Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *Quo vadis*?*

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OPSOMMING

Die herinstelling van kredietooreenkomste kragtens die "National Credit Act" 34 van 2005: *Quo vadis*?

Die artikel handel oor 'n verbruiker wat in verstek is se reg op herinstelling van sy of haar kredietooreenkoms kragtens artikel 129(3) en (4) van die "National Credit Act". Die swak bewoording van die genoemde wetsbepalings het tot sowel teenstrydige hofuitsprake as wetswysigings gelei. In hierdie bydrae word die oorsprong van die reg op herinstelling asook die evolusie daarvan bespreek. Daar word aan die hand gedoen dat die huidige toedrag van sake, selfs na die wetswysigings, onbevredigend is en dat die bestaande bepalings geskrap en herskryf moet word. Ten slotte word daar voorlopige voorstelle vir die pad vorentoe gemaak.

1 INTRODUCTION

When a consumer defaults on his payment obligations under a credit agreement, the credit provider usually obtains the right to cancel or enforce the agreement, but to do so it must follow the procedural and substantive requirements of the National Credit Act.[1] If the default is rectified before debt enforcement commences, it is fairly clear that no further action can be taken by the credit provider to initiate such proceedings.[2] What is more controversial, however, is the situation

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1 34 of 2005 ("the NCA").

2 Debt enforcement cannot commence if the default is rectified. Firstly, the notice of default (a step in preparation of debt enforcement) can only be sent if the consumer is in default (see s 129(1)), implying that, if default is rectified before this point, the notice cannot be sent. Secondly, the credit provider may only approach a court (serve summons) if the

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where a consumer rectifies his default after debt enforcement proceedings have commenced but before they have been completed. It may be that such on-going enforcement proceedings can be undone through a mechanism that has become known as the "right to re-instate" or the "re-instatement" of a credit agreement. The theory is that successful re-instatement should restore the rights and duties of the parties to the position prior to default – as if the default never happened.[3]

In section 129(3) and (4) of the NCA the legislature purportedly intended to create such a remedy for consumers who are willing and able to bring their arrears up to date and to compensate the credit provider for certain costs and charges that were incurred as a result of the default. In principle, this is a valuable and worthy consumer protection mechanism, but ever since the NCA was enacted, it was evident that these statutory provisions contained certain conceptual and terminological contradictions, and that there were some questions surrounding their interpretation. When the NCA was amended by the National Credit Amendment Act,[4] which became operative on 13 March 2015, certain aspects of section 129(3) and (4) were amended in an attempt to rectify these problems.[5] Unfortunately, it has become clear that these amendments have created more problems than what they have solved and, indeed, there now hangs certain serious question marks over exactly what these subsections intend. What is more, the Constitutional Court recently was called upon to clarify the interpretation of certain points, particularly the controversial question of when the credit provider's legal costs becomes payable for re-instatement purposes.[6] The fact that this topic has been litigated all the way to the Constitutional Court, combined with the notable fact that the judges expressed opposing views on matters of interpretation, means that re-instatement now has been placed in the spotlight like never before.[7]

This contribution consequently traces the evolution of the right to re-instate credit agreements in South African credit law from the legal position prior to the NCA to the current situation after the 2014 Amendment Act, and in view of the way in which the courts have interpreted this concept. It is ultimately concluded that the present state of affairs is wholly inadequate and rife with too many uncertainties to arrive at a satisfactory interpretation. After identifying the most pressing uncertainties with the re-instatement concept as currently formulated in the NCA, we conclude that the whole concept of re-instatement has become so muddled that it is time to go back to the drawing board. Instead of attempting to

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consumer is still in default at that point, i.e. ten business days after the notice of default has been sent and 20 business days after default (see s 130(1)). Thirdly, a court may not hear the matter if the arrears referred to in the notice of default has been brought up to date (see s 130(3)(c)(ii)(dd)).

3 Grammatically re-instatement means "to restore to a previous effective state" or "the action of giving someone back a position that they have lost": see http://bit.ly/2cdC1x6 (accessed on 9 August 2016). For the effects of re-instatement, see para 3 3 below.

4 19 of 2014.

5 S 32(a)–(b) of the Amendment Act.

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

7 See, eg, the responses to *Nkata* in recent issues of *De Rebus*: Louw "Banks beware: Reinstatement of mortgage loan agreements" 2016 (July) *De Rebus* 52; Smit and Essa "Nkata: The court's interpretation of s 129 of the NCA and the meaning of 'reinstatement'" 2016 (July) *De Rebus* 28; Mohale "Protection offered by s 129 of the National Credit Act" 2016 (July) *De Rebus* 23.

provide a logical interpretation of the current section 129(3) and (4), we strongly advocate a complete re-drafting of these provisions. Therefore, in view of the present problems, certain preliminary recommendations are made for the way forward.

2 RE-INSTATEMENT PRIOR TO THE NCA

2 1 Common law

At common law, as soon as the creditor had obtained the right to cancel the contract (either due to a material breach or in terms of a *lex commissoria*) and has exercised that right to cancel, the contract ceases to exist and, therefore, cannot be automatically "re-instated" when the breach of contract (default) is subsequently corrected. Before cancellation, the debtor usually may remedy his default, but not after. After cancellation the creditor can even refuse to accept late payment, and he is entitled to demand repayment of the full outstanding debt by virtue of an acceleration clause.[8] The same applies if the creditor relied on an acceleration clause to demand the full outstanding debt. It was, of course, possible for the creditor to indulge the debtor by accepting late payment after cancellation. However, technically this did not involve the "re-instatement" of the cancelled agreement, but rather entering into of a new agreement.

The only exception that the common law provided was a right of "redemption" in respect of any property that had been attached in execution.[9] The debtor had the right to "redeem" the attached property but only by paying the full (accelerated) outstanding amount payable (the judgment debt). Redemption seemed to have been possible after the property had been sold in execution but prior to it being transferred to a third party who bought it at the auction. However, since the full debt had to be paid, redemption cannot rightly be compared to re-instatement. Redemption involved the payment of the judgment debt, which terminates all obligations towards the creditor and furthermore frees the property from any attachment or security rights.

After cancellation of a credit agreement, the common law therefore did not allow much leeway for debtors, and instead confirmed the strong rights of creditors to cancel the contract and demand payment of outstanding amounts. It is consequently understandable that the legislature over the years made provision to temper the otherwise-powerful operation of cancellation and acceleration clauses.

