were not due

and payable because the bank neither provided Nkata with notice of legal costs nor demanded payment and such legal costs were not agreed or assessed for reasonableness by taxation or other means. The bank *mero motu* debited costs which were not agreed (par [79]). According to Moseneke DCJ legal costs are due and payable if are reasonable, taxed and notice of such legal costs is given to the consumer (par [80]).

On the reinstatement of credit agreement Moseneke DCJ referred to the section 2 of the NCA indicating that it must be interpreted in a way that it gives effect to the purpose of it (par [93]). He confirmed that the NCA pervade the values of fairness, good faith, reasonableness and equality in the credit market (par [94]). He also observed that in *Sebola* (par [36]) it was recognised that the NCA aims to create marketplace that is in line with constitutional democracy through its purpose which is to promote “a fair . . . marketplace for access to consumer credit” and the means adopted to achieve those goals (par [96]).

Moseneke DCJ indicated that the purpose of section 129(3) is to urge consumers to pay default charges and legal costs and in turn are rewarded with reinstatement and return of property (par [100]). He indicates that in view of section 129(3) and (4) it is the consumer who reinstate a credit agreement and is not compelled to give notice or seeks assistance or cooperation from the credit provider (par [104]). He indicated that the consumer will reinstate a credit agreement by paying all arrears that are due, default charges that are permissible and legal costs. He opines that by requiring a consumer to give notice to the credit provider will limit the value to the consumer of this remedy of reinstatement (par [105]).

The court considered the question on whether a right to reinstatement requires that consumer pay full accelerated debt or arrears. In this regard the Constitutional Court agreed with the High Court that only arrears instalments must paid and not full accelerated debt (par [108]). The court also found that a credit agreement was not cancelled because the bank did not comply with section 129 (par [110]).

On the issue of reasonableness of costs pertaining to enforcement of agreement the court invoked a question as to whether the costs that the bank debited Nkata bond account for legal fees are “permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement” (par [114]). The court agreed with High Court that credit agreement was reinstated when Nkata settled her bond account (par [121]). The Constitutional Court further agreed with High Court that the consumer could not be expected to take proactive steps to establish which costs would be necessary for reinstatement of credit agreement (par [122]). According to the court a consumer cannot be expected to start taxation or agree with the credit provider on quantification of costs. The court said a consumer need to take steps if it intend to recover costs of enforcement of credit agreement and the cost say it will be reasonable costs only (par [122]). According to the court, to allow a credit provider to quantify costs and give legal notice to the consumer will render a remedy of section 129(3) illusory and will also frustrate the consumer (par

[125]). The court concluded that a credit agreement was reinstated (par [126]).

The court considered the question on whether reinstatement was precluded or limited by section 129(4)(a) that is execution (par [127]). The court agree with High Court that reinstatement will be precluded if the sale in execution have been realised (par [129] and [131]). The court said although the property was attached, no sale to the execution of property had occurred and the proceeds of sale were not realised when she cleared arrears in March 2011. According to the court Nkata correctly revived a credit agreement that the credit provider did not cancel. The court finally agreed with High Court that the default judgment and writ of execution ceased by operation of law and as such it not have any legal force with effect from 8 March 2011 (par [136]).

Nugent AJ does not agree with majority judgment by Moseneke DCJ. He support Cameron J that the appeal must fail (par [140]).

Nugent AJ indicates that in terms of section 129(3) a consumer from the moment of default until sale may restore earlier position by fulfilling three conditions which is payment of overdue amount, payment of default charges and payment of reasonable cost incurred by the bank when enforcing accredit agreement (par [142]). He agrees with majority judgement that the conditions need not be communicated to the bank (par [143]). Nugent AJ does not share the view with majority judgment that it was not necessary to pay costs since they were not due (par [145]). He indicates that there is no indication from section 129(3) that the consumer must not pay the costs. He indicates that majority judgment does not state that payment of costs is pre-condition to fulfilment of section 129(3). He says because the same language is not used for both, a demand cannot be a precondition of payment (par [147]). According to him it is unrealistic to always expect a bank to tax and demand costs as and when they are incurred (par [151]). He indicates that majority judgment reached this conclusion on the ground that the costs required by the bank are not reasonable until taxed, assessed for reasonableness (par [152]). According to Nugent J if the consumer needs opinion of taxing official on whether the costs are reasonable may do so, nonetheless the section does not require a consumer to pay taxed costs and as such it will be left to the court to determine whether the costs are reasonable (par [154]).

