

**THE SHIFTING OF MORAL HAZARD IN CONSUMER DEBT: DOES THE
NATIONAL CREDIT AMENDMENT ACT 19 OF 2014 TIP THE SCALES IN
FAVOUR OF THE DEBTOR?**

By

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ABSTRACT

In this dissertation I discuss a selection of the amendments to the National Credit Act 34 of 2005 by the National Credit Amendment Act 19 of 2014. The purpose of this is to evaluate whether the amendments accord with the purpose of the National Credit Act. More specifically, whether the amendments are in line with promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers in section 3(1) (d) of the National Credit Act. This is done under to answer the question of whether the amendments favour the consumer over the credit provider. Where the amendment are overall consumer oriented, the effect of this would shift the moral hazard of consumer debt to the consumer and thereby create an imbalance in the credit market. To answer this question I look at the amendments of sections 86(2), (11), 89(5) (c), 129(3) & (4), 130 and the introduction of sections 71A and 129(5),(6) and (7). In the course of my discussion I refer to various case law which prompted the amendments and or, which influenced the interpretation of the provisions which were amended. I also take into consideration the views and opinions of legal scholars who have written extensively on the National Credit Act, often in light of judgements handed down by our courts. My discussion concludes with the assertion that the amendments I have chosen, being those which dictate the rights and responsibilities of credit providers and consumers, have the effect of favouring the consumer over the credit provider, by either burdening the credit provider with more duties when enforcing their agreements with consumers, or, by allowing the consumer greater leeway despite them breaching of their agreements.

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INTRODUCTION

Moral hazard can be defined as “the risk that an individual or organization will act irresponsibly or recklessly if protected or exempt from the consequences of an action”.¹

Prior the introduction of the National Credit Act² (“the NCA”), the Usury Act,³ which was drastically amended in 1980, and the Credit Agreements Act⁴ regulated a large part of the South African credit industry for more than 25 years.⁵

Prior to the NCA, moral hazard generally lay with financial institutions and credit providers, as the Usury Act and Credit Agreements Act only afforded consumers protection in relation to credit agreements valued to a maximum of R100 000⁶ and R500 000⁷ respectively. This meant that credit providers could grant loans, in some instances for amounts which the consumer could not afford, and the risks associated with defaulting on these loans were borne primarily by the consumer. The corresponding consequence was that the moral hazard associated with consumer credit lay with the credit provider. The introduction of the NCA could be seen as an attempt to re-align this imbalance.

The purpose of the NCA⁸ is 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” -

- (a) promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by customers;
- (b) discouraging reckless credit granting by credit providers and contractual default by consumers;

¹ <http://www.dictionary.com/browse/moral-hazard> (accessed 05 July 2016).

² Act 34 of 2005.

³ Act 73 of 1968.

⁴ Act 75 of 1980.

⁵ Otto and Otto *The National Credit Act explained* (2015) 4.

⁶ S 15 of Act 73 of 1968.

⁷ Otto and Otto *The National Credit Act explained* (2015) 6.

⁸ See s 3 of the NCA.

- (c) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
- (d) improving consumer credit information and reporting and regulation of credit bureaux;
- (e) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations; and
- (f) Providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

In order to achieve the abovementioned goals, the NCA contains various provisions which, amongst others, regulate what constitutes reckless credit and the accompanying prohibition against credit providers engaging in reckless lending practices,⁹ debt relief measures where consumers find themselves over-indebted (such as debt review),¹⁰ and debt enforcement procedures where consumers have not complied with their obligations.¹¹

Many of these measures and procedures have been scrutinised and applied by the courts in various ways since 2006 when the NCA first became operational. A number of years later, the legislature saw it fit to amend the NCA and its various provisions, presumably to bring it more in line with some of the objectives herein mentioned and also as a result of judicial criticism in various judgments. For example, in *FirstRand Bank v Seyffert*¹² Willis J stated the following:

“I share the general frustration of my judicial colleagues around the country at the lack of clarity that features at least in the parts of the NCA with which one is concerned in cases of the kind now before me. A court is forced to go round and round loops from subsection to subsection, much like a dog chasing its tail. Indeed, the language used in the Act from time to time

⁹ See S80 and S81 of the NCA.

¹⁰ See S86 of the NCA.

¹¹ See S129 and S130 of the NCA.

¹² 2010 (6) SA (GSJ).

suggests that foreign draftspersons rather than South African lawyers had a strong hand in preparing the text”¹³

The Judge went on to state:

“Nevertheless, it is clear from reading s 3 of the NCA, which sets out the purposes of the Act, that it pursues varied objectives which must be held in balance. Certainly, the NCA is designed to protect consumers but it was not intended to make of South Africa a ‘debtors’ paradise’. Indeed a ‘debtors’ paradise’ will not last for long. Very soon, credit would not be available to ordinary people.”¹⁴

The National Credit Amendment Act¹⁵ (“the NCA”) was assented to in May 2014 and came into operation in March 2015. The NCA has a number of provisions which at first glance seem to shift the moral hazard of consumer credit further into the hands of the consumer and hence leaning more toward the “debtor’s paradise” which Willis J alluded to in the above-quoted passage.

The question is thus whether the NCA, as amended, allows for a consumer to take greater risks because they are assured of certain protection measures and indulgences due to the operation of the Act, at the undue expense of the credit provider. This research problem will be addressed in four chapters. In chapter 1 I will give a brief overview of the NCA’s field of application as well as of what the Act seeks to address (its aims and objectives) and how this relates and applies to credit agreements along with the various roles and responsibilities of both consumers and credit providers.

In chapter 2 I will investigate where the moral hazard lay at the inception of the NCA and whether its introduction in 2007 brought about a different balance within the consumer credit environment. In doing this I will consider case law that illustrate how the courts applied the debt relief measures prior to the NCA and whether the courts’ application and interpretation of the Act were in line with the objectives of the NCA.

In chapter 3 I will critically scrutinise some of the applicable amendments brought about under the auspices of the NCA to determine whether these adaptations

¹³ 2010 (6) SA (GSJ) at para 10.

¹⁴ 2010 (6) SA (GSJ) at para 11.

¹⁵ Act 19 of 2014.

address the issues which arose through the application of the NCA prior to these amendments. The purpose of this chapter will be to evaluate whether the amendments align with the objectives as laid out in section 3 of the NCA. I will appraise the amended sections as well as the various new sections introduced by the NCA. In chapter 4 I will draw conclusions and make proposals in view of the amendments and their possible impact on the debtor and creditor relationship.

In this discussion the focus will be only on those amendments that implicate the consumer's ability to incur debt and the creditor's ability to enforce and terminate the credit agreement – arguably the two sides of the coin that influence moral hazard the most. In this way one can judge the effects of the amendments on consumer rights and responsibilities and determine how these may or may not be skewed too heavily in favour of the consumer at the expense of the credit provider. The ultimate ideal is that consumer credit law should be carefully designed in a manner that no moral hazard is created in either direction (neither towards the consumer nor the credit provider). At this point in time when the NCA has recently undergone major amendments, it is therefore an opportune time to take stock in this regard.

CHAPTER 1: GENERAL OVERVIEW OF THE NATIONAL CREDIT ACT

1.1 Application of the NCA

The NCA applies to transactions between consumers¹⁶ and credit providers¹⁷ dealing at arm's length, where the transaction is concluded or has effect within the Republic,¹⁸ and where the transaction is a credit agreement which forms the basis of the relationship between the parties.

An agreement is a credit agreement for the purposes of the Act where it is a credit facility, credit transaction, credit guarantee or a combination of the aforementioned.¹⁹ These transactions can come in various forms and sub-categories and as such the NCA has endeavoured to specify and categorise them for clarity.²⁰ As such, a credit facility is categorised as an agreement irrespective of form where –

- (a) a credit provider undertakes-

¹⁶ S 1 of the NCA defines a consumer as follows:

- “ ‘consumer, in respect of a credit agreement to which this Act applies, means-
- (a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
 - (b) the party to whom money is paid, or credit granted, under a pawn transaction;
 - (c) the party to whom credit is granted under a credit facility;
 - (d) the mortgagor under a mortgage agreement;
 - (e) the borrower under a secured loan;
 - (f) the lessee under a lease;
 - (g) the guarantor under a credit guarantee; or
 - (h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement”.

¹⁷ S 1 of the NCA defines a credit provider as follows:

- “ ‘credit provider’, in respect of a credit agreement to which this Act applies, means-
- (a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
 - (b) the party who advances money or credit under a pawn transaction;
 - (c) the party who extends credit under a credit facility;
 - (d) the mortgagee under a mortgage agreement;
 - (e) the lender under a secured loan;
 - (f) the lessor under a lease;
 - (g) the party to whom an assurance or promise is made under a credit guarantee;
 - (h) the party who advances money or credit to another under any other credit agreement; or
 - (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into”.

¹⁸ S 4(1) of the NCA.

¹⁹ S 8(1) of the NCA.

²⁰ Otto and Otto *The National Credit Act explained* (2015) 24-25.

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to-

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of-

(i) Any amount deferred as contemplated in paragraph (a) (ii) (aa); or

(ii) Any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement.²¹

A credit transaction constitutes one of eight types of transaction irrespective of form, that being

- a) a pawn transaction;²²
- b) discount transaction;²³
- c) incidental credit agreement, subject to section 5(2);²⁴
- d) instalment agreement;²⁵

²¹ S 8(3) of Act 34 of 2005

²² S 1 of the NCA defines this an agreement as one, irrespective of its form, in terms of which one party advances money or grants credit to another, and at the time of doing so, takes possession of goods as security for the money advanced or credit granted; and either- the estimated resale value of the goods exceeds the value of the money provided or the credit granted, or a charge, fee or interest is imposed in respect of the agreement, or in respect of the amount loaned or the credit granted; and the party that advanced the money or granted the credit is entitled on expiry of a defined period to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations under the agreement.

²³ S 1 of Act 34 of 2005, defines this is an agreement as one, irrespective of its form, in terms of which goods or services are to be provided to a consumer over a period of time; and more than one price is quoted for the goods or service, the lower price being applicable if the account is paid on or before a determined date, and a higher price or prices being applicable if the price is paid after that date, or is paid periodically during the period.

²⁴ This is where a consumer has been in default for a period of 20 business days and the supplier of the goods or services have levied a fee or interest in relation to that account; or higher quoted price for the goods becomes applicable. (J Otto, 'The National Credit Act explained', 2006, 16-17)

²⁵ S 1 of Act 34 of 2005 defines this is an agreement as one involving a sale of movable property in terms of which all or part of the price is deferred and is to be paid by periodic payments; possession and use of the property is transferred to the consumer and where ownership of the property either passes to the consumer only when the agreement is fully complied with; or passes to the consumer immediately, subject to a right of the credit provider to re-possess the property if the consumer fails to

- e) a mortgage agreement²⁶ or secured loan;²⁷
- f) a lease;²⁸ or
- g) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of the agreement or the amount that has been deferred.

Thus one can see that there is a wide range of transactions which the NCA applies to and as a consequence thereof, there are many instances where consumers and credit providers will interact and which may lead to litigation and the need to balance the interests of both parties to these transactions. These credit agreements feature in everyday life and thus have a direct effect on almost all South African citizens.

1.2 Exclusions from the Act

The NCA does not apply to all credit agreements, as mentioned above, as there are certain credit agreements which are exempted from the operation of the Act. The NCA thus does not apply to credit agreements in terms of which the consumer is a juristic person with an annual turnover or asset value greater than R1 million; or where the juristic person is the state or an organ of state.²⁹ The Act furthermore does not apply to large agreements³⁰ with juristic persons; where the credit provider is the South African Reserve Bank; or where the credit provider is outside of the Republic.³¹

satisfy all of the consumer's financial obligations under the agreement; and interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.

²⁶ S 1 of the NCA (as amended by s 1 of Act 19 of 2004) defines this as an agreement where a mortgage bond is registered by the registrar of Deeds over immovable property that serves as continuing covering security for a mortgage agreement.

²⁷ S 1 of the NCA defines this as an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person advances money or grants credit to another, and retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement;

²⁸ S 1 of the NCA defines a lease as an agreement wherein temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use such property is granted to or at the direction of the consumer against payment of a predetermined amount during the life of that agreement, wherein interest and fees may be charged for non-payment and where ownership may pass to the consumer at the end of the term.

²⁹ S 4(1)(a) of the NCA.

³⁰ Agreements larger than R250 000.00.

³¹ S4(1)(c) and (d) of the NCA

As stated earlier, the NCA only applies to agreements where the parties are contracting at arm's length.³² The NCA states that parties will not be dealing at arm's length where

- a) a shareholder loan or other credit agreement is between a juristic person, as customer, and a person controlling the juristic person, as the credit provider;³³
- b) a loan to a shareholder or other credit agreement between a juristic person as credit provider and a person controlling the juristic person as customer;³⁴
- c) a credit agreement between natural persons where there is a familial relationship and there is an element of dependence between the persons or any other arrangement where each party is not independent and as a result does not strive to obtain the utmost advantage from that transaction.³⁵

Section 8(2) of the NCA explicitly excludes certain agreements from constituting credit agreements. These are insurance policies, leases of immovable property and stokvels.³⁶

From the above one can conclude that the NCA only applies to certain credit agreements and also only to creditors and customers dealing at arm's length with each other. The question then becomes: what rights and duties are applicable between the consumer and credit provider where they conclude one of the aforementioned credit agreements which fall within the ambit of the NCA?

