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REINSTATEMENT OR REVIVAL OF A CREDIT AGREEMENT IN TERMS OF THE NATIONAL CREDIT ACT

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CHAPTER 1

INTRODUCTORY REMARKS ON THE NATIONAL CREDIT ACT

1 *New concepts for credit consumer protection*

With the implementation of the National Credit Act 34 of 2005 (the Act) came the introduction of new concepts and mechanisms for credit consumer protection, some of which were foreign to South African law.[1] What was envisaged was "a wholesale replacement of legislation that has regulated consumer credit for more than a quarter of a century"[2] and the Act "represents a bold and no doubt timely effort to make a clean break from the past."[3] The Act came into operation in different stages between 1 June 2006 and 1 June 2007.[4]

An example of a concept foreign to South African law is the definition of "lease" in the Act.[5] It makes provision for the passing of ownership[6] whereas ownership does not pass under a common law lease.[7] Another example is the "incidental credit agreement".[8] The Act contains a deeming provision in terms of which the agreement in the case of an incidental credit agreement is deemed to have been made 20 business days after the credit provider first charges a late payment fee or interest or a pre-determined higher price for full settlement becomes applicable, unless the consumer has already fully settled the account.[9]

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1 Scholtz, Otto, Van Zyl, Van Heerden and Campbell *Guide to the National Credit Act* (2008) (Scholtz) 1-8; Otto and Otto *The National Credit Act Explained* (2013) (Otto) 3; Kelly-Louw and Stoop *Consumer Credit Regulation in South Africa* (2012) (Kelly-Louw) 3-4.

2 Scholtz (n 1) 2-1. See also Kelly-Louw (n 1) 3-4 and 13-18 in respect of the history of the Act.

3 *Absa Bank Ltd v Prochaska* 2009 2 SA 512 (D) 515I-J; *Sebola v Standard Bank* 2012 5 SA 142 (CC) 152C-153C.

4 Scholtz (n 1) 2-4 to 2-6; Otto (n 1) 8-11; Kelly-Louw (n 1) 18-19.

5 Scholtz (n 1) 2-3; Otto (n 1) 5; Kelly-Louw (n 1) 75-76.

6 s 1.

7 Scholtz (n 1) 8-12; Otto (n 1) 26-27; Kelly-Louw (n 1) 75-76.

8 Otto (n 1) 5; Kelly-Louw (n 1) 63.

9 s 5(2). See s 1 for the definition of an "incidental credit agreement". See also Scholtz (n 1) 8-4(2) to 8-6(1) and 9-2; Otto (n 1) 21-24; Kelly-Louw (n 1) 63-72.

2 *Poor draftsmanship*

Unfortunately the Act is not, as put in *Scholtz*, "a model of legal accuracy or elegance."[10] Malan JA put it thus in *Nedbank Ltd v National Credit Regulator*:[11]

> "Unfortunately the NCA cannot be described as the 'best drafted Act of Parliament which was ever passed,' ... . Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise."

Criticism of the draftsmanship giving rise to the Act is legion:

(a) "The draftsmanship of s 86 leaves much to be desired."[12]

(b) It was described as "notorious for its lack of clarity."[13]

(c) The constitutional court recently referred to the "dismal drafting" of the Act in *National Credit Regulator v Opperman*.[14]

(d) Willis J (as he then was) perhaps commented most elequently when he said that it had "become a notorious fact that cases requiring the interpretation of the National Credit Act result in a scarcely muffled cry of exasperation resounding from the leathered benches of the judiciary" and referred to the-

> "widespread lack of clarity and certainty which various judicial colleagues around the country had experienced when trying to interpret the NCA. If judges have such difficulty, how much more so must this be the case among the men and women of business?"[15]

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10 (n 1) 2-3. See also Kelly-Louw (n 1) 4-5. Brits "Purging Mortgage Default: Comments on the Right to Reinstate Credit Agreements in terms of the National Credit Act" 2013 *Stell LR* 165 172 refers to its "drafting oddities and uncertainties".

11 2011 3 SA 581 (SCA) 585A-B.

12 *FirstRand Bank Ltd v Collett* 2010 6 SA 351 (ECG) 357F.

13 *Mercedes Benz Financial v Dunga* 2011 1 SA 374 (WCC) 379C-D.

14 2013 2 SA 1 (CC) 31G.

15 *Renier Nel Inc v Cash on Demand* 2011 5 SA 239 (GSJ) 242F and 245C-D. See also Scholtz (n 1) 2-3; Kelly-Louw (n 1) 4-5.

3 *Divergent judicial views*

Not surprisingly these foreign concepts and poor draftsmanship gave rise to "a spate of litigation" as predicted in *Scholtz*.[16] As the court put it in *Wesbank v Papier* it was:[17]

> "[I]ronic that a piece of legislation that was passed with such laudable intentions has become, within a few months after its promulgation a 'fertile ground for litigation', as it was described in one of the plethora of cases in which its provisions were considered by the court."

Even less surprisingly, these foreign concepts and poor draftsmanship also led to divergent judicial views. Whilst referring to the *Sebola* case in *Absa Bank Ltd v Petersen* Binns-Ward J mentioned that it-[18]

> "added to the growing volume of jurisprudence that has been produced in the course of the courts' grapples with the inept draftmanship of many provisions of the NCA, which have taken up an extraordinary amount of space in the law reports in the last few years and given rise to what one might have hoped the National Credit Regulator and the Department of Trade and Industry would by now acknowledge to be an embarrassment of conflicting judicial interpretations of a number of important provisions of the statute."

A prime example of such divergent judicial views is the different approaches adopted by the various divisions of the high court to sections 129 and 130 dealing with debt enforcement in court.[19] A brief discussion of three cases in different divisions about the same question will suffice for purposes hereof.

In the *Sebola* case the constitutional court held that:[20]

> "Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication

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16 (n 1) 2-3.
17 2011 2 SA 395 (WCC) 400B-C. See also (n 11) and the other authorities cited by Scholtz (n 1) 2-3 n 16.
18 2013 1 SA 481 (WCC) 486E-487A.
19 Otto (n 1) 116. See also Kelly-Louw (n 1) 419-434 for a discussion on delivery of the notice in terms of s 129 and 357-373 for a discussion on the divergent judicial views on s 86(10).
20 (n 3) 168E-F.

> constitute sufficient proof of delivery. If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed."

This beckons the question: what if the notice is returned to sender? In *Nedbank v Binneman* it was held that as the consumer has the right to choose the address to which the notice must be despatched, he or she bears risk of its going astray.[21]

A different conclusion was however reached subsequently in *Absa Bank Ltd v Mkhize* where it was held that even if the credit provider proves that the notice was sent to the correct post office, but it turns out that the consumer did not receive the notice, the credit provider will have to start afresh by making use of the different methods for delivery provided for in section 65(2).[22]

Then came the judgment in *Balkind v Absa Bank*.[23] The court criticised the *Binneman* decision and approved the *Mkhize* decision.[24] In this matter the section 129(1) notice was sent by registered mail to the consumer's chosen *domicillium citandi et executandi*. The "track and trace" report from the post office showed that the notice reached the correct post office, but it was common cause that the notice had not come to the consumer's attention because he had moved from this address without notifying the credit provider thereof. The court referred to *Sebola* and held that the constitutional court had "read in" section 129 a requirement that the notice had to either be brought to the attention of or have reached the consumer.[25] Conclusive evidence that the notice had not come to the consumer's attention "may trump these requirements."[26] The court held that while the principle that the notice must either reach the consumer or be brought to his or her attention was "ordinarily" established by registered mail coupled with proof that the notice reached the correct post office, where there are indications to the contrary the court must make a factual

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21 2012 5 SA 569 (WCC) 572F.
22 2012 5 SA 574 (KZD).
23 2013 2 SA 486 (ECG).
24 (n 23) 497H-I.
25 (n 23) 494F-495B.
26 (n 23) 496D.

finding and the claim can not be enforced if the court is not satisfied that the notice came to the consumer's attention.[27]

The court also mentioned *obiter* that there is room for a finding of fictional fulfilment of the principle that the notice had to come to the consumer's attention. For instance if the facts show that the consumer was residing at the chosen *domicillium* at the time the notification to collect the registered item was posted to that address from the correct post office, a finding of fictional fulfilment of the principle might be permitted even if the notice was returned to sender.[28]

The *Mkhize* judgment went on appeal to the supreme court of appeal.[29] The majority held that the judgment of Olsen AJ in the court *a quo* was not appealable because it amounted to no more than a direction as to the manner in which the matter should proceed before the main action could be entertained, in other words it was an interlocutory order.[30] The majority therefore declined to consider the merits of the appeal. The minority was of the view that it was appealable, but would nevertheless have dismissed the appeal.[31] The minority held that the risk of non-delivery lies with the credit provider. It further held that Olsen AJ correctly found that the court could not ignore conclusive evidence that the section 129 notice did not come to the consumer's attention.[32] It confirmed that "[i]f the court is faced with allegations that the notice was not brought to the attention of the consumer, it must adjourn the proceedings in terms of s 130(4)(b)."[33]

Some clarity came at last with the constitutional court's judgment in *Kubyana v Standard Bank.*[34] Its judgment in *Sebola* was considered and it was held that the following three features should be emphasised:[35]

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27 (n 23) 496E-G.
28 (n 23) 497I-498C.
29 *Absa Bank v Mkhize* 2014 5 SA 16 (SCA).
30 34J-35A.
31 24G, 25D and 33F.
32 31H-32A.
33 32D-E.
34 2014 3 SA 56 (CC). Although this judgment was published in the South African Law Reports prior to the supreme court of appeal's judgment in *Mkhize* it was actually delivered subsequent to the supreme court of appeal's judgment in *Mkhize*.
35 69A-70C.