Nugent AJ does not agree with majority judgement in the findings that a consumer cannot be expected to take proactive steps. In doing so Nugent AJ compared it with situation where there are other consumers whose calculations of compound interest are compound, they would know what is required with enquiring from the bank (par [157]). Nugent AJ finally agreed with Cameron J that payment made by Nkata did not offer him protection in terms of section 129(3) and that the order of SCA was correct (par [162]).

Jafta J does not agree with Cameron J and Nugent J that appeal must be dismissed. He agreed with Majority judgment by Moseneke DCJ. He indicates that legal costs claimed by the bank were not due. According to Jafta J the bank was not supposed to institute litigation because it did not comply section 129(1) (par [163]). He does not agree with Cameron J and Nugent J that legal fees debited

from Nkata constitutes reasonable costs of enforcing the credit agreement. According to him no legal fees were due because institution of legal action before complying with section 129(1) was irregular and default judgment was nullity because the registrar did not have power to grant it (*City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 ZASCA 116; 2012 (6) SA 294 (SCA) and *Master of the High Court Northern Gauteng High Court, Pretoria v Motala* 2011 ZASCA 238; 2012 (3) SA 325 (SCA)). Jafta J indicated that that the bank instituted legal action when it was in fact precluded by section 130(1). He referred to the decision in *Sebola* by Cameron J (para 45) where it was indicated that compliance with section 129(1) before instituting legal action is mandatory (par [168]). He also referred to section 130(3) which prohibits a court from deciding the case unless it is satisfied that the provisions of section 129 are complied with (par [170]). He also referred to section 130(4) which directs the court in case where the consumer did not comply with section 130(3)(a) to adjourn the matter and make order directing the consumer on the steps that must be taken before resuming with the matter (par [171]). He referred to *Kubyana v Standard Bank* (para 67-68) and indicated that legal fees by the bank in this matter was in breach of the NCA. He put it as follows (par [172] and [173]):

"First, it failed to give notice as required by section 129(1) read with section 130(1). Second, it sought and obtained a default judgment from the registrar of the High Court, something that is incompatible with section 130(3) which requires such matters to be determined by the court. Third, the Bank sought and obtained the default judgment without satisfying the Court on compliance with section 129. Fourth, the Bank caused a writ to be issued, an attachment to be effected and Ms Nkata's home to be advertised for sale in execution on account of an invalid judgment. Fifth, the Bank opposed Ms Nkata's application for the rescission of that judgment".

According to Jafta J costs incurred in breach of the NCA cannot be regarded as reasonable costs within the meaning of section 129(3) and the whole process was tainted with non-compliance with the provisions of NCA (par [176] and [177]). He said in terms of the authority of *Kubyana* and *Sebola* the bank was prohibited from instituting legal proceedings (par [185]). He further indicated that default judgment was granted in violation of peremptory terms of section of 130(3). He concluded that credit agreement was reinstated and default judgment ceased at the moment of reinstatement (par [188]).

3. ANALYSIS AND DISCUSSION

The uncertainty pertaining to application and interpretation of section 129(3) was prevalent before the Constitutional Court. Otto in *Otto National Credit Act Explained* 3ed (2013) 125 observed that:

"In the end, it must be said that section 129(3) is difficult to explain. It escapes my mind how an agreement which has not been cancelled can be reinstated, nor is it clear how a person can resume possession of a thing which was repossessed pursuant to an attachment order if the agreement

was not cancelled to justify the attachment order in the first place".

Van Heerden in Scholtz (eds) *Guide to the National Credit Act* (2008) par 12.8.4.1 indicated that:

"...section 123(a) might be construed as indicating that the Act allows the granting of interim attachment orders in that it allows the consumer, after meeting the requirements of section 129(3)(a), to resume possession of any property that had been repossessed pursuant to an attachment order".