1.3 Rights and Duties of Consumers and Credit Providers

Consumers have the right to apply for credit and credit providers have the corresponding right to refuse to grant such credit.³⁷ The credit provider's refusal may however not unfairly discriminate, directly or indirectly, against any person based on any of the grounds as set out in section 9(3) of the Constitution of the Republic of

³² Supra.

³³ S 4(2)(b)(i) of the NCA.

³⁴ S 4(2)(b)(ii) of the NCA.

³⁵ S 4(2)(b)(iii) of the NCA.

³⁶ A Stokvel is defined in s 1 of the NCA as a formal or informal rotating financial scheme with entertainment, social or economic functions, which consists of two or more persons in a voluntary association, each of whom has pledged mutual support to the others towards the attainment of specific objectives; establishes a continuous pool of capital by raising funds by means of the grants credit to and on behalf of members; provides for members to share in profits from, and to nominate management of, the scheme; and relies on self-imposed regulation to protect the interest of its members.

³⁷ S 60 of the NCA.

South Africa, 1996.³⁸ In granting credit, the credit provider has a duty not to enter into an agreement with a consumer that would amount to reckless credit and which would thus have the effect of rendering the consumer over-indebted.³⁹ Should a consumer find himself over-indebted⁴⁰ he may apply for debt review in terms of section 86 of the NCA to have their debt repayments restructured, thereby giving him a second chance.

Credit providers have a host of duties which include the duties to register as a credit provider;⁴¹ to conduct credit assessments of credit applicants;⁴² to furnish the consumer with a pre-agreement statement and quotation prior to entering into the agreement;⁴³ and to protect the confidentiality of the information pertaining to the consumer that it receives and or retains.⁴⁴

From the above it can be seen that the NCA regulates nearly every part of the credit environment, from the types of agreements, to the relationship between the contracting parties. Thus amendments to the NCA will affect almost all credit agreements and thereby potentially altering the contractual relationship between credit providers and consumers. What will become apparent from the discussion of the courts' application of the NCA to follow, is that the balancing of these rights and duties is what lies at the core of the NCA and ultimately will assist in evaluating whether the amendments to the act achieve the purpose of balancing these interests.

³⁸ S 61 of the NCA.

³⁹ S 80(1) of the NCA.

⁴⁰ According to s 79(1) of the NCA, a consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy, in a timely manner, all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's financial means, prospects and obligations; and probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

⁴¹ S 40(1) of the NCA.

⁴² S 81(2) of the NCA.

⁴³ S 92 of the NCA.

⁴⁴ S 68 of the NCA.

Chapter 2: CERTAIN CONTROVERIAL SECTIONS IN THE NATIONAL CREDIT ACT

2.1 General

Section 2(1) of the NCA makes it clear that when interpreting the provisions of the NCA, it must be done in a manner which gives effect to the purposes set out in section 3. This dissertation looks at whether or not the NCA will have the effect of promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers as set out in section 3(d) of the NCA.

When one considers the nature of credit transactions, it appears at first glance that the credit provider holds all the power. The consumer approaches the credit provider with open hands requesting credit, whereas the credit provider can decide whether or not to grant the request. Generally, the credit provider will also determine the terms under which the moneys must be repaid (for instance the payment of interest). However, once the agreement has been concluded and the consumer has the cash in hand, the scales seem to equalise, or at least that is what the NCA apparently aims to achieve. One of the ways in which this balancing is facilitated is by affording the consumer a defined opportunity to apply for debt review instead of adhering to the contractual demands of the credit provider.

When a consumer finds himself over-indebted,⁴⁵ he may apply for debt review under section 86(1) of the NCA in order for him to be declared as formally over-indebted. The consumer does this by making an application to a debt counsellor who must, in consultation with the credit providers, make a determination whether or not the consumer is over-indebted.⁴⁶ If the debt counsellor finds that the consumer is over-indebted, he may make a proposal to the Magistrates' Court, based on which proposal the court may order that one or more of the agreements is declared as reckless credit or that the debt should be re-arranged.⁴⁷ At first glance debt review seems to favour the consumer, as the restructuring process gives them "breathing room" in relation to

⁴⁵ See fn 41 for the definition.

⁴⁶ S 86(6) and (7) of the NCA.

⁴⁷ A consumer's obligations can be re-arranged by extending the period of the agreement and reducing the amount of each payment due accordingly; postponing during a specified period the dates on which payments are due under the agreement; extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6: see s 86(7)(c)(ii) of the NCA.

their obligations, while usually the credit provider would have to wait longer than originally agreed upon before obtaining repayment of the loan. The advantage that the consumer gets is particularly evident in the rule that the credit provider cannot terminate the review process if the consumer is not in default with their credit agreement.⁴⁸

There are caveats to the debt review process, however, as the NCA states that an application for debt review will not apply to a particular agreement if the credit provider under that agreement has taken steps to enforce the agreement in terms of section 129 of the NCA,⁴⁹ provided that the consumer is in default. If the consumer is in default and has applied for debt review, a credit provider may terminate the debt review and continue to enforce their credit agreement in terms of the provisions of the Act provided that at least 60 business days have passed since the consumer applied for debt review.⁵⁰ However, if the credit provider has given notice to terminate the debt review in terms of section 86(10), the Magistrates' Court hearing the review application may make an order that the debt review resume on conditions that the court considers to be just in the circumstances.⁵¹

Therefore, there is an attempt on the part of the legislature to even out the playing field when it comes to debt review in that a consumer is allowed the chance to re-arrange his credit obligations, but when he is in default the credit provider may terminate the process after a specified period and hence proceed to enforce the agreement.

It is within this general scheme of the Act, which deals with debt enforcement and debt review, that the courts have been tasked with the difficult task of interpreting various provisions in the NCA. These provisions have proved to be controversial largely due to drafting problems, but also due to the fact that interpreting these provisions often impacted (and still impacts) the ambition of finding the correct balance between

⁴⁸ S 86(10).

⁴⁹ S 86(2) of the NCA. S 129(1) states that, if the 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 agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and subject to section 130(2), may not commence any legal proceedings to enforce the agreement before first providing notice to the consumer or in section 86(10), as the case may be; and meeting any further requirements set out in section 130.

⁵⁰ S 86(10) of the NCA.

⁵¹ S 86(11) of the NCA.

consumers and credit providers. In the sections that follow, several of these provisions are discussed with reference to the interpretational difficulties that arose before the courts and in literature. The purpose is to illustrate how these provisions, and particularly their interpretation, impact on the location of moral hazard in the consumer credit market. This discussion will also lay the foundation for the discussion of the Amendment Act that follows in the subsequent chapter.

2.2 Application of the NCA by the Courts

2.2.1 Interpretation and application of section 86

As stated above, prior to the Amendment Act, an application for debt review was predicated on the consumer not having received a section 129(1) notice from a credit provider in terms of section 86(2). Unsurprisingly, this posed a host of problems for consumers who only became aware of the ability to apply for debt review once the notice was received.⁵² This had the effect that they could apply for debt review in terms of all of their other credit agreements, but in relation to the one for which they received the notice, debt review was not an option.

The conundrum was: how can the sending of a section 129(1) notice preclude a consumer from applying for debt review, when a section 129 notice expressly states that the matter may be referred to a debt counsellor?⁵³

Otto⁵⁴ restates the question as “whether a consumer may approach a debt counsellor for a debt review” once they have received a s129 (1)(a) notice. He goes on to state that the answer is not as simple as it may seem, as the notice makes no mention of debt review at all. This is true, as the notice merely states that the credit provider must notify the consumer that they may refer the agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud. Otto describes the role of the debt counsellor at this stage as one where the counsellor acts as a mediator to “facilitate a

⁵² Supra fn 48

⁵³ *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) para 7, where the court quotes Boraine and Renke as follows: “[t]o interpret s86(2) to read that the delivery of the s 129(1)(a) notice to the consumer means that the credit provider has proceeded to take steps to enforce the agreement (with the effect that no application for debt review may be made) would be nonsensical as it is proposed in the s 129(1)(a) notice that the consumer refer the matter to a debt counsellor.” See further A Boraine & S Renke “Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 (Part 2)” (2008) 41 *De Jure* 1 at 9 fn186.

⁵⁴ JM Otto “Over-indebtedness and Applications for Debt Review in Terms of the National Credit Act: Consumers Beware! *Firstrand Bank Ltd v Olivier*” (2009) 21 *SA Merc LJ* 272 at 276.

friendly rearrangement of payments, or an extension thereof”.⁵⁵ “A complicating factor”, as Otto states, is that section 86(2) prohibits a consumer from applying for debt review in relation to an agreement where the credit provider has taken steps to enforce that agreement in terms of section 129. Otto argues that upon receipt of the section 129 notice by the credit provider, debt review is stayed.⁵⁶

Otto’s view, namely that debt review is stayed once the consumer’s attention has been drawn to their default by the credit provider in terms of the section 129(1)(a) notice, is challenged by Boraine and Renke. The latter authors argue that where section 86(2) makes reference to the steps contemplated in section 129, that this means that it applies to the whole of section 129 and “by incorporation 130”. They go on to argue that to interpret section 86 (2) to mean that a credit provider has taken steps to enforce the agreement by merely sending a s129(1)(a) notice, would be “nonsensical” as specific reference is made to referral of the agreement to a debt counsellor. They submit that the debt review is only stayed once summons has been issued.⁵⁷

Otto subsequently agreed with the submissions of Boraine and Renke, stating that their interpretation makes practical sense.⁵⁸

The above mentioned question was also briefly discussed by Vah Heeden and Otto, who state that “it may be argued that the steps mentioned in s129 are not steps to enforce the agreement, but are merely steps required before debt enforcement”.⁵⁹ As seen from the above, authors have debated this question with differing views. The courts too were faced with this question and also came to different viewpoints, as explained in the following discussion of case law.

⁵⁵ JM Otto “Over-indebtedness and Applications for Debt Review in Terms of the National Credit Act: Consumers Beware! *Firststrand Bank Ltd v Olivier*” (2009) 21 *SA Merc LJ* 272 at 276.

⁵⁶ JM Otto *The National Credit Act Explained* (2006) 85 fn25.

⁵⁷ A Boraine & S Renke “Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 (Part 2)” (2008) 41 *De Jure* 1 at 9 fn186.

⁵⁸ JM Otto “Over-indebtedness and Applications for Debt Review in Terms of the National Credit Act: Consumers Beware! *Firststrand Bank Ltd v Olivier*” (2009) 21 *SA Merc LJ* 272 at 276.

⁵⁹ CM van Heerden & JM Otto “Debt Enforcement in terms of the National Credit Act” 2007 *TSAR* 655 at 667.

BMW Financial Services (SA) (Pty) Ltd v Mudaly

Wallis J in the matter of *BMW Financial Services (SA) (Pty) Ltd v Mudaly*⁶⁰ found that the mere sending of a section 129 notice could not be construed as a step in enforcing the agreement as envisaged by section 86(2). He stated as follows:

“The language of s 86(2) occasions some difficulties. It refers in the plural to the ‘steps contemplated in section 129’ to ‘enforce’ the agreement. That seems incompatible with this merely requiring the giving of notice under section 129(1)(a), both because that is a single step and because it is not a step directed at enforcing the agreement but at resolving the problem occasioned by the consumer’s default. Consistently with the language used this must then be a reference to s 129(1)(b), which refers to both the giving of notice and meeting the requirements in s 130.”⁶¹

The judge found that there is a plurality of steps which must be taken to give effect to section 86(2), which would ultimately bar a consumer from debt review.⁶² He further stated that it is only after these steps have been taken that the creditor may commence legal action, and therefore after which point section 86(2) debars a consumer from applying for debt review.⁶³

⁶⁰ 2010 (5) SA 618 (KZD).

⁶¹ *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) para 13.

⁶² *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) para 14, where Willis J stated that: “In my view the relevant provision referred to in s 86(2) is s 129(1) (b), as that makes sense of the use of the plural ‘steps’. However, there is nothing in that section that suggests that these steps include the commencement of legal proceedings. The section prescribes the steps that must be taken prior to legal proceedings being commenced. Those steps are the giving of notice under s 129(1) (a), or the termination of a pre-existing debt review under s 86(10), and ‘meeting any further requirements set out in section 130’.”

⁶³ Wallis J at para 15: “It follows that on the basis of s 129(1)(b) there are various steps which the credit provider will have to take before action can be commenced and the debt enforced. Those steps do not include the commencement of proceedings to enforce the debt, but are prior to it. As a straightforward matter of the language of s 86(2) it seems to me that the problems disappear if one construes the expression ‘the steps contemplated in section 129 to enforce that agreement’ as referring to the steps in s 129(1)(b). In other words it refers to the steps that must be taken by the credit provider in order to arrive at the point where they are entitled to commence legal proceedings to enforce the agreement. Those steps may be positive, such as the giving of notice, the acceptance of the surrender of the property and the sale of the property, or may be negative such as the obligation to await the elapse of the time periods in s 130(1) and 130(1) (a). Whatever their character once those steps have been taken the credit provider is entitled to commence legal proceedings. It is at that stage, as a matter of language, that s 86(2) debars the consumer from applying for debt review.”

