

# PURGING MORTGAGE DEFAULT: COMMENTS ON THE RIGHT TO REINSTATE CREDIT AGREEMENTS IN TERMS OF THE NATIONAL CREDIT ACT

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## 1 Introduction

Since the National Credit Act 34 of 2005 (the “NCA”)<sup>1</sup> came into effect, the enforcement of consumer credit agreements has become subject to stricter control.<sup>2</sup> The calling up of mortgage bonds is no exception, seeing that mortgage agreements qualify as credit agreements for purposes of the NCA.<sup>3</sup> The intention of this contribution is to investigate one specific debt relief mechanism that the NCA has introduced, namely the right to reinstate credit agreements.<sup>4</sup> As with much of the NCA, the idea behind this right is to extend greater protection to credit consumers.<sup>5</sup> Although full debt enforcement through litigation and the execution process can have detrimental consequences for debtors who default on their loans, reinstatement provides a way to prevent and even reverse debt enforcement – up to a certain point, at least – for those who can satisfy the requirements. As I aim to show, reinstatement has quite significant implications for debt enforcement, particularly in the mortgage context.

Reinstatement is provided for in section 129(3) and (4):

“(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 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.

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\* I am grateful to Prof AJ van der Walt for his valuable comments

<sup>1</sup> All sections of legislation or regulations cited in this contribution refer to those of the NCA or its regulations, unless otherwise indicated

<sup>2</sup> In general, see JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell (eds) *Guide to the National Credit Act* (RS 3 2011); JM Otto & R-L Otto *The National Credit Act Explained* 2 ed (2010); CM van Heerden & JM Otto “Debt Enforcement in terms of the National Credit Act 34 of 2005” (2007) *TSAR* 655

<sup>3</sup> S 8(1)(b) read with s 8(4)(d) See also *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 1

<sup>4</sup> For more details on how the NCA impacts mortgage foreclosure in general, see R Brits “Impact of the South African National Credit Act on the Enforcement of Mortgage Bonds” in B Akkermans & E Ramaekers (eds) *Property Law Perspectives* (2012) 85-106 and R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* LLD thesis Stellenbosch (2012)

<sup>5</sup> For the purposes of the NCA, see s 3

- (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) surrender of property in terms of section 127;
  - (b) the execution of any other court order enforcing that agreement; or
  - (c) the termination thereof in accordance with section 123.”

The NCA therefore provides a debtor who is in arrears with his or her credit agreement with the right to reinstate such an agreement by paying certain specific amounts before the agreement is cancelled.<sup>6</sup> As I explain below, the restriction with regard to the timing of reinstatement (before cancellation) is problematic but not insurmountable. Accordingly, part 4 below analyses the exact time frame within which the debtor may exercise the right of reinstatement, since the NCA also provides some restrictions – especially in section 129(4). Reinstatement is effected by paying the three amounts mentioned in section 129(3), which amounts are investigated in part 5 below. An important issue that I explore is how reinstatement can be reconciled with the established principles of mortgage foreclosure and acceleration clauses.

It is pertinent for all the actors in the credit industry to pay attention to the debtor-in-default’s right to reinstate credit agreements and to learn what to expect. Debtors should seek to make use of this debt relief mechanism and creditors (especially mortgagees) should be aware of the effect that the right of reinstatement has on their position. Consequently, the purpose of this contribution is to set out the legislative framework of the right to reinstate and to analyse how this mechanism functions, with a particular focus on mortgage default.

## 2 Importance of reinstatement in the mortgage context

The enforcement of mortgage agreements (or the calling up of bonds) is commonly referred to in South African law as foreclosure. This remedy entails that, when the debtor defaults, the creditor is entitled to accelerate repayment of the full outstanding debt, which enables the creditor to obtain a judgment order for this amount. In addition, if the debtor is unable to immediately repay the full outstanding amount – which is typically the case – the creditor can apply for (and should generally be granted) an order declaring the mortgaged property specially executable. A sale in execution at a public auction usually follows in order to use the proceeds to settle the debt. The basic operation of this remedy is trite and it is invoked daily.<sup>7</sup>

A powerful element of foreclosure is the fact that the creditor can cancel the loan and reclaim the entire outstanding debt, regardless of the size of the actual

<sup>6</sup> S 129(3)(a)

<sup>7</sup> In general, see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s the Law of Property* 5 ed (2006) 364 n 61 and 367-368; CG van der Merwe *Sakereg* 2 ed (1989) 625; TJ Scott & S Scott *Wille’s Law of Mortgage and Pledge in South Africa* 3 ed (1987) 203-251. Case law that confirms these basic principles include *FirstRand Bank Ltd v Soni* 2008 4 SA 71 (N) para 22; *The Master v IL Back & Co Ltd* 1983 1 SA 986 (A) 1004; *Western Bank Ltd v SJJ Van Vuuren Transport (Pty) Ltd* 1980 2 SA 348 (T) 351; *TG Bradfield Coastal Properties (Pty) Ltd v Toogood* 1977 2 SA 724 (EC) 730; *Moodley v Community Development Board* 1968 4 SA 615 (D) 619; *Thirllwell v Johannesburg Building Society* 1962 4 SA 581 (N) 583

default. This state of affairs is in accordance with the well-known principles of foreclosure and with the acceleration clause that mortgage agreements typically include.<sup>8</sup> Therefore, the result is that a debtor who falls in arrears with his or her monthly repayment instalments will be liable to repay the entire debt in the event that the creditor decides to foreclose and hence to enforce its real security right of mortgage. Traditionally, after foreclosure (in other words, after the creditor has elected to accelerate repayment of the debt and call up the bond), even if the actual amounts outstanding are very small or subsequently brought up to date, foreclosure will not be reversed. For example, in *Boland Bank Ltd v Pienaar*<sup>9</sup> the creditor's right to accelerate was upheld despite the debtor's ability and willingness to purge the default – the mortgagee was entitled to refuse to accept late payment. The more recent decision in *Nedbank Ltd v Fraser*<sup>10</sup> (“*Fraser*”) also confirms the traditional common law approach, namely that the creditor may in principle accelerate repayment of the full outstanding debt, even if the default is insignificant or can subsequently be purged.<sup>11</sup> As the court in *ABSA Bank Ltd v Ntsane*<sup>12</sup> (“*Ntsane*”) acknowledged, the bank's election to accelerate payment of the debt (which is based on a right afforded in terms of the mortgage bond) can hardly be regarded as unlawful, even if the default that triggered it is very small.<sup>13</sup>