Van Heerden in Scholtz (eds) *Guide to the National Credit Act* (2008) par 12.10 is of the view that section 129(3)(b) indicates that a consumer can reinstate the agreement if goods have been repossessed from a third party such as panel beater after attachment order (see discussion on reinstatement of credit agreement by Louw *Consumer Credit Regulation in South Africa* (2012) 455-456).

In *Nedbank v Fraser* 2011 (4) SA 363 (SGJ) the court indicated a consumer has a right to re-instate a credit agreement in terms of section 129(3) and (4) even after summary judgment or default judgment was granted and this right will be extinguished or not be available to consumer if firstly the agreement was terminate by credit provider, secondly sale of property pursuant to attachment order or surrender or thirdly if the property is transferred to the name of purchaser.

Section 129(3) of the National Credit Act 34 of 2005 was amended by the National Credit Amendment Act 19 of 2014. The new section 129(3) provides that consumer may at any time before the credit provider has cancelled the agreement, remedy a default of credit agreement by paying credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied. The new section state that the consumer may remedy the default by paying the outstanding amounts and prescribed charges and costs, Brits, R "The "reinstatement" of credit agreements: Remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act" [2015] DEJURE 75.

Section 129(4) of the National Credit Act 34 of 2005 was also amended by the National Credit Amendment Act 19 of 2014. The new section 129(4) only amended the words "a consumer may not reinstate a credit agreement after" in the Act 34 of 2005 to "a credit provider may not re-instate or revive a credit agreement after" as in the Act 19 of 2014. The word "re-instate" is retained and the word "or revive" is added while the word "consumer" was replaced with "credit provider". There is not significant change (for discussion on amendment see Brits, R "The "reinstatement" of credit agreements: Remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act" [2015] DEJURE 75.

In Nkata matter the High Court in ascertaining as to what would a phrase "all amounts that are overdue" mean noted that a mortgage bond contained acceleration clause. The court held that in order to effect reinstatement in terms of section 129(3)(a) it was not necessary for Nkata to pay full accelerated debt buy only the arrear instalments which she accordingly paid in March 2011 and

March 2012. According to the court the consumer must make payment to all the amount that is overdue and also credit providers permitted default charges in order to effect reinstatement. The High Court also stated that where a credit provider invokes acceleration clause the contract will remain in force and the consumer will be obliged to make specific performance of the accelerated indebtedness.

There was no evidence in the High Court that the costs which the bank debited from Nkata bond were neither taxed nor quantified by agreement between parties. There was also no evidence that Nkata was invited to agree on quantification of those costs. It was patently clear that the bank did not present cost to Nkata to make payment but instead the bank unilaterally debited the amounts from her bond account. The Constitutional Court per Moseneke DCJ concurs with High Court that legal costs were not due and payable because the bank neither provided Nkata with notice of legal costs nor demanded payment and such legal costs. These costs were not agreed or assessed for reasonableness by taxation or other means. According to Moseneke DCJ legal costs are due and payable if are reasonable, taxed and notice of such legal costs is given to the consumer. Furthermore a consumer who intend to reinstate agreement is not compelled to give notice or seeks assistance or cooperation from the credit provider. The court concurred with the decision of Eksteen J in *Nedbank Ltd v Barnard* 2009 ZAECPEHC 45 par 14-15 in ruling that a consumer is not required to consult a credit provider if it intent to reinstate agreement and obtain the repossessed property. A consumer can unilaterally reinstate agreement by make payments to cover sufficient costs and charges in terms of section 129(3).

The consumer is required to pay all arrears that are due and default charges that are permissible as well as legal costs. Furthermore to require a consumer to give notice to the credit provider will limit the value to the consumer of this remedy of reinstatement. The court clearly state that consumers cannot be expected to establish which costs would be necessary for reinstatement of credit agreement. Furthermore consumers cannot be expected to start taxation process.

It is therefore patently clear that a credit provider is duty bound to bring to the attention of the consumer all the legal costs that are due and payable. Failure to do so may also have far reaching consequences on part of the credit provider.

