AANTEKENINGE

ALLOCATION OF PREPAYMENTS RECEIVED ON CREDIT AGREEMENTS: PERSPECTIVES ON SECTION 126(3) OF THE NATIONAL CREDIT ACT 34 OF 2005

OPSOMMING

Toewysing van vooruitbetalings ingevolge kredietooreenkomste: Perspektiewe op artikel 126(3) van die *National Credit Act* 34 van 2005

Die *National Credit Act* 34 van 2005 het verskeie maatreëls ingevoer ten einde beter beskerming te bied aan Suid-Afrikaanse kredietverbruikers. Een sodanige maatreël wat klaarblyklik ten doel het om verbruikers te beskerm teen uitbuiting deur kredietverskaffers is artikel 126 wat voorsiening maak vir die vooruitbetaling van bedrae verskuldig ingevolge 'n kredietooreenkoms. Die fokus van hierdie bydrae is spesifiek op artikel 126(3) wat die kredietverskaffer verplig om enige vooruitbetaling deur die ver-bruiker onmiddellik op die datum van betaling toe te wys volgens 'n bepaalde metodologie. Hierdie bydrae betoog egter dat artikel 126(3) in sommige gevalle tot onbedoelde gevolge kan lei wat meebring dat dit die doelstelling van die Wet om kontraktuele versuim deur verbruikers te ontmoedig, in die wiele ry. Ondersoek word gevolglik ingestel na moontlike alternatiewe uitlegte van artikel 126(3) en voorstelle vir die wysiging van die gewraakte subartikel word gemaak.

1 INTRODUCTION

The National Credit Act 34 of 2005 (NCA) has revolutionised the landscape of consumer credit regulation by introducing various measures to extend greater protection to South African credit consumers. (For a general overview of the Act and its scope of application, see Scholtz *et al Guide to the National Credit Act* (2008 ff) ch 1.) These protective measures include provisions aimed at providing consumers with adequate disclosure and standardised information so that they can make informed choices (ss 92 and 93 read with regs 28–31); capping of interest rates, initiation fees and service fees (regulations to the National Credit Act published in *GG* 28824 of 11 May 2006 specifically regs 42–44); a statutory *in duplum* provision (s 103(5)); protection against reckless credit granting (ss 81–83) that is one of the root causes of over-indebtedness; dedicated debt relief measures (ss 85 and 86); and a number of procedural protections in the context of the enforcement of credit agreements (ss 129–131). One such measure that *prima facie* appears to have been devised for the protection of consumers, is the provision made in section 126 for prepayment of amounts due under a credit agreement. In order to ensure that credit providers do not arbitrarily allocate prepayments received by consumers, the Act mandates the credit provider to allocate any prepayment on the date of receipt according to a specified methodology. However, it is submitted that section 126(3) that prescribes the manner in which prepayments under the Act must be allocated, may have the unintended consequence of actually prejudicing some consumers who prepay their credit agreement debt.

The purpose of this contribution is to discuss the principles relating to prepayment of debt payable in instalments as it has evolved in South African law and to discuss and analyse the provisions of section 126 of the NCA with specific focus on section 126(3). The rationale behind section 126(3) is interrogated as well as its nature and scope of application and the consequences that may result from such application. The main contentious issue in this regard appears to be whether, in the scenario where a consumer makes a prepayment on a credit agreement that is in excess of a single instalment due, such amount can be "spread" over a period of time to prevent future default by the consumer under that credit agreement. The contribution aims to answer this vexing question and to make some recommendations for a more balanced approach to section 126(3). It is to be noted that the contribution deals with prepayment only and not with comprehensive and complete early settlement of a credit agreement debt which is dealt with in section 125 of the NCA.

2 COMMON LAW

A creditor who extends credit to a debtor is compensated for allowing deferral of such payment by the interest that he is entitled to levy on the deferred amount. Where a debtor prepays a debt that has been deferred the creditor may thus be averse to accepting such payment as it will mean that the interest he could earn on the transaction will be diminished given that the agreement did not run its full course.