Under the common law, the only way to escape the full effects of foreclosure (namely, sale in execution of the mortgaged property) is to make use of the right of redemption.<sup>14</sup> For this right to be invoked the debtor must pay the full outstanding debt, which frees the property from the limited real right of mortgage and redeems the attached property, even after it has been sold in execution (but not after it has been transferred by registration to the auction purchaser). It is not difficult to perceive that the right of redemption does not provide much relief for the debtor who is unable to pay the outstanding judgment debt. Although this option remains available for those who can accumulate the necessary funds, it is of little practical use for those who cannot. Only getting the amounts in arrears up to date is not enough to call upon the debtor's right of redemption, and consequently foreclosure can go ahead. Many a merciful creditor might be content with not proceeding with foreclosure if the debtor simply gets the arrears up to date, but the common law provides for no legal obligation to do so.

The potential harshness of this legal position is quite evident if one considers the drastic effects that full foreclosure can have on debtors. It is

<sup>8</sup> Badenhorst et al *Property* 364 n 61 and 367-368; Van der Merwe *Sakereg* 625

<sup>9</sup> 1988 3 SA 618 (A)

<sup>10</sup> 2011 4 SA 363 (GSI) para 36

<sup>11</sup> See also *TG Bradfield Coastal Properties (Pty) Ltd v Toogood* 1977 2 SA 724 (EC) 730, where it was held that even the creditor itself cannot reverse its election to foreclose. I doubt whether this approach will be followed or even argued today

<sup>12</sup> 2007 3 SA 554 (T) para 68

<sup>13</sup> The court nevertheless refused to allow acceleration and foreclosure in this case, since it regarded the bank's decision to foreclose as abusive and a violation of the debtors' rights in terms of s 26 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). See part 5.2 below

<sup>14</sup> In general, see Badenhorst et al *Property* 381; Scott & Scott *Mortgage and Pledge* 191-195 and the sources cited there

not for nothing that there has been controversy regarding the constitutional implications in cases where mortgage debtors face eviction from their homes. Sales in execution of residential property can have dire socio-economic results and the general approach that has developed requires a fair and proportionate outcome also in mortgage foreclosure cases. Broadly speaking, the attitude of the courts is that the home should only be sold if there are no other options available to settle the dispute.<sup>15</sup> To still insist on sale in execution under circumstances where the arrears had been paid up, with the loss of home imminent, is hardly likely to pass constitutional scrutiny. There is simply no justification to sell the home (and violate section 26 of the Constitution)<sup>16</sup> if the loan repayment schedule is brought up to date. The bank's purpose – debt enforcement – and security interest will seldom still be under threat, especially when compared to the importance that the Constitution attaches to homes. Despite the possible constitutional problems, it has not been necessary for the courts to develop the strict common law position with respect to foreclosure. Instead, the legislature has stepped in with the NCA, which goes a long way to protect credit consumers who face the sale in execution of their properties,<sup>17</sup> at least in those respects where the traditional foreclosure principles might not do so.

### 3 What is the effect of reinstatement?

#### 3.1 Resume possession of property

Before explaining the requirements for and qualifications of the right to reinstatement, it is necessary to first describe the consequences that reinstatement will have in cases where it is successfully utilised. Part 2 above explains that foreclosure will usually have the effect that the mortgage agreement is cancelled and payment of the entire outstanding debt enforced by selling the mortgaged property in execution. Moreover, under the common law the bank has the right to refuse to accept late payment of the amounts in arrears. Only the repayment of the full outstanding debt would save the debtor's property. However, by successfully making use of the right of reinstatement the debtor now has a way to escape the full consequences of

<sup>15</sup> *Gundwana v Steko Development* 2011 3 SA 608 (CC) paras 53 and 54. The entire controversy is analysed in *Brits Mortgage Foreclosure* 60-137. See also AJ van der Walt & R Brits "The Purpose of Judicial Oversight over the Sale in Execution of Mortgaged Property: *Gundwana v Steko Development* 2011 3 SA 608 (CC); *Nedbank Ltd v Fraser and Four Other Cases* 2011 4 SA 363 (GSJ)" (2012) 75 *THRHR* 322.

<sup>16</sup> S 26 of the Constitution:

"(1) Everyone has the right to have access to adequate housing

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve 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. No legislation may permit arbitrary evictions."

<sup>17</sup> See *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D) para 59:

"Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort. Even though the defendants in the present matter put up the property as security for the indebtedness to the plaintiff under the mortgage bond, *the [NCA] has nevertheless given them the opportunity to utilise its provisions to avoid execution in suitable circumstances*" (Emphasis added)

foreclosure by only paying the amounts outstanding (plus the other amounts required by section 129(3)).

Section 129(3)(b) provides that successful reinstatement entitles the debtor to “resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order”. Although a term like “repossessed” is not perfectly suited for the mortgage foreclosure context, there is no reason to believe that the same principle should not apply where a mortgaged property has been attached pursuant to a writ of execution.<sup>18</sup> If a mortgage agreement can be reinstated even after judgment had been granted and the hypothecated property attached,<sup>19</sup> the logical implication is that the attachment must fall away at the point of reinstatement. If the mortgage agreement is reinstated, it makes no sense to have the sale in execution go ahead.

If the requirements of the NCA are fulfilled, the credit agreement will consequently be fully reinstated and continue to operate as if there had never been any default. If the debtor was to default again, the debt enforcement procedures of the NCA would have to be complied with again. That is, the notice of default<sup>20</sup> must be sent once more. The only exception to this principle is when the debtor falls in arrears with a rearranged payment plan, in which case another notice of default is not necessary.<sup>21</sup> In all other cases, it seems like reinstatement can occur over and over again. All enforcement proceedings will be overturned each time that the debtor rectifies the default. Although this position may cause administrative difficulties for some creditors, the NCA clearly places no restriction on the number of times a debtor can reinstate the agreement by getting the relevant amounts paid up. However, debtors should in my opinion not be allowed to abuse the right of reinstatement, for which abuse there would have to be proper proof.<sup>22</sup>