(a) There is no general requirement that the section 129 notice be brought to the consumer's subjective attention, nor is personal service required.

(b) "When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection."[36]

(c) The credit provider needs to take the steps that would bring the section 129 notice to the attention of a reasonable consumer.

Regarding proof of delivery the court held that it was held in *Sebola* that it is for the credit provider to place facts before the court showing on a balance of probabilities that the section 129 notice reached the consumer. In this regard it is not prudent to lay down a general principle. The facts in each case must be considered by the court before which the proceedings are launched.[37]

4 *Purposes of the National Credit Act*

Enough said about how poorly drafted the Act is and the resultant confusion. As mentioned above,[38] the Act was passed with "laudable intentions" and this much is evident from a reading of the provision setting out the purposes of the Act.[39] The purposes of the Act are to:[40]

> "[P]romote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by [*inter alia*]-
>
> …
>
> (c) promoting responsibility in the credit market by-
>
> (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

36 71H-72A.
37 81F-G and 85B-C.
38 See (n 17).
39 s 3.
40 *ibid.*

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

…

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

…

(i) 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" (own insertion).

The Act "must be interpreted in a manner that gives effect to the purposes" set out above.[41]

Before dealing with the main topic of this dissertation, to wit reinstatement or revival of a credit agreement, a brief discussion of the scope of application of the Act and the different types of credit agreements will be useful.

41 s 2(1).

CHAPTER 2

APPLICATION OF THE NATIONAL CREDIT ACT

1 *Credit agreements*

As a "wholesale replacement"[42] of consumer credit legislation the Act naturally applies to a variety of credit agreements.[43] The provisions of the Act apply to "every credit agreement between parties dealing at arm's length and made within, or having effect within, the Republic".[44] Of course there are certain exemptions.[45]

Broadly speaking, as a so-called "rule of thumb", the Act will apply to an agreement if two things are present, to wit credit is extended and "a charge, fee or interest … is payable or a lower price … applies in the event of early payment."[46] There are certain exceptions. For example, credit guarantees, loans secured by "cession" of movables and mortgage agreements are covered by the provisions of the Act irrespective of whether a charge, fee or interest is payable.[47]

Once it is established that a specific agreement is a credit agreement, the next question that should spring to mind is whether the credit agreement was entered into "at arm's length".[48] The Act lists certain "arrangements" where the parties are not dealing at arm's length.[49] These arrangements include amongst others an arrangement in which each party is dependant ("not independent") of the other "and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction".[50] This is a codification of what was held by the (then) appellate division in the last century.[51] An arrangement which has been held in law not to be at arm's length also falls under this category of arrangements.[52]

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42 Scholtz (n 1) 2-1. See also Kelly-Louw (n 1) 3-4.
43 Scholtz (n 1) 4-1; Otto (n 1) 19; Kelly-Louw (n 1) 28.
44 s 4(1).
45 s 4(1)(a)-(d). See also Scholtz (n 1) 4-1; Otto (n 1) 19; Kelly-Louw (n 1) 28-29 and 47.
46 Scholtz (n 1) 8-1; Otto (n 1) 19; Kelly-Louw (n 1) 48.
47 Scholtz (n 1) 4-3 and 8-2; Otto (n 1) 19; Kelly-Louw (n 1) 48-49.
48 (n 44).
49 s 4(2)(b).
50 s 4(2)(b)(iv)(aa).
51 *Hicklin v Secretary for Inland Revenue* 1980 1 SA 481 (A) 495A. See also Scholtz (n 1) 4-4.
52 s 4(2)(b)(iv)(bb).

2 *Exemptions*

The exemptions alluded to in the opening paragraph of this chapter are amongst others (and relevant for current purposes) the following:[53]

(a) Where the consumer in terms of a credit agreement is a juristic person with an asset value or annual turnover which equals or exceeds the determined threshold.[54] The threshold is currently R1 000 000.[55] A "juristic person" includes a partnership, a corporate or unincorporated body of persons, an association and a trust with three or more individual trustees or where the trustee itself is a juristic person.[56] The combined asset value or annual turnover of all related juristic persons is taken into account in determining the juristic person's asset value or annual turnover, which is calculated at the time the agreement is entered into.[57]

(b) Where the consumer in terms of a credit agreement is a juristic person with an asset value or annual turnover which is below the threshold and the credit agreement qualifies as a "large agreement".[58] A large agreement is a credit transaction with a principal debt of R250 000 or more or a mortgage agreement.[59] Pawn transactions and credit guarantees are excluded from the definition of a large agreement.[60] It follows that if a consumer in terms of a credit agreement is a juristic person the Act will only apply to the credit agreement if the principal debt is less than R250 000 and the juristic person's asset value or annual turnover is below R1 000 000.

(c) All leases of immovable property are excluded from the provisions of the Act.[61]

53 See Scholtz (n 1) 4-5 to 4-8; Otto (n 1) 31 and 33; Kelly-Louw (n 1) 32-35.
54 s 4(1)(a)(i).
55 GN 713 in *GG* 28893 (01-06-2006).
56 s 1.
57 (n 54).
58 s 4(1)(b).
59 s 9(4).
60 *ibid.*
61 s 8(2)(b).

(d) Where a debt arises from a dishonoured cheque or similar instrument it does not qualify as a credit agreement in respect of which the Act applies. Similarly, where a third person such as a bank refuses a charge against a credit facility the resulting debt does not constitute a credit agreement between the seller and the purchaser.[62] A cheque presented for payment is therefore not subject to the Act.[63]

3 *Limited application*

Only once it is established that a specific agreement is a credit agreement for purposes of the Act, that it was entered into by parties dealing at arm's length and that it does not resort under one of the exemptions, it should be considered whether the Act only finds limited application to the agreement.[64]

Incidental credit agreements are only hit by some provisions of the Act.[65] *Inter alia* the provisions dealing with registration as a credit provider,[66] reckless credit,[67] unlawful credit agreements[68] and unlawful provisions,[69] do not apply to incidental credit agreements.[70]

The provisions of the Act only find application to credit guarantees to the extent that it finds application to the "credit facility or credit transaction in respect of which the credit guarantee is granted."[71] Put differently: "If the [Act] does not apply to the credit facility or credit transaction in respect of which the guarantee is granted, it does not apply to the credit guarantee"[72] (own insertion).

62 s 4(5). See also Scholtz (n 1) 4-7; Otto (n 1) 33; Kelly-Louw (n 1) 34-35.
63 *Essa v Asmal* 2012 2 SA 576 (KZP) 582I-J, 583I-584A and 585B-C. See also Scholtz (n 1) 4-7 n 44; Otto (n 1) 33 n 115; Kelly-Louw (n 1) 34 n 59.
64 Scholtz (n 1) 4-9. See also Otto (n 1) 34-35; Kelly-Louw (n 1) 35-47.
65 Scholtz (n 1) 4-9; Otto (n 1) 34-35; Kelly-Louw (n 1) 39-41.
66 s 40.
67 s 81.
68 s 89.
69 s 90.
70 s 5. See also Scholtz (n 1) 4-9 to 4-10; Kelly-Louw (n 1) 39-41.
71 s 4(2)(c).
72 Scholtz (n 1) 4-11 to 4-12. See also *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) 390B-D and 390H-391E; *Ribeiro v Slip Knot Investments* 2011 1 SA 575 (SCA) 578A-C and 580D; Otto (n 1) 29-30; Kelly-Louw (n 1) 41-42.

Credit agreements in respect of which the consumer is a juristic person are not affected by the provisions of the Act dealing with over-indebtedness, reckless credit and debt review.[73] The same rings true in respect of *inter alia* the provisions dealing with variable interest rates[74] and fees, charges and interest recoverable.[75]

[73] S 78(1) provides that part D of chapter 4, which deals with over-indebtedness, reckless credit and debt review, does not apply to a credit agreement if the consumer in respect thereof is a juristic person.

[74] S 6(c) provides that s 90(2)(o), which deals with variable interest rates, does not apply to a credit agreement if the consumer in respect thereof is a juristic person. S 90(2)(o) should be read with s 103(4).

[75] S 6(d) provides that part C of chapter 5, which deals with these aspects, does not apply to a credit agreement if the consumer in respect thereof is a juristic person.