The position regarding prepayment of debt at common law was succinctly stated in *Bernitz v Euvrard* where the court indicated that:

> "It is a well-recognised principle of our law that where a future date has been fixed for payment of a debt, a presumption arises that such future date was fixed for the benefit of the debtor. To this rule there are exceptions, one of which occurs when the future date has been fixed partly for the benefit of the creditor, and in that case the debtor *cannot pay before the agreed date* unless, possibly he pays interest up to the agreed date as well. This principle is derived from the Roman law (see *Digest* 45.1.41; 45.1.137.2; 46.3.70; 50.17.17) and has been approved in our law" (1943 AD 595 602; own emphasis).

(See also *Kelly v Holmes Bros* 1927 OPD 29; *McCabe v Burisch* 1930 TPD 261; *Wolmarans v Wolmarans* 1931 3 *SALJ* 409 and *Nedperm Bank Ltd v Lavarack* [1997] JOL 252. See further Bradfield *Christie's Law of contract in South Africa* (2017) 484–485.)

Considering whether payment by instalments is partly for the benefit of the creditor implies that it is necessary to look at the nature of the contract concerned (*Bernitz v Euvrard* 1943 AD 595). Arguably, where credit is extended to a debtor it can be said that the fixing of the future date for payment is fixed not only for the benefit of the debtor but also for the benefit of the creditor who earns interest from such arrangement – hence at common law the debtor could only prepay under the conditions as alluded to in *Bernitz v Euvrard*.

It should further be noted that at common law, whenever a debtor who owed several debts paid one of those debts, he had the right to state which obligation he preferred to discharge and the one he selected would then be paid. (Kerr "Payment of one of a number of debts owed to the same creditor" 1982 *SALJ* 532; Otto "Toewysing van betalings by meerdere kontraktuele skulde" 1995 *TSAR* 43 where he refers to the following statement by Ulpian in *D* 46 3 1 (as translated by Scott): "Whenever a debtor, who owes several debts, pays one of

them, he has the right to state which obligation he prefers to discharge, and the one which he selects shall be paid, for we can establish a certain rule with reference to what we pay".) Although the aforesaid applied where a debtor had more than one debt, it appears that at common law the debtor had the right generally to specify the allocation of payments in the sense that he could indicate which specific debt he wanted to pay (not, however, in which sequence he wanted such payment to be apportioned, for example that he wanted to pay capital before interest). Where the debtor failed to indicate which debt he wanted to pay the creditor had the right to allocate payments made by the debtor to a debt of the creditor's choice but under obligation to consider which debt he would pay if the obligations were his own (Kerr *The principles of the law of contract* (2002) 526). Insofar as the apportioning of a specific payment was concerned, that is, the methodology for apportioning the payment, the general rule was that such payment was allocated first to the repayment of interest and thereafter towards repayment of the outstanding capital amount (Otto 1995 *TSAR* 43).

For purposes of this contribution it is submitted that insofar as credit agreements where payments have to be made in instalments are concerned, each instalment represents a debt owed (and thus a separate cause of action) by the consumer and hence one can regard a consumer who makes a prepayment of more than one instalment due under a credit agreement as actually paying more than one debt. This would mean that at common law the debtor would have been entitled to specify to which debt (instalment) he wanted the prepayment to be allocated, hence when he made a prepayment of an amount that was large enough to cover a number of instalments (but did not completely settle the debt concerned) he would have been able to specify that the prepaid amount had to be spread out and allocated to payment of specific instalments as they fell due.

In *Jefferson, Executor of Stewart v De Morgan* (2 EDC 205 213; see also *Croghan's Executrix v Whitby and Webber* 1904 TH 101 107) the court held that:

> "[T]he whole doctrine of Roman-Dutch law as to the appropriation of payments *turns upon the intention of the debtor*, either express, implied or presumed; express, when he has directed the application of the payment, as in all cases he has a right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of payment, without objection; presumed , when in the absence of any such special appropriation it is most to his benefit to apply it to a particular debt (own emphasis)."

As pointed out, the debtor, however, was not at liberty to demand that such payment be apportioned to payment of capital in lieu of interest. Insofar as the apportioning of such payment is concerned, the general rule that payments must be appropriated first to payment of the interest and then to capital was confirmed by the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd* 1998 1 SA 811 (SCA) 832f–g.

