THE REINSTATEMENT OF CREDIT AGREEMENTS UNDER THE NATIONAL CREDIT ACT 34 OF 2005

by

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SUMMARY

Section 129(3) and (4) of the National Credit Act 34 of 2005 contains a special consumer protection mechanism commonly referred to as the right to “reinstate” a credit agreement. The general concept is that a consumer who has defaulted on his payment obligation has the right to reinstate the agreement by getting the arrears up to date and by paying certain costs. Successful reinstatement would then prevent the credit provider from enforcing or cancelling the agreement, while any ongoing enforcement action is also overturned. This right to reinstate is not absolute and thus subsection (4) provides for a number of events after which it can no longer take place. The original wording of section 129(3) and (4) led to some confusion and even litigation that reached all the way to the Constitutional Court. The subsections were also amended in 2015 in an attempt to provide clarity. However, it is unclear whether these amendments have truly resulted in the desired clarification and legal certainty.

Therefore, the purpose of this dissertation is to investigate the reinstatement mechanism in detail – starting with an historical overview of similar concepts that existed prior to the NCA. The position pre and post the 2015 amendments are then analysed in order to determine the current interpretation of these provisions, to assess whether the contradictions in the original subsections were addressed properly, and to identify any remaining problems in the present version of the subsections. A strong emphasis is on analysing case law and academic commentaries on this topic, and to ask questions regarding the future of this consumer credit mechanism.

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CHAPTER 1
INTRODUCTION

1.1 Research problem

The National Credit Act 34 of 2005 (NCA) made significant changes to the consumer credit law landscape in South Africa. One of its innovations was the introduction of a right for a defaulting debtor to reinstate the relevant credit agreement by complying with certain requirements. This reinstatement mechanism is provided for in section 129(3) and (4) of the Act, with subsection (3) setting out the requirements of reinstatement and subsection (4) stipulating some limitations on it.

The general idea behind these provisions is that a credit consumer (debtor) who has fallen in arrears with his or her payment obligations under a credit agreement, can rectify his or her default (breach of contract) by getting the relevant arrears up to date before a certain point in the debt enforcement process has occurred. The result of complying with the requirements provided for in these subsections is that the agreement is reinstated to a position prior to default, as if no default had taken place, and that any repossessed or attached property is returned to the consumer.

In this respect, the reinstatement concept in the NCA is comparable to a similar mechanism that was contained in the Act's predecessors, namely the Hire-Purchase Act 36 of 1942 and later the Credit Agreements Act 75 of 1980. The NCA as well as these earlier statutes represented a departure from the common law, which did not afford a right – after cancellation or enforcement proceedings have begun – to reinstate a credit agreement by merely getting the arrears up to date. There are also significant differences between the particulars of the NCA and those of the earlier statutes when it comes to the meaning and operation of reinstatement.

Despite the relatively simple concept underlying reinstatement, the interpretation and application of the provisions in the NCA have proven to be quite controversial. The prime reason for this is that the wording of the original version of the Act contained a number of contradictions and uncertainties as far as the drafting of the subsections were concerned. This problem was apparent from both case law and academic commentaries. As a result, the subsections were amended by the National Credit

Amendment 19 of 2014. However, despite the fact that some issues were addressed, it does not appear that the reinstatement concept is now free of uncertainties either. For instance, the amended version has also been criticised by scholars.

In view of the above, the purpose of this dissertation is to analyse the reinstatement mechanism, as provided for in the NCA, in full. The idea is to reinvestigate the subsections with respect to all the issues and debates that have come up in case law and academic discussions. The historical development of the concept will be traced from the common law to the statutes that preceded the NCA, to the original and amended versions of the NCA. All of the important debates will be discussed critically with reference to the wording of the provisions, case law as well as academic opinions. Ultimately, the aim is to set out the current interpretation of the NCA on this point and to identify the uncertainties that remain and should therefore be addressed. Some recommendations are also made with reference to the possible way forward.

The original section 129(3) and (4) used the terms “re-instate” and “re-instatement” with a hyphen, while the amended section 129(4) uses “reinstate” without the hyphen. For purposes of this dissertation it was decided to not use a hyphen unless it appears in a direct quote.

1.2 Overview of chapters

The research problem set out above will be investigated over the course of three substantive chapters followed by a concluding chapter. In what follows, an overview is provided of that which is discussed in each of the chapters of this dissertation.

The purpose of chapter 2 of the dissertation is to sketch the background and context of reinstatement. It essentially explains how the reinstatement remedy came about and where it fits in the bigger scheme of the NCA. Because the reinstatement mechanism in the NCA is not the first such concept in South African consumer credit legislation, it is necessary to provide a historical overview of the legal position prior to the current Act. Chapter 2 therefore sets out the common law position when it comes to reinstatement (or the lack thereof), and then traces the development of this notion in the two consumer credit statutes the preceded the NCA, namely the above-mentioned Hire-Purchase Act and the Credit Agreements Act. To complete the

discussion of the historical progression, chapter 2 will also summarise how the reinstatement mechanism in the NCA was developed further under the 2014 Amendment Act. Although the details of the relevant provisions in the pre- and post-amendment NCA are discussed in closer detail in chapters 3 and 4 respectively, chapter 2 provides a summary so as to understand the legislative history. The historical overview should provide valuable context to assist in reaching a deeper understanding of the reinstatement mechanism in the NCA. The comparison between the NCA and its predecessors will show that, although the concepts are the same in name, they differ significantly in substance and application. It is also noteworthy to see how the reinstatement mechanism has evolved over the years and has progressed when it comes its consumer-protection focus.

In addition to setting the right of reinstatement in a historical timeline, chapter 2 also discusses its textual setting within the NCA as a whole. In this regard a discussion is provided of how reinstatement operates within the broader debt enforcement framework that has been set in place by the NCA. This discussion should help to understand the function of reinstatement even better.

Chapter 3 will then zone in on the particulars of the original section 129(3) and (4) of the NCA. It provides a detailed discussion of the requirements for reinstatement as was set out in the original subsection (3) and it investigates the uncertainties that came up in that regard. It for instance explains the contradictions that existed in the subsection, most of which were caused by the fact that the subsection insinuated a right of reinstatement that could only be exercised before the contract had been cancelled. The chapter also considers the amounts that are payable in order to trigger the reinstatement of the agreement, with a special focus on the uncertainties regarding when the enforcement costs become payable. Further points of discussion include the consequences of successful reinstatement as well as the idea that reinstatement takes place by operation of law.

After discussing section 129(3), chapter 3 also analyses the original section 129(4). The latter subsection was presumably enacted to place certain limitations on the right of reinstatement. It contained a list of events after which reinstatement could no longer take place. Chapter 3 therefore discusses each of these events and also investigates the uncertainties that have come up in that regard. The well-known *Nkata*

case[1] will feature strongly in chapter 3, since it contains findings regarding many of the issues that have come up in terms of the original section 129(3) and (4).

After investigating the original version of section 129(3) and (4) in chapter 3, chapter 4 discusses how the subsection were amended by the National Credit Amendment Act of 2014, which came into operation in 2015. The chapter sets out the particulars of how each of the subsections was amended textually and then analyses the implications of such changes. The specific purpose is to evaluate whether the amendments improved the reinstatement concept by removing the uncertainties identified in the original subsections, or whether there are remaining problems in need of clarification. In this regard chapter 3 also sets out the proposals that were made by certain academics when it comes to possible future reforms.

Finally, chapter 5 summarises the findings of each preceding chapter and provides final conclusions with regard to the current state of the reinstatement mechanism. It is ultimately aimed that the analysis set out in the dissertation will identify the aspects that need clarification and/or reform, and hopefully the discussion could provide a platform upon which to consider the need (or lack thereof) to amend the NCA again.

[1] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC); *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA); *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC).

CHAPTER 2
BACKGROUND AND CONTEXT OF REINSTATEMENT

2.1 Introduction

The reinstatement mechanism in section 129(3) and (4) of the NCA is not the first of its kind in South African consumer credit legislation and indeed similar concepts existed in at least two previous statutes. It is therefore necessary to draw a comparison between reinstatement in terms of the NCA and how this mechanism was previously applied in the former statutes. As will be shown below, even though these statutes provided the same right in name, the substance and application thereof differed significantly.

In other words, the general aim of this chapter is to investigate how the right of reinstatement has progressed through the years, from its role (or lack thereof) in common law to its introduction and expansion in modern statutes. South African common law did not know a rule whereby the operation of an acceleration clause could be overturned by merely remedying the contractual default. Specifically in the mortgage context, the only comparable measure was the right of redemption in terms of which a mortgagee could have his attached property released by paying the full outstanding debt, but payment of the arrear amount alone could not reverse debt enforcement action.

The reinstatement provision in the Hire-Purchase Act 36 of 1942 was quite similar to the one in the Credit Agreements Act 75 of 1980, although the concept was amended and expanded somewhat in the latter statute. However, these statutes focused on specific situations relating to the credit sale (hire purchase or instalment sale) of movable objects, and thus they did not include mortgage agreements. The provisions regarding reinstatement in these statutes also had a more limited scope of application than the reinstatement mechanism introduced by the NCA. However, as progressive and pro-consumer as the introduction of a new reinstatement concept in NCA was (and is), there were (and perhaps still are) some serious drafting issues, and hence it has led to significant uncertainty. In response, the Act was amended by the National Credit Amendment Act 19 of 2014. Although the original section 129(3) and

(4) is discussed in detail in chapter 3 below and the amended version is discussed in chapter 4 below, this chapter will provide a brief analysis of their main tenets so as to sketch the historical progression of the reinstatement in South African law over the years.

In addition to the historical context, it is also necessary to consider that reinstatement as it currently exists does not operate in a vacuum. It functions within the general debt enforcement framework of the NCA, which means that, for a deeper understanding of reinstatement, the broader debt enforcement provisions in the NCA must be understood. This chapter accordingly also provides a brief analysis of the main sections in the Act concerning debt enforcement. This will arguably assist in interpreting the reinstatement concept in section 129(3) and (4).

2.2 Historical context of reinstatement

2.2.1 Introduction

The purpose of the following sections is to discuss the reinstatement concept within its historical context, from the common law position to the different statutes enacted over the years. It will be shown in particular that the NCA's version of reinstatement is far more progressive in scope and purpose than the previous statutes, which is not a surprise considering the NCA's strong emphasis on consumer protection. This historical overview also serves as a summary of the various features of section 129(3) and (4) of the NCA, both before and after the 2014 Amendment Act. These two phases of reinstatement under the NCA (pre and post 2014) will then be discussed in greater detail in chapters 3 and 4 below respectively.

2.2.2 Common law

Generally in South African law, where the debtor has a contractual obligation that must be performed or is payable in instalments, failure to pay any single instalment does not necessarily justify the creditor to cancel the contract or claim payment of the whole amount. Regarding cancellation, it is trite that the contract can only be cancelled if the

breach is material or if the contract contains a cancellation clause.[1] In the case of defaulting on a credit agreement that must be paid in instalments, the full outstanding debt can only be claimed if the contract contains a so-called acceleration clause. Typically such a clause would have the effect that, in the event of a breach by a debtor of his duties under a principal obligation, the capital amount of the loan together with interest and all other payments will become due payable when the credit provider invokes its right to accelerate. Based on this contractual right to receive the accelerated full outstanding amount, the creditor can then apply for and obtain a judgment for that amount. Acceleration clauses are very common in – but by no means limited to – especially mortgage agreements, with the effect that, if the debtor cannot satisfy the judgment (pay the full amount), which is invariably the case, the ultimate result is the sale in execution of the mortgaged property to satisfy the judgment debt.[2]

The common law did not provide for the reinstatement of credit agreements by simply paying the outstanding arrears or otherwise rectifying the contractual default. Under the common law of contract, when the creditor cancels the contract, the contract ceases to exist, and it therefore cannot be automatically reinstated when the default is corrected by the consumer.[3] This meant that the debtor could remedy the default before cancellation but not after cancellation, depending on how the *lex commissoria* (cancellation clause), if any, was formulated.

Furthermore, under common law the debtor could not, by simply rectifying the default, overturn the creditor's election to accelerate the full outstanding debt. Therefore, no formal reinstatement-type solution was available for a debtor who was willing and able to get the arrears up to date. This point is well illustrated in *Boland Bank Ltd v Pienaar and Another*.[4] In this case the court held that, after the bank had elected to rely on the acceleration clause and thus triggered the acceleration of the full outstanding debt, it could not be deprived of its right to claim the full outstanding amount just because the debtor tenders to repay the arrear amount and thus purge

[1] SWJ van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General principles* (4 ed 2012) 343.
[2] See further R Brits *Real security law* (2016) 61-62.
[3] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 179.
[4] 1988 (3) SA 618 (A) 9.

the default. Instead it was accepted that the creditor could elect to refuse or accept late payment.

This interpretation of the common law was later confirmed in *Nedbank Ltd v Fraser and Another and Four Other Cases*,[5] where the court found that, under the common law, the right to accelerate could be exercised even if the default was for a relatively small amount or was subsequently purged. Similarly, in *ABSA Bank Limited v Ntsane and Another*[6] it was held that, once the debtor defaulted, the creditor is entitled to resolve to enforce the acceleration clause or invoke its provisions in those cases where acceleration occurs automatically. It was also held that where the creditor decides to enforce the acceleration clause, it cannot be said to be unlawful per se.

The only common law phenomenon comparable to the modern right of reinstatement is found in the law of mortgage, where the mortgage debtor had (and still has) an equitable right of redemption which, if triggered, allows the mortgagor to escape the full effects of foreclosure in the case of property that had been attached in execution. In this regard the debtor can redeem the attached property by paying the full accelerated outstanding amount payable. It is also possible to redeem the property after it has been sold but only up and until it is transferred to the third party who bought it at the sale in execution. On payment of the amount due to the mortgagee, the mortgagor is entitled to have his property restored to him free of the mortgage.[7] The notable difference between redemption and reinstatement is therefore that the former requires payment of the full outstanding debt while the latter, as explained below, only requires payment of the arrear amounts (and possibly certain costs).

After having discussed the common law position, where no true reinstatement mechanism existed, the following sections discuss the statutory innovations that were introduced over the years to soften the common law approach in as far as it had a harsh effect on consumers who could pay the arrears but could not rely this fact to compel the creditor to undo the cancellation of the contract or the acceleration of the debt.

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[5] 2011 (4) SA 363 (GSJ) para 36.
[6] 2007 (3) SA 554 (T) para 66.
[7] See further R Brits *Real security law* (2016) 63-64; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3 ed 1987) 191-195. See also R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 179; R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" (2013) 24 *Stell LR* 165-184 167.

2.2.3 The Hire-Purchase Act 36 of 1942

According to general common law principles, in a cash sale ownership of the *merx* is transferred when it is delivered to the buyer and if the price is paid, while in a credit sale ownership is transferred at delivery without payment.[8] However, selling on credit meant that the seller had no security to ensure the future payment of the purchase price. A solution to this issue was the development of a new kind of arrangement in terms of which it is agreed that the purchaser receives delivery and pays the price by instalments but only becomes owner once the full price has been paid and all other obligations have been fulfilled.[9] Hence, the transfer of ownership is suspended until the full debt is paid, meaning that the retained ownership functions as the creditor's security. These contracts were commonly referred to as "hire-purchase" contracts. According to Otto, the hire-purchase contract was globally the most important driving force behind consumer credit legislation, and he explains that this type of contract fulfilled a social and economic need in the South African common law as well.[10]

As part of the first statutory regulation of hire-purchase agreement in South Africa, a right of reinstatement of credit agreements was developed in order to rectify some of the detrimental consequences for buyers who defaulted on their payment obligations under such agreements. In other words, the first statutory reinstatement measure in South Africa dates back to 1942 when the Hire-Purchase Act 34 of 1942 was enacted. This statute provided a right for a buyer of movable goods to be reinstated in his rights and duties under the agreement if, after repossession of the goods when the seller cancelled the contract, the buyer paid the amounts due.[11] Section 13 of the Act provided for this right in the following terms:

> "(1) If the seller has, as a result of the failure of the buyer to pay any instalment due under any agreement, recovered possession, otherwise than by an order of court, of any goods to which the agreement relates, the buyer shall except where he has himself terminated the agreement be entitled if he pays all arrears due under the agreement within a period of twenty-one days after the

[8] G Glover *Kerr's Law of sale and lease* (4 ed 2014) 165-166; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5 ed 2006) 177.
[9] JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273 262.
[10] JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273 262.
[11] For a summary reinstatement in terms of this statute, see R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?"(2017) 80 *THRHR* 177-197 179-180.

seller recovered possession of the goods, to the return of the goods at the seller's place of business or if he has no place of business or if the buyer so requests, at the premises in which goods are kept and to be reinstated in his rights under the agreement.

(2) Any seller who fails to return any goods to a buyer in pursuance of an obligation under subsection (1), shall be guilty of an offence and liable on conviction to a fine not exceeding on hundred rand."

Section 13 of the Hire-Purchase Act was limited to movables to which the Act applied, and this section became relevant only after cancellation of the credit agreement by the creditor. This right afforded by section 13 vested in the buyer and could be invoked when the buyer had failed to make payment of an instalment that was due and when, as a consequence of this breach of contract, the seller had recovered possession of movables without a court order. Reinstatement was however barred in instances where the buyer had him- or herself terminated the agreement and where the seller had recovered possession through a court order.

The Act limited the opportunity for reinstatement to a period of 21 days after seller recovered possession of the goods. A successful application of section 13 resulted in the goods being returned to the buyer and the buyer was then reinstated in his or her rights in terms of the agreement as they existed before cancellation. It seems like there was no requirement on the buyer to notify the seller of his or her intention to reinstate the agreement.[12]

As limited in scope as the Hire-Purchase Act was, it is clear that it represented a noteworthy departure from the strict common law position. It also paved the way for similar future statutory rules. Even though the Hire-Purchase Act did not contain exactly the same reinstatement concept as was later introduced by the NCA, it contained at least one important similarity with the NCA, namely the idea that reinstatement can be achieved, and the property can be reclaimed without having to pay the full outstanding debt. In other words, the debtor was granted a right more favourable than the common law right of redemption, even though it was only under these narrow conditions. It was notably still not possible to reinstate a mortgage agreement by merely remedying the default, since the Act did not apply to mortgage

[12] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 180.

loans, and instead the attached bonded property could only be redeemed by payment of the full outstanding debt.