Nedbank Ltd and Others v National Credit Regulator and Another

The Supreme Court of Appeal (“SCA”) in *Nedbank Ltd and Others v National Credit Regulator and Another*⁶⁴ disagreed with Wallis J’s finding, in that the court instead interpreted the wording of section 86(2) quite literally. Malan JA argued that a “step” is just that, a “step” and thus means an action which “leads to a result”. When interpreting the meaning of “proceed”, he reasoned it to mean “a continuance of the action” and thus in effect meaning to continue on with what has already commenced. In applying these interpretations, the judge concluded that the delivery of the section 129(1)(a) notice is a step which precedes the institution of, or commencement of, legal proceedings. Therefore, if it is a step in commencing legal proceedings, then “by giving the notice envisaged by s129 (1) (a) the credit provider ‘has proceeded to take the steps contemplated in section 129 to enforce that agreement’”.⁶⁵

The court thus concluded that debt review in relation to that specific agreement, being the agreement wherein the section 129 notice was received, was excluded from the debt review process. Therefore, prior to the amendment of the NCA it can be seen that although Wallis J in *Mudaly*⁶⁶ reasoned that his interpretation of the section 86 gave effect to achieving a balance between the consumer and credit provider,⁶⁷ the SCA clearly disagreed. The SCA judgement set a precedent that a consumer may not apply for debt review in relation to an agreement where they had received a section 129 notice prior to the application. However, they may proceed with debt review in relation to all their other credit agreements.

What is then evident from the above is that our courts ultimately interpreted section 86 of the NCA in favour of credit providers. This position has now changed with the amendment of the NCA, which amendment is discussed in chapter 3 below.

⁶⁴ 2011 (3) SA 581 (SCA).

⁶⁵ *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) para 14.

⁶⁶ *BMW financial services and Mudaly* 2010 (5) SA 618 (KZD).

⁶⁷ *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) para 16: “The provisions of s 86 and s 129 and 130 seek to provide that balance by establishing mechanisms for the review of a creditor’s indebtedness, either in relation to a particular agreement or in relation to over-indebtedness generally, whilst also preserving the right of the credit provider if those mechanisms do not succeed in resolving the problem, to enforce the agreement.”

2.2.2 Interpretation and application of section 129(1)

From the above discussion of section 86 one can observe that giving effect to the debt review process inevitably involves a consideration of section 129(1) also. Prior to the NCA, before credit providers could approach the court to claim “return of the goods they financed” or cancellation of a credit agreement, they had to send a letter of demand in terms of the Credit Agreements Act.⁶⁸ The position has changed with the NCA in that now, before the court can be approached, as section 129(1)(a) notice must be delivered to the consumer. Section 129(1) states as follows:

- “If the consumer is in default under a credit agreement, the credit provider—
- (a) 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 agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
 - (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
 - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
 - (ii) meeting any further requirements set out in section 130.”

Van Heerden and Otto point out that the word “may” in section 129(1)(a) seems to suggest that a credit provider has an option of whether or not to draw the attention of the consumer to the notice.⁶⁹ They are of the opinion that the word “may” is “misleading” when one considers the provisions of section 130(1)(b) wherein it states that a credit provider may not commence with legal proceedings before giving such a notice.⁷⁰ Van Heerden and Borraine agree that the use of the word “may” is misleading and preface this by pointing out the significance of section 129 being entitled “Required procedures prior to debt enforcement”. They too rely in the wording of section 130(1)

⁶⁸ CM van Heerden & JM Otto “Debt Enforcement in terms of the National Credit Act” 2007 *TSAR* 655 at 659.

⁶⁹ CM van Heerden & JM Otto “Debt Enforcement in terms of the National Credit Act” 2007 *TSAR* 655 at 661.

⁷⁰ CM van Heerden & JM Otto “Debt Enforcement in terms of the National Credit Act” 2007 *TSAR* 655 at 661. See also C van Heerden & A Borraine “The Conundrum of the Non-compulsory Compulsory Notice in terms of Section 129(1)(a) of the National Credit Act” (2011) 23 *SA Merc LJ* 45 at 47.

which makes it clear that a credit provider may not enforce a credit agreement to which the NCA applies without first delivering to the consumer a notice in terms of section 129(1)(a). They go on to add that “s 130(3) further provides that despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which the NCA applies”, and that the court may determine the matter only if it is satisfied that the procedures required by section 129 have been complied with.⁷¹

Kelly-Louw opines that it is the “general consensus” that it is compulsory for a credit provider to first send the section 129(1)(a) notice to a consumer prior to enforcing the credit agreement.⁷² From the above it would seem that where a credit provider has failed to deliver this notice, then that would be the end of the matter and they could not proceed with enforcing the agreement. Yet, this is not strictly the case. As Kelly-Louw points out, “where a court finds that a credit provider has failed to send this notice, such failure will not automatically invalidate the summons or application, because the court has a discretion in terms of s 130(4) (b) to adjourn the matter sine die and make an order setting out the steps that the credit provider must take before the matter may be heard”.⁷³

The question of whether or not a section 129 notice needed to be sent prior to instituting action was addressed by the high court in *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors*.⁷⁴ The court stated that when one considers not only sections 129(1)(a) and 130 but also sections 86 and 129(1)(b), it is clear that this notice is a pre-requisite for commencing with legal action and any argument to the contrary “is devoid of merit”.⁷⁵

Although the wording of the section may seem straight forward on face value, there has been much litigation surrounding exactly when the notice contemplated in subsection (1) is considered to have been delivered to the consumer. Subparagraph (b) makes it clear that the credit provider may not institute legal proceedings before

⁷¹ C Van Heerden & A Boraine “The Conundrum of the Non-compulsory Compulsory Notice in terms of Section 129(1) (a) of the National Credit Act” (2011) 23 *SA Merc LJ* 45 at 53.

⁷² M Kelly-Louw “The overcomplicated interpretation of the word ‘may’ in sections 129 and 123 of the National Credit Act” (2015) 132 *SALJ* 245 at 249.

⁷³ M Kelly-Louw “The overcomplicated interpretation of the word ‘may’ in sections 129 and 123 of the National Credit Act” (2015) 132 *SALJ* 245 at 249.

⁷⁴ 2009 (2) SA 512 (D).

⁷⁵ *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) at paras 22-35.

the notice is sent to the consumer. Hence, it was open for consumers, who defended debt enforcement proceedings instituted against them, to allege that the notice was never received by them and accordingly that the proceedings may not continue.

In fact, the above defence has been used by a number of consumers in defending summary judgment applications brought by credit providers. A discussion of the most important cases on this issue follows.

*Munien v BMW Financial Services (SA) (Pty) Ltd*⁷⁶

In this matter the applicant had applied for rescission of a default judgment claiming, *inter alia*, that the credit provider had not complied with section 129(1)(a) of the NCA in that he did not receive the notice. It was common cause that the notice was sent by the credit provider to the consumer's chosen *domicilium* address.⁷⁷

Wallis J stated that when interpreting the wording of section 129 in determining whether a notice has been delivered, one need not focus on the "underlying policies and purposes of the NCA" but what must be considered is striking a balance between the consumer and credit provider.⁷⁸ The balancing that Wallis J spoke of, however, is itself one of the purposes of the NCA.⁷⁹ Wallis J went on to state that ordinarily the addressee receives a notice sent by post, and that the person sending the notice has little control over whether or not the addressee receives the letter. Thus where a postal address is given by the consumer to the credit provider and then the consumer's address changes, the credit provider has no way of obtaining such information without notification from the consumer. Having considered these factors, along with section 3 of the NCA, the court found that it can be said that "the credit provider discharges their obligation of delivering notice to the consumer by sending it to the postal address selected by the consumer by registered post, or by fax to a fax number chosen by the consumer, or by e-mail to an e-mail address chosen by the consumer".⁸⁰ In the present case the application was therefore dismissed.

⁷⁶ 2010 (1) SA 549 (KZD).

⁷⁷ *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD) at para 3.

⁷⁸ *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD) at para 14.

⁷⁹ S 3(1)(d) of the NCA.

⁸⁰ *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD) at para 14.

*Rossouw and Another v FirstRand Bank Ltd*⁸¹

In this case the Rossouws had concluded a mortgage agreement with FirstRand Bank, but they fell into arrears only two years after concluding the agreement. The bank consequently sent them a section 129(1)(a) notice informing them of their default and the option to attend debt counselling. The couple made a restructuring proposal to the bank, which was amended by the bank and accepted by the Rossouws. The Rossouws however abandoned the debt management plan and thus made no payments towards the arrears.⁸²

Following the non-fulfilment of the restructuring agreement, the bank issued a “fresh” section 129(1)(a) notice. Summons was issued and the Rossouws entered their appearance to defend, prompting the bank to apply for summary judgement. One of the grounds for their defence was that they did not receive the section 129(1)(a) notice.⁸³ The court *a quo* ruled that, based on the omission of the definition of the word “deliver” in the Act, the court had no reason to assume that “deliver” meant one of the modes of delivery provided for in section 65(1)⁸⁴ of the NCA.⁸⁵ In doing so the court ruled that the notice had been received as it was sent via registered post and the summary judgment application was granted.

The Rossouws then appealed the decision of the high court to the SCA. The SCA, in rejecting the Rossouws’ appeal, stated that the legislature gives the consumer a “right to choose the manner of delivery” and that this points to an intention to place the risk of non-receipt on the consumer. The court went on to state that “with every choice lies a responsibility” and as such it is the consumer’s responsibility to ensure that they are able to receive any communication via the chosen delivery method. It is by this reasoning that the court found that “dispatch of a notice in the manner chosen by the appellants” is enough for the purposes of commencing with legal action as contemplated in section 130(1).⁸⁶

⁸¹ 2010 (6) SA 439 (SCA).

⁸² *Rossouw and another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at para 4.

⁸³ *Rossouw and another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at para 6.

⁸⁴ S 65(2) of the NCA lists ordinary mail as a form of delivery.

⁸⁵ *Rossouw and another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at para 8.

⁸⁶ *Rossouw and another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at para 31.

In essence, the court in *Rossouw* ruled that the mere sending of the notice to the consumer's elected address was enough for proof of delivery of the section 129(1)(a) notice and that proof of actual receipt was not necessary.

*Sebola and Another v Standard Bank of South Africa Ltd and Another*⁸⁷

The constitutional court in *Sebola* was faced with this exact issue. The Sebolas had defaulted on their obligations under a mortgage agreement and Standard Bank had obtained default judgment against them in the high court. The Sebolas approached the high court to apply for a rescission of the judgment, claiming that they had not received the section 129(1)(a) notice. The high court dismissed their application, relying on the SCA's judgment in *Rossouw* as discussed above.⁸⁸

The high court in *Sebola*⁸⁹ consequently ruled that, when the credit provider can prove that the notice was sent to the *domicilium* address provided by the consumer in the credit agreement, this will be sufficient to prove delivery for purposes of complying with section 129(1)(a).

The Sebolas' then applied for leave to appeal directly to the Constitutional Court, contending that the SCA in *Rossouw* failed to interpret section 129 in line with the NCA's objectives. The Constitutional Court therefore had to interpret section 129 and pronounce on the question of exactly what constitutes delivery of the notice for purposes of commencing legal action in terms of section 129(1)(b).

In this regard, Cameron J stated as follows:

"These considerations drive me to conclude that the meaning of 'deliver' in section 130 cannot be extracted by parsing the words of the statute. It must be found in a broader approach – by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the section 129 notice in fact reached the consumer. As pointed out earlier, the statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high

⁸⁷ 2012 (5) SA 142 (CC).

⁸⁸ *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA).

⁸⁹ *Sebola and Another v Standard Bank of South Africa* [2011] ZAGPJHC 229.

significance of the section 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer.”⁹⁰

Cameron J therefore found that, although it would be unfairly onerous to require the credit provider to prove that the notice was *received* by the consumer, the credit provider must at least prove that the notice was *delivered* to the consumer. Cameron J went on to stipulate how a credit provider may go about proving delivery of the notice:

“To sum up. The requirement that a credit provider provide notice in terms of section 129(1) (a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. The statute, though giving no clear meaning to ‘deliver’, requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If in contested proceedings the consumer avers that the notice did not reach her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4) (b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed.”⁹¹

This explanation by the Constitutional Court thus confirmed the requirements for a credit provider to prove that the notice was delivered to a consumer, should such delivery be disputed. One would presume that the ruling of the Constitutional Court would have put an end to any question regarding when a section 129(1)(a) notice was deemed to have been delivered. This, however, was not the case, as the courts remained divided between the judgment in *Rossouw* and the judgment in *Sebola* as will be illustrated below.

⁹⁰ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) at para 74.