2 2 Hire-Purchase Act 36 of 1942

With the enactment of legislation to regulate hire purchase agreements, a greater measure of protection was extended to debtors (buyers) who generally were in an unequal bargaining position compared to creditors. One of these protection measures was a statutory right to re-instate a credit agreement. Section 13(1) of the Act stipulated that

> "if the seller has, as a result of the failure of the buyer to pay any instalment due under any credit agreement, recovered possession, otherwise than by an order of

8 See eg *Boland Bank Ltd v Pienaar* 1988 3 SA 618 (A); *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ) 377D–H.

9 See Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" 2013 *Stell LR* 165 167; Scott and Scott *Wille's Law of mortgage and pledge in South Africa* (1987) 191–195 and sources cited.

> 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 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 the goods are kept, and to be reinstated in his rights under the agreement".

The scope of application of section 13 was limited to movables to which the Hire-Purchase Act applied and it apparently became relevant after cancellation of the credit agreement by the creditor – hence the use of the word "re-instatement". The right belonged to the buyer and could only be invoked in very specific circumstances, namely, in the event that the buyer had failed to pay an instalment that was due (not in any other instance of default) and the seller subsequently recovered possession of the movables without a court order. However, where the consumer himself terminated the agreement and where the goods were repossessed in terms of a court order, re-instatement was barred. Section 13 also limited the buyer's right of re-instatement to a specific time period, namely, 21 days after the seller recovered possession of the goods.

The buyer became entitled to re-instatement only upon making certain stipulated payments, namely, "all arrears due". If exercised properly, the result was that the goods were returned to the buyer and the buyer was re-instated in his "rights" in terms of the agreement. By necessary implication the buyer also would have had to resume his obligations in terms of the agreement. Section 13 did not require either of the parties to give any specific notice, in writing or otherwise, but either indicated that the credit receiver wished to re-instate the agreement or that the credit grantor required payment of specific amounts.

2 3 Credit Agreements Act 75 of 1980

The Hire-Purchase Act was repealed by the Credit Agreements Act, which similarly included a right of re-instatement for the debtor (credit receiver). Section 12 of the Act provided that if

> "the credit grantor, otherwise than by order of court, has recovered possession of any goods to which a credit agreement relates, the credit receiver, except where he has himself terminated the 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 the credit agreement".

Like its predecessor, section 12 could be invoked by the credit receiver in limited instances, namely, where movables ("goods") financed in terms of credit agreements to which the Act applied were repossessed without a court order and in the absence of termination of the agreement by the credit receiver himself. Section 12, however, differed from section 13 of the Hire-Purchase Act in the following respects: It apparently had a wider reach, as it did not specifically require the credit receiver to be in default with paying an instalment (although it appears to have been implied if one has regards to the amounts required to be paid to invoke the right); it provided for a longer period within which payment had to be made in order to successfully re-instate the agreement, namely, 30 days; it expanded the amounts that were required to be paid in order for re-instatement to occur, adding the credit grantor's reasonable costs in connection with the return of the goods; and it specifically provided for the credit receiver to be re-instated in his rights *and* obligations.[10]

It was also confirmed in case law that section 12 becomes relevant after the agreement had been cancelled, hence the term "reinstatement".[11] Similar to the previous Act, the new section also contained no requirement for specific notices, in writing or otherwise, regarding, *inter alia*, the intention to re-instate or the payment of specified amounts.[12]

2 4 Remarks

Having regard to the re-instatement provisions in the aforesaid two statutes, it may be concluded that this mechanism, while not taking away the debtor's right to recover possession of the goods by means of the common law remedy of *mandament van spolie*,[13] aimed to protect the apparently already out-of-pocket debtor when goods financed in terms of a credit agreement were unlawfully repossessed. The idea was to restore these goods to him in the circumstances set out in the sections and, thus, to obviate the need for costly judicial intervention to recover the repossessed goods.[14] As such it appears that the purpose of sections 12 and 13 was to create a moratorium on any further action by the creditor and that upon compliance by the debtor with the provisions of these sections, prior cancellation of the agreement was undone and the debtor got his goods back and was able to carry on with the credit agreement.

As will become clear from the discussion of the NCA below, the new re-instatement mechanism differs quite significantly from and seems to go much further than those in the repealed Acts. For instance, whereas the previous statutes only covered movable property subject to hire-purchase or instalment-sale agreements, the NCA covers immovable property as well. Indeed, it has become clear that re-instatement now features prominently in mortgage cases, which had not been the case previously. The NCA also does not provide a specific time period within which re-instatement should take place, but rather lists certain cut-off points in the procedure. Moreover, the NCA appears to focus not only (or at all) on the situation where the credit provider had taken possession of the property without a court order, but rather seems aimed at the stage during which official debt enforcement proceedings are underway. Another difference is that re-instatement in the previous Acts appeared clearly to apply after the contract had been cancelled, whereas the NCA supposedly contemplates some kind of intervention prior to cancellation.

The provisions in the NCA and those in the previous Acts differ so extensively that not much can be learnt from case law decided under the previous Acts when

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10 See, in general, Otto "The right of the credit receiver to reinstatement after return of goods to credit grantor" 1981 *SALJ* 516.

11 *Trust Bank van Afrika Beperk v Eales* 1989 4 SA 509 (T) 513B–C.

12 See *Maswanganyi v First National Western Bank Ltd* [1998] JOL 250 (W) 11.

13 See *idem* 10, where it was held that "failure by a credit receiver to exercise its right of redemption (sic) does not validate an unlawful repossession by the credit grantor".

14 In any event, where a debtor chose not to make use of the mechanism of s 12 of the Credit Agreements Act (or its predecessor s 13 of the Hire-Purchase Act) and proceeded to obtain a *mandament van spolie* to restore possession of the goods to him, the problem still remained that the default was not cured, the cancellation remained in place and the creditor could still repossess the goods by means of a court order.

interpreting the NCA on this point. It is nonetheless interesting to consider the previous Acts when viewing the historical context of re-instatement in the NCA. Although the provisions in the previous Acts provided a much narrower right of re-instatement, at least they were drafted more clearly and caused less uncertainty than the corresponding provisions in the NCA. The latter Act intends a more progressive and extensive consumer relief mechanism, with good reason, but unfortunately does so in terms that cause unnecessary interpretational difficulties.

3 RE-INSTATEMENT UNDER THE NCA PRIOR TO THE 2014 AMENDMENT ACT

The general idea revealed by the pre-amended section 129(3) and (4) is that, by paying specified amounts before a certain cut-off point, the consumer could re-instate the credit agreement and thereby prevent or overturn debt enforcement proceedings. This is in line with the general policy of the NCA to encourage extra-judicial dispute resolution between credit providers and consumers so that all-out debt enforcement is avoided if at all possible. As explained in the following discussions, however, it is questionable whether this laudable policy is translated into clear and workable legislative provisions.