3 POSITION RELATING TO PREPAYMENTS IN TERMS OF PREVIOUS CREDIT LEGISLATION

3 1 Hire Purchase Act 36 of 1942

It appears that the reluctance of creditors to accept prepayment of debt that would divest them of a portion of the interest that they would otherwise have

been entitled to had the agreement run its full course, necessitated the legislature to intervene. Section 14 (b) of the Hire Purchase Act accordingly determined that the *buyer* (debtor)

> "shall at all times be entitled to pay any instalment of the purchase price *before it is due*, and shall, if he pays the whole of the purchase price remaining unpaid (not being the final instalment of the purchase price) together with such interest as may have accrued up to the date upon which the payment is made, in one amount, be entitled to the reduction of each instalment not due at the said date by an amount calculated at the rate of five per cent per annum on such instalment in respect of the period by which the payment of such instalment is accelerated".

Section 14(b) thus affirmed that the debtor was *inter alia* entitled to make a prepayment and, further, that if he paid the balance of the purchase price and interest due (settle the debt) it would entitle him to a reduction also of instalments not yet due on the date that he made such advanced payment – thus amortising the amount due as originally agreed upon. However, section 14(b) did not contain any specific statement to the effect that the debtor could not indicate how he wished advance payments to be appropriated or that the creditor was under a statutory obligation to appropriate prepaid amounts on the day of receipt thereof and in a specific order. No notification by the debtor that he would be making a prepayment was required and the Act did not impose any penalty on the debtor as a result of making such prepayment.

3 2 Usury Act 68 of 1973

Section 6 of the Usury Act dealt with "Reduction of debt in instalments in the event of advanced payment, refinancing, or consolidation" and provided as follows:

> "6(1) Where the principal debt and finance charges owing by a borrower or a credit receiver in connection with a money lending transaction or credit transaction concluded before the date of commencement of the Limitation and Disclosure of Finance Charges Act, 1980, have in terms of an agreement between himself and the moneylender or credit grantor concerned, to be paid in instalments over a period in the future and the finance charges form part of the said instalments, the borrower or credit receiver *shall at all times be entitled to pay any instalment before it is due*, and shall, if he pays all instalments still unpaid (not being the final instalment) in one amount, be entitled to a *reduction of every instalment not due* on the date upon which payment is thus effected, by an amount calculated at the rate of seven and one half percent per annum on such instalment in respect of the period by which the payment of the said instalment is advanced" (own emphasis).

Section 6 thus affirmed that the debtor was entitled to make a prepayment on a money-lending transaction or a credit transaction and that if he settled the debt in advance it would entitle him to reduction or amortisation also of instalments not yet due on the date that he made such advanced payment. However, section 6 did not contain any specific statement to the effect that the consumer could not indicate how he wished advance payments to be appropriated nor did it specify that the creditor was under an obligation to appropriate such prepayment in full on the day it was received and in a specific order. As with the Hire Purchase Act, no prior notification of the intention to prepay was required of the debtor and no penalty was imposed in respect of such prepayment.

3 3 Credit Agreements Act 75 of 1980

The position regarding payments in respect of credit agreements was dealt with in the Usury Act as set out in paragraph 3 2 above and hence the Credit Agreements Act did not make any reference to prepayments and the allocation thereof.

4 PREPAYMENTS IN TERMS OF THE NCA

4 1 Purpose and interpretation of NCA

Before embarking on an investigation of the provisions of the NCA relating to prepayment of credit agreement debt which is the focus of this contribution, it is important for purposes of contextualisation to have regard to the purposes of the Act as they inform the interpretative approach to be taken. This approach is mandated by section 2 which states that the NCA must be interpreted in a manner that gives effect to the purposes set out in section 3 (*Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 40). In terms of section 3 the purposes of the NCA are to "promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and *to protect consumers*" by, *inter alia*, promoting responsibility in the credit market through "encouraging responsible borrowing, avoidance of over-indebtedness and *fulfilment of financial obligations by consumers*" and "discouraging reckless credit granting by credit providers *and contractual default by consumers*" (s 3(c)(i) and (ii); own emphasis). From the aforesaid, it is clear that the Act requires its provisions to be interpreted purposively through the prism of the purposes set out in section 3 and, for purposes of this discussion, consonant with its avowed objective of discouraging default by credit consumers.