CHAPTER 3

TYPES OF CREDIT AGREEMENT

1 *Introduction*

Otto calls the "credit agreement" the "umbrella term" in the Act.[76] An agreement constitutes a credit agreement in terms of the Act if it qualifies as:-[77]

(a) A credit facility;[78]

(b) A credit transaction;[79]

(c) A credit guarantee;[80] or

(d) Any combination of (a) to (c).[81]

Again there are exceptions.[82] Suffice it for current purposes to mention that a lease of immovable property is one such an exception.[83]

2 *Credit facility*

An agreement constitutes a credit facility if a credit provider undertakes to supply goods or services or to pay money to or on behalf of a consumer as required by the consumer from time to time and either to defer the consumer's obligation to pay (or repay) or to bill the consumer periodically for the credit provider's performance.[84] A further prerequisite is that a charge, fee or interest is payable by the consumer in respect of such a deferred or billed amount which is not paid timeously in terms of the agreement.[85] Overdrawn cheque accounts and credit card transactions are typical examples of a credit facility.[86]

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76 (n 1) 20. See also Scholtz (n 1) 8-3.
77 s 8(1). See also Scholtz (n 1) 8-3; Otto (n 1) 20; Kelly-Louw (n 1) 47.
78 s 8(1)(a).
79 s 8(1)(b).
80 s 8(1)(c).
81 s 8(1)(d).
82 s 8(2).
83 s 8(2)(b).
84 s 8(3)(a).
85 s 8(3)(b).
86 Scholtz (n 1) 8-4 n 4n; Otto (n 1) 20 n 11 where reference is made to *JMV Textiles v De Chalain Spareinvest* 2010 6 SA 173 (KZD) 179B. See also Kelly-Louw (n 1) 54.

3 *Credit transaction*

The types of agreement that constitute a credit transaction are listed[87] and include *inter alia* an incidental credit agreement,[88] an instalment agreement,[89] a mortgage agreement,[90] a lease[91] and any other agreement (but not a credit facility or credit guarantee) "in terms of which payment is deferred, and any charge, fee or interest is payable … in respect of" the agreement itself or the deferred amount.[92] The latter is the so-called "catch-all category".[93]

For the sake of completeness I deal briefly with the meaning of the respective types of agreement identified as credit transactions.

The incidental credit agreement has already been discussed above.[94]

An instalment agreement entails the sale of movable property. The price or part thereof is deferred and to be paid periodically. The consumer takes possession. Ownership can pass to the consumer either immediately subject to the credit provider's right of repossession in the event of the consumer's failure to fulfil its financial obligations or only when the agreement is fully complied with. Interest, fees or other charges are payable.[95]

The definition of mortgage agreement has been amended by the National Credit Amendment Act 19 of 2014 (the Amendment Act).[96] It is "a credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property".[97] A typical example is a so-called home loan secured by a mortgage bond registered in favour of the credit provider, normally a bank.[98]

87 s 8(4).
88 s 8(4)(b).
89 s 8(4)(c).
90 s 8(4)(d).
91 s 8(4)(e).
92 s 8(4)(f). See also Scholtz (n 1) 8-15; Otto (n 1) 28.
93 Scholtz (n 1) 8-15; Otto (n 1) 28. See also Kelly-Louw (n 1) 78-82 for a discussion on this type of credit agreement.
94 See chap 1 par 1.
95 s 1. See also Scholtz (n 1) 8-6(1) to 8(9); Otto (n 1) 24-25; Kelly-Louw (n 1) 61-63.
96 s 1. The Amendment Act came into operation on 13 March 2015 (*GG* 38557 of 13-03-2015).
97 s 1. See also Scholtz (n 1) 8-9 to 8-10.
98 Scholtz (n 1) 8-10; Otto (n 1) 25; Kelly-Louw (n 1) 72-73.

An agreement qualifies as a lease if the consumer has temporary possession of or the right to use movable property. Payment for the possession or use is made periodically or deferred in whole or in part. Interest, fees or other charges are payable. Ownership of the property passes to the consumer at the end of the agreement.[99]

Finally, in respect of the credit transaction, the "catch all category"[100] or the "extended credit agreement"[101] essentially "covers any deferral of payment of an amount when a charge, fee or interest is payable in respect of the agreement itself or in respect of the amount deferred."[102]

4 *Credit guarantee*

Credit guarantees are agreements in terms of which someone binds him or herself to satisfy the obligation of another consumer in terms of a credit facility or a credit transaction upon demand.[103] As mentioned earlier the Act only applies to the credit guarantee insofar as it applies to the credit facility or credit transaction.[104] An example of a credit guarantee is an ordinary suretyship extended by one person in favour of the bank in terms of which he or she undertakes to fulfil another person's (the principal debtor's) obligations in terms of an overdrawn cheque account.[105]

5 *Combination*

In concluding this chapter mention needs to be made that any combination of a credit facility, credit transaction and credit guarantee also qualifies as a credit agreement and that the definitions discussed above can overlap to some extent.[106]

99 s 1. See Scholtz (n 1) 8-12 to 8-15; Otto (n 1) 26-28; Kelly-Louw (n 1) 75-78.
100 (n 93).
101 Scholtz (n 1) 8-15; Otto (n 1) 28.
102 Scholtz (n 1) 8-15. See also Kelly-Louw (n 1) 78-82.
103 s 8(5). See also Scholtz (n 1) 8-16; Otto (n 1) 29; Kelly-Louw (n 1) 82.
104 See chap 2 par 3.
105 Scholtz (n 1) 8-16(1); Otto (n 1) 29. See Kelly-Louw (n 1) 82-89 for a discussion on credit guarantees.
106 Scholtz (n 1) 8-18. See also Kelly-Louw (n 1) 78.

CHAPTER 4

REINSTATEMENT OR REVIVAL OF A CREDIT AGREEMENT

1 *Introduction*

Brits correctly states that reinstatement of credit agreements "has quite significant implications for debt enforcement, particularly in the mortgage context."[107]

Section 129(3), prior to its amendment by virtue of the Amendment Act,[108] provided that a consumer may, subject to section 129(4)-

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

Section 129(4) provides that a credit agreement may not be reinstated after-

> "(a) the sale of any property pursuant to-
>
> (i) an attachment order; or
>
> (ii) surrender of property in terms of section 127;
>
> (b) the execution of any other court order enforcing that agreement; or
>
> (c) the termination thereof in accordance with section 123."

Section 127 deals with the surrender of goods. A consumer is afforded "an extraordinary right" to unilaterally decide to return the goods forming the subject matter of a lease, instalment agreement or secured loan to the credit provider so that

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107 Brits (n 10) 165. See Kelly-Louw (n 1) for a brief discussion on reinstatement of credit agreements.

108 S 129 has been amended by s 32 of the Amendment Act. These amendments are discussed in chap 5 par 1.

it can be sold.[109] Section 123 deals with the circumstances under which a credit provider may terminate a credit agreement.

A couple of questions arise on a reading of section 129(3) and (4). These include:

(a) How can a credit agreement be reinstated? In other words, what steps does a consumer need to take to reinstate?

(b) When can a credit agreement be reinstated? Put differently, up to which stage may a consumer reinstate a credit agreement? Part and parcel of this question is the question whether reinstatement can take place after judgment has been granted?

(c) How can a consumer reinstate a credit agreement if the credit provider refuses to inform the consumer of the amount the consumer needs to pay in order to reinstate?

2 *Analysis of relevant case law*

Hopefully an analysis of the apposite judgments regarding reinstatement of credit agreements will assist in attempting to answer these questions.

2.1 *BMW Financial Services (SA) (Pty) Ltd v Dr MB Muluadzi Inc*[110]

Mogoeng JP (as he then was) was seized with a summary judgment application in respect of which one of the issues was: "Whether or not payment of the amount in respect of which a notice in terms of s 129 of the Act had previously been sent could keep the agreement alive or revive it."[111]

The facts concerned a lease agreement between the parties. The subject matter of the lease agreement was a Porche Cayenne. Prompt payments were made by the defendant in terms of the lease agreement until August 2007 when it fell in arrears of approximately R8 000.[112]

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109 Scholtz (n 1) 9-25; Otto (n 1) 75; Kelly-Louw (n 1) 282-283.
110 2009 3 SA 348 (BPD).
111 350F-G.
112 349E-G.

Pursuant to the delivery of a purported notice in terms of section 129(1) the defendant made a payment of approximately R28 000 in September 2007 and again in October 2007.[113] In November 2007 the plaintiff cancelled the lease agreement.[114]

After considering the provisions of section 129 the court concluded that subsection (3)-[115]

> "addresses the reinstatement of a contract which is not yet cancelled, in respect of which a repossession of the affected property has already taken place, by paying all the amounts that are overdue, and regaining possession of the repossessed property, provided it has not yet been legitimately sold …".