3 1 Requirements for re-instatement in section 129(3)

Prior to its amendment in 2015,[15] section 129(3) of the NCA provided as follows:

> "Subject to subsection (4), a consumer may –
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> (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and
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> (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order."

Section 129(3) did three main things. Firstly, it stated what the consumer had to do to re-instate the agreement, namely, to pay the listed amounts. Secondly, it provided that one of the consequences of re-instatement was that the consumer had to be permitted to resume possession of any property that had been repossessed as a result of his default. Thirdly, the subsection placed a qualification on re-instatement in that it could only occur before the credit provider had cancelled the agreement. In what follows the requirements for re-instatement are discussed briefly with reference to some of the controversies surrounding them. The "before-cancelled" qualification is discussed further below.[16] As will become clear, it is debatable whether the term "re-instate" grammatically is the best term to describe the effect of section 129(3), but we continue using it provisionally in a general sense.

3 1 1 Amounts payable

In order to re-instate a credit agreement, the first important requirement is[17] that certain amounts must be paid, namely, all overdue amounts, default charges and enforcement costs.

15 See para 4 1 below.
16 See para 3 2 1 below.
17 This requirement is the same both before and after the 2014 Amendment Act, hence the use of the present tense.

3 1 1 1 Overdue amounts

The concept of "amounts that are overdue" is not defined in the NCA, probably because it is self-explanatory. It involves amounts that should have been paid to the credit provider according to the terms of the credit agreement, but have not been so paid at the stipulated time. In other words, the consumer is in arrears with his payment obligation.

The only uncertainty that had to be addressed was whether overdue amounts have a different meaning in cases where acceleration clauses are involved. In other words, the consumer defaults by failing to pay a certain amount (amount 1) on the stipulated date, which triggers the acceleration clause and thus renders the full outstanding capital amount (amount 2) due and payable. Amount 1 may be relatively small, whereas amount 2 may be very large. To comply with section 129(3), must the consumer pay amount 1 or amount 2? Since the credit provider is contractually entitled to claim either amount, both could be seen as "overdue" if not paid on demand. However, it has become apparent that the payment of amount 2 could hardly have been the intention of the legislature. It would add nothing to what already is the rule under the common law right of redemption[18] and, therefore, it would render this consumer protection measure nugatory. Save for one *obiter* exception,[19] courts – including the Constitutional Court – have confirmed that the consumer only needs to pay the actual amount in arrears (and not the full outstanding capital debt) to reap the benefits of section 129(3).[20] We have no objection against this approach.

3 1 1 2 Default charges

The second amount that the consumer must pay is "the credit provider's permitted default charges". Section 101 of the Act provides a closed list of the amounts that credit providers may claim from consumers. In addition to claiming payment of the principal debt, several other permitted amounts are listed, including interest, service fees, *et cetera*. Also listed are "default administration charges", which presumably are the "permitted default charges" referred to in subsection 129(3).

Section 1 of the NCA defines "default administration charges" 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". Section 101(f) of the Act furthermore stipulates that these default charges, firstly, "may not exceed the prescribed maximum for the category of credit agreement concerned" and, secondly, "may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted

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18 See para 2 1 above.

19 *Dwenga v First Rand Bank Ltd* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35 fn 36.

20 *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) 284G–285C; *Firstrand Bank Ltd v Nkata* 2015 4 SA 417 (SCA) 421E–G; *Nkata v Firstrand Bank Ltd* 2014 2 SA 412 (WCC) 422A–H; *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ) 378B–379G. See also *ABSA Bank Ltd v Morrison* 2013 5 SA 199 (GSJ) 204B–H; *Standard Bank of South Africa Limited v Botes t/a JHLS Botes Vervoer* (M85/15) [2015] ZANWHC 49 (3 September 2015) para 11; *Investec Bank Limited v Maruarona* (14412/2014) [2016] ZAGPJHC 160 (19 April 2016) para 16; *Firstrand Bank Limited v Mdletye* (8145/2015) [2016] ZAKZDHC 22 (1 July 2016) para 11.

by Part C of Chapter 6". The maximum amount claimable is prescribed in regulation 46 of the NCA, which 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."

Part C of Chapter 6 of the Act refers to the sections in the NCA that regulate the enforcement of credit agreements.[21] Default charges consequently refer to the costs involved in writing and delivering letters that are necessary prior to and during the debt enforcement process. The quintessential example is the writing and delivering of the notice of default contemplated in section 129(1), but it probably includes the notice envisaged in section 86(10) as well.[22]

3 1 1 3 Enforcement costs

The third amount that must be paid is "the credit provider's ... reasonable costs of enforcing the agreement up to the time of re-instatement". The only item in the closed list of amounts claimable in section 101 that could refer to enforcement costs is "collection costs". Section 1 of the Act defines this as "an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge".[23]

Section 101(g) moreover specifies that the amount claimable under this heading "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". Once again, the prescribed maximum can be found in the regulations to the NCA, where regulation 47 provides as follows:

> "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,
> whichever is applicable to the enforcement of the credit agreement."

It may seem like the correct enforcement costs to be paid in order to comply with section 129(3) therefore merely are a matter of calculation in accordance with the above-quoted provisions. Nevertheless, it has become more complicated recently. The problem is not with how to calculate the correct amount of the enforcement costs, but with determining when these amounts are due and payable for re-instatement purposes. Indeed, the *Nkata* case[24] – which went all the way to

21 Ss 129–133.
22 This provision is not part of Part C of Ch 6, but it is cross-referenced in s 129(1)(b)(i).
23 In other words, in this context "collection costs" is a broad concept that includes enforcement costs (or legal fees).
24 *Nkata v Firstrand Bank Ltd* 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).

the Constitutional Court – revolved around exactly this question. The fact that there are strong disagreements between the various judges that wrote judgments on this question shows the lack of clarity of the NCA on this point.

