

**EINSTATEMENT OF A MORTGAGE
AGREEMENT IN RESPECT OF RESIDENTIAL
PROPERTY – A DISCUSSION OF THE JUDGMENT
IN *NKATA V FIRST RAND BANK LTD* AND ITS
IMPLICATIONS**

by

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DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and has not been previously submitted in its entirety or in part at any University for a degree.

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ABSTRACT

There is a lack of clarity in subsections 129(3) and (4) of the National Credit Act 34 of 2005 (the NCA) dealing with reinstatement of a credit agreement. These provisions state that a credit agreement can be reinstated if certain conditions are complied with. Reinstatement of a credit agreement is an important remedy for consumers who have fallen into default and who are willing to pay the arrears and the credit provider's costs and charges that were incurred as a result of the default. This remedy is essential to mortgagors, who may be rendered homeless if their homes were to be sold in execution. However, it has been evident from the judicial disagreement in *Nkata v First Rand Bank Ltd* 2016 (4) SA 257 (CC) that there are difficulties with interpreting subsections 129(3) and (4) of the NCA. The legislature amended section 129(3) of the NCA by the enactment of section 32 of National Credit Amendment Act 19 of 2014 ('Amendment Act') in an attempt to rectify these problems. This dissertation will discuss the interpretation of these subsections applied by the Constitutional Court and its implications. This paper will also discuss Rule 46 of the Uniform Rules of Court which has recently been amended by the insertion of Rule 46A. This rule requires the court to consider alternative means, ie other than execution against a primary residence, which resulted in some High Court Divisions amending their practice manuals and directives. For instance, the South Gauteng Local Division did so. Reinstatement may be considered as an alternative to execution; however the ambiguity and the failure of the provision to stipulate a logical and consistent procedure for reinstatement creates uncertainty. Therefore, in view of the lacuna revealed it is recommended that a further amendment to the NCA is desirable which will be precise, coherent and adhere to the objectives of the Act.

Key terms: credit agreement, reinstatement, remedy, arrears, mortgaged bond, mortgagee and mortgagor.

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Chapter One: Introduction

1. Introduction

In a society where there is continuous credit granting there is a need for some protection for mortgagors¹ who find themselves in a position of being unable to pay their debts and where forced sale of their homes may render them homeless.² Such protection needs to be certain and must balance both the social and economic welfare of all South Africans. This dissertation will focus on the protection provided by the National Credit Act³ in the form of reinstatement of a credit agreement. The reinstatement of a credit agreement is a remedy that protects the debtor who has fallen into default and who is willing and able to pay the arrears and the credit provider's costs and charges.⁴ This remedy is important for the protection of mortgaged⁵ residential property, especially since Rule 46A of the Uniform Rules of Court requires the court to consider any alternative means, other than execution of primary residence, by which the obligation may be satisfied.⁶ The implications of *Nkata v First Rand Bank*,⁷ the leading case in relation to reinstatement of a home mortgage credit agreement will be analysed and discussed in an endeavour to ascertain if there is any need for further amendment of the NCA to address the shortcomings of the remedy of reinstatement of a credit agreement.

¹ The terms 'mortgagor', 'debtor', 'homeowner' and 'consumer' are used interchangeably.

² The court, in *Absa Bank Limited v Mokebe and related matters (Investec Bank Limited and others as amici curiae)* 2018 JOL 40390 (GJ) par 1, recognised the significance of a mortgage bond by stating that it is an important socio-economic tool, which enables individuals to acquire a home as most citizens are unable to afford to pay the cash price to acquire immovable property.

³ Act 34 of 2005; hereafter referred to as the 'NCA'. 'Section 3 of the NCA states that the purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers'.

⁴ 'Default administration charge means a charge that may be imposed by a credit provider to cover administration costs incurred as a result of a consumer defaulting' (see section 1 of the NCA). Section 101 of the NCA provides a list of amounts that a credit provider may claim from the consumer in respect of an obligation under a credit agreement.

⁵ A mortgage bond was defined in *Standard Bank v Saunderson and Others* 2006 (2) SA 264 (SCA) par 2 as 'an agreement between a borrower and a lender, binding upon third parties once it is registered against the title deed of the property, that upon default, the lender will be entitled to sell the property in order to satisfy the outstanding debt'. 'Mortgage agreement' means a credit agreement that is secured by a pledge of immovable property (see section 1 of the NCA).

⁶ Uniform Rules of Court; *Absa Bank Limited v Njolomba* 2018 JOL 39713 (GJ) par 9. This is in line with the Constitutional Court's judgment in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) par 59, where it was stated that the sale in execution of a residential property should not be permitted where there are other reasonable ways in which the debt can be satisfied.

⁷ *Nkata v First Rand Bank* 2016 (4) SA 257 (CC); hereafter referred to as '*Nkata*'.

In *Jaftha v Schoeman; Van Rooyen v Stoltz*⁸ and *Gundwana v Steko*,⁹ the Constitutional Court recognised that in every forced sale of a residential property the right to have access to adequate housing is potentially infringed. This is regardless of whether or not there is a mortgage bond registered against that property. In these two cases it was stated that the court will have to determine whether there has been an infringement of the right to housing based on the facts of each case.¹⁰ In *Jaftha*, the court established factors that must be taken into account in the exercise of judicial oversight when adjudicating on the forced sale of residential property.¹¹ One of the factors was whether there is any disproportionality between execution and the creditor's need to have the debt satisfied, including whether there are other ways in which recovery of the debt is feasible.¹² In this case the court ruled that only a court of law has the power to declare residential property specially executable. This stance was confirmed in *Gundwana* where the court introduced the requirement for judicial oversight in high court execution proceedings against residential property. It declared Rule 31(5)(a) of the Uniform Rules invalid to the extent that it allowed the Registrar to declare a person's primary residential property executable. Both decisions demonstrate a progressive protection of the right to have access to 'adequate housing' as the court will have to evaluate and weigh against the judgment debtor's interest in retaining the home, the creditor's¹³ interest to recover the debt. However Froneman J in *Gundwana* emphasised that:

It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be

⁸ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); hereafter referred to as '*Jaftha*', par 34.

⁹ *Gundwana v Steko* 2011 (3) SA 608 (CC), hereafter referred to as '*Gundwana*', par 52.

¹⁰ *Jaftha* (note 8 above) par 60; *Gundwana* (note 9 above) par 54.

¹¹ The court in *Jaftha* (note 8 above) par 56 provided the following factors to be taken into account: whether proper procedure has been complied with; whether there are other reasonable ways in which the debt can be paid; the size of the debt. 'If the requirements of the rules have been complied with and there is no other reasonable way by which the debt may be satisfied, an order authorising the sale-in-execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless'.

¹² *Jaftha* (note 8 above) par 59.

¹³ The term 'creditor', 'bank' and mortgagee' are used interchangeably.

avoided.¹⁴

It follows that in circumstances where there are no other means to recover the debt, execution will be permissible. Developments in the Uniform Rules dealing with the procedure for execution against primary residential property are in line with the protection of the right to have access to adequate housing as provided for by the Constitution. This is because both the magistrate's court's and the high court's execution procedures now require judicial oversight in matters concerning execution against a debtor's home. The Rules Board for Courts of Law has recently amended Uniform Rule 46 by Rule 46A. Also, Rule 43 of the Magistrates' Court Rules has been amended to be consistent with the Constitution and Constitutional Court judgments. This dissertation will focus only on Uniform Rule 46A, which will be discussed in Chapter 3. Rule 46A is applicable in all of the case law that will be discussed in this dissertation.

1.1 The constitutional 'right to housing' and limitation of the right

Section 39(2) of the Constitution places an obligation on courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Mortgage foreclosure in respect of immovable property constituting the debtor's primary residence has a major impact on the right to have access to adequate housing provided for by section 26(1) of the Constitution.¹⁵ The concept of housing encompasses the right to shelter that provides a space to eat, sleep and to raise a family.¹⁶ The right to housing is a fundamental basic human right and it falls under the umbrella of socio-economic rights. The right to housing is specifically protected under section 26 of the Constitution which provides:

- (1) Everyone has a right to access to adequate housing;
- (2) The State must take reasonable legislative and other measures, within its available resources, to advance the progressive realisation of this right;
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.

¹⁴ *Gundwana* (note 9 above) par 54.

¹⁵ *Absa Bank Limited v Mokebe and related matters (Investec Bank Limited and others as amici curiae)* 2018 JOL 40390 (GJ) par 46.

¹⁶ The court in *Jaftha* (note 8 above) par 27 emphasised the significance of the right to housing when it pointed out that the right to have access to housing is linked to dignity and self-worth.

No legislation may permit arbitrary evictions.¹⁷

The wording of section 26 clearly indicates the existence of a positive duty and a negative duty.¹⁸ A positive duty rests on the State to put measures in place to ensure the progressive realisation of the right to have access to adequate housing.¹⁹ There is also a negative duty that is imposed on all persons not to interfere with an individual's existing right to housing.²⁰ As a result, in an instance where a mortgagee causes the mortgaged property constituting the debtor's residential property to be sold in satisfaction of the debt, this amounts to a limitation of the right to have access to adequate housing despite the fact that there is a mortgage passed over that immovable property.²¹

In litigation where an individual's right to housing is in dispute, the plaintiff must show that he is a beneficiary of the right to housing and that such right has been interfered with.²² On the other hand, the defendant will have to prove that such violation is justifiable in terms of section 36 of the Constitution. This stance was adopted in the case of *Standard Bank v Saunderson*,²³ where the Supreme Court of Appeal pointed out that the creditor needs to inform the debtor of his right, as provided for under section 26(1) of the Constitution, and to advise such debtor to show whether the right has been violated. In an instance where there is an infringement to the right, the creditor may only justify such infringement by showing that execution would be proportional.²⁴

¹⁷ Section 26 of the Constitution of the Republic of South Africa, 1996, hereafter referred to as the 'Constitution'.

¹⁸ R Brits & AJ Van Der Walt 'Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the NCA: Part 1' (2014) 2 *TSAR*, 291.

¹⁹ *Ibid.*

²⁰ Section 26(3) of the Constitution; *Jaftha* (note 8 above) par 34.

²¹ Section 8 of the Constitution: Application

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court— (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

²² *S v Makwanyane* 1995 (3) SA 391 (CC) par 100.

²³ *Standard Bank v Saunderson* 2006 (2) SA 382 (SCA).

²⁴ *Ibid.*

1.2 Limitation of the right to housing under section 36

It must be noted that section 26 of the Constitution does not indicate that one's home may never be sold in execution in circumstances where the debtor fails to pay his or her mortgage bond instalments as per the credit agreement.²⁵ This is because there is a bond registered over the immovable property and as a result execution may be justifiable in terms of section 36 of the Constitution. The relationship between the mortgagor and the mortgagee is that the mortgagor has a duty to pay back the loan in instalments, whilst the mortgagor retains ownership of mortgaged property, until the home loan is paid in full. In circumstances where the mortgagor defaults, the mortgagee would be entitled to take enforcement measures which may lead to a sale in execution of the mortgaged residential property.²⁶

In the case of *Standard Bank v Bekker*²⁷ it was stated that 'in the absence of unusual circumstances, or an abuse of process, execution against hypothecated property which is the home of the mortgagor is prima facie constitutionally justifiable, even if its effect would be to infringe the judgment debtor's section 26 right'. This dissertation will focus on the negative aspect of the infringement of the right to housing, which arises in a situation where a mortgaged residential property is sold in execution with the purpose of obtaining satisfaction of the debt.

2. Applicable law: established precedent and legislative provisions

2.1 *Jaftha v Schoeman* and *Gundwana v Steko Development CC*

Jaftha and in *Gundwana* are the leading cases regarding execution against immovable property that constitutes the home of a debtor. In these two cases the Constitutional Court set binding precedent regarding the forced sale of a debtor's home and noted that such execution must be in line with constitutional principles. The Court also came up with the notion that forced sale of a debtor's home will be permitted only if such execution is justifiable under section 36 of the Constitution. In order to assess whether execution will be justifiable under the limitation clause, the court must apply the 'proportionality test'.²⁸

²⁵ *Gundwana* (note 9 above) par 54.

²⁶ See section 8(3) and section 130 of the NCA.

²⁷ *Standard Bank v Bekker* 2011 (6) SA 111 (WCC) par 17.

²⁸ *Gundwana* (note 9 above) par 54.

In this dissertation, these two cases are used to provide a background to the development of the requirement of judicial oversight in cases involving forced sale of a home. Although this study does not scrutinise the procedure of forced sale, but the reinstatement of a credit agreement, the main focus is the protection of the debtor's home.