### 3.2 Unilateral and automatic

Is reinstatement a unilateral juristic action taken by the debtor or must he or she first consult with the creditor? In other words, is physical repayment of the amounts outstanding enough to fully reinstate the credit agreement and prevent and overturn any enforcement action being commenced by the creditor, even if the creditor is unaware of payments being brought up to date? It was argued in *Nedbank Ltd v Barnard*<sup>23</sup> that a debtor who wants to reinstate his or her credit agreement must first approach the creditor to obtain information regarding the extent of his or her default. Moreover, it was argued

<sup>18</sup> See also H Coetzee “Voluntary Surrender, Repossession and Reinstatement in terms of the National Credit Act 34 of 2005” (2010) 73 *THRHR* 569 578

<sup>19</sup> Whether reinstatement is indeed possible after judgment and/or attachment is discussed in parts 4.2 and 4.3 below

<sup>20</sup> S 129(1)(a) of the NCA

<sup>21</sup> S 88(3)(b)(ii) However, see part 3.3 below

<sup>22</sup> For example, a creditor who is frustrated with the debtor’s repeated default and reinstatement might want to argue that the debtor is abusing his or her right of reinstatement (if this motive can indeed be proven) However, the fact that the creditor may claim default charges (see part 5.1 below) should mostly compensate for creditors’ frustrations in this regard

<sup>23</sup> (1142/08) 2009 ZAECPEHC 45 (1 September 2009) *SAFLII* para 14 <<http://www.saflii.org/za/cases/ZAECPEHC/2009/45.html>> (accessed 10-08-2012)

that the debtor must inform the creditor of his or her intention to reinstate the credit agreement. Consequently, the contention was that the credit agreement cannot be regarded as being automatically reinstated when the debtor simply purges the default.<sup>24</sup> However, the court rejected this argument, since there is nothing in the NCA that requires the parties to consult with each other before reinstatement.<sup>25</sup> In other words, the debtor can unilaterally reinstate the agreement by paying the amount in arrears as well as the permitted charges. Reinstatement occurs automatically once the required amounts are paid.<sup>26</sup> There is no reason to doubt the correctness of this decision, seeing that nothing in the NCA seems to indicate otherwise. Banks are accordingly advised to structure their systems in such a way that they take accurate account of outstanding amounts being repaid, so that enforcement proceedings are not instituted (or continued) despite reinstatement already having taken place.

### 3 3 Purging arrears under a rearranged payment plan

Debt rearrangement is one of the debt relief mechanisms that the NCA provides for those who are over-indebted.<sup>27</sup> For current purposes I do not go into the details of debt rearrangement.<sup>28</sup> To summarise, as part of the debt review process, the parties can agree to a rearranged payment plan or a court can grant an order to that effect. For example, the amount of the monthly instalments can be decreased and combined with a longer repayment period.<sup>29</sup> Therefore, rearrangement is a way to assist debtors who have fallen in arrears with (or who are about to default on) their credit agreements. Also, debt review prevents enforcement of the debt (including foreclosure).<sup>30</sup> However, if the debtor also falls in arrears with the rearranged payment plan, normal debt enforcement can take its course.<sup>31</sup>

Consequently, the right of reinstatement is qualified under circumstances where the consumer's obligations have been rearranged, when he or she defaulted on such a repayment plan, and subsequently brought *those* arrears up to date. In other words, debt rearrangement will fall away if the debtor is in default with the credit agreement as well as the rearranged payment plan.<sup>32</sup> If the amount that the debt rearrangement plan is in arrears with is purged, the rearranged payment scheme will not be reinstated and debt enforcement can

<sup>24</sup> Para 14

<sup>25</sup> Para 15

<sup>26</sup> Para 15 See also *Dwenga v FirstRand Bank Ltd* (EL 298/11, ECD 298/11) 2011 ZACECELLC 13 (29 November 2011) *SAFLII* para 34 n 35 <<http://www.saflii.org/za/cases/ZACECELLC/2011/13.html>> (accessed 10-08-2012)

<sup>27</sup> Ss 86 and 87 of the NCA

<sup>28</sup> In general, see Otto & Otto *National Credit Act* 58-64; C van Heerden "Over-Indebtedness and Reckless Credit" in JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell (eds) *Guide to the National Credit Act* (RS 3 2011) 11-5-11-24

<sup>29</sup> S 86(7)(c)(ii)(aa) of the NCA

<sup>30</sup> S 88(3)

<sup>31</sup> S 88(3)(b)(ii) See also *FirstRand Bank Ltd v Fillis* 2010 6 SA 565 (ECP) paras 14-16

<sup>32</sup> S 88(3)(a)-(b) of the NCA

therefore continue.<sup>33</sup> Only the purging of the amount that the original credit agreement is in arrears with will lead to reinstatement. Nevertheless, it seems that courts may be willing to refuse to grant summary judgment against a debtor who is willing and able to comply with the rearranged payment plan, despite his or her momentary (but purged) default in terms of such a plan.<sup>34</sup>

#### 4 When can a credit agreement be reinstated?

##### 4.1 Before debt enforcement proceedings commences: Section 130(3)(c)(ii)(dd)

To reinstate a credit agreement, the debtor in default must pay certain amounts, which are analysed in part 5 below. I firstly investigate *when* reinstatement is possible. Although section 129(3) and (4) is the main provision regarding the right of reinstatement, I first refer to another provision that establishes a point of departure for explaining what happens when default is purged. Section 130(3)(c)(ii)(dd) provides as follows:

- “(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied ... –
- (c) that the credit provider has not approached the court –
    - (ii) despite the consumer having –
      - (dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).”

This provision applies if the amounts in question are brought up to date before any debt enforcement proceedings have been “commenced in a court”. In such a case the creditor would not be able to enforce through litigation its decision to cancel the credit agreement. Foreclosure action would be prevented despite the bank’s decision to call up the bond. The force of this provision is emphasised by the fact that it applies “[d]espite any provision of law or contract to the contrary”. In other words, the benefits of this section can be neither waived through agreement nor limited by a provision of statutory or common law. When a bank therefore wishes to foreclose on a bond under circumstances where the debtor has defaulted on the loan, it would be prevented from taking legal action to do so if the debtor rectified the default before court proceedings commence. According to subparagraph (dd), the default that should have been purged is the one that had been disclosed to the debtor in the section 129(1)(a)<sup>35</sup> notice of default. However, section 130(3)(c)(ii)(dd) says nothing about what

<sup>33</sup> *FirstRand Bank Ltd formerly known as First National Bank of Southern African Ltd v Fester* (14597/2011) 2011 ZAWCHC 363 (15 September 2011) *SAFLII* para 4 <<http://www.saflii.org/za/cases/ZAWCHC/2011/363.html>> (accessed 10-08-2012), citing and quoting from *FirstRand Bank Ltd v Fillis* 2010 6 SA 565 (ECP) paras 14-16

<sup>34</sup> *FirstRand Bank Ltd v Britz* (5243/2011) 2012 ZAFSHC 13 (9 February 2012) *SAFLII* paras 22 and 26 <<http://www.saflii.org/za/cases/ZAFSHC/2012/13.html>> (accessed 10-08-2012)

<sup>35</sup> S 129(1)(a) of the NCA:

- “(1) If the consumer is in default under a credit agreement, the credit provider –
- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date ”

happens when arrears are paid up *after* debt enforcement proceedings have been commenced but not yet completed, or have been completed but not yet executed. I address these questions in the following parts.