The case involved a situation where re-instatement was alleged to have taken place when the overdue amounts were settled, but the problem was that the enforcement costs, which were debited to the consumer's account, were not paid along with the arrear amounts. The High Court[25] assumed that the amounts debited formed part of the reasonable enforcement costs, but the problem was that these costs were not taxed or quantified by agreement between the parties. The court explained that, although taxation or agreement is not necessary for the consumer to be liable to pay the costs (since liability is ultimately established by court order), quantification through taxation or written agreement is necessary to levy the costs.[26]

A possible objection to this approach is that, although legal costs might not yet be due and payable, re-instatement cannot take place before these amounts (whatever they turn out to be) are paid. This might imply that the consumer who wishes to re-instate 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. However, the High Court explained that such an approach would contradict the purposes of the NCA.[27] Instead, the court reasoned that, if the credit provider wishes to recover its legal costs, it (and not the consumer) must take the necessary steps to quantify the amounts payable. If it does not do so, and in the meantime the consumer pays only the overdue amounts and all other amounts that are already due and payable, the agreement will be re-instated. In other words, if the costs simply had been debited to the consumer's account it is not necessary to pay these amounts for purposes of re-instatement.[28]

The majority of the Constitutional Court per Moseneke DCJ essentially confirmed this approach.[29] The judge found that, for enforcement costs to be payable for re-instatement purposes, these costs had to be due and payable by virtue of the credit provider having given notice of the costs to the consumer. Furthermore, the nature and extent of the legal costs must either be agreed to by the consumer or must be assessed for reasonableness by taxation or another acceptable means. Hence, the credit provider cannot be the sole arbiter by simply debiting the alleged legal costs against the consumer's account. In other words, enforcement costs become due and payable when they are reasonable, agreed to or taxed, and when due notice is given to the consumer. Moseneke DCJ found this approach to be more in line with the text and purposes of the provision and the NCA in general. According to his argument, the alternative would permit credit providers to thwart a re-instatement by simply asserting that legal costs (which had unilaterally been debited to the account) have not yet been paid.

Although the interpretation favoured by the majority of the Constitutional Court must now be accepted as the authoritative state of the law, it is necessary

25 *Nkata v Firstrand Bank Ltd and Others* 2014 (2) SA 412 (WCC) 423I–424F.
26 *Ibid.*
27 *Idem* 424F–H.
28 *Nkata v Firstrand Bank Ltd* 2014 2 SA 412 (WCC) 424F–425D. See also *Firstrand Bank Ltd v Nkata* 2015 4 SA 417 (SCA) 421E–G.
29 *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) 277C–F 285F–288G.

to briefly mention the opinions of the members of the court who dissented on this point. The essence of Cameron J's argument was that the onus rests on the consumer and not on the credit provider to determine the reasonableness of the enforcement costs that must be paid to satisfy section 129(3).[30] Hence, the absence of taxation or agreement regarding the quantification of the costs does not absolve the consumer of the duty to pay the legal costs, or at least to tender payment of an amount she considers reasonable.[31]

Nugent AJ also disagreed with the majority judgment and essentially focussed on the fact that nothing in the wording of section 129(3) requires the credit provider to claim payment of the costs as a pre-condition for them to become payable, and that there is no indication that the enforcement costs would sometimes not have to be paid.[32] It would furthermore be unrealistic to expect banks to tax and demand costs each time they are incurred just in case the consumer were to invoke his right to re-instate (also because it is accepted that the consumer does not have to notify the bank when it intends to re-instate the agreement).[33] Nugent AJ also did not agree with the prospect that costs are determined to be reasonable through taxation or agreement.[34] He therefore contended that if a consumer disputes the reasonableness of the costs, a taxing official may be approached for a determination, but even then it is only a court that can finally judge whether the costs are reasonable.[35] Moreover, Nugent AJ pointed out that section 129(3) does not require the payment of costs only once they become payable; indeed the section itself renders these amounts payable for re-instatement purposes.[36]

What is clear from the differences in opinion in the *Nkata* matter is that the onus to determine the reasonableness of the costs payable is placed either on the credit provider or on the consumer. Although both sides of the argument make good points, it seems to us that the minority judgments (particularly Nugent AJ's) are more closely aligned not only to the wording of the Act, but also with practical reality. Moreover, it does not appear to us that the minority's approach would work unreasonably against consumers who wish to make use of the re-instatement mechanism. In fact, if a consumer desires to benefit from the indulgence bestowed by section 129(3), it is in our view not unreasonable (or unduly pro-creditor/anti-debtor) to expect the consumer to exert some good-faith effort by finding out the exact amounts he should pay to re-instate the agreement. Be that as it may, this issue is something that needs to be addressed and clarified in any future amendment of the NCA. The current unsatisfactory situation of placing the burden on the credit provider also is linked to another matter discussed below,[37] namely, the unilateral and *ex lege* nature of re-instatement.

3 1 1 4 Meaning of payment

Re-instatement happens by "paying to the credit provider" the required amounts.[38] Although the meaning of "paying" usually goes without saying, this point is now

30 See especially *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) 272E–273A.
31 *Idem* 275C–F.
32 *Idem* 292D–E.
33 *Idem* 292I–293B.
34 *Idem* 293C–F.
35 *Idem* 293F–I.
36 *Idem* 294A–C 294G–H.
37 See para 3 1 2 below.
38 It is not enough for the consumer to tender payment; it must be actual payment, unless a tender is made but refused: see *Standard Bank of South Africa Limited v Botes t/a JHLS Botes Vervoer* (M85/15) [2015] ZANWHC 49 (3 September 2015) para 5.

somewhat controversial due to certain statements made in the *Nkata* case. The High Court reasoned that, by debiting the costs against the consumer's account and by not specifically requiring it to be paid, it indicated that it was content with lending the amount to the consumer and to receive payment thereof in instalments as if the amount was part of the capital debt.[39] Although the court did not say so expressly, it seemed to imply that this "payment" would be sufficient for re-instatement purposes.

The Supreme Court of Appeal did not find it necessary to address this issue, but nonetheless referred to the contrary argument by counsel that, by debiting the costs against the consumer's account, the credit provider is simply claiming the payment of the amount and that such debiting therefore does not constitute payment.[40]

The majority of the Constitutional Court per Moseneke DCJ correspondingly did not deem it necessary to make a finding on this point, but stated that there is "much to be said" for the High Court's reasoning in this respect.[41] In his minority (main) judgment, however, Cameron J rejected the reasoning of the High Court and essentially explained that the postponing of payment (by debiting the costs against the consumer's account) does not mean that the costs have been paid for purposes of re-instatement.[42] Unless it can be shown that the credit provider has waived his right to receive immediate and actual payment of the legal costs, it is submitted that Cameron J's approach should be preferred. But it would be preferable for the Act to be amended in order to provide clarity on exactly what would qualify as payment for purposes of re-instatement.