4 2 Section 126: Early payments and crediting of payments

Section 126 ("early payments and crediting of payments") which is located in Chapter 6 of the NCA ("Collection, Repayment, Surrender and Debt Enforcement") provides for the right of a consumer to effect prepayment of a credit agreement debt governed by the Act in the following terms:

> "(1) *At any time, without notice or penalty*, a consumer may *prepay* any amount owed to a credit provider under a credit agreement.
>
> (2) A credit provider *must* accept any payment under a credit agreement when it is tendered, even if that is *before the date on which the payment is due*.
>
> (3) A credit provider *must* credit each *payment* made under a credit agreement to the consumer *as of the date of receipt of the payment*, as follows:
>
> (a) Firstly, to satisfy any due or unpaid *interest charges*;
>
> (b) secondly, to satisfy any due or unpaid *fees or charges*; and
>
> (c) thirdly, to reduce the amount of the *principal debt*" (own emphasis).

Notably, the NCA does not provide a definition of the concept "prepayment" or "prepay" but it is clear from the general tenor of section 126 that a prepayment refers to a payment that is made in advance, that is, a payment made *before* a relevant instalment is due – hence the reference to "early payments" in the heading of the section. As such, a prepayment can cover only one instalment that is paid before its due date or it can cover a number of instalments that are paid in advance of their due dates, but does not include settlement and consequent termination of the credit agreement as envisaged by section 125 of the Act. In order to comprehend the exact meaning of section 126(3), it has to be read together with the definitions of principal debt, interest, fees and charges as they appear in the Act.

"Principal debt" is defined in section 1 as "the amount calculated in accordance with section 101(1)(a)". Section 101(1)(a) provides that the principal debt is

"the *amount deferred* in terms of the credit agreement *plus* the value of any item contemplated in section 102" (own emphasis).

However, the Act does not define the concept "deferred amount". Although regulations as subordinated legislation cannot generally be used to provide interpretation to concepts that the legislature has failed to define in the enabling Act (*Rossouw v Firstrand Bank Ltd* [2010] ZASCA 130), note should nevertheless be taken of Part A of Chapter 5 of the Regulations to the National Credit Act that is titled "Charges and Fees" and which is a clear attempt by the legislature to provide guidance on the interpretation of the matters mentioned therein. It refers in regulation 39(1) to the concept of "deferred amount" which is described to mean:

> "any amount payable in terms of a credit agreement the payment of which is deferred and upon which interest is calculated, or any fee, charge or increased price is payable by reason of the deferment; and
> (a) the deferred amount includes –
> (i) any obligation of the consumer that is deferred as per section 8(3) and section 8(4) of the Act . . ;
> (iii) the amounts referred to in section 101 (1)(b) to section 101(1)(g) inclusive;
> (iv) the amount referred to in section 102 (1)(b) to section 102(11)(f) [this reference is patently incorrect and should be to s 102(1)(f);
> (b) the deferred amount is *reduced* by any amount paid towards the settlement of the deferred amount, *or an amount credited* to the deferred amount, *at the time such payment is made*, or credit falls due" (own emphasis).

Insofar as fees and charges due under a credit agreement are concerned, section 102 of the Act is titled "fees or charges" and provides as follows:

> "(1) If a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or a lease, the credit provider may include *in the principal debt deferred* under the agreement any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement –
> (a) an initiation fee as contemplated in section 101(1)(b), if the consumer has been offered and declined the option of paying that fee separately;
> (b) the cost of an extended warranty agreement;
> (c) delivery, installation and initial fuelling charges;
> (d) connection fees, levies or charges;
> (e) taxes, licence or registration fees; or
> (f) subject to section 106, the premiums of any credit insurance payable in respect of that credit agreement" (own emphasis; see further s 102(2) regarding prohibitions with respect to the aforementioned charges and s 102(3) that deals with refunds or credits in the circumstances mentioned therein)."

Although central to a credit agreement governed by the NCA, the Act does not also define the concept of "interest". However, it deals pertinently with the concept of interest in sections 103 to 105 read with Chapter 5 of the Regulations to the NCA that is titled "Interest and fees" and Part B of Chapter 5 which deals in particular with the calculation of interest in regulation 41. In addition, regulation 42 lists the maximum interest rates prescribed by the NCA.

