The Confusion Continues: Lack of Clarity with the Application of Section 129(3) of the *National Credit Act* 34 of 2005 – *Naidoo v Changing Tides 17 (Pty) Ltd* (1885/2009) [2024] ZAKZDHC 55 (23 August 2024)

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Abstract

Since the enactment of the *National Credit Act* 34 of 2005 there has been much inconsistency and confusion regarding the application of many of its provisions. From an interpretational perspective, section 129 has undoubtedly been one of the most controversial provisions in the Act. Section 129(3) provides that a consumer may reinstate a credit agreement by settling the arrears, default and enforcement costs. Unfortunately, section 129(3) has been extremely problematic in its interpretation and application, as it is unclear how and when this right can be exercised.

The main challenges with sections 129(3) and (4), such as the requirements for the right to come into effect, and the time when the right lapses, were considered and resolved by the Constitutional Court in *Nkata v FirstRand Bank*. The recent judgment of *Naidoo v Changing Tides 17 (Pty) Ltd* has, however, exposed some other challenges with section 129(3), such as whether the provision contains any time limitations as to when the right can be claimed, and whether a recapitalisation of the arrears constitutes a reinstatement. Given the importance of the right to reinstatement as a debt relief mechanism for consumers, clarity is urgently needed on the aspects regarding its application; hence an amendment to section 129(3) may be necessary to create this certainty.

Keywords

Acceleration; *National Credit Act*; section 129(3); recapitalisation; reinstatement.

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1 Introduction

The *National Credit Act* 34 of 2005 (hereafter the *NCA* or the Act) is currently the primary legislation regulating consumer credit agreements in the country.[1] The Act was assented to by the President of South Africa in 2006 and became fully operational on 1 June 2007.[2] The *NCA* came into operation when "consumer credit regulation laws" were somewhat unheard of in South Africa.[3] Prior to the *NCA* the only debt relief mechanisms available to consumers were sequestration under the *Insolvency Act*[4] and administration under the *Magistrates' Courts Act*.[5] This lack of appropriate debt relief measures left a large portion of society without adequate remedies during their financial crises.

The *NCA* added a new dimension to the credit industry. It sought to curb the unregulated and harsh exercise of creditor rights and created a realm of protection for consumers by levelling the playing field between the contracting parties. The Act provided much-needed relief for consumers and has been hailed as one of the most important pieces of legislation passed by Parliament since the *Constitution*.[6]

One of the primary purposes of the *NCA* is to protect consumers *inter alia* by promoting responsible credit lending,[7] avoiding over-indebtedness,[8] discouraging reckless credit[9] and regulating contractual default by consumers.[10] Section 129 of the *NCA* was one of the primary provisions in the Act that sought to regulate consumer credit default and the resultant

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1 The *National Credit Act* 34 of 2005 (*NCA*) is not the only consumer credit legislation in South Africa, as there are other laws that also regulate consumer credit, *inter alia* the *Consumer Protection Act* 68 of 2008 and the *Alienation of Land Act* 68 of 1961. Also see s 4(1)(a) of the *NCA* for credit agreements excluded from the *NCA*'s application.

2 The *NCA* came into operation in a piecemeal fashion to allow credit providers an opportunity to get their systems compliant with its provisions.

3 See Kreuser 2012 *De Jure* 1. Although the predecessors to the *NCA* did provide consumer protection in the form *inter alia* of the cooling-off right and regulation of the contents of credit agreements, previous legislation did not provide any credit regulation laws. Also see DTI 2004 https://static.pmg.org.za/docs/2005/050608consumer.pdf. This 40-page policy framework recognised the need for a reformed consumer credit framework in South Africa, and was key to implementing the *NCA*.

4 *Insolvency Act* 24 of 1936.

5 Section 74 of the *Magistrates' Courts Act* 32 of 1944. See Greig 2000 *SALJ* 622 for a discussion of some of the challenges with administration orders.

6 See Otto 2009 *SAMLJ* 272, Boraine and Renke 2007 *De Jure* 222.

7 Section 3(a), (b) and (c) of the *NCA.*

8 Section 3(c) and (f) of the *NCA*.

9 Section 3(c) of the *NCA.*

10 Section 3(f)-(i) of the *NCA.*

debt enforcement processes taken by credit providers. Unfortunately, despite its being one of the most important sections, section 129 is also one of the most ambiguous sections of the Act and has been widely criticised for its poorly drafted provisions.[11] The inconsistencies within section 129 are highly regrettable, as this is one of the key provisions implemented to protect consumers during the debt enforcement process.[12]

Section 129(1) of the NCA provides that if a consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution, consumer court or Ombud, with the intent to resolve the dispute or develop a payment plan under the agreement. In essence the notice that is required to be sent in terms of section 129(1) serves to inform the consumer of his or her default and – importantly – also refers the consumer to several remedies available under the *NCA*, such as the right to apply for debt review, the right to refer the matter to the Ombud, and the right to develop a repayment plan with the credit provider.[13] Unfortunately, the application and interpretation of section 129(1) have been muddled and there has been a substantial amount of academic and judicial commentary criticising the wording of the section.[14]

In addition to the remedies provided in section 129(1) of the *NCA*, section 129(3) of the Act provides for another unique form of debt relief, namely, the right to reinstatement. In its original form the section provided the following:

> (3) Subject to subsection (4), a consumer may:
>
> (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement.
>
> (4) A consumer may not re-instate a credit agreement after:
>
> (a) the sale of any property pursuant to–

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11 The ambiguities of the *NCA* have been widely publicised. For a discussion of the ambiguities within the *NCA,* see Kelly-Louw 2015 *SALJ* 246; Singh *Critical Analysis of the Home Mortgage Foreclosure Requirements* ch 3; Singh 2019 *SA Merc LJ* 145.

