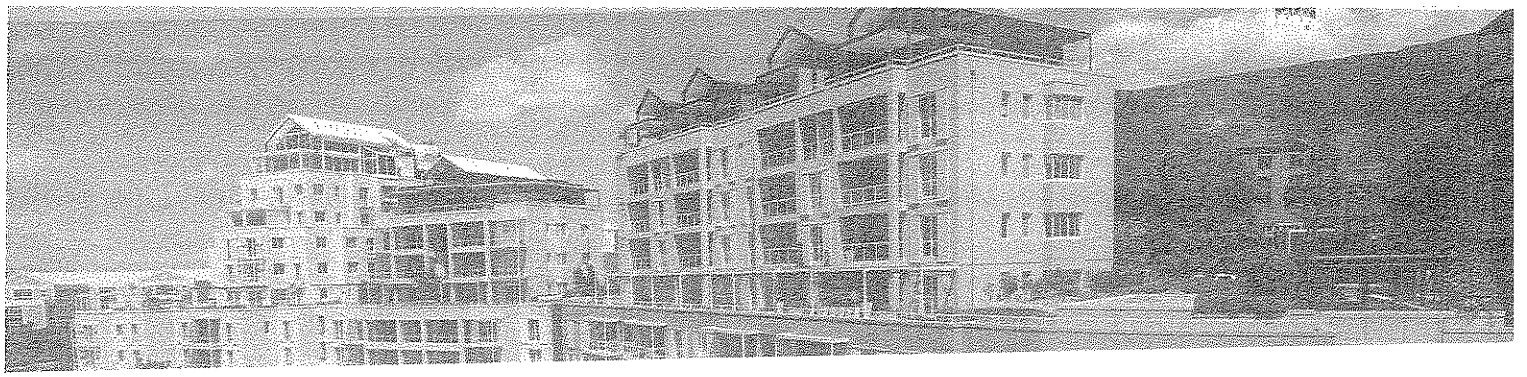

A home owner's automatic mechanism for taking the sting out of a default judgment

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The National Credit Act 34 of 2005 ("the NCA") has a mechanism whereby a defaulting debtor can automatically (and even without the knowledge of the creditor or the debtor himself) "reinstate"[1] a credit agreement.

The mechanism operates subject to the proviso that the credit provider has not yet cancelled the agreement.

The effect of the "reinstatement" procedure is to "normalize" a credit agreement that was in default (due to the debtor's failure to pay), to the extent that a default judgment that was obtained at a time when the debtor was in breach, is no longer of use to the credit provider.

Should the debtor repeat the breach by falling into arrears subsequent to the "reinstatement", the credit provider is obliged to apply to court for a new default judgment.

As a result, it is important for property practitioners to take note of the *Nkata* judgment, handed down in the Western Cape High Court in January this year.