It was held that the defendant's version that at the time the September 2007 payment was made all overdue amounts were paid and the lease agreement which had at that stage not been cancelled, was thereby reinstated, constituted a *bona fide* defence for purposes of the summary judgment application. The judge bore in mind the fact that the defendant had continued to possess the Porche Cayenne "which, unlike in the situation contemplated by s 129(3)(b), had not yet been repossessed."[116]

2.2 *BMW Financial Services (SA) (Pty) Ltd v Donkin*[117]

The facts concerned an instalment sale agreement between the parties with a BMW as the subject matter. The defendant's payments in terms of the instalment sale agreement were irregular from the outset. She fell in arrears and the plaintiff despatched a notice in terms of section 129(1). The arrears amounted to approximately R37 000. The plaintiff cancelled the instalment sale agreement in September 2008 after receiving no response to the section 129 notice from the defendant.[118]

113 349H-I. I say "purported" because Mogoeng JP was clearly not satisfied that the notice complied with the provisions of s 129 of the Act, see 351A-F.
114 349I-350A.
115 351H-I.
116 352C-D.
117 2009 6 SA 63 (KZD).
118 66C-G.

Most part of the judgment concerned questions in respect of the provisions of the Act dealing with debt review and over-indebtedness,[119] but relevant for current purposes is simply what follows.

After considering the provisions of section 129(3) and (4) the court held that:[120]

> "The NCA makes express provision for a consumer who falls into arrears to prevent the credit provider from exercising a right of cancellation, even one that has accrued, by paying the arrears together with default charges and the reasonable costs of enforcing the agreement up to that stage. However, that right falls away once the agreement has been lawfully cancelled."

Wallis J rejected the defendant's contention that the cancelled instalment sale agreement could be reinstated "as a result of a debt rearrangement flowing from a court's order under s 85 of the NCA"[121] and held that "[t]he NCA does not itself expressly provide for such reinstatement and all the textual and contextual indications point in the opposite direction."[122]

The defendant was ordered to redeliver the BMW to the plaintiff.[123]

2.3 *Nedbank Limited v Clifford Neil Barnard*[124]

In this matter the plaintiff applied for summary judgment. Its *causa* was a loan agreement between the parties in terms of which a mortgage bond was registered over immovable property of the defendant in favour of the plaintiff.[125]

After the defendant had fallen in arrears with the monthly instalments the plaintiff addressed a notice in terms of section 129(1) to the defendant stating *inter alia* that the total arrears amounted to approximately R36 000 in December 2007.[126] Subsequently a number of payments were made by the defendant, but the defendant

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119 These concepts do not fall within the ambit of this dissertation. For the formulation of the questions the court had to decide, see 67I-68D.
120 76A-B.
121 80F-G.
122 80G.
123 81D.
124 case no 1142/08 (EC) (unreported).
125 pp 2 and 4 of the typed version of the decision.
126 p 3.

also missed a few instalments and in the beginning of June 2008 the plaintiff caused summons to be issued against the defendant.[127]

According to the defendant he then telephoned the plaintiff and was informed that the outstanding arrears as at 30 June 2008 were approximately R54 000. He paid R70 000 on 30 June 2008. Further payments were also made.[128]

It was submitted on behalf of the defendant that as a result of these payments all overdue amounts together with "default charges or reasonable costs of enforcing the agreement" were paid. In the result it was contended that the loan agreement has been reinstated.[129]

On behalf of the plaintiff it was argued that a credit agreement cannot "be automatically reinstated merely by the consumer paying" all the overdue amounts. This argument entailed that a consumer who wishes to reinstate a credit agreement must do two things. First he must approach the credit provider to enquire about the "overdue indebtedness" and the permitted default charges and reasonable costs of enforcing the credit agreement. Next the consumer "must advise the credit provider that he or she intends reinstating [the credit agreement] by paying the amounts so due" (own insertion).[130]

The plaintiff's argument was rejected and it was held that:[131]

> "I am unable to find anything in the section which requires a consultative process of this nature before a credit agreement could be reinstated. The express provision of the section is that the agreement will be reinstated 'by paying to the creditor provider all amounts that are overdue …'. I consider that the consumer can unilaterally reinstate the agreement merely by making payment of sufficient amounts of money to cover all the charges referred to in section 129(3). Once that has occurred I am of the view that the agreement is automatically reinstated. The mere fact that such payments are made would be sufficient for a credit provider to infer the intention of the defendant to reinstate the contract."

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127 pp 4-5.
128 p 5.
129 pp 5-6.
130 p 8.
131 pp 8-9.

In casu the defendant could not have been certain of what exactly the permitted default charges and reasonable costs of enforcing the loan agreement were at that stage, but it was submitted on the defendant's behalf that by making the R70 000 payment, *id est* R26 000 more than what the plaintiff advised to be overdue on that date, such expenses must have been wiped out. [132]

Eksteen AJ dismissed the application for summary judgment.[133] It is worth noting that in this matter it was common cause that the loan agreement had not been cancelled.[134]

2.4 *Nedbank Ltd v Fraser*[135]

This judgment concerned five actions. In two of them application was made for default judgment and in the other three summary judgment was applied for. Relevant to all the actions were the relevant circumstances which a court needs to consider and the procedure when seized with an application for an order declaring immovable property specially executable.[136]

After making reference to the provisions of section 129(3) the court mentioned that:[137]

> "It would appear that the effect of s 129(3) of the NCA is to permit a right of reinstatement even after default or summary judgment has been given by making payment of the amount of the arrears, charges and costs, provided that such is done within the time period provided in s 129(3) of the NCA… . In this sense a judgment may be overtaken by a reinstatement."

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132 p 9.
133 p 10.
134 p 8.
135 2011 4 SA 363 (GSJ). For the sake of completeness in respect of the chronology of the judgments referred to, it is worth noting that another unreported judgment saw the light prior to *Fraser*, namely *Imperial Bank v Audrey Busiswe Kubheka* case no 28713/08 (GNP) (unreported).
136 366B. The "relevant circumstances" and "procedure" relate to applications for an order to declare specially executable the primary residence of a judgment debtor. See rule 46(1)(a) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa in Van Loggerenberg *Erasmus Superior Court Practice* (1994) B1-331 and B1-335 to B1-336F.
137 378D-E.

Peter AJ went on to say that in the context of section 129(4) which "does not permit reinstatement 'after execution' of a court order enforcing the agreement,"[138] in his view:[139]

> "[E]xecution contemplates both the sale and registration of transfer of ownership of the immovable property into the name of the purchaser at a sale in execution of the property."

The court compared the "statutory right of reinstatement" created by section 129(3) to the common-law right of redemption in terms of which a judgment debtor is entitled to redeem property attached in execution as long as the judgment debtor remains the owner. On the strength of two decisions of the same division of the high court and one of the appellate division,[140] Peter AJ stated that "the right of redemption is extinguished only when registration takes place into the name of the purchaser after the sale in execution".[141] Accordingly a purchaser at a sale in execution "acquires a clouded, as opposed to a clear right to receive transfer of ownership"[142], in other words the purchaser "purchases … subject to the judgment debtor's right of redemption, which, if properly exercised, would be resolutive of the sale."[143]

Importantly for current purposes the court stated that:[144]

> "Similarly, in my view, where the provisions of the NCA are applicable it is open to a debtor to exercise the rights conferred in s 129(3) of the NCA within the time period therein provided and redeem the immovable property from the execution process by making payment not of the full sum of the judgment debt, interest and costs, but of the overdue amounts of the arrears together with default charges and legal costs of enforcing the agreement up to the time of reinstatement. A purchaser at a sale in execution in such circumstances similarly acquires a clouded right to transfer subject to the statutory right of reinstatement."

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138 378F.

139 *ibid*.

140 *Simpson v Klein* 1987 1 SA 405 (W); *Shalala v Bowman* 1989 4 SA 900 (W); *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 459.

141 378G-H. Peter AJ referred to the criticism to this view expressed *obiter* in another division of the high court in *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central; Schoerie v Syfrets Bank Ltd* 1997 1 SA 764 (D), but was not persuaded that the two decisions in *Simpson* and *Shalala* are wrong, see 378H-379A. See Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (2006) (Badenhorst) 381 in respect of the right of redemption.

142 379C.

143 379B-C.

144 379D-F.

2.5 *Dwenga v FirstRand Bank Ltd*[145]

Default judgment was granted against the applicant in July 2009 for his indebtedness towards the first respondent (the bank) which arose in terms of a mortgage loan. His primary residence was subsequently sold in execution to the fourth respondent (the purchaser) in February 2011. The applicant sought an order rescinding the default judgment as well as an order setting aside the sale in execution. By the time the application served before court registration of transfer of the property to the purchaser was already in process.[146]

The crux of the applicant's version was that at the time the summons was served and when judgment was granted respectively he was not in arrears with the loan account. In fact, he was in credit. According to the applicant a custom had developed in terms of which the bank would "overlook his tardy payment of instalments" because of the nature of his business, namely building construction work and the like which he renders to government departments "which invariably fail to pay him promptly". His account would be in arrears for short periods only until he would make lump sum payments which would mostly bring his loan account into credit.[147]

Regarding the so-called custom alleged by the applicant, the bank's stance was that the applicant's "reliance" on any indulgences granted by the bank was misplaced in light of the terms of the loan agreement which provide that such indulgences could not amount to the abandonment or waiver of any of the bank's rights. The bank relied on the acceleration clause to foreclose on the mortgage bond, *id est* to claim the full outstanding amount (as opposed to only the arrears) once the applicant "regularly defaulted on the periodic instalments".[148]

In respect of the acceleration clause Hartle J said that:[149]

> "Although an acceleration clause, including *a Lex commissoria*, in a mortgage agreement, has been held to be perfectly permissible and justifiable in a commercial context, to my mind it is self evident that the principal obligation to which it is

145 case no 298/11 (EC) (unreported).
146 p 2 of the typed version of the report.
147 p 5.
148 pp 7-8.
149 pp 11-12.