12 See Govender and Kelly-Louw 2018 *PELJ* 1-2; Fuchs 2013 *PELJ* 377.

13 Section 129(1) of the *NCA* does not explicitly require the credit provider to alert consumers to their right to reinstatement in terms of s 129(3). However, in the case of *Absa Bank Ltd v Mokebe* 2018 6 SA 492 (GJ) the court found that it was necessary for the credit provider to refer to the right to reinstatement in the s 129 notice, and failure to do so was a flaw in the notice. The court further held that s 129(3) was imperative in balancing the rights and obligations of consumers and credit providers, and crucial in promoting the purpose of the *NCA*.

14 This paper does not intend to provide a detailed analysis of s 129(1) of the Act. For a detailed discussion on this section, see Singh 2021 *SA Merc LJ* 56.

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123.

In summary, section 129(3) allows a consumer to reinstate a credit agreement by paying the arrear amount and any reasonable default and enforcement costs incurred by the credit provider. Regrettably, as with section 129(1) there has been much inconsistency with the interpretation and application of section 129(3). The term "reinstate" is not defined in the Act. Initially there was much inconsistency on the effect of reinstatement due to the failure of the legislature to define this term. The *Oxford English Dictionary*[15] defines "reinstate" as to restore something to its former state or position. After some years of judicial and academic controversy and debate, it is now generally accepted that reinstatement brings an end to the debt enforcement proceedings instituted by a credit provider, and restores the credit agreement and consumer to a position as if no default ever occurred.[16] Another challenge with sections 129(3) and (4) was that it was unclear when (at what stage) a consumer could – and could not – exercise this right by settling the arrears and other related costs. It was unclear whether the consumer's right to reinstatement lapsed after judgment was granted, or whether the consumer was still entitled to exercise the right to reinstatement up to and even after a sale in execution.

The numerous challenges within section 129 and the other provisions of the *NCA* resulted in the Act being amended by the *National Credit Amendment Act* 19 of 2014 (*NCAA*). Unfortunately, the amendments that sought to remedy the challenges within section 129 were improperly drafted and consequently, the changes created even more inconsistency and ambiguity.[17]

The recent case of *Naidoo v Changing Tides 17 (Pty) Ltd*[18] (hereafter referred to as *Naidoo*) considered the application of section 129(3) of the *NCA* and exposed some new unanswered questions with the right to reinstatement, namely whether a recapitalisation[19] of the arrears constitutes

15 Oxford English Dictionary date unknown https://www.oed.com/dictionary/reinstate_v?tl=true.

16 The effect of reinstatement is discussed in part 2 of this article.

17 The *NCAA* will be discussed in part 2 of this article.

18 *Naidoo v Changing Tides 17 (Pty) Ltd* (1885/2009) [2024] ZAKZDHC 55 (23 August 2024) (*Naidoo*).

19 The term "recapitalisation" is also not defined by the *NCA*. In business a recapitalisation of arrears usually entails a financial exercise where the arrear and default amounts on the account are split over the remaining term of the credit agreement. This occurs in banking and collection practices as an indulgence to

a reinstatement of the credit agreement, and whether section 129(3) and (4) provides any time limitations for "exercising" or "claiming" the right to reinstatement.[20] This contribution seeks to briefly analyse section 129(3) and discuss the challenges posed by the *Naidoo* decision. This will be done by considering the history of section 129(3) and the prominent judicial cases that have adjudicated the section.

2 Section 129(3) of the *National Credit Act*: The right to reinstatement

2.1 History of section 129(3)

Historically, general credit and debt enforcement practices allowed a credit provider, upon default by a consumer, to claim the entire debt outstanding in terms of the credit agreement. This claim was initiated by the enforcement of the acceleration clause. An acceleration clause in the credit agreement allows the credit provider to acquire judgment against the defaulting consumer for the full outstanding debt, not just the arrear amount.[21] The enforcement of the acceleration clause has, however, become much stricter since the implementation of the *NCA*.[22] The consumer's right to reinstatement, provided for in section 129(3) of the *NCA*, may be seen to deny or limit the credit provider's right to acceleration. A consumer may dilute or cancel the effect of the acceleration clause by settling the arrears, default and enforcement costs due and thus bringing an end to the credit provider's accelerated claim. In other words, once an agreement is reinstated by the consumer settling the arrears and other costs as required by section 129(3), the consumer's record is wiped clean, and any judgment taken against the consumer for the outstanding balance in terms of the acceleration clause is of no force and effect.[23]

Prior to the *NCA* a consumer was required to settle the full outstanding balance on the credit agreement (not just the arrears), to stay or rescind any debt enforcement proceedings or judgment taken against him/her.[24] Reinstatement thus allows the consumer to escape the full consequences

consumers to assist them in bringing their account out of an arrear or bad book status and prevent any debt enforcement proceedings.

20 The *Naidoo* case will be discussed in part 3 of this article. In this matter the consumer appeared to have reinstated the agreement but claimed this as a defence only 15 years after the settlement of the arrears.

21 See *Boland Bank Ltd v Pienaar* 1988 3 SA 618 (A) and Brits 2013 *Stell LR* 165-166 for a discussion on the acceleration clause.