⁹¹ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) at para 87.

*Nedbank Ltd v Binneman and Thirteen Similar Cases*⁹²

Following the judgement in *Sebola*, many applications for default judgments were referred back to the Western Cape High Court in cases where the section 129 notices did not reach the correct post office and were marked “return to sender”. The question was whether or not in these circumstances the credit provider would still be entitled to default judgment?⁹³

The court in these matters followed the interpretation put forth in *Munien v BMW Financial Services*⁹⁴ and confirmed in the *Rossouw* case, namely that where a credit provider has delivered the notice in the manner chosen by the consumer, and if that method accords with the methods listed in section 65(2)(a) of the NCA, it is “irrelevant” whether the consumer received it or not, as the consumer chose the manner of service, and that it is reasonable to expect that it would come to their attention.⁹⁵ In these cases where the credit providers proved that the notices were dispatched to the consumers’ chosen addresses, as per the agreements, the default judgment applications were granted.

*Absa Bank Ltd v Mkhize and another and Two Similar Cases*⁹⁶

In these cases, the court differed from the ruling of the Western Cape High Court in *Binneman* and that of the SCA in *Rossouw*, and instead relied on the majority judgment in *Sebola* to find that mere proof that the notice was sent to the chosen address is not enough. The credit provider must accordingly also show that the notice reached the correct postal office in order to prove delivery. In these cases the “track and trace” reports provided by the post office showed that the notices were returned “unclaimed”. Therefore, the court postponed all of the default judgment applications, pending compliance with section 129(1)(a).⁹⁷

⁹² 2012 (5) SA 569 (WCC).

⁹³ *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC).

⁹⁴ *Munien v BMW Financial Services* 2010 (1) SA 549 (KZD).

⁹⁵ *Munien v BMW Financial Services* 2010 (1) SA 549 (KZD) para 8.

⁹⁶ 2012 (5) SA 574 (KZD).

⁹⁷ *Absa Bank Ltd V Mkhize and another and Two Similar Cases* 2012 (5) SA 574 (KZD) para 2.

The court, in arriving at its decision referred to the majority judgment in *Sebola*,⁹⁸ wherein the court recognised that, should a notice go astray after delivery to the post office and the consumer can prove non receipt of same, the proceedings can be stayed in accordance with section 130(4)(b).⁹⁹ Section 130(4)(b) allows for a court, where there has been non-compliance with section 129(1)(a), to stay the proceedings until such a time that the credit provider can comply with the provision. This, the court held, “puts it beyond doubt that the Constitutional Court has not endorsed the decision in *Rossouw*”.¹⁰⁰

Following the ruling above, ABSA took the matter on appeal to the SCA and challenged the High Court’s interpretation of the *Sebola* judgment. The bank argued that the order precluded them from continuing with their claim unless they complied with section 129(1)(a), and in so doing the order was “definitive of the rights of the parties and final” and thus not merely a postponement.¹⁰¹ ABSA further argued that if the order given by the High Court is given effect, a consumer may deliberately avoid collecting the notice to frustrate the process. The court found that, in situations where the consumer asserts that the notice has gone astray or not been collected, the court may make a finding as the High Court did. The court stated that the risk of non-delivery rests with the credit provider. .¹⁰²

The court, relying on the judgment in *Balkind v Absa Bank*,¹⁰³ held that where it can be shown that the consumer was living at the chosen address, that the notice was delivered to the correct post office, that notification was sent to the correct address, and that there is no “satisfactory explanation” for why the notice was not collected, then a finding of fictional fulfilment would be appropriate.¹⁰⁴ The court further found, quoting Cameron J in *Sebola*, that although the ruling has the effects of increasing the cost of credit for both the consumer and credit provider, “that this is a social burden the legislation imposes”.¹⁰⁵ The Court thus agreed with the interpretation of the High

⁹⁸ At paras 77 and 78.

⁹⁹ *Absa Bank Ltd v Mkhize and another and Two Similar Cases* 2012 (5) SA 574 (KZD) at paras 57-59.

¹⁰⁰ *Absa Bank Ltd v Mkhize and another and Two Similar Cases* 2012 (5) SA 574 (KZD) at paras 57-59.

¹⁰¹ *Absa Bank Ltd v Mkhize and another and Two Similar Cases* [2014] 1 All SA 1 (SCA) at para 16.

¹⁰² *Absa Bank Ltd v Mkhize and another and Two Similar Cases* [2014] 1 All SA 1 (SCA) at para 50.

¹⁰³ *Balkind v ABSA Bank* 2013 (2) SA 486 (ECG) at para 48.

¹⁰⁴ *Absa Bank Ltd v Mkhize and another and Two Similar Cases* [2014] 1 All SA 1 (SCA) at para 50.

¹⁰⁵ *Absa Bank Ltd v Mkhize and another and Two Similar Cases* [2014] 1 All SA 1 (SCA) at para 51.

Court in its interpretation of *Sebola*, but the appeal was denied for a lack of jurisdiction.¹⁰⁶

The two judgments in *Mkhize* and *Binneman* therefore did very little to clarify what approach should be followed when determining whether or not a section 129(1)(a) notice has been delivered. However, the case of *Kubyana v Standard Bank of South Africa Ltd*¹⁰⁷ clarified the issue.

*Kubyana v Standard Bank of South Africa Ltd*¹⁰⁸

The Constitutional Court was again faced with determining whether section 129(1)(a) was complied with in *Kubyana v Standard Bank of South Africa Ltd*. The court in essence agreed with its earlier ruling in *Sebola* as to what is required to prove that the section 129(1)(a) notice was delivered. But the court clarified these requirements, with Mhlantla AJ, in the majority judgement, stating:

“The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that—

(a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) the Post Office’s notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer’s correct postal address, which inference may be rebutted by an indication to the contrary as set out in above; and

(d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)-(c), which

¹⁰⁶ *Absa Bank Ltd v Mkhize and another and Two Similar Cases* [2014] 1 All SA 1 (SCA) at para 52, 65.

¹⁰⁷ 2014 (3) SA 56 (CC).

¹⁰⁸ 2014 (3) SA 56 (CC).

inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.”¹⁰⁹

In both *Sebola* and *Kubyana* the Constitutional Court could be said to have made a concerted effort in balancing the rights and duties of consumers and credit providers imposed by the NCA. This is because, on one hand, the credit providers have more certainty as to how they should go about dispatching and proving delivery of the notice and, on the other hand, the consumer’s right to have the notice brought to their attention is protected. This, however, should be understood with the caveat that the consumer may not unreasonably ignore or fail to respond to the notice and thereby stave off the enforcement proceedings by the credit provider.

Although section 86 of the NCA, discussed in 2.2.1 above, tends to benefit the consumer over the creditor, the application and interpretation of section 129(1)(a) leans more in favour of the credit provider. Read together, the position prior to the Amendment Act was that a consumer could not apply for debt review in respect of a credit agreement where the credit provider could prove that the notice was delivered to the address provided by the consumer, that the post office servicing that address had received the notice, and that a receipt proving such receipt and dispatch by the post office concerned was tendered as proof of delivery.

This then can be seen as a balancing of the rights of the consumer and credit provider in line with section 3(1)(c) of the Act. Although the consumer may apply for debt review to allow him some breathing room in relation to his debt repayments, he could not do so if the credit provider had already properly commenced with enforcement measures.

2.2.3 Interpretation and application of section 86(10) and (11)

Debt review has far reaching consequences for the consumer and credit provider, as consumers are not able to enter into any further credit agreements in terms of section 88(1) and credit providers may not enforce the debt in terms of section 88(3). This is

¹⁰⁹ *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) at para 54.

compounded by the fact that a debt review does not terminate or lapse automatically on the non-occurrence of a certain event or on the expiry of a certain time period.¹¹⁰

Section 86(10) of the NCA, however, allows a credit provider to give notice of an intention to terminate a debt review application, in relation to that specific agreement, where the consumer is in default under his credit agreement and 60 business days have lapsed since the consumer referred the matter to a debt counsellor. This section enables a credit provider to terminate the debt review and continue to enforce its rights under the credit agreement. This measure is favourable to a credit provider in that it prevents the moratorium placed on debt enforcement (due to debt review) from becoming permanent.

However, section 88(3) states that, subject to section 86(10), a credit provider may not proceed with enforcing, by litigation or other judicial process, any right or security under the credit agreement until “the consumer is in default under the credit agreement; and one of the following has occurred ... an event contemplated in subsection (1)(a) through (c); the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal”.¹¹¹

Furthermore, section 88(1)(a) to (c) states that where “the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied; the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor’s proposal or the consumer’s application; or a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer’s obligations, all the consumer’s obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement”.

As a consequence of this arrangement, which was the state of the law prior to the Amendment Act, consumers found themselves in a position where, even after they had applied for debt review and the matter was sent to court for determination, credit providers could still cancel the debt review in terms of their specific agreement.

¹¹⁰ D Subramanien “Section 86(10) of the National Credit Act 34 of 2005: *Firststrand Bank v Raheman* (5345/2010) [2012] ZAKZDHC 3” (2012) 33 *Obiter* 693 at 694.

¹¹¹ S 88(3) of the NCA.

Van Heerden and Coetzee state that where “a debt review is incorrectly terminated” and enforcement proceedings are thereafter instituted, such proceedings would be “unlawful and premature”.¹¹² They go on to state that, in practice the termination of debt review is “problematic as there is uncertainty regarding the scope of debt review and whether it should be afforded a narrow or broad interpretation”.¹¹³

The courts wrestled with whether to interpret section 86(10) in the broad or narrow sense and as such this gave rise to conflicting judgments, the most important of which are discussed in what follows.

*Standard Bank v Kruger*¹¹⁴

The court in this matter observed that “the purpose of the Act is clearly to promote and protect consumers. The Act must accordingly be interpreted to give effect to this core purpose”¹¹⁵. In applying this purpose, the court found that a credit provider’s right to cancel a debt review is limited to the confines of section 86. Once it has been referred to the magistrates’ court for consideration, section 87 is applicable and any termination of the debt review in terms of section 86(10) would be “unlawful”.¹¹⁶

*SA Taxi Securitisation (Pty) Ltd v Nako and Others*¹¹⁷

In this case the court differed from the judgment and reasoning of the *Kruger* case above. Kemp AJ commented that “the Act has many other objectives” and thus to interpret it through the “lenses” of “the promotion and protection of consumers” is narrow sighted and unfair towards credit providers.¹¹⁸

The court therefore did not apply a restrictive interpretation of the purpose of the NCA but required that all of the objectives and circumstances should be considered in

¹¹² C van Heerden & H Coetzee “Perspectives on the termination of debt review in terms of section 86(10) of the national credit act 34 of 2005” (2011) 14 *PELJ* 37 at 39.

¹¹³ C van Heerden & H Coetzee “Perspectives on the termination of debt review in terms of section 86(10) of the national credit act 34 of 2005” (2011) 14 *PELJ* 37 at 56.

¹¹⁴ 2010 (4) SA 635 (GSJ).

¹¹⁵ *Standard Bank v Kruger* 2010 (4) SA 635 (GSJ) at para 11.

¹¹⁶ *Standard Bank v Kruger* 2010 (4) SA 635 (GSJ) at paras 13, 14.

¹¹⁷ 2010 (4) SA 635 (GSJ).

¹¹⁸ *Standard Bank v Kruger* 2010 (4) SA 635 (GSJ) at para 38.

applying the Act. I agree with this interpretation, as it allows for a more balanced application of the rights afforded by the NCA and, more specifically in this instance, section 86(10).

Kemp AJ further pointed out that the court in *Kruger* lost sight of section 86(11), which states that: “If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances”.¹¹⁹

Section 86(11) can then be seen as an attempt by the legislature to balance the right of a credit provider to terminate the debt review process with the right of the consumer to enjoy the benefits of debt review.

*Collett v FirstRand Bank Ltd and Another*¹²⁰

The SCA has since ruled on the question of whether or not debt review may be terminated once it has been referred to the magistrates' court for determination. In coming to its conclusion, the court stated the following:

“The purpose of the debt review is not to relieve the consumer of his obligations but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the Magistrate's Court. The purposes of the NCA include the promotion of responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers'. Its approach to over-indebtedness is 'based on the principle of satisfaction of all responsible consumer obligations'. By providing for a consistent and harmonised system of debt restructuring the NCA 'places priority on the eventual satisfaction of all responsible consumer obligations'. It follows that the NCA serves not only the interest of consumers: its construction calls for a careful balancing of all relevant interests.”¹²¹

¹¹⁹ *Standard Bank v Kruger* 2010 (4) SA 635 (GSJ) at para 42.

¹²⁰ 2011 (4) SA 508 (SCA).

¹²¹ *Collett v FirstRand Bank Ltd and another* 2011 (4) SA 508 (SCA) at para 10.