> accessory – which is in the nature of a credit agreement – must necessarily yield to the relevant provisions of the NCA pertaining to the enforcement of the foreclosure remedy which avails the mortgagee in the case of the mortgagor's default under the bond. Mortgage bonds typically contain clauses empowering the mortgagee to foreclose the mortgage. It is usually stated that in the event of a breach by the debtor of his duties under the principal obligation, the capital amount of the bond, together with interest and all other payments will become due and payable and that the mortgaged property may be declared executable by the court for the satisfaction of the mortgagee's claim. Cancellation, or termination, is also necessarily implied thereby. But cancellation is in my view not an act which the mortgagee performs unilaterally and at its whim. It is in itself the enforcement of a debt within the meaning contemplated in the NCA" (footnotes omitted).

Hartle J holds the view that termination or cancellation of the credit agreement comes about by debt enforcement. The learned judge disagreed with the view of Bertelsmann J expressed in *Absa Bank Ltd v Ntsane*[150] that acceleration can occur "automatically" and that debt enforcement is preceded by a decision to accelerate. According to Hartle J: "Acceleration and the concomitant termination is … the debt enforcement."[151]

Two reasons are advanced in support of this view. Firstly, the provisions of the Act set out procedural requirements before a court can be approached to enforce a credit agreement.[152] Secondly, and more importantly for current purposes, section 129(3) provides for the reinstatement of a credit agreement prior to cancellation and section 130(3)(c)(ii)(dd) provides that the "determination of commenced proceedings" are precluded where "the consumer has brought his payments under the credit agreement up to date."[153]

After the dispatch of the bank's purported notice in terms of section 129,[154] but before service of the summons the applicant made a payment to the bank, which resulted in

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150 2007 3 SA 554 (T).
151 p 12 n 15.
152 p 11. See ss 129 and 130.
153 pp 12-13.
154 I say "purported" because the court found merit in the submission made on behalf of the applicant that the bank did not comply with s 129(1)(a) and also found that the notice was deficient. See pp 18-19.

the loan account being "in credit".[155] The court assumed that the credit would be sufficient as it was "not insubstantial"[156] to settle the bank's permitted default charges and reasonable costs of enforcing the credit agreement as envisaged by section 129(3).[157] In this regard it was held that:[158]

> "In the present matter the applicant fully extinguished the arrears and left something in reserve more than adequate to cover costs and charges. The payment may have been too late to avert the issue of the summons in it entirety, but the process could only have remained extant thereafter in order for the first respondent to have recovered its costs of issuing the summons. Therefore, by the time the application for default judgment was placed before the Registrar for her consideration, it could similarly not be asserted that the applicant was in default of payment of the arrears he had been called upon by the purported notice to remedy, because he had fully purged those. Further, not only would the agreement have been automatically re-instated by the payment before the service of the summons, pursuant to the provisions of section 129(3), but the provision of section 130(3)(c)(dd) of the NCA would in my view have precluded the further enforcement of the proceedings" (footnotes omitted).

In support of the view that the credit agreement would have been automatically reinstated the court relied upon the judgment in *Barnard*.[159]

Hartle J doubted the correctness of the view taken by Peter AJ in *Fraser* on two scores. The view expressed in *Fraser* that a judgment debtor can exercise his or her right of redemption by making payment only of the "**overdue amounts of the arrears** together with default charges and legal costs of enforcing the agreement up to the time of re-instatement" as opposed to the entire judgment debt (the accelerated amount), interest and costs, was doubted by Hartle J in light of "the accepted basis on which a foreclosure clause vests a mortgagee with the right to refuse to accept the late performance by the mortgagor."[160] Hartle J did also not agree with Peter AJ that reinstatement of a credit agreement could occur "**after**

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155 p 19.
156 p 19 n 32.
157 *ibid.*
158 pp 20-21.
159 p 20 n 35.
160 p 21 n 36.

judgment" simply "because by that date the credit agreement would have been terminated, thus precluding re-instatement".[161] Hartle J proceeded to say that:[162]

> "If the mortgagee has commenced proceedings to give effect to the more drastic remedy of foreclosure, presumably only payment of the full outstanding amounts, plus costs etc, would be adequate in that event to purge the breach justifying it. *'Re-instatement'* as envisaged by section 129(3) is then a remote prospect. On this basis the enforcement of an acceleration clause appears inimical to the express purpose of the NCA which is to promote responsible consumer obligations."

In casu the relief sought was granted because the court was satisfied for the reasons aforementioned that the applicant demonstrated "a substantial defence" to the bank's claim.[163]

2.6 *Absa Bank v Morrison*[164]

In this matter the applicant (the bank) applied for the setting aside of a sale in execution of immovable property.[165] The bank obtained judgment against the third respondent (the judgment debtor) in January 2010 pursuant to which the judgment debtor's residential property was sold by the sheriff to the first respondent (the purchaser) in September 2011. Prior to the auction the judgment debtor contacted the bank. The bank agreed to stop the sale in execution "if the total arrears were paid before the sale date."[166] The arrears were settled in full prior to the sale in execution but due to an administrative error the bank failed to instruct its attorneys to cancel the sale in execution.[167]

Two issues arose for consideration by the court:[168]

> "[F]irstly, whether a judgment creditor can stop a sale after the property has been knocked down, and secondly whether the fall of the hammer at a sale in execution of immovable property is regarded as effecting delivery and therefore amounting to the

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161 *ibid.*
162 *ibid.*
163 pp 22 and 24.
164 2013 5 SA 199 (GSJ).
165 200C-D.
166 201B-D.
167 200D and 201C-D.
168 200G.

> transfer of ownership without the need for registration in the deeds office as in the case with ordinary sales of land."

The court mentioned that *in casu* "an additional factor which may be determinative in its own right arises"[169], *viz* the provisions of the Act.[170] Spilg J referred to the reasoning of Peter AJ in *Fraser*.[171] The learned judge also mentioned, with reference to section 129(3), that foreclosure in respect of residential homes-[172]

> "has received considerable attention with the underlying consideration being that foreclosure should be properly weighed by reference to the individual and his family losing their residence, respect for proper fiscal discipline, and the effect on banks and the economy as a whole if debts cannot be enforced."

The interests of a purchaser at a sale in execution and the interests of the public relating to the certainty and regularity of public auctions need to be weighed up against these considerations.[173]

In conclusion Spilg J held that even if the interpretation in *Fraser* of section 129(3) and (4) were ignored "the basic principles the sections enunciate are consistent with avoiding the loss of property if the debtor is able to rearrange his or her finances to meet the arrears even at the eleventh hour."[174]

The court's reasoning proceeded from "a different vantage" and was "somewhat broader" than the reasoning of the court in *Fraser*, but "the thread is a common one and the conclusion identical when applied to the present facts."[175] The sale in execution was cancelled.[176]

2.7 *Nkata v FirstRand Bank*[177]

A judgment was granted against the applicant in her absence in September 2010. The respondent's (the bank) action was based on a mortgage loan agreement. The

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169 203F.
170 203F-H.
171 204B-E.
172 203H-J.
173 204A-B.
174 204F.
175 204H.
176 205A.
177 2014 2 SA 412 (WCC).

immovable property forming the subject matter of the loan agreement was sold in execution in April 2013. The applicant sought rescission of the default judgment, a declarator that the sale in execution was invalid and ancillary relief.[178]

The immovable property was purchased in 2005 and the applicant fell into arrears in 2010.[179] Summons was served in July 2010 and in August 2010 the applicant applied for debt review.[180] The applicant averred that she had only become aware of the default judgment in October 2010 when the bank telephoned her and informed her that a sale in execution was scheduled to take place.[181]

Settlement negotiations then ensued between the parties and they reached an agreement in terms of which the sale in execution was cancelled. The applicant would, according to the agreement, sign the bank's "Quicksell" mandate which entailed that she would pay monthly instalments of R10 000 whilst the mandate was in place. In the event of the immovable property not being sold pursuant to the mandate the applicant would pay the full arrears to the bank within a specified time in which event the bank would not sell the immovable property but the applicant had to resume payment of the full monthly instalment. Failure on behalf of the applicant to pay the full arrears would entitle the bank to put the immovable property up for sale in execution again.[182]