2.2.4 The Credit Agreements Act 75 of 1980

A right of re-instatement was also known in the consumer legislation that repealed and replaced the Hire-Purchase Act and that directly preceded the NCA, namely the Credit Agreements Act 75 of 1980. Although the reinstatement measure is comparable to the one found in the NCA, it is not completely similar either.[13]

The Credit Agreements Act was adopted in 1980 and it covered contractual aspects of credit agreements in connection with the sale and lease of movable goods. These contractual aspects included the contents of contracts, the credit receiver's cooling-off right, the right of redemption, forbidden terms, and requirements regarding minimum deposits and maximum periods of payments.[14] The Credit Agreements Act replaced the Hire-Purchase Act and was supposed to co-exist with the Usury Act 73 of 1968, which covered financial aspects of money-lending contracts, leasing contracts pertaining to movable goods, the rendering of services, and the sale of movable goods.[15] It seems however that these two statutes could not harmoniously co-exist and eventually both were replaced by the National Credit Act 34 of 2005.

Section 12 of the Credit Agreements Act provided as follows:

> "(1) If the credit grantor, otherwise than by order of court, has recovered possession of any goods to which any credit agreement relates, the credit receiver, except where he has himself terminated the credit agreement, shall be entitled, against payment within a period of 30 days after the credit grantor recovered possession of such goods of the amounts, if any, which are then claimable and unpaid in terms of the credit agreement and of the reasonable costs incurred by the credit grantor in connection with the return of those goods, to the return of those goods at the place of business of the credit grantor or, if the credit receiver so requests or the credit grantor has no place of business, at the premises on which those goods are kept, and to be reinstated in his rights and obligations in terms of credit agreement.

[13] JM Otto & R-L Otto *The National Credit Act explained* (4 ed 2016) 130.
[14] JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273 266.
[15] JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273 266.

(2) No credit grantor shall fail to return the goods in question to the credit receiver in accordance with subsection (1)".

In other words, the Act provided the credit receiver with a right to reinstate the agreement after the creditor cancelled[16] the agreement and after it had repossessed the relevant goods without a court order. Similar to the Hire-Purchase Act as discussed above, section 12 of the Credit Agreements Act applied to movable property only. The main differences between the statutes were that the time provided was extended from 21 to 30 days, while the amount payable was extended to include not only the arrear amount but also the reasonable collection costs incurred by the credit provider. Except for these changes to the reinstatement requirements, the reinstatement provisions in these two statutes do not different significantly and thus the Credit Agreements Act does not represent a major development as far as the reinstatement concept is concerned. Nevertheless, we do see traces of what would later be included in the NCA's reinstatement concept, namely the idea that the amounts payable should include not only the arrear amounts but also certain costs.

It is furthermore interesting to consider that the reinstatement mechanisms in both the Hire-Purchase Act and the Credit Agreements Act involved the situation where the creditor repossessed the movable without first obtaining a court order. In other words, these reinstatement remedies empowered the debtor to overturn the creditor's self-help in repossessing the movables. In effect the remedies amounted to statutory versions of the common law spoliation remedy (*mandament van spolie*) that a person can rely on to restore possession of property that had been unlawfully dispossessed.[17] However, the difference is that these statutory versions of the spoliation remedy required the debtor to first pay the arrear amounts before receiving the property back. The remedy also restored the debtor in lawful possession of the property seeing as the cancellation of the credit agreement was reversed.

As will become clearer below, the reinstatement concept in the NCA does not at all envisage the situation where the agreement has been cancelled and the property repossessed without a court order. Instead, the NCA expressly refers to reinstatement *before* and not *after* cancellation. The general requirements pertaining to debt

[16] See e.g. *Trust Bank van Afrika Beperk v Eales en Andere* 1989 (4) SA 509 (T) 513.
[17] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 181.

enforcement under the NCA also do not permit self-help at all and thus reinstatement is not aimed at rectifying self-help as such. Instead, as explained below, reinstatement under the NCA involves a much broader (but not always clear) concept of reinstatement and with a wider purpose and application.

In light of the above summaries of the common law and two statutory innovations, the next two sections introduce the reinstatement mechanism established in the NCA and as later amended by the 2014 Amendment Act. The subsequent chapters will then analyse these provisions in finer detail.

2.2.5 The National Credit Act 34 of 2005

The NCA was promulgated in 2005 (and became fully operative in 2007).[18] It repealed and replaced both the Usury Act and the Credit Agreements Act. The nature and consequences of credit agreements are complex and, as a result, renders consumers, especially illiterate ones, vulnerable and exposed to exploitation by credit providers. With this in mind, section 3 of the NCA states that the purposes of the Act are "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers".

The Act goes on to list a number of ways in which the Act seeks to achieve these purposes.[19] Some of these can be highlighted for presented purposes. For instance, the Act seeks to promote responsibility in the credit market by *inter alia* encouraging the fulfilment of financial obligations and discouraging contractual default by consumers.[20] The Act further pursues "equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers"[21] and by "correcting imbalances in negotiating power between consumers and credit providers".[22] It is also the goal to provide "mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial

[18] For general discussions of the NCA, see standard works like JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell (eds) *Guide to the National Credit Act* (Service Issue 10, Jun 2018); JM Otto & R-L Otto *The National Credit Act explained* (4 ed 2016); M Kelly-Louw *Consumer credit regulation in South Africa* (2012).
[19] S 3(a)-(i) of the NCA.
[20] S 3(c)(i)-(ii).
[21] S 3(d).
[22] S 3(e).

obligations".[23] A final ambition of the Act that can be emphasised is the aim of "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".[24] The purposes of the NCA are important because the Act must be interpreted in a manner that gives effect to these purposes.[25] In other words, also when interpreting the provisions pertaining to reinstatement, one must always keep the Act's purposes in mind as a guideline.

To fulfil these purposes, the Act contains various aspects – some of which are novel to the South African credit industry. To mention some important features, the NCA contains provisions that establish a National Credit Regulator and a National Consumer Tribunal.[26] The Act also requires credit providers to register with the Regulator.[27] The NCA furthermore sets out certain consumer rights[28] and regulates matters such as marketing practices,[29] unlawful agreements and provisions,[30] and rules regarding interest and other costs that may be claimed from consumers.[31] The Act also has a strong focus on combating over-indebtedness and reckless lending practices, and it introduced the novel debt review procedure.[32] Importantly for present purposes, the NCA moreover contains special rules regarding the enforcement and termination of credit agreements.[33] This aspect is summarised in section 2.3 below.

Section 129(3) and (4) is situated within the provisions of the Act that specifically deal with debt enforcement. The original subsections – before their subsequent amendment – provided a right for the consumer to reinstate a credit agreement in terms of which the consumer is in default. Prior to its amendment in 2015, section 129(3) stated as follows:

> "(3) Subject to subsection (4),
> (a) a consumer may at anytime before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying

[23] S 3(g).
[24] S 3(i).
[25] S 2.
[26] Ch 2 of the NCA.
[27] Ch 3.
[28] Ch 4 part A.
[29] Ch 5 part C.
[30] Ch 5 part A.
[31] Ch 5 part C.
[32] Ch 4 part D.
[33] Ch 6.

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;

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

The right provided in subsection (3) did not exist without limits or qualifications. In this respect section 129(4), also prior to its later amendment, provided the following:

"(4) 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 or 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 general aim of section 129(3) and (4) of the NCA is to provide a way for consumers to escape the harsh consequences of defaulting on their loans. According to subsection (3)(a), reinstatement could only occur by the consumer paying the listed amounts, but only before the credit provider had cancelled the credit agreement. Therefore, this subsection provided requirements to be met by the consumer before the credit agreement could be reinstated. The academic debate and controversy surrounding this subsection will be investigated in chapter 3 below. The discussion will include analyses regarding important concepts, such as the requirement that reinstatement can only be done before the cancellation of the contract, the meaning of "payment" as well as of other concepts like "default charges", "reasonable costs of enforcing the agreement" and "overdue amounts". All of these issues have proven to be thorny in arriving at a proper interpretation of these subsections, and thus they must be investigated thoroughly.

For purposes of the current discussion on the historical progression of the reinstatement concept, it is immediately evident that the reinstatement concept in the NCA differs substantially from the reinstatement provisions in the Hire-Purchase Act and the Credit Agreements Act.[34] The most striking difference is that the NCA purports a reinstatement that is available prior to the cancellation of the agreement, while the

[34] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 181.

earlier statutes expressly dealt with reinstatement after cancellation. In fact, as explained in more detail in chapter 3 below, the before-cancellation qualification in section 129(3) has caused (and possibly continues to cause) serious confusion. Another big distinction, as mentioned already, is that the NCA applies to a much broader category of credit transactions, including mortgage agreements, which were not covered by the previous statutes.[35] As will become clear below, and as case law on reinstatement under the NCA has shown, the reinstatement mechanism has become a rather prominent aspect of consumer mortgage law especially. These provisions also protect consumers who face the sale in execution of their properties by providing them with a way to reverse a mortgage creditor's election to foreclose.[36]

Another difference between the NCA and its two predecessors is that the NCA does not attach a time limit to the consumer's opportunity to reinstate the agreement. Instead, it lists certain events in the process after which reinstatement can no longer take place. Moreover, the amounts that the consumer must pay have been extended to include not only the arrear amounts and the creditor's reasonable enforcement costs, but also default charges.

On face value, the purpose behind and basic concept underlying the reinstatement mechanism seemed relatively clear. The problem was that, in addition to the confusion surrounding the before-cancellation qualification, there were quite a number of other interpretational uncertainties in and between the two subsections. As discussed below, the legislature eventually attempted to clarify some of these issues.

2.2.6 The National Credit Amendment Act 19 of 2014

It is well known that the NCA in its original form contained many drafting issues, which led to an exceptionally high number of case law and academic commentaries. In response, the Department of Trade and Industry embarked on a review project,[37] which eventually culminated in the National Credit Amendment Act 19 of 2014. The Amendment Act came into operation on 13 March 2015.[38] The NCA was amended in

[35] See s 8(4)(d) of the NCA.
[36] *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) para 59.
[37] See the Department of Trade and Industry *Draft National Credit Act Policy Review Framework* (2013) (General Notice 559 in *Government Gazette* 36504 of 29 May 2013).
[38] See Proclamation R 10 in *Government Gazette* 38557 of 13 March 2015.

a number of respects, but for present purposes the most important amendments are those made to section 129(3) and (4) in response to some of the problems identified in these subsections. These problems are discussion in chapter 3 below.

In attempt to rectify and clarify the reinstatement mechanism, subsection (3) was modified to provide as follows:

> "(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."

The differences between the original and new subsections are discussed in more detail in chapter 4 below, but for now it can be noted that the new subsection consists of only one paragraph, unlike the original, which contained two paragraphs. Specifically, the original paragraph (b) has been removed. Also, the term "reinstate" has been removed and replaced with "remedy a default". As explained in chapter 4 below, although these changes have removed some of the inconsistencies, it left some in place and might even have created some new problems.

Subsection (3) was originally limited by the provisions in subsection (4), but the latter subsection was amended and now provides as follows:

> "(4) A credit provider may not reinstate 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 172;
> (b) the execution of any other court order enforcing that agreement; or
> (c) the termination thereof in accordance with section 123."

The only textual amendment is that the term "consumer" has been replaced with "credit provider" and that the term "or revive" has been added. As explained in chapter 4, it is difficult to arrive at an answer for what these changes are meant to imply for the reinstatement concept.

Therefore, the legislature was sensitive to the fact that the original version of the subsections contained problems in need of clarification. However, even though significant amendments were eventually made to section 129(3) and (4), there is still

great controversy surrounding the interpretation and application of these subsections. As also discussed in chapter 4 below, some authors continue to criticise the amended subsections while some also call for further amendments or even a complete redrafting of the provisions.

2.2.7 Possible further amendments in the pipeline

It should be noted that a new Draft National Credit Amendment Bill was published for comment recently.[39]The primary purpose of the suggested amendments is to introduce a new procedure referred to as "debt intervention". This debt relief mechanism falls outside the scope of this dissertation, but it is worth noting that clause 18 of the Bill also proposes some changes to section 129(4) of the Act. The suggestion is to amend the current paragraph (b) ("the execution of any other court order enforcing that agreement") by adding court orders granted by the National Consumer Tribunal. Hence, the idea is that reinstatement would also be impossible after the execution of an order granted by the Tribunal, and not only one granted by a court.

Furthermore, the proposal includes the addition of a paragraph (d), which would provide that the "credit provider may [also] not reinstate or revive a credit agreement after ... (d) the Tribunal ordered that the debt that underlies a credit agreement is extinguished, or that the credit agreement was reckless or void". At this stage it is difficult to comment on what the meaning of these suggested changes might be, since the ultimate particulars and implications of the debt intervention process are still unclear. However, it does seem rather obvious that a credit agreement cannot be reinstated (by the consumer or the credit provider) if the debt has been extinguished or if the contract itself is void. It is therefore not perfectly clear what the legislature's intention is with this proposed amendment. It might be that the legislature simply wishes to ensure that a credit provider does not use the reinstatement mechanism referred to in section 129(4) as a way to undo the relief enjoyed by a consumer under a debt intervention order.

[39] Draft National Credit Amendment Bill, 2018 (General Notice 922 in *Government Gazette* 41274 of 24 November 2017).

2.2.8 Conclusion

The above summary of the historical progression not only serves as a foundation for the more detailed analysis of section 129(3) and (4) to follow in subsequent chapters, but it also compels one to ask whether the development of the reinstatement concept is heading in the right direction. In view of the 2014 Amendment Act and even the suggestions made in the new draft Bill, the time is arguably ripe to reconsider the entire topic and to ask assess whether the current subsections are adequate, whether further changes need to be made or whether, as some argue,[40] it is time to embark on a complete rethink and redrafting of the relevant provisions.

Before discussing section 129(3) and (4) in detail in subsequent chapters, it is necessary to also situate the subsections in their statutory context – in other words, to understand exactly where and how they fit into the scheme of the NCA. This will be done in the following section of this chapter.

2.3 Debt enforcement under the National Credit Act

In terms of section 123(2) of the NCA, if a consumer is in default under a credit agreement, the credit provider may take the steps set out in the Part C of Chapter 6 to enforce and terminate that agreement. Chapter 6 of the NCA is titled "Collection, repayment, surrender and debt enforcement" and consists of three parts, one of which (Part C) is titled "Debt enforcement by repossession or judgment". Part C comprises sections 129 to 133 of the Act and therefore it is evident that the provisions containing the reinstatement mechanism (section 129(3) and (4)) are included in the part of the NCA that deals specifically with debt enforcement.[41] In light of this particular placement in the Act, it is useful to briefly discuss the debt enforcement provisions in the NCA so as to establish the context within which reinstatement is available to a consumer.

When a consumer defaults on his obligations under a credit agreement, and should the creditor wish to enforce and/or terminate the agreement, the first step is to notify the consumer of his default and to allow him the opportunity to rectify the

[40] Especially R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197. See section 4.4 below.
[41] For a detailed discussion of debt enforcement under the NCA, see further C van Heerden "Enforcement of credit agreements" in JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell (eds) *Guide to the National Credit Act* (Service Issue 10, Jun 2018) ch 12.

defaulter to approach a debt counsellor, ombud or alternative dispute resolution agent.[42] If, after the consumer has been in default for at least 20 business days and at least 10 days after the aforementioned notice was given, the consumer has not responded to or exercised any of the aforementioned options, the credit provider is permitted to approach a court for an order enforcing the agreement.[43] Although there is some debate as to exactly what is meant by the notion of approaching a court, for present purposes we can assume that it probably refers to the issuing of summons and thus the commencement of formal enforcement proceedings.

For reinstatement purposes, the first point to keep in mind is the rule that a credit provider may only send the notice of default if the consumer is actually in default of his obligations under the agreement. This is clear from the wording of section 129(1). This implies that if the arrears are brought up to date before the credit provider even has the chance to send the notice of default, no further enforcement steps are permissible. The possibility of reinstatement, as contemplated in section 129(3), is not even relevant at this stage.

The second point to consider in this regard is that the credit provider may only approach a court to enforce the agreement if the consumer is in default at that point and has been in default for at least 20 business days. This is clear from the wording of section 130(1). In other words, if – in response to a notice of default – the consumer pays the arrear amount stipulated in the notice and thus rectifies his default, the credit provider has no *locus standi* to bring any enforcement action to court. In a sense, the reinstatement concept in section 129(3) and (4) is not yet relevant at this point either because the rule in section 130(1) is enough to cover instances where arrears were paid before the commencement of enforcement action.

A third point of relevance is the express stipulation that a court may not hear a debt enforcement case if the consumer had paid the amounts listed in the notice of default before the credit provider approaches the court – hence before enforcement action commences with the issuing of summons. This rule is specifically provided for in section 130(3)(c)(ii)(dd), which provides that:

[42] S 129(1)(a) read with s 129(1)(b)(i) of the NCA.
[43] S 130(1)(a)-(b).

> "(3) 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 this Act applies, the court may determine the matter only if the court is satisfied ...
> (c) that the credit provider has not approached the court-
> (ii) despite the consumer having-
> (dd) brought the payment under the credit agreement up to date, as contemplated in section 129(1)(a)."

In other words, the effect of this provision is that the court does not have jurisdiction to decide on a debt enforcement case if the consumer rectified his arrears in response to the notice of default prior to the issuing of summons.[44] This provision affirms and strengthens the general idea that, if there is no default, there may be no enforcement. However, it refers to a remedying of default prior to the commencement of enforcement action, whereas section 129(3) and (4) could (and does) apply while enforcement is ongoing (but before cancellation) up until the final conclusion of enforcement, such as the sale of property or execution of a court order. As discussed in more detail in chapter 3 below, section 129(3) also does not specifically refer to an amount listed in the notice of default, nor are its requirements limited to the payment of the default amount alone.