According to High Court a writ of execution is not an order but a process which may be issued whether an order to pay amount of money is made (par [49]). The SCA referred to English cases of *Re Overseas Aviation Engineering (GB) Ltd* 1963 Ch 24 (CA) [1962] 3 All ER 12, *Fagot v Gaches* [1943] 1 KB 10 (CA); 1942 2 All ER 476 and came to a conclusion that judicially there is general consensus across the board not in South Africa only but also in England that execution refers to a process. The SCA holds agrees with High Court that civil execution is a "process oriented" instead of one single event but that single vent denotes finality and there is no reversal (par [31]) but reached a different conclusion.

The SCA is also of the view that reinstatement of agreement entails revisiting, revision and

amendment. It opined that in terms of section 116 of the NCA any alteration to agreement is void unless is in writing and signed by both parties. The SCA could not observe any possible inference from the NCA that a redemption can occur by paying full amount of debt after sale in execution but before registration.

The Constitutional Court per Cameron J in dissenting he rejected submission that Nkata paid account statement including legal costs (par [43]). According to Cameron J payment is understood within the law as delivery of something owed (par [48]) and it does not mean a promise to pay at a later stage. In reaching this conclusion he referred to the decision in *Woudstra v Jekison* 1968 (1) SA 453 (T) 457 where it was indicate that payment means "the satisfaction or performance" of an obligation (par [49]).

Cameron J indicated that the bank did not want to recover the costs of enforcing the credit agreement and it would not initiate the process of quantifying unpaid costs while it was Nkata who seeks reinstatement. He further indicated that the NCA does not state that the bank need to establish costs which are reasonable for the purpose of reinstatement and it rested on Nkata to establish what was reasonable in order to reinstate a credit agreement. He concluded that since the NCA does require the bank to request for those costs the consumer was required to pay them or tender payment.

Nugent AJ agreed with Cameron J that payment made by Nkata did not offer him protection in terms of section 129(3) and that the order of SCA was correct (par [162]). Nugent AJ does not agree with majority judgement in the findings that a consumer cannot be expected to take proactive steps. In doing so Nugent AJ compared it with situation where there are other consumers whose calculations of compound interest are compound, they would know what is required with enquiring from the bank. According to Nugent AJ there is no indication from section 129(3) that the consumer must not pay the costs and it is unrealistic to always expect a bank to tax and demand costs as and when they are incurred. He support Cameron J that the appeal must fail.

Moseneke DCJ does not agree with the judgment of Cameron J and Nugent J (par [75]). He concurs with the judgment of High Court per Rogers J that a credit agreement was reinstated, that warrant of execution and default judgment are of no legal force, that the sale at the public auction is set aside and Nkata property may not be transferred to Kraainsfontein property.

Jafta J who also delivered separate judgment does not agree with Cameron J and Nugent J that appeal must be dismissed. He agreed with majority judgment by Moseneke. He based his decision on procedural aspect. According to Jafta J the bank was not supposed to institute litigation because it did not comply section 129(1) (par. He does not agree with Cameron J and Nugent J that legal fees debited from Nkata constitutes reasonable costs of enforcing the credit agreement. According to him no legal fees were due because institution of legal action before complying with section 129(1) was irregular and default judgment was nullity because the registrar did not have power to grant it (*City of Johannesburg*

v Changing Tides 74 (Pty) Ltd and Others [2012] ZASCA 116; 2012 (6) SA 294 (SCA) and *Master of the High Court Northern Gauteng High Court, Pretoria v Motala* 2011 ZASCA 238; 2012 (3) SA 325 (SCA)). According to Jafta J costs incurred in breach of the NCA cannot be regarded as reasonable costs within the meaning of section 129(3) and the whole process was tainted with non-compliance with the provisions of NCA. He concluded that credit agreement was reinstated and default judgment ceased at the moment of reinstatement.

The judgment by Jafta J is based on procedural compliance. It reinforces that compliance with procedural requirements of section 129 is mandatory. Institution of legal proceeding inconsistent with procedural requirements as stated in section 129 would undoubtedly result irregular costs.