## 4 2 Before the agreement is cancelled

### 4 2 1 Contradictions in section 129(3)

As with many of the NCA's provisions, drafting oddities and uncertainties also occur with regard to the topic at hand. Nonetheless, it is important to try and make sense of the provisions, with reference to their purposes as well as those of the NCA as a whole. The potentially awkward aspect of section 129(3)(a) – quoted in part 1 above – is the fact that the debtor in default may only reinstate the credit agreement *before* it has been cancelled. In addition, section 129(3)(b) implies that reinstatement should be possible *after* the property that is subject to the credit agreement has been attached as part of the debt enforcement process. Otto comments on this contradiction as follows:

“It escapes my mind how, first, an agreement which has not been cancelled can be reinstated. Secondly, it is not clear how a person can resume possession of a thing which has been repossessed pursuant to an attachment order, if the agreement was *not* cancelled to justify such an attachment order in the first place.”<sup>36</sup>

As a result, a literal reading of the subsection may render its practical application quite restrictive or even unworkable. From section 130(3)(c)(ii) (dd) – discussed in part 4 1 above – it is clear that debt enforcement (and foreclosure) will be prevented if the amounts outstanding are repaid before litigation commences. Since that section refers to purging the arrears before debt enforcement is commenced, “reinstatement” is not truly what happens in that instance because, as Otto rightly points out, one cannot *reinstate* an agreement that has not been *cancelled*.<sup>37</sup> Rather, the right of reinstatement (revealed in section 129(3) and (4)) seems to apply to a later stage – potentially during or even after conclusion of debt enforcement litigation. Logically, reinstatement should apply *after* cancellation or at least after the cancellation process has been set in motion. Yet, the literal wording of section 129(3)(a) restricts reinstatement to *before* cancellation.

In light of the fact that section 129(3)(b) contradicts section 129(3)(a) by expressly allowing reinstatement *after* cancellation (when the property has been attached), the question should be asked: what is meant by “before the credit provider has cancelled the agreement” in section 129(3)(a)? The literal meaning of section 129(3)(a) seems to imply that the debtor is allowed to only *prevent* cancellation by getting the arrears up to date before the creditor decides to take action and *cancel* the agreement. However, this interpretation would not allow the debtor to reinstate the agreement after the creditor has already taken the necessary steps to lawfully cancel the agreement. Also, recovering possession of the attached property (as section 129(3)(b) provides

<sup>36</sup> JM Otto *The National Credit Act Explained* (2006) 98, similarly repeated in Otto & Otto *National Credit Act* 117 (original emphasis)

<sup>37</sup> Otto *National Credit Act* 98; Otto & Otto *National Credit Act* 117

for) would then never be possible, since the creditor would only ever repossess the property in terms of an attachment order *after* cancellation. Therefore, section 129(3)(b) would have no meaning, which could hardly have been the legislature's intention. In terms of this paragraph it is clear that reinstatement would have to be possible after the property had been attached in terms of an attachment order, which can only occur *after* and not *before* cancellation.<sup>38</sup> Yet, if reinstatement is only possible *before* cancellation (as section 123(3)(a) states), the word "reinstatement", as Otto explains, would be "a misnomer"<sup>39</sup> because it would not be the correct term to describe the mechanism. This interpretation would also render section 129(3) rather pointless, since it is obvious that debt enforcement can be *prevented* by getting the arrears up to date. Section 130(3)(c)(ii)(dd) and the mandatory notice-of-default requirement of section 129(1)(a) already provide as much.

Therefore, the literal interpretation of section 129(3)(a) would render section 129(3)(b) without effect. In my view, the only way to sensibly interpret section 129(3) so that both paragraphs (a) and (b) would have a function is to assume that the concept "cancelled" in paragraph (a) has a broader (and rather loose) meaning here. For reinstatement to have any substantive effect, one would have to give more weight to the other provisions that regulate this mechanism and not stumble over the unclear before-cancellation requirement in section 129(3)(a). I suspect that the legislature's intention with the before-cancellation qualification in section 129(3)(a) was to ensure that reinstatement would not be possible after the whole debt enforcement process has been completed, since such an approach would clearly be unsustainable. Hence, one should not read the term "cancelled" too technically here. Other provisions like sections 129(3)(b) and 129(4)<sup>40</sup> clearly envision a wider scope for the right of reinstatement than the restriction implied by section 129(3)(a).

<sup>38</sup> Otto *National Credit Act* 98; Otto & Otto *National Credit Act* 117 See also Coetzee (2010) *THRHR* 578 A possibility, as Coetzee (578) suggests, is that:

"[Section 129(3)(a)] had the situation in mind where the consumer brings his or her payments up to date in general, or under circumstances where the credit provider already acquired the right to cancel the agreement, but has not yet exercised such right"

However, she also acknowledges (578-579) that s 129(3)(b) (reinstatement *after* attachment) makes her suggested interpretation problematic, unless s 129(3)(b) had the situation in mind where the property had been attached prior to cancellation – that is, in terms of a so-called interim attachment order to ensure the temporary safekeeping of goods pending debt enforcement action being instituted. However, it is not settled that such an attachment is at all possible under the NCA, at least not *as a part of* the debt enforcement process: See Otto & Otto *National Credit Act* 112-113; JM Otto "Attachment of Goods Sold in terms of Instalment Agreement Without Cancellation of Contract – Sanctioned by the National Credit Act? *Absa Bank Ltd v De Villiers* unreported case no 15692/07 (C)" (2009) 72 *THRHR* 473 477-479 Even if courts would be willing under the NCA to grant interim attachment orders to keep goods safe pending cancellation (which was not uncommon pre-NCA and moreover necessary under certain circumstances: See Otto (2009) *THRHR* 477-479), the interim attachment of *immovable property* to keep it safe for future *foreclosure* is not known (or necessary) in South African law

