May 17, 2023

What you need to know about the reinstatement of Credit Agreements

This article discusses the recent changes in the interpretation of section 129(3) of the National Credit Act (hereinafter referred to as the NCA) and how it affects the reinstatement of credit agreements.

When is a Credit Agreement deemed to be reinstated?

Prior to the judgement in *Firstrand Bank Limited v Nkata 213/2014 2015 ZASCA 44; 2015 2 All SA 264 (SCA); 2015 4 SA 417 (SCA) interpreting section 129(3) of the National Credit Act 34 of 2005*, credit providers would suspend legal action if the consumer settled the arrears, but would proceed with legal action or court order execution if the account fell in arrears again.

However, the Nkata judgement changed this practice completely.

For ease of reference we will firstly discuss the definition of a credit agreement under the NCA and then discuss the agreements excluded from the NCA.

What is a Credit Agreement?

Section 1 of the NCA defines a “**credit agreement”** as “an agreement that meets all the criteria set out in section 8. This includes a credit guarantee, or any combination of these criteria.

Section 4(1) of the NCA explains which agreements are excluded from the NCA. A credit agreement between parties dealing at arm’s length, which is concluded in or has an effect within the Republic, with the exception of agreements where the consumer is a juristic person whose asset value or annual turnover equals or exceeds the threshold value determined by the Minister, are covered by the NCA.

Which agreements are excluded from the National Credit Act (NCA)?

Other agreements excluded from the NCA include large agreements, credit agreements with the Reserve Bank of South Africa, and credit agreements in respect of which the credit provider is located outside the Republic, approved by the Minister on application by the consumer in the prescribed manner and form.

If the consumer is a juristic person with an annual turnover or combined asset value, together or separate, exceeding One Million Rand (R1 000 000,00), the agreement or transaction shall be exempt from the NCA and the provisions of the NCA shall therefore not apply.

Where the principal debtor referred to in the credit agreement is a juristic person and the value of the agreement exceeds Two Hundred and Fifty Thousand Rand (R250 000,00), as determined by the Minister, the agreement shall be deemed a large agreement and the NCA shall not apply to such an agreement.

It is evident from the above that where the principal debtor is a juristic person with an annual turnover or asset value exceeding R1 000 000,00, or alternatively where the agreement concluded is a mortgage agreement or the agreement value exceeds R250 000,00, the NCA shall not be applicable.

Where the NCA is not applicable to a principal debtor (juristic person) for the reasons set out above, a suretyship agreement, irrespective of whether or not the surety is given by a natural person, shall also not be subject to the NCA as the principal debt is not part a credit agreement which falls within the scope of the NCA.

Reinstatement of Credit Agreements - Section 129(3) of the National Credit Act

Section 129(3) of the NCA makes provision for the reinstatement of credit agreements. In the event that the NCA is not applicable to a credit agreement (whether it is for the principal debtor or the surety), the provisions of section 129(3) and the findings in the Nkata judgement shall therefore not apply to the said agreement.

The credit provider shall furthermore not be required to change their practice with regards to the reinstatement of the credit agreement.

Reinstatement of Credit Agreements in terms of Nkata judgement

Section 129 of the NCA provides a mechanism for consumers who have defaulted on their credit agreements and are facing legal action as a result. This section allows consumers to reinstate their credit agreements by paying the arrears and the credit provider's reasonable costs of enforcing the agreement. However, prior to the Nkata judgement, credit providers could proceed with legal action or court order execution if the account fell into arrears again.

Caselaw: *Firstrand Bank Limited v Nkata 213/2014 2015 ZASCA 44; 2015 2 All SA 264 (SCA); 2015 4 SA 417 (SCA):*

In the Nkata case, the Constitutional Court determined when a credit agreement is deemed to be reinstated, and also made other relevant findings that changed the practice of credit providers entirely. The court held that the credit provider must issue a notice to the consumer, informing them that the credit agreement had been reinstated and citing the outstanding balance, the amount required to settle the arrears, and the credit provider's enforcement costs. This notice must be issued within five days of the credit provider receiving the arrears payment from the consumer. If the notice is not issued, the credit agreement will not be reinstated.

Furthermore, the court held that when a credit agreement is reinstated, the credit provider cannot add the legal costs and interest on the legal costs to the consumer's account. The credit provider can only add the reasonable enforcement costs. The court also held that if the credit agreement is reinstated, the consumer is entitled to the protection of the NCA in respect of the reinstated credit agreement. This means that the consumer will be protected by the NCA if the credit provider attempts to enforce the credit agreement in a manner that is contrary to the NCA.

Conclusion:

In conclusion, the Nkata judgement has had a significant impact on the practice of credit providers.

Consumers who have defaulted on their credit agreements now have additional protections and credit providers must follow specific procedures to reinstate a credit agreement. The changes resulting from the Nkata judgement have brought about a fairer balance between the rights of credit providers and the rights of consumers.

As a result of the facts at hand and the arguments put forward by First National Bank's legal team, the court did not consider section 129(4)(a). As discussed above in the Nkata judgement, the arrears on the mortgage bond account were settled by Nkata prior to the sale in execution. The argument on behalf of the Bank was made therefore in terms of section 129(4)(b) of the NCA. The Constitutional Court found that the execution of the court order enforcing the agreement, occurs when the proceeds of the sale is paid over to the Bank. The fact that section 129(4)(a) of the NCA was not interpreted creates much uncertainty, especially in circumstances where the arrears on the mortgage bond account have been settled pursuant to the sale in execution.

SERR Synergy assist businesses to comply with provisions of the Consumer Protection Act, Electronic Communications Act and the National Credit Act. We make it easy for businesses to keep up with the ever-changing legal compliance environment.

About the Arthur: Megan Visagie joined SERR Synergy in May 2022. She currently serves as Corporate Legal Advisor at our Pretoria Branch, advising businesses on unique ownership structures. She is an admitted attorney of the High Court of South Africa and completed her Bachelor of Laws (LLB) degree at the North-West University.