Given that section 126(3) specifically differentiates between the principal debt and interest as well as fees and charges (which in terms of section 101(1)(a) is included in the concept of principal debt) it appears that the reference to "principal debt" in section 126(3) should be narrowly construed to refer to the capital amount advanced exclusive of interest and fees and charges as listed in section 102.

4 3 Discussion

Section 126, itself, does not specify the rationale behind its enactment. The *Memorandum on the objects of the National Credit Bill* 2005 para 2.12 also does not provide any detail on prepayments or the rationale behind section 126(3) save to state that "the Bill allows for consumers to prepay any amount owing at any time". It is submitted that such rationale is not difficult to surmise: As alluded to in paragraph 2 above, creditors may be averse to prepayment of accounts as it inevitably leads to a reduction in the finance charges that they can earn on an agreement. The purpose of section 126(3) clearly is to protect consumers by giving consumers a "right" to effect prepayment and by preventing any delay by the credit provider in allocating prepayments (hence the stipulation that such allocation has to be done at the date of payment) and to contribute towards reduction of the principal debt. Notably, section 126(3) does not only apply to prepayments but to payments in general. The title of the section – "Early payments and crediting of payments" – suggests that two different aspects are dealt with in the section; namely, prepayments on the one hand; and crediting of payments on the other. At first glance it might appear that one would be able to regard the provisions of the section relating to prepayment as distinct from those pertaining to the allocation of (normal) payments in section 126(3). However, when one has regard to section 126(2) it becomes clear that the legislature uses the word "payment" in a broader sense in section 126 and that this broader notion of payment includes "prepayment" (early payment) – hence section 126(3) applies to prepayments as well. The effect of section 126(3) specifically with regard to prepayments is that it appears to mandate a predetermined payment allocation with the result that only such part of the prepayment that exceeds due or unpaid interest and due or unpaid fees or charges (as allocated in terms of section 126(3)(a) and (b)) will reduce the *principal debt*.

It is further clear that a prepayment as envisaged in section 126 can be made at *any time* during the course of a credit agreement and that the consumer is *not* obliged to give notice of such prepayment, although nothing prohibits a consumer to give such notice if he or she so desires. Notably, prepayment does not attract any penalty even though it would eventually impact negatively on the amount of finance charges that the credit provider can recover. The credit provider may also not refuse to accept such prepayment. Section 126(3) further obliges the credit provider to allocate any prepayment on the day that it is received and first to interest, then to fees and charges and finally to the principal debt.

The wording of section 123(6) is clearly peremptory and this peremptory nature is reinforced by regulation 39(1)(b) as alluded to above. There is no indication in section 126(3) itself that the credit provider is allowed to either (a) *not* credit the prepayment amount received from the consumer *as of the date of receipt* (that is, to credit it on a later date); or (b) to credit only a part of such payment; or (c) to *deviate* from the order of allocation set out in section 126(3)(a) to (c). Thus, if a consumer makes a prepayment that is in excess of an instalment due the credit provider will debit the whole amount on the date that it is received in the order as stipulated in section 126(3).

What section 126(3) achieves therefore is to provide a statutory methodology for the allocation of prepayments received and to mandate the credit provider to effect such allocation at a specific time, namely, at the date that the prepayments

are received, and in a specific order. It does not refer to the issue of default at all and does not make any mention of allocating prepayments that are in excess of a specific monthly instalment in such a manner as to avoid future default by the consumer. It also does not expressly provide the consumer with any opportunity to give direction as to how the prepaid amount should be allocated. As a matter of fact, section 126(3) is completely silent on whether the consumer has any say in how a prepayment is allocated. Credit providers regard themselves as bound by the peremptory wording of section 126(3) and, in practice, should they receive a prepayment from a consumer, it appears that they generally abide by the allocation that the Act mandates. In fact, from a survey of instalment agreements of the major banks in South Africa it appears that credit providers insert standard clauses regarding allocation of prepayments that mirror the exact wording of section 126(3).