22 See *Combined Developers v Arun Holdings* 2015 3 SA 215 (WCC); *FirstRand Bank v Mdletye* 2016 5 SA 550 (KZD) (*Mdletye*). See also Brits 2018 *Stell LR* 168; Steyn 2015 *Stell LR* 144-167; Brits 2015 *De Jure* 75-79; Otto *National Credit Act Explained* 98.

23 Brits 2013 *Stell LR* 165.

24 See Steyn 2017 *Fundamina* 109-114 for a discussion on the right to redemption.

of the acceleration clause by simply settling the arrears, default and enforcement costs. Should the consumer default again after the reinstatement, the credit provider is required to initiate fresh debt enforcement proceedings, issue a new section 129(1) notice and summons, and obtain judgment.[25]

As with many of the sections within the *NCA*, section 129(3) has been the subject of much controversy. The two main issues of controversy have been: when (or at what stage) a consumer is entitled to exercise the right to reinstatement; and whether the right to reinstatement reverses all debt enforcement proceedings taken by the credit provider. Regarding the uncertainty as to when a consumer is entitled to exercise the right to reinstatement, section 129(3) initially (prior to its amendment) provided that a consumer may at any time before the credit provider has cancelled the agreement reinstate the agreement by paying all amounts overdue, together with the default and enforcement charges. The effect of this was to permit reinstatement, even after judgment for the full outstanding balance had been granted by a court. Section 129(4), however, (prior to its amendment) provided that a consumer could not exercise reinstatement after "execution". There have been varying interpretations as to when "execution" takes place, but the Constitutional Court has confirmed that execution occurs "after the sale and transfer of ownership and receipt of the proceeds from the sale" of the property.[26] Hence, it appears that a consumer is entitled to exercise the right to reinstatement at any time prior to the sale and transfer of the hypothecated (auctioned) property.

Regarding the issue of whether reinstatement has the effect of overturning any debt enforcement proceedings taken by the credit provider, it has become accepted that reinstatement does have the effect of reversing this. However, in practice there has been criticism of this approach and the consequence that reinstatement invalidates any judgment or attachment order lawfully granted in favour of the credit provider. The amendments effected by the *NCAA* have not brought any clarity on these issues.[27]

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25 Brits 2013 *Stell LR* 165-169. Brits contends that once an agreement is reinstated any judgment or other order granted falls away, and the agreement will continue to operate as if no default occurred. He submits that the right to reinstatement is a specific form of debt relief mechanism introduced by the *NCA* as it provides a way to prevent and even reverse debt enforcement. Brits believes that the right to reinstatement fills the current gap in the system of failing to provide adequate debt relief, as reinstatement reverses the socio-economic effects of the credit provider's debt enforcement action.

26 See *Nkata v FirstRand Bank* 2016 4 SA 257 (CC) (*Nkata*), which will be discussed in the following subsection of this article.

27 The *NCAA* will be discussed in section 2.3 of this article. Also see Singh *Critical Analysis of the Home Mortgage Foreclosure Requirements* para 4.4.

The recent case of *Naidoo v Changing Tides* brought two other questions of controversy to section 129(3), namely whether a recapitalisation or rearrangement of the arrears by the credit provider amounts to a reinstatement, and whether there are any time limitations as to when a consumer can claim protection under section 129(3).

2.2 Nkata v FirstRand Bank

Nkata v FirstRand Bank[28] was one of the first cases that considered the application of section 129(3) of the *NCA*. In this case the consumer (Nkata) had fallen into default with her mortgage repayments. FirstRand proceeded with litigation and obtained default judgment against Nkata. Time passed and Nkata settled the arrear amounts on the mortgage. However, over the ensuing months she fell into arrears again, and her property was eventually sold in execution. Nkata brought an application to set aside the sale in execution and argued that she had reinstated the agreement by settling the arrears after the judgment was granted. Consequently, she argued that the judgment was no longer effective and the resultant sale in execution was invalid.[29]

The High Court found in favour of Nkata.[30] FirstRand Bank appealed the decision to the Supreme Court of Appeal (SCA). A significant part of the SCA's judgment considered the interpretation of section 129(4) and the meaning of "execution".[31] The court found that the Rubicon for the right to reinstatement was the sale in execution and a consumer could not reinstate

28 *Nkata v FirstRand Bank Limited* 2014 2 SA 412 (WCC) (*Nkata* WCC).

29 *Nkata* WCC paras 13-16.

30 *Nkata* WCC paras 43, 54-55. The high court held that if the credit provider wants to recover the costs of enforcing the agreement from the consumer, the credit provider must take the appropriate steps. If the credit provider does not do so, and if in the meanwhile the consumer pays the full amount of the overdue instalments and any other amounts already due and payable, the agreement would be automatically reinstated in terms of s 129(3) of the *NCA*. It further held that s 129(4)(*a*) provides that a consumer may not reinstate a credit agreement after the sale of the executed property. The court held that "execution" is a process and requires money to have been raised from the sale of the property and paid to the credit provider. Hence, the court found that execution of the default judgment had not occurred by the time Nkata brought the arrears up to date, and therefore the agreement had been validly reinstated. Once the agreement was reinstated, the judgment ceased in operation and could no longer be enforced. Accordingly, the subsequent sale in execution was invalid and was set aside.

31 See *FirstRand Bank v Nkata* 2015 4 SA 417 (SCA) paras 19-33 (*Nkata* SCA). The SCA found that execution is the process of giving effect to the credit provider's right and held that the high court's interpretation – that execution takes place only when the proceeds of the sale in execution are paid to the credit provider – was erroneous.

a credit agreement after the sale in execution.[32] The SCA overruled the court *a quo*'s judgment.[33]

Nkata launched an appeal to the Constitutional Court. The Constitutional Court found that it was clear that Nkata had reinstated the agreement before the sale in execution, as the sale in execution took place on 24 April 2013, whereas Nkata settled the initial arrears in March 2011. While it was common cause that Nkata had settled the arrears, section 129(3) provides that for a consumer to exercise the right to reinstatement, the consumer is required to settle the arrears owing, the default charges and the enforcement costs. Nkata had settled only the arrears and not the enforcement costs.