<sup>39</sup> Otto *National Credit Act* 98 n 135, repeated in Otto & Otto *National Credit Act* 116 n 165

<sup>40</sup> See part 4 3 below

#### 4 2 2 *The cancellation of a credit agreement for purposes of section 129(3)*

In general, the cancellation of a contract can be defined as “a unilateral juristic act which terminates certain consequences of a valid contract”.<sup>41</sup> The power to cancel a contract is derived from an *ex lege* contractual term that comes into effect when the contract is breached.<sup>42</sup> However, cancellation as a remedy is only available if the breach is material or serious, or if the contract provides for a right to cancel;<sup>43</sup> the classical *lex commissoria*. Credit agreements that are repaid in a number of instalments habitually provide for cancellation in the form of acceleration clauses. The agreement may also include certain requirements for cancellation – for instance, that the creditor must first give notice of the breach (default) and allow the debtor to rectify it within a certain time. Therefore, cancellation is a legal action that occurs prior to (and provides the basis for) enforcement through litigation and execution.

For credit agreements that fall under the ambit of the NCA, cancellation may not take place before the creditor has provided a notice of default in terms of section 129(1)(a) and the debtor either rejects the proposals made or fails to respond within the required time period.<sup>44</sup> (As mentioned in part 4 1 above, rectifying the default within this period must necessarily prevent cancellation.) The sending of the notice is also regarded as a first step to enforce (cancel) the credit agreement.<sup>45</sup> Furthermore, a creditor must comply with section 123 in order to “terminate” a credit agreement before the time provided in that agreement.<sup>46</sup> Accordingly, when a debtor is in default, the creditor may only “enforce and terminate” the agreement in terms of Part C of Chapter 6 of the NCA,<sup>47</sup> which refers to sections 129 to 133. Although neither “termination” nor “cancellation” is defined in the NCA, it is rather apparent that these concepts refer to the same thing. Therefore, to enforce or cancel/terminate a credit agreement when the debtor is in default, the creditor must follow the requirements of especially sections 129 and 130. This contribution does not concern the details of what sections 129 and 130 require for a valid cancellation/termination,<sup>48</sup> but the conclusion that I draw for current purposes is that to cancel/terminate a credit agreement entails a process of following various requirements (for instance, the notice of default and time periods, with the possibility of debt review intervening). Therefore, a credit agreement is not regarded as being fully “cancelled” or “terminated” before the debt enforcement process has been completed in terms of sections 129 and 130 of the NCA. Of course, these sections contain all the provisions that

<sup>41</sup> S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 3 ed (2007) 398-399

<sup>42</sup> 399

<sup>43</sup> 399

<sup>44</sup> S 130(1) of the NCA

<sup>45</sup> C van Heerden “Enforcement of Credit Agreements” in JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell (eds) *Guide to the National Credit Act* (RS 3 2011) 12-9

<sup>46</sup> S 123(1) of the NCA

<sup>47</sup> S 123(2)

<sup>48</sup> In general, see Otto & Otto *National Credit Act* 98-117; Van Heerden “Enforcement of Credit Agreements” in *Guide to the NCA* ch 12; Van Heerden & Otto (2007) *TSAR* 655

afford the right to reinstate, which implies that the right to a valid cancellation (and enforcement through litigation) of a credit agreement is qualified by the debtor's right of reinstatement. I elaborate on the enforcement aspect below.

### 4 3 Qualifications in terms of section 129(4)

#### 4 3 1 *Until judgment is executed or property sold*

Section 129(3) is expressly made subject to section 129(4) and it would therefore not make sense if section 129(3) was interpreted more restrictively than the manner in which it is qualified by section 129(4). In fact, the section 129(4) qualifications should by and large be regarded as the boundaries for debtors' rights under section 129(3) to reinstate credit agreements that are in default. Under section 129(4), reinstatement is only prohibited after the attached or surrendered property has been sold; a court order that enforces the agreement has been executed; or the agreement has been terminated (cancelled) in terms of section 123.

The court in *Dwenga v FirstRand Bank Ltd*<sup>49</sup> (“*Dwenga*”) pointed out (*obiter*) that reinstatement should only be possible until judgment is granted because the agreement is terminated at that point. Yet, this interpretation is inconsistent with section 129(4)(a) and (b), which allows reinstatement until the judgment is executed or the property sold – therefore, *after* judgment had been granted. It is unfortunate that section 129(4) also appears to have some internal inconsistencies, especially between paragraphs (a) and (b) on the one hand and paragraph (c) on the other. Paragraph (c) prohibits reinstatement when the agreement had been terminated in terms of section 123, whereas paragraphs (a) and (b) prohibit reinstatement after the attached (or surrendered) property is sold or the judgment is executed. Since paragraphs (a), (b) and (c) are separated by the word “or”, they should be read as alternatives and therefore any of these events will prohibit reinstatement.

If termination refers to the moment that judgment is granted, the court in *Dwenga* was correct to state that reinstatement cannot occur after judgment is granted, since this would be the point that section 129(4)(c)'s restriction on reinstatement is triggered. However, this interpretation of paragraph (c) would render paragraphs (a) and (b) meaningless, since both of those events occur *after judgment* had been granted (except paragraph (a)(ii)). In my view, paragraph (c) should not be interpreted to refer to the granting of judgment as such. Rather, for paragraphs (a) and (b) to have any meaning whatsoever, “termination” in paragraph (c) should be given a wider meaning that includes execution of the judgment. Be that as it may, despite the unclear drafting of section 129(4), I suggest that it should be construed so that reinstatement is only prohibited once the judgment had been enforced or the property sold (paragraphs (a) and (b)), which may often refer to the same event. The purpose of paragraph (c) would then probably be to cover instances of termination not

<sup>49</sup> (EL 298/11, ECD 298/11) 2011 ZAECELLC 13 (29 November 2011) *SAFLII* para 35 n 36

covered by paragraphs (a) and (b) – for example, credit agreements that do not concern the purchase or possession of property.