In applying the above principle to the interpretation of the rights of the consumer versus those of the credit provider, the court stated that:

“It is not that the credit provider is ‘derailing’ the process when he terminates the debt review: it the consumer that is in breach of contract, not the credit provider. If the consumer applies for debt review before he is in default the credit provider may not terminate the process. But if the consumer is in default the consumer is entitled to a 60 business days’ moratorium during which time the parties may attempt to resolve their dispute.”¹²²

This interpretation of section 86(10) in the *Collet* case shows that in order to find a fair, reasonable and justifiable outcome in applying the rights afforded by the NCA, the rights of the consumer and credit provider must be balanced. This interpretation is in line with section 3(c) of the NCA and illustrates that, in interpreting the NCA, one need not be pro-creditor or pro-debtor but one must attempt to balance the interests of both parties. In my opinion it is clear that the legislature, by introducing section 86(11), achieved the balance required by section 3(c) and that the courts need not have laboured over the issue.

By section 86(11) stating that the magistrates’ court may resume with the review application in spite of the notification by the credit provider to terminate the review proceedings, a problem arises where the credit provider has instituted action in another court. For instance, where the credit provider has instituted a summary judgment application in the high court and yet there are debt review proceedings before the magistrates’ court, this may cause confusion where the magistrates’ court rules that the review proceedings must continue. In view of this dilemma, the court in *Collet* resolved the matter as follows:

“Proceedings to enforce a credit agreement may be commenced in either the High or the Magistrate’s Court. Section 86(11) mentions only the Magistrate’s Court. It seems to me that the words ‘hearing the matter’ in this subsection relate to the proceedings to enforce the agreement and must, consequently, refer to the enforcing court which may be either the High or the Magistrate’s Court. The problem, however, is that s 86(11) does not refer to the High Court at all. This, it was submitted, is an omission in the legislation that can and should be cured by reading the words ‘or High Court’ into the subsection. I agree with this approach: it

¹²² *Collett v FirstRand Bank Ltd and another* 2011 (4) SA 508 (SCA) at para 12.

will avoid the issues that may arise from two different courts considering related matters.”¹²³

By reading in the words “or High Court”, the court took a rather pragmatic approach in interpreting section 86(11). This approach can be seen as a further way to give effect to the rights of the consumer by allowing the high court to also rule that the debt review proceedings may continue.

2.2.4 Interpretation and application of section 129(3) and (4)

Section 129(3) allows a consumer to reinstate a credit agreement. Before it was amended by the Amendment Act, the subsection provided as follows:

“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; and-
- (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.”

This subsection allowed (and still allows) the consumer to unilaterally reinstate the agreement by paying the amount in arrears as well as the permitted charges and costs, resulting in the automatic reinstatement of the agreement once the required amounts have been paid.¹²⁴

Brits, in commenting on the drafting of the section and echoing the sentiments of Otto,¹²⁵ questions how an agreement can be reinstated where it has not yet been cancelled, as section 129(3) states that reinstatement can only occur prior to cancellation.¹²⁶ Further confusion is created by the notion ascribed by section 129(3)(b), which gives the consumer the right to resume possession of his

¹²³ *Collett v FirstRand Bank Ltd and Another* 2011 (4) SA 508 (SCA) para 17.

¹²⁴ See generally R Brits “Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act” (2013) 24 *Stell LR* 165-184.

¹²⁵ JM Otto *The National Credit Act Explained* (2006) at 98.

¹²⁶ R Brits “Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act” (2013) 24 *Stell LR* 165 at 172.

repossessed property once the agreement has been reinstated. The contention here is that, in order for the credit provider to have repossessed the property of the consumer, the agreement must have first been cancelled.¹²⁷ Despite the contradiction and poor drafting, the courts have given effect to the purpose of section 129(3), which is ultimately to allow for a consumer to remedy his default and thereby prevent a credit provider from continuing or even beginning default and or summary judgement proceedings in order to enforce the agreement.

This is demonstrated by the ruling in *Dwenga v First Rand Bank and Others*,¹²⁸ where the applicant had made a payment over and above the arrears, enough to cover the costs and charges. And although this was made too late to prevent the issue of summons, by the time the default judgement was before the registrar for consideration, the applicant was no longer in default and therefore the agreement had been automatically re-instated.¹²⁹

On face value it seems as though section 129(3) weighs heavily in favour of the consumer, as it allows him to effectively frustrate the credit provider's intentions with regard to enforcing the agreement. This is where section 129(4) comes to the assistance of the credit provider. Prior to the Amendment Act, it provided that:

"A consumer may not re-instate 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."

Section 129(4) can be seen as corralling the consumer's ability to reinstate the agreement, as such reinstatement is made subject to section 129(4). Thus, where a consumer's property has been sold in execution or an order has been given enforcing the agreement, the consumer cannot reinstate the agreement by paying the arrears plus costs. As with the balance created in section 86(10) and (11), section 129(4)

¹²⁷ R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" (2013) 24 *Stell LR* 165 at 172.

¹²⁸ 2011 JDR 1641 (ECP).

¹²⁹ *Dwenga v First Rand Bank Ltd and Others* 2011 JDR 1641 (ECP) at para 34.

provides a counterbalance to the right provided in section 129(3) in that it does not allow for the unfettered reinstatement of credit agreements by the consumer even after the property has been sold in execution.

The question then arises: up until what point can the consumer reinstate the agreement and when will it be too late? The court in *Dwenga v FirstRand Bank Ltd* stated (*obiter*) that “invariably” by the date of judgment “the credit agreement would have been terminated, thus preventing re-instatement within the meaning envisaged in section 129(3) of the NCA”.¹³⁰ Brits is of the opinion that this interpretation by the court in *Dwenga* is inconsistent with section 129(4)(a) and (b), which allows for reinstatement of the agreement until the judgment is executed or the property sold and thus after judgment had been granted.¹³¹

The court in *Nedbank Ltd v Fraser and Another and Four Other Cases*,¹³² when faced with a similar question, stated that:

“Section 129(4) of the NCA does not permit reinstatement “after execution” of a court order enforcing the agreement. In this context, my view is that execution contemplates both the sale and registration of transfer of ownership of the immovable property into the name of the purchaser at a sale in execution of the property. Parallels may be drawn between this statutory right of reinstatement and the common law right of a judgment debtor to redeem property attached in the process of execution. Once property is attached, the judgment debtor can redeem the attached property for so long as the judgment debtor remains the owner. *In the case of movable property, the right of redemption is extinguished on the sale when delivery and payment take place. In the case of immovable property, the right of redemption is extinguished only when registration takes place into the name of the purchaser after the sale in execution*”¹³³ (own emphasis).

The interpretation of section 129(4) in *Dwenga*, but even more so in *Fraser*, clearly advantaged the consumer by allowing him to reinstate the agreement right up to at least the point where judgment is given (*Dwenga*) and perhaps even after the sale in execution but prior to transfer (*Fraser*). Thus, although section 129(4) seems to curtail

¹³⁰ *Dwenga v First Rand Bank Ltd and Others* 2011 JDR 1641 (ECP) at para 35 fn36.

¹³¹ R Brits “Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act” (2013) 24 *Stell LR* 165 at 175.

¹³² 2011 (4) SA 363 (GSJ).

¹³³ *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ) at para 40.

a consumer's ability to reinstate the credit agreement, the courts have interpreted this in such a way as to stretch the consumer's rights as far as possible.

*Nkata v Firstrand Bank Ltd and Others*¹³⁴

The observation made immediately above can be seen even clearer from the interpretation of this provision in the case of *Nkata v First Rand Bank Ltd and Others*.¹³⁵ In this case the credit provider had obtained default judgment against Ms Nkata but had nevertheless agreed to a payment arrangement with her to pay down her arrears. She subsequently defaulted on this payment arrangement and her property was sold in execution.

Ms Nkata approached the Western Cape High Court for an order rescinding the default judgment, setting aside the writ of execution and declaring the sale in execution invalid.¹³⁶ Ms Nkata further applied for condonation for the late filing of her rescission application.¹³⁷ Although Ms Nkata's rescission application failed due to the unreasonably long delay (more than two years), the court requested submissions on the applicability of section 129(3) and (4) of the NCA. The court, relying on the *obiter* views of Peter AJ in *Fraser*,¹³⁸ stated that in order to give effect to section 129(3)(a), Nkata only needed to pay the arrear instalments, which she had done twice, in March of 2011 and 2012 respectively.¹³⁹ The court further held that "[i]n order to effect reinstatement the consumer must not only pay all amounts that are overdue but also the credit provider's 'permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement'".¹⁴⁰ The court found that this had been done, in effect, due to the fact that these charges were debited against her account by the credit provider and not presented to her for payment.¹⁴¹

The court reached this conclusion by finding that if the interpretation of section 129(3) meant that a consumer would not be able to reinstate an agreement without engaging

¹³⁴ 2014 (2) SA 412 (WCC).

¹³⁵ *Nkata v Firstrand Bank Ltd and others* 2014 (2) SA 412 (WCC).

¹³⁶ *Nkata v Firstrand Bank Ltd and others* 2014 (2) SA 412 (WCC) at para 2.

¹³⁷ *Nkata v Firstrand Bank Ltd and others* 2014 (2) SA 412 (WCC) at paras 26-27.

¹³⁸ 2011 (4) SA 363 (GSJ).

¹³⁹ *Nkata v Firstrand Bank Ltd and others* 2014 (2) SA 412 (WCC) at para 38.

¹⁴⁰ *Nkata v Firstrand Bank Ltd and others* 2014 (2) SA 412 (WCC) at para 41.

¹⁴¹ *Nkata v Firstrand Bank Ltd and others* 2014 (2) SA 412 (WCC) at para 43.

with the credit provider and agreeing on the costs or agreeing to having said costs taxed, this would not be in line with the purpose of the Act. The court further stated that where a credit provider fails to take the necessary steps to recover the legal costs, and the consumer pays the full arrears, “the agreement would be reinstated in terms of s 129(3)”.¹⁴²

Given the above considerations the court ruled that the agreement had been reinstated and thus the default judgement was of “no force and effect” and thus invalidated the sale in execution and prohibited transfer of the property.¹⁴³

*FirstRand Bank Ltd v Nkata*¹⁴⁴

The credit provider then appealed the decision of the high court on the basis that the interpretation of section 129(3)(a) by the high court was “not only novel and imaginative but also that it did not accord with reality and is quite unjustified”.¹⁴⁵ It was further argued that section 129(3)(a) requires some form of communication by the consumer to the credit provider that they intend on reinstating the agreement.¹⁴⁶

Wallis J agreed with the interpretation given by the court *a quo*, namely that reinstatement can take place upon payment of the arrears as well as the default charges and reasonable costs of enforcing the agreement, but the judge stated that this does not change the common law consequence of “the axe falling” on sale in execution.¹⁴⁷ In doing so, the court relied on section 129(4)(b), which prohibit reinstatement after sale in execution. Wallis J moreover held that “[i]f one has regard to s 129(4) as a whole, it is clear that some kind of final, irrevocable step is envisaged, beyond which a consumer may not return”.¹⁴⁸

The court, in evaluating the consequences of reinstatement after sale in execution but before transfer, as introduced by *Fraser*,¹⁴⁹ agreed with Brits’s¹⁵⁰ argument that to

¹⁴² *Nkata v FirstRand Bank Ltd and others* 2014 (2) SA 412 (WCC) at para 43.

¹⁴³ *Nkata v FirstRand Bank Ltd and others* 2014 (2) SA 412 (WCC) at para 57.

¹⁴⁴ 2015 (4) SA 417 (SCA).

¹⁴⁵ *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) at para 15.

¹⁴⁶ *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) at para 16.

¹⁴⁷ *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) at para 23.

¹⁴⁸ *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) at para 27.

¹⁴⁹ *Nedbank Ltd v Fraser & another and Four Other cases* 2011 (4) SA 363 (GSJ).

¹⁵⁰ R Brits “Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act” (2013) 24 *Stell LR* 165 at 177.

allow for a reinstatement after a sale in execution but prior to registration would prejudice debtors, as the auction sales would be insecure resulting in lower prices, which is contrary to the “core” purpose of the NCA.¹⁵¹

The court concluded by stating that section 129(4) is “peremptory” and as such “reinstatement can only occur prior to sale in execution”.¹⁵² For these reasons the court ruled in favour of the credit provider and set aside the judgment of the court *a quo*.

*Nkata v FirstRand Bank*¹⁵³

Nkata then approached the Constitutional Court for leave to appeal against the SCA’s judgment. The court had to determine whether she had indeed reinstated the agreement by paying the arrears, default charges and enforcement costs as contemplated by section 129(3). The bank contended that she had not reinstated the agreement, as she had only paid the arrears and default charges but not the reasonable legal costs incurred by the bank in enforcing the agreement as required by section 129(3)(a). In the majority judgment Moseneke DCJ agreed that Nkata had indeed reinstated the agreement by merely paying the arrears and default charges, stating that section 129(3) does not prohibit a consumer from reinstating a credit agreement where they have paid all monies due and owing except for the costs in enforcing the agreement. This, the court said, must be the case because the legal costs only become due and payable when they are “reasonable, agreed or taxed” and notice of these costs had been given to the consumer.¹⁵⁴

The court furthermore reasoned as follows:

“This is clear from a simple reading of section 129(3), which provides that the agreement is reinstated by the consumer 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 reinstatement’. The words ‘together’ and ‘and’ make it clear that three distinct requirements are imposed on a consumer before a credit agreement is reinstated. By requiring a credit provider to demand separately payment of the reasonable

¹⁵¹ *Firststrand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) at para 34.