The majority found that section 129(3) did not preclude reinstatement where a consumer had paid the arrears but had not been given due notice of the reasonable enforcement costs. In *Nkata* the bank had not demanded the payment of the enforcement fees and had unilaterally debited these costs. The court found that the credit provider could not unilaterally impose these costs without them being taxed or agreed upon.[34] The Constitutional Court further confirmed that, in terms of section 129(4), the barrier to the right to reinstatement applied only when the proceeds of the sale in execution were realised. Once an agreement was reinstated, the judgment and attachment were rendered "without force and effect".[35] The court accordingly held that Nkata had reinstated the agreement.[36]

In sum, the Constitutional Court in *Nkata* found that once a credit agreement is reinstated, any judgment taken against the consumer is of "no force and effect". The court's finding that reinstatement "lapses or cancels" any judgment has been subject to some criticism.[37] While it is accepted that the

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32 *Nkata* SCA paras 34-45.

33 *Nkata* SCA paras 28-45. The SCA found that the bank had already executed the default judgment in terms of s 129(4) of the Act when the property was sold at the sale in execution, therefore Nkata was not entitled to reinstate the agreement.

34 *Nkata* paras 79-80.

35 *Nkata* paras 130-131, 170-171.

36 *Nkata* paras 35, 54-58. The minority, however, found that Nkata had not reinstated the agreement as she had not paid the enforcement costs required by s 129(3) of the *NCA* and found that the default judgment that was granted was still valid. Cameron J relied on the plain language of s 129 and held that since Nkata had not paid the enforcement fees as required by the *NCA*, the agreement had not been reinstated. Cameron J disagreed with the majority judgment's finding that the credit provider was required to take proactive steps to recover the legal fees. Nugent J concurred with Cameron J and held that it was impractical to expect a credit provider to attend to the taxation and demand the enforcement costs every time the consumer falls into default. Cameron J held that the Act placed the responsibility of paying all the costs upon the consumer and not the credit provider. The fact that the bank had not presented these fees to Nkata did not mean that these fees were not due.

37 See Singh *Critical Analysis of the Home Mortgage Foreclosure Requirements* para 4.4.

right to reinstatement does have the effect of staying any debt enforcement proceedings by the credit provider, this should not mean that any valid debt enforcement proceedings and judgment already taken against the consumer are overturned or rescinded. It is submitted that in cases where a consumer falls into default again after reinstatement, a credit provider should be entitled to "revive" any previous judgment taken against the consumer.[38] The credit provider should not need to start debt enforcement proceedings afresh on the same credit agreement, as it is trite that any judgment validly granted by the court does not lapse until it is rescinded by the court or the outstanding debt is settled in full.[39] The current interpretation in *Nkata* allows consumers to continually fall into default and reinstate the agreement again and again.[40] While this can be viewed in a positive light as being hugely beneficial for consumers, it does have the potential to create administrative challenges for credit providers, credit bureaus and the courts, as every time a consumer falls into default the credit provider would be required to start debt enforcement proceedings afresh and attend to the taxation of enforcement costs.[41] Historically, if a consumer fell into default a

38 See Singh *Critical Analysis of the Home Mortgage Foreclosure Requirements* para 4.5 for a detailed discussion of this topic. The reasoning for this interpretation is substantiated by the difference in the majority judges' findings in *Nkata*. In *Nkata* Moseneke DCJ held that the consumer had reinstated the agreement by settling the arrears and found that the judgment taken by the credit provider was "no longer of any force and effect". However, Jaftha J found that since there had been non-compliance with s 129(1) of the Act – as the notices were incorrectly served – the judgment obtained was "*null and void"*. It is submitted that there is a substantial difference in the terms "no longer of any force and effect" and "*null and void"*. The term "*null and void"* means that the subject never existed or is invalid. Thus, in *Nkata*, the judgment never existed and was invalid (was *null and void*) as s 129(1) had not been complied with. The term "no force and effect" is substantially different from the term "*null and void"*. Moseneke DCJ held that the judgment was of "no force and effect" after reinstatement. It is submitted that this means that the judgment taken against Nkata was valid; however, once Nkata reinstated the agreement, the judgment was no longer of any force and effect. In other words, after reinstatement the effect of the judgment was suspended and ineffective. It is submitted that the judgment could become effective again should the consumer default again. Therefore, it can be argued that reinstatement does not lapse or rescind any valid judgment obtained. Once the consumer settles the arrear amount, the judgment can no longer be enforced and is no longer effective. However, should the consumer default after reinstatement, the judgment can be revived and become effective again.

39 See s 11 of the *Prescription Act* 68 of 1969, which provides that the prescription period of any judgment debt on a mortgage bond is thirty years. Also see the Uniform Rules of Court – GN R48 in GG 999 of 12 January 1965 (Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa).