3 1 2 Unilateral and by operation of law

Another question that has come up relates to how re-instatement takes place, since section 129(3) does not require anything more than payment of the relevant amounts. Hence, the implication is that the action of payment is enough to trigger section 129(3). Nothing is required before or after payment and therefore at this moment re-instatement happens regardless of whether or not this was the consumer's intention, and whether or not the consumer or the credit provider even knew about it. Although credit providers have tried to argue that the consumer should approach and notify the credit provider when he wishes to re-instate the agreement, the courts have found that no such steps are necessary. Therefore, re-instatement takes place unilaterally, automatically and by operation of law the very moment that the amounts are paid, even if neither of the parties intends it or is aware of it.[43]

An interesting argument was presented by the Supreme Court of Appeal in *Firstrand Bank Ltd v Nkata*[44] namely, that because re-instatement essentially amounts to an amendment of the written credit agreement, section 116 of the

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39 *Nkata v Firstrand Bank Ltd* 2014 2 SA 412 (WCC) 424H–425D.

40 *Firstrand Bank Ltd v Nkata* 2015 4 SA 417 (SCA) 422C–E.

41 *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) 287D–F.

42 *Idem* 269C–52.

43 *Nedbank Ltd v Barnard* (1142/08) [2009] ZAECPEHC 45 (1 September 2009) paras 14–15; *Nkata v Firstrand Bank Ltd* 2014 2 SA 412 (WCC) 425D–F; *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) 283E–284G 291H–I. See also *Investec Bank Limited v Maruarona* (14412/2014) [2016] ZAGPJHC 160 (19 April 2016) para 16.

44 2015 4 SA 417 (SCA) 429F–430C.

NCA must be complied with. Hence, the re-instatement must be in writing and signed by the parties, failing which the amendment will be void.[45] Yet, the Constitutional Court did not support this view and instead reaffirmed the principle that nothing more is needed than payment of the required amounts.[46]

Notwithstanding that this is probably the correct interpretation of the wording of the Act, unilateral and automatic re-instatement poses certain practical difficulties that were probably not foreseen when the section was drafted. One of the problems with the approach that re-instatement can take place without either of the parties intending or knowing about it, is that they may only realise quite a while after the fact that re-instatement had taken place. The facts of *Nkata* illustrate this difficulty well in that it was the judge of the High Court who raised the prospect of re-instatement for the first time. The problem is that, in the meantime, judgment had been granted, the mortgaged property had been sold in execution and transferred to a purchaser. The effect is that everything that had happened after re-instatement was a nullity, including all sales and transfers of property.

This retrospective effect of re-instatement has been criticised rightly by Steyn as unsatisfactory for the lack of certainty it creates.[47] She argues that the NCA should be amended to provide "clear cut substantive and procedural requirements" that should be met in order for re-instatement to happen. In a related point, the author also argues that it is undesirable for re-instatement to occur by operation of law.[48] She suggests that there should be a clear process through which re-instatement must take place and that this should include a duty on the credit provider to inform the consumer of his right to re-instate. This information should then provide the consumer with the knowledge of the consequences of paying the relevant amounts as well as give him the opportunity to "deliberately and overtly" claim such re-instatement. We generally support this line of reasoning and suggest that such a procedure should be included in the NCA.

3 2 Limitations on re-instatement

Although section 129(3) and (4) provide a powerful remedy to consumers who can rectify their default and thereby re-instate their credit agreements, this right is not unlimited. Under the previous Acts, a number of business days were given within which re-instatement could happen, but under the NCA certain specific cut-off events are listed. Firstly, section 129(3) states that re-instatement may only take place before the credit agreement in question has been cancelled. Secondly, section 129(3) is made subject to section 129(4) which provides a list of events after which re-instatement is prohibited.

3 2 1 Before cancellation

Section 129(3) expressly provides that the consumer may only re-instate the agreement before the credit provider has cancelled the agreement. Before the 2014 Amendment Act, this qualification suffered from a number of contradictions.[49]

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45 Before the Supreme Court of Appeal it was also argued that some form of communication is necessary, otherwise it would not be possible to determine what the reasonable enforcement costs are: see 422F.

46 *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) 283E–284G 291H–I.

47 Steyn "Reinstatement of a home mortgage bond by paying the arrears: The need for appropriate legislative reform" 2015 *Stell LR* 132 142–143.

48 *Idem* 143 153.

49 See already Otto *The National Credit Act explained* (2006) 98, similarly repeated in Otto and Otto *The National Credit Act explained* (2010) 117 and Otto and Otto (2013) 125.

First, it made little sense to talk about the re-instatement of an agreement that has not yet been cancelled since there would then be nothing to re-instate. Second, the before-cancelled qualification contradicted the fact that section 129(3)(b) referred to the restoration of possession of property that had been repossessed. How could the property have been repossessed if there was no cancellation to justify such repossession? Third, most of the events listed in section 129(4) (after which re-instatement is prohibited) could only take place after the cancellation of the contract, which made the listing of these events redundant. It is furthermore interesting to note that the re-instatement remedy provided for in the previous statutes was possible after cancellation,[50] which renders it all the more strange that the NCA seemed (and still seems) to contemplate re-instatement only before cancellation. What is more, it is not clear how the cancellation referred to in section 129(3) relates to the concepts of termination and enforcement as referred to elsewhere in the Act.

Attempts were made to try and explain some of these conundrums,[51] but it is unnecessary to provide much detail on these suggestions. Suffice it to say that the contradictions summarised above are just too significant to be overcome with creative interpretational gymnastics. What is required, instead, is the complete removal of the "before-cancelled" qualification, since the events listed in section 129(4) could arguably be drafted in a manner sufficient to ensure that the opportunity to re-instate is limited within reasonable bounds.

One of the unintended consequences of the before-cancelled qualification is that a distinction is made currently between cases where debt is collected through the cancellation of the agreement and cases where an acceleration clause is enforced. Courts have confirmed that, when an acceleration clause is enforced (which is typically what happens during mortgage foreclosure), the contract is not cancelled and therefore this before-cancelled qualification does not prevent such a debtor from re-instating the agreement.[52] The contract is not cancelled and therefore re-instatement is only qualified by the events listed in section 129(4). In other words, in the case of agreements that are enforced through acceleration, re-instatement is a much more extensive right than what it appears to be in the case of agreements that are cancelled. In the latter instance, the cut-off point is sooner.