The mandatory provisions of section 126(3), therefore, have the (probably unintended) consequence that a credit provider cannot spread any prepayment made by the consumer by only crediting the amounts of interest, fees, charges and the part of the principal debt owing at that specific stage and keeping the balance of any excess prepayment in reserve for purposes of allocating it to subsequent instalments on the dates that they become due. This means that a prepayment made by the consumer cannot be utilised for purposes of preventing future default with the result that a prepayment, if large enough, essentially serves to decrease the principal debt, thus leading to a "restructuring" of future payments to be made but not to prevent future default. Therefore, even though the amount outstanding in terms of the agreement becomes smaller leading to decreased instalments for the remainder of the agreement, the effect is that the consumer will still need to pay these restructured future instalments, albeit in a lesser amount than originally agreed upon, as they become due. Accordingly, should the consumer not pay the "restructured " instalment the next month when the due date for such payment arrives, the consumer will be in default and he will not be shielded from such default as a result of the prepayment that he had previously made.

Thus, from the perspective of a consumer who was mistakenly of the view that making a prepayment on his credit agreement with the intention that the said prepayment would keep him out of default in respect of one or more future instalments, section 126(3) obstructs any such result.

5 A MORE BALANCED APPROACH?

It is trite that South Africa has a large number of vulnerable consumers of which a significant portion is either not fully literate or at least not financially literate. It is possible that some of these consumers, especially vulnerable ones, may find themselves in a situation where, being unaware of the contents and implications of section 126(3), they effect a prepayment on a credit agreement such as a retail clothing account or vehicle finance or even a mortgage agreement, thinking that it would be spread out to cover future instalments – only to find that such prepayment does not protect them against future default and its dreaded consequences which may include enforcement and, in extreme situations, even the loss of their home.

Therefore, one may ask whether, but for the provisions of section 126, there are any other provisions in the NCA that deal specifically with prepayments and could possibly facilitate an interpretation of section 126(3) that would allow

prepayments to be allocated *ad hoc* on an instalment-by-instalment basis as per the instructions of the consumer but still in accordance with the methodology set out in section 126(3).

Unfortunately, a further interrogation of the NCA reveals that, apart from section 126, the Act does not deal with the issue of prepayments any further. In addition to the Act dealing very sparsely with the notion of prepayment, there is also a dearth of other authority on section 126(3). The only reference in case law to the subsection is in *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA), a judgment that dealt with the statutory *in duplum* rule contained in section 103(5), where the court stated:

> "[41] On behalf of First Rand reliance was also placed on s 126(3). It was submitted that this section makes no difference between payment made during the time of default and the time when the consumer is not in default. Thus, so the argument proceeded, the credit provider may again charge interest until the double is reached . . .
>
> [43] On behalf of ABSA s 126(3) was invoked and it was argued that payments made during default would prevent the aggregate amount of the costs of credit from reaching the unpaid balance of the principal debt with the result that arrear interest and other charges could accumulate from time to time . . .
>
> [48] Section 126(3) provides for the appropriation of payments: This provision takes the matter no further. While it is correct that this section makes no distinction between payments before and after default it cannot affect the question whether a particular charge has 'accrued'."

It is clear that the above statements in *Nedbank* regarding section 126(3) were made in the context of payments for purposes of applying the *in duplum* rule and that the focus was *not* on the interpretation of section 126(3) in the context of prepayments *per se*. Nothing said in *Nedbank* takes the question central to this contribution any further, save to note that it was pointed out that section 126(3) does not distinguish between payments made during default and payments made at a time when a consumer is not in default.

However, it may be asked whether the legislature actually intended to change the common law position which allowed a debtor to specify how payment should occur by enacting section 126(3) of the NCA.

As explained by Malan JA in *Nedbank* as referred to above, where he was considering whether section 103(5) of the NCA changed the common law *in duplum* rule:

> "The rule of interpretation is that a statutory provision should not be interpreted so as to alter the common law more than is necessary unless the intention to do so is clearly reflected in the enactment, whether expressly or by necessary implication: '[I]it is a sound rule to construe a statute in conformity with the common law, save where and insofar as the statute itself evidences a plain intention on the part of the Legislature to alter the common law. In the latter case the presumption is that the Legislature did not intend to modify the common law to any extent greater than is provided in express terms or is a necessary inference from the provisions of the enactment'"(para 38).