Consequently, the reinstatement mechanism envisioned in section 129(3) in all likelihood refers to situations after the court has been approached and where the consumer was in default at that point but tries to rectify the default after the commencement of legal action. Situations where default was remedied prior to the commencement of enforcement action are covered by the rules summarised above, namely that no default notice may be sent if there is no default – or, by implication, if default is remedied before the notice is sent; and secondly that the court may not hear the matter if default was rectified before enforcement action was commenced.

In a sense one can see reinstatement as a kind-of indirect debt enforcement measure because it encourages a consumer to remedy his contractual default instead of "giving up" and simply facing the credit provider's formal enforcement action. The possibility of reinstatement may even inspire consumers to get their affairs in order so as to remedy the default, and thus avoid the negative consequences of judgments and executions against assets. However, despite the debt enforcement function that can indirectly be fulfilled by section 129(3) and (4), the true legal effect of successful

[44] See e.g. *Van As v Nedbank Limited* (10589/16) [2016] ZAWCHC 107 (26 August 2016) para 19.

reinstatement is that it interrupts and reverses the credit provider's ongoing formal enforcement action. From a credit provider's perspective, when it considers the debt enforcement requirements and procedures set out in the NCA, it must necessarily be aware of the fact that possible reinstatement by its debtor could interrupt any ongoing legal action. In this sense reinstatement functions as a qualification on the creditor provider's usual right to enforce the terms of the credit agreement.

It should also be considered that the right to reinstate a credit agreement fits into the NCA's preference for extra-judicial and consensual dispute resolution.[45] Brits also emphasises this feature and reasons that it is better for both parties if, when at all possible, the transaction is seen through to its natural conclusion instead of being enforced through litigation.[46] Successful reinstatement therefore qualifies as a dispute that has been resolved without court involvement. In this view it is therefore arguable that the reinstatement concept should be interpreted as generously as linguistically possible, but within the reasonable confines set by the Act itself.

Related to the above point, it can also be mentioned that there is increasing realisation in case law that the opportunity to reinstate the agreement by getting the arrears up to date is an ideal way in which a struggling homeowner can present the sale in execution of his home.[47] In other words, it seems that the protection of consumers' housing rights[48] could serve to assist with the interpretation of section 129(3) and (4) in as far the application of these subsections can help avoid the unconstitutional loss of homes due to mortgage foreclosure.[49]

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[45] See e.g. s 3(h) of the NCA.

[46] 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* 75-91 78

[47] See e.g. *ABSA Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T) paras 91-94; *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35 fn 36; *FirstRand Bank Ltd v Mdletye and Another* 2016 (5) SA 550 (KZD); *FirstRand Bank Ltd t/a First National Bank v Zwane and Two Other Cases* 2016 (6) SA 400 (GJ). See also L Steyn "Execution against a mortgaged home – a transformed, yet evolving landscape: *FirstRand Bank Ltd v Mdletye*(KZD) and *FirstRand Bank t/a First National Bank v Zwane* (GJ)" (2018) 135 *SALJ* 446-460.

[48] S 26 of the Constitution.

[49] For more detail on the relationship between the NCA and housing rights, see further R Brits & AJ van der Walt "Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 1)" 2014 *TSAR* 288-305; R Brits & AJ van der Walt "Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 2)"2014 *TSAR* 508-519.

2.4 Conclusion

This chapter aimed at investigating the background and context of the right of reinstatement found in the original section 129(3) and (4) of the National Credit Act. The different statutes that provided and provides for a right of reinstatement were looked into individually and a discussion was conducted on how the application of this right has changed through the years.

The historical development of reinstatement reveals an evolution from a largely creditor-friendly credit law regime with little opportunity to overcome a creditor's election to rely on its contractual enforcement rights, to a rather progressive measure that clearly favours the consumer. The historical overview above also shows that reinstatement started out as a somewhat modest exception in the Hire-Purchase Act and the Credit Agreements Act, and that it had a limited role to play. For instance, it only applied where the property was repossessed without a court order and it only applied to movable goods. Conversely, it is reasonably clear that the reinstatement remedy in the NCA is much more than a spoliation type remedy. It applies to a much broader scope of situations and, importantly, it also includes immovable property within its field of application. In fact, experience in case law has shown that reinstatement under the NCA has had the most significant impact, not in the context of movable objects, but in the case of immovable property subject to mortgage agreements.[50] It is also with respect to this category of consumer transactions where the impact of the Act on the common law position is most striking.

The reinstatement mechanism is contained in section 129 of the NCA, which is the section that deals with steps that a credit provider must take before enforcing the credit agreement through court processes. Indeed, the central feature of the section is to stipulate the law regarding the notice of default that must be sent before a court is to be approached. This textual position of the reinstatement mechanism provides clues as to its place and purpose within the scheme of the NCA. The clear intention is that reinstatement was intended to be a route by which a consumer could avoid facing formal debt enforcement action. Ideally, the best time to make use of reinstatement would be in response to the notice of default, which would naturally set out the amounts claimed by the credit provider. However, as the following chapters illustrate,

[50] The best example is the *Nkata* judgments; see section 3.2.2 below.

the opportunity to reinstate stretches even after debt enforcement action has commenced, but only until a certain point in the process.

The chapter also situated the reinstatement mechanism within the broader debt enforcement provisions contained in the NCA, namely Chapter 6 Part C of the Act. The main conclusion from this contextualisation is the point that reinstatement functions as an exception to – and even a hurdle in – the credit provider's right to enforce and/or terminate the credit agreement. The reason for this is that it allows the consumer a way to prevent or even overturn ongoing debt enforcement. The broader assumption is that the resolution of contractual default is better than allowing normal debt enforcement – with its various consequences – to proceed unabated.

The next chapter sets out to evaluate the original version of the section 129(3) and (4) in detail, with particular emphasis on the controversies that have surrounded its interpretation.

CHAPTER 3
REINSTATEMENT UNDER THE ORIGINAL SECTION 129(3) AND (4)

3.1 Introduction

The purpose of this chapter is to analyse section 129(3) and (4) of the NCA as it was originally enacted in 2005 (coming into operation in 2007). As will become clear, doubts regarding certain terminological contradictions and other interpretational issues in these subsections were raised already soon after the NCA was enacted. Problems were also picked up in case law and the reinstatement concept was especially placed under the spotlight when even the Constitutional Court was called upon to provide an authoritative interpretation of certain contentious issues. Therefore, this chapter will analyse the subsections themselves and investigate the case law and academic opinions on the original version of the Act on this point. The discussion will serve as a foundation for the discussion to follow in chapter 4 on how the subsections were amended to address some of the problems.

The chapter is divided into two broad parts. The first deals with section 129(3) of the NCA, which provided the right to reinstate a credit agreement, set out the requirements to utilise this right and limited it to agreements that have not yet been cancelled. The second part discusses section 129(4), which lists a number of events in the process after which reinstatement is no longer possible. In both instances the analysis will focus on the subsections as they were formulated and interpreted prior to the 2014 Amendment Act.

It should be noted that the use of past and present tense in this chapter could be somewhat confusing. Some features of the subsections were changed in 2014 and will thus be discussed in the past tense in this chapter (as they existed pre-Amendment Act), while some features, which have remained the same, are discussed in the present tense. The aspects of section 129(3) and (4) that did not change in 2014 are discussed here and thus not repeated in chapter 4 below. In other words, chapter 4 will focus specifically on the changes that were made.

3.2 The original section 129(3): the requirements for reinstatement

3.2.1 Introduction

The original section 129(3), prior to its later amendment, provided as follows:

> "(3) Subject to subsection (4),
>
> (a) a consumer may at anytime 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;
>
> (b) after complying with (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order."

In other words, section 129(3) provided in paragraph (a) that a consumer may reinstate a credit agreement before it is cancelled by paying the all amounts that are overdue, permitted default charges and reasonable costs for enforcing the agreement. Paragraph (b) set out some of the supposed consequences of successful reinstatement, such as that any repossessed property must be returned to the consumer.

The following discussion will therefore include an investigation into the requirements for how a credit agreement can be reinstated. As part of the analysis, certain aspects must be discussed, such as the meaning of cancellation and payment in this context. The different amounts payable, namely default charges, reasonable costs and amounts overdue, will also be addressed because the correct payment of these amounts will trigger reinstatement. Furthermore, the contradictions and other interpretational difficulties in the subsection will be discussed, along with an analysis of whether reinstatement takes place by operation of law without the parties' knowledge and/or cooperation. The consequences of successful reinstatement will then also be discussed.

Before investigating these questions, and in order to sketch the context for the debates surrounding reinstatement, it will be useful to first summarise the facts of and legal problems in the *Nkata* saga,[1] since the case well illustrates some of big questions

[1] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC); *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA); *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC). For a commentary on the cases,

pertaining to reinstatement. It is also the most prominent case on reinstatement, since it reached the Constitutional Court.

3.2.2 Background: the *Nkata* case[2]

Ms Nkata was a businesswoman who sold hospital equipment. In March 2005 she bought a property at 35 Vin Doux Crescent, Durmonte, Durbanville in the Western Cape. She also registered two mortgage bonds with FirstRand Bank in 2005 and 2006 respectively to finance the acquisition of the property. The property became her primary residence in 2007. The two mortgage bonds covered loans for R850 000 and R630 000 respectively. For the first bond Ms Nkata selected the address of the bonded property as the *domicilium* address for the service of all notices but for the second bond she selected C/04 Devonshire Hill, Rondebosch, Cape Town, 7700, which was the residence she temporarily lived in while her house was being built on the bonded property.

Ms Nkata fell into arrears repeatedly under her credit agreements with the bank and this triggered many telephone calls and letters from the bank as well as default notices in terms on section 129(1) of the NCA. In June 2010 the bank addressed the first 129(1) notice to Ms Nkata to 27 Vin Doux Cresent, Durmonte, Durbanville instead of 35 Vin Doux Cresent, Durmonte, Durbanville and therefore Ms Nkata never received it. The second section 129(1) notice was meant to be sent to the Rondebosch apartment but the Bank again misstated the address and sent it to c/o4 Devonshire Hill instead. In July 2010 the bank issued a summons that was served at 35 Vin Doux Crescent, which is the correct address, by affixing a copy of the summons to the outer door. Ms Nkata did not enter an appearance to defend and, in fact, she alleged that the summons was never served on her.

A default judgment was granted against Ms Nkata in September 2010 by the Registrar of the Western Cape Division of the High Court. The judgment was for the total outstanding amount owed to the bank, which totalled R1 472 506.89 with interest

see further e.g. L Steyn & R Sharrock "Remedying mortgage default: *Nkata v FirstRand Bank Ltd*" (2017) 134 *SALJ* 498-513.

[2] The facts of the case are reported in *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) paras 3-14; *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) paras 3-9; *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) paras 3-16, 82-91.

from 1 June 2010 to the date of payment. The registrar also issued a writ of execution authorising the sheriff to attach and sell the property in execution. In November 2010 Ms Nkata applied to the High Court to rescind the default judgment but she and the bank entered into a settlement agreement before the application was heard. The bank cancelled the sale in execution and Ms Nkata agreed to pay monthly instalments of R10 000. Ms Nkata contended that after the settlement agreement, when she paid her arrears of over R87 000, the original credit agreement was reinstated. As shown further below, this allegation was disputed by the credit provider, and thus it was necessary for the court to establish whether the requirements for reinstatement had been met.

These facts raised a number of issues regarding the interpretation of the reinstatement mechanism in the NCA. The following discussions on these various aspects will in each instance refer back to how the judgments of the respective courts in *Nkata* (the Cape High Court, the Supreme Court of Appeal and the Constitutional Court) dealt with some of these thorny questions. Ultimately, and as illustrated in the *Nkata* saga, by answering the question whether or not the requirements for reinstatement were met, this could very well determine whether or not the sale in execution of a mortgaged property can go ahead.

3.2.3 The meaning of "cancelled" and contradictions in the subsection

When tackling the issue of reinstatement, the first question to be asked is when can a credit agreement be reinstated? The original section 129(3) specifically stated that the consumer may reinstate a credit agreement that is in default *before* the credit provider *cancels* the agreement. The key question therefore is: what is meant by the cancellation of an agreement in this context? The term "cancelled" is not defined in the NCA and thus one would expect it to bear the commonly accepted meaning of cancellation as understood in the normal law of contract. It is trite that cancellation is a remedy that can be invoked by the innocent party to an agreement when there was default (breach of contract) by the other party. It is also trite that unless the contract includes a cancellation clause (*lex commissoria*), the contract may only be cancelled if the breach was material. If a contract is cancelled, it per definition no longer exists and in the credit context the creditor would then typically claim contractual damages

in the amount of the outstanding indebtedness and/or the return of any relevant property, such as in the case of a lease or instalment agreement.[3]

As explained above, the reinstatement concept under both the Hire-Purchase Act and the Credit Agreements Act had such a typical cancellation of the credit agreement in mind. More specifically, the idea was that successful reinstatement would reverse any cancellation that had been initiated by the creditor. In other words, the envisaged reinstatement mechanism was clearly intended to be available after the contract had been cancelled, as a way to overturn such cancellation by remedying the breach of contract that instigated the cancellation in the first place.

However, section 129(3) of the NCA specifically limited the opportunity for reinstatement to the period prior to cancellation of the contract. In other words, reinstatement is apparently not perceived as a mechanism that literally reinstates or resuscitates a cancelled contract, but a measure that must be done while the contract is still in existence (pre-cancellation). As explained in more detail below, this pre-cancellation feature of reinstatement reveals a serious contradiction, namely the unexplainable notion of reinstating a contract that is still in existence (uncancelled) and thus technically not in need of reinstating.

In view of the above, it was not clear what exactly the legislature had in mind with the reinstatement provisions in the NCA. Exactly what is meant to be “reinstated”, if not a cancelled contract? What does the reinstatement of an uncancelled contract refer to? What exactly is meant by “cancelled”? Does it refer to a certain point in the process of terminating the agreement? Does it mean something other than the normal common law meaning of cancellation? In view of how section 129(3) and (4) was formulated, it was difficult to provide logical answers to these questions, although some academics and courts tried to do so.

Already in 2006 Otto pointed to the contradictions revealed by the wording of section 129(3).[4] Firstly, the term “reinstate” is ill suited to refer to an agreement that has not yet been cancelled: how can a credit agreement that has not yet been

[3] On the cancellation remedy in general, see SWJ van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General principles* (4 ed 2012) ch 11.4.

[4] JM Otto *The National Credit Act explained* (2006) 98, similarly repeated in JM Otto & RL Otto *The National Credit Act explained* (2 ed 2010) 117 and JM Otto & R-L Otto *The National Credit Act explained* (3 ed 2013) 125. See also JM Otto & R-L Otto *The National Credit Act explained* (4 ed 2016) 130.

cancelled be reinstated?[5] Coetzee[6] agreed with Otto's observations and tried to make some sense of these contradictions. Although it seemed logical that reinstatement should be construed as a mechanism available to a consumer after the cancellation of the contract, she acknowledged that this interpretation does not align with the clear wording of the subsection. Coetzee further speculated that the section might have had in mind the situation where the consumer brings his or her payments up to date in general or under situations where the credit provider already acquired the right to cancel the agreement but has not yet done so. She nevertheless conceded that this suggestion contradicts the assumption in section 129(3)(b) that property had been attached, which could only have been done under attachment order granted after cancellation of the property.

The aforementioned point refers to the second contradiction in section 129(3), namely between paragraphs (a) and (b). Paragraph (a) contemplated reinstatement *before* cancellation, whereas paragraph (b) – referring to the return of repossessed property – seemed to suggest a situation where reinstatement happens after property had been repossessed under an attachment order – hence *after* cancellation.[7] The contradiction rests therein that logically reinstatement cannot be restricted to *before* the contract is cancelled (paragraph (a))while at the same time be permitted after cancellation (paragraph (b)).

After first Otto and later Coetzee pointed to these contradictions, Brits[8] analysed them further and attempted to find some workable interpretation. The main thrust of his suggestion was that the contradictions can perhaps be removed when the concept of "cancelled" as used in section 129(3) is not given its traditional common law meaning in this context. It should thus be interpreted more broadly to refer to the ultimate termination of the contract after the entire enforcement process is completed

[5] JM Otto *The National Credit Act explained* (2006) 98, similarly repeated in JM Otto & RL Otto *The National Credit Act explained* (2 ed 2010) 117 and JM Otto & R-L Otto *The National Credit Act explained* (3 ed 2013) 125. See also JM Otto & R-L Otto *The National Credit Act explained* (4 ed 2016) 130.
[6] H Coetzee "Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 569-588 578.
[7] See R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" (2013) 24 *Stell LR* 165-184 172, 173. See also CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 683 fn 152; R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 188-189.
[8] R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" (2013) 24 *Stell LR* 165-184 173.

and, if relevant, the property subject to the agreement has been sold in execution. Such an admittedly loose interpretation would, as Brits argued, not only remove the contradictions between paragraphs (a) and (b) of section 129(3), but it would also align section 129(3) with the list of events in section 129(4) after which reinstatement is no longer possible.

The question surrounding the meaning of the before-cancelled qualification also came up in the *Nkata* case. The specific question was whether the mortgage creditor's reliance on an acceleration clause to accelerate repayment of the full outstanding debt and to call up (or foreclose) the mortgage, involved a cancellation of the credit agreement as meant in section 129(3). If so, then reinstatement was no longer possible; if not, then reinstatement was still possible.

The high court in *Nkata v FirstRand Bank Ltd and Others*[9] held that if the credit provider invokes an acceleration clause, the contract remains in force and the consumer is obliged to make specific performance of the accelerated indebtedness. In other words, the enforcement of an acceleration clause does not constitute a cancellation of the agreement as such, and thus the before-cancelled limitation on reinstatement is not triggered by a typical foreclosure remedy (which involves acceleration).