Doctrinally the difference between acceleration and cancellation makes sense, but it is artificial and arbitrary to permit re-instatement after the enforcement of an acceleration clause but not after the enforcement of a cancellation clause. Not only is there no logical reason for this differentiation, but it may now encourage mortgage creditors to cancel their mortgage agreements instead of enforcing the acceleration clause when they take foreclosure action. In other words, by simply electing to follow a different route (cancellation instead of acceleration), re-instatement is forestalled at an earlier stage. In our view, this differentiation is unwarranted and should thus be rectified.

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50 See paras 2 2 and 2 3 above.

51 See, eg, Brits 2013 *Stell LR* 165 172–175; Van Heerden "Reinstatement" in Scholtz *et al Guide to the National Credit Act* (2008) para 12.10; Coetzee "Voluntary surrender, repossession and re-instatement in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 569 578–579.

52 *Nkata v Firstrand Bank Ltd* 2014 2 SA 412 (WCC) 422I–423E; *Nkata* (CC) 283C–D 284C 285C–E 290E.

3 2 2 Before the events in section 129(4)

In addition to the controversial before-cancelled qualification in section 129(3), section 129(4) – prior to being amended by the 2014 Amendment Act – provided for certain events after which the consumer may no longer re-instate the credit agreement. Subsection (3) was accordingly also made expressly subject to subsection (4), which provided as follows:

> "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."

The obvious purpose of this subsection was to list the points of no return for the consumer, in that legal proceedings would have run its course when the applicable event had occurred. After this point, it would also not make sense to try and place the consumer back (re-instate him) in the position that he was prior to his default – also keeping in mind the rights of third parties who have purchased the property that formed the subject of the credit agreement.

It is apparent that the cut-off event in section 129(4)(a) was the sale of property either as a result of an attachment order or where the consumer has surrendered the property. Section 129(4)(b), in turn, referred to the "execution" of any other court order enforcing an agreement. Regarding the difference between section 129(4)(a)(i) (sale pursuant to an attachment order) and 129(4)(b) (execution of any other court order), a possible explanation could be that section 129(4)(a)(i) refers to movable property and section 129(4)(b) to matters where immovable property is at stake. The reason for this is that in South African law one does not generally obtain an "attachment order" when executing against immovable property. Instead, the property is declared executable and a writ of execution is issued, so "execution of any other court order" can readily include the sale in execution of land. It seems that this distinction was accepted in *Nedbank Ltd v Fraser*[53] as well as by the High Court in the *Nkata* case.[54] However, the Constitutional Court in *Nkata* did not refer to such a distinction but rather focussed on the meaning of "execution" in section 129(4)(b).[55]

If it is true that section 129(4)(a) applies to situations where movables are attached and sold, the cut-off point in such instances are relatively uncontroversial, since clear reference is made to "sale" as the moment after which re-instatement no longer is possible. However, the situation with immovable property is more complicated, since the meaning of "execution" in section 129(4)(b) might not be as clear. In this respect the court in *Fraser* decided that "both the sale and registration of transfer of ownership of the immovable property into the name of the purchaser" marked the cut-off point.[56] However, the court in *Dwenga v Firstrand Bank Ltd*[57] seemingly took the stance, albeit *obiter*, that

53 2011 4 SA 363 (GSJ) 378D.
54 See 426A–B. See also 427D–F.
55 See, in general, 288H–290F.
56 378F.
57 (EL 298/11, EC 298/11) [2011] ZAECELLC 13 (29 November 2011).

the granting of judgment marked the relevant event. The reason for this, according to the court, is that the credit agreement is terminated at this time, which would preclude re-instatement on the basis of section 129(3).[58]

In *Nkata* the High Court[59] decided that a consumer may re-instate a mortgage agreement until the "money is raised pursuant to a sale of attached property and paid to the judgment creditor", as this was when the judgment was actually executed.[60] The court also considered the meaning of "attachment order" in, amongst others, section 129(4)(a)(i). The Supreme Court of Appeal found in this respect that the common law was not altered as far as "the axe falling" is concerned.[61] The court reasoned that section 129(4)(b) did not refer to the completion of the execution process, as such an alteration of the common law would lead to absurd results.[62] Consequently, the Supreme Court of Appeal decided that the sale in execution reflected the moment after which a consumer could no longer re-instate the agreement.[63] However, the Constitutional Court went the other direction and confirmed the High Court's judgment namely, that the point of no return was the moment when the proceeds of the sale in execution of immovable property is paid.[64] Only at this time "would the revival be of no use to either party".[65]

A third cut-off event is listed in section 129(4)(c), namely, "the termination thereof in accordance with section 123". The latter section provides for termination after enforcement procedures or the closure of a credit facility.[66] To date, section 129(4)(c) has not been judicially considered. But keeping in mind the discussion above relating to the circumstances listed in section 129(4)(a) and (b), section 129(4)(c) could arguably only refer to instances where property does not form the object of execution proceedings.

What seems to be the case, therefore, is that the point of no return differs depending on whether or not there is property involved and, if so, whether the property is movable or immovable. With movables, sale marks the cut-off point, whereas payment of the proceeds of a sale in execution is the line in the sand when immovable property is at stake. When no property is involved, the moment of termination will end the consumer's opportunity to re-instate the agreement. Although it makes sense to distinguish between different situations, it is in our view nevertheless necessary for the legislature to re-consider and clarify the exact moment(s) after which re-instatement no longer is permissible. For instance, we are not convinced of the practical feasibility of allowing re-instatement until the moment that the proceeds of a sale in execution of immovable property have been paid.

3 3 Effect of re-instatement

The whole idea behind successful re-instatement is that all further debt enforcement action is prevented and any judgments already granted or attachments made

58 See para 35 fn 36.
59 *Nkata v Firstrand Bank Ltd* 2014 2 SA 412 (WCC).
60 427I.
61 *Firstrand Bank v Nkata* 2015 4 SA 417 (SCA) 424C and 432 E–G.
62 *Idem* 425H.
63 *Idem* 424C.
64 *Nkata v Firstrand Bank Ltd* 2016 (4) SA 257 (CC) 289D.
65 *Ibid*.
66 Otto and Otto (2016) 131 fn 191.

become of no force and effect.[67] The contractual relationship between the parties can go ahead as before (as if no default had occurred) and can be seen through to its natural conclusion. Hence, the position prior to default is restored.[68] As one court put it, the right to cancel is lost and all is forgiven.[69] Importantly though, if the consumer defaults again, the credit provider must comply with section 129(1) again and obtain a new judgment and authority to execute the judgment.[70]

Before its amendment, section 129(3) referred expressly in paragraph (b) to one of the intended consequences of re-instatement, namely, that the consumer "may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order". Beside the fact that this provision contradicted the before-cancelled qualification,[71] it was useful in that it at least indicated that re-instatement should lead to the restoration of any property that the consumer might have lost as a result of his default. Even without an express rule like this, it seems obvious that re-instatement would have to involve the restoration of any property that was attached or repossessed, provided that re-instatement takes place prior to the events listed in section 129(4) and, as section 129(3) indicates, before the contract is cancelled.