2.2 *Nkata v Firstrand Bank Limited*

The issue in *Nkata* was when a credit agreement will be regarded as being reinstated in terms of section 129(3) of the NCA. The case commenced in the Western Cape High Court²⁹ where Rogers J *mero motu* raised the question of whether the credit agreement had in fact been reinstated. The learned judge found that the credit agreement had indeed been reinstated. The matter went on appeal to the Supreme Court of Appeal,³⁰ which reversed the decision of the court *a quo*. Ms *Nkata* took the matter to the Constitutional Court.³¹ The majority of the Constitutional Court overturned the decision of the SCA and concurred with Rogers J, although for different reasons.

As in *Jaftha* and *Gundwana*, the court imposed the constitutionally-entrenched notion of fairness and equality to the interpretation of subsections 129(3) and (4) of the NCA. Also, the court emphasised the need to take into account the housing clause when one interprets subsections 129(3) and (4) of the NCA. This dissertation concerns the court's interpretation of subsections 129(3) and (4) of the NCA in *Nkata*.

2.3 National Credit Act 34 of 2005

The National Credit Act, which came into operation on 01 June 2007, regulates the relationship between consumer and credit provider. The NCA is very important because of its impact on the credit market, consumers and the South African economy as a whole. The NCA only applies to credit agreements as defined, except those excluded under section 4 of the Act. The NCA specifically states that its purpose is, amongst others, to regulate and improve the credit marketplace and to correct the imbalances of the past. This NCA creates a mandatory procedure to be complied with by both the

²⁹ *Nkata v FirstRand Bank Ltd and others* 2014 (2) SA 412 (WCC).

³⁰ *FirstRand Bank v Nkata* 2015 (4) SA 417 (SCA).

³¹ *Nkata* (note 7 above).

credit provider and the consumer. In cases where there is a dispute between the parties, the NCA provides a cordial way to resolve it through compulsory notice, time frames and procedure.³² The NCA encourages resolution of disputes between the parties without court intervention. The advantage of this is that it expedites the entire process and it is cheaper.³³

For the purposes of this dissertation, the NCA is crucially important as the dissertation as a whole is concerned about the remedy provided for in terms of the NCA, namely the reinstatement of a credit agreement. It is important to indicate that reinstatement of a credit agreement can be triggered in a credit agreement concerning movable property as well as in a credit agreement concerning immovable property. However, this dissertation is only concerned with reinstatement of a mortgage credit agreement in respect of residential immovable property.

3. Objective and research questions

The purpose of this dissertation is to critically evaluate the requirements that need to be satisfied in order for a credit agreement to be reinstated and whether subsection 129(3) and (4) of the NCA afford adequate protection for a consumer's right to have access to adequate housing. The research questions are:

- 1 What does the Constitution of the Republic of South Africa, 1996 state about the right to adequate housing? How may such a right be limited in terms of the Constitution?
- 2 What are the practice directives of South Gauteng and KwaZulu-Natal High Court divisions in relation to forced sale of residential property?
- 3 Does the National Credit Act provide any protection for a debtor's residential home? If so, how?
 - (a) What are the requirements that a debtor needs to satisfy for reinstatement to be triggered?
 - (b) Who has a right to reinstate a credit agreement?
 - (c) What amounts to 'reasonable costs'?
 - (d) What are 'all amounts overdue'?

³² Section 129(1) of the NCA.

³³ Section 86 of the NCA.

- 4 How does the Constitutional Court's decision in *Nkata* contribute towards the protection of the right to adequate housing?
 - (a) What is the courts' approach to execution against a debtor's home following the decision of *Nkata*?
 - (b) What are problematic aspects of the interpretation of subsections 129(3) and (4) as employed in the *Nkata* decision?
- 5 What are the material differences between the wording of subsections 129(3) and (4) pre- and post- the NCA amendment in 2014?

4. Methodology

The research for this paper is desktop-based. It is a conceptual analysis. I will be required to look precisely at the Constitution, legislation, cases, textbooks, journal articles and reports.

5. Structure of the dissertation

This chapter provides an introduction to the dissertation, canvassing the background to the developments regarding execution against a residential property.

Chapter Two will deal with subsections 129(3) and (4) of the NCA (short-comings in the amendments to the NCA and recommendations as to how these may be addressed will be exposed and expressed in Chapter Four). Discussion of the Constitutional Court's decision in *Nkata* will reveal that the majority and minority judgments adopted different ways to apply and interpret subsections 129(3) and (4) of the NCA. Lastly, I will make comments on the majority decision and its implications.

The first part of Chapter Three will consider the relevant sections of the Practice Directives applicable in KwaZulu-Natal and South Gauteng High Court divisions, respectively. The second part will discuss the case law following the *Nkata* judgment.

Lastly, Chapter Four will summarise the salient points in the three preceding chapters of the dissertation, including particularly the implications of *Nkata* judgment. Thereafter I will offer my own suggestions and lastly note my conclusions and recommendations.

Chapter Two: Subsections 129(3) and (4) of the NCA and the *Nkata* judgment

1. Introduction

This chapter deals with reinstatement of a credit agreement which is a remedy for consumers who have fallen into default and who are willing and able to pay their arrears up to date and to compensate the credit provider for certain costs and charges.³⁴ The first part of this chapter will briefly discuss the remedy of reinstatement as provided for by subsections 129(3) and (4) of the NCA. Subsections 129(3) and (4) of the NCA, prior to and post their amendment in 2014 will be discussed to provide an overview of the concept of reinstatement and the requirements that the consumer has to meet for a credit agreement to be reinstated. The second part will discuss the leading judgment regarding reinstatement of a credit agreement, *Nkata v FirstRand Bank*.³⁵ The High Court's and SCA's judgment will be discussed, after which the Constitutional Court's judgments will be analysed and the implications of the Constitutional Court's decision will be considered.

2. Subsections 129(3) and (4) of the NCA

Before discussing the reinstatement of a credit agreement it is important to indicate how it fits into the enforcement procedure. When a home mortgage loan is granted, it imposes obligations on both the mortgagor and the mortgagee.³⁶ The mortgagor is required to pay back the loan in the agreed instalments, together with interest.³⁷ In a situation where a mortgagor fails to pay what is due in accordance with the terms of the credit agreement, the acceleration clause will be triggered, which renders the full amount outstanding due and payable to the mortgagee. The NCA encourages dispute resolution between the mortgagor and the mortgagee without court intervention.³⁸ To this end, the NCA provides for a procedural process to be followed in a circumstance

³⁴ R Brits, H Coetzee & C Van Heerden 'Reinstatement of credit agreements in terms of the National Credit Act 34 of 2005: *Quo vadis?* (2017) 80 *THRHR*, 177, 196, the authors stated that reinstatement of a credit agreement should be relevant at the stage where the credit provider has instituted legal proceedings up until the Court grants the judgment. The reason being that at this stage the credit agreement has not been cancelled or the acceleration clause has been invoked, and payment of the arrears and costs would reverse the acceleration.

³⁵ *Nkata* (note 7 above).

³⁶ Section 8(3) of the NCA.

³⁷ Section 8(3)(a)(ii)(aa) of the NCA.

³⁸ Section 3(h) of the NCA.

where the consumer is in default. It obliges a credit provider to deliver a notice in terms of section 129(1) to the consumer, informing the consumer of the default and inviting the consumer to remedy the default or to follow the suggestions stipulated.³⁹ In response, the consumer will have to resolve the dispute by paying his or her arrears. However, sometimes the consumer will not respond to the section 129(1) notice and the credit provider will commence enforcement proceedings. The credit provider will commence action by serving the summons and if the consumer fails to defend the matter, a request for default judgment will be brought before the court.⁴⁰ If the order is granted, a writ will be issued and the property may be sold in execution.⁴¹

2.1 Subsections 129(3) and (4) of the NCA before their amendment by the NCAA

Section 129(3) of the NCA used to state:⁴²

Subject to subsection (4), a consumer may

- a) at any time before the credit provider has cancelled the agreement reinstate 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 reinstatement; 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(3) of the NCA had to be read together with section 129(4), which qualified it. Section 129(4) of the NCA stated:

A consumer may not reinstate a credit agreement after—

- (a) the sale of any property pursuant to—
 - (i) an attachment order; or
 - (ii) surrender of property in terms of section 127;
- (b) the execution of any other court order enforcing that agreement; or

³⁹ Section 129(1)(a) of the NCA. In *Rossouw v Firstrand Bank Ltd* [2011] 2 All SA 56 (SCA) the court considered the meaning of 'delivery' in sections 129 and 130 of the NCA, and held that dispatch by registered post was sufficient for a section 129(1) notice to have been delivered. However, in *Sebola and another v Standard Bank of South Africa Ltd and Another (Socio-Economic Rights Institute of South Africa and others as amici curiae)* 2012 (8) BCLR 785 (CC), the Constitutional Court held that proof of receipt at the post office to which the notice was dispatched is required.

⁴⁰ Rule 31(2)(a) and (5) of the Uniform Rules of Court.

⁴¹ Rule 46A of the Uniform Rules of Court.

⁴² These subsections have been amended by section 32 of the National Credit Agreement Amendment Act which came into operation in March 2015.

- (c) the termination thereof in accordance with section 123.

The reinstatement of a credit agreement contained two phases.⁴³ The first phase was reflected in section 129(3) which confirmed the consumer's right to reinstate the credit agreement and stated the prerequisites for reinstatement to occur.⁴⁴ The second phase was reflected in section 129(4), which provided for instances where the reinstatement of the credit agreement would be impossible. Otto criticised the ambiguity of the subsection when he stated: 'It escapes my mind how, first, an agreement which has not been cancelled can be reinstated...'⁴⁵ As Otto stated, it is without doubt that section 129(3) dealt with a situation where the credit agreement had not been cancelled but the credit provider had commenced the enforcement process. As a result, before the cancellation of the credit agreement the consumer could still reinstate it by paying all outstanding amounts and overturn the creditor's decision to invoke the acceleration clause. In an endeavour to rectify the above inconsistency the legislature amended the subsection. The amendments are discussed below.

2.2 Amendment of subsections 129 (3) and (4) by section 32(a) and (b) of the NCAA
In March 2015, the National Credit Amendment Act⁴⁶ came into operation. Section 32(a) of the NCAA, which amended section 129(3) of the NCA and section 32(b) amended section 129(4) of the NCA. Section 32(a) read as follows:

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

Section 32(b) of the NCAA read as follows:

A credit provider may not re-instate or revive a credit agreement after:

- (a) the sale of any property pursuant to—
 - (i) an attachment order; or
 - (ii) surrender of property in terms of section 127;

⁴³ R Brits 'The reinstatement of a credit agreement: Remarks in response to the 2014 amendment of section 129(3) - (4) of the National Credit Act' (2015) *De Jure*, 79.

⁴⁴ *Ibid.*

⁴⁵ Otto *The National Credit Act Explained* 2ed (2010) 117.

⁴⁶ National Credit Amendment Act 19 of 2014.

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

In terms of the amended subsection, a consumer who has fallen into financial difficulty is still afforded an opportunity to remedy his default by paying the credit provider all amounts that are overdue. As in the old section, a consumer is required also to pay the credit provider's administration charges together with the reasonable costs of enforcing the agreement.

2.3 The pre- and post-amendment subsections compared

2.3.1 Deletion of phrase 'reinstate' and replacement of it with 'revive'

The amended section 129(3) introduced a new term, 'revive'. In terms of the new provisions, the consumer no longer reinstates, but revives, a credit agreement. Steyn and Sharrock correctly submit that the use of the word 'revive' is illogical as the credit agreement was never 'dead'.⁴⁷ They argue that this is because the section deals with a credit agreement that has not been cancelled and if it has not been cancelled, it cannot be revived.⁴⁸

2.3.2 Removal of subsection 129(3)(b)

Section 129(3)(b), which permitted the consumer to resume possession of the property after the credit agreement had been reinstated, has been deleted in its entirety. It is not clear what the legislature intended by the removal of paragraph (b) in its amended form. Brits is of the view that such deletion can be seen as a good thing to clarify the inconsistency that Otto pointed out, as mentioned above.⁴⁹ On the other hand, this can be viewed as the legislature's intention to indicate that even if the consumer remedies the default it will not be entitled to resume possession of property that has been repossessed.⁵⁰ However, this subsection is only applicable to movable property.

2.3.3 Credit provider, and not the consumer, revives a credit agreement

The amended section 129(4) replaced the word 'consumer' with the phrase 'credit provider'. This means that a credit provider, not the consumer, is now granted the

⁴⁷ L Steyn & R Sharrock 'Remedying mortgage default: *Nkata v FirstRand Bank*' (2017) *SALJ*, 498.