40 See Brits 2013 *Stell LR* 169.

41 See Brits 2015 *De Jure* 81. Brits believes that this is a reasonable compromise between the parties. Even though a credit provider who has undertaken enforcement proceedings may be slightly inconvenienced, s/he is compensated for this as reinstatement demands that the consumer pay all enforcement charges. Brits therefore submits that s 129(3)-(4) must be interpreted in a manner that avoids

credit provider would enforce the acceleration clause and obtain judgment for the full outstanding debt. Only upon the settlement of the full outstanding debt would the judgment lapse. The right to reinstatement and the *Nkata* judgment seem to have done away with this long-established principle, as it appears to allow the rescinding of a judgment upon the settlement of the arrears. This approach is commendable insofar as it ensures consumer protection, but it is noted that such an interpretation diminishes the power of the acceleration clause and further diminishes the value of any valid court judgment. It is questionable whether this was the true intention of the legislature, and if it was, legislative intervention is required to clarify the current uncertainties.

In *Nkata* the court also found that a consumer was entitled to exercise the right to reinstatement up to the time the proceeds of the sale in execution were realised.[42] According to this interpretation, it appears that the purchaser at the sale in execution purchases the property subject to the consumer's statutory right to reinstatement. It is submitted that this interpretation is unsatisfactory as the application of section 129(3) should be limited to the period prior to the sale in execution. In other words, once the property is sold at the sale in execution (more specifically, upon the fall of the hammer at the Sheriff's sale in execution) the consumer should lose the right to reinstatement. The innocent buyer who purchases the property at the sale in execution should not be subject to section 129(3). The current position of allowing consumers to reinstate the agreement after the sale in execution has the negative effect of deterring bidders at the sale and reducing even further the prices obtained at the auction.[43]

Due to the lack of clarity and controversy in numerous provisions of the *NCA*, the Act was amended in 2015. However, as previously indicated, the amendments have not provided any clarity on the issues raised above, and due to their poor wording have created further inconsistency.

2.3 NCAA changes to subsections 129(3) and (4)

The *NCAA* sought to resolve the challenges within sections 129(3) and (4). The amendments read as follows:

> (3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default

unconstitutional results and avoids instances of disproportionate debt enforcement proceedings.

42 Also see *Nedbank Ltd v Frasier* 2011 4 SA 363 (GSJ); *Absa Bank Ltd v Morrison* 2013 5 SA 199 (GSJ).

43 Also see Brits 2013 *Stell LR* 177; Singh 2023 *Speculum Juris* 175.

> administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.
>
> (4) A credit provider may not re-instate or revive a credit agreement after–
>
> (a) the sale of any property pursuant to–
>
> (i) an attachment order; or
>
> (ii) surrender of property in terms of section 127;
>
> (b) the execution of any other court order enforcing that agreement; or
>
> (c) the termination thereof in accordance with section 123.

The crucial difference between the previous section 129(3) and the amended section is that the phrase "reinstate a credit agreement" has been deleted and replaced with "the consumer's right to remedy a default under such credit agreement". The amendment no longer uses the word "reinstate".[44] The amendment also does not state what the consequence of remedying the default would be, and whether reinstatement has the consequence of overturning debt enforcement proceedings and/or a valid judgment already taken by the credit provider. Accordingly, it is submitted that there is still uncertainty regarding this aspect.

The amendment to section 129(4) sought to clarify the exact stage at which the consumer's right to reinstatement would lapse. The section replaced the reference to the "consumer" with "credit provider". The amendment appears to refer only to the credit provider's rights and not to the consumer's rights. Brits[45] submits that on a literal interpretation the amendment is nonsensical, as it provides the credit provider with the right to reinstate the agreement. This could be interpreted to mean that the credit provider has the right or discretion to accept the consumer's reinstatement and payment of the arrear amount. However, such an interpretation is contrary to the *NCA*, as it creates a situation where, having settled the arrears as well as the default and enforcement costs, the consumer's position depends on whether the credit provider chooses to allow the reinstatement.

Section 129(4) further fails to provide clarity on the stage (or any time limitations) at which the right cannot be exercised. The section provides that a credit provider (which should read "consumer") may not reinstate a credit agreement after the sale of the property, or the execution of any court order enforcing that agreement. This is ambiguous as it is unclear whether the consumer could still exercise the right after judgment and/or a warrant of attachment (after enforcing a court order), after the sale of the property

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44 See Brits 2015 *De Jure* 84-85; Steyn 2015 *Stell LR* 148.

45 See Brits 2015 *De Jure* 88; Brits, Coetzee and Van Heerden 2017 *THRHR* 177-178.

(after the conclusion of the sale in execution), or after the sale but before the transfer, as held in *Nkata*.

Several academics have submitted that the current situation is inadequate.[46] Accordingly, there has been a call for the complete redrafting of subsections 129(3) and (4). Brits[47] submits that it is unfortunate that one is obliged to engage in such mental gymnastics and creative interpretations to squeeze out a clear interpretation of these sections in the Act and it is even more disappointing that the amendments, which were intended to provide clarity, created only more confusion.

The judgments of *FirstRand Bank v Mdletye*[48] (hereafter referred to as *Mdletye*) and *FirstRand Bank v Zwane*[49] (hereafter referred to as *Zwane*) were the first reported cases to interpret the *Nkata* decision and the legislative amendments to section 129(3).[50] In both matters the consumers were three months in arrears on their mortgage payments, and the credit provider sought to obtain default judgment and an order of executability against the hypothecated immovable property.