In March 2011 the applicant made a lump sum payment of approximately R87 000. This payment settled the arrears and the applicant resumed payment of the monthly instalments. The applicant fell into arrears again but extinguished the arrears for a second time in March 2012.[183] After falling into arrears again in February 2013 the bank sold the immovable property in execution in April 2013 to Kraaifontein Properties.[184] The next day the applicant and Kraaifontein Properties entered into a monthly lease entitling the applicant to occupy the immovable property pending the resale thereof by Kraaifontein Properties.[185] The rescission application before court

178 413I-414B.
179 414B-D.
180 414H-I.
181 415B.
182 415D-F.
183 415G-I.
184 416B-D.
185 416E.

seem to have been triggered by the fact that Kraaifontein Properties then sold the immovable property in May 2013.[186]

In dealing with the merits of the rescission application the court rejected three of the four grounds upon which the rescission application was brought.[187] It however held that the applicant's criticism that section 129(1) was not complied with because the requisite notice was not addressed to the correct *domicilium citandi et excutandi* had merit.[188] In the latter regard the applicant had a *bona fide* defence to the bank's action because compliance with section 129(1) is "a prerequisite for the issuing of summons."[189]

Despite this finding the court refused to grant condonation for the applicant's non-compliance with the time periods within which the rescission application had to be instituted. The court held that a satisfactory explanation for the lengthy delay in bringing the rescission application was not proffered.[190]

Another basis upheld for refusing the rescission application was that of peremption, *id est* that the applicant had acquiesced in the default judgment.[191]

Although satisfied that the rescission application should fail, Rogers J raised the possible effect of the provisions of section 129(3) on the matter.[192]

The court considered what is meant by the phrase "all amounts that are overdue" in section 129(3)(a) and opined that the distinction between the arrears and the full outstanding amount is not, for purposes of section 129(3)(a), obliterated when an acceleration clause kicks in.[193] Rogers J opined further as follows:[194]

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186 416F-G.
187 The grounds are listed, see 416H-417C. See 417C, 417E and 417H respectively for the rejections. These grounds and the reasons for their rejection are not relevant for current purposes.
188 418A-D.
189 418D-E and 419H-I.
190 420F-I.
191 420I-421C. This finding and the reasons therefor fall outside the ambit of this dissertation.
192 421D-E.
193 422B-C.
194 422D-E. This view accords with that of Peter AJ in *Fraser*, see 422H.

> "The right of reinstatement conferred by s 129(3)(a) would be rendered nugatory if the 'overdue' amount contemplated by s 129(3)(a) were the full accelerated debt rather than the arrear instalments. In most credit transactions there would be nothing to reinstate if the consumer could only 'reinstate' the agreement by paying the full debt. The very notion of reinstatement, in the context of s 129(3), is that the consumer may put the agreement back into the position it was prior to his or her falling into default. This accords with certain of the stated purposes of the Act … ".

In casu the credit agreement had not been cancelled because by relying on the acceleration clause the bank was seeking specific performance of the loan agreement.[195] On this point Rogers J disagreed with the view of Hartle J in *Dwenga* that cancellation is necessarily implied when an acceleration clause kicks in. According to Rogers J:[196]

> "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 (provided he has complied with the procedures laid down in the Act). The remedies then available to the credit provider are those provided by law where a contract has been terminated because of breach. Where 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. If the consumer pays the accelerated indebtedness, the contract will be terminated—not by the act of the credit provider but through performance by the consumer."

Moreover, in light of the bank's non-compliance with sections 129 and 130 it was in terms of section 123 not entitled to cancel the loan agreement in the first instance.[197]

Dealing with the meaning of "permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement" the learned judge was concerned with the fact that the legal costs which the bank added ("simply debited the amounts to her account")[198] to the applicant's account "were not taxed nor quantified by agreement".[199] The court rejected the possible contention that because

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195 422I-J.
196 423A-D.
197 423E.
198 424D.
199 423I-424A.

the legal costs were as such "not yet due and payable,"[200] the applicant could not have reinstated the loan agreement because such an approach-[201]

> "would mean that a consumer could not reinstate an agreement without proactively taking steps to find out what those costs were and either reach agreement with the credit provider on the quantification thereof or initiate a taxation. I do not believe that such an approach would be consistent with the purposes of the Act. If the credit provider wants to recover the costs of enforcing the agreement from the consumer, the credit provider must take the appropriate steps. If the credit provider does not do so, and if in the meanwhile the consumer pays the full amount of the overdue instalments and any other amounts already due and payable, the agreement would be reinstated in terms of s 129(3)."

The court also held in this regard that the costs of enforcement envisaged by section 129(3)(a) "are those costs of which the credit provider is at that time requiring payment."[202]

Turning to deal with section 129(4) Rogers J mentioned in accordance with the view of Eksteen J in *Barnard* that once the consumer "makes the payments contemplated by s 129(3)"[203] the credit agreement is "reinstated by operation of law"[204] unless prohibited by section 129(4).[205] Section 129(4)(a)(i) refers to an "attachment order" whilst section 129(4)(b) refers to "the execution of any other court order enforcing that agreement."[206] The judge proceeded to reason that the loan agreement *in casu* was reinstated in March 2011 or March 2012 if the immovable property was sold in April 2013 in terms of an "attachment order". If not sold in terms of an "attachment order" the meaning of "execution" needs to be determined.[207]

200 424F.
201 424F-H.
202 425C-D.
203 425E-F.
204 *ibid.*
205 *ibid.*
206 425F-G.
207 425H-I.

"Attachment order" envisages "an order entitling a credit provider to take repossession of movable goods which are the subject of an instalment agreement, secured loan or lease".[208]

On the other hand, where a money judgment is granted on the basis of an outstanding loan, an order for the attachment of the property forming the subject matter of the loan is not included in such an order – the judgment creditor needs to cause a writ of execution to be issued.[209]

On this basis the default judgment did not constitute an "attachment order", nor did it become one when the writ of execution was issued. It then follows that reinstatement was not precluded by section 129(4)(a)(i) *in casu*.[210]

Considering the question of whether "there had been 'execution' of the default judgment",[211] the court held that "[t]he judgment is only actually 'executed' when money is raised pursuant to a sale of attached property and paid to the judgment creditor."[212] In coming to this conclusion the learned judge referred to the reasoning of Peter AJ in *Fraser* and the common-law principle of redemption.[213]

It was accordingly held that because the sale in execution only took place after the applicant had settled the arrears "execution" could not have taken place at that stage. The court concluded that the loan agreement was reinstated and that "if a credit agreement is reinstated before the execution of a monetary judgment enforcing that agreement, the judgment can no longer be enforced."[214] Should the consumer later fall into arrears again, the credit provider needs to comply with section 130 before approaching a court to enforce the reinstated credit agreement.[215]

The default judgment was not rescinded, but due to the finding that the loan agreement was reinstated no later than 8 March 2011, the default judgment of

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208 426A-B.
209 426C-D.
210 426F-G.
211 426G-H.
212 427I. This view is in accordance with the view expressed in *Fraser*.
213 427H-J.
214 428B-C.
215 *ibid.*

28 September 2010 "thereupon became of no force and effect".[216] It followed that the writ of attachment had no force and effect and that the sale in execution was set aside.

3 *Conclusion: application of the law to the questions posed*

In light of the above case analysis I now turn to deal with the questions raised in the introductory paragraph of this chapter.

(a) How can a credit agreement be reinstated? In other words, what steps does a consumer need to take to reinstate?

A consumer who wishes to reinstate a credit agreement must make payment of certain amounts to the credit provider. These amounts consist of "all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement".[217]

In *Fraser* reference was made to "overdue amounts of the arrears" and it was made clear that the overdue amounts do not mean the "judgment debt".[218] The court in *Dwenga* did not agree with this approach.[219] However, according to the court in *Nkata* the distinction between the arrears and the full outstanding (accelerated) amount is however not obliterated for purposes of section 129(3)(a) when an acceleration clause kicks in. The court, correctly it is submitted, reasoned that the right of reinstatement would serve no purpose if the overdue amounts meant "the full accelerated debt rather than the arrear instalments."[220]

The Act 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".[221] Such charges may be claimed "in respect of each letter necessarily written in terms of Part C of Chapter 6

216 429D-E.
217 s 129 (3)(a).
218 (n 144).
219 (n 160).
220 (n 193) and (n 194).
221 s 1.

of the Act",[222] *id est* in respect of debt enforcement. Such charges are limited to the charges allowed for a registered letter of demand in undefended actions in terms of the Magistrates' Courts Act,[223] "in addition to any reasonable and necessary expenses incurred to deliver such letter."[224]

The "reasonable costs of enforcing the agreement up to the time of reinstatement" is described by the definition of "collection costs"[225] which "means 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".[226] These costs are limited to the costs incurred in collecting or enforcing the debt-[227]

> "(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,
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> (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."