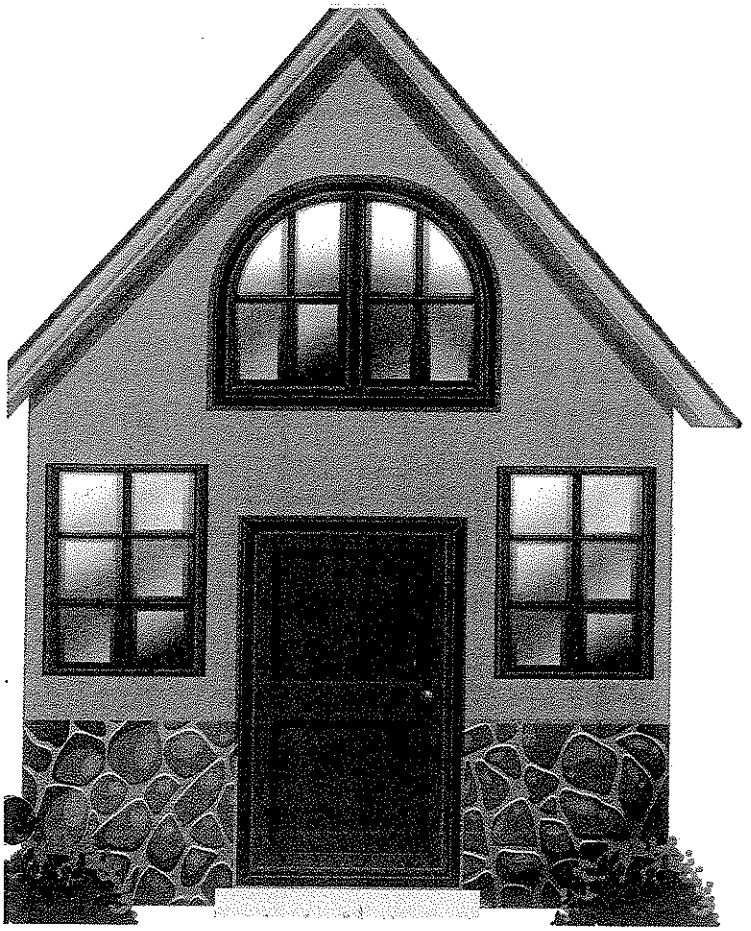
In this article, I highlight the application of this mechanism as illustrated in *Nkata* and comment, where apposite, on some of the criticism levelled against the inaccurate drafting of the applicable provisions.

Reinstatement: the relevant provisions from the NCA

Sections 129(3) and (4) provide as follows:

"(3) Subject to subsection (4), a consumer may:

(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's



permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and:

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

(4) A consumer may not re-instate a credit agreement after:

(a) the sale of any property pursuant to:

(i) an attachment order; or

(ii) ...

(b) the execution of any other court order enforcing that agreement; or

(c) ..."

[My emphasis].

Nkata v FirstRand Bank Limited and others [2014] JOL 31232 (WCC)

The facts

Ms Nkata bought a vacant plot and obtained two bonds from FirstRand Bank ("FirstRand") to finance, on the one hand, the purchase price and on the other, the costs of building works to be undertaken. For the first bond Ms Nkata chose the mortgaged property as her *domicilium citandi et executandi*; for the second bond she chose a different address as her *domicilium*, being the address of a flat where she lived pending completion of the building work on the new property.

During 2010, Ms Nkata fell into arrears with her mortgage bond repayments and, in June 2010, FirstRand's attorneys sent the requisite section 129 letter, requesting her to rectify the breach and setting out her various rights to obtain debt counselling as provided for in the NCA. This letter was addressed to the wrong house number in the street where Ms Nkata resided (she had moved in once the building work was completed) and never reached her. A letter was also sent to the flat where she used to stay, but she did not receive that letter either.

The bank issued summons in July 2010. Ms Nkata did not enter an appearance to defend and default judgment was granted against her. Meanwhile, on 4 August 2010, she approached a debt counsellor and, on 20 August 2010, an application for a debt review was made.

According to Ms Nkata, she only learnt of the judgment when she received a telephone call from the bank in October 2010 informing her that the property was to be sold in execution. She then approached attorneys to apply for rescission on her behalf ("the first rescission application").

Prior to the hearing, the parties reached a settlement which they incorporated into a draft order (the order was never made an order of court though and the application was postponed as a result of the settlement). In terms of the settlement agreement, the sale in execution of the property was cancelled and Ms Nkata undertook to sign the bank's standard "Quicksell" mandate; and that, while the mandate was in place, she would pay monthly instalments of R10,000. Were the property not sold pursuant to the "Quicksell" mandate, then Ms Nkata was to pay the full arrears to the bank within 14 days, failing which the bank would be entitled to proceed to sell the property in execution. Were the full arrears paid, then the bank agreed not to sell the property and Ms Nkata was obliged to resume payment of the full monthly instalments. Ms Nkata was also to pay the wasted costs of the cancelled sale as well as the costs of the rescission application "as taxed or agreed".