⁴⁸ *Ibid.*

⁴⁹ R Brits (note 43 above) 87.

⁵⁰ *Ibid.*

power to revive a credit agreement. The conditions that prevent reinstatement occurring remain unchanged.⁵¹ It is submitted that the legislature's substitution of the word 'consumer' with 'credit provider' is illogical.⁵² This is because it is the consumer who requires the credit agreement to be reinstated or revived and not the credit provider. This might have an adverse interpretation which may be contrary to the protection afforded by the section. As Brits pointed out, the legislature might have wanted to give a credit provider the discretion to decide whether to accept the consumer's payment of the arrear amount, and thereafter reinstate the credit agreement.⁵³

2.4 Comments on the amended subsections 129(3) and (4) of the NCA

The NCA provides an important remedy to a mortgagor who has fallen into default. This remedy ensures advancement of the constitutional right to adequate housing. It is submitted that reinstatement balances a mortgagor's right to have access to adequate housing and the mortgagee's interest in collection of debts as a mortgagee is put back in the position it was before the mortgagor defaulted with respect to the payment of instalments. This is because, for the mortgagor to reinstate a credit agreement, he or she must also pay the credit provider's permitted default charges and legal costs.

While the remedy of reinstatement of a credit agreement is laudable, the ambiguities in subsections 129(3) and (4) render problematic their proper interpretation. Also, from a practical perspective, there is no set procedure for reinstatement of a credit agreement. It is unfortunate that the legislature has been afforded a chance to remove such ambiguity and hence provide a clear substantive and procedural requirement for reinstatement of a credit agreement, but it failed to do so.⁵⁴ It is submitted that the amended subsections 129(3) and (4) pose even more problems and do not provide solutions to the lacunae and ambiguities that existed before amendment. Steyn and Sharrock observe that, as was the position before, the new section does not provide substantive and procedural prerequisites for the revival of a credit agreement other than

⁵¹ Section 129 (4)(a)-(c) of the amended NCA.

⁵² In *Mokebe* (note 15 above) par 49 it was stated that replacement of a consumer with a credit provider is more perplexing. The court held that the right to reinstate or revive remains with the consumer.

⁵³ R Brits (note 43 above) 88.

⁵⁴ Ibid 89-90, Brits stated that 'it is regrettable that the legislature leaves one with little choice but to disregard the actual wording of the NCA on this point, because the alternative would simply be too nonsensical. The bizarre reality is that one is compelled to interpret section 129(4) as if it has not been amended at all'.

to pay the overdue amount together with the credit provider's administration charges and reasonable costs of enforcing the credit agreement.⁵⁵ Brits proposes that the solution is to disregard the amended section 129(4) and read it as if it still provides for situations in which reinstatement or revival of a credit agreement will not be permitted.⁵⁶ It is submitted that the legislature's failure to stipulate a precise procedure to be followed for a credit agreement to be reinstated poses the same problems relating to interpretation of the subsections dealing with the remedy of reinstatement.⁵⁷

The next section discusses the case of *Nkata v FirstRand Bank* in which the ambiguity inherent in subsections 129(3) and (4) of the NCA was exposed.

3. *Nkata v FirstRand Bank*

3.1 The High Court's⁵⁸ judgment

3.1.1 The facts

The applicant, Ms Nkata, had purchased an undeveloped property in Durbanville in March 2005. Ms Nkata financed the acquisition of the property through two mortgage loans from First Rand Bank. The first bond was registered in June 2005 and the second bond in May 2006. Ms Nkata built a house on the property which became her family home in 2007. In the first bond, Ms Nkata chose the address of the mortgaged property as her *domicilium citandi et executandi* and in the second mortgage bond she chose an address in Rondebosch. During 2010 Ms Nkata fell behind with her mortgage bond payments. This led to the bank making numerous phone calls to Ms Nkata. On 1 June 2010, First Rand Bank issued a section 129(1) notice. There was no response and, as a result, summons was issued. Ms Nkata failed to defend the matter. On September 2010 a default judgment was granted by the Registrar permitting the sheriff to attach and sell the property in execution. Ms Nkata received neither the section 129(1) notice nor the summons. She only became aware of the judgment when FirstRand Bank's attorneys informed her by telephone that her house was to be sold in execution.

⁵⁵ L Steyn & R Sharrock (note 47 above) 498.

⁵⁶ R Brits (note 34 above) 89.

⁵⁷ Steyn and Sharrock (note 47 above) 499.

⁵⁸ *Nkata* (note 29 above).

Ms Nkata brought an application to rescind the default judgment. First Rand Bank opposed it. The matter was settled. Ms Nkata and FirstRand Bank agreed that the sale in execution of the property would be cancelled and that Ms Nkata would pay all amounts in arrears together with wasted costs, which constituted the cancellation costs and costs of the application. In March 2011 Ms Nkata paid a sum of R87 500.00 and she continued paying her monthly instalments. After paying her arrears she fell behind with her payments. However, she brought her account up to date in March 2012, and, again, in May 2012. In April 2012 she asked First Rand Bank to agree to rescission of the default judgment, but the bank refused. Also, Ms Nkata informed the bank that she was having difficulty paying her instalments, but the bank did not assist her on basis that the matter was still under litigation. In or around February 2013, she again fell into arrears and First Rand Bank sold the property in execution.

3.1.2 Applicant's Contentions

In Ms Nkata's founding affidavit it was argued that: (a) the summons were not properly served by the sheriff; (b) First Rand Bank failed to comply with section 129(1) of the NCA as the notice was served at the wrong address; (c) the summons was silent about section 26(3) of the Constitution; and, lastly, (d) the summons falsely confirmed compliance with section 129(1) of the NCA.

3.1.3 Judgment

Rogers J dismissed all of the applicant's arguments except for the second one. The learned Judge found that the bank failed to comply with section 129(1) of the NCA.⁵⁹ This was because the notices were posted to the wrong addresses. As a result the court found that the non-compliance with section 129(1) of the NCA was a *bona fide* defence to rescind the default judgment.⁶⁰ The court held that the bank's failure to comply with section 129 resulted in summons being prematurely issued. However, Rogers J held that the default judgment could not be rescinded in the circumstances due to unreasonable delay on the part of Ms Nkata to bring an application for rescission of the default judgment.⁶¹ However, that was not the end of the matter: Rogers J raised the question

⁵⁹ *Nkata* (note 29 above) par 20.

⁶⁰ *Ibid* par 21.

⁶¹ *Ibid* par 28.

whether Ms Nkata reinstated the credit agreement in terms of section 129(3) when she paid up her arrears in March 2011 and March 2012.⁶²

Rogers J first considered whether, for the purposes of section 129(3)(a), the amount referred to is the full outstanding amount of the mortgage bond debt or only the arrear instalments.⁶³ The learned Judge recognised that the mortgage bond in question contained an acceleration clause.⁶⁴ He held that the amounts due under section 129(3)(a) refer to arrear instalments and not the accelerated debt. Rogers J pointed out that section 129(3) would be rendered irrelevant if it referred to the full outstanding debt and further that reinstatement allows the consumer an opportunity to be put back in the position it was before it defaulted in respect of payment of instalments.⁶⁵

A credit agreement can only be reinstated if it has not been cancelled. It was argued on behalf of Ms Nkata that the credit agreement had not been cancelled. Rogers J held that the credit agreement in question had not been cancelled, but that, on the contrary, the bank sought to enforce the performance of the agreement.⁶⁶ The learned Judge provided two instances in which a credit agreement may be cancelled, the first being where the credit provider cancels it in consequence of the consumer being in breach and the credit provider is mandated to follow the route provided for under the NCA.⁶⁷ The second instance is where the consumer defaults and the credit provider seek specific performance. The credit agreement will be cancelled in a situation where the consumer makes specific performance by paying the amount of the accelerated indebtedness. In that case the credit agreement is terminated by the consumer's performance of the obligation. Rogers J found that invocation of the acceleration clause does not constitute a cancellation of a credit agreement.⁶⁸

Section 129(3) provides that, for a credit agreement to be reinstated, the consumer must also pay the credit provider's default charges and reasonable costs of enforcing the agreement. It was common cause that Ms Nkata's account was debited with an amount

⁶² Ibid par 32.

⁶³ Ibid par 36.

⁶⁴ Ibid.

⁶⁵ Ibid par 37.

⁶⁶ Ibid par 39.

⁶⁷ Ibid.

⁶⁸ Ibid.

of R9 050.00 which was in respect of issuing summons, obtaining a default judgment, a writ, attachment as well arranging the first sale in execution and the sheriff's fees.⁶⁹ The learned Judge found that the legal costs were not due and payable because the costs debited to Nkata's account were not agreed upon by the parties nor were they taxed. It was held that it is the credit provider who must take steps to recover enforcement costs from the consumer.⁷⁰ He found that in the present case the bank failed to invite Nkata to pay the costs by informing her of those costs.⁷¹ The court stated that the conduct of the bank in debiting Ms Nkata's account with legal costs meant that it accepted receiving the costs in instalments.⁷² Also by debiting the costs instead of demanding them separately, this meant that the costs lost their separate character as those of enforcing the agreement.⁷³

Rogers J questioned whether section 129(4) of the NCA prevented Ms Nkata from reinstating her credit agreement.⁷⁴ He found that Ms Nkata was not prevented from doing so as the consumer does not need to know or intend to reinstate a credit agreement. This is because reinstatement of a credit agreement happens by operation of law. The court ruled that if the consumer makes payment as envisaged by section 129(3), the credit agreement is reinstated by operation of law.

3.2 The Supreme Court of Appeal's judgment

The Supreme Court of Appeal upheld an appeal by the bank.⁷⁵ It found that for reinstatement of a credit agreement to occur formalities are required to be complied with. This is because reinstatement amends the credit agreement. The SCA referred to section 116 of the NCA which requires any amendment to or change in the credit agreement to be in writing and signed by both parties, failing which the amendment or change will be void. The court found that, in the present case, the parties did not comply with such formalities and it followed that such amendment was void. It also found that, by the time Ms Nkata had paid the arrears, the bank had already executed against the mortgaged property.

⁶⁹ Ibid par 41.

⁷⁰ Ibid par 42.

⁷¹ Ibid.

⁷² Ibid par 44.

⁷³ Ibid.

⁷⁴ Ibid par 45.

⁷⁵ *Nkata* (note 30 above).

3.3 The Constitutional Court's judgment

3.3.1 Majority Judgment

The majority⁷⁶ of the Constitutional Court overturned the SCA's decision and upheld Rogers J's findings, although for different reasons. The Constitutional Court interpreted what may be called 'the key elements' of reinstating a credit agreement. They are discussed as follows.

3.3.1.1 Co-operation between the consumer and the credit provider

The credit provider in this case was of the view that section 129(3) requires some sort of collaboration between the consumer and the credit provider in that the consumer has to communicate its intention to reinstate the credit agreement.⁷⁷ The bank argued that, in some instances, the consumer pays the arrears, not with the intention to reinstate a credit agreement, but for other reasons, which might be that the consumer cannot afford the upkeep and cost related to keeping the property.⁷⁸ In such case, the consumer pays in order to fulfil its obligations under the credit agreement until the property is sold.⁷⁹ On the contrary, the *amicus curiae*⁸⁰ argued that reinstatement of a credit agreement takes place by operation of law.⁸¹ This means that the consumer need not communicate its intention to the credit provider, but need only comply with the requirements stipulated by section 129(3) and, thereafter, reinstatement will automatically take place. Writing for the majority, Moseneke DJP pointed out that subsections 129(3) and (4) of the NCA stipulate what the consumer may or may not do.⁸² Consequently, it is the consumer who has the power to reinstate a credit agreement. In doing so, the court stated that the consumer need not convey its intention to reinstate a credit agreement, seek consent or perhaps to make any cooperation with the credit provider.⁸³ The court confirmed that the reinstatement of a credit agreement occurs by operation of law. Meaning that the reinstatement of the credit agreement will automatically take place in

⁷⁶ The majority judgment was written by Moseneke DJP and Jafta, Khampepe, Madlanga, Nkabinde, Van der Westhuizen and Zondo JJ concurred.

⁷⁷ *Nkata* (note 7) par 102.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Socio-Economic Rights Institute of South Africa.

⁸¹ *Ibid* par 103.

⁸² *Ibid* par 104.