Scholtz points out that "Part C is conspicuously silent on the issue of collection costs"[228] but submits that such silence should not preclude the recovery of collection costs "provided the credit provider follows the debt-enforcement procedures in the Act."[229]

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222 Reg 46 of the Regulations made in terms of the National Credit Act, 2005 (the regulations). The regulations were promulgated in GN R489 in *GG* 28864 (31-05-2006).
223 32 of 1944.
224 (n 222). See also Scholtz (n 1) 10-22; Otto (n 1) 103; Kelly-Louw (n 1) 239; Brits (n 10) 178.
225 s 1.
226 *ibid*.
227 reg 47 of the regulations.
228 Scholtz (n 1) 10-22 to 10-23.
229 *ibid*. See also Otto (n 1) 103; Kelly-Louw (n 1) 240; Brits (n 10) 178.

In *Nkata* the court referred to the basic principle in our law that legal costs should be agreed upon or taxed.[230] The court found that the consumer need not proactively take steps to ascertain the amount of the credit provider's legal costs.[231] The consumer needs neither to endeavour to reach agreement with the credit provider on the legal costs nor ensure that the legal costs are taxed.[232] The costs of enforcement "are those costs of which the credit provider is at that time requiring payment."[233] It also bears mentioning that the court already in *Barnard* rejected the notion of a consultative process.[234] By making payment of the required amounts the consumer unilaterally reinstates the credit agreement. The consumer need not even inform the credit provider of its intention to reinstate because the credit provider should infer the consumer's intention to reinstate the credit agreement from such payment.[235]

To sum up: a consumer who wishes to reinstate a credit agreement must pay the arrear instalments together with the default charges and other legal costs which the credit provider is claiming at the time.

(b) When can a credit agreement be reinstated? Put differently, up to which stage may a consumer reinstate a credit agreement? Part and parcel of this question is the question whether reinstatement can take place after judgment has been granted.

At first glance the answer to the first part of this question seems plain: the Act provides that a credit agreement may be reinstated "at any time before the credit provider has cancelled the agreement".[236] It is when the provisions of section 129(4)(a)(i) and (b) are perused that it becomes more complicated and the last part of this question arises.

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230 (n 199). In this regard it is trite law that taxation is not a prerequisite for the recovery of legal costs, but may result in a dilatory special plea. See in this regard *Chapman Deyer Miles & Moorhead Inc v Highmark Investment Holdings CC* 1998 3 SA 608 (D); *Benson v Walters* 1984 1 SA 73 (A) and Harms *Amler's Precedents of Pleadings* (2009) 56.

231 (n 201).

232 *ibid.*

233 (n 202).

234 (n 131).

235 *ibid.*

236 s 129(3)(a).

From the analysis of cases above it is clear that reinstatement may be effected after the service of summons. For example in *Barnard* the defendant only telephoned the plaintiff and paid an amount in excess of the outstanding arrears, thereby having found (at least for purposes of summary judgment) to have reinstated the loan agreement, subsequent to summons having been issued.[237]

In fact if one has regard to *Fraser*,[238] *Morrison*[239] and *Nkata*[240] it becomes apparent that a credit agreement can even be reinstated after judgment has been granted. The only judgment to the contrary is that of the court in *Dwenga*.[241] The court's reasoning in this regard was that the credit agreement would have been terminated by that time, *id est* after judgment.[242] The court in *Nkata* disagreed with this reasoning on the basis that where a credit provider relies on an acceleration clause the credit agreement is not terminated but remains in force because the consumer is required to provide specific performance of the accelerated indebtedness. In the event of the consumer then settling the accelerated indebtedness the credit agreement comes to an end due to the consumer's performance and not by virtue of the termination by the credit provider.[243]

Brits holds the following views on this question:[244]

(i) A credit agreement can not be "fully" terminated until the completion of the debt enforcement process. A credit provider's right to terminate is qualified by the consumer's right of reinstatement.[245]

(ii) Reinstatement is prohibited in terms of section 129(4) only-

> "after attached or surrendered property has been sold; a court order that enforces that agreement has been executed; or the agreement has been terminated (cancelled) in terms of section 123."[246]

237 (n 127), (n 128) and (n 132).
238 (n 137).
239 (n 167) and (n 174).
240 (n 214).
241 (n 161).
242 *ibid.*
243 (n 196).
244 (n 10).
245 (n 10) 174-175.
246 (n 10) 175.

(iii) The interpretation in *Dwenga* that reinstatement is only possible up to the stage of judgment being granted "is inconsistent with section 129(4)(a) and (b), which allows reinstatement until the judgment is executed or the property sold – therefore, *after* judgment had been granted."[247]

(iv) An interpretation that the granting of judgment brings about termination of the credit agreement in terms of section 129(4)(c) would therefore render section 129(4)(a) and (b) meaningless. "Rather, for paragraphs (a) and (b) to have any meaning whatsoever, 'termination' in paragraph (c) should be given a wider meaning that includes execution of the judgment."[248]

(v) Section 129(4) should be interpreted in such a fashion that reinstatement can take place until the judgment has been enforced or the property has been sold and section 129(4)(c) would then probably have the purpose "to cover instances of termination not covered by paragraphs (a) and (b)".[249]

(vi) The interpretation of the court in *Fraser* that the "sale" in section 129(4)(a) envisages not only the sale in execution but also the "transfer of ownership by way of registration (in the case of immovables)"[250] might be incorrect because the provision does not give such a wide meaning to "sale" in express terms.[251] It is confusing, with respect, that *Brits* supports a "wide" interpretation of section 129(4) to solve the contradiction between the provisions of section 129(4)(a) and (b) on the one hand and the provisions of section 129(4)(c) on the other, but opts for a "narrow" interpretation of the word "sale" in section 129(4)(a). This is also surprising in light of *Brits'* view that "[l]ogically, there appears to be no reason to restrict the scope of reinstatement to provide lesser relief than the common law right of redemption".[252]

(vii) Reinstatement of credit agreements up to such a late stage in the debt enforcement process such as after the sale in execution but prior to registration of transfer might be justifiable if such an interpretation of section

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247 *ibid.*
248 *ibid*.
249 (n 10) 175-176.
250 (n 10) 176.
251 *ibid*.
252 (n 10) 176.

129(4)(a) would promote the "spirit, purport and objects of section 26 of the Bill of Rights."[253]

(viii) However, section 129(4)(a) may also be interpreted more restrictively if such an interpretation "can be justified in terms of section 36(1) of the Constitution, which may be the case if the public auction process is to be protected and encouraged for the undoubtedly important public purpose it serves."[254]

(ix) He concludes on this as follows:[255]

> "Since no final positon has been taken by a higher court, I put forward that section 129(4)(a) should be interpreted wider than what was proposed in *Dwenga* but somewhat narrower that [*sic*] what was decided in *Fraser*. Reinstatement is not prohibited from the moment of judgment being granted but is also not allowed beyond the sale concluded at the public auction (or the enforcement of judgment in some other way). Hence, the concept 'sale' in section 129(4)(a) is limited to the conclusion of the auction sale and does not include transfer by registration."

The fact that no court higher than the courts in *Dwenga* and *Fraser* has taken a final stance on this question still rings true. However, the courts in *Morrison* and *Nkata* have agreed with the reasoning of the court in *Fraser*.[256] It follows that, until decided to the contrary, the stance taken by the court in *Fraser* reflects the legal positon at least in the Gauteng local division and the Western Cape division of the high court.

(c) How can a consumer reinstate a credit agreement if the credit provider refuses to inform the consumer of the amount the consumer needs to pay in order to reinstate?

The answer to this question has been alluded to above.[257] In *Barnard* the argument that a consumer wishing to reinstate a credit agreement should approach the credit provider to enquire about the amounts payable and advise the credit provider of his or her intention to reinstate was rejected by the court which found that it was "unable

253 (n 10) 177.
254 *ibid.*
255 *ibid.*
256 (n 175) and (n 212).
257 See chap 4 par 3(a).

to find anything in the section which requires a consultative approach of this nature".[258]

Also in *Nkata* the court refused to endorse a similar approach when it held that it is not for the consumer to proactively take steps to find out from the credit provider what the outstanding legal costs are and either to reach agreement on the quantification thereof or see to the taxation thereof.[259] The court held that it is for the credit provider to take the necessary steps if it wants to recover the legal costs from the consumer.[260]

258 (n 130) and (n 131).
259 (n 201).
260 *ibid.*

CHAPTER 5

AMENDMENT ACT

1 *Amendment of section 129*

Section 129(3) in its amended form reads thus:[261]

> "(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" (own emphasis).

The first sentence of section 129(4) has been amended to read:[262] "A **credit provider** may not re-instate or **revive** a credit agreement after …" (own emphasis).

Subsections (5), (6) and (7) have been included in section 129. It reads as follows:[263]

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

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261 S 32(a) of the Amendment Act effected this amendment.
262 S 32(b) of the Amendment Act effected this amendment.
263 S 32(c) of the Amendment Act effected this amendment.

I deal with the amendments in turn.