The property was not sold pursuant to the "Quicksell" mandate. Ms Nkata paid a lump sum of R87,500 which extinguished her arrears, and she resumed her

monthly payments. However, over the following 12 months she again fell into arrears, but again brought the account up-to-date in March 2012 by making a further lump sum payment.

In April 2012, shortly after extinguishing her arrears for the second time, Ms Nkata asked the bank to agree to the rescission of the default judgment because the judgment was negatively affecting her credit record. The bank refused. Then, in May 2012, Ms Nkata submitted a distressed debt application but the bank rejected the application, stating that the matter was "under litigation".

In February 2013, after further default by Ms Nkata on her instalments, the bank caused the property to be sold in execution (in terms of the initial default judgment and writ of execution) to Kraaifontein Properties ("KP"). KP immediately effected some renovations to the house and put it on the market for on-selling. Pending re-sale, KP and Ms Nkata agreed that she could stay in the house and they entered into a lease agreement to this effect. Ms Nkata never mentioned that she intended to (again) seek rescission of the judgment. On 2 May 2013, KP sold the property to a third party and, on 13 May 2013, Ms Nkata brought an application for rescission (the second application), seeking: rescission of the default judgment; the setting aside of the writ of attachment issued by the court registrar; and an order declaring the sale of the property in execution on 24 April 2013 invalid. The bank and KP opposed the application.

The judgment

1. The court held that with regard to second rescission application, that none of the arguments raised on behalf of Ms Nkata had substance, except for the argument that there was non-compliance with section 129(1) of the NCA as this prescribed notice was not dispatched to her correct *domicilium* address. The non-compliance afforded Ms Nkata with a *bona fide* defence to the bank's action, which is an important component of showing good cause for rescission as required in terms of the Rules of Court. However, the fact that Ms Nkata had a *bona fide* defence to the initial default judgment action and that the judgment was erroneously sought and granted did not, without more, entitle her to rescission, as she was out of time. The Rules require a rescission application to be brought within 20 days of the defendant's acquiring knowledge of the default judgment, but the present application (the second rescission application, the first having been settled) was launched nearly two and a half years after Ms Nkata learnt of the default judgment. Ms Nkata had not satisfactorily explained the lengthy delay in seeking rescission. As such, the prayer for condonation of her non-compliance with the time limits had to be refused.

2. The court further agreed with FirstRand and KP's argument that Ms Nkata had lost the right to seek rescission when she reached settlement in the first rescission application. That is because of the principles of "peremption" (which applies to appeals and to the remedy of rescission), the underlying premise being that "no person can be allowed to take up two positions inconsistent with one another" or, as is commonly expressed, "to blow hot and cold, to approbate and reprobate".

3. But, although the possible application of section 130 was not raised by counsel for Ms Nkata, the court *mero motu* asked for submissions on whether or not the credit agreement was "reinstated" as provided for in section 129(3) and (4) of the NCA, as quoted above.

On a reading of the sections, the court noted that it did, in fact, appear as if the agreement was reinstated, although unwittingly on the side of Ms Nkata and unknown to FirstRand. This was because:

1. both in March 2011 and 2012 Ms Nkata made payments to the bank which wiped-out the full amount of her arrears at the relevant dates;

2. in compliance with section 129(3)(a), it appeared that the outstanding "default charges and reasonable cost of enforcing the agreement" were paid as well. (The mechanism by which this was done was criticised by the court. The bank merely debited the fees to her account and there was no agreement or taxation of the costs, as was required in the settlement reached in the first rescission application. Even without the settlement, the costs had to be taxed before they could be included as a cost to be executed on); and

3. the credit agreement was not cancelled by FirstRand, its steps rather showing that it was seeking specific performance of the mortgage loan agreements by relying on the acceleration clause.

Section 129(4) prohibits reinstatement if there was a sale of any property pursuant to "an attachment order" or "execution of another order". Neither term is defined in the NCA.