⁸³ *Ibid* par 105.

an instance where the consumer pays arrears, permitted charges and legal fees.⁸⁴ However, the consumer may only reinstate a credit agreement if it has not been cancelled by the credit provider

3.3.1.2 'All amounts due'

The court held that there is a positive duty placed by section 129(3) of the NCA upon the consumer to pay 'all amounts that are overdue' before the credit agreement can be reinstated.⁸⁵ The court recognised that the initial credit agreement had an acceleration clause, the effect of which was that the full amount owing became due and payable, and not just the arrears.⁸⁶ The question that the court had to answer was whether section 129(3) of the NCA required the consumer to pay the accelerated debt or only the arrear instalments. The court found that for the purpose of section 129(3), the consumer is only required to pay the arrear instalment and not the full accelerated debt. In arriving at that conclusion the court examined the purpose of the reinstatement mechanism which is to provide assistance to a consumer who has fallen into default and found that it would operate contrary to such purpose if the consumer were required to pay the full accelerated debt in order to reinstate the credit agreement.⁸⁷

3.3.1.3 Before the credit provider has cancelled the credit agreement

The court stated that reinstatement may be triggered only prior to cancellation by the credit provider. Similarly to Rogers J, the court held that enforcement of the acceleration clause does not amount to cancellation of a credit agreement.⁸⁸ The court confirmed Rogers J's findings that the credit provider can only cancel the credit agreement by invoking section 130 read with section 129. The court found that, in this case, the bank never complied with section 129 of the NCA. As a result, the credit agreement was never cancelled.⁸⁹

⁸⁴ Ibid.

⁸⁵ Ibid par 107.

⁸⁶ Ibid par 108.

⁸⁷ Ibid par 109.

⁸⁸ Ibid par 110.

⁸⁹ Ibid.

3.3.1.4 Reasonable costs of enforcing the agreement

One of the requirements to reinstate a credit agreement is that the consumer needs to pay the reasonable costs of enforcing the credit agreement. Such costs are made up of legal costs and disbursements.⁹⁰ The bank argued that Ms Nkata did not pay the legal costs as required by section 129(3) of the NCA to trigger reinstatement. The learned Judges arrived at the same conclusion as Rogers J had done, that the credit agreement was indeed reinstated, but on different bases. The first was that, since the bank failed to give notice of the nature and extent of the legal costs, the costs were not due and payable.⁹¹ Secondly, the bank failed to demand payment of the legal costs.⁹² Thirdly, the legal costs were not shown to be reasonable as they were never agreed upon with Ms Nkata nor were they taxed.⁹³ The learned Judges agreed with Rogers J's finding that a consumer cannot be expected to take proactive steps to find out the costs in order to reinstate the credit agreement. The majority found that it is the credit provider who should initiate the process of recovering enforcement costs and that only reasonable costs are recoverable.⁹⁴ The court pointed out that reinstatement of a credit agreement cannot be prevented in a case where the consumer pays only the amount in arrears, and not legal costs, because it had not been notified of reasonable costs, whether taxed or agreed. The court held that legal costs will be due and payable only when they are reasonable and the costs only become reasonable when it is agreed or taxed.

3.3.1.5 Execution – Section 129(4)

The bank contended that reinstatement could not have taken place as it was precluded by section 129(4)(a) of the NCA.⁹⁵ This subsection prevents reinstatement of a credit agreement after a sale of the property following an attachment order. As did Rogers J, the Constitutional Court concluded that reinstatement of a credit agreement is only prevented when the proceeds of the sale have been realised, because, in that instance, the reinstatement would be of no use to both the consumer and credit provider.⁹⁶

⁹⁰ Ibid par 111.

⁹¹ Ibid par 121.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid par 123.

⁹⁵ Ibid par 127.

⁹⁶ Ibid par 136.

3.3.2 Cameron J's minority judgment

Writing one of the minority judgments, Cameron J took a different approach from that of the majority of the Constitutional Court and of the High Court. Cameron J found in favour of the bank. He found that the High Court's approach was incorrect in that 'payment', for reinstatement to occur, means only payment of those costs which the credit provider requires the consumer to pay at that time. He accepted that the fact that the bank debited Ms Nkata's bond account meant that it was happy to add those costs to the capital amount. Nonetheless, such conduct did not necessarily mean that the bank waived its rights to recover legal costs, but it meant that the bank was happy to recover those costs at a later stage.⁹⁷ The result was that debiting the bond account did not constitute 'payment' under section 129(3). Referring to the decision of *Harrismith Board of Executors v Odendaal*,⁹⁸ Cameron J defined 'payment' as 'the satisfaction or performance of an obligation'.⁹⁹ Based on the above definition, he found that 'payment' does not mean the promise to pay later or adding to the existing debt. As a result, by debiting Ms Nkata's account the bank accepted that she could pay the legal costs later and not that she had paid or that she was not required to pay such legal costs.¹⁰⁰

Cameron J disagreed with Moseneke DJP's stance that the bank ought to have notified Ms Nkata of the legal costs and that its omission to do so resulted in them not being due and payable.¹⁰¹ On the contrary, he was of the view that since it is the consumer who desired reinstatement of the credit agreement the consumer must take proactive steps to ascertain the credit provider's enforcement costs.¹⁰² He reasoned that the NCA places the obligation, not on the credit provider, but on the consumer, to pay the legal costs.¹⁰³ In the circumstances, Ms Nkata did not even attempt to take steps to find out the legal costs¹⁰⁴ and the bank did not act in any way to frustrate or hinder the process of reinstatement.¹⁰⁵ Cameron J recognised that there are unsatisfactory results in permitting a consumer to reinstate credit agreement without paying legal fees. First, permitting the consumer to escape paying legal fees jeopardizes the balance the NCA

⁹⁷ Ibid par 51.

⁹⁸ 1923 AD 530 and 539.

⁹⁹ *Nkata* (note 7) par 49.

¹⁰⁰ Ibid.

¹⁰¹ Ibid par 54.

¹⁰² Ibid par 56.

¹⁰³ Ibid.

¹⁰⁴ Ibid par 57.

¹⁰⁵ Ibid par 60.

seeks to achieve.¹⁰⁶ Secondly, the NCA requires the consumer to pay enforcement costs in order to protect the credit provider who has already taken steps to enforce the credit agreement.¹⁰⁷ Regarding execution, Cameron J agreed with Rogers J that reinstatement is disallowed only once the proceeds of sale have been realised.

3.3.3 Nugent AJ's minority judgment

Similar to Cameron J, Nugent AJ found that Ms Nkata's appeal must be dismissed and that the finding of the SCA should be upheld. Nugent AJ concurred with the majority in that the consumer need not communicate its intention to reinstate a credit agreement as the reinstatement occurs by operation of law.¹⁰⁸ On the other hand, Nugent AJ was against the majority's finding that the consumer needs to pay the enforcement costs once they are demanded and taxed or agreed upon. Nugent JA found that there is nothing in the wording of section 129(3) of the NCA that indicates that sometimes a consumer will not be required to pay enforcement costs. The section requires payment of enforcement costs as a prerequisite to the reinstatement remedy. Since there is no demand for the overdue amount, there should be no demand for enforcement costs, as the same language is used. With regards to taxation, Nugent AJ held that if the legislature required taxation of costs, it would have specifically stated so.¹⁰⁹ Nugent AJ commented on the majority judgment that costs need to be demanded each time they are incurred.¹¹⁰ He was of the view that demanding costs each and every time they are incurred is impossible because costs are incurred at various stages of enforcement.¹¹¹ For that reason, the credit provider cannot be expected to tax and demand costs each time they are incurred. On the issue of costs, Nugent AJ held that costs would not be reasonable simply because they are taxed or agreed upon, but only if they are in fact reasonable. And it is only a court that can decide whether or not costs are reasonable.¹¹²

3.3.4 Jafta J's minority judgment

Jafta J took a different approach as his findings were based on the bank's non-compliance with section 129(1) of the NCA. He did not examine whether Ms Nkata's

¹⁰⁶ Ibid par 66.

¹⁰⁷ Ibid par 67.

¹⁰⁸ Ibid par 143.

¹⁰⁹ Ibid par 148.

¹¹⁰ Ibid par 151.

¹¹¹ Ibid.

¹¹² Ibid par 153.

credit agreement was indeed reinstated. He took the stance that the bank's conduct in issuing summons without complying with section 129(1) of the NCA, was irregular. This is because section 130(1) of the NCA forbids commencement of legal action prior to the expiry of ten business days from the date of delivery of the section 129(1) notice. Further, the default judgment issued by the registrar was void. This is because the registrar did not have the power to grant judgment as section 130(3) stipulates that it is the court that must adjudicate on a matter of this nature.

3.4 Comments on the judgment

The *Nkata* judgment established a precedent on the reinstatement of a credit agreement and the interpretation of sections 129(3) and (4) of the NCA. The judgment exposed multiple ways in which subsections 129(3) and (4) of the NCA can be interpreted. It must be noted that the decision was concerned with the interpretation of subsections 129(3) and (4) prior to their amendment. However, it has been argued that the implications of the *Nkata* judgment are still applicable despite the amendment of the NCA.¹¹³ Some academics are of the view that the amended sections are as ambiguous as the original sections.¹¹⁴ It follows that the position does not change and as a result consumers can still rely on the *Nkata* judgment to reinstate their credit agreement. It is submitted that the decision of *Nkata* has undesirable implications for parties that have entered into credit agreements, third parties and to the credit market as a whole. Van Heerden is of the view that the majority 'skewed the balance' that the NCA aims to achieve by adopting an unbalanced approach as it shifted the obligations solely to the credit provider and not the consumer.¹¹⁵ Steyn and Sharrock are also of the view that the decision has 'far-reaching consequences' for creditors with regards to the enforcement processes and handling of consumers' mortgage bond accounts.¹¹⁶ I now discuss the crucial points that came out of the *Nkata* judgment.

¹¹³ Steyn and Sharrock (note 47 above) 500.

¹¹⁴ C Van Heerden '*Nkata v Firstrand Bank Ltd* (2016) ZACC 12 April 2016 and its impact on the Reinstatement of Credit Agreements Governed by the National Credit Act 34 of 2005' in C Hugo (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) 181.

¹¹⁵ Ibid 100. See Choma, H. & Kgarabjang, T. 'A critical analysis of debtor's right to reinstate a credit agreement & resume possession of property' *Risk Governance and Control: Financial Markets & Institutions/ Volume 8, Issue 1, Winter* (2018), 67 the authors are of the contrary view that decision of *Nkata* 'gave effect to constitutional value and aim of the NCA for the creation of market place that is consistent and in line with constitutional democracy.

¹¹⁶ Steyn and Sharrock (note 47 above) 506.

3.4.1 Reinstatement occurring by operation of law

The most important aspect that came out of the decision of *Nkata* is that reinstatement of a credit agreement occurs by operation of law. This stance was agreed upon in both the majority and the minority judgments. This means that the consumer is only required to pay instalment arrears, permitted default charges and legal costs, whereupon the credit agreement will automatically be reinstated. The consumer does not need to know that he is, or have the intention of, reinstating the credit agreement. It is submitted that such a stance may have an undesirable effect on the parties who have entered into the credit agreement and to third parties (such as the purchaser of immovable property). In some cases, the court orders a retransfer of property after the purchaser has made some alterations to it, believing himself to be the rightful owner.¹¹⁷ The retrospective effect of reinstatement has been criticised correctly by Steyn and Sharrock when they stated that it creates uncertainty and it may take time for the court to identify that reinstatement has been triggered.¹¹⁸ They observed that this is predominantly detrimental in cases of mortgaged property where the court grants a default judgment, but the sale in execution is rendered invalid and a court subsequently orders a re-transfer of the property.¹¹⁹ Van Heerden also expressed dissatisfaction with this position by pointing out that this stance is impractical where the consumer has no obligation to notify the credit provider of the intention to reinstate the credit agreement.¹²⁰ She further pointed out that the difficulty is that the credit provider will not know when to notify the consumer of arrear amounts, defaults charges and reasonable costs.¹²¹ Clearly, this imposes a difficulty on the credit provider who has been burdened with a responsibility that is impractical. Steyn and Sharrock commented that reinstatement occurring by operation of law may result in uncertainty about whether the reinstatement requirements have been met or whether it has occurred.¹²² To resolve this issue, it is submitted that there must be communication between the consumer and the credit provider. The credit provider needs to inform the consumer of its right to reinstate a credit agreement. This may be incorporated in the section 129(1) notice. In response the mortgagor would have to communicate its intention to the mortgagee.

¹¹⁷ *Makubalo* (note 15 above); *Nkata* (note 7 above).

¹¹⁸ Steyn and Sharrock (note 47) 507.

¹¹⁹ *Ibid.*

¹²⁰ C Van Heerden (note 114) 100.