4 2014 AMENDMENTS TO THE RE-INSTATEMENT CONCEPT

The purpose of this section is briefly to explain how section 129(3) and (4) was amended by the 2014 Amendment Act, and to highlight the aspects of re-instatement that have changed – especially those that have remained problematic. It is regrettable, however, that the amendments have not brought about much improvement (if any) and, thus, we express the view further below that additional amendments (probably a complete re-write of the subsections) are needed to provide clarity and certainty. The purpose here is not to grapple with the amendments in detail or to make perfect sense of them, since such attempts have been made elsewhere.[72]

4 1 Amendments to section 129(3)

After its amendment, section 129(3) provides as follows:

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

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67 *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) 289C–F; *Firstrand Bank Limited v Mdletye* (8145/2015) [2016] ZAKZDHC 22 (1 July 2016) paras 10–11; *Nkata v Firstrand Bank Ltd* 2014 (2) SA 412 (WCC) 428B–C G–H.

68 *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) 291H–I 143 (Nugent AJ).

69 *Standard Bank of South Africa Limited v Botes t/a JHLS Botes Vervoer* (M85/15) [2015] ZANWHC 49 (3 September 2015) para 11.

70 *Nkata v Firstrand Bank Ltd* 2014 2 SA 412 (WCC) 421G–J 428B–C; *Standard Bank of South Africa Limited v Botes t/a JHLS Botes Vervoer* (M85/15) [2015] ZANWHC 49 (3 September 2015) paras 11 12.

71 See para 3 2 1 above.

72 See especially 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 *De Jure* 75–91. See also Van Heerden in Scholtz *et al* (2008) para 12.10; Otto and Otto (2016) 130–131; and Steyn 2015 *Stell LR* 132 148–150.

Textually, the content of the former paragraph (b) has been removed, and the terms "re-instate" and "re-instatement" have been replaced with the idea that a consumer may "remedy a default". From this one can deduce that the legislature envisioned to correct some of the contradictions referred to above.[73] On face value the subsection has been improved, since there now no longer is a conflict between the term "re-instate" and the notion that re-instatement must take place prior to cancellation.[74] Also, the conflicting suggestion that property could have been attached before cancellation has been removed. However, in our view, these adaptations do not address the true flaw that existed in the original subsection. The problem was not the terms "re-instate" and "re-instatement" or the rule enunciated in the old paragraph (b). Rather, the real problem was the before-cancelled qualification itself, which regrettably has been left in place. There furthermore is no more clarity on what exactly cancellation means in this context.

Taken literally, the subsection now simply states the obvious, namely, that the default can be remedied before cancellation, which adds nothing to the common law position. In a sense, section 129(3) 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 (presupposing cancellation of the contract). The point is that, whatever remedy is contemplated by section 129(3), it can only occur prior to the cancellation of the contract, either due to a material breach or in terms of a *lex commissoria*.[75] Therefore, the problem underlined above[76] (namely that re-instatement is precluded after cancellation but not after the enforcement of an acceleration clause) has not been addressed, but indeed seems to have been exacerbated.

With regard to other aspects of section 129(3), one can assume that the amounts payable have remained the same and that the subsection still takes effect by operation of law.[77] This means that the potential difficulties regarding the claim for enforcement costs[78] (their taxation prior to being payable for re-instatement purposes) remain and are in need of further clarification, but time will tell how practice responds to the approach that was adopted by the Constitutional Court in *Nkata*. Notwithstanding, a pro-active legislative amendment – similar to the recommendations made in the conclusion below – might be preferable.

4 2 Amendments to section 129(4)

Subsequent to its amendment, section 129(4) provides that:

> "A credit provider may not re-instate or revive a credit agreement after –
> (a) the sale of any property pursuant to –
> (i) an attachment order; or
> (ii) surrender of property in terms of section 127;

73 See para 3 2 1 above.
74 See also Otto and Otto (2016) 130.
75 See, eg, *Standard Bank of South Africa Limited v Botes t/a JHLS Botes Vervoer* (M85/15) [2015] ZANWHC 49 (3 September 2015) paras 7–11 and 15; Potgieter "NCA: The line in the sand – can a cancelled agreement be revived?" 2016 (May) *De Rebus* 40–41.
76 See para 3 2 1 above.
77 See para 3 1 above.
78 See para 3 1 1 3 above.

(b) the execution of any other court order enforcing that agreement; or
(c) the termination thereof in accordance with section 123."

Subsection (4) has been amended by substituting the term "consumer" with "credit provider" and by adding the phrase "or revive". It is unclear what the purpose or effect of the amendment is,[79] but it seems to sever the content of subsections (3) and (4) from each other.[80] Although section 129(3) is still made subject to section 129(4), the former refers to the consumer's right to remedy a default, whereas the latter no longer makes reference to any right of the consumer. Section 129(4), instead, refers to the credit provider's (not the consumer's) supposed right of re-instatement or revival, which is a concept that is very hard to explain and that does not fit within the context of section 129 or the NCA in general.[81] Hence, although the two subsections formally are still linked, there seems to be no substantive link between them, which is difficult to make sense of.

A serious problem with this state of affairs, at least as far as the consumer's right of re-instatement is concerned, is that there now exists no provision for the points of no return.[82] Therefore, the only qualification that remains is that default cannot be remedied after cancellation, but this only applies to situations where the credit provider actually cancels the contract (as opposed to enforcing an acceleration clause). A startling possibility is that if an acceleration clause is enforced, there is no express cut-off point for the consumer's right to remedy his default (section 129(4) currently only limits the credit provider, not the consumer). It is very hard to believe that this was the legislature's intention. Similarly, what was intended with the addition of the phrase "or revive"? Although attempts have been made to try and make sense of the amended section 129(4),[83] the only conclusion that can be reached is that the subsection is currently so unclear and illogical, that it is pointless to try and figure it out. The only real solution is to amend the provision again.