The interesting question which arose was whether either of these had occurred, on the facts, in the *Nkata* matter. The court concluded that there was neither an "attachment order" nor an "execution of any other order".

Regarding the "attachment order", the court noted that the default judgment was an order sounding in the payment of money. The writ of execution that was obtained subsequently constituted steps in the process of attachment and execution, but did not constitute "an attachment order" – as the creditor (bank) retained the choice of how to proceed. The court orders did not oblige the bank to execute against the property, but merely entitled it to do so.

Neither did the default judgment and writ constitute an "execution of a judgment". A judgment is only actually "executed" when money is raised pursuant to a sale of attached property and paid to the judgment creditor.

As a result, the court concluded that the loan agreements were reinstated, both in March 2011 and in March 2012, when Ms Nkata paid the full outstanding amounts and costs – and automatically so, by the working of the law.

Ms Nkata did not need to be aware of the fact of reinstatement.

Execution could no longer be levied against the property, despite the existence of the default judgment.

If Ms Nkata again fell into arrears, the bank would have had to re-apply for a new default judgment.

A cautionary note

In *Nedbank Ltd v Fraser & another and other cases* [2011] JOL 27423 (GSJ), the court also had an opportunity to deal with section 129(3) of the NCA. That court noted that in its view, with regard to section 129(4) (which does not permit re-instatement "after execution" of a court order enforcing the agreement) execution contemplates both the sale and transfer of ownership of the immovable property into the name of a purchaser at a sale in execution of the property. Accordingly re-instatement will cause the auction sale to fail if the property has not yet been transferred. The reason for the approach in the *Fraser* judgment was the court's finding that reinstatement was analogous with the common law right of redemption. The common law rule works as follows: once property is attached, the judgment debtor can redeem the attached property for so long as the judgment debtor remains the owner. In the case of movable property, the right of redemption is extinguished on the sale when delivery and payment take place. In the case of immovable property, the right of redemption is extinguished only when registration takes place into the name of the purchaser after the sale in execution. Redemption presupposes that the whole of the debt is repaid. Under the common law an auction purchaser buys property subject to the debtor's right of redemption.

Brits[2] levels criticism at this interpretation and argues, in our view correctly, that reinstatement should be seen not as an extension of the rights of redemption, but as a new legislative intervention.

Re-instatement must be construed to make practical sense, which will prefer a view thereof that makes re-instatement impossible after a sale in execution. In support of the latter, Brits argues that:

1. The two mechanisms are similar, but have notable differences, especially when regard is had to the fact that, with reinstatement, only the outstanding debt and costs are repayable whilst, for redemption, the whole of the debt must be repaid. (Redemption will therefore not occur often in real life and is not of much protective value for a credit consumer).

2. Great uncertainty will ensue in practice if auction sales were regarded as subordinate to the possibility of reinstatement until the point of registration of transfer.

As a result, Brits suggests that the word "sale" in section 129 (3) should not be extended to include registration of transfer and should be interpreted to refer only to the completed auction sale.

Conclusion

The availability of the option of reinstatement is a measure incorporated in the NCA to assist those consumers struggling with debt not to lose their assets. In the property industry, and seen against the constitutional protection of the protection of the right to housing, reinstatement may be a successful tool. However, there are uncertainties with the interpretation of the provisions of the Act in this regard, one aspect of which the above discussion highlighted, and the court's further guidance is anticipated when similar cases are presented in future. ❐

ENDNOTES:

1 The NCA uses the word "reinstate" in section 130 – where this "reinstatement" procedure is dealt with. The use of the word has rightly been criticized by academic writers as it presupposes that the agreement was cancelled (see Brits, "Purging Mortgage Default: Comments on the Right to Reinstate Credit Agreements in terms of the National Credit Act" (2013 24 Stell LR 165)). The section itself, however, applies only where the credit agreement has not yet been cancelled.

2 See Brits, *op cit* in fn 1.