¹⁵² *Firststrand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) at para 44.

¹⁵³ 2016 (4) SA 257 (CC).

¹⁵⁴ *Nkata v FirstRand Bank* 2016 (4) SA 257 (CC) at para 80.

costs of enforcing the agreement, the Act imposes a more transparent practice of billing – one which is in line with the purposes of the Act. The Bank should have demanded payment of the reasonable costs of enforcing the agreement separately from Ms Nkata's arrears, and brought it to her attention."¹⁵⁵

The bank then asserted that in terms of section 129(4) the property had been sold in execution and thus was immune from reinstatement. However, the Constitutional Court did not agree, stating that even though the property had been attached, no sale in execution had occurred and no proceeds of the sale were realised when Ms Nkata settled her arrears in 2011. At this event, she was well within her rights to “revive” the agreement, as it had not yet been cancelled. It is on this basis that the court agreed with the judgment in the high court.¹⁵⁶

Therefore, the Constitutional Court has set out the requirements for reinstatement, namely that it is only the payment of the arrears plus the default charges that must be paid in circumstances where the legal costs have not yet been agreed to or taxed. Moreover, we now sit with a situation where, given the judgment in *Nkata*, a consumer may reinstate his agreement by paying the arrears and default charges *after* the sale in execution but *prior* to the realisation of the proceeds from the sale in execution.¹⁵⁷ This poses many problems and might have far reaching consequences in practice. This interpretation, in my view, weighs heavily in favour of the consumer without taking into account the potential practical implications for the credit provider. Where credit providers have obtained default judgment against defaulting debtors and have attached the debtor's property in an attempt to recoup their investment, they are now forced to expediently have the property sold and the funds realised. The reason for this is that a consumer can reinstate the agreement after sale in execution but prior to the realisation of the funds from the sale, and that if he then defaults again, the credit provider must start again with enforcing the agreement by sending a section 129(1)(a) notice.

Van Heeden, when commenting on the judgment of the Constitutional Court, states that, in regards to the operation of the right to reinstatement, there is no indication that the majority followed a balanced approach; nor did the court, in ruling so heavily in

¹⁵⁵ *Nkata v FirstRand Bank* 2016 (4) SA 257 (CC) at para 124.

¹⁵⁶ *Nkata v FirstRand Bank* 2016 (4) SA 257 (CC) at para 136.

¹⁵⁷ *Nkata v First Rand Bank* 2016 (4) SA 257 (CC) at para 131.

favour of the consumer, repair a “past imbalance” which was in favour of the creditor.¹⁵⁸ The imbalance Van Heeden refers to is that the credit provider is “loaded” with obligations, namely to notify the consumer of the legal cost and obtain consensus of the same, failing which it must tax the costs, but places no corresponding duty on the consumer to notify the credit provider of their intention to reinstate the agreement.¹⁵⁹ Van Heeden goes on to state that the majority judgment is incorrect insofar as it has done away with the “balanced approach of the NCA” to assist a consumer who finds himself in breach of his agreement by forcing the credit provider to continue with the agreement where the consumer pays the monies due in terms of section 129(3). Van Heeden¹⁶⁰ concludes by stating that the credit provider now only has hopes of “legal reform” to “tone down” the unfairness of the judgment.¹⁶¹ As seen in chapter 3 below, such a “toning down” has not been accomplished by the 2015 amendments.

2.2.5 Concluding remark

All the sections discussed in this chapter have been amended by the National Credit Amendment Act 19 of 2014. In the next chapter an evaluation of the new amendments will be conducted in light of the objectives of the NCA.

¹⁵⁸ C van Heerden “*Nkata v Firstrand Bank Ltd* [2016] ZACC 12 (12 April 2016) and its Impact on the Reinstatement of Credit Agreements Governed by the National Credit Act 34 of 2005” in C Hugo (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) 169 at 183.

¹⁵⁹ C van Heerden “*Nkata v Firstrand Bank Ltd* [2016] ZACC 12 (12 April 2016) and its Impact on the Reinstatement of Credit Agreements Governed by the National Credit Act 34 of 2005” in C Hugo (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) 169 at 183.

¹⁶⁰ C van Heerden “*Nkata v Firstrand Bank Ltd* [2016] ZACC 12 (12 April 2016) and its Impact on the Reinstatement of Credit Agreements Governed by the National Credit Act 34 of 2005” in C Hugo (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) 169 at 190.

¹⁶¹ C van Heerden “*Nkata v Firstrand Bank Ltd* [2016] ZACC 12 (12 April 2016) and its Impact on the Reinstatement of Credit Agreements Governed by the National Credit Act 34 of 2005” in C Hugo (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) 169 at 190.

CHAPTER 3: THE NATIONAL CREDIT AMENDMENT ACT

3.1 General

The National Credit Amendment Act 14 of 2014 (NCAA) was signed into law on 16 May 2014 and made significant changes to certain provisions of the NCA. It came into operation in March 2015. For the purposes of this discussion I will only focus on a certain number of amended provisions which relate to the relationship between the consumer and creditor provider.

3.2 Introduction of section 71A

A new section 71A has been added to the NCA and it provides as follows:

- “(1) The credit provider must submit to all registered credit bureaux within seven days after settlement by a consumer of any obligation under any credit agreement, information regarding such settlement where an obligation under such credit agreement was the subject of—
- (a) an adverse classification of consumer behaviour;
 - (b) an adverse classification enforcement action against a consumer;
 - (c) an adverse listing recorded in the payment profile of the consumer; or
 - (d) a judgement debt.
- (2) The credit bureau must remove any adverse listing contemplated in subsection (1) within seven days after receipt of such information from the credit provider.
- (3) If the credit provider fails to submit information regarding a settlement as contemplated in subsection (1), a consumer may lodge a complaint against such credit provider with the National Credit Regulator.
- (4) For the purposes of this section—
- (a) ‘adverse classification of consumer behaviour’ means classification relating to consumer behaviour and includes a classification such as “delinquent”, “default”, “slow paying”, “absconded”, or “not contactable”; and
 - (b) ‘adverse classification of enforcement action’ means classification relating to enforcement action taken by the credit provider, including a classification such as “handed over for collection or recovery”, “legal action”, or “write-off”.”

The NCAA's introduction of section 71A thus provides for the automatic removal of adverse consumer credit information.

Kelly-Louw states that: "The credit information of a consumer held by a credit bureau is often used by a credit provider to determine the consumer's credit profile and to determine whether he has a good or bad debt repayment history before granting any credit to him."¹⁶² This means that it is very important for credit bureaus to keep correct and up to date information on a consumer's credit profile.¹⁶³ This profile often contains the consumer's payment history along with any judgments which have been granted against the consumer in relation to any of their credit agreements.

In 2007 the National Credit Regulator issued regulations which granted consumers amnesty from adverse credit information on their credit records, thereby granting consumers a clean slate in terms of their past credit record. Although the adverse credit information was removed, it is important to remember the debt itself remained. Although this amnesty was aimed at helping consumers to start afresh after the passing of the NCA in 2005, there were some drawbacks in its application. The Department of Trade and Industry issued a press statement in this regard, stating that:

"The weaknesses of this amnesty however lie largely in that a consumer had to take certain steps to action and benefit from it. Knowing the extent of the information gap in our society, it is obvious that most consumers could not take advantage of the amnesty as they were either not aware of it, and where they were aware, the processes were not simplified enough to extend this benefit to the affected consumers. This led to this 2007 amnesty benefitting only a handful of the affected consumers".¹⁶⁴

Due to these and other shortcomings, a further amnesty took effect on 1 April 2014 whereby all credit bureaus had to remove all negative consumer credit information. This information included:

¹⁶² M Kelly-Louw "The 2014 Credit-Information Amnesty Regulations: what do they really entail?" (2015) 48 *De Jure* 92 at 93.

¹⁶³ Regulation 18(2) of the National Credit Regulations including Affordability Assessment Regulations reads: "The credit bureau must take all reasonable steps to ensure that all records are kept up to date".

¹⁶⁴ DTI media statement: Removal of Adverse Consumer Credit Information and Information Relating to Paid up Judgments, <https://www.thedti.gov.za/editmedia.jsp?id=3006>, accessed 25 August 2016.

- 1) Subjective classifications of consumer behaviour such as: delinquent, default, slow paying, absconded or not contactable;
- 2) The adverse classification of enforcement action, i.e. those that are related to enforcement action taken by credit providers including classifications such as: handed over for collection or recovery, legal action or write off;
- 3) Details and results of disputes lodged by consumers irrespective of the outcome of such disputes; and
- 4) Adverse consumer credit information contained in the payment profile represented by means of any mark, symbol, and sign or in any manner or form.

Paid up judgments, which means civil court judgment debts, including default judgments where the consumer has settled the judgment debt, also had to be removed from the credit bureau records on 1 April 2014.¹⁶⁵

This credit amnesty was of a great advantage to consumers as they could now apply for credit with a clean record. It however had the drawback that credit providers could henceforth only rely on a consumer's income and expenditures (with no knowledge of the consumer's payment and credit history) to evaluate whether or not a loan could be granted. Hence, both the 2007 and 2014 credit amnesties were arguably pro-consumer and anti-creditor. The main difference is that prior to the NCAA, provisions related to credit amnesty were not contained in the NCA itself.

This new section thus imposes on credit providers an obligation to, within seven days of settlement of the debt, notify the credit bureau of such settlement where there is an adverse classification as listed in subsections (1)(a) to (d). The credit bureau must then remove this information within seven days of receipt of the information from the credit provider. This ensures that there will not be a need for granting credit amnesty to consumers again, as there is now a duty on credit providers and the credit bureaus to remove the adverse information upon settling of the debt. This new automatic removal of adverse information will serve the purpose of allowing people to apply for credit more easily and increase their chances of being afforded credit.

¹⁶⁵ Removal of Adverse Consumer Credit Information and Information Relating to Paid Up, Frequently Asked Questions, available at https://www.thedti.gov.za/invitations/consumer_credit.pdf (accessed 08 August 2016).

Kelly-Louw¹⁶⁶ however points out that there is still clarity needed regarding the wording and interpretation of section 71A in that it states that the credit provider must provide information “after settlement by a consumer of any obligation under any credit agreement”. The term “settlement” is not defined for purposes of this section, which may lead to potential litigation in future. The reason for this is because most adverse information, for example being classified as a slow payer or default, is in relation to the accumulation of arrears on a consumer’s credit agreement. The question which could then be asked is: if a consumer settles their arrears, is the credit provider under an obligation to notify the credit bureau of said settlement within the time frame? Or does settlement relate to the entire outstanding debt plus interest? Since there is no indication as to what kind of settlement is required for the credit provider to comply with section 71A, each credit provider is compelled to make the determination on their own.

Kelly-Louw further points out that no distinction is made in the section between the subjective and objective adverse classifications and listings. She argues that it is important that the objective listings remain on the consumer’s record, because these indicate whether a payment was missed or how long it took the consumer to repay the debt. This information is used by credit providers to determine if the consumer, when applying for credit, can afford it. However, there is no such indication within the section and thus it seems as if both subjective and objective classifications and listings must be removed. I agree with Kelly-Louw in this regard because where all adverse information is removed, a credit provider cannot make a fully informed evaluation of the consumer’s affordability before providing him with credit.

The unfettered and scarcely qualified automatic removal of adverse consumer credit information introduced by section 71A clearly benefits the consumer over the credit provider and thus is not quite in keeping with the purpose of balancing the interests of consumers and credit providers as mentioned in section 3(d) of the NCA. It could be argued that, although it does not quite give effect to section 3(d) of the NCA, section 71A does give effect to section 3(a), namely “promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions”, as the

¹⁶⁶ M Kelly-Louw “The 2014 Credit-information Amnesty Regulations: what do they really entail?” (2015) 48 *De Jure* 92 at 111.

removal of the adverse information will be of greater benefit to the lower and middle class consumers of all backgrounds. It further gives effect to section 3(f) in that it also assists in improving consumer credit information and reporting and the regulation of credit bureaus.

3.3 Amendment of section 86(2) and (11) and section 130

Section 86(2) originally provided as follows:

“An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement”.

As discussed above,¹⁶⁷ the application referred to in section 86(2) is that for debt review. As discussed in the case of *Mudaly*,¹⁶⁸ the court found the wording of this section to be confusing in its application, which had led to much litigation surrounding the question of at which point a consumer is no longer permitted to apply for debt review in relation to a specific agreement. It can be assumed that the NCAA amended this section in order to provide some clarity as to when a debt review will not apply to a specific agreement. This amendment may have come from the submission by Van Heerden and Otto that the section should be amended to substitute section 129 with section 130.¹⁶⁹ The new section 86(2) thus provides as follows:

“An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in *section 130* to enforce that agreement.”¹⁷⁰ (Own emphasis)

The result of making an agreement exempt from debt review if the credit provider has taken steps in terms of section 130 to enforce the agreement instead of 129(1), is that

¹⁶⁷ See para 2.2.1 above.