¹²¹ *Ibid.*, R Brits, H Coetzee & C Van Heerden 'Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *Quo vadis?*' 2017 (80) *THRHR* 195.

¹²² Steyn and Sharrock (note 47) 507.

It is not desirable for reinstatement to take place automatically as it can occur at various stages of the enforcement process. First, it can occur once the consumer defaults, but before the credit provider sends a section 129(1) notice.¹²³ In this instance, the consumer may pay the arrears and the credit provider would be precluded from sending a section 129(1) notice.¹²⁴ Secondly, it can occur after the credit provider has sent a section 129(1) notice but before delivery of summons. The consumer can rectify the default and the credit provider will be precluded from proceeding with summons.¹²⁵ It is submitted that the right to reinstate the credit agreement should be incorporated into the section 129(1) notice to draw to the consumer's attention the right to reinstatement.¹²⁶ Thirdly, it can occur where enforcement proceedings have been instituted, up until the judgment is handed down. As Brits, Coetzee & Van Heerden correctly stated, it is at this stage that reinstatement is relevant because the credit agreement has been cancelled or the acceleration clause has been invoked.¹²⁷ Fourthly, it can occur after judgment has been handed down but before it has been executed against the mortgaged property.¹²⁸ The mortgagor is still permitted to reinstate the credit agreement at this stage. Reinstatement is impermissible where proceeds of sale have been realised.¹²⁹ It has been argued that at this stage the credit provider should be given an election either to accept or to decline payment of the arrears.¹³⁰ If the credit provider accepts such payment, the credit agreement would then be reinstated. However, if the credit provider declines, the mortgagor can approach the court to authorise re-instatement and grant rescission of judgment.¹³¹ Such procedure is desirable as it will prevent the consumer from abusing this remedy by perpetually defaulting with the hope of reinstating the credit agreement at the last minute.¹³² The last stage is where the judgment has been executed against the mortgaged property.¹³³

¹²³ R Brits, H Coetzee & C Van Heerden (note 121) 195.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ In *Absa Bank Limited v Mokebe and related matters (Investec Bank Limited and others as amici curiae)* 2018 JOL 40390 (GJ), the court held that the right to reinstatement must be incorporated in a document initiating the proceedings where a mortgaged property may be declared executable.

¹²⁷ R Brits, H Coetzee & C Van Heerden (note 121) 196.

¹²⁸ *Ibid.*

¹²⁹ *Nkata* (note 7 above).

¹³⁰ R Brits, H Coetzee & C Van Heerden (note 121) 196.

¹³¹ *Ibid.*

¹³² See Chapter Four – 2.2, below.

¹³³ R Brits, H Coetzee & C Van Heerden (note 121) 197.

The other crucial thing that came out from the judgment is that a credit provider must not debit consumers' 'accounts' with legal costs without informing the latter in an attempt to agree on those costs. The court ruled that, if the costs are not agreed upon, they should be taxed by the taxing master, failing which the credit provider bears the risk of a consumer reinstating the credit agreement without paying legal costs.¹³⁴ This is because those costs will not be due and payable. The impracticality of this was raised by Nugent AJ, when he stated that taxation of the costs every time before inviting the consumer to pay is impossible as the costs are incurred in various stages of the litigation process.¹³⁵ Steyn and Sharrock are of the view that it is the credit provider who bears the burden of informing the consumer about the other costs and charges. They submit that in a situation where the consumer asks the credit provider for the arrear amount, it is reasonable for a credit provider to assume that the consumer wants to reinstate the credit agreement.¹³⁶ On the contrary, Van Heerden finds it difficult to accept the court's findings that the consumer does not have to take any steps to ascertain the enforcement costs. She views this stance as over protective of consumers' rights at the 'expense of common sense and the balance the NCA aims to achieve'.¹³⁷ It has been argued that it is reasonable for a consumer who wants to benefit from the indulgence provided by section 129(3) to make the effort, in good faith, to ascertain the amounts payable for reinstatement to occur.¹³⁸

3.4.2 Payment of arrears and not accelerated debt

The question was raised in *Nedbank Ltd v Fraser & another and other cases*¹³⁹ as to what constitutes 'overdue amounts of the arrears' and the court held that overdue amount does not refer to 'judgment debt'. However, in *Dwenga v Firstrand Bank*¹⁴⁰ the court was of the view that the approach adopted in *Fraser* was not correct. The court confirmed the approach adopted in *Fraser*, that the consumer is only required to pay

¹³⁴ Gian Louw 'Banks beware: Reinstatement of mortgage loan agreements' *De Rebus* (1st July 2016) 52 wherein it was stated that 'banks should be aware that a consumer may, under certain circumstances, reinstate a credit agreement after judgment, even up to such a late stage as after a sale in execution of the bonded property has taken place, provided the proceeds of the sale have not yet been realised'.

¹³⁵ *Nkata* (note 7 above) par 148.

¹³⁶ Harold Smit & Sabina Ismael Essa 'The court's interpretation of s 129 of the NCA and the meaning of 'reinstatement' *De Rebus*, (1st July 2016), 28.

¹³⁷ C Van Heerden (note 114 above) 184.

¹³⁸ R Brits, Coetzee & C Van Heerden (note 121 above) 186.

¹³⁹ *Nedbank Ltd v Fraser & another and other cases* 2011 (4) SA 363 (GSJ), hereafter referred to as '*Fraser*'.

¹⁴⁰ *Dwenga v Firstrand Bank* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011), hereafter referred to as '*Dwenga*'.

arrear amounts and not the accelerated debt.¹⁴¹ This makes logical sense because payment of the accelerated debt will defeat the whole purpose of reinstatement, which aims to provide the consumer with the opportunity to remedy the default and hence reinstate the credit agreement. The court pointed out that invocation of an acceleration clause does not amount to cancellation of a credit agreement. It went further to state that, because in *Nkata* there was non-compliance with section 129(1), there was no cancellation. It has been argued that this is confusing, however it has been interpreted to mean that the credit agreement will be cancelled when there has been compliance with section 129(1) in conjunction with section 130.¹⁴²

3.4.3 Reinstatement renders void a previously obtained judgment

One of the most significant rulings made by the Constitutional Court is that reinstatement renders invalid judgments that had been obtained on the basis of default. This means that every time reinstatement takes place, the default judgment will fall away. As a result, if the credit provider wants to enforce the credit agreement it will have to institute a new action by beginning afresh with issuing a section 129(1) notice. It is submitted that this will amount to greater costs being incurred and a waste of the courts' time. The other difficulty with this, as noted by Steyn and Sharrock, is that there is no process by which to render the default judgment invalid nor is the invalidity recorded. This is crucial because it has an impact on the consumer's access to credit and also on whether the credit agreement would be included in debt review proceedings under the NCA.¹⁴³ Steyn and Sharrock commented that this may result in an unwelcome change to consumers' attitude towards the way they handle their mortgage bond account, knowing that there is no threat.¹⁴⁴ It is submitted that this problem can be avoided if the NCA places a limit on the number of times in which the credit agreement can be reinstated.

¹⁴¹ David Mohale 'Protection offered by s 129 of the National Credit Act' *De Rebus* (1st July 2016) 23 is of the view that 'acceleration clauses will lead consumers to become over-indebted and being unable to satisfy all their credit obligations in a consistent and harmonised manner. An acceleration clause, when effected, will urge the consumer to neglect their other credit obligations in order to repay the full balance owing on the affected credit agreement'.

¹⁴² C Van Heerden (note 114 above) 185.

¹⁴³ Steyn and Sharrock (note 47 above).

¹⁴⁴ *ibid.*

4. Conclusion

As evident from the above, it is clear that the NCA's provisions dealing with reinstatement fail to deal appropriately with a situation where homeowners have fallen into default and want to remedy that default in order to keep their homes. The legislature had been offered the opportunity to remedy the loophole, but they have failed to do so. As pointed out above, the academics are of the view that the amended provisions are worse than the original ones. The *Nkata* case demonstrates the shortcomings of subsections 129(3) and (4) of the NCA. This is evident from the different interpretations of the provisions adopted in the majority and minority judgments. The Constitutional Court provided insights as to how the provisions dealing with reinstatement should be interpreted. Unfortunately, the decision has not been uniformly or widely welcomed because of its undesirable implications. As stated earlier, Van Heerden views it as skewing the balance that the NCA aims to achieve.¹⁴⁵

The following chapter discusses the judgments that have been decided since the *Nkata* judgment.

¹⁴⁵ C Van Heerden (note 114 above) 185.

Chapter Three - A discussion of cases reported post-*Nkata*

1. Introduction

The Constitutional Court's majority judgment in *Nkata* does not only impact parties to a credit agreement and the credit market as a whole, but it also changed the way in which courts should deal with execution against residential property. The first part of this chapter will discuss Rule 46A of the Uniform Rules and also the provisions in the practice manuals of in the South Gauteng and the KwaZulu-Natal High Court Divisions, with the aim of providing insight into the application of the Rules and practice directive in the cases, which will be discussed in part two of this chapter.

The second part discusses some of the judgments that have been issued since *Nkata*. The *Nkata* judgment plays a crucial role in the way the courts currently deal with execution against mortgaged residential property. Further, since *Nkata*, the courts have extended protection to debtors in default by adjourning *sine die* the applications for declarations of special executability to allow an opportunity for reinstatement of the credit agreement to occur. This will influence my comments and recommendations.

2. Rules and directives applicable to the sale in execution of residential property

2.1 Rule 46(A) of the Uniform Rules of Court

Sale in execution of an immovable property is governed by Rule 46A of the Uniform Rules of Court.¹⁴⁶ The rule has recently been amended. The rule requires notice of attachment to be served personally on the owner of the immovable property.¹⁴⁷ The rule grants the court a discretion to set a reserve price on the property to be sold in execution.¹⁴⁸ However, this is not mandatory, meaning that properties may still be sold without a reserve price. The setting of a reserve price constitutes an improvement to the rule, as it now requires the applicant to provide the market value¹⁴⁹ of the immovable property. This is designed to minimise the number of properties being sold below their

¹⁴⁶ Rule 46 was amended by Rule 46A, which came into operation in December 2017.

¹⁴⁷ Rule 46A(3)(a).

¹⁴⁸ Rule 46A(8)(c) & (e).

¹⁴⁹ Michael Lombard, in 'Amendments of rules in line with constitutional rights to adequate housing' *De Rebus* (1st May 2018) 30, made reference to the International Valuation Standards Council, where 'market value' was defined as 'the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing where the parties had each acted knowledgeable, prudently and without compulsion'.

market value as a result of collusion during the auction process.¹⁵⁰ It also requires the local authority to divulge any municipal rates.¹⁵¹ It has been argued that this may address the sale of properties at exceedingly low prices, the reason being that non-disclosure of municipal rates is one of the contributing factors.¹⁵² The new rule does not make provision for the buyer to view the property before the sale. However, it has been argued that this could be addressed through authority being given to the sheriff to enter the property by force to allow the buyer to view the property.¹⁵³ Rule 46(2)(c) prohibits the registrar from issuing writs of execution. This amendment is in line with the *Gundwana* judgment. Shaw is of the view that the rule should have incorporated the finding of the *Jafitha* judgment, that execution should be used as a last resort.¹⁵⁴ He further argues that execution should not be permissible in an instance where the market value of the property is more than 20% of the outstanding loan amount. He submits that the outstanding loan amount should at least be 80% of the house value for execution to take place. This is a valid standpoint because, when the bank sells the property in execution, it auctions it in order to recoup the amount of the outstanding debt. As a result, a property worth millions of rands might be sold for only a few thousand. The amendment of Rule 46 has resulted in amendments being made to the practice directives applicable in the South Gauteng High Court Division.

The next section discusses the practice directives applicable in the South Gauteng and KwaZulu-Natal High Court Divisions with the aim of providing insights into the relevant practice directives applicable to the cases which will be discussed thereafter.

¹⁵⁰ See D J Shaw ‘Dialogue: 05 August 2016 – Rules of Execution against immovable property’ Volume II – 20. See Lombard (note 149 above), who stated that where ‘the sale in execution leaves the owner with a shortfall, the shortfall *per se* amounts to an infringement to the right to property in that the property was not sold for value. The new rules will, in these instances, now become the law of general application, which – in my opinion – provides the cure for the shortfall issue as far as s 25 provides for such a remedy’.

¹⁵¹ Rule 46A(8)(b).

¹⁵² D J Shaw (note 146 above) 21.

¹⁵³ Rule 46A(5)(3).

¹⁵⁴ DJ Shaw (note 146 above) 21.