The Constitutional Court in *Nkata v FirstRand Bank Ltd*[10] agreed with this interpretation and confirmed that the enforcing of an acceleration clause does not involve the cancellation of the agreement for breach of contract.[11] Hence, enforcing the contractual right to immediately claim full payment is not the same as cancelling the agreement in response to a breach of the duty to pay an instalment. The implication of this interpretation is that reinstatement cannot reverse the actual cancellation of a credit agreement, but it can reverse or prevent the creditor's election to accelerate payment of the debt under an acceleration clause.

This interpretation is relatively satisfactory in that it at least does not prevent mortgage debtors from utilising the benefits of section 129(3) just because the creditor

[9] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 39.
[10] 2016 (4) SA 257 (CC) para 110.
[11] See also e.g. *FirstRand Bank Ltd v Mdletye and Another* 2016 (5) SA 550 (KZD) para 9; *FirstRand Bank Ltd t/a First National Bank v Zwane and Two Other Cases* 2016 (6) SA 400 (GJ) para 27; *Makubalo and Another v Nedcor Bank Ltd and Others* (M153/2016) [2017] ZANWHC 45 (29 June 2017) para 12.

had commenced with foreclosure action. However, this is not a full answer because it still leaves one with unanswered contradictions in section 129(3) and (4) and potentially unsatisfactory outcomes in cases where credit agreements (even mortgage agreements) are actually cancelled. Does it make sense that the creditor's choice of remedy (cancellation versus enforcing of an acceleration clause) should determine whether or not reinstatement is still possible?[12] Also, it does not explain how the term "reinstate" is appropriate when dealing with a contract that had not yet been cancelled; neither does it address the contradictions between paragraphs (a) and (b) of section 129(3). As explained in chapter 4 below, the legislature opted to amend the Act in an attempt to remove some of these contradictions. It will be analysed in that chapter whether the amendments truly reached the goal of providing clarity.

3.2.4 Meaning of payment

In order for a consumer to reinstate a credit agreement that is in default, the original section 129(3) provided that the consumer must pay certain amounts, which are the amounts overdue and the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement. It is usually not controversial to determine whether a certain amount has been legally *paid* but in *Nkata* one of the arguments related to whether the relevant enforcement costs had actually been paid. The question was whether it could be regarded as payment for purposes of section 129(3) if the bank debited the costs to Ms Nkata's account. The argument was that reinstatement could occur once the parties had agreed that payment would be affected as part of the total capital payment flowed by monthly instalments.[13]

Moseneke DCJ, writing for the majority of the Constitutional Court, did not deem it necessary to decide on this point. The reason for this is the court's finding that the relevant costs were not even due and payable to begin with because the bank had not given notice of the legal costs and had not demanded payment.[14] However, in his minority judgment Cameron J addressed the question and reasoned that, when the bank debited the costs to Ms Nkata's bond account, it agreed to allow her to pay those

[12] See e.g. *Standard Bank of South Africa v Botes t/a JHLS Botes Vervoer* (M85/15) [2015] ZANWHC 49 (3 September 2015) where the contract was cancelled in the normal course and thus it was found that reinstatement could no longer take place.
[13] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 50.
[14] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 79.

costs later but this did not mean that actual payment had taken place.[15] Hence, postponed or partial payment could not be regarded as payment for purposes of reinstatement under the NCA.

Despite the fact that the Constitutional Court therefore did not give a final answer on the exact meaning of payment in this context, it is arguable that Cameron J's approach is more in line with the common understanding of payment.[16] Because payment is a bilateral legal act,[17] both parties must agree that a certain action qualifies as fulfilling a certain duty to pay or otherwise perform. Hence, in the reinstatement context, unless it can be shown that the bank agreed to accept a debiting of the account (postponed payment) as performance of the duty to perform, it arguably cannot be regarded as the kind of payment that would be sufficient to reinstate the credit agreement.

It is furthermore important to consider that tendering to pay the relevant amounts is not enough, since actual payment is required.[18] Another point to remember is that the amounts must be paid by or on behalf of the consumer. Therefore, payment other than by or on behalf of the consumer will not comply with section 129(3).[19]

3.2.5 The amounts payable

3.2.5.1 Introduction

Section 129(3) required (and still requires) the payment of three amounts in order to trigger the reinstatement of the credit agreement, namely the amounts overdue, the default administration charges and the reasonable enforcement costs. Each of these categories will be discussed in the paragraphs that follow.

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[15] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 49.
[16] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 187.
[17] See for example the definition given by Cameron J in *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 48.
[18] *Standard Bank of South Africa Limited v Botes t/a JHLS Botes Vervoer* (M85/15) [2015] ZANWHC 49 (3 September 2015) para 5; *De Bruin v FirstRand Bank Limited t/a Wesbank* (42493/2015) [2017] ZAGPJHC 132 (5 May 2017) paras 39-42; *Ndlazi v Wesbank, A division of FirstRand Bank Limited* (260/2017) [2018] ZANCHC 24 (25 April 2018) para 37.
[19] *Mostert and Others v FirstRand Bank t/a RMB Private Bank* (198/2017) [2018] ZASCA 54 (11 April 2018) paras 25-26, 30.

3.2.5.2 Amounts overdue

The NCA does not give a definition of what is meant by "amounts overdue" but as Brits explains, in terms of a loan repaid in periodical instalments, it simply refers to moneys in arrears (the amount of the default).[20] Most mortgage loan agreements contain acceleration clauses with the effect that once an acceleration clause is invoked in response to the debtor's default, the full extent of the mortgage debt becomes due and payable. This then raises the question whether the "amounts overdue", which must be paid to reinstate the credit agreement, refers to the full extent of the debt or only to the actual amount in arrears. The overwhelming academic consensus is that it is only necessary to pay the actual amount in arrears and not the full accelerated debt, which means that reinstatement effectively reverses or prevents the creditor's election to accelerate payment of the full outstanding debt.[21]

The only case in which there was a suggestion that the amount payable for reinstatement purposes should be the full accelerated debt is *Dwenga v First Rand Bank Ltd and Others.*[22] In this case the court allowed the repayment of the arrear amount to reinstate the agreement but only because the bank did not specifically rely on its right to accelerate the debt.[23] The implication of this approach seems to be that, if the bank specifically claimed the accelerated full outstanding debt, then this full amount must be paid in order to reinstate the credit agreement. However, none of the other judgments followed this approach.

The high court in *Nkata* per Rogers J held that in order to effect reinstatement in terms of section 129(3)(a), the consumer need not pay the full accelerated debt but only the arrear instalments.[24] The judge further held that the crux of reinstatement was to restore the agreement to the position it was in prior the default, which means that

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[20] R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" (2013) 24 *Stell LR* 165-184 179.

[21] See for example R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" (2013) 24 *Stell LR* 165-184 179; L Steyn "Reinstatement of a home mortgage bond by paying the arrears: the need for appropriate legislative reform" (2015) 26 *Stell LR* 132-155 138-139; JM Otto & R-L Otto *The National Credit Act explained* (4 ed 2016) 130-131; R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 183; C van Heerden "Enforcement of credit agreements" in JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell (eds) *Guide to the National Credit Act* (Service Issue 10, Jun 2018) para 12.10.

[22] (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35.

[23] *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35.

[24] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 37.

the right to reinstatement would be worthless if it required the payment of the full accelerated debt rather than only the arrear instalments.

The majority of the Constitutional Court per Moseneke DCJ agreed with the high court judgment of Rogers J and held that the right of reinstatement would be useless if the amount due in terms of section 129(3)(a) was interpreted to mean the full accelerated debt because most consumers would not be able to pay the full debt and thus would not be able to reinstate the agreement.[25] A number of other high court judgments agreed with this view. For instance, in *Nedbank Ltd v Fraser and Another and Four Other Cases*[26] it was accepted that getting the actual amount of the default up to date will undo foreclosure and reinstate the mortgage agreement.[27]

Strong constitutional support for this interpretation of the "overdue amounts" requirement is also found in *ABSA Bank Ltd v Ntsane and Another.*[28] The effective implication of the case was that the creditor's attempt to enforce repayment of the full outstanding amount of the mortgage debt in circumstances where the actual arrears were quite low, would constitute an unjustified infringement of the debtors' constitutional right of access to adequate housing, since the execution of such a full debt would lead to the sale in execution of the debtor's home. The court held further that, because the actual arrears were so low, the claim for repayment of the full amount constituted a *prima facie* abuse of the right to claim an outstanding amount that can easily be obtained by executing against movable assets instead.[29] The court in *Ntsane* therefore refused the application to declare the immovable property executable for a default judgment for the full amount outstanding on the bond. Indeed, the court mentioned that the reinstatement mechanism in the NCA would be the ideal solution in this case, instead of enforcing the full outstanding debt, since merely getting the arrears up to date would prevent the debtors from losing their home.[30]

Therefore, it can be accepted without much controversy that the overdue amount that must be paid for reinstatement purposes is only the actual amount in arrears under

[25] *Nkata v FirstRand Bank Ltd and Others* 2016 (4) SA 257 (CC) para 109.
[26] 2011 (4) SA 363 (GSJ) paras 35-39.
[27] See also *ABSA Bank Ltd v Morrison and Others* 2013 (5) SA 199 (GSJ) paras 26-27; *Makubalo and Another v Nedcor Bank Ltd and Others* (M153/2016) [2017] ZANWHC 45 (29 June 2017) paras 13-14.
[28] 2007 (3) SA 554 (T).
[29] *ABSA Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T) paras 85-94.
[30] *ABSA Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T) paras 91-94. For more detail on the housing rights dimension of foreclosure cases, see R Brits *Real security law* (2016) 68-100 and other sources cited there.

the credit agreement and not the full outstanding capital amount. This has been confirmed by most of the case law (including, and most authoritatively, by the Constitutional Court) while it is also the academic consensus.[31] This interpretation is also in line with the purposes of the Act and of the reinstatement mechanism in particular. Requiring the full outstanding debt to be paid would render reinstatement unavailable to almost all consumers and it would moreover mean that the NCA adds nothing to the right of redemption that the common law already provides for.

3.2.5.3 Default administration charges

Section 129(3)(a) requires the consumer to also pay default administration charges in order to reinstate an agreement in default. The original version of the subsection used the term "default charges" while the subsequently amended version uses "default administration charges". This change has little substantive meaning except to align section 129(3) with the term used elsewhere in the Act. For instance, as explained immediately below, the Act contains a specific definition for "default administration charge" but not one for just "default charge". One can therefore assume that the "default charges" referred to in the initial version of section 129(3) is not something different than the "default administration charges" defined in the Act.

The NCA defines a default administration charge as a charge that may be imposed by a credit provider to cover administration costs incurred as a result of a consumer defaulting on an obligation under a credit agreement.[32] Default charges may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement and only to the extent permitted by Part C of Chapter 6 of the Act.[33]

[31] In addition to the cases discussed here, see also the cases decided subsequent to the 2014 Amendment Act and which followed *Nkata*, such as *Standard Bank of South Africa v Botes t/a JHLS Botes Vervoer* (M85/15) [2015] ZANWHC 49 (3 September 2015) para 11; *FirstRand Bank Ltd v Mdletye and Another* 2016 (5) SA 550 (KZD) para 11; *FirstRand Bank Ltd t/a First National Bank v Zwane and Two Other Cases* 2016 (6) SA 400 (GJ) para 30.
[32] S 1 sv "default administration charge" of the NCA.
[33] S 101(f).

The prescribed maximum referred to above is found in the National Credit Regulations. In this regard regulation 46, titled "Default Administration Charges", provides as follows:

> "The credit provider may require payment by the consumer of default administration charges in respect of each letter necessarily written in terms of Part C of Chapter 6 of the Act. Such payment may not exceed the amount payable in respect of a registered letter of demand in undefended action in terms of the Magistrates' Courts Act, 1944 in addition to any reasonable and necessary expenses incurred to deliver such letter."[34]

For present purposes it is not necessary to expand on the meaning of default administration charges any further, since the above provisions are rather self-explanatory. For the most part, it can be assumed that these charges will be those representing the preparation and sending of notices in response to the consumer's default, such as the section 129(1)(a) notice.[35]

3.2.5.4 Reasonable enforcement costs

In addition to the amounts overdue and the default administration costs, the consumer is also required to pay the reasonable costs incurred by the credit provider for enforcing the agreement. It is assumed that this refers to "collection costs" as defined in the NCA. The Act defines "collection costs" as amounts that may be charged by a credit provider in respect of the enforcement of a consumer's monetary obligations under a credit agreement, but it does not include a default administration charge.[36] According to section 101(1)(g) of the NCA, a credit provider must not require payment by the consumer of any money or other consideration except for the costs listed in the subsection, including collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6.

With reference to the abovementioned prescribed maximum, the National Credit Regulations states as follows in regulation 47, titled "Collection Costs":

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[34] Reg 46 of the National Credit Regulations, 2006 (Government Notice R489 in *Government Gazette* 28864 of 31 May 2006).
[35] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 183-184.
[36] S 1 sv "collection costs". See also reg 47.

> "For all categories of credit agreement, collection costs may not exceed the costs incurred by the credit provider in collecting the debt
> (*a*) to the extent limited by Part C of Chapter 6 of the Act, and
> (*b*) in terms of
> (i) the Supreme Court Act, 1959,
> (ii) the Magistrates' Court Act, 1944,
> (iii) the Attorneys Act, 1979; or
> (iv) the Debt Collector's Act, 1998,
> which ever is applicable to the enforcement of the credit agreement."

As Brits, Coetzee and Van Heerden point out, on face value it seems like the payment of enforcement costs merely requires a correct calculation with reference to the above stipulations. However, they also comment that this aspect has become complicated, not with regard to the calculation of the correct amount, but rather when it comes to the question of when and how this amount becomes payable for reinstatement purposes.[37] This was also the main point of contention in the *Nkata* matter. It is therefore necessary to set out the three courts' positions in this regard.

In the high court case of *Nkata v FirstRand Bank Ltd and Others*,[38] Rogers J held that the enforcement costs that the consumer must pay in terms of section 129(3)(a) are those costs that are owed to the credit provider at the time that the creditor requires payment.[39] He further stated that, unless the costs have been quantified by agreement, the official with the authority to determine the reasonableness and thus recoverability of costs in high court litigation (namely is the taxing master acting in accordance with the rules of court) must make such a determination (usually referred to a "taxation" of costs) in order for the costs to be payable for reinstatement purposes. The judge explained, with reference to High Court Rule 45(2), that taxation or agreement is not a prerequisite for liability, but that execution in respect of costs cannot be levied until these costs have been taxed or if there was an agreement in writing as to the quantification.[40]

Applying this approach to the facts of the case, the high court held that, because the bank did not present the costs to Ms Nkata and did not invite her to pay them, the amounts were in fact not payable yet (at least not for reinstatement purposes).

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[37] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 184.
[38] 2014 (2) SA 412 (WCC).
[39] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 44.
[40] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 42.

Moreover, the bank's conduct (by debiting the costs to Ms Nkata's account) implied that the bank was content to settle the costs by lending her the money.[41] As Roger J reasoned, for purposes of section 129(3)(a), if properly debited the costs lose their separate character as costs of enforcing the agreement, meaning that the enforcement costs that the consumer must pay in terms of section 129(3)(a) in order to reinstate a credit agreement are those costs the payment of which the credit provider is demanding at that time.[42]

In other words, the judge found that if it wants to recover the costs of enforcing the agreement, the credit provider is the one who must take appropriate steps and not the consumer.[43] He further stated that if the credit provider does nothing to recover the costs and in the meantime the consumer pays the full amount of the overdue instalments and any other amounts that are due and payable, then the agreement would be reinstated. Since Ms Nkata had neither agreed to – nor was she invited to agree to – the quantification of the costs and since the costs were not specifically demanded from her, the costs were not payable for reinstatement purposes.[44]

The Supreme Court of Appeal in the *Nkata* case however did not entirely agree with the findings of the high court. Willis JA agreed with the findings of the high court that the reasonable costs of enforcing the agreement must either be taxed or agreed upon. However, the judge explained that this point was irrelevant because at the time of the sale in execution, the aggregate of the charges for recovery of the debt was less than the amount in respect of which the debtor was in arrears.[45]

Moseneke DCJ – writing for the majority of the Constitutional Court – held that, when Ms Nkata settled in full her bond arrears of R 87 500 on 8 March 2011, the bank's legal costs were not yet due and payable, and therefore did not have to be paid to effect reinstatement of the agreement. According to the judge's reasoning, the bank had not given Ms Nkata notice of the nature and extent of the legal costs and had not demanded their payment properly or at all.[46] Consequently, Moseneke DCJ held that the legal costs were not shown to be reasonable, since their nature and extent had

[41] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 44. On this point, see section 3.2.4 above.
[42] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 44.
[43] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 43.
[44] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 44.
[45] *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) para 13.
[46] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 121.

not been agreed to by Ms Nkata and had not been assessed for reasonableness by taxation or another acceptable means.[47]

Moseneke DCJ also agreed with the high court judgment that the consumer could not be expected to take proactive steps to find out what the costs would be for reinstatement to be effected; neither could a consumer be expected to initiate taxation processes or communication with the credit provider regarding the quantification of these costs.[48] Therefore, the judge held that section 129(3), properly understood, does not preclude the reinstatement of a credit agreement where the consumer has paid all the amounts that were overdue but has not been given due notice of the reasonable costs of enforcing the agreement, whether agreed or taxed. Hence, the judge found that the legal costs would become due and payable only when they are reasonable, agreed or taxed and also only on due notice to the consumer.[49]

Moseneke DCJ quoted from section 129(3) ("all amounts that are overdue together with the credit provider's permitted default charges and reasonable costs of enforcing the credit agreement") and held that the words "together" and "and" imply that the credit provider must demand the payment of the reasonable costs of enforcing the credit agreement separately. Accordingly, the bank should have demanded payment of the reasonable costs of enforcing the agreement separately from Ms Nkata's (and not along with the arrears) or brought it to her attention separately.[50] The judge held that this understanding gives better effect to the clear text and purpose of the NCA. Moseneke DCJ further found that, if a credit provider is not obliged to properly quantify and give due notice of the legal costs to the consumer, the relief that section 129(3) affords to a consumer will be frustrated and could even become illusory.[51]

Steyn and Sharrock support the interpretation of Moseneke DCJ because it gives better effect to the purpose of section 129(3) and the NCA as a whole.[52] They however point to the risk that, in terms of this interpretation, it will always be open to the credit

[47] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 121.
[48] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 122.
[49] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 123.
[50] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 124.
[51] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 125.
[52] L Steyn & R Sharrock "Remedying mortgage default: *Nkata v FirstRand Bank Ltd*" (2017) 134 *SALJ* 498-513.

provider to thwart a reinstatement by simply asserting that certain legal costs have not been paid.[53]

In his minority judgment in the Constitutional Court, Cameron J disagreed with both the high court and the majority judgment of the Constitutional Court. Cameron J reasoned that the statute imposes no obligation on the credit provider to take steps to recover the costs of enforcing the credit agreement. If the consumer wants to reinstate the agreement, then the consumer should also be the one who is expected to pay the required sums.[54] The judge explained that the NCA does not require that the credit provider must establish that the costs are reasonable or that the bank had to demand payment of the costs in section 129(3).[55]

Therefore, the judge held that it was Ms Nkata's duty to determine what was reasonable in order to achieve reinstatement. According to him, the fact that the costs had not been taxed or agreed on did not absolve the consumer from the obligation to pay the costs in order to reinstate the credit agreement.[56]Cameron J also reasoned that she could have objected if she believed the sums to be unreasonable, which she did not do. He also held that the reasonableness of the costs accords with the parties' settlement agreement and that Ms Nkata should have at least tendered payment of what she considered to be reasonable.[57]

The view of Cameron J was shared by Nugent AJ in his minority judgment in the same case. Nugent AJ held that, to expect a bank to tax and demand costs each time that they are incurred seems to be unrealistic and cannot be accepted as the true meaning of the provision.[58] He further explained that costs are either reasonable or they are not reasonable as a fact and that unreasonable costs do not become reasonable by agreement between the parties – they merely become agreed. He also held that costs cannot move from unreasonable to reasonable by taxation either, because through taxation, a taxing official merely certifies that in his or her opinion the

[53] L Steyn & R Sharrock "Remedying mortgage default: *Nkata v FirstRand Bank Ltd*" (2017) 134 *SALJ* 498-513 505. See also R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 185.
[54] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 56.
[55] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 57.
[56] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 70.
[57] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 70.
[58] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 151.

costs are reasonable.[59] Accordingly, whether costs are reasonable as a fact is not dependent upon the sole opinion of a taxing official.