Malan JA then stated that section 103(5) seemed to signify such an intention as it provided for the introductory words "[d]espite any provision in the common law or a credit agreement to the contrary". Notably, section 126 (unlike section 103(5) as referred to in *Nedbank*) contains no introductory wording stating that the section or subsection (3) thereof applies "despite any provision in the common

law or a credit agreement to the contrary". Thus, the section contains no express indication that it seeks to change the common law position regarding the consumer's right to specify how payments should be allocated.

The next step would be to consider whether section 126(3) seeks to change the common law "by implication". It is submitted in this regard that the answer should also be in the negative as the section does not appear to tamper with the consumer's right to specify the allocation of payments (that is, to one or more instalments) that he makes towards a debt. Rather it appears that the intention of the legislature was merely to place an obligation on a creditor to deal with payments that he receives in a certain way in order to avoid that a delay in allocating such payments upon the date of their receipt and failure to allocate them in the order set out in the section, would prejudice the consumer who makes a prepayment. Thus, the credit provider cannot, for example, on own initiative hold back any part of the prepayment and appropriate it contrary to section 126(3) in order to garner some benefit for himself such as facilitating the levying of further interest or fees and charges.

It is submitted therefore that it appears that the debtor's common law right to generally direct to which debt (instalment) payments made by him should be allocated has not been changed by section 126(3). One could thus argue that the "default" position in terms of the common law would accommodate an interpretation that, because the NCA only stipulates the obligations of the credit provider on receipt of a prepayment and does not mention any rights of the consumer in this regard, the consumer may rely on his common law right to indicate which debt is to be paid and direct a different allocation of a prepayment that exceeds a single instalment, which trumps the provisions of section 126(3) in the sense that the whole prepayment is not allocated on the date that it is received by the credit provider but spread over future instalments.

However, should this argument not be upheld, the alternative question would be whether the parties can by agreement insert a clause into a credit agreement stipulating that unless the consumer specifies in writing how he wishes any prepayment to be allocated, such prepayment will be allocated in terms of section 126(3).

In order to determine whether such a clause would be valid regard must be had to section 90 of the NCA which prohibits unlawful provisions in a credit agreement with the effect that any such provision would be void. Notably, section 90 does not make any specific mention that a clause in a credit agreement whereby the consumer may indicate how he wishes prepaid amounts to be allocated constitutes an unlawful provision. It must therefore be considered whether such a clause would not be regarded as unlawful by virtue of some of the more general provisions contained in section 90, *inter alia*

(a) section 90(2)(a) that prohibits a provision that deceives the purposes or policies of the Act;

(b) section 90(2)(b) that prohibits a provision that directly or indirectly purports to waive or deprive the consumer of a right as set out in the Act;

(c) section 90(2)(b)(iii) that prohibits a provision that sets aside or overrides the effect of the Act;

(d) section 90(2)(b)(iv) that prohibits a provision that authorises the credit provider to fail to do anything that is prescribed by the Act; or

(e) section 90(2)(c) that prohibits a provision that purports to waive any common law rights that may be applicable to the agreement and have been prescribed in terms of section 90(5).

It is submitted that a provision in a credit agreement that would allow the consumer to specify that a prepayment be allocated in such a manner as to ensure that future default is prevented would not be in contravention of any of these other provisions in section 90 either – as long as the credit provider apportions the amount first to interest, then to charges and fees and then to the capital part of the instalment due at that stage, retaining the balance to be allocated to future instalments that may become due.

6 FINAL REMARKS

Section 126(3) clearly has a Janus-faced quality: on the one hand it protects consumers by mandating credit providers to allocate any prepayment on the date it is received, in a specific order, to reduce the outstanding principal debt. On the other hand it has the effect that where a consumer did not intend the part of the prepayment that is in excess of a single instalment to be allocated immediately but was under the mistaken impression that it would be spread out to cover future instalments also, such spreading will not occur – meaning that the consumer will be in default if he fails to pay the next instalment when it is due. Such a consumer will indeed be in for a big surprise if the credit provider accepts such prepayment but advises him the very next month that he is in default under the agreement.