5 FUTURE OF RE-INSTATEMENT

The main lesson than can be learnt from the afore-going exposition of section 129(3) and (4) is that the current state of the law is wholly unsatisfactory. There is no doubt that re-instatement is a worthy and important mechanism in consumer credit law, but the current principles revealed by the subsections are simply too unclear, unbalanced and chaotic. It is clear that there were several problems with the original version of section 129(3) and (4). However, it is with respect that we conclude that the amended version is far worse than the original. Instead of rectifying the biggest problem in section 129(3), namely, the problematic before-cancelled qualification, the legislature retained this limitation and made certain other changes to both subsections (3) and (4) in an attempt to clarify the provisions. Yet, the result is even more confusing.

It is accordingly our contention that it is henceforth pointless to try and make sense of the wording of the provisions as they presently stand. Rather, it is time to completely redraft the provisions in a way that is more precise and reasonable.

79 See also Otto and Otto (2016) 131; Brits 2015 *De Jure* 88.
80 See Van Heerden in Scholtz *et al* (2008) para 12.10.
81 Otto and Otto (2016) 131; Brits 2015 *De Jure* 88–89.
82 See also Otto and Otto (2016) 131.
83 Brits 2015 *De Jure* 89–90.

During such a drafting process, the following aspects, in our view, should be kept in mind.

The idea that a consumer can re-instate an agreement before cancellation is illogical and should therefore be avoided – not by removing the term "re-instatement" but by deleting the before-cancelled qualification. Even the notion that the consumer can "remedy a default" before cancellation is unsatisfactory, because it is redundant and a simple restatement of the common law as well as of the principle that is already implied by section 129(1) read with section 130(1). In order to create a cut-off point for the right to re-instate, it is not necessary to refer to the cancellation of the contract at all. Events like those listed in section 129(4) are more than adequate, provided that these are clear and workable. Logically, re-instatement therefore should refer to a mechanism that is available after (not before) cancellation (or after the moment that debt enforcement proceedings commence when the credit provider approaches the court), but only until a clearly identified future moment. The cut-off point can either be the granting of judgment or the execution of such a judgment, for example, through the sale in execution of property. Whichever date is chosen, it is necessary to carefully consider the implications of such a choice. For instance, if sale is the cut-off point, there must be some procedure in place to deal with a judgment that had already been granted.

It is our view that re-instatement should not take place automatically and by operation of law, as is currently the situation. It leads to too much uncertainty for all parties concerned, and it is unsustainable to permit a situation where re-instatement can take place without either party's knowledge or intention. In line with the overall purpose of the NCA, engagement between the parties should be encouraged (the current approach discourages engagement between the parties). It is not unreasonable to expect a consumer to notify the credit provider of his wish to re-instate and to request a statement indicating the outstanding amounts and costs, which will then allow them to deal with any disputes that there might be with respect to the calculation of the amounts owing. If necessary, taxation of any legal costs can then take place. After this notification, payment of the relevant amounts can then occur and re-instatement will become operative. The detail of this process can be worked out further and in greater detail, but for now it is enough to point out that some measures must be put in place to ensure legal certainty – also for third parties such as purchasers of property at the sales in execution.

When drafting provisions pertaining to re-instatement, we furthermore suggest that a clear distinction should be made between the stages discussed below. Some of these suggestions are already implied in the NCA as a whole, but were not properly taken into account in the current drafting of section 129(3) and (4). The rest are general and preliminary suggestions of what a reformed re-instatement concept could look like.

Firstly, if the consumer defaults, this default can freely be rectified before the credit provider sends the section 129(1) notice. 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.

Secondly, after the credit provider has sent the notice of default, but before it approaches the court (delivers summons), the consumer is permitted to rectify the default that is indicated in the notice of default, the effect of which will be that the credit provider cannot approach the court. The reason for this is that section 130(1) determines that the credit provider may only approach the court if the consumer actually is in default. If by that time default had been remedied, the credit provider cannot approach the court. Also, section 130(3)(c)(ii)(dd) provides that the court may not determine the matter if the amount in the notice of default had been brought up to date by the time the credit provider approached the court.

The third stage starts after the credit provider has approached the court up until judgment is handed down. Hence, there was an existing default at the time that the court was approached. It is from this moment on where re-instatement proper should become relevant because at this stage the credit agreement has been cancelled or the acceleration clause has been invoked, and hence payment of the arrears and costs would either overturn the cancellation or reverse the acceleration. Therefore, the credit provider's election to terminate/enforce the credit agreement is undone and the position is restored as if there was no default to begin with. During this period the agreement is not yet enforced or terminated for purposes of the NCA, but is still in the process of being enforced or terminated.

During this third stage, we suggest that the following arrangement could be considered for introduction in the re-instatement concept: It would be ideal if a consumer who wished to re-instate 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. The consumer can then pay these amounts, with the effect that re-instatement will take place at that moment, and all on-going debt enforcement proceedings must cease. If the consumer should dispute the amounts provided by the credit provider, the consumer is then at liberty to call upon the credit provider to request a taxing officer to judge the legal costs for reasonableness (the costs of taxing should naturally also be paid by the consumer). The credit provider would not be entitled to resist re-instatement but must co-operate by providing the consumer with the necessary information and by accepting payment of the relevant amounts.

The fourth stage starts after judgment had been handed down but before it has been executed against the consumer's property. From this point the contractual debt is replaced with a judgment debt and, therefore, it is necessary to think a bit differently about re-instatement. As the law currently stands, re-instatement is still possible during this stage, but it is arguable that the process and conditions should be somewhat different. What we suggest is that, if the consumer is willing and able to get the arrear amounts and 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 re-instatement can occur, provided that the judgment must be abandoned. Conversely, to cater for instances after judgment where the credit provider does not accept payment of the relevant amounts, a procedure could be created through which the consumer could call upon the court to authorise re-instatement and grant a rescission of the judgment. In such a procedure the court could have a discretion based on, *inter alia*, the *bona fides* of the consumer, his willingness and ability to pay the amounts outstanding, as well as the costs (including the costs of the application for rescission). Other factors could include the impact that enforcement of the judgment would have on the consumer's housing rights as well as the general equity of the matter. Previously failed debt counselling could also count against the consumer.

The fifth stage would start 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 re-instatement is possible whatsoever, although the common law right of redemption could still be relied on to redeem the attached property up to the time that ownership is transferred. The latter would however happen very rarely in light of the fact that it requires payment of the full capital debt.

We have not attempted to provide a full and perfect answer to the re-instatement controversy in this article, but we aimed to summarise most of the interpretational and practical difficulties currently faced. The suggestions made with regard to matters that should be considered when drafting new provisions similarly are not final, but we hope that they will assist on the journey towards a balanced approach.