Nugent AJ held that section 129(3) does not require payment of costs only if they have become payable at the time the section is invoked, since the section itself renders the costs payable as a condition for reinstatement if they have been incurred.[60] Therefore, if she desired to challenges the costs charged to her account, Ms Nkata should have asked for taxation instead of simply ignoring the matter. The judge held that a demand for payment may or may not be a requisite for a debt to become payable, depending upon the facts. And in this case, Ms Nkata was obliged to pay the costs (by a clause in the agreement) without first receiving any demand as a precondition.[61]

Brits, Coetzee and Van Heerden reason that a possible objection to the approach of the high court and of the majority of the Constitutional Court is the requirement in section 129(3) that, although legal costs might not yet be due and payable, reinstatement cannot take place before these amounts are paid. The authors further state that, this view might imply that the consumer who wishes to reinstate must proactively take steps to find out how much the costs are and reach an agreement with the credit provider on the quantification of the costs or request taxation.[62]

Brits, Coetzee and Van Heerden further state that it is clear from the differences in opinion in the *Nkata* matter that the onus to determine the reasonableness of the costs payable is placed either on the credit provider or on the consumer. They contend that, although both sides of the argument make good points, it seems that the minority judgments are more closely aligned not only to the wording of the Act, but also with practical realities.[63] Despite their preference for the minority judgment's approach, the authors also acknowledge that the minority's approach could operate unreasonably against a consumer who wishes to make use of the reinstatement mechanism.[64] Yet, they state that if a consumer desires to benefit from the indulgence bestowed by

[59] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 153.
[60] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 156.
[61] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 155.
[62] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197.
[63] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197.
[64] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197.

section 129(3), it is not unreasonable to expect the consumer to exert some good faith by finding out the exact amounts he should pay to reinstate the agreement. Indeed, Brits, Coetzee and Van Heerden are so critical of the current interpretation of the NCA on this point that they advocate for this issue to be addressed and clarified in a future amendment of the NCA.[65]

3.2.5.5 How to ascertain the amounts owed?

It goes without saying that, for a consumer to make use of section 129(3), he or she must know how much to pay.[66] However, it may not always be possible for a consumer to know exactly how much is due with reference to the relevant categories of amounts payable for reinstatement purposes. The Act provides a measure of assistance in section 110, which provides as follows:

> "(1) At the request of a consumer, a credit provider must deliver without charge to the consumer a statement of all or any of the following-
> *(a)* the current balance of the consumer's account;
> *(b)* any amounts credited or debited during a period specified in the request;
> *(c)* any amounts currently overdue and when each such amount became due; and
> *(d)* any amount currently payable and the date it became due.
> (2) A statement requested in terms of subsection (1) must be delivered-
> *(a)* within 10 business days, if all the requested information relates to a period of one year or less before the request was made; or
> *(b)* within 20 business days, if any of the requested information relates to a period of more than one year before the request was made.
> (3) A statement under this section may be delivered-
> *(a)* orally, in person or by telephone; or
> *(b)* in writing, either to the consumer in person or by sms, mail, fax, email or other electronic form of communication, to the extent that the credit provider is equipped to offer such facilities,
> as directed by the consumer when making the request.
> (4) A credit provider is not required to provide-
> *(a)* a further written statement under this section if it has, within the three months before the request is given, given such a statement to the person requesting it; or
> *(b)* information in a statement under this section more than three years after the account was closed.

[65] See section 4.4 below.
[66] See *Van As v Nedbank Limited* (10589/16) [2016] ZAWCHC 107 (26 August 2016) para 18.

(5) On application by a credit provider, the Tribunal may make an order limiting the credit provider's obligations to a consumer in terms of this section if the Tribunal is satisfied that the consumer's requests are frivolous or vexatious."

Although the section provides a way for the consumer to request (and therefore a duty on the credit provider to provide) information regarding the amounts outstanding, it has some limitations. Firstly, the credit provider does not have to provide the information if it already did so within the preceding three months.[67] A second, and possibly larger, difficulty was recently revealed in *De Bruin v FirstRand Bank Limited t/a Wesbank*,[68] where the court pointed out there is currently a *lacuna* in the Act. The *lacuna* rests therein that even after the consumer requests a statement of account from the credit provider in order to purge the default, this information might not be given and that the Act prescribes no consequence of such failure by the credit provider. Accordingly, if the credit provider does not provide the information, the consumer him- or herself would have to calculate what the relevant amounts are in order to pay in accordance with section 129(3).[69]

The above approach is probably only true with reference to the arrear amounts, since the reasonable enforcement costs (and possibly also the default charges) will – in terms of the *Nkata* case (discussed above) – only be payable for reinstatement purposes once – and to the extent that – they have been specifically claimed by the credit provider (or taxed).[70]

3.2.5.6 Conclusion

After having discussed the different amounts payable for reinstatement purposes, the following preliminary conclusions can be drawn regarding the current state of the law. Firstly, for reinstatement to occur it is not necessary to pay the fully outstanding (accelerated) amount of the debt. All that is required is for the arrear amount to be brought up to date, along with payment of the listed costs and charges. This is not a

[67] S 110(4)(a) of the NCA.
[68] (42493/2015) [2017] ZAGPJHC 132 (5 May 2017).
[69] *De Bruin v FirstRand Bank Limited t/a Wesbank (*42493/2018) [2017] ZAGPJHC 132 (5 May 2017) paras 45-49.
[70] *Ndlazi v Wesbank, A division of FirstRand Bank Limited* (260/2017) [2018] ZANCHC 24 (25 April 2018) para 40.

controversial point and it seems perfectly in line with the general purpose of reinstatement.

Secondly, and more controversially, the Constitutional Court has settled on the rule that enforcement costs are only required to be paid for reinstatement purposes if these costs have been rendered due and payable – and reasonable – through agreement or taxation. Hence, if such costs are not yet payable and its reasonableness has not yet been determined through agreement or taxation, then reinstatement can take place by merely paying the outstanding arrears (and default charges). As seen above, there is no consensus over the accuracy of this interpretation. Some academics are sceptical while even the judges of the Constitutional Court expressed strong disagreement with each other on this question. Nevertheless, this is now the authoritative approach and it remains to be seen whether any changes will in future be made by the legislature and/or whether this approach leads to practical difficulties.

3.2.6 Section 129(3)(b)

The original section 129(3)(b) of the NCA provided that, after complying with section 129(3)(a), the consumer could resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order. Repossession is not defined by the NCA but Coetzee[71] reasons that the term usually refers to an act by a credit provider to cancel an agreement and claim back possession of property under circumstances where the credit provider had reserved ownership of the property that is subject to the credit agreement. Similarly, Rogers J in the high court judgment in *Nkata*[72] defined an attachment order as an order entitling a credit provider to take possession of movable goods that are the subject of an instalment agreement, secured loan or lease.

Section 129(3)(b) contained a number of interpretational difficulties. Firstly, it was not clear whether the repossession referred to, included the attachment of property under a foreclosure remedy in the case of immovable property. Secondly, as

[71] H Coetzee "Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 569-588 577.
[72] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 48.

mentioned in section 3.2.3 above, section 129(3)(b) suggested a situation where the agreement had been cancelled, since it is trite that repossession cannot take place before the relevant contract had been cancelled.[73] This, in turn, contradicts the qualification that reinstatement can only take place before – and not after – cancellation of the agreement.[74] As seen in the next chapter, it is probably for this very reason that paragraph (b) was eventually deleted from section 129(3). Notwithstanding the contradictions between paragraphs (a) and (b) of section 129(3), the general concept underlying section 129(3)(b) appears logically correct. After all, it only makes sense that successful reinstatement should have the effect that any attached (or repossessed) property should be returned to the consumer – provided of course that none of the events listed in section 129(4) (discussed in section 3.3 below) have yet occurred.

3.2.7 Reinstatement by operation of law?

Another question debated in case law and by scholars is whether reinstatement occurs by operation of law or whether it must be actively invoked by the consumer who elects to reinstate his or her credit agreement. A related question is whether a particular process must be followed to reinstate the agreement and also whether there needs to be communication between the parties before reinstatement takes effect. On face value it appears that section 129(3) sets no such requirements and thus it seems like payment of the listed amounts are enough for reinstatement to occur automatically – irrespective of whether either party knows about it or intends for it to happen.

The question of whether reinstatement occurs by operation of law came up for the first time in *Nedbank Ltd v Barnard*,[75] where the court held that the consumer can unilaterally reinstate a credit agreement by paying to the credit provider the arrears that are overdue as well as the charges referred to section 129(3), and when this has

[73] H Coetzee "Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 569-588 578.
[74] See JM Otto *The National Credit Act explained* (2006) 98, similarly repeated in JM Otto & RL Otto *The National Credit Act explained* (2 ed 2010) 117 and JM Otto & R-L Otto *The National Credit Act explained* (3 ed 2013) 125;
[75] (1142/08) 2010 ZAECPEHC 45 (13 December 2010) para 15.

occurred, the agreement would be automatically reinstated. Hartle J in *Dwenga v FirstRand Bank Ltd and Others*[76] concurred with this interpretation.

Rogers J in the high court judgment in the *Nkata* case came to a similar conclusion and therefore found that, in order for reinstatement to take effect, it is not necessary that the consumer should have made payment with the intention of reinstating the agreement or that the consumer should even have been aware of the statutory right of reinstatement.[77] However, Willis JA in the Supreme Court of Appeal judgment took a different approach and held that reinstatement amounts to an amendment or novation of the credit agreement and so the parties should, in compliance with section 116 of the Act, ascend to this amendment knowingly and in writing.[78]

In his minority judgment in the Constitutional Court, Nugent AJ in *Nkata* explained that the fulfilment of the conditions stated in section 129(3) need not be communicated to the credit provider, and thus all that is required is that the conditions be fulfilled – with the result that the agreement is then automatically reinstated by operation of law.[79] The majority judgment of Moseneke DCJ agreed with Nugent AJ on this point. Moseneke DCJ therefore confirmed that reinstatement occurs by operation of law, because the wording of the provision is clear that the consumer's payment in the prescribed manner is sufficient to trigger reinstatement.[80] Indeed, the judge held that, if reinstatement did not occur automatically against due payment, it would unduly limit the value of this mechanism. He also explained that it would unduly diminish the usefulness of reinstatement if the consumer was saddled with an extra procedural requirement to trigger reinstatement.[81]

In his earlier comments on the right of reinstatement, and with reference to the *Barnard* case, Brits[82] argued that there is no reason to doubt the correctness of the fact that the NCA allows reinstatement to take place by operation of law. However, along with his co-authors, Coetzee and Van Heerden, Brits subsequently pointed out

[76] (EL 298/11, ED 298/11) [2011] ZAECELLC 13 (29 November 2011) para 34.
[77] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 45.
[78] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) paras 17, 36.
[79] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 143.
[80] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 105.
[81] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 105.
[82] R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act*"* (2013) 24*Stell LR* 165-184 170.

that automatic reinstatement, although clearly the only interpretation possible on the express wording of section 129(3), causes practical difficulties which might have been unforeseen when the section was drafted.[83] One problem illustrated by these authors is the fact that reinstatement can take place without either party knowing or intending it, while they might only realise at a later stage that reinstatement had in fact taken place at some point in the past.

Reinstatement by operation of law is also criticised by Steyn,[84] who states that the only mortgagor that will claim reinstatement once he pays the arrears is one who has access to a legal advisor and the resources to institute a high court application. Steyn explains that it is unfortunate that the legislature did not lay down a specific process by which reinstatement should occur, and that such a process should ideally include the imposition of a duty on the mortgagee to inform the mortgagor of the right so that the mortgagor may know the significance and effect of paying the arrears.[85] The consumer would then be in a position to intentionally claim reinstatement. Brits, Coetzee and Van Heerden, in their plea for a wholesale amendment of section 129(3) and (4), also argue that a clear process should be introduced through which reinstatement should take place.[86]

3.2.8 Conclusion

This part of the chapter aimed at investigating the requirements of reinstatement as per the original section 129(3)(a) and the consequences of a successful reinstatement as per paragraph (b). The discussion above illustrates that the original section 129(3) contained a number of interpretational difficulties, which attracted debates in case law and among scholars. One of the main stumbling blocks in the original subsection was the contradiction between the notion of reinstatement a credit agreement and expecting such reinstatement to take place only *before* cancellation of the agreement. It is now generally accepted that cancellation does not include the enforcement of an

[83] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 187.
[84] L Steyn "Reinstatement of a home mortgage bond by paying the arrears: the need for appropriate legislative reform" (2015) 26 *Stell LR* 132-155.
[85] L Steyn "Reinstatement of a home mortgage bond by paying the arrears: the need for appropriate legislative reform" (2015) 26 *Stell LR* 132-155 143.
[86] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 195.

acceleration clause and thus the cancellation qualification does not prevent a mortgage agreement from being reinstatement after the acceleration clause (and thus the foreclosure remedy) has been triggered.

The main requirement for reinstatement to occur is the payment of certain amounts, namely the amounts outstanding, the default administration charges and the enforcement costs. Regarding the outstanding amounts, it is settled that it does not refer to the full outstanding debt but only to the actual amount in arrear in terms of, for instance, a mortgage loan. A controversial issue has proven to be the question of when the enforcement costs become payable for purposes of reinstatement. In this regard the Constitutional Court in *Nkata* decided that the enforcement costs are only payable once they have been declared reasonable either through agreement or taxation. Although this is now the settled state of the law, it has been criticised by some authors and hence it is not clear whether *Nkata* will serve as the end of this debate.

It was also explained that reinstatement takes place by operation of law (a conclusion which is also not free of criticism) and that the effect of reinstatement is to place the parties in the position they were before default. A consequence of this is that any attached or repossessed assets must be returned to the consumer. In the next part of the chapter, section 129(4) will be discussed in as far as it places certain further limitations on the right of reinstatement. It namely lists certain events after which reinstatement can no longer occur.

3.3 The original section 129(4): limitation of reinstatement

3.3.1 Introduction

The original section 129(4) provided for certain events after which reinstatement would no longer be available for the consumer. This subsection listed the points of no return for the consumer, and these are essentially those events that represent the points at which the legal proceedings would have run its course. The main benefit of this subsection is that there will probably be a (presumably innocent) third party who would have purchased the property forming the subject of the credit agreement. After legal proceedings have drawn to a close (such as after the property has been sold), it would not be logical to place the consumer back in the position he was prior to his default.

Legal certainty is therefore promoted if there are set points after which all parties concerned can know that reinstatement cannot happen.

Section 129(4) is linked to the provisions in section 129(3) by the fact that the latter subsection expressly makes its provisions subject to what is provided for in subsection (4). The original subsection (4) provided as follows:

> "(4) 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."

Therefore, under the original section 129(4), reinstatement was prohibited after the attached or surrendered property had been sold; a court order that enforced the agreement had been executed; or the agreement had been terminated in terms of section 123. It should be noted that the listed events are separated by the word "or" and therefore reinstatement is prohibited after any (and not necessarily all) of these events have occurred.[87] In what follows I briefly analyse these limitations. Ultimately the main reason for seeking clarity on these events is firstly so that one can know which of them applies in a particular situation and secondly so that one then knows from exactly what point reinstatement is impossible.

3.3.2 Sale of property pursuant to attachment order

The first event after which reinstatement is impossible is after the sale of any property pursuant to an attachment order.[88] What exactly is meant by this? Although the meaning of a sale after attachment almost goes without saying, it has proven not to be so clear. Firstly, how does a sale pursuant to an attachment order differ from the execution of any court order, which is one of the other listed events? And secondly, what exactly is meant by "sale"?