¹⁶⁸ See para 2.2.1 above.

¹⁶⁹ CM van Heerden & JM Otto “Debt enforcement in terms of the National Credit Act” 2007 *TSAR* 655 at 668.

¹⁷⁰ S 26(a) of the NCAA.

it arguably creates more criteria for the credit provider to prove when it claims that its credit agreement is not subject to the debt review application.

Section 130(1) (a) was also amended to provide that a credit provider can only proceed to enforce an agreement when the consumer has been in default for at least 20 business days and at the time of the enforcement 10 business days have lapsed since delivery of the notice of termination of debt review in terms of section 86(10) or section 129(1).¹⁷¹ Both amendments, when read together, make it more onerous for the credit provider to meet the requirements to nullify a debt review application in terms of their agreement. This can be seen as another way in which the NCAA amends the NCA to lean more in favour of the consumer. However, at least there is more certainty regarding which credit agreements a debt review application will apply to and which will be exempt. This clarity will benefit probably consumers and creditors alike.

The NCAA however limits the ability for a credit provider to terminate a debt review application by introducing section 130(1)(b), which states the following:

“No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.”¹⁷²

The introduction of this section gives effect to the ruling in *Collett*¹⁷³ and thus finally closes the debate of whether or not a debt review application can be terminated once it is before a court of law. The practical implication of this is that it encourages debt counsellors to file their debt review applications as soon as possible in order to mitigate the risk of a credit provider giving notice of termination of the debt review with respect to that credit agreement. In this respect, one however has to keep in mind section 86(11) and its new wider application.

Section 86(11) has been amended to remove the words “Magistrates’ Court” and thus now reads:

“If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter

¹⁷¹ S 33 of the NCAA.

¹⁷² S 26(b) of the NCAA.

¹⁷³ *Collett v FirstRand Bank* 2011 (4) SA 508 (SCA).

6, the court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.”¹⁷⁴

This amendment can also be seen as giving effect to the court’s interpretation of the section in *Collet*. However, when read with section 86(10), it still allows a court to order the resumption of the debt review regardless of whether the credit provider provided the notice of termination prior to the filing of the application at court. This approach is still very much aimed at assisting the consumer in rearranging their obligations within the confines of debt review. These amendments all fall to the benefit of the consumer and thus it can be argued that they do not aid in achieving the purpose of establishing a balance within the credit market as put forth in section 3(d) of the NCA.

3.4 Amendment of section 89(5)(c)

Section 89(5) sets out the consequences of an order that the court can make when a credit agreement is unlawful. Prior to its amendment, the wording preceding section 89(5)(a) stated that: “If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that” and then went on to list the possible rulings the court could give. This has now been amended by removing the common law qualification and adding the provision that the court must make a just and equitable order. The amended subparagraph reads as follows:

“If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that...”¹⁷⁵

This amendment can be seen as the implementation of the Constitutional Court’s interpretation of section 89(5) in the matter of *National Credit Regulator v Opperman and Others*.¹⁷⁶ In this case the court had to decide whether section 89(5)(c) was

¹⁷⁴ S 26(b) of the NCA.

¹⁷⁵ S 27(a) of the NCA.

¹⁷⁶ 2013 (2) SA 1 (CC). For comprehensive discussions of the case, see further EJ Marais “The constitutionality of section 89(6)(c) of the National Credit Act under the property clause: *National Credit Regulator v Opperman & Others*” (2014) 131 SALJ 215; R Brits “Arbitrary deprivation of unregistered credit provider’s right to claim restitution of performance rendered: *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC 27 (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)” (2013) 16 PELJ 422.

consistent with the right not to be arbitrarily deprived of property as contemplated in section 25(1) of the Constitution.¹⁷⁷ Section 89(5)(c) provided that it was one of the consequences of finding that an agreement was unlawful that:

“all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either-

- (i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
- (ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer”.

The effect of this provision was that, in situations where an agreement was found to be unlawful, the court had to make an order whereby the credit provider was prevented from recovering the remaining capital amount of the loan given to the consumer (effectively the restitution claim, founded in unjustified enrichment, which it would otherwise have had against the consumer). The high court found this effect on the credit provider’s rights to be an arbitrary deprivation of property in violation of section 25(1) of the Constitution and thus declared section 89(5) unconstitutional.¹⁷⁸

The court pointed out that the legislature’s failure to make the application of section 89 subject to the common law but instead imposing a statutory obligation on the courts, would lead to unfairness. In this regard Van der Westhuizen J stated that where a credit provider enters into an agreement where they are not registered and are unaware of the need to register, in terms of section 89(5) (a), the agreement must be “declared void from its inception, which is in keeping with the common law”. However, the requirement that in such a case the rights of the credit provider must be cancelled or forfeited to the state, materially differs from the common law and thus can be labelled as “far reaching” or “outrageous”, and “unfair”.¹⁷⁹

¹⁷⁷ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at para 1.

¹⁷⁸ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at paras 9, 10.

¹⁷⁹ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at para 18.

The Constitutional Court found the interpretation made by the high court¹⁸⁰ to be the correct one and in doing so ruled that section 89(5)(c) was inconsistent with the Constitution.

Therefore, in giving effect to this ruling, section 89(5)(c) was removed by section 27(b) of the NCAA. The amendment also removed the words “common law” and thus leaves the common law remedies in place so that the credit provider can recoup the moneys lent, hence allowing them to plead undue enrichment by the consumer to recover the moneys. Section 27(b) of the NCAA also removed section 89(5)(b), which provided that the credit provider had to refund the consumer with all the money paid under the agreement including interest up to the date of repayment. The removal of this subsection could be said to give effect to the sentiments of Van der Westhuizen J when he stated that:

“Section 89(5) (b) furthermore states that the credit provider must refund all money paid by the consumer, with interest. The failure to allow a court a discretion to distinguish between credit providers who intentionally exploit consumers and those who fail to register because of ignorance and lend money to a friend on an ad hoc basis, for example, is disproportional”.¹⁸¹

It therefore seems that the legislature agreed with the Constitutional Court. Section 89(5)(b) had the effect of punishing credit providers who unknowingly entered into unlawful credit agreements. The amendment of section 89 as a whole can be seen as an attempt by the legislature to balance the rights of consumers and credit providers without overreaching. Prior to the amendment there was a disproportionately punitive effect on credit providers, but in its current form section 89(5) permits for a court to make a ruling which is just and equitable, thus allowing it to consider the common law as well. This can be seen as giving effect to section 3(d) of the NCA.

3.5 Amendment of section 129(3) and (4)

As discussed above, section 129(3) and (4) deals with the reinstatement of credit agreements by a consumer.¹⁸² The issues with the drafting of this section raised by

¹⁸⁰ See *Opperman v Boonzaaier and Others* (24887/2010) [2012] ZAWCHC 27 (17 April 2012).

¹⁸¹ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at para 76.

¹⁸² See 2.2.4 above.

Brits¹⁸³ and Otto¹⁸⁴ have been addressed by removing the words reinstate and replacing same with the word “remedy” in section 129(3) and by adding the word “remedy” to section 129(4). The amended subsection (3) reads as follows:

“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 administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.”

This amendment will probably not have any effect on the interpretation and application of this provision in light of the Constitutional Court’s *Nkata* judgement, as the requirements for reinstatement have not been amended or clarified. Thus, the Constitutional Court’s ruling stands on this matter. Even before its amendment, this provision, and especially its application, was therefore pro-consumer. It could even be argued that it created an imbalance in the credit market, since consumers were allowed a lot of latitude at the expense of the credit provider. Why then amend the section at all? Brits posits a possible explanation for replacing the word “reinstate” with “remedy” and removing subparagraph (b) by stating that,

“...the idea of reinstatement, perhaps as previously understood, is not what the legislature has in mind for the future. Accordingly, the legislature possibly wanted to bring about changes to the substance of the consumer’s rights in this regard. However, there is no express indication of what this substantive modification is supposed to be. Therefore, the more likely explanation for the change in terminology is that the legislature simply wanted to remove the conceptual contradictions in the original subsection (3)(a) as well as those between subsection (3)(a) and (b).”¹⁸⁵

I am inclined to agree with his sentiments in this regard, as it gives clarity to the meaning and reading of the section and its relation to section 129(4). However, section 129(4) has also been amended, which amendment has raised various questions in the writer’s mind. For example, what are the practical implications of this amendment?

¹⁸³ R Brits “Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act” (2013) 24 *Stell LR* 165.

¹⁸⁴ JM Otto ‘National Credit Act. Vanwaar Gehási? Quo vadit lex? And some reflections on the National Credit Amendment Act 2014 (part 2)’ 2015 *TSAR* 756 at 765.

¹⁸⁵ R Brits “The ‘reinstatement’ of credit agreements: remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act” (2015) 48 *De Jure* 75 at 83.

And why amend the subsection at all, since previously it served the purpose of confining the consumer's rights to reinstatement? The amended section 129(4) reads as follows:

“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 amendment replaces the word “consumer” with “credit provider”, thus no longer prohibiting the consumer from reinstating the agreement after sale, execution, surrender or termination, but preventing the credit provider from doing so. In light of this, Brits puts forth two possible interpretations of the amended section by stating as follows:

“[T]here are two options when interpreting the amendment of section 129(4): The first option is that the legislature replaced “consumer” with “credit provider” so as to indicate that the reinstatement mechanism should be in the hands of the credit provider and not the consumer. This implies that subsection (4) no longer serves to indicate the limits of the consumer's right to remedy the default, but that it refers to some separate, albeit unexplainable, right of the credit provider. ... this approach is illogical and therefore it is difficult to accept that this was the legislature's intention.

The second option is to assume that the amendments made to section 129(4) should not be taken literally and, for all practical purposes, might have to be ignored. A strong indication of this possibility is the fact that the first draft amendment bill proposed no amendments to this subsection, and therefore the final version is probably the result of last minute drafting confusion. Since the legislature also provided no explanation for the amendment, one must assume that

it was never the intention to bring about the kind of substantive change that the literal wording of the modified subsection appears to indicate.”¹⁸⁶

I share in the confusion of Brits in that the amendment serves no tangible or practicable purpose. I am not alone in my shared confusion with the amendments enacted by the legislature. For instance, Van Heerden is also of the opinion that the amendments of both section 129(3) and (4) “dismally” fail in their purpose as they do not assist in providing for clarity but create further confusion.¹⁸⁷ Van Heerden goes on to state that the *Nkata* judgment has “skewed the balance” that the NCA tries to achieve, as the balance is “unfairly” in favour of the consumer.¹⁸⁸ Otto and Otto further comment that the words “credit provider” in section 129(4) may be a “misprint”, otherwise it would have the effect that a consumer can remedy his breach even after the goods were sold in execution which will cause chaos.¹⁸⁹

The amendments to section 129(3) and (4) have not made any significant impact on their interpretation by the Constitutional Court in *Nkata* and indeed serve no practical purpose. Certain authors even opine that the amended sections are worse than the original.¹⁹⁰ The status quo then remains unchanged. Consumers can rely on the judgment in *Nkata* to reinstate their agreements and the credit provider is saddled with the added burden of increased administration and costs in enforcing their agreements.

¹⁸⁶ R Brits “The ‘reinstatement’ of credit agreements: remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act” (2015) 48 *De Jure* 75 at 89.

¹⁸⁷ C van Heerden “*Nkata v Firstrand Bank Ltd* [2016] ZACC 12 (12 April 2016) and its Impact on the Reinstatement of Credit Agreements Governed by the National Credit Act 34 of 2005” in C Hugo (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) 169 at 188-189.

¹⁸⁸ C van Heerden “*Nkata v Firstrand Bank Ltd* [2016] ZACC 12 (12 April 2016) and its Impact on the Reinstatement of Credit Agreements Governed by the National Credit Act 34 of 2005” in C Hugo (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) 169 at 190

¹⁸⁹ JM Otto & R-L Otto *The National Credit Act Explained* (4 ed 2016) at 130.

¹⁹⁰ R Brits, H Coetzee & C van Heerden “The Re-instatement of Credit Agreements in terms of the National Credit Act 34 of 2005: *quo vadis?*” (2017) 80 THRHR (forthcoming).

3.6 Introduction of section 129(5), (6) and (7)

In my earlier discussion of the *Kubyana* case,¹⁹¹ I discussed the criteria that the court laid down for proving that a consumer had received a section 129(1)(a) notice of default. As a consequence of this and the controversies arising from the other cases discussed above, the legislature has taken it a step further by introducing subsections (5), (6) and (7) to section 129. These subsections set out certain express requirements for delivery of the notice. Not only must the consumer now indicate their preferred method of service, but the amended section also stipulates under which circumstances the requirements for delivery will be met. The new subsections state as follows:

- “(5) the notice contemplated in subsection (1) (a) must be delivered to the consumer -
- (a) by registered mail; or
 - (b) to an adult person at the location designated by the consumer.
- (6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).
- (7) Proof of delivery contemplated in subsection (5) is satisfied by -
- (a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
 - (b) the signature or identifying mark of the recipient contemplated in subsection (5)(b).”