As pointed out in paragraph 2 above, the NCA mandates a purposive approach to its interpretation. It can further be argued that an interpretation in terms of which a consumer's common law right to specify which debt is to be paid means that the consumer can indicate which part of a prepayment has to be allocated to payment of a specific instalment under a credit agreement, would be aligned with the purpose of the Act to discourage contractual default by consumers. However, whilst it appears that section 126(3) was aimed at protecting the consumer rather than removing his common law right to allocate payments. It would appear that the consumer's common law right to allocate payments has been retained or that it is at least possible for the parties to agree that the credit provider will spread prepayments as allocated by the consumer, the practical reality is that many credit providers will not be prepared to enter into such an arrangement. They will probably argue that they do not wish to act as trustee of the consumer's money or that their systems are not geared to retain and spread prepayments to avoid future default. Their argument would most likely be that a consumer who wishes a prepayment to be spread out to prevent future default should then rather make payments of the instalments as they become due instead of depositing one large prepayment into the relevant credit agreement account. It is doubtful whether a credit provider such as a bank with which the consumer has a current account will allow the consumer to keep the excess money in his current account and leave it up to the credit provider to "redirect" amounts due in respect of future instalments as and when they become due by using the provisions of section 124 of the Act that pertinently deals with set-off.

However, the problem is that in practice many consumers may still, unaware of the implications of section 126(3), make prepayments in excess of a single instalment thinking it would shield them against future default. Accordingly it is

suggested that a more balanced approach that would be better aligned with the purpose of the Act to prevent contractual default would be for the legislature to step in and amend the provisions of section 126(3) to avoid the harsh consequences described in this contribution. It is suggested that the section should be amended by providing that a consumer who wishes to make a prepayment in excess of a single future instalment should notify the credit provider seven days in advance and that the credit provider should then on receipt of such notification draw the consumer's attention to fact that the whole prepayment will immediately be apportioned in which event it would then be up to the consumer to decide to prepay only the instalment that would become due at the end of that month and to keep the excess amount to pay other subsequent instalments individually at a later stage. Alternatively, the legislature can add a proviso to section 126(3) to the effect that where a consumer makes a prepayment that exceeds the interest, fees, charges and capital amount of the payment that is due at the time that such payment is made, the consumer and credit provider may agree in writing that the balance of such amount may be spread out and used for paying subsequent instalments – thus preventing future default. It would then be up to the parties to agree on the practicalities of facilitating their arrangement. Such an arrangement would benefit the consumer and also be favourable to the credit provider as it would allow him to earn more finance charges.

CORLIA VAN HEERDEN
CARIKA FRITZ
University of Pretoria

WHAT TO DO WITH BITCOIN AND BLOCKCHAIN?

OPSOMMING

Wat om te maak omtrent Bitcoin en blokketting?

Hierdie nota toon aan hoe blokkettingtegnologie en kriptogeldeenhede soos Bitcoin konsternasie veroorsaak vir regerings wêreldwyd oor hoe om hierdie ontwikkelings regtens te hanteer. Tans skep dit probleme om dit sakeregtelik te hanteer, te besluit of dit "n wettige betaalmiddel is of kan wees en hoe om dit te belas. Regtens is dit took problematies vir die internasionale privaatreg en vir jurisdiksiereëls. Die aantekening toon aan hoe kriptogeldeenhede aanvaarding begin geniet by konvensionele finansiële dienste. Laastens word die moontlikhede wat blokkettingtegnologie bied om die ou probleem van digitale vragbriewe op te los, bespreek.

1 INTRODUCTION

It is often said that there is nothing new under the sun. Nevertheless, now and again something truly unique appears, also in law, which causes challenges regarding how the law should deal with such new phenomenon. When Bitcoin and blockchain were introduced in 2008 (Nakamoto "Bitcoin: A peer-to-peer electronic cash system" (March 2009), accessed at https://bitcoin.org/bitcoin.pdf (1 November 2019); and Omlor "Digitization of money and currency under German and EU law" 2018 *TSAR* 614ff) it took a while before commerce started to notice and for the idea of cryptocurrencies to evolve (Fredrick "Down the rabbit hole: Cryptocurrency and