Regarding the first question, the definition of an execution of any court order is discussed in section 3.3.4 below. However, for present purposes it is worthwhile

[87] R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" (2013) 24 *Stell LR* 165-184 175.
[88] S 129(4)(a)(i) of the NCA.

pointing out that it is important to establish when section 129(4)(a)(i) (sale pursuant to court order) is relevant and when section 129(4)(b) (execution of any court order) is relevant because it may be that the two concepts overlap.

With regard to the meaning of "sale" in section 129(4)(a)(i), a question arises as to whether an agreement can be reinstated after the property has been sold in execution but not yet transferred to the auction purchaser? It was held in *Nedbank Ltd v Fraser and Another and Four Other Cases*[89] that "sale" in this context includes the conclusion of the sale agreement at the auction as well as the transfer of ownership through registration.[90] The court in this matter drew from the way in which the common law right of redemption operates and accordingly found that reinstatement will cause the auction sale to fall away if the relevant arrears and the costs are paid before the property is transferred. However, this view was not shared by the judge in *Dwenga v FirstRand Bank Ltd and Others*.[91]In the latter case it was held that the opportunity to reinstate falls away when the judgment is granted, even before the sale is concluded.[92]

Brits[93] agrees with the stance taken in *Fraser* but only to a certain extent. Indeed, he supports an interpretation that lies somewhere between what was decided in *Fraser* and that which was decided in *Dwenga*. He does not agree with *Dwenga* that reinstatement is barred when judgment is granted but he also disagrees with *Fraser* that reinstatement is allowed after the auction sale and up until property in transferred. He concludes instead that reinstatement is not prohibited from the moment of judgment being granted but is also not allowed beyond the sale concluded at the public auction. Thus, the cut-off point, at least under section 129(4)(a)(i), is the moment that the sale takes place at the auction. Coetzee similarly regards the moment of sale as the point of no return.[94]

Rogers J in the high court judgment of the *Nkata* case held that reinstatement is barred only if the relevant property has been sold.[95] He further held that, if the provision

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[89] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ).
[90] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ) para 40.
[91] (EL 298/11, ED 298/11) [2011] ZAECELLC 13 (29 November 2011).
[92] *Dwenga v FirstRand Bank Ltd and Others* (EL 298/11, ED 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35.
[93] R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" (2013) 24 *Stell LR* 165-184 176-178.
[94] H Coetzee "Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 569-588 581.
[95] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 53.

included the mere obtaining of a writ of attachment of movables or immovables or the attachment of goods by the sheriff, there would be very little time between the granting of the enforcement order and the execution and hence very little time for the consumer to purge his default.[96]

Rogers J in *Nkata*[97] also explained the general principle that, where a credit provider obtains a monetary judgment against the consumer for the outstanding amount of the loan, the court order will not include an order for the attachment of any property, but the rules of court entitle the judgment creditor to obtain a writ of execution in such cases. The writ is addressed by the Registrar to the Sheriff and a writ of execution is not itself an order but a process which may be issued where an order for the payment of money has been made.

The judge held that, even where the loan agreement is secured by a mortgage bond and the court declares the bonded property to be specially executable, the court's order does not include an order for the attachment of the property. The order of executability merely entitles the creditor to levy execution or the immovable property in terms of High Court Rule 46, without first attempting execution against movables in terms of High Court Rule 45. Therefore, the court does not order the immovable property to be attached as such; it is for the judgment creditor to determine how it will go about executing the judgment.[98]

Regarding the facts of the *Nkata* case, the judge held that the default judgment granted by the Registrar on 28 September 2010 did not constitute an order for the attachment of property, nor did the default judgment acquire that character when the bank elected to obtain a writ of execution against the mortgaged property.[99]

The Supreme Court of Appeal in *Nkata*[100] also confirmed that the term "sale" in section 129(4)(a)(i) does not include the transfer of ownership. In this respect the court agreed with the opinion of Brits[101] that it would lead to serious uncertainty for sale-in-execution and auction process if the reinstatement could still take place until the very moment before transfer of ownership is effected. As seen below, the Constitutional

[96] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 53.
[97] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 49.
[98] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 49.
[99] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 50.
[100] *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) para 34.
[101] R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" (2013) 24 *Stell LR* 165-184 177.

Court did not express a view on section 129(4)(a)(i) and the meaning of "sale" but focussed on the execution of a court order referred to in section 129(4)(b).

It was held in *FirstRand Bank Ltd v Mdletye and Another*[102] that, once a sale pursuant to an attachment order has taken, it would close the door of opportunity for reinstatement.[103] Hence, if the property is sold by virtue of an attachment following a declaration of executability, the agreement will not be capable of being reinstated and the respondents will lose their home.

Therefore, it is reasonably clear that, if section 129(4)(b)(i) applies to a transaction, reinstatement will not be possible from the moment that the property is sold. The concept of sale in this context refers to the moment of sale at the auction and it does not include the transfer of ownership.

3.3.3 Sale pursuant to surrender of property

The second event after which reinstatement may not occur is after the property has been sold pursuant to surrender of property in terms of section 127.[104] Section 127 of the NCA concerns a consumer's right to surrender property that is subject to a credit agreement. In this regard subsection (1) provides that a consumer under an instalment agreement, secured loan or lease may give a written notice to the credit provider to terminate the agreement. Further, if the goods are in the credit provider's possession, the consumer may require the credit provider to sell the goods or otherwise return the goods that are subject of that agreement to the credit provider's place of business within five business date or at such other time and place as may be agreed with the credit provider.[105]

For present purposes it is not necessary to discuss this surrender mechanism in more detail.[106] Instead, the main point for present purposes is that, after the property was sold pursuant to such a surrender, no reinstatement of the agreement may take

[102] 2016 (5) SA 550 (KZD).
[103] *FirstRand Bank Ltd v Mdletye and Another* 2016 (5) SA (KZD) para 15.
[104] S 129(4)(a)(ii) of the NCA.
[105] S 127(1)(b)(i) and (ii) of the NCA.
[106] For more detail, see C van Heerden "The importance of section 127 of the National Credit Act 34 of 2005" (2018) 81 *THRHR* 239-262; H Coetzee "Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 569-588; CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 656-658.

place. This necessarily implies that reinstatement is available to a consumer after the property has been surrendered but only before it has been sold.

It can be mentioned that section 127 uses the term “goods” and thus it probably does not include credit agreements where immovable property is at stake, such as mortgage agreements. This can also be seen from the fact that section 127 expressly only mentions instalment agreements, secured loans and leases, all of which involve agreements dealing with movable property.[107]

3.3.4 Execution of any other court order enforcing an agreement

The third event after which reinstatement can no longer take place is “the execution of any other court order enforcing that agreement”.[108] Exactly which moment in the process does this “execution” refer to? At what point can it be said that execution of a court order has taken place?

Rogers J in the high court case of *Nkata* held that, if the notion of execution in section 129(4)(b) included the mere obtaining of a writ of attachment with respect to movable or immovable property or the mere attachment of goods by the sheriff, there would usually be very little time between the granting of the enforcement order and its execution and thus very little scope for the consumer to purge his default.[109] Indeed, the steps of obtaining a writ and causing property to be attached are merely steps towards execution and can be undone at common law if the judgment debtor pays the full judgment debt. On this reasoning, the judge therefore held that the judgment is only actually “executed” when money is raised pursuant to a sale of attached property and paid to the judgment creditor.[110]

On the facts of the case, the high court held that a writ of execution was issued but no sale in execution had taken place by the time that Ms Nkata cleared the arrears. In other words, execution of the default judgment had not occurred by the time Ms

[107] H Coetzee “Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005” (2010) 73 *THRHR* 569-588 572.
[108] S 129(4)(b) of the NCA.
[109] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 53.
[110] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 53.

Nkata brought the account up to date and hence reinstatement was not prohibited at this point.[111]

Willis JA, writing for the Supreme Court of Appeal in *Nkata,* differed from the judgment of the high court on this issue. In fact, Willis JA concurred with the applicant that civil execution is a process and not an event.[112] He referred to a definition given by De Villiers JA in *Reid and Another v Godart and Another*,[113] where it was held that the word "execution" means the carrying out of or giving effect to the judgment in a manner provided by law. Willis JA further quoted Kriegler J in *Simpson v Klein NO & others*,[114] where he concurred with De Villiers AJ by holding that execution is a process and that it entails a number of successive steps, including delivery to the purchaser of the goods attached and sold in execution; receipt of the price obtained at the sale in execution for such goods; the accounting for such receipts; the payment to the judgment creditor of what is his due; and the payment over to the judgment debtor of any balance which may still remain.[115]

However, Willis JA held that section 129(4)(b) does not refer to the completion of a sale in execution and that "execution" in this context does not refer to the absolute and perfect finality in the process of execution. Instead, the judge found that the provisions in section 129(4)(a)(i) – referring to "sale" as the cut-off point for reinstatement – will be nugatory and superfluous if the high court is correct in its conclusion that execution only takes place when the proceeds of the sale in execution are paid over to the judgment creditor, which would naturally only occur at a time after the sale was concluded.[116]

Notwithstanding the reasoning of the Supreme Court of Appeal, the majority of the Constitutional Court in the *Nkata* case (per Moseneke DCJ) held that the high court was correct in finding that the reinstatement of a credit agreement is only barred when the proceeds of a sale in execution have been realised.[117] The judge held that there

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[111] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 54.
[112] *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) para 20.
[113] 1938 AD 511.
[114] *Simpson v Klein NO & Others* 1987 (1) SA 405 (W).
[115] *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) para 27.
[116] *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) para 39.
[117] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 131. This approach was followed later in *Makubalo and Another v Nedcor Bank Ltd and Others* (M153/2016) [2017] ZANWHC 45 (29 June 2017) paras 19, 21; *ABSA Bank Ltd v Njolomba and another and related matters* [2018] 2 All SA 328 (GJ) para 37.

is no compelling reason why the meaning if execution in section 129(4)(b) should be given the extended meaning preferred by the credit provider and that the extended meaning would render the section not useful.[118] The judge further held that, had the property been sold in execution following an attachment order, the execution would not have stopped the reinstatement because the sale in execution took place in April 2013, over two years after Ms Nkata had cleared her arrears for the first time in 2011.[119]

Moseneke DCJ moreover found that, although there had been an attachment of the bonded property, no sale in execution of the property occurred and that no proceeds of sale were realised at any time before Ms Nkata had cleared her arrears in March 2010. Therefore, she was well within her entitlement to reinstate the credit agreement that the credit provider had not yet cancelled. The judge concluded that, due to such reinstatement, the warrant of execution against her home (issued after the arrears had been paid) had no legal force.[120]

In sum, according to the authoritative interpretation of the Constitutional Court, the "execution" referred to in section 129(4)(b) contemplates the moment after which the proceeds of any sale in execution have been realised and thus paid to the credit provider. Up until this point, it is still possible for the consumer to reinstate the agreement by payment the required amounts.

3.3.5 Difference between "sale" and "execution"

As seen from the above paragraphs, section 129(4)(a)(i) prohibits reinstatement after a *sale* of property in pursuance of an attachment order, while section 129(4)(b) prohibits reinstatement after the *execution* of any court order. The difficulty is that execution and sale appear to refer to different points in the process, whereas it is also not clear under which circumstances which of these events will apply. As seen above, "sale" is generally interpreted quite literally as the moment when attached or surrendered property is sold, for instance at an auction, and not when ownership is transferred to the buyer. However, as also seen above, the Constitutional Court

[118] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 131.
[119] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 135.
[120] *Nkata v FirstRand Bank Ltd* 2016 (4) 257 (CC) para 137.

interprets “execution” as a process which is only complete once the proceeds of a sale has been paid to the creditor. In the sequence of events, execution therefore refers to a moment after a sale was concluded.

The only logical way to make sense of the difference between subparagraph (a) and (b) is to conclude that both cannot be applicable under the same circumstances because the alternative would be highly contradictory. Brits, Coetzee and Van Heerden[121] try to distinguish between the two events by suggesting that subparagraph (a)(i) (sale after attachment) refers to matters involving movable property under an instalment agreement, secured loan or lease, while subparagraph (b) (execution of a court order) refers to matters involving immovable property – typically a mortgage agreement. The reasoning behind their theory is that, in the case of mortgage foreclosure, an attachment order as such is typically not granted. Instead, the judgment is executed against the relevant property in terms of an order of special executability and a writ of execution. On the other hand, in the case of movable property under an instalment agreement, secured loan or lease, it is typical for court to indeed grant an actual attachment order with reference to the property. So, in cases where a judgment must be executed (which is typical in mortgage cases), reinstatement is prohibited after the execution is complete, and where property is attached and sold under an attachment order (which is typical in credit agreements involving movable assets), reinstatement is prohibited after the property has been sold.

The above difference between movables and immovables would not have been such a problem if “execution” and “sale” referred to the same point in the process, but as it stands the Constitutional Court regards execution to be complete only once the proceeds have been paid to the creditor, which takes place after the sale has been concluded and also when ownership is transferred. There appears to be no principled reason for why the opportunity for reinstatement should be longer in the case of immovables that in the case of movables and thus this is a point in need of clarification. This approach of allowing reinstatement up until such a late point (essentially at transfer of ownership, which is typically around the time when the proceeds will be

[121] 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* 177-197 190.

paid to the creditor) also goes against the Supreme Court of Appeal's warning[122] of how uncertain this would render the general sale-in-execution and auction processes.

3.3.6 Termination in accordance with section 123

A consumer may lastly also not reinstate an agreement after it has been terminated in accordance with section 123 of the Act.[123] Section 123 provides for how a credit provider may terminate the credit agreement before the lapse of the credit agreement when the consumer has defaulted. Subsection (2) specifically states that the credit provider must follow the procedure laid out in the Part C of Chapter 6 of the NCA and this process starts with the credit provider sending the section 129(1) default notice to the consumer. The process is summarised in section 2.3 above. The general premise of section 129(4)(c) is that, once the credit provider has followed all the steps provided in Part C of Chapter 6 of the NCA, the consumer will be barred from reinstating the agreement.

The question that comes up is: what exactly does this event (termination of the agreement) refer to and how does it differ from the other two events? Hence, how is termination of the agreement different than a sale of property after attachment and/or the execution of any order enforcing the agreement? Indeed, it seems like, since termination refers to the completion of all the steps in Part C of Chapter 6 of the Act, it would necessary include any sale of property or execution of an order. To avoid any contradictions between subparagraph (c) on the one hand and subparagraphs (a) and (b) on the other, Brits[124] argues that it would not make sense for termination (as meant in subparagraph (c)) to refer to the mere granting of a judgment, since that would render subparagraphs (a) and (b), which both refer to events after the granting of judgments, redundant. Brits, Coetzee and Van Heerden[125] point out that section 129(4)(c) has not yet been considered in case law. They suggest that it probably refers

[122] *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) para 34.
[123] S 129(4)(c) of the NCA.
[124] R Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act"(2013) 24*Stell LR* 165-184 175.
[125] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 191. See also 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.

to situations of termination not covered by the other subparagraphs, especially where there is no property involved.

In other words, the likely meaning of section 129(4)(c) is to serve as a “catch all” provision that covers instances not covered in section 129(4)(a) or (b), such as where the execution of a court order or the sale of property is involved.

3.3.7 Conclusion

This part of the chapter considered the points of no return after which reinstatement can no longer take place, as was provided for under the original section 129(4). From the above analysis it appears that the exact particulars of the different events listed in section 129(4) could benefit from some clarification by the courts or even reconsideration by the legislature. The difference between “sale” and “execution” is especially, and unnecessarily, confusing. However, as discussed in the next chapter, when section 129(4) was amended by the 2014 Amendment Act, none of these matters were addressed.

3.4 Conclusion

The purpose of this chapter was to provide a detailed account of section 129(3) and (4) as these subsections were formulated prior to their subsequent amendment. There were a number of uncertainties regarding the original section 129(3) and (4) and in that respect the chapter identified those uncertainties and explained how the case law and scholars clarified (or attempted to clarify) them. Of course, some aspects were not changed by the Amendment Act (which are discussed in the next chapter) and therefore to that extent the chapter also includes the current state of the law. Furthermore, some of these uncertainties persisted even after the Act was amended.

In light of the above, the next chapter is focused on how subsections 129(3) and (4) were amended by the 2014 Amendment Act. Chapter 4 will only focus on the aspects that were amended and will therefore not repeat the aspects of chapter 3 that have remained unchanged. I will particularly evaluate whether these amendments effectively addressed the uncertainties identified in the original version of the subsections and/or whether they have created new uncertainties.

CHAPTER 4
IMPACT OF THE 2014 AMENDMENT ACT

4.1 Introduction

In 2013 the Department of Trade and Industry published the results of a review process, namely the Draft National Credit Act Policy Review Framework 2013, together with a Draft Amendment Bill.[1] A final version of the bill was passed by Parliament in 2014 and subsequently the president assented to the National Credit Amendment Act 19 of 2014, which came into operation on 13 March 2015.[2] The general purpose of this amendment initiative was to clarify quite a number of uncertainties that had come to light in the preceding years with respect to various aspects of the NCA. Importantly for present purposes, the Amendment Act also amended section 129(3) and (4) – presumably to rectify the problems that had been pointed out with reference to the interpretation of the reinstatement concept.

Regrettably neither the review framework nor the draft bill contained any explanation of the legislature's exact intention as to the way in which it decided to amend these subsections. As Brits[3] states, this lack of explanation tends to complicate the task of interpreting the amendments. He nevertheless argues that one can assume that Parliament probably intended to merely rectify some of the contradictions in and between the subsections. Brits also presents an alternative assumption, namely that the legislature might have intended to amend the substance of the right of reinstatement, but he regards this possibility as unlikely due to the lack of explanation provided.