In *Mdletye* the court considered the *Nkata* judgment and found that:

> … if the arrears can be eliminated and other amounts referred to in s 129 (3) paid, the agreement will be reinstated. From the date of reinstatement, the default will have 'no force and effect'. If the property is sold by virtue of an attachment following a declaration of executability, the agreement will not be capable of being reinstated and the respondents (mortgagors) will lose their home. The potential for this to occur must therefore be a factor to be taken into account in an application to declare the property executable.[51]

In *Mdletye* the consumers had provided the credit provider with a reasonable payment proposal indicating how they intended to settle their default and had made payments in terms of the proposal, significantly reducing the arrear amount. Gorven J held that there was a reasonable prospect that the agreement could be reinstated within a short period of time,[52] and held that proper judicial oversight would not be served if an order of executability were granted, as this would amount to disproportionality between the means used to exact the payment of a judgment debt and other available means to obtain the same purpose.[53] Gorven J granted default

46 See Brits, Coetzee and Van Heerden 2017 *THRHR* 179; Steyn and Sharrock 2017 *SALJ* 498.
47 Brits 2015 *De Jure* 91.
48 *FirstRand Bank Limited v Mdletye* 2016 5 SA 550 (KZD) (*Mdletye*).
49 *FirstRand Bank Limited v Zwane* 2016 6 SA 400 (GJ) (*Zwane*).
50 Also see Steyn 2017 *Fundamina* 111-112.
51 *Mdletye* para 11.
52 *Mdletye* paras 13-14.
53 *Mdletye* paras 16-17. The court, however, held that this did not mean that the credit provider will never be entitled to such an order. Much will depend on the track record of consumers and their payments during the ensuing period.

judgment but adjourned the application to declare the property executable for a period of six months. This six-month period was intended to provide the consumer with an opportunity to remedy the default and reinstate the agreement in terms of section 129(3).

Similarly, in *Zwane* the court adjourned both the judgment and the executability applications for a period of four months.[54] The court did find, however, that the declining of a judgment might be viewed as being contrary to the principle of honouring agreements, and further could render meaningless the effect of an acceleration clause.[55] This result could be avoided if the immediate enforcement of the agreement could be deferred by postponing the declarations of executability for a few months and allowing the consumers an opportunity to pay the arrears.[56] The court accordingly postponed the judgment and executability applications for four months.

While the courts in both *Mdletye* and *Zwane* did not provide any clarity on the issue of whether reinstatement has the effect of rescinding previous debt enforcement proceedings, the postponing of the applications in both *Mdletye* and *Zwane* raises the question of whether the possibility of reinstating the agreement must be considered by the courts when hearing a judgment application. In a recent case of *Nedbank v Matshethe*[57] the Polokwane High Court (without making specific reference to section 129(3)) declined a credit provider's application for summary judgment.[58] In this matter Matshethe had fallen four months in arrears on his vehicle finance agreement and Nedbank instituted proceedings to cancel the agreement and order the return of the motor vehicle. Before the matter could be heard in court Matshethe reduced the arrears that were initially owed, bringing the account significantly below three months in arrears. Despite this, Nedbank continued to proceed with the summary judgment application.[59] The court held that allowing the credit provider to proceed with the cancellation of the credit agreement under such circumstances would be unjust and contrary to the objects of the *NCA*.[60] Accordingly, the court in *Matshethe* seemed to have considered the consumer's right to reinstatement as a possible

54 *Zwane* para 7. The court also made reference to ch 10.17 of the *Gauteng Practice Manual* (The Judiciary 2018 https://www.saflii.org/images/Practice_Manual_Gauteng.pdf). The Practice Manual proposed the postponement of a judgment application to allow a consumer the opportunity to take advice and seek arrangements to bring the arrears up to date.

55 *Zwane* para 18.

56 *Zwane* paras 19-21.

57 *Nedbank t/a MFC v Matshethe* (3493/2024) [2024] ZALMPPHC 145 (26 September 2024) (*Matshethe*).

58 *Matshethe* para 6.

59 *Matshethe* para 17.

60 *Matshethe* para 66.

remedy to resolve the issue between the parties.[61] The question of whether a court must consider section 129(3) in proceedings concerning a credit agreement has remained unanswered, and it is also questionable whether a consumer can raise this as a defence in debt enforcement proceedings.

The recent case of *Naidoo v Changing Tides* has raised more questions in the section 129(3) debate. This case will be discussed in detail below.

3 *Naidoo v Changing Tides*

In this matter Naidoo sought to set aside a sale in execution of her property, which took place in 2021.[62] Naidoo had defaulted on payments for her mortgage bond and her credit provider issued a summons against her in January 2009. In February 2009 it appeared that Naidoo had settled the arrears on the account, but not the enforcement costs.[63] She fell into arrears again later in 2009 and signed a consent to judgment in favour of her credit provider, as well as consenting to an order declaring the property executable.[64] The credit provider, however, did not apply for judgment immediately and lodged the application for default judgment only in October 2013. The default judgment was granted in December 2013.[65] Naidoo remained on the property after the judgment had been granted and continued to make payments on the bond, and the credit provider continued to accept the payments. It was clear that Naidoo had consistently been in arrears thereafter and because of her defaults she concluded another settlement agreement with her credit provider in 2020. However, Naidoo, continued to default on her payments and due to the accruing arrears, the property was eventually sold at a sale in execution in October 2021.[66]

The main issue before the court was whether the credit provider was entitled to proceed with the sale in execution based on the 2013 default judgment.[67]

Naidoo argued that her payment of the arrears in February 2009 had extinguished the claim in the summons, and the right to seek default judgment on the original cause of action had fallen away.[68] In essence, relying on *Nkata* she argued that she had reinstated the agreement.[69] She

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61 *Matshethe* paras 78-79. The court held that Nedbank's remedy to seek the cancellation of the agreement was inappropriate, and that the specific performance remedy (of demanding the consumer to pay the arrears) was more just in the circumstances.