2.2. Practice Directives

2.2.1 South Gauteng Division of the High Court

The sale in execution of residential property in the South Gauteng division is governed by directive 10.17 of the Practice Manual. According to the Practice Manual, an order of execution against primary residential property can only be granted by a court provided that the application has been served on the respondent personally or in the manner authorised by the court.¹⁵⁵ It further states that if execution is sought against primary residential property, there must be a *pro forma* affidavit including the bank's undertaking to prevent foreclosure. In a situation where the application is for both a money judgment and a declaration that the property is specially executable, it must be done in an open court. The registrar may not grant a monetary judgment if such debt is related to a mortgage bond over the primary residential property.¹⁵⁶ This is consistent with the Constitutional Court's ruling in the *Gundwana* case. The practice manual states that where the court is of the view that the debtor is in arrears in respect of an amount representing instalments for only a few weeks or months, it has the discretion to postpone the matter *sine die* and to direct that the matter not be set down before the lapse of six months. The notice of set down should also be served on the respondent, ie, the debtor. When the matter is set down again, an affidavit should be filed setting out the bank's endeavours to reach a settlement in order to avoid foreclosure.¹⁵⁷ It goes further to state that the court should not grant any monetary judgment, whether for the accelerated debt or otherwise. This is because, if the money judgment is granted, and the creditor executes against the debtor's movables, section 129(4) of the NCA will preclude reinstatement.¹⁵⁸

The practice manual also deals with a situation where the creditor fails to deliver a section 129(1) notice to the debtor. In that case the court may adjourn the matter *sine die* and order that the creditor serve, via the sheriff, a revised section 129(1) notice, a copy of the application and annexures and notice of re-enrolment. It also requires the attachment of a draft order in duplicate. In the draft order, the respondent is informed about the remedy of reinstatement, as provided for under subsections 129(3) and (4) of the NCA, and that the respondent can prevent the sale by paying the arrear amounts,

¹⁵⁵ 10.17.1.

¹⁵⁶ 10.17.2.

¹⁵⁷ 10.17.3.

¹⁵⁸ 10.17.6.

enforcement costs and default charges only, and not the full accelerated debt. This draft order must be served on the respondent personally as soon as possible after it has been granted and before the sale in execution.

2.2.2 KwaZulu-Natal Division of the High Court

Unlike the South Gauteng Practice Manual, the KwaZulu-Natal Practice Manual does not set out a detailed procedure to be followed when execution against a residential property is sought. It states that where foreclosure is sought, the summons must draw the debtor's attention to section 26 of the Constitution. In the event that the defendant claims an infringement of the right, the information supporting the allegation must be put before the court. It is submitted that there is a need for amendment of the practice manual in this division to be consistent with rule 46A of the Uniform Rules. Such amendment must set out a coherent procedure to be followed by the courts when dealing with mortgage foreclosure in respect of residential property.

The next part of this chapter discusses some judgments in which the relevant practice directive was applied by the court.

3. Cases decided since *Nkata* judgment

3.1 Firstrand Bank v Mdletye

FirstRand Bank Ltd v Mdletye,¹⁵⁹ is a KwaZulu-Natal High Court judgment that concerned an application for default judgment in an amount of R291 634.33 together with costs and an order declaring the immovable property specially executable.¹⁶⁰ The brief facts of the case are that the applicant, FirstRand Bank, advanced a loan to the respondents (Nzimende and Abigail Mdletye) for the acquisition of immovable property. A mortgage bond was passed in favour of the applicant as security for the loan. Of significance is that the property constituted the primary residence of the respondents. The respondents defaulted in their mortgage bond instalments.¹⁶¹ They submitted that judicial oversight needed to be exercised under the circumstances. The issue in this case was whether it was appropriate for the court, in performance of its judicial oversight, to dismiss an application to declare immovable property specially

¹⁵⁹ *FirstRand Bank Ltd v Mdletye* 2016 (5) SA 550 (KZD) hereafter referred to as '*Mdletye*'.

¹⁶⁰ *Mdletye* par 1.

¹⁶¹ *Ibid* par 2.

executable in circumstances where there is a possibility of reinstatement of a credit agreement.

Gorven J referred to *Gundwana*, in which it was pointed out that judicial oversight is required in a situation where execution against a home will render a debtor homeless.¹⁶² The learned judge also referred to the case of *Jaftha* where the Constitutional Court established factors to be taken into account by the court when exercising judicial oversight.¹⁶³ One of these is whether there is disproportionality between execution and recovery of the debt, taking into account any other possible means for the mortgagee to obtain payment. Gorven J took into account the factors established in both of the cases, and as well as those in *Nkata*, which dealt with the interpretation of subsections 129(3) and (4) of the NCA concerning reinstatement of a credit agreement.¹⁶⁴ In the *Nkata* case, it was held that reinstatement can take place even after the bank has obtained default judgment, as long as the agreement has not been cancelled. The court found that the consequence of reinstatement is that it renders invalid the default judgment previously obtained. However, if the property is sold in execution pursuant to the attachment order, reinstatement would be prohibited and in a mortgage bond agreement a debtor will lose his or her home.

During the hearing, the respondents argued that an order declaring their property specially executable should not be granted.¹⁶⁵ They undertook to keep up with their monthly instalments. The applicant, on the other hand, contended that a declaration of special executability should be granted. It was argued that execution takes time and it followed that, if the mortgagor makes payment, the agreement may be reinstated before the property is sold in execution.¹⁶⁶ The court agreed that execution takes time, but pointed out that, if a sale takes place pursuant to an order of execution, reinstatement will be prohibited by section 129(4) of the NCA. This would mean that the respondents would not be able to reinstate their mortgage bond agreement and would therefore lose their home.

¹⁶² Ibid par 7.

¹⁶³ Ibid par 8.

¹⁶⁴ Ibid par 9.

¹⁶⁵ Ibid par 12.

¹⁶⁶ Ibid par 15.

As a result, the court was of the view that granting the order declaring the property specially executable would constitute ‘disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose’.¹⁶⁷ The court granted an order against the respondent for the arrear amount, together with interest and costs. However, it adjourned *sine die* the application to declare the immovable property specially executable and further directed that the matter should not be set down sooner than six months from the date of judgment.¹⁶⁸

The court, in the *Mdletye* judgment, extended even further the protection provided to consumers by adjourning the matter to afford the homeowner mortgagor an opportunity to reinstate the credit agreement. Unlike in *Nkata*, in *Mdletye*, the mortgagors did not comply with any of the requirements mentioned in section 129(3) of the NCA, nor did they attempt to reinstate the credit agreement. It follows that when the court is deciding whether to grant an order of special executability in respect of a debtor’s primary residence, the possibility of the credit agreement being reinstated will play a crucial role. The most important aspect that arose in *Mdletye* is that immovable property constituting the primary residence of the debtor should not be declared executable if there is a possibility that the mortgagor may reinstate the credit agreement. It is submitted that this decision has far-reaching consequences because the consumer has plenty of time to reinstate the credit agreement or attempt to reinstate before the credit provider can approach the court. As explained in Chapter 2 that the credit provider before approaching the court, it has to follow the procedure provided in the NCA which includes sending section 129(1) notice to the consumer. Reinstatement of a credit agreement is not a right but an indulgence towards a consumer who defaulted in the payment of his or her monthly instalment.¹⁶⁹

3.2 *Nedbank Ltd v Zwane*

Similarly, in *Nedbank Ltd v Zwane*,¹⁷⁰ the South Gauteng High Court Division was called upon to decide on the executability of a mortgaged primary residential property.

¹⁶⁷ *Ibid* par16.

¹⁶⁸ *Ibid* par 18.

¹⁶⁹ C Van Heerden (note 114 above) 185.

¹⁷⁰ *FirstRand Bank t/a First National Bank v Zwane* 2016 (6) SA 400 (GJ), hereafter referred to as ‘*Zwane*’.

The case concerned three applications for default judgment, seeking payment of the full outstanding debt, and an order declaring the immovable property specially executable. The first application was only for a declaration that the immovable property be specially executable and the other two applications were for payment of the full outstanding debt and an order declaring the mortgaged property specially executable. In all three matters, the properties constituted the primary residence of the respondents and all three properties had a mortgage bond passed in favour of the applicant as security for the loan. The court was of the view that because the debtors were behind with their payment for only three months, it would not grant an execution order. The court took into account paragraph 10.17 of the Practice Manual¹⁷¹ and held that it would be appropriate under the circumstances for the application to be postponed in order to afford the debtors an opportunity to remedy their default.¹⁷²

The applicant on the other hand contended that even though the court has a discretion to postpone an application for declaratory relief, it does not have the power to postpone default judgment in the capital amount.¹⁷³ The issue to be decided was whether the court, in exercising its judicial oversight, is empowered to postpone declaratory relief, but immediately grant judgment for payment of the full outstanding debt. In dealing with the issue, Van der Linde J referred to the practice manual where it permits the court also to postpone the application for default judgment in the capital amount or else ‘...this will defeat the object of postponing the matter i.e. to allow the consumer to take advice and seek to make arrangements to bring the arrears up to date / purge the default’.¹⁷⁴ The court held that it would be reluctant to grant an execution order where there is only three months’ worth of arrears in a 240-month loan repayment scheme.¹⁷⁵ The learned judge observed that a claim for the default judgment of the capital amount is permissible because of the acceleration clause and in turn the claim for declaration of special executability will not be possible without judgment in the accelerated amount being granted.¹⁷⁶

¹⁷¹ <https://johannesburgbar.co.za/wp-content/uploads/Practice-Manual-Gauteng-Local-Division-JANUARY-2017-FINAL-6-Feb-rev-1.pdf> accessed on 04 June 2018.

¹⁷² *Zwane* par 25.

¹⁷³ *Ibid* par 4.

¹⁷⁴ Practice Manual – South Gauteng Local Division: Johannesburg 10.17.

¹⁷⁵ *Zwane* (note 170 above) 17.

¹⁷⁶ *Ibid* par 18.

The learned judge noted that if the court postponed for six months the application for a declaration of special executability and, during that period, the debtor manages to pay the arrears and continue with the monthly instalments, it is highly unlikely that the court would grant an execution order.¹⁷⁷ However, the dilemma with this is that, even though the arrears would have been paid, the full outstanding balance would be rendered immediately payable due to the acceleration clause. The court stated that the problem with granting a judgment order for payment of the full amount is that this might prejudice a debtor who has been given an opportunity to remedy the default.¹⁷⁸ This is because the creditor may use the judgment to execute against movable assets and make use of means that the debtor could have used to pay the arrears. The court adjourned the applications for default judgment *sine die* and it further directed that the matters should not be set down before the lapse of four months.

The court in the *Zwane* case extended the protection afforded to debtors even further. The court refused to grant either declaratory relief and or the monetary judgment. Just as in *Mdletye*, the court adjourned the application *sine die* and ordered that the matter should not be set down before the lapse of four months. The court made reference to clause 10.7 of the Practice Manual Directive, discussed above, which allows the court to use its discretion to adjourn the money judgment for six months. The most significant aspect of the *Zwane* decision is that it established that the court has a discretion to decline to grant a declaration of special executability of the primary residential property and an order for payment of the full outstanding debt. It is however not clear whether this is the position only in South Gauteng as their Practice Manual spells this out because the KZN Practice Manual is silent on this point.

3.3 *Absa Bank Limited v M*

In *Absa Bank Limited v M*,¹⁷⁹ in the South Gauteng High Court, the bank applied, unlike in the two cases discussed above, for summary judgment in the amount of the full outstanding debt and for an order declaring the mortgaged immovable property specially executable. The respondent filed an opposing affidavit on the basis that the alleged value of the property was too high and that they were in the process of a divorce

¹⁷⁷ *Ibid* par 20.

¹⁷⁸ *Ibid* par 23.