A question that can be asked is how the amended section 129(3) and (4) fits into the broader line of development of the reinstatement concept from the common law all the way through the Hire-Purchase Act, the Credit Agreements Act, the original NCA, and now the amended version of the NCA. For instance – and as explained in more detail below – Brits, Coetzee and Van Heerden hypothesise that, taken literally,

[1] See General Notice 559 in *Government Gazette* 36504 of 29 May 2013.
[2] See Proclamation R 10 in *Government Gazette* 38557 of 13 March 2015.
[3] 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* 75-91 77.

the amended subsection (3) now simply states that the consumer's default can be remedied before cancellation and that this adds nothing to the common law position.[4]

Therefore, the general purpose of this chapter is to closely investigate the amended subsections and to compare them with the original versions. The purpose is not to repeat the law that has remained the same but to specifically focus on and evaluate the aspects that have changed. The main question is to determine whether the amendments have improved the subsections (for instance by clarifying the uncertainties identified in chapter 3 above) or whether more needs to be done. In the first two sections of the chapter I discuss how subsections (3) and (4) respectively were amended, followed by a discussion of academic proposals for future reform.

4.2 Amendment of section 129(3)

4.2.1 Introduction

The modified version of subsection (3) provides as follows:

> "(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."

Textually, subsection (3) no longer comprises two subparagraphs but instead only one paragraph. Therefore, the content of paragraph (b) has been removed completely and not replaced with anything new. Furthermore, the phrase "reinstate a credit agreement" is deleted and replaced with the phrase "right to remedy a default under such credit agreement". Regrettably the legislature offered no explanation for these amendments made to this subsection, so one is left with little choice but to speculate.

[4] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 193.

4.2.2 The change in terminology

The removal of the word “reinstate” raises a number of questions. Firstly, are “reinstate” and “reinstatement” still the correct terms to describe this mechanism and, secondly, does subsection (4) still contain a limitation on the right created in subsection (3)? Furthermore, what are the implications of the removal of the original paragraph (b)? It is consequently important to investigate these changes and to try to extrapolate what the legislature might have had in mind when it removed paragraph (b) and replaced some of the wording in paragraph (a).

In his reflection on the removal of the word “reinstate”, Brits[5] also asks whether this term can or should still be used to describe the mechanism in section 129(3). The author nevertheless states that it remains useful to employ the reinstatement terminology, since it still appears in section 129(4).

Brits[6] also provides some theories in an attempt to explain the change in terminology in section 129(3). His first theory is the prospect that the idea of reinstatement, as previously understood, is not what the legislature had in mind for the future. Although this theory might have a ring of truth to it, it still does not explain whether “remedy a default” is now a new concept and “reinstatement” is no longer the one preferred by the legislature. Secondly, Brits submits as an alternative that the change in terminology might imply that the legislature simply wanted to remove the conceptual contradictions found in the original subsection.[7] According to this assumption, the legislature therefore replaced “reinstatement” with the more neutral idea of “remedy a default” to try to clean up the terminological confusion inherent in the idea of reinstating an agreement that has not been cancelled, as well as the contradictory implication that property might have been attached prior to cancellation. This second theory seems more realistic and in line with the general purpose behind section 129(3) and would thus mean that a consumer can still remedy a default under circumstances where the property was attached but only if this was one in terms of a remedy other than cancellation.

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[5] 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* 75-91.
[6] 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* 75-91 83.
[7] This view is also shared in R Brits, H Coetzee & C van Heerden “Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?” (2017) 80 *THRHR* 177-197 193.

Most commentators regard the replacing of the term “re-instate” with “remedy a default” as an improvement. For instance, Otto and Otto explain that this change removes the “misnomer” that was the original reinstatement concept – referring to the illogical notion that an agreement can be reinstated before its cancellation.[8]

In response to the replacing of the terms “reinstate” and “reinstatement” in subsection (3), Brits, Coetzee and Van Heerden[9] suggest that, on face value, the subsection has been improved. The reason for this is that there is now no longer a conflict between the term “reinstate” and the notion or idea that reinstatement must take place prior to cancellation, since the subsection no longer refers to reinstatement. They similarly point out that the conflicting suggestion that property could have been attached before cancellation has been removed. However, Brits, Coetzee and Van Heerden argue that the amendments do not address the true flaw that existed in the original subsection, which was the before-cancelled qualification itself. They also criticise the fact that there is still no clarity on what exactly cancellation means in the context of this subsection.

Steyn and Sharrock[10] contend that the replacing of “re-instate a credit agreement” with “remedy a default” renders the subsection grammatically and conceptually more correct because an agreement can never itself be “in default”. They continue to reason that, since no explanation was given for the amendment, perhaps the terminology was changed to avoid confusion between this remedy and the “reinstatement” of a credit agreement which was provided in the now repealed Credit Agreements Act, which could be exercised only after cancellation of the credit agreement by the credit grantor.

Notwithstanding the attempts by academics to clarify the meaning of the amendments made to section 129(3), it is regrettable that this amendment itself did not properly clarify the reinstatement concept. The chances are also good that the changes will not help to fully sort out the terminological contradictions. Indeed, the changes might even have introduced new contradictions. For example, it is now not clear what the relationship is between the remedying of a default and the reinstating a

[8] JM Otto & R-L Otto *The National Credit Act explained* (4 ed 2016) 130.
[9] R Brits, H Coetzee & C van Heerden “Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?” (2017) 80 *THRHR* 177-197 193.
[10] L Steyn & R Sharrock “Remedying mortgage default: *Nkata v FirstRand Bank Ltd*” (2017) 134 *SALJ* 498-513 498.

credit agreement. The former is dealt with in the new section 129(3) while the latter is still contemplated in section 129(4). Logically one might assume that reinstatement is a consequence of remedying a default, and this could explain the wording used, but it does not provide much assistance in dealing with the practical implications of the before-cancellation qualification that is still present in subsection (3).

In the original section 129(3)(a) there was an apparent contradiction that, if the debtor pays all the amounts that are overdue (plus enforcement costs and default administration charges), then the credit agreement would be reinstated but only if the payment is done before the creditor had *cancelled* the agreement. Paragraph (b) stated that after these amounts had been paid, the debtor was entitled to "resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order". This contradiction was criticised by Otto[11] as follows:

> "It escapes my mind how, first, an agreement which has been cancelled can be reinstated and secondly, it is not clear how a person can resume possession of a thing which has been repossessed pursuant to an attachment order if the agreement was not cancelled to justify such an attachment order in the first place."

Brits[12] states that a partial solution was presented in *Nkata v FirstRand Bank Ltd and Others*[13] where the Western Cape High Court explained that there is a conceptual distinction between the cancellation of an agreement and specific performance of an acceleration clause. In this respect the court held that

> "where an agreement is terminated by the credit provider because of the consumer's breach, the contract is terminated by the act of the credit provider. The remedies then available to the credit provider are those provided by law where a contract has been terminated because of breach. Where a credit provider invokes an acceleration clause, the contract remains in force and the consumer is obliged to make specific performance of the accelerated indebtedness. If the consumer pays the accelerated indebtedness then the contract will be terminated not by the act of the credit provider but through performance by the consumer."[14]

[11] JM Otto *The National Credit Act explained* (2006) 98, similarly repeated in JM Otto & RL Otto *The National Credit Act explained* (2 ed 2010) 117 and JM Otto & R-L Otto *The National Credit Act explained* (3 ed 2013) 125. See also JM Otto & R-L Otto *The National Credit Act explained* (4 ed 2016) 130.
[12] 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* 75-91 83-84.
[13] 2014 (2) SA 412 (WCC).
[14] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 39.

The court went on to conclude that "the enforcement of an acceleration clause does not in law constitute a cancellation of the agreement".[15]

In light of this, Brits[16] argues that section 129(3) deals with situations where the credit provider is in the process of enforcing the acceleration clause in the credit agreement, and thus that it does not deal with any situation after the agreement has been cancelled. This means that, at any time during the enforcement process but before cancellation, it is still open to the consumer to pay the outstanding amount and consequently overturn the creditor's decision to enforce the acceleration clause. Even after the High Court in *Nkata* had interpreted and applied section 129(3), it was still necessary to clean up the terminological confusion surrounding the idea of reinstating an agreement that has not yet been cancelled and the implication that property might have been attached prior to cancellation. Brits presumes that this is why the legislature chose to remove references to the notion of reinstatement from subsection (3) and replaced it with the more neutral idea of "remedying a default". Brits further states that this amendment is helpful to maintain terminological logic. He however also stresses that it is important to consider that this change in terminology probably does not impact the basic concept of what the consumer's rights in this regard entail.

4.2.3 The removal of subparagraph (b)

With regard to the striking out of paragraph (b), Brits explains that it might present the advantage of removing the other contradiction pointed out by Otto, namely the idea that property could be repossessed before cancellation as previously implied in the original subsection (3)(b). Paragraph (a) of the original subsection seemed to contradict with paragraph (b) in that paragraph (a) provided for reinstatement before cancellation of the agreement but paragraph (b) seemed to suggest the possibility of reinstatement after the property involved had been attached. This is contradictory because the attachment of property typically happens after debt enforcement proceedings have commenced and indeed have been completed, which is after cancellation of an agreement and not before.

[15] *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 39.
[16] 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* 75-91 84.

Brits furthermore questions whether the removal of paragraph (b) might have broader consequences, since it may imply that, even if he remedies his default, the consumer is – unlike before – not entitled to be placed back in possession of property that had been repossessed. This might in turn suggest the legislature's intention that the opportunity to remedy the default is no longer available at a stage after the property had been repossessed. However, it is highly doubtful that this consequence was intended by the legislature.[17]

One can indeed ask: if a consumer is not entitled to be placed back in possession of the repossessed property, then what is the purpose of remedying of the default? This theory for why paragraph (b) might have been removed also does not line up with the purpose of the NCA. Brits[18] therefore concludes that the legislature probably only intended to rid the subsections of the contradictions pointed out by Otto and that one should not assume any intention to substantively amend the consumer's right. He goes on to state that one should not read more into the removal of paragraph (b) than the purpose to remove conceptual contradictions found in the subsection. Brits also points out that the removal of paragraph (b) does not create a serious gap because even without paragraph (b) it is obvious that the remedying of the default would have to lead to the return of any repossessed property, otherwise the purpose would be defeated. This prospect is strengthened by the fact that the operation of section 129(4) probably still covers instances where the consumer remedies the default after repossession or attachment of the property. As Brits reasons, even though paragraph (b) has been removed, it is still only logical that, subject to subsection (4), any attached or repossessed property must be returned to the consumer in instances where debt enforcement is not going ahead.

4.2.4 Conclusion

Considering the above, and despite the confusing manner in which the subsection was changed, the amended section 129(3) clearly still permits consumers who have fallen

[17] 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* 75-91 84-85.
[18] 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* 75-91 85.

into arrears to remedy their default by paying the relevant outstanding amounts together with prescribed charges and costs.

In a more sceptical view of the amended section 129(3), Brits, Coetzee and Van Heerden[19]argue that the subsection now purely restates the implication of section 129(1) read with section 130(1), namely that a default which has been brought to the consumer's attention can be rectified before the credit provider approaches the court. They furthermore assume that the other aspects of the amended section 129(3), remain the same as before. Regrettably this means that the potential difficulties surrounding the claim for enforcement costs, as discussed in chapter 3 above, remain unchanged and are arguably in need of further clarification.

Steyn and Sharrock state that the amended subsection 129(3), similar to the original subsection, does not set any substantive and procedural requirements for a consumer to "remedy a default" except that they must pay the arrears and the prescribed costs. They further point out that this subsection does not spell out the consequences of a consumer "remedying his default".[20]

4.3 Amendment to section 129(4)

Subsection (3) was originally limited by the provisions in subsection (4), but the latter subsection has been amended to now read as follows:

> "(4) A credit provider may not reinstate 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 172;
> (b) the execution of any other court order enforcing that agreement; or
> (c) the termination thereof in accordance with section 123."

According to the original subsection (4), reinstatement was prohibited only after the attached or surrendered property has been sold; a court order that enforces the agreement has been executed; or the agreement has been terminated in terms of section 123 of the NCA.As explained in chapter 3.3 above, the original subsection (4)

[19] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 193.
[20] L Steyn & R Sharrock "Remedying mortgage default: *Nkata v FirstRand Bank Ltd*" (2017) 134 *SALJ* 498-513 500.

contained certain contradictions – both between its subparagraphs as well as between its provisions and some aspects of subsection (3). The inconsistencies internal to subsection (4) essentially entailed the possible conflicts or overlaps between the events listed in the subparagraphs –in other words, the events after which reinstatement can no longer take place. As also explained above, there is currently some uncertainty as to the exact meaning of concepts like "sale" and "execution" for purposes of applying section 129(4).

The original subsection (4) specified the limits of the consumer's right to reinstate the credit agreement, whereas the amended version of the subsection appears to turn this around by replacing the reference to "consumer" with "credit provider". The term "reinstate" is retained under this amendment (although the hyphen is removed) but the phrase "or revived" is added. Consequently, this subsection is now – after the amendment – the only place in the NCA that expressly refers to the reinstatement of a credit agreement, since this term has been removed from subsection (3).

In his response to the textual changes in section 129(4), Brits[21] suggests that the original subsection (4) was not that problematic although there were inconsistencies between the events listed in the subparagraphs. He also observes that the amendments to subsection (4) do not seem to be aimed at clarifying any particular uncertainty or uncertainties, and as a result it creates more confusion.[22] To a similar effect, Brits, Coetzee and Van Heerden[23] state that it is unclear what the purpose or effect of the amendments to subsection (4) is, and that it seems to separate the content of subsections (3) and (4) from each other.[24] They further point out that, although the two subsections are formally still linked through the cross-reference to subsection (4) in subsection (3), there no longer seems to be a substantive link between them and this is difficult to make sense of. How can the *consumer's* right to *remedy* his default (subsection (3)) be made subject to limitations placed on the *credit provider's* ostensible right to *reinstate* or *revive* the credit agreement (subsection (4))?

[21] 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* 75-91 87.
[22] 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* 75-91 87.
[23] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 194.
[24] See also JM Otto & R-L Otto *The National Credit Act explained* (4 ed 2016) 131.

Brits[25] observes that a surface reading of subsection (4) creates the impression that, unlike the previous right of reinstatement, the consumer's right to "remedy a default" is not qualified by the events listed in section 129(4), since this subsection now expressly refers to the credit provider's rights and not the consumer's rights. Brits suggests that, if taken literally, the amendments made to subsection (4) imply the introduction of a new concept, which is the credit provider's right to reinstate or revive a credit agreement (and thus no longer the consumer's right in this regard).

Brits moreover states that it is not clear why "or revive" had to be added to the subsection. He further speculates that subsection (4) apparently no longer has anything to do with the consumer's right under subsection (3), since these now refer to two different parties. The result would then be that subsection (4) can no longer be used to interpret the confines of the right stipulated in subsection (3), despite the fact that, subsection (3) is still expressly made subject to subsection (4). The legislature's aim in this regard is indeed difficult to understand.

Brits argues furthermore that a right for the credit provider to "reinstate or revive" a credit agreement hardly fits into the Act as a whole and that it is also out of place in section 129. He attempts to explain this amendment, by supposing that the legislature might have wanted to afford the creditor the choice whether to accept or reject the debtor's payment of arrears. However, he also points out that this theory would not make sense because it would mean that the reinstatement of the agreement depends on the discretion of the credit provider. The author further explains that, if both parties want to reinstate, there is no dispute and hence no need for a specific statutory measure, as there would be a consensual arrangement. He goes on to reason that if the legislature wanted to afford a creditor such a discretion, it could have been achieved in a much simpler and clear manner.

In line with the above theory, Brits states that the amended section 129(4) could be read to give the discretion to reinstate or revive the credit agreement to the credit provider alone, but that he can elect to do so only until any of the events listed in paragraphs (a) to (c) takes place. This would mean that even if the consumer pays all the outstanding amounts, he is at the mercy of the credit provider who can elect

[25] The explanation in the following paragraphs of the views of Brits are found in 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* 75-91 86-90.

whether or not to allow reinstatement. Brits is of the view that if this was the true intention, it could have been achieved in a much simpler and clearer manner than with the present wording of the subsection. He therefore rejects this possible interpretation of the amended subsection because it seems to contradict the overall purpose of the Act and may even discourage the credit provider's co-operation in extra-judicial dispute resolution.

Brits suspects that, if taken literally, the amended section 129(4) would have no practical meaning as far as the consumer's rights are concerned. He suggests that the prospect that section 129(4) is no longer relevant will cause problems because apparently there is now nothing to indicate until which point in the process the remedy of default can take place. Brits conversely reasons that, to make practical sense of section 129(3) and (4) as a coherent whole regarding the right of reinstatement, one needs to stretch the wording. Also, the fact that subsection (3) is still expressly made subject to subsection (4) might give an indication of what the function of subsection (4) is meant to be. Brits accordingly provides 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 option then implies that subsection (4) no longer serves to indicate the limits of the consumer's right to remedy the default but refers to a separate right of the credit provider.

The second option, Brits suggests, is to assume that the amendments made to section 129(4) should not be taken literally and might have to be ignored for practical purposes. The author states that, since there was no explanation provided for the amendment, one must assume that it was never the intention to bring about the kind of substantive change insinuated above. He concludes that one is regrettably compelled to interpret section 129(4) as if it has not been amended at all, meaning section 129(4) should be read as still providing for the limitations on the consumer's right of "reinstatement", regardless of the fact that the subsection now literally refers to the limitations on the credit provider's ability to reinstate or revive the agreement.[26]

The author postulates that the legislature probably intended to emphasise that the credit provider must allow reinstatement if the consumer remedies his default prior

[26] 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* 75-91 90.

to any of the events listed in the subsection. After these events, the credit provider may then refuse to accept late payment, hence refusing reinstatement. Brits argues that the aspect of section 129(4) that could have benefited from the amendment process is clarification regarding the listed events after which reinstatement is no longer possible. These events were (and still are) the only issue in this subsection that caused uncertainty.

In light of the change in terminology in subsection (4), Brits, Coetzee and Van Heerden[27] argue that a serious problem now exists because there is now no provision for the concrete points of no return after which reinstatement is no longer possible. Also, the only qualification now is that default cannot be remedied after cancellation, but this only applies to situations where the credit provider has actually cancelled the contract and not where it enforces an acceleration clause. These scholars conclude that the subsection is currently so unclear and illogical that it is pointless to try and figure it out. They suggest that the only real solution is to amend the provision again.