These amendments serve to assist the courts when ascertaining whether proper delivery of a section 129(1)(a) notice was effected, particularly when the consumer disputes such delivery. Therefore, these additional provisions allow for certainty in the method and proof of service of a section 129(1)(a) notices, and place a stricter duty on the consumer to properly indicate where service must be effected. A consumer is then left in a situation where, when they have elected their service address and their preferred manner of service, and the credit provider can furthermore prove delivery in terms of section 129(7), the consumer will find it very difficult to prove that they did not receive the notice and thus that the credit provider did not comply with section 130. As

¹⁹¹ *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC). Also see my earlier discussion of s 129(1) in 2.2.2 above.

Otto correctly points out, this amendment was not necessary, given the judgment in *Kubyana*,¹⁹² but what it arguably does is to clarify the issue and provide a point of reference for the average consumer who does not read and is not privy to case law.

The introduction of these sections into the Act cures the ambiguity which first arose regarding the necessity to deliver the notice to the consumer, as section 129(5) now makes use of the word “must”, rendering such delivery mandatory. Furthermore, the legislature can be said to have settled the question of proof of receipt of the section 129 notice by stipulating what is regarded as sufficient proof of service in section 129(7). From the above amendment one can conclude that the courts had a direct influence on the amendment of the Act in that the legislature drew from the judgments in *Kubyana* and *Sebola* in drafting the new sections.

The moral hazard associated with credit agreements can be seen to weigh evenly between the credit provider and the consumer, in reference to the delivery and receipt of the section 129(1)(a) notice, since both parties are given rights and responsibilities which are not too onerous on either party. In practice, once the section 129(1)(a) notice is sent and the time period in which to respond has expired, one must simply obtain the “track and trace” report from the post office, which will indicate where it was delivered, and then one can just attach this report to the summons. In cases where consumers enter a request for leave to defend a summary judgment application, one can easily dispose of said opposition with reference to the “track and trace” report as well as their elected *domicillum* address in the agreement. Therefore, the new sections assist in curtailing long drawn out trials wherein the question is whether or not the notice was delivered and whether or not the consumer has received same.

¹⁹² JM Otto “National Credit Act. Vanwaar Gehási? Quo vadit lex? And some reflections on the National Credit Amendment Act 2014 (part 2)” 2015 *TSAR* 756 at 764.

CONCLUSION

At the outset of this dissertation, the question was asked whether the amendments to certain sections of the NCA has shifted the moral hazard and thereby tipped the scales in favour of the consumer. Otto succinctly comments that the amendments “were by and large consumer-orientated”.¹⁹³ Although the courts have attempted to interpret the provisions of the NCA within the bounds of the purposes of the Act as set out in section 3(d), it is evident that in doing so, more often than not, these interpretations favoured the consumer’s rights over the credit provider’s rights.

Perhaps the most recent evidence of this hypothesis is the Constitutional Court’s ruling in *Nkata*,¹⁹⁴ where the court favoured the consumer’s right to reinstate the credit agreement over the credit provider’s right to enforce the agreement – and arguably in a manner that is not perfectly justified by the wording of the Act. By rendering the third requirement to reinstate a credit agreement in terms of section 129(3), namely payment of the legal costs incurred during the enforcement of the agreement, inoperative without a mutual agreement or taxation of the costs, the court has probably placed the moral hazard of credit agreements in the hands of the consumer. One reason for this is that it is unclear how credit providers will practically deal with the taxation of legal costs in these instances, which might even lead to the unsatisfactory situation where reinstatement will very often be permitted to take place without the consumer having to pay the credit provider’s legal fees. The amendment of section 129(3) and (4) has done nothing to address the imbalance created by the ruling in *Nkata*, and as Brits, Coetzee and Van Heerden argue, the amendments may be “worse than the original”.¹⁹⁵

The introduction of section 71A into the NCA is plainly aimed at assisting consumers to obtain further credit by ensuring that credit providers remove any adverse listing information, in regards to any agreement they had with the consumer, upon settlement of the debt. This section further tips the scales in favour of the consumer as the moral hazard associated with a credit agreement lies with the consumer. A consumer’s credit

¹⁹³ JM Otto “National Credit Act. Vanwaar Gehási? Quo vadit lex? And some reflections on the National Credit Amendment Act 2014 (part 2)” 2015 *TSAR* 756 at 764.

¹⁹⁴ *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC).

¹⁹⁵ R Brits, H Coetzee & C van Heerden “The Re-instatement of Credit Agreements in terms of the National Credit Act 34 of 2005: *quo vadis?*” (2017) 80 *THRHR* (forthcoming).

history will arguably not be a true reflection on their ability to pay and not an accurate reflection of their payment history, which increases the risk for the creditor.

As stated above, the amendments to sections 86(2), (11) and 130(1)(a) have the cumulative effect of, not only making it more onerous on the credit provider to prove that their credit agreement is not subject to debt review, but also allowing a court to order the resumption of the debt review regardless of whether the credit provider provided the notice of termination prior to the filing of the application at court. This amendment also shifts the moral hazard to the benefit of the consumer as they are given further reprieve if or when they default on their agreements, at the expense of the credit provider.

The removal of section 89(5)(b) and (c) and the introduction of section 129(5), (6) and (7) seem to be two of the only amendments which attempt to balance the rights and responsibilities of consumers and credit providers. *Bona fide* credit providers who enter into unlawful credit agreements are now able to recoup moneys advanced to consumers through the common law and the courts may make any order which they regard as just and equitable. Furthermore, consumers and credit providers now have clarity in regards to the delivery and receipt of section 129(1)(a) notices, which benefits both parties in that consumers can ensure that the address they elect for service is an address where they can receive the notice and the credit provider is now certain on how they should prove delivery. These amendments can be said to give effect to the aim of establishing a balance in the credit market as provided for in section 3(d) of the NCA.

What does this mean for the South African credit market? In my opinion the cumulative effect of the amendments to the NCA, as reviewed in this dissertation, have brought South Africa closer to the debtor's paradise Willis J warned against.¹⁹⁶ When creditors are faced with laws and courts that make it harder for them to recoup funds from debtors, it may lead to an increase in the cost of credit or a decline in the availability of credit in the market. Both of these situations are ultimately detrimental to the economy's growth in the long run.

¹⁹⁶ *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases* 2010 (6) SA 429 (GSJ) at para 10.

John Maynard Keynes, an English economist, once said: “If you owe your bank a hundred pounds, you have a problem. But if you owe a million, it has.”¹⁹⁷ This statement has never been truer than in the post-amendment era we find ourselves in. The net effect of the NCAA is that credit providers necessarily take a greater risk when granting credit than consumers when they accept such credit. As such the moral hazard in consumer debt rests firmly in the hands of credit seekers and the over-indebted, tipping the scales in the credit market.

Courts and Judges should be mindful of the rulings they make in regards to the interpretation and application of the NCA and the NCAA, as it has become evident that such rulings can have a direct impact on legislative amendments. And in some instances, as with the introduction of section 129(5), (6) and (7), court judgments can become the direct reference material used for the amendment. Judges and courts should furthermore be mindful of the overall and cumulative impact that their rulings can have on the balance which the Act seeks to achieve. Read alone, a single interpretation that a court attributes to a provision of the NCA may not tip the scales too far in favour of one party or the other, but when the NCA is considered as a whole, too many ticks in the credit provider’s or the consumer’s box can turn the scales of justice, fairness and equality, into a trebuchet.

¹⁹⁷ <http://www.goodreads.com/quotes/tag/debt> [accessed 26 August 2016].

BIBLIOGRAPHY

Books and Chapters in Books

Otto J *The National Credit Act Explained* (2006) Durban: LexisNexis

Otto JM & Otto R-L *The National Credit Act Explained* (4 ed 2016) Durban: LexisNexis

Van Heerden C “*Nkata v Firstrand Bank Ltd* [2016] ZACC 12 (12 April 2016) and its Impact on the Reinstatement of Credit Agreements Governed by the National Credit Act 34 of 2005” in Hugo C (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) Cape Town: Juta 169-190

Case Law

Absa Bank Ltd v Mkhize and another and Two Similar Cases 2012 (5) SA 574 (KZD)

BMW Financial Services (SA) (Pty) Ltd v Mudaly 2010 (5) SA 618 (KZD)

Collett v FirstRand Bank Ltd 2011 (4) SA 508 (SCA)

Dwenga v First Rand Bank Ltd and Others 2011 JDR 1641 (ECP)

FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases 2010 (6) SA 429 (GSJ)

FirstRand Bank Ltd v Nkata 2015 (4) SA 417 (SCA)

Ferris and Another v FirstRand Bank Ltd and Another 2014 (3) BCLR 321 (CC)

FirstRand Bank v Raheman 2012 (3) SA 418 (KZD)

Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC)

National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC)

Nedbank Ltd v Fraser 2011 (4) SA 363 (GSJ)

Nedbank Ltd v Swartbooi Unreported case no 708/2012 (ECP)

Nedbank and others v National Credit Regulator and Others 2011 (3) SA 581 (SCA)

Nkata v FirstRand Bank Ltd 2016 (4) SA 257 (CC)

Nkata v FirstRand Bank Ltd and others 2014 (2) SA 412 (WCC)

Munien v BMW Financial Services (SA) (Pty) Ltd and Another 2010 (1) SA 549 (KZD)

Rossouw and another v FirstRand Bank Ltd 2010 (6) SA 439 (SCA)

Sebola v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC)

Sebola and Another v Standard Bank of South Africa [2011] ZAGPJHC 229

Dissertations

Gloy M *Weighing the Rights of Consumers against Credit Providers – Aspects of Debt Review* (2011) LLM Dissertation University of Pretoria

Journal Articles

Boraine A & Renke S “Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 (Part 2)” (2008) 41 *De Jure* 1-15

Brits R “Purging Mortgage Default: comments on the right to reinstate credit agreements in terms of the National Credit Act” (2013) 24 *Stell LR* 165-184

Brits R “The ‘Reinstatement’ of Credit Agreements: Remarks in Response to the 2014 Amendment of Section 129(3)-(4) of the National Credit Act” (2015) 48 *De Jure* 75-91

Kelly-Louw M “The 2014 Credit-Information Amnesty Regulations: What do They Really Entail?” (2015) 48 *De Jure* 92-115

Kelly-Louw M “The Overcomplicated Interpretation of the Word ‘may’ in Sections 129 and 123 of the National Credit Act” (2015) 132 *SALJ* 245-257

Otto JM “National Credit Act. Vanwaar Gehasi? *Quo vadit Lex?* And some Reflections on the National Credit Amendment Act 2014 (part 1)” 2015 *TSAR* 583-601

Otto JM “National Credit Act. Vanwaar Gehasi? *Quo vadit Lex?* And some Reflections on the National Credit Amendment Act 2014 (part 2)” 2015 *TSAR* 756-772

Otto JM “Over-indebtedness and Applications for Debt Review in Terms of the National Credit Act: Consumers Beware! *Firststrand Bank Ltd v Olivier*” (2009) 21 *SA Merc LJ* 276-278

Potgieter E “NCA: The Line in the Sand – Can a Cancelled Agreement be Revived?” (2016 May) 563 *De Rebus* 40-41

R Brits, H Coetzee & C van Heerden, “The Re-Instatement of Credit Agreements in terms of the National Credit Act 34 of 2005: *quo vadis?* (2017) 80 *THRHR* (forthcoming)

Steyn L “Reinstatement of a Home Mortgage Bond by Paying the Arrears: The Need for Appropriate Legislative Reform” (2015) 26 *Stell LR* 132-155

Subramanien D “Section 86(10) of the National Credit Act 34 of 2005: *Firststrand Bank v Raheman* (5345/2010) [2012] ZAKZDHC 3” (2012) 33 *Obiter* 693-701

Van Heerden CM & Otto JM “Debt Enforcement in terms of the National Credit Act” 2007 *TSAR* 655-684

Van Heerden C & Boraine A “The Conundrum of the Non-compulsory Compulsory Notice in terms of Section 129(1)(a) of the National Credit Act” (2011) 23 *SA Merc LJ* 45-63

Van Heerden C & Coetzee H “*Wesbank v Deon Winston Papier and the National Credit Regulator*” (2011) 44 *De Jure* 463-479

Van Heerden C “Section 85 of the National Credit Act 34 of 2005: Thoughts on its Scope and Nature” (2013) 46 *De Jure* 968-997

Legislation

Credit Agreements Act 75 of 1980

National Credit Act 34 of 2005

National Credit Amendment Act 19 of 2014

Usury Act 73 of 1968

Internet sources

Annelene Dippenaar <https://www.compuscan.co.za/practical-impact-national-credit-act/> [accessed 12 July 2016].

Removal of Adverse Consumer Credit Information and Information Relating to Paid Up, Frequently asked questions https://www.thedti.gov.za/invitations/consumer_credit.pdf [accessed 08 august 2016]

DTI media statement: Removal of Adverse Consumer Credit Information and Information Relating to Paid up Judgments, <https://www.thedti.gov.za/editmedia.jsp?id=3006>, [accessed 25 August 2016].

<http://www.goodreads.com/quotes/tag/debt> [accessed 26 August 2016]