4. CONCLUSION

The decision of Constitutional Court in *Nkata v FirstRand* cannot be faulted. This decision is important in our law because it signify the importance of presenting the legal fees by the credit provider to the consumer. It also indicate that such costs need to be taxed or quantified. The decision in *Nkata* send a message to the credit providers that there will be dire consequences if they *mero motu* debit legal fees from the consumer without quantification because the court will regard such costs as not due and payable. This in turn will ensure that there is cooperation between the consumer and the credit provider and this will accord with the purpose of NCA which is to harmonise system of enforcement. The decision of High Court demonstrates the importance of

providing satisfactorily explanation in a rescission for default judgment in the credit agreement in which the NCA applies. Notably the credit provider in view of the decision High Court and Constitutional Court is duty bound to take necessary steps to inform the consumer about the costs in which the credit provider intend to recover. This undoubtedly accord respect on part of the consumer. The decision in *Nkata* also protect consumer who are frustrated and in woe arising from arrears in the credit agreement. The court also gave effect to the constitutional values and aim of the NCA for the creation of market place that is consistent and in line with constitutional democracy.

In terms of the decision of Constitutional Court it is patently clear that a credit provider is duty bound to bring to the attention of the consumer all the legal costs that are due and payable. Failure to do so may also have far reaching consequences on part of the credit provider. On the other hand consumers cannot be expected to take pro-active steps to enquire about costs which are due and payable. The consumers would be expected to pay all arrears that are due, default charges that are permissible and legal costs.

This judgment also serve to reinforce or bring it to the attention of credit providers that compliance of section 129 is not escapable route as observed that according to the Constitutional Court legal fees incurred were not necessary because a litigation was instituted prematurely and inconsistent with section 129 (see discussion on section 129 by Choma, H., Tshidada, T. C., & Kgarabjang, T., 2016). Therefore a credit provider who institute litigation prematurely renders a risk of wasting legal costs.

REFERENCES

1. Brits, R. (2015). The "reinstatement" of credit agreements: Remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act. *DEJURE*, 1, 75-91.
2. Chakabva, O., & Thurner, T. (2015). Credit risk management practices in small & medium-sized micro-finance providers. *Corporate Ownership & Control*, 13(1-9), 1101-1107. <http://dx.doi.org/10.22495/cocv13i1c9p11>.
3. Chisasa, J. (2014). Rural credit markets in South Africa: A review of theory and empirical evidence. *Corporate Ownership & Control*, 12(1-3), 363-374. <http://doi.org/10.22495/cocv12i1c3p6>
4. Choma, H., & Kgarabjang, T. (2016). Risk and opportunities connected to the credit legislation on movable property: A case study. *Risk governance & control: financial markets & institutions*, 6(4-1), 151-154. <http://dx.doi.org/10.22495/rcgv6i4c1art5>
5. Choma, H., & Kgarabjang, T. (2016). Risks and peculiarities of the default situations in bank-consumer relationship: A case study. [Special issue]. *Risk governance & control: financial markets & institutions*, 6(3-2), 47-52. <http://dx.doi.org/10.22495/rcgv6i3c2art6>
6. Choma, H., Tshidada, T. C., & Kgarabjang, T. (2016). The impact of the credit legislation on consumers. *Risk governance & control: financial markets & institutions*, 6(4-special issue), 503-509. <http://dx.doi.org/10.22495/rcgv6i4siart8>
7. City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 ZASCA 116; 2012 (6) SA 294 (SCA). (2012). Retrieved from the World Wide-Web: <http://www.saflii.org/za/cases/ZASCA/2012/116.html>
8. First National Bank of Southern Africa v Van Rensburg NO: In re First National Bank of Southern Africa Ltd V Jurgens 1994 (1) SA 677 (T).
9. FirstRand Bank Limited v Nkata 2015 (4) SA 417 (SCA). Retrieved from the World Wide Web: <http://www.saflii.org/za/cases/ZASCA/2015/44.html>
10. Fuchs, M.M. (2013). The impact of the National Credit Act 34 of. 2005 on the enforcement of a mortgage bond: *Sebola v. Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC). *PER*, 16(3). Retrieved from the World Wide Web: <http://www.scielo.org.za/pdf/pej/v16n3/13.pdf>.
11. Kubyana v Standard Bank of South Africa Ltd (CCT 65/13) 2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC). Retrieved from the World Wide Web: <http://www.saflii.org/za/cases/ZACC/2014/1.html>.
12. Latella, D. (2010). The shareholder derivative suits: Disfunction and remedies against a "paradoxal" inactivity. *Corporate Ownership & Control*, 7(4-2), 297-302. <http://doi.org/10.22495/cocv7i4c2p5>
13. Liquidators Union v Brown 1922 AD 549.
14. Kelly-Louw, M., & Stoop, P. (2012). Consumer Credit Regulation in South Africa. Retrieved from the World Wide Web: <https://juta.co.za/print/catalog/Product/1284>.