¹⁷⁹ *Absa Bank Limited v M* (31305/2016) [2017] ZAGPJHC 30 (28 February 2017).

and that they, the divorcing parties, had agreed to sell the property.¹⁸⁰ The court referred to paragraph 10.17.2 of the Practice Directive, which deals with foreclosures.¹⁸¹ The issue that was to be decided by the court was whether the relief sought by the applicant in the circumstances was just and equitable. The court recognised that, in exercising its judicial oversight, it has an obligation to balance the amount outstanding, the financial difficulty of the respondent, the amount in arrears and the bond history.¹⁸² Based on the facts of the case, the court found that the respondent made regular payment for over three quarters of the mortgage period as per the credit agreement.¹⁸³ It also found that there was a link between the divorce and the respondents' default.¹⁸⁴ The court held that, if the respondents succeeded in selling the house 'both the applicant and the respondents would walk away a winner'.¹⁸⁵ However, granting summary judgment would result in only one winner which would be the applicant.¹⁸⁶ The court adjourned the matter *sine die* and ordered that the matter should not be set down before the lapse of six months.¹⁸⁷

3.4 *Makubalo v Nedcor Bank*

In the case of *Makubalo v Nedcor Bank*,¹⁸⁸ the North West High Court was called upon to decide on the lawfulness and validity of an order declaring the debtor's primary residential property specially executable. As in the *Nkata* case, by the time the court decided on the matter, the property had already been sold and ownership had been transferred to the fifth respondent. Briefly, the facts of this case were that the applicants defaulted in their monthly instalments. As a result, the bank, the first respondent, obtained a default judgement in the Magistrate's Court against the applicants for the outstanding debt of R30 556.30.¹⁸⁹ A warrant of execution was issued and the property was eventually sold in execution on 5 December 2014,¹⁹⁰ the outstanding arrear amount then being R39 249.03.¹⁹¹ On the same day, the applicant transferred electronically to

¹⁸⁰ Ibid par 2.

¹⁸¹ Ibid par 4.

¹⁸² Ibid.

¹⁸³ Ibid par 6.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid par 7.

¹⁸⁸ *Makubalo v Nedcor Bank* (M153/2016) [2017] ZANWHC 45 (29 June 2017).

¹⁸⁹ Ibid par 2.

¹⁹⁰ Ibid.

¹⁹¹ Ibid par 5.

the first respondent an amount of R43 000.00. The attorneys for the first respondent were notified of the transaction.¹⁹² Notwithstanding that, the property was sold in execution, first, to the third respondent for an amount of R271 000.00 and, at a later stage, it was sold on to the fifth respondent for an amount of R450 000.00.¹⁹³

The court had to decide two issues: first, whether the conduct of the applicant by paying an amount of R43 000.00 reinstated the credit agreement in terms of section 129(3) of the NCA; and, secondly, whether the proceeds from sale had been realised by the time the applicants made the payment of the arrear amount. Hendricks J found that the credit agreement had not been cancelled but that the first respondent elected to apply for specific performance in terms of the agreement.¹⁹⁴ It was further found that the amount paid by the applicant consisted of all overdue amounts, together with default charges and the reasonable costs of enforcing the agreement, as at 5 December 2014.¹⁹⁵ With regards to legal costs, the court referred to the *Nkata* case and held that at the time the applicant had made the payment, no legal costs had been demanded, agreed to or taxed by the taxing master. Therefore the legal costs were not due and payable.¹⁹⁶ The court held that an amendment to section 129(3) suggest that legal costs payable are calculated at the time the default was remedied.¹⁹⁷

In dealing with the second issue the court held that reinstatement was not prohibited by section 129(4)(d) of the NCA.¹⁹⁸ The court reasoned that the proceeds of the sale had not been realised because the ten percent deposit of the purchase price was paid to the sheriff and not to the first respondent, and also because the full purchase price was only paid on 19 January 2015.¹⁹⁹ The court found it alarming that, after the payment was completed and this fact was communicated to the attorneys of the first respondent, they nevertheless proceeded with the sale of the property.²⁰⁰ The court found that the credit agreement was reinstated and it set aside the sale in execution. It ordered a re-registration of the property in the names of the applicants.

¹⁹² Ibid par 22.

¹⁹³ Ibid par 4.

¹⁹⁴ Ibid par 12.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid par 14.

¹⁹⁷ Ibid par 15.

¹⁹⁸ Ibid par 21.

¹⁹⁹ Ibid.

²⁰⁰ Ibid par 22.

This case reveals one of the problematic implications of the *Nkata* judgment, which is the possible bad attitude of debtors towards their contractual obligations arising from the credit agreement. In this case, the applicants waited until the last minute, ie, until the day of the sale in execution, to make payment of all amounts overdue and the default charges. As was the situation in the *Nkata* case, the applicants reinstated the credit agreement without making payment of legal costs. This was because the costs were not agreed upon or taxed by the taxing master. The court in this case extended the meaning of realised proceeds of sale by the purchaser to the seller. The judgment makes it clear that payment of the full purchase price must be effected to the bank (creditor/mortgagee), and not the sheriff. It follows that a credit agreement can now be reinstated up until the stage where the full purchase price is paid to the bank. It is submitted that the stance adopted by the court does not only inconvenience the banks but also third parties ('the purchasers in execution') who legitimately purchased the property and perhaps raised the funds through a mortgage bond to acquire such property. The decision also reveals the unreliability of the banks in that even though the applicants paid the arrears and default charges at the last minute, and this was communicated to the attorneys of the respondent, they went ahead with the sale in execution. The bank ought to have cancelled the sale in execution due to the arrears having been settled. The decision also shows that forced sale of properties yields drastically low prices. In this case, the property was sold in execution for an amount of R271 000 and was later sold on to the fifth respondent for an amount of R450 000.00. It is submitted that the bank should have afforded the applicants the opportunity to sell the property on condition that it should be disposed of within a certain period of time, failing which it could be sold in execution. A sale in execution should be held as a last resort.²⁰¹

3.5 Absa Bank Limited v Njolomba

The case of *Absa Bank Limited v Njolomba*²⁰² in the South Gauteng High Court, concerned eight applications for default judgment in terms of Rule 31(5) of the Uniform Rules. Each application was in respect of a mortgaged property that constituted the primary residence of the respondent(s). Unlike the cases discussed above, the applicants

²⁰¹ *Jaftha* (note 8 above) par 59.

²⁰² *Absa Bank Limited v Njolomba* 2018 JOL 39713 (GJ) hereafter referred to as '*Njolomba*'.

in this case sought the granting of a money judgment only and not for the properties to be declared specially executable. The court had to decide whether it had discretion to grant a money judgment and if so, whether granting judgment would prevent a debtor from reinstating the credit agreement.

Fisher J acknowledged that courts had adopted different approaches in relation to money judgments, some courts having refused to grant them and others having granted them. The learned judge referred to *Zwane*,²⁰³ where it was found that a court has discretion to postpone an application for a money judgment where a declaration of special executability is still to be considered.²⁰⁴ Fisher J also referred to the Practice Manual, at paragraph 10.7, which prohibits the granting of a money judgment where an application for a declaration of special executability is postponed. The motive behind this is that, if the money judgment is granted and the judgment creditor executes against the debtor's movables, then section 129(4)(b) of the NCA will bar a debtor from reinstating the credit agreement.²⁰⁵ The court made reference to *FirstRand Bank Limited t/a First National Bank v Stand 949 Cottage Lane Sundowner (Pty) Limited*,²⁰⁶ where it was stated that there is no need for judicial oversight where the applicant is only seeking an order granting a money judgment.²⁰⁷ It was found that the only instance where a mortgage agreement will not be capable of being reinstated is when the property has been sold and transferred to a third party. If the judgment creditor executes against a debtor's movable property, that does not hinder the reinstatement of a mortgage agreement.²⁰⁸ Fisher J found that:

section 129(4) (b) relates exclusively to the instalment sale, secured loan, and lease variety of credit agreements which are singled out for debt enforcement by sale of the movable property which is their subject matter and further resort to judgment for the balance remaining after the sale of such property.²⁰⁹

He ruled that section 129(4) does not relate to general execution against other assets of the debtor and, as a result, reinstatement of the mortgage agreement is not prevented by

²⁰³ See above 3.2.

²⁰⁴ *Njolomba* (note 202 above) par 7.

²⁰⁵ *Ibid* par 8.

²⁰⁶ [2014] ZAGPJHC 117.

²⁰⁷ *Ibid* par 9.

²⁰⁸ *Ibid* par 15.

²⁰⁹ *Ibid* par 34.

section 129(4) should a money judgment be granted and executed upon.²¹⁰ Fisher J pointed out that the interpretation of section 129(4) as per the Practice Manual is detrimental to the Bill of Rights, as it unnecessarily places an impediment on the right to housing.²¹¹ The learned judge made a reference to *Nkata*, where it was stated that reinstatement will be prohibited when the proceeds of the sale in execution of the mortgaged property has been received.²¹² The court acknowledged that *Nkata* does not constitute authority for the proposition that section 129(4) applies to mortgage loans as it was concerned with what is required of a consumer to reinstate a credit agreement.²¹³

3.6 Absa Bank Limited v Mokebe and related matters (Investec Bank Limited and others as amici curiae)

In a recent case, *Absa Bank Limited v Mokebe and related matters (Investec Bank Limited and others as amici curiae)*²¹⁴ the full court of Gauteng Local Division was called upon to decide on several issues regarding foreclosure and the granting of money judgments. The first issue was whether the court has discretion to postpone an application for a declaration of special executability and a money judgment for the accelerated, full outstanding balance to afford a consumer/ mortgagor an opportunity to revive a credit agreement. Further, if the court has such discretion, whether there should be uniformity in the manner in which such discretion is exercised by the judges in the division. Secondly, whether the money judgment for the accelerated full balance amounts to ‘any other order enforcing that agreement’ for purposes of subsections 129(3) and (4) of the NCA. If it does qualify, does it have the consequence of preventing the credit provider from reinstating the credit agreement? Further, in what circumstances should a court set a reserve price and how will this be determined in terms of the Rule 46A.

The banks submitted that the court does not have discretion to postpone the money judgment and only Standard Bank was of the view that it is desirable to have both the application for the money judgment and the declaration of execution heard and decided

²¹⁰ Ibid par 17.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid par 18.

²¹⁴ *Absa Bank Limited v Mokebe and related matters (Investec Bank Limited and others as amici curiae)* [2018] JOL 40390 (GJ) hereafter referred to as ‘*Mokebe*’.

at the same time.²¹⁵ The court held that the granting of the money judgment for the accelerated debt and postponing the relief of a declaration of special executability results in undue protraction of the proceedings and the piecemeal handling of the matter with an unnecessary increase in costs.²¹⁶ It further stated that piecemeal adjudication should be discouraged. The court reasoned that the money judgment is part of the cause of action and is linked to the *in rem* claim for an order for execution, the latter being non-existent without the money judgment.²¹⁷ It follows that the claim for execution is accessory in nature and is dependant for its existence on the obligation which is secured.

The court agreed with the position in *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal, en 'n Ander*²¹⁸ where it was stated that when the consumer/mortgagor is sued, and where both actions are instituted, the 'personal action' aims to recover the debt and execution is for the utilisation of the property to pay the debt.²¹⁹ The court held that the argument that the money judgment stands on a different footing, ignores the fact that it is a cornerstone of the order of execution and it is a necessary averment that forms part of the cause of action.²²⁰ Like Van der Linde J in *Nedbank Ltd v Zwane*, the court observed the desirability of postponing the money judgment in that it prevents the creditor from executing against movables whilst the debtor will be trying to pay the arrears.²²¹ The court dismissed a submission that Rule 46A suggests that a money judgment may be obtained prior to and separate from a declaration of special executability. It held that it is not in conflict with the rule to deal with the money judgment and the declaration of special executability despite the fact that the rule requires certain steps to be followed, such as execution against movables having to occur before execution against immovable property.

With respect to the question of whether the money judgment for the full, accelerated balance amounts to 'any other court order enforcing that agreement' for the purposes of subsections 129(3) and (4) of the NCA, the court referred to Moseneke DCJ's finding in

²¹⁵ Ibid par 9.

²¹⁶ Ibid par 13.

²¹⁷ Ibid par 18.

²¹⁸ 1975 (4) SA 936 (T).

²¹⁹ Ibid par 16.

²²⁰ Ibid par 20.

²²¹ Ibid par 23-24.

Nkata that reinstatement of a credit agreement is only precluded once the proceeds of the sale have been received.²²² As a result, granting the money judgment and declaring the property specially executable is no bar to reinstatement. The court recognised that section 129(3) has been amended by section 32(a) of the NCAA, which refers to a consumer remedying the default under the agreement instead of the consumer reinstating the agreement.²²³ To ensure that a homeowners aware of the right to reinstate the credit agreement, the court held that this must be incorporated in the document initiating the proceedings where a mortgaged property may be declared specially executable.²²⁴

The court recognised the prejudice that the defaulting debtor suffers in an instance where the primary residence is sold for a nominal amount.²²⁵ This is because the mortgagor does not only lose a home but remains indebted to the mortgagee for a substantial amount.²²⁶ The banks contended that setting a reserve price would reduce interest by prospective purchasers and would make it difficult for them to find a buyer.²²⁷ The court found that such an allegation had no foundation as the court can always be approached for a change to an existing order to make it more likely for them to find a buyer.²²⁸ The court pointed out that a sale in execution does not fetch the same price as a private sale. As a result, banks' interests are better served by sale on a voluntary basis.²²⁹ It was submitted by the Legal Aid (as *amici curiae*) that the court must set a reserve price so that the mortgagor will not be left with any outstanding debt after the sale in execution.²³⁰ The court held that same cannot be avoided as a reserved price would depend on the size of the debt and the amount in arrears.²³¹ However a reserve price would ensure that the property is sold at a just and equitable price by taking the factors of each specific matter into account.