62 *Naidoo* para 1.

63 *Naidoo* para 4.

64 *Naidoo* para 5.

65 *Naidoo* paras 6-8; it appears that the credit provider assisted Naidoo with several payment arrangements before deciding to proceed with default judgment.

66 *Naidoo* para 15.

67 *Naidoo* para 25.

68 *Naidoo* para 11.

69 *Naidoo* para 28.

further claimed that any arrears thereafter were written off by the credit provider in 2015 because of a recapitalisation of the outstanding debt.[70]

The credit provider denied these allegations and argued that the recapitalisation was a way of assisting Naidoo with her repayment obligations due to her various defaults. Further, regarding the settlement of the arrears in 2009, the credit provider claimed that although the arrears had been settled the enforcement costs were still outstanding, and this entitled them to proceed with judgment. Naidoo countered this argument by indicating that in terms of *Nkata*, enforcement costs were due only when taxed or agreed upon, and in this matter neither had occurred.[71]

Relying on *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*[72] and *Zuma v Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State*,[73] the credit provider argued that the significant delay by Naidoo in bringing the application should preclude her from obtaining any relief as the delays were inexplicable and the underlying motive of the application was to avoid her eviction.[74] Despite the persuasiveness of these arguments, the court held that it could not overlook the fact that the case fundamentally involved a home which was a primary residence, and there was a need to protect this right recognised in section 26 of the *Constitution*. This constitutional right, therefore, trumped any delay argument.[75]

The court found that it was clear from the documents provided that the agreement had been reinstated and that the cause of action in the 2009 summons and 2013 judgment had been extinguished. The subsequent sale in execution was thus invalid.[76] Further, the credit provider, through its conduct and acceptance of payments, conducted itself in a manner consistent with the reinstatement of the loan agreement, mirroring the conduct in *Nkata*.[77] Considering the similarity of the facts in the current matter with those in *Nkata*, it was clear that Naidoo was entitled to relief in the form of the right to reinstatement.[78]

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70 *Naidoo* paras 12-13.
71 *Naidoo* para 29.
72 *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 6 SA 87 (SCA)
73 *Zuma v Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State* 2021 11 BCLR 1263 (CC).
74 *Naidoo* para 33.
75 *Naidoo* para 34.
76 *Naidoo* paras 30-32.
77 *Naidoo* para 37.
78 *Naidoo* para 39.

The court found that the default judgment granted in December 2013 was of no force and effect and the subsequent sale in execution was set aside. The court ordered the reinstatement of the loan agreement as at the date of the sale in execution.[79]

While the court did consider the effect on third parties, such as the buyer at the sale in execution, and ordered the credit provider to refund to him the purchase price of the sale in execution and subsequent costs, the court failed to consider the rights and interests of other parties and the consequences of allowing reinstatement after such a significant time had passed. One of the primary principles in law is the need for consistency and finality. Allowing a consumer to claim a remedy that should have been claimed 15 years prior does not appear fully fair and reasonable. Accordingly, it is submitted that the delay of more than a decade in bringing the application should have played a more significant role. Most importantly, the fact remains that Naidoo was significantly in default on her mortgage repayments at the time of the sale in execution and could not afford to pay the loan agreement. The facts revealed that her credit provider assisted her with several payment arrangements (on numerous occasions) and had even recapitalised the arrears on the loan. The credit provider even delayed in proceeding to apply for default judgment as a result. Despite these indulgences, she continued to fall into default. It was clear that Naidoo was unable to maintain the agreement and afford the home; the sale in execution was the only plausible resolution for the credit provider. These factors should have been given more weight by the court.

It was also concerning to note that the court appeared to view the recapitalisation of the arrears by the credit provider as a reinstatement of the credit agreement by the consumer. Section 129(3) clearly provides that a credit agreement will be reinstated upon the settlement of the arrears, default and enforcement costs. During a recapitalisation no payment of the aforementioned costs is made; therefore, a recapitalisation or development of a payment plan cannot and should not be construed as a reinstatement. A recapitalisation is an act of indulgence by the credit provider to assist the consumer with a payment arrangement in an effort to prevent debt enforcement proceedings. The view by the court in *Naidoo* that the recapitalisation should be perceived as a reinstatement is misleading and may have a negative consequence as credit providers may now be less inclined to assist consumers with such recapitalisation arrangements, and be more zestful in proceeding with debt enforcement, as their efforts to assist consumers with arrangements may be viewed as acts of reinstatement, which effectively neutralises their debt enforcement process.

79 *Naidoo* para 50.

4 Concluding remarks

One of the main purposes of the *NCA* is to enhance consumer protection. However, it must be noted that this is not the sole purpose of the Act as there is also a need for the rights of consumers and credit providers to be equally balanced.[80] Credit providers and the banking industry play important roles in the country's economy and their interests need to be protected to ensure financial stability in South Africa.[81] Hence, the rights of credit providers should not be neglected during the application of the *NCA*.

The right to reinstatement provided for in section 129(3) of the *NCA* plays an important role in balancing the rights of consumers and credit providers and ensuring just and fair results during the debt enforcement process. Unfortunately, as indicated throughout this paper, section 129(3) has been ambiguous and difficult to interpret and apply. Despite the efforts made by the judiciary – in *Nkata*, and the legislature – in the *NCAA*, to deal with some of the errors in the section, much inconsistency still exists. In addition, the recent *Naidoo* judgment has brought to the surface several other questions that remain unanswered and have added to the confusion.