15. Master of the High Court Northern Gauteng High Court, Pretoria v Motala 2011 ZASCA 238; 2012 (3) SA 325 (SCA). Retrieved from the World Wide Web: <http://www.saflii.org/za/cases/ZASCA/2011/238.html>.
16. National Credit Act Explained. 2ed (2013).
17. National Credit Amendment Act 19 of 2014. Retrieved from the World Wide Web: <https://www.ncr.org.za/documents/pages/National%20Credit%20Amendment%20Act.pdf>.
18. Nedbank Ltd v Barnard 2009 ZAECPEHC 45. Retrieved from the World Wide Web: <http://www.saflii.org/za/cases/ZAECPEHC/2009/45.html>.
19. Nedbank Ltd v Jessa 2012 (6) SA 166 (WCC). Retrieved from the World Wide Web: <http://www.saflii.org/za/cases/ZAWCHC/2011/495.html>
20. Nedbank v Fraser 2011 (4) SA 363 (SGJ).
21. Nkata v FirstRand Bank Limited [2016] ZACC 12. Retrieved from the World Wide Web: <http://www.saflii.org/za/cases/ZACC/2016/12.html>.
22. Nkata v FirstRand Bank Limited and Others (CCT73/15) [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC). Retrieved from the World Wide Web: <http://www.saflii.org/za/cases/ZACC/2016/12.html>.
23. Nkata v FirstRand Bank Ltd 2014 (2) SA 412 (WCC). Retrieved from the World Wide Web: <http://www.saflii.org/za/cases/ZAWCHC/2014/1>.
24. Otto National Credit Act Explained 3ed (2013).
25. Pezzuto, I. (2012). Miraculous financial engineering or toxic finance? The genesis of the U.S. subprime mortgage loans crisis and its consequences on the global financial markets and real economy. *Journal of Governance and Regulation*, 1(3-1), 114-125. http://doi.org/10.22495/jgr_v1_i3_c1_p5
26. Re Overseas Aviation Engineering (GB) Ltd 1963 Ch 24 (CA) (1962) 3 All ER 12, Fagot v Gaches 1943 (1) KB 10 (CA); 1942 2 All ER 476.
27. Reid v Godart 1938 AD 511.
28. SA Taxi Securitisation (Pty) Ltd v Soya (2012). ZAGPJHC 210+.
29. Scholtz, J.W., Otto, J., Zyl, E.V., Heerden, C. V., & Campbell, N. (2008). *Guide to the National Credit Act*. Durban:LexisNexis South Africa.
30. Sebola v Standard Bank of South Africa 2012 (5) SA 142 (CC). Retrieved from the World Wide Web: <http://www.saflii.org/za/cases/ZACC/2012/11.html>
31. Section 129(3) and (4) of the National Credit Act 24 of 2005 (2006). Retrieved from the World Wide Web: <http://www.justice.gov.za/mc/vnbp/act2005-034.pdf>
32. Simpson v Klein 1987 (1) SA 405 (W).
33. Standard Bank of South Africa v Saunderson 2006 (2) SA 264 (SCA).
34. Woudstra v Jekison 1968 (1) SA 453 (T).