With regard to the retention of the word "reinstate" in section 129(4), Steyn and Sharrock[28] argue that it was probably an oversight on the part of the drafters of the amendment. They further state that one may now think that subsections (3) and (4) have been disconnected from each other, but this does not seem to be the intention of the legislature because subsection (4) still clearly poses limitations on the consumer's right provided for in subsection (3). With regard to the addition of the term "revive" in subsection (4), Steyn and Sharrock state that it is also baffling.[29] They contend that this term is not suitable in this context in light of the fact that the credit agreement was never "dead" because subsections (3) and (4) apply only in cases where the credit provider has not cancelled the credit agreement and therefore the agreement does not need to be revived.

Steyn and Sharrock state that it would have been more appropriate for section 129(4) to also have been amended to contain the words "remedy a default" –hence the same as the terminology introduced in section 129(3) – instead of "reinstate or

[27] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 194.
[28] L Steyn & R Sharrock "Remedying mortgage default: *Nkata v FirstRand Bank Ltd*" (2017) 134 *SALJ* 498-513 499.
[29] L Steyn & R Sharrock "Remedying mortgage default: *Nkata v FirstRand Bank Ltd*" (2017) 134 *SALJ* 498-513 500.

revive".[30] They further suggest that the amended subsections (3) and (4) should be interpreted and applied in such a way that a consumer's right to "remedy a default" in terms of section 129(3) by paying the arrear amount and the prescribed costs, will have the effect that the obligation arising out of the credit agreement will continue as if no default had occurred. They also suggest that section 129(4) must still be seen as limiting the circumstances in which a consumer may remedy a default in terms of section 129(3).[31]

To my knowledge, only one court has grappled with the meaning and implications of the change in terminology (from "consumer" to "credit provider") in section 129(4). In this regards full bench of the Gauteng Local Division (Johannesburg) of the High Court in the case of *ABSA Bank Limited v Mokebe; Absa Bank Limited v Kobe; ABSA Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another*[32] recently endorsed the "second option" presented by Brits and as explained a number of paragraphs above.

4.4 Academic proposals for reform

As mentioned above, Brits, Coetzee and Van Heerden advocate for a complete re-write of section 129(3) and (4). They also propose certain aspects to be kept in mind during any such future re-drafting process. Firstly, they state that the idea that a consumer can (and is permitted to only) reinstate an agreement *before* cancellation is illogical and should be avoided – and not by removing the term "re-instatement" but by deleting the before-cancelled qualification itself.[33] They state that even the notion that the consumer can "remedy a default" before cancellation is unsatisfactory, because it is unnecessary and little more than a restatement of the common law together with the principle already implied by section 123(1) read with section 130(1). They suggest that in order to create a cut-off point for the right to reinstate, it is not

[30] L Steyn & R Sharrock "Remedying mortgage default: *Nkata v FirstRand Bank Ltd*" (2017) 134 *SALJ* 498-513 500.
[31] L Steyn & R Sharrock "Remedying mortgage default: *Nkata v FirstRand Bank Ltd*" (2017) 134 *SALJ* 498-513 500.
[32] (2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 485 (12 September 2018) para 49, quoting with approval from 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* 75-91 89-90.
[33] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 195.

necessary to refer to the cancellation of the agreement at all, since the events listed in section 129(4) are more than enough, provided that they are clear and workable.[34]

The authors also state that, logically, reinstatement should refer to a mechanism that is available after cancellation, not before, but only until a clearly identified future moment.[35] One would also have to choose the ideal cut-off point. It can for instance either be the granting of a judgment or the execution of such a judgment through the sale in execution of property. It is also their view that reinstatement should not take place automatically and by operation of law as is currently the case, because it leads to too much uncertainty for the parties concerned. It is unsustainable to permit a situation where reinstatement can take place without either party's knowledge or intention, while an engagement between parties should instead be encouraged.[36]

The authors also argue that when drafting provisions pertaining to reinstatement, a clear distinction should be made between the following stages. Firstly, if the consumer defaults, this default can freely be rectified before the credit provider sends the section 129(1) notice. And the notice of default can only be sent if the consumer actually is in default, which implies that any rectification of default before this point will preclude the sending of the notice and hence prevent any enforcement or cancellation.[37]

Secondly, they suggest that, after the credit provider sends the notice of default but before he approaches the court, the consumer is permitted to rectify the default per the amount that is indicated in the notice of default. If such payment is made, the credit provider cannot approach the court, because section 130(1) determines that the credit provider may only approach the court if the consumer actually is in default. Thus, if the default had been remedied, the credit provider cannot approach the court.[38]

Thirdly, as these writers suggest that, the reinstatement concept proper should become relevant after the credit provider has approached the court and up until the

[34] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 195.
[35] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 195.
[36] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 195.
[37] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 196.
[38] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 196.

moment when judgment is handed down. They argue that it would be ideal if a consumer who wished to reinstate during this stage should be expected to inform the credit provider of this intention and moreover request a statement indicating the amount in arrears as well as the other charges and costs outstanding.[39] They further suggest that the consumer can then pay these amounts with the effect that reinstatement will then take place at that moment, while all ongoing debt enforcement proceedings must then cease. If the consumer disputes the amounts provided by the credit provider, the consumer could call upon the credit provider to request a taxing officer to judge the legal costs for reasonableness. The credit provider would then not be entitled to resist reinstatement but must cooperate by providing the consumer with the necessary information and accepting payment of the relevant amounts.[40]

The fourth stage identified by Brits, Coetzee and Van Heerden, is after judgment had handed down but before it has been executed against the consumer's property.[41] From this point the contractual debt is replaced with a judgment debt and therefore they argue that it is necessary to think differently about reinstatement. They propose that if the consumer is willing and able to get the arrear amount and the costs up to date, he should tender payment of these amounts to the credit provider. If the credit provider accepts such payment, there is no problem and reinstatement can occur provided that the judgment must be abandoned. To carter for instances after the judgment had been granted but where the credit provider does not accept payment of the relevant amounts, the authors suggest that a procedure could be created through which the consumer could call upon the court to authorise reinstatement and grant a rescission of the judgment.[42]

Lastly, the writers suggest that, after the judgment has been executed against the debtor's property through a sale in execution, it is advisable that from the moment that sale takes place, no reinstatement is possible whatsoever.[43] However, the

[39] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 196.
[40] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 196.
[41] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 196.
[42] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 196.
[43] R Brits, H Coetzee & C van Heerden "Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis*?" (2017) 80 *THRHR* 177-197 197.

common law right of redemption could still be relied on to redeem the attached property up to the time that ownership is transferred. It is not clear whether the authors would, as the Constitutional Court does, extend the concept of execution to include the payment of the proceeds to the creditor, but it appears that they prefer a situation where the actual moment of sale is the final moment.

4.5 Conclusion

This chapter investigated how section 129(3) and (4) was amended by the 2014 Amendment Act. Although some contradictions were removed especially from subsection (3), it is also relatively clear that the amendments did not leave the subsections in a state of perfect clarity either. Firstly, some of the larger problems that appeared in case law and academic literature were not addressed. For instance, the before-cancellation qualification in subsection (3) has, despite strong criticism, remained in place. Also, the questions regarding the exact meaning of "sale" and "execution" in subsection (4) – as well as when each event applies – were not answered by the amendments. The legislature similarly left untouched the main debate in the *Nkata* saga, namely the question of when enforcement costs become payable for reinstatement purposes. This could indicate the legislature's tacit endorsement of the Constitutional Court's interpretation in *Nkata*.

In addition to not clarifying some of the debates surrounding the interpretation of the subsections, it may even be that some of the amendments added to – instead of detracted from – the uncertainties regarding the reinstatement concept. In this respect the strangest amendment was the replacement of "consumer" with "credit provider" in section 129(4), since it is hard to discern the purpose of this change.

As also explained in the last part of this chapter, the academic writers Brits, Coetzee and Van Heerden are so critical of the amendments and the current reinstatement mechanism as a whole that they recommend a complete redrafting of the subsections. At this stage there is no sign that the legislature plans to again amend section 129(3) and (4), expect for the small amendments suggested in the Draft Amendment Bill of 2018 in order to accommodate the new debt intervention procedure. Also, from the cases decided after the 2014 Amendment Act came into operation, it is not clear yet clear that the new versions of the subsections are exactly

as problematic as Brits, Coetzee and Van Heerden expect. Only time will tell whether they were justified in their criticism and reform proposals.

The next and final chapter concludes this dissertation by summarising the overall analysis and by drawing final conclusions regarding the current state of the reinstatement mechanism in South African law.

CHAPTER 5
CONCLUSION

5.1 Introduction

This final chapter of the dissertation aims at drawing some conclusions regarding the present interpretation of section 129(3) and (4) of the NCA, also with a view of identifying matters that need attention. A general question that could be asked as this dissertation draws to a close is whether the reinstatement mechanism upholds the purpose of the NCA. Before providing the final conclusions and recommendations, it will however first be useful to provide a summary of the analysis that was conducted in the preceding chapters.

5.2 Summary of analysis

This dissertation commenced with a setting out the background and context of reinstatement. It showed that the reinstatement mechanism provided for in the NCA was not the reinstatement-type measure known in South African statutory law. Indeed, the need for having a right of reinstatement in legislation is founded in the fact that the common law did not permit for the reversal of a credit provider's choice to enforce and/or cancel a credit agreement merely because the debtor was willing and able to get the arrears up to date. Instead, the only way to have one's attached assets released from the execution process was to settle the entire outstanding debt, in other words the value of the judgment debt (plus interest). This was referred to as the so-called "right of redemption".

In view of the strict common law position, certain statutory exceptions were created first in the Hire-Purchase Act and later in the Credit Agreements Act. Both statutes were aimed to consumer protection goals in the credit industry and they had a particular focus on the purchase of movable goods on credit (hire-purchase agreements or instalment sale agreement). These statutes both permitted a debtor (purchaser) to pay the arrears in order to reverse the cancellation of the credit agreement, but this was only possible if the asset had been repossessed without a court order, and also only within a limited time period. In that sense, reinstatement was

a kind of spoliation remedy available for debtors who could get their arrears up to date (and later also the payment of certain costs). Notably, these statutes did not apply to mortgage agreements and thus a creditor's foreclosure action could not be overturned by paying one's arrears in terms of these provisions.

The National Credit Act replaced the Credit Agreements Act and expanded the scope of consumer credit protection to a broader range of credit agreements, importantly also mortgage agreements. The new statute similarly included subsections dealing with reinstatement, but even a cursory reading of these provisions indicate that it differs substantially from the reinstatement concept known under the older statutes. Instead of envisioning a measure through which cancellation can be overturned, the NCA expressly limited reinstatement to a moment prior to cancellation. If the arrear amount, the default charges and the enforcement costs were paid before such cancellation, as well as before any of the events listed in section 129(4), the agreement was regarded as reinstated by operation of law. The consequence was that any repossessed or attached property had to be returned to the consumer.

The original version of section 129(3) and (4) revealed some obvious contradictions. Most notably, it seemed strange to talk of reinstating an agreement that had not yet been cancelled. Similarly, how could assets have been repossessed prior to cancellation of the credit agreement? Initially there was also some debate regarding what was meant with the outstanding amount that had to be paid: did it include the full accelerated outstanding debt, or only the actual amount in arrear? Case law settled on the latter option without much controversy. One of the greatest points of contention turned out to revolve around the payment of the credit provider's reasonable enforcement costs, which was (and is) required under section 129(3) in order for reinstatement to take effect. The matter went all the way to the Constitutional Court in the *Nkata* saga and the Court eventually settled on the interpretation that such costs are only payable if they have been determined to be reasonable through agreement or taxation.

It also appeared that there was a lack of clarity regarding the events listed in section 129(4), namely the events after which reinstatement could no longer happen. These events were the sale of the property after attachment or surrender; the execution of any court order; or the termination of the agreement. The general conclusion from case law is that "sale" refers to the moment at which the property is

literally sold at the auction and that it does not include the transfer of ownership, whereas “execution” refers to the moment after which the proceeds of a sale in execution had been realised and paid to the credit provider. Leaving aside the contradiction between these two events and the uncertainty as to the circumstances under which each will apply, it is also not perfectly clear what the last event (namely termination of the agreement) refers to or how it differs from the other events.

In light of some of the problems and contradictions found in the wording of the original section 129(3) and (4), the NCA was amended via the 2014 Amendment Act, which became operative in 2015. The apparent terminological contradictions in section 129(3) were removed by replacing the term “re-instate” with the notion of “remedy a default”. The subparagraph referring to the return of repossessed assets was also removed. Presumably these changes were made to remove the contradictory insinuations that an agreement can be reinstated before it has been cancelled, and that assets could have been repossessed before cancellation. As far as it goes, one cannot fault the logic of removing these contradictions. However, one is still left with the situation where reinstatement is prohibited after the cancellation of the contract, but not after the enforcement of an acceleration clause. A difficulty with this difference is that it creates the opportunity for a credit provider to choose cancellation instead of acceleration, thereby forestalling its customer’s opportunity to rectify his or her default.

Section 129(4) was also amended. For unclear reasons, the term “consumer” was replaced with “credit provider”. This insinuates that the credit provider has a right to reinstate the agreement, but only until one of the listed events take place. The tentative interpretation is that the subsection still places limitations on the consumer’s right to reinstate the agreement, despite the change in terminology.

It is unclear whether we have reached the end of the debates surrounding reinstatement. Indeed, the current state of affairs has been criticised by some authors who go as far as to recommend a complete redrafting of the subsections.[1]

[1] See section 4.4 above.

5.3 Final conclusions

At the end of this dissertation, it would be useful to provide a list of points regarding the current interpretation of section 129(3) and (4), thus as a summary of the present legal position. In other words, these are the points that are more or less authoritatively accepted in case law:

- The point of departure is that a consumer who is in default under a credit agreement is permitted to remedy such default before the credit provider has cancelled the credit agreement.
- The above involves that any outstanding amounts, as well as default administration charges and reasonable enforcement costs are paid.
- The outstanding amount which must be paid does not refer to the full outstanding (accelerated) indebtedness, but only to the actual amount with which the consumer is in arrears.
- The enforcement costs are only payable if they have been specifically and separately demanded by the credit provider and if they have been agreed to or if they have been judged as reasonably through taxation.
- The fact that the consumer may only remedy the agreement prior to cancellation does not mean that reinstatement is impermissible after the acceleration clause is enforced. In other words, the creditor's election to foreclose (and its commencement of enforcement proceedings) does not stand in the consumer's way; the default can still be remedied, unless the agreement has been cancelled in the technical sense.
- Upon complying with the requirements in section 129(3), any repossessed or attached property must be restored to the consumer.
- Complying with the requirements in section 129(3) results in reinstatement by operation of law. Thus, no special procedure, consent or communication between the parties is necessary.
- Successful reinstatement undoes any ongoing enforcement action and also invalidates any judgment that had been granted.

- Reinstatement is not possible after the relevant property has been sold pursuant to an attachment order or a surrender of property. It is also not possible after any judgment has been executed or after the agreement is otherwise terminated.
- Sale refers to the moment that the property is sold at the auction and not to, for instance, the moment at which ownership of the property is transferred to the buyer.
- Execution of a judgment refers to the moment after the proceeds of property, which had been sold in execution, are realised and thus paid to the credit provider.

Despite the apparent clarity when it comes to the points listed above, there are also a number of unresolved issues or controversial points that should be noted:

- The rule that reinstatement is not possible after cancellation of the contract (in the technical sense) remains unsatisfactory. Firstly, there appears little reason for such a qualification, since the events listed in section 129(4) could serve as sufficient restrictions on reinstatement. Indeed, some of the events listed could happen *after* cancellation, such as the sale of property pursuant to an attachment order. Secondly, there appears to be no principled reason why reinstatement should be permitted after the enforcement of an acceleration clause but not after the cancellation of the agreement.
- The fact that reinstatement takes place by operation of law is subject to criticism and is perhaps not the ideal approach. It suggests that reinstatement can take place without either party even knowing about it or intending it, which could lead to practical problems if it becomes necessary to apply the consequences of reinstatement after the fact (and thus retrospectively). It would arguably create more certainty if reinstatement required a process of some kind or the active wilful involvement of the parties.
- With respect to the events after which reinstatement is impermissible, there is some uncertainty as to the meaning of the different events and, more specifically, under which circumstances they apply. For instance, as currently interpreted a “sale” takes place prior to an “execution”, but both events are listed

as points of no return. Although this suggests that these events apply in different circumstances, more clarity is required.

- The conflicting opinions regarding when enforcement costs become payable for reinstatement purposes (for instance, the cogent arguments by the judges on both sides of the argument) suggest that the current interpretation is not as clear and accepted as one would like. Therefore, this question might need a further rethink, but much would depend on whether further problems come in future litigation.
- The fact that the term “consumer” was replaced with “credit provider” in section 129(4) remains a baffling feature of the 2014 Amendment Act, and thus it needs to be reconsidered by the legislature. It remains to be seen whether this change leads to difficulties in applying the subsection.

In conclusion therefore, although we have a fair degree of clarity when it comes to how section 129(3) and (4) should presently be interpreted and applied, there remains matters in need of clarification – either through judicial pronouncement or legislative amendment. It is hoped that the analysis that was provided in this dissertation will not only assist in understanding the current interpretation of the subsections, but that it can also serve as a foundation upon which to consider possible amendments in future. It remains an open question whether it will be necessary to completely reconceive the provisions regarding reinstatement in the NCA, as for instance argued by Brits, Coetzee and Van Heerden,[2] or whether a couple of relatively minor adjustments will be sufficient.

The main point to remember is the ultimate purpose of reinstatement, namely the goal to prevent the negative consequences that can come about when a credit agreement is formally enforced and executed under circumstances where the default can be remedied. At the same time, one must also keep in mind that the NCA strives to seek an appropriate balance between the rights of credit providers and credit consumers. It is within this balance – or tension – that one must seek to design the most appropriate reinstatement mechanism.

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[2] See section 4.4 above.

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