#### 4 3 2 *Until property is sold but not until transferred*

Another question that needs to be addressed is whether the agreement can be reinstated even after the property that is subject to the credit agreement (for example, a mortgaged home) has been sold in execution but not yet transferred to the auction purchaser. Section 129(4)(a) only restricts reinstatement after sale but does not say whether transfer of ownership is included. The court in *Fraser* held that this was indeed the case: “sale” includes the conclusion of the sale agreement at the auction as well as transfer of ownership by way of registration (in the case of immovables).<sup>50</sup> Accordingly, reinstatement will cause the auction sale to fail if the property has not been transferred yet.

The reason for the approach that was supported by *Fraser* is that the common law right of redemption (which the court regarded as analogous to reinstatement) functions in this way as well.<sup>51</sup> Under the common law an auction purchaser buys the property subject to the debtor’s right of redemption and the court argued that the same should apply when it comes to reinstatement under the NCA.<sup>52</sup> Logically, there appears to be no reason to restrict the scope of reinstatement to provide lesser relief than the common law right of redemption. Given that the purpose of sale in execution arguably falls away when the mortgage default is purged, the implication is that the sale would have to fail unless registration has already taken place. Section 129(4)(a)(i)’s qualification on reinstatement was consequently interpreted broadly so as to include both sale and transfer of the attached property.

However, the court in *Dwenga* did not agree and held that the opportunity to make use of reinstatement ends even before the sale is concluded at the auction, namely at the point of judgment being granted.<sup>53</sup> As explained in part 4 3 1 above, this approach is unlikely to be correct. However, no opinion was expressed in *Dwenga* with regard to whether *Fraser* was correct in finding that “sale” in section 129(4)(a) also includes transfer by registration. Seeing as section 129(4)(a) does not expressly give this wide meaning to “sale”, *Fraser*’s accommodating interpretation might be incorrect – also if one takes practical considerations into account.

To interpret the provisions in the NCA that govern the scope of the right of reinstatement it might make sense to draw from the established principles that govern the common law right of redemption. However, the comparison can only go so far, since reinstatement must also be interpreted as a separate and new legislative measure and not as an extension of the right of redemption. Moreover, reinstatement must be construed to make practical sense. The fact is that, despite the similarities that can be drawn between the

<sup>50</sup> *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ) para 40

<sup>51</sup> Paras 40–41

<sup>52</sup> Para 40

<sup>53</sup> *Dwenga v FirstRand Bank Ltd* (EL 298/11, ECD 298/11) 2011 ZAECELLC 13 (29 November 2011) *SAFLII* para 35 n 36

two mechanisms, reinstatement and redemption differ notably. The court in *Dwenga* may therefore have been correct in questioning the interpretation given to reinstatement by *Fraser*, at least on this point (on other issues I agree with *Fraser*, as explained in part 5 4 below).

One can envision the uncertainty that would ensue in practice if auction sales were to be regarded as subordinate to the possibility of reinstatement until the point of registration. It would mean that auction sales will fail each time a debtor gets all outstanding amounts up to date prior to registration. With regard to redemption, this is not a problem because the possibility of redemption is so low and therefore there is virtually no material risk for persons who purchase immovable property at auctions. On the other hand, the possibility of reinstatement could be quite high, depending on how low the outstanding amounts are. Therefore, to allow reinstatement to occur after sale but prior to registration would render auction sales very insecure (and hence unpopular) and would cause great inconvenience for auction purchasers as well as the deeds registration system. The public auction process would not be able to fulfil its debt recovery function properly. Also, lower sale prices (which will, no doubt, accompany the high risk of sales failing due to reinstatement) will in return prejudice debtors, which is contrary to the NCA's core purposes.

Conversely, this detriment to the practical functioning of the public-auction process may be outweighed by the benefit that reinstatement entails for homeowners who wish to save their homes, even after the auction but before registration. One may therefore lean towards allowing reinstatement after the auction sale but prior to registration if this interpretation of section 129(4)(a) promotes the spirit, purport and objects of section 26 of the Bill of Rights.<sup>54</sup> Yet, a more restrictive interpretation might also be allowed if it can be justified in terms of section 36(1) of the Constitution, which may be the case if the public auction process is to be protected and encouraged for the undoubtedly important public purpose that it serves. The alternative might be an amendment of the public auction system to provide for reinstatement post-sale within its structures. In other words, if reinstatement is possible until the point of registration, the auction sale process would have to be adapted to ensure that auction purchasers are alerted to this qualification on their sale agreements. Moreover, the instabilities that this approach will cause would have to be counterbalanced in some way that will keep public auctions' integrity intact.

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

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<sup>54</sup> S 39(2) of the Constitution requires that legislation must be interpreted in this manner

property marks the final point of no return for the consumer” who wished to reinstate his or her credit agreement.<sup>55</sup>

## 5 How are credit agreements reinstated

### 5.1 The amounts payable

Above I analysed *when* reinstatement can take place. Despite unclear drafting, I arrived at some conclusions that are defensible in my view. This part analyses *how* reinstatement takes place. Section 130(3) simply states that debt enforcement litigation will be prevented by bringing the payments under the credit agreement up to date. To know which payments will achieve reinstatement, one must refer to section 129(3)(a), which requires the payment of three amounts to successfully reinstate a credit agreement: (1) All overdue amounts; (2) default charges (or “default administration charges” as defined in the Act); and (3) enforcement costs (or “collection costs” as defined in the Act). After briefly dealing with the second and third amounts, I consider the first one – the more important amount – in more detail.