²²² *Ibid* par 42.

²²³ *Ibid* par 44. The court held that it is logical to speak of remedying the default rather than reinstating the credit agreement. This is because one cannot 'reinstate' an agreement which has not been cancelled. It further held that the prohibition against reinstatement, in subsection 129(4)(b) must be read together with the Constitutional Court's judgment in *Nkata* where section 129(4) was given a narrow interpretation. A narrow interpretation promotes the 'values of fairness, good faith, reasonableness and equality'.

²²⁴ *Ibid* par 46.

²²⁵ *Ibid* par 53.

²²⁶ *Ibid*.

²²⁷ *Ibid* par 54.

²²⁸ *Ibid*.

²²⁹ *Ibid* par 56.

²³⁰ *Ibid* par 56.

²³¹ *Ibid* par 62.

It was stated that the court's power and duty to impose a reserve price is founded in section 26(3) of the Constitution. The granting of a judgment against a homeowner is a first step towards his or her eviction from the property. It held that the bondholder should place before the court all relevant circumstances when seeking an execution order. This includes a proper valuation of the property, proof of the amount of the arrears, and the municipal accounts. A reserve price may leave a debtor with or without a debt or even a balance in his or her favour. In determining the reserve price the court stated that it will take into consideration all the factors placed before it by both parties.²³²

The full court resolved the contradiction in the interpretation of practice directive 10.17 of the South Gauteng Division Practice Manual, as applied in the *Zwane* and the *Njolomba* judgments, respectively. The court adopted the same stance as that taken in the *Zwane* judgment. The most important aspect of this decision is that it was decided that both the money judgment and the declaration of special executability against a primary residence should be adjudicated at the same time. The court correctly pointed out that separate adjudication amounts to piecemeal litigation, which leads to unnecessary costs being incurred. The most crucial shortcoming of this was pointed out by Van der Linde J, in the *Zwane* judgment, that the granting the money judgment allows a creditor to execute against the debtor's movable property. It is submitted that the granting of the money judgment may frustrate the debtor who may be in a process of disposing of movable property with the aim of gathering money to pay the arrears and charges in order to reinstate/revive the credit agreement. The court ruled that any document commencing proceedings, where an order declaring the mortgaged property specially executable is sought, must draw the mortgagor's attention to section 129(3) of the NCA. This will ensure that indigent mortgagors are aware of their right to reinstate the credit agreement. It is submitted that it would be desirable for all high court divisions to adopt this approach as it is in line with the advancement of the right to housing.

²³² The bank submitted that the actual number of properties that are sold in execution is small compared to the total number of mortgage accounts. In view of this, the court held that it is highly unlikely that a small fraction of the total of all mortgage matters can threaten the stability of the entire home loan market.

The court clarified that granting a money judgment does not qualify as ‘any other court order enforcing that agreement’ in terms of subsections 129(3) and (4) of the NCA. This is because reinstatement is only precluded by the proceeds of the sale being received. Regarding the question of when the proceeds of the sale would be regarded as received whether it is upon receipt of the deposit or receipt of the full purchase price – the court, in *Makubalo*, found that payment of the deposit to the sheriff does not amount to realisation of the proceeds of the sale. It follows that only upon the receipt of the full purchase price, will reinstatement be precluded.

4. Conclusion

It is apparent from the above discussion that the *Nkata* judgment has an impact on how courts deal with the applications pertaining to a sale in execution of the debtor’s home. The courts, in the recent cases discussed above, adopted a stance that was taken in the *Nkata* judgment and took it even further by extending the protection provided to the mortgagor. The cases reveal that the court can refuse to grant a declaratory order and adjourn the matter to afford the mortgagor an opportunity to attempt to reinstate the credit agreement. In other words, a primary residence should not be declared specially executable if there is a possibility that the credit agreement may be reinstated. Not only may the application for a declaration of special executability be adjourned, but so too should the application for a money judgment be postponed. It is evident that the South Gauteng Division’s Practice Manual is far-reaching, yet coherent, and is in line with the precedent set in *Nkata*. There is a need for the amendment to the Practice Manuals of the High Court divisions to provide a logical and coherent procedure, which is consistent with Rule 46A of the Uniform Rules, to be followed where execution against residential property is sought.²³³

As discussed above, the South Gauteng Practice Manual clearly provides for postponement of both the application for a declaratory order of special executability and the money judgment. The cases also show that a credit agreement can be reinstated

²³³ The Western Cape High Court division has recently amended its practice manual dealing with foreclosure of primary residents following its judgment in *Standard Bank of South Africa Limited v Hendricks and Another*; *Standard Bank of South Africa Limited v Sampson and Another*; *Standard Bank of South Africa Limited v Kamfer*; *Standard Bank of South Africa Limited v Adams and Another*; *Standard Bank of South Africa Limited v Botha NO*; *Absa Bank Limited v Louw* (11294/18; 15134/18; 12777/18; 12285/18; 13809/18; 22263/17; 12365/18) [2018] ZAWCHC 175 (14 December 2018).

without payment of legal costs because, if they have not been demanded, at the time of reinstatement they will not be due and payable.

Chapter Four - Conclusion and Recommendations

1. Conclusion

As stated in Chapter One, this dissertation exposes the lack of coherent statutory remedies to assist mortgagors who find themselves in financial difficulty. It discussed the most significant judgment in relation to reinstatement of a home mortgage credit agreement, namely the *Nkata* judgment. The remedy of reinstatement of a credit agreement is crucial as it is the only remedy that aims to rescue a mortgagor who has fallen into default with his or her mortgage obligations. However, this study has shown that there are *lacunae* with this remedy. As it was pointed out in Chapter Two, the *Nkata* judgment revealed difficulties in the interpretation of subsections 129(3) and (4) of the NCA as they do not establish a coherent procedure to be adopted when reinstating a credit agreement. The findings have indicated that there is a need for legislation which will balance the interests of both the consumer and the credit provider by providing a coherent procedure and clear substantive law.

The study has shown that there are practical difficulties with the application of subsections 129(3) and (4) of the NCA. There is uncertainty regarding the determination of whether the remedy of reinstatement has been triggered or not. In most instances it is the courts who end up having to decide whether reinstatement has indeed occurred. This involves high litigation costs and delays the whole process. In the *Nkata* judgment the Constitutional Court ruled that reinstatement occurs by operation of law and that the consumer need not communicate his or her intention to reinstate the credit agreement. As revealed in Chapter Two, this stance has practical implications, mostly because it is uncertain when reinstatement has taken place. This frustrates the effectiveness of the remedy of reinstatement of a credit agreement as the credit provider will not know when to inform the consumer of the legal costs in order to comply with the provisions of section 129(3). The findings show that according to subsections 129(3) and (4), a credit agreement will be reinstated when the consumer pays the amount in arrears, the default charges and the reasonable costs of enforcing the agreement. However, the court, in *Nkata*, ruled that the credit agreement may be reinstated without paying enforcement costs but paying only the amount in arrears and the default charges. This may have an undesirable effect on the attitudes of consumers, who may pay arrear amounts and default charges, with the aim of reinstating the credit

agreement, only at the last minute before the sale in execution. It is evident from the cases that courts are now cautious – almost reluctant – to declare residential property specially executable and that they adopt a more lenient approach to a debtor in that they may postpone an application to declare specially executable a residential property in order to afford the mortgagor an opportunity to meet his obligations by alternative means or to invoke section 129(3) of the NCA.

2. Recommendations

It is submitted that there is a need for legislation which will balance the interests of creditors and consumers by providing a coherent, substantive and procedural framework for the remedy of reinstatement of a home mortgage bond credit agreement.²³⁴ Alternatively, the legislature should further amend the NCA and lay down a practical procedure to be followed when utilising the remedy of reinstatement. The following recommendations are made:

2.1 Interaction between consumer and credit provider

As already alluded to earlier on this dissertation,²³⁵ there is a need for a requirement of engagement and or interaction between the consumer and a credit provider. If a consumer wants to reinstate a credit agreement, this needs to be communicated to the credit provider. This will be more practical as the credit provider will know when to inform the consumer of the legal costs that are required to be paid. However, it should be acknowledged that some consumers are not aware of the remedy of reinstatement. It is submitted that, in the section 129(1) notice, the credit provider should be required to draw the consumer's attention to the remedy of reinstatement and the requirements to be fulfilled in order to be in compliance with subsections 129(3) and (4) of the NCA.²³⁶ Once the credit provider has been informed of the intention to reinstate the credit agreement, it must then inform the consumer of the enforcement costs by sending a bill of costs. If the consumer is happy with the legal costs as per bill of costs, the bill will be taxed as unopposed or by consent. However, in the event that the consumer places the fees or items in the bill of costs in contention, the taxing master will tax the bill as

²³⁴ Steyn & Sharrock (note 47 above).

²³⁵ See Chapter Two- 3.4.1, above.

²³⁶ Steyn & Sharrock (note 47 above); *Mokebe* (note 214 above) par 46.

opposed in the presence of both parties.²³⁷ On the other hand, this may result in considerable legal costs for the mortgagor/consumer who may require the services of an attorney to prepare objections and representations and to appear on his or her behalf. Alternatively, when a mortgagor/consumer informs the credit provider of the intention to reinstate a credit agreement, he can request the credit provider to provide him with details of the legal costs.

2.2 A bar to reinstatement of a credit agreement

In the *Nkata* judgment the court ruled that the mortgagor would be precluded from reinstating a credit agreement after the proceeds of the sale are received. Similarly, in the *Makubalo* judgment, the court provided clarity as to what constitutes realisation of the proceeds of the sale by stating that payment of a deposit to the sheriff does *not* amount to proceeds of the sale being received. It is the full purchase price that must reach the credit provider for the proceeds of the sale to be regarded as being received. It is submitted such a stance has far reaching consequences. A mortgagor should not be allowed to reinstate a credit agreement after payment of the full amount or after a deposit has been made to the sheriff. This should be regardless of whether or not such payment reached the mortgagee. This will avoid inconvenience to a third party, such as the purchaser in execution, who will tend to be prejudiced when the court finds that reinstatement occurred and orders the return of the immovable property to the previous owner, the mortgagor.²³⁸

2.3 Limitation on utilisation of the remedy of reinstatement

As stated above,²³⁹ there is a need for a limit to be imposed on the number of times that a mortgagor may reinstate a home mortgage credit agreement.²⁴⁰ This will preclude mortgagors from abusing the remedy by continually falling into default with the hope of reinstating the credit agreement at the last minute. Further, as reinstatement renders invalid the default judgment previously obtained, it means that, every time the mortgagor defaults, the credit provider will have to re-initiate the entire enforcement procedure and more costs will be incurred.

²³⁷ Rule 70 of the Uniform Rules of Court provide that the party objecting to the fees or items in the bill should do so within 20 days by providing grounds of objections for each item objected.

²³⁸ Steyn and Sharrock (note 47 above).

²³⁹ See Chapter Two -3.4.3, above.

²⁴⁰ Steyn and Sharrock (note 47 above).

2.4 Court's discretion when dealing with foreclosure

In dealing with an application for summary judgment or default judgment in which an order declaring immovable property specially executable is sought, the court should adjourn such matter if it is of the view that the consumer can reinstate the credit agreement. The court can ascertain from the consumer whether or not he or she intends to reinstate the credit agreement. If the consumer has no means to pay the arrear amount, then the court should have the discretion to adjourn the matter in order to allow the consumer to sell the property based on the market value. In granting that order the court should stipulate a time frame in which the mortgagor must sell the property. In circumstances where the consumer fails to secure a buyer within the time stipulated by the court, the court could grant an order declaring such property specially executable. However, an estate agent should monitor such sale, and not the sheriff. The aim is to sell the property at a price that reflects its market value so that both the mortgagor and the mortgagee can emerge as 'winners'.

There is a need for further amendment of the NCA's provisions dealing with reinstatement of a credit agreement. Such amendment must take into consideration the recommendations made above and it must provide a coherent substantive and procedural framework for the remedy of reinstatement. It must also balance the interests of both the mortgagor and the mortgagee. This will ensure economic stability while advancing the socio-economic right to have access to adequate housing.

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