The *Naidoo* judgment raised two points of controversy concerning the right to reinstatement, namely:

- Does an indulgence such as a payment arrangement and recapitalisation or restructuring of the arrear amount qualify as a reinstatement of the agreement?
- Should there be a time limitation as to when the consumer can "claim" and "exercise" this right?

As indicated previously, a recapitalisation cannot and should not be considered as a reinstatement as it is essentially a rearrangement or payment plan with the credit provider (as provided by section 129(1)). Further, in the case of *Absa Bank Ltd v Mokebe*[82] the court found that the failure of the section 129 notice to include reference to the right to reinstatement was an inherent flaw in the notice. This signifies that there is a difference between a "recapitalisation" and a "reinstatement", as prior to *Mokebe* reference to a recapitalisation in the form of a payment arrangement, was already made in section 129(1) and the notice. In other words, a recapitalisation is a form of payment arrangement in terms of the debt relief options available in section 129(1), whereas a reinstatement is referred to as a settlement of the arrears and other related costs in terms of

80 See s 3 of the *NCA* for an overview of the purpose of the Act.

81 See Singh *Critical Analysis of the Home Mortgage Foreclosure Requirements* chs 3-4.

82 *Absa Bank Ltd v Mokebe* 2018 6 SA 492 (GJ).

section 129(3). Accordingly, a recapitalisation or rearrangement of the arrears is not a reinstatement of the credit agreement (a recapitalisation is a development of a payment plan that takes place in terms of section 129(1), whereas a reinstatement entails the payment of the full arrears and other related costs that takes place in terms of section 129(3)).

Furthermore, it is submitted that the *Nkata* decision can be distinguished from the *Naidoo* case, as in *Nkata* the consumer brought an application to stay the sale in execution a few months after the sale. Nkata immediately raised her right to reinstatement as a defence to the debt enforcement proceedings. On the contrary, in *Naidoo* the consumer brought the application nearly three years after the sale in execution and sought to raise a defence in terms of the right to reinstatement only 15 years after the act of reinstatement had taken place. It was further trite that the main purpose of Naidoo's application was to prevent her eviction from the premises. The court in *Naidoo* found that since the case in question involved the constitutional right to access to housing, any delay by the consumer was trumped by the values enshrined in the *Constitution* – hence, any delay could be excused to ensure the protection of a constitutional right.

It is submitted that this reasoning is understandable in the situation involving a primary residence (mortgage agreement); however, what would be the situation in the case of another credit agreement? The *Nkata* and *Naidoo* cases both involved mortgaged residential properties. Would the situation still be the same, and would a similar delay be reasonable, for other credit agreements such as a motor vehicle finance agreement, an investment property, or an unsecured loan? Should the consumer still be given a lengthy period in which to claim the right to reinstatement, even after repeatedly falling into arrears, and still being in arrears?

As indicated above, the amendments to section 129(4) have not created any clarity as to when a consumer can no longer exercise the right to reinstatement (i.e. the right to settle the arrears and other costs and stay debt enforcement proceedings). The *Naidoo* decision has now raised another question: when a consumer can "claim" or raise the right to reinstatement as a defence? In *Naidoo* (although it appeared that the consumer had settled the arrears), she raised this defence 15 years after the fact – after the credit provider had proceeded with its debt enforcement processes and even after the property had been sold at a sale in execution. The consumer had not raised this defence before. This delay was significantly prejudicial – not only to the credit provider, but also to innocent third parties such as the purchaser at the sale in execution and the Sheriff of the High Court. Accordingly, it is suggested that the *NCA* be amended to make it clear that a consumer can "claim" and "exercise" the right to reinstatement only before the sale in execution. Once the property is sold

at a sheriff's sale, the consumer should lose all rights in terms of section 129(3).

In sum, the right to reinstatement is an important remedy that is fundamental not only to the objectives of the *NCA*, but also to the *Constitution*, and the right to have access to adequate housing. The proper interpretation of subsections 129(3) and (4) has been the cause of much debate and attempts at clarity from the judiciary – and the legislature was required to confirm the effect of reinstatement on judgments and orders of executability. It is submitted that the right to reinstatement can be of immense value to a consumer who is facing debt enforcement proceedings, and can be utilised to prevent any unreasonable action being taken by a credit provider.[83] It is also interesting to note that in *Mdletye, Zwane* and *Matshethe* the courts held that where there is a possibility of the agreement being reinstated, the court would not grant an order but would rather adjourn the matter and allow the consumer the opportunity to reinstate the agreement. These courts held that proper judicial oversight would not be served if it allowed the execution to proceed where there was a reasonable prospect of reinstatement. Thus, the right to reinstatement has thrown consumers a lifeline as it allows them an opportunity to postpone their credit provider's acceleration rights and prevent the harsh consequences of debt enforcement and judgment proceedings.[84]

Reinstatement is an essential part of credit and banking law and it is regrettable that the provision contains so many flaws and inconsistencies. In order for the right to reinstatement to be given full effect, there is still a need for further clarity, and it is therefore submitted that there is a need for the legislature to clarify the current uncertainties in subsections 129(3) and (4).

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83 A prime example where reinstatement could be used is *Absa Bank Ltd* v *Ntsane* 2007 5 SA 554 (T). The *Ntsane* case illustrated how a credit provider could abuse the application of the acceleration clause, and if the consumer had the opportunity to exercise the right of reinstatement by simply paying the arrear amount of R 18.46, Absa would not have been able to proceed with the default judgment application.

84 Steyn 2015 *Stell LR* 143.

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List of Abbreviations

DTI	Department of Trade and Industry
NCA	National Credit Act 34 of 2005
NCAA	National Credit Amendment Act 19 of 2014
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law