Default administration charges (default charges) “may be imposed by a credit provider to cover administration costs incurred as a result of a consumer defaulting on an obligation under a credit agreement”.<sup>56</sup> Default charges may not exceed the maximum prescribed by the National Credit Regulations.<sup>57</sup> Therefore, default charges may be charged for each letter written necessary for the enforcement of the debt in terms of Part C of Chapter 6 of the NCA. This amount may not surpass the amount payable for a registered letter of demand in undefended actions in terms of the Magistrates’ Courts Act 32 of 1944 plus necessary and reasonable expenses to deliver these letters.<sup>58</sup>

Collection (enforcement) costs “may be charged by a credit provider in respect of enforcement of a consumer’s monetary obligations under a credit agreement, but does not include a default administration charge”.<sup>59</sup> This amount may not be more than the maximum prescribed by regulation and may be charged only to the degree permitted by Part C of Chapter 6.<sup>60</sup> The relevant regulation provides as follows:

“For all categories of credit agreement, collection costs may not exceed the costs incurred by the credit provider in collecting the debt –

- (a) to the extent limited by Part C of Chapter 6 of the Act, and
- (b) in terms of –
  - (i) the Supreme Court Act, 1959,
  - (ii) the Magistrates’ Court Act, 1944,
  - (iii) the Attorneys Act, 1979; or
  - (iv) the Debt Collector’s Act, 1998,

which ever is applicable to the enforcement of the credit agreement.”<sup>61</sup>

<sup>55</sup> Coetzee (2010) *THRHR* 581

<sup>56</sup> S 1 of the NCA *sub verbo* “default administration charge”

<sup>57</sup> S 101(1)(f)(i) of the NCA

<sup>58</sup> Reg 46 See GN R489 in *GG* 28864 of 31-05-2006

<sup>59</sup> S 1 of the NCA *sub verbo* “collection costs”

<sup>60</sup> S 101(1)(g)

<sup>61</sup> Reg 47 See GN R489 in *GG* 28864 of 31-05-2006

Determining the exact default charges and reasonable enforcement costs, which the debtor must pay as part of the reinstatement requirements, is therefore not problematic. It is purely a matter of correct calculation and for current purposes requires no further attention.

What is meant by “all amounts that are overdue” may be more contentious, since this is the crux of the question as to what the debtor must pay so as to reinstate the credit agreement. The matter is complicated because this concept is not specifically defined in the Act. The reason that the NCA provides no definition for “amounts that are overdue” is probably because it is meant to be self-explanatory – but is it?

With regard to a loan that must be repaid in periodical instalments, like most home loans, “amounts overdue” refers to monies in arrears – in other words, instalments that are not up to date (accumulated interest probably qualifies as well). Section 129(3) entails that, if all such payments are brought up to date, the agreement is reinstated and the creditor can no longer rely on default as a ground to cancel the agreement and continue (or commence) debt enforcement proceedings. In cases where the enforcement of acceleration clauses usually causes the full outstanding debt to become immediately due and payable, reinstatement effectively reverses or prevents the creditor’s election to accelerate payment of the debt. Section 130(3)(c)(ii)(dd) reinforces this point by providing – as explained in part 4 1 above – that the court may not even determine the matter if the debtor brought “payments under the credit agreement up to date” before court proceedings have been commenced. Therefore, the creditor’s decision to cancel the agreement and accelerate repayment of the loan would be unenforceable in court. In what follows I consider whether the same is true in cases where creditors rely on acceleration clauses in the mortgage foreclosure context.

## 5 2 Can reinstatement reverse foreclosure?

As argued in part 4 3 above, even after commencement of court proceedings but before sale of the property (or otherwise executed), payment of the arrears will result in reinstatement. However, an important issue to address is whether reinstatement applies in acceleration and foreclosure circumstances. The reason this question arises is that a mortgage creditor who claims foreclosure normally claims the accelerated full outstanding debt. Although it is not unknown in South African law to restrict creditors’ powers under acceleration clauses,<sup>62</sup> acceleration in the context of mortgage foreclosure has not been regulated very extensively. Consumer credit legislation prior to the NCA did not allow debtors to prevent mortgage foreclosure by rectifying only the arrears. In fact, the mortgage creditor is traditionally entitled to refuse late payment of amounts in arrears and go ahead with foreclosure. As explained

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<sup>62</sup> For credit agreements that fell under the ambit of the Credit Agreements Act 75 of 1980, s 12 provided a right of redemption, in terms of which the returned goods could be redeemed by, amongst others, getting the amount in arrears up to date. See Otto *National Credit Act* 98

in part 2 above, foreclosure could only be prevented in terms of the common law right of redemption – in other words, by paying the full outstanding debt.

Concerning the reinstatement of a credit agreement where the full outstanding debt had been accelerated and the bond foreclosed on, the court in *Fraser* accepted that getting the actual amount of the default up to date will in fact undo foreclosure and consequently reinstate the mortgage agreement.<sup>63</sup> This point of view seemed to make sense, especially because it provided a solution to the type of problem brought to light in the *Ntsane* case.<sup>64</sup> However, the court in *Dwenga* raised some doubts as to how reinstatement should function in mortgage foreclosure circumstances.<sup>65</sup>

The immense value of and need for a right of reinstatement in mortgage foreclosure cases is illustrated by the facts in *Ntsane*, which was decided before the NCA came into effect. As a result of accelerating repayment of the outstanding mortgage debt, the bank in *Ntsane* claimed a judgment order for R62,042.43. Since the debtors would not have been able to satisfy this claim and because there was no alternative way to settle the debt, the bank also requested an order declaring their mortgaged home specially executable. Because the amount claimed was not extraordinarily small, the case appeared to comply with the principles set out in *Jaftha v Schoeman; Van Rooyen v Stoltz*<sup>66</sup> (“*Jaftha*”) and *Standard Bank of South Africa Ltd v Saunderson*<sup>67</sup> (“*Saunderson*”) – the most important cases on this issue decided up until that point.

However, what made *Ntsane* unique was the fact that the actual amount outstanding on the day that the case was heard was only R18.46. Without going into the details on how *Ntsane* was decided,<sup>68</sup> the court ultimately refused to grant a judgment for the accelerated debt of R62,042.43 even though the bank was contractually entitled to obtain an order for this amount. Instead, the court granted an order for the outstanding arrears of R18.46. In summary, although the court acknowledged that the bank’s claim for R62,042.43 was undoubtedly lawful, it denied the claim for equitable reasons that were strongly informed by the Constitution’s housing clause<sup>69</sup> and because it regarded the bank’s foreclosure action as an abuse of the process.<sup>70</sup> Despite some doctrinal concerns (traditionally speaking, at least)<sup>71</sup> with this approach, it is not difficult to understand why the court simply could not allow the debtors to lose their home because they were in arrears with only R18.46. Options such as debt review and debt rearrangement were not available at that point in time. If the debtors had a right of reinstatement then, simply paying

<sup>63</sup> *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ)

<sup>64</sup> *ABSA Bank Ltd v Ntsane* 2007 3 SA 554 (T)

<sup>65</sup> *Dwenga v FirstRand Bank Ltd* (EL 298/11, ECD 298/11) 2011 ZAECELLC 13 (29 November 2011) SAFLII

<sup>66</sup> 2005 2 SA 140 (CC)