The amendment to section 129(3) removed the consumer's right of reinstatement and replaced it with a right to remedy its default. According to *Scholtz* this removed the "problematic concept of 'reinstatement'".[264] It is however unclear how this amendment will cure the divergent judicial views on the right of reinstatement discussed herein. Surely the same, or at least not dissimilar, anomalies will remain. For instance, the view that a credit agreement can not be reinstated after judgment because by that time the credit agreement would have terminated will no doubt be advanced with the same force in respect of the right to remedy a default. Why would a consumer wishing to remedy his or her default by paying the overdue amounts together with the prescribed default administration charges and reasonable enforcement costs not be entitled to do so after judgment in respect of that credit agreement has been granted? This amendment takes the matter no further.

The replacement of "consumer" with "credit provider" and the insertion of "revive" in section 129(4) is even a bigger mystery. A situation where the credit provider as opposed to the consumer would wish to reinstate a credit agreement is unimaginable. It is also not clear what the concept of revival brings to the party. The concept is nowhere defined and I fail to see how it adds to the concept of reinstatement.

Finally, the insertion of subsections (5), (6) and (7) is to be welcomed. These amendments were no doubt brought about as a result of the constitutional court's judgment in *Sebola*.[265]

2 *Other interesting amendments*

A number of interesting amendments have been introduced by the Amendment Act. Only a handful will however be mentioned herein as being relevant to the topics discussed in this dissertation.[266]

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264 (n 1) 12-76.

265 See chap 1 par 3.

266 Some of the amendments discussed herein may only be remotely relevant to the topics discussed in this dissertation.

The definition of a mortgage in the Act was previously problematic due to its reference to a "pledge over immovable property".[267] A pledge is a form of security over movable property as opposed to a mortgage which is a form of security over immovable property.[268] In its amended form a mortgage is defined as-[269]

> "a mortgage bond registered by the registrar of deeds over immovable property that serves as continuing covering security for a mortgage agreement."

As pointed out by *Scholtz* the inclusion in the definition of "continuing covering security" resulted in the "birth to a new little monster"[270] because it creates the incorrect impression that a mortgage secures future debts still to be incurred. However, *Scholtz* continues:[271] "The typical mortgage bond in the case of consumer transactions is, however, a bond over a particular immovable thing that secures an existing debt."

The unfortunate reference in the definition of a mortgage agreement to a pledge of immovable property has been removed by the Amendment Act.[272] It is now defined as "a credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property".[273]

Prescription of debt is now dealt with by the Act, albeit to a limited extent.[274] The Act dealt only with the limitation on the referral of complaints to a consumer court or the National Consumer Tribunal until the introduction of section 126B.[275] This section provides the following:

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267 See s 1 prior to the amendment thereof by s 1 of the Amendment Act.
268 Badenhorst (n 141) 357; Scholtz (n 1) 8-9; Otto (n 1) 25; Kelly-Louw (n 1) 72-73.
269 s 1.
270 (n 1) 8-9.
271 (n 1) 8-9 to 8-10.
272 s 1.
273 s1 of the Act.
274 s 126B. This section was inserted by virtue of s 31 of the Amendment Act.
275 s 166. See also Scholtz (n 1) 12-98. In this regard it is worth making a brief reference to the discussion in Scholtz of the judgment in *Investec Bank Limited v Mavhungu David Ramurunzi* case no 12554/08 (WC) (unreported). In this matter it was held that prescription is not interrupted by the service of summons where the provisions of s 129(1)(a) have not been complied with (see pp 6-7 of the typed judgment). Moreover compliance with s 129(1)(a) pursuant to a court order in terms of s 130(4) does not have retrospective effect (see p 7 of the judgment).

"Application of prescription on debt

126B. (1) *(a)* No person may sell a debt under a credit agreement to which this Act applies and that has been extinguished by prescription under the Prescription Act, 1969 (Act No. 68 of 1969).

(b) No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies—

(i) which debt has been extinguished by prescription under the Prescription Act, 1969 (Act No. 68 of 1969); and

(ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise."

Essentially section 126B(1)(a) creates a prohibition on the cession of book debts which have prescribed in terms of the Prescription Act.[276]

Section 126B(1)(b), on a literal interpretation, essentially provides that a credit provider may not take further steps in the collection of a debt which has prescribed and where the consumer raises, or could have raised the defence of prescription. This subsection also prevents the re-activation of a debt if these two requirements are met. It is not clear what is meant with the use of the word "re-activate", but presumably it means that a prescribed debt may not be novated so as to giving rise to the period of prescription beginning to run afresh.

A typographical error in the original text of the Act has been rectified by the amendment of section 130(1)(a).[277] This section now refers to section 86(10) instead of section 86(9).[278]

Other amendments brought about by the Amendment Act include *inter alia* the following:

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276 68 of 1969.

277 By virtue of s 33 of the Amendment Act.

278 See s 130(1)(a). See also Scholtz (n 1) 12-6 n 43; Otto (n 1) 118 n 121; Kelly-Louw (n 107) 436 n 215.

(a) The Minister may prescribe a code of conduct as envisaged in section 48(1)(b).[279]

(b) Payment distribution agents and prohibited conduct are defined.[280]

(c) Payment distribution agents need to register as such and they must *inter alia* maintain fidelity insurance and trust accounts.[281]

(d) The threshold of 100 credit agreements for the mandatory registration as a credit provider has been removed.[282]

(e) Credit providers must submit information about a consumer settling any obligation under a credit agreement to credit bureaux and the credit bureau must then remove any adverse information about the consumer. Adverse information is defined.[283]

(f) The National Consumer Tribunal may declare a credit agreement reckless and a consumer to be over-indebted on that account.[284]

(g) If a debt review application has been filed at court or the National Consumer Tribunal a credit provider may not terminate such an application for debt review.[285]

(h) If a court finds that a credit agreement is unlawful in terms of section 89 it is no longer confined to make an order limited to the options in section 89(5), but "must make a just and equitable order".[286]

(i) Alternative dispute resolution agents must be registered.[287]

279 s 48A. This amendment was brought about by virtue of s 16 of the Amendment Act.
280 s 1. These amendments were brought about by virtue of s 1 of the Amendment Act.
281 s 44A. This amendment was brought about by virtue of s 12 of the Amendment Act.
282 This amendment to s 40 has been brought about by virtue of s 10 of the Amendment Act.
283 s 71A. This amendment was brought about by virtue of s 22 of the Amendment Act.
284 s 82. This amendment was brought about by virtue of s 25 of the Amendment Act. Prior to the amendment only a court could make such a determination.
285 s 86(10)(b). This amendment was brought about by virtue of s 26 of the Amendment Act.
286 s 89(5). This amendment was brought about by virtue of s 27 of the Amendment Act.
287 s 134A. This amendment was brought about by virtue of s 35 of the Amendment Act.

CHAPTER 6

CONCLUDING REMARKS

The Act has been severely criticised for its lack of clarity and abundance of confusion which have led to divergent judicial views on a number of important new concepts introduced by the Act.

The courts, ranging from the different divisions of the high court through the supreme court of appeal and up to the constitutional court have had its hands full with interpreting and applying the provisions of the Act. At the forefront of much of this controversy were more often than not the provisions of section 129.

Central to this dissertation are questions pertaining to the reinstatement of credit agreements. What beckoned was the question how and when a credit agreement is reinstated. I hope that, after a journey through the most apposite judgments on the issue, a practical and helpful answer was provided herein, namely that a consumer wishing to reinstate a credit agreement must make payment to the credit provider of the arrear instalments together with the default charges and enforcement costs which the credit provider is claiming at the time of reinstatement. This the consumer needs to do before the credit agreement is cancelled. In the event of foreclosure the consumer can exercise this extraordinary right at any stage before the immovable property which has been sold in execution is transferred into the name of the purchaser. (This is the position in the Gauteng local and Western Cape divisions of the high court.)

The legislature has made an attempt to remedy the poor drafting of the Act in certain respects by means of the Amendment Act. In this regard it is submitted that it has failed to do so successfully in respect of section 129(3) and (4). The amendment to section 129 by the insertion of subgraphs (5), (6) and (7) should however go a long way to clear up uncertainty regarding the delivery of the infamous section 129 notice.

In conclusion, the purposes of the Act are laudable, the interpretation thereof remains a challenge and the practical effect of it on credit providers and consumers has been and remains to be immense. As mentioned above, I hope that this dissertation goes

at least some distance in clarifying an aspect of section 129, to wit reinstatement or revival of credit agreements in terms of the Act.

SAMEVATTING

HERINSTELLING VAN 'N KREDIETOOREENKOMS IN TERME VAN DIE NASIONALE KREDIETWET

Die Kredietwet is erg gekritiseer vanweë die wet se onduidelikheid wat aanleiding gegee het tot uiteenlopende gewysdes. Die bepalings van artikel 129 het gereeld voor die verskillende howe gedien en die konsep van herinstelling van krediet-ooreenkomste was voorop. Vrae rakende hoe en wanneer 'n kredietooreenkoms heringestel word is beantwoord aan die hand van die mees relevante gewysdes. Voorts word 'n paar onlangse en interessante wysigings tot die wet bespreek.

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