<sup>67</sup> 2006 2 SA 264 (SCA)

<sup>68</sup> For more details on the case, see Brits *Mortgage Foreclosure* para 4 4 3 2; L Steyn “‘Safe as Houses’? – Balancing a Mortgagee’s Security Interest with a Homeowner’s Security of Tenure” (2007) 11 *LDD* 101 109-113

<sup>69</sup> S 26 of the Constitution

<sup>70</sup> See especially *ABSA Bank Ltd v Ntsane* 2007 3 SA 554 (T) paras 85-94

<sup>71</sup> See the criticism in *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ) paras 32-37

R18.46 (plus the permitted charges) would have been an easy solution to solve the problem – that is, *if* reinstatement can reverse foreclosure. But in light of housing considerations, the possibility of reinstatement is clearly favourable. As the court in *Dwenga* later conceded (despite its discomfort with allowing reinstatement to reverse foreclosure), reinstatement is “the beacon ... that keeps the hope alive” for debtors who wish to “weather the hard times and keep their homes, and dignity”.<sup>72</sup>

After the NCA came into effect, the court in *Fraser* made some comments with respect to how *Ntsane* was decided and the court specifically dealt with the right to reinstate credit agreements in the mortgage context. Of significance for current purposes, the court unequivocally accepted that getting the amounts outstanding (the arrears) up to date will reinstate the credit agreement and therefore overturn foreclosure. The court also compared the right of reinstatement with the common law right of redemption and held that they are analogous, except that redemption requires payment of the full outstanding debt, whereas reinstatement can occur by getting only the arrears up to date.<sup>73</sup> Accordingly, when the debtor pays the amounts required by section 129(3), the attached property will be redeemed (set free) from the sale-in-execution process and will return to the debtor’s possession. However, the mortgage is of course still in effect and the mortgage agreement will continue to operate as it did prior to default.

This approach to the right of reinstatement in the mortgage context was nonetheless put into question by the court in *Dwenga*.<sup>74</sup> In *Dwenga* the court allowed reinstatement to reverse foreclosure, but only because the creditor did not indicate in the notice of default that it was foreclosing the bond. The court therefore wondered how the case would have been decided if the creditor had expressly warned the debtor of its decision to accelerate repayment of the full debt and institute foreclosure proceedings. Notwithstanding that these doubts were *obiter* (since the facts did not necessitate a decision in this respect), this is a vital question that needs to be settled so as to ensure certainty in practice.

In my view, the position taken in *Fraser* is correct. There is nothing in the wording of the reinstatement provisions that indicates that *Dwenga*’s *obiter* doubts are founded. If truth be told, the NCA plainly implies that reinstatement will also operate in foreclosure cases. The concept of “all amounts that are overdue”<sup>75</sup> clearly refers to the amounts in arrears and not the accelerated outstanding debt. Also, bringing “payments... up to date”<sup>76</sup> indicates purging the arrears. Furthermore, this interpretation finds support in simple logic. If it was necessary to pay the full outstanding debt to reinstate a foreclosed mortgage agreement, paying such amounts would not *reinstate* the agreement at all. Rather, payment would simply mean that the full debt is

<sup>72</sup> *Dwenga v FirstRand Bank Ltd* (EL 298/11, ECD 298/11) 2011 ZAECELLC 13 (29 November 2011) SAFLII para 35 n 36 per Hartle J

<sup>73</sup> See *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ) paras 39-42

<sup>74</sup> *Dwenga v FirstRand Bank Ltd* (EL 298/11, ECD 298/11) 2011 ZAECELLC 13 (29 November 2011) SAFLII para 35 n 36 per Hartle J

<sup>75</sup> S 129(3)(a) of the NCA

<sup>76</sup> S 130(3)(c)(ii)(dd)

paid off and that the contractual relationship has come to an end. The right to reinstate would then also add nothing more to the law than what the right of redemption already provides. Nevertheless, although the court in *Dwenga* seemed to prefer this reading (based on the traditional principles surrounding acceleration clauses), it also pointed to the fact that this interpretation conflicts with the purposes of the NCA:

“It does not appear to me to be proper that the consumer is at the mercy of a mortgagee who can decide at whim after it has sought to rely on the acceleration clause whether to indulge him or not by accepting instalments and holding off execution for as long as it feels so inclined.”<sup>77</sup>

The court commented further that this state of affairs would not fall inside the ambit and structures of the NCA and that it would render the debtor without the protection that the NCA provides.<sup>78</sup> As the court in *Dwenga* admitted, the restrictive construction of the right of reinstatement in foreclosure cases would render it useless for debtors who wish to save their homes.<sup>79</sup> Hence, it seems to me that the court in *Dwenga* was itself not so convinced of its *obiter* comments. For example, earlier in the judgment the court held that, though an acceleration clause is valid, “the principal obligation to which it is accessory – which is in the nature of a credit agreement – must necessarily yield to the relevant provisions of the NCA pertaining to the enforcement of the foreclosure remedy which avails the mortgagee in the case of the mortgagor’s default under the bond”.<sup>80</sup>

Therefore, the court recognised that the principles surrounding foreclosure must yield to the NCA. As far as the common law principles of acceleration clauses are incompatible with the NCA’s right of reinstatement, the common law must be seen as having been amended. One can accordingly conclude that reinstatement is possible in the mortgage context and that foreclosure will be prevented and reversed if the debtor purges the default (along with the permitted charges). However, reinstatement can only occur up until the point that the auction sale is concluded.<sup>81</sup> After this point, and up until registration takes place, only redemption (paying the full outstanding debt) can save the debtor’s home.

## 6 Conclusion

The provisions that regulate the right of reinstatement once again display the poor drafting of the NCA. The interpretational confusion that I have attempted to make sense of in this contribution should have been unnecessary, since a right of reinstatement can be structured in a much simpler and clearer way. Nonetheless, as with other aspects of the NCA, one must make do with what is available and find some workable interpretation of the mechanism in question.

<sup>77</sup> *Dwenga v FirstRand Bank Ltd* (EL 298/11, ECD 298/11) 2011 ZAECELLC 13 (29 November 2011) *SAFLII* para 35 n 36 per Hartle J

<sup>78</sup> Para 35 n 36

<sup>79</sup> Para 35 n 36

<sup>80</sup> Para 21 per Hartle J

<sup>81</sup> See part 4.3 above

To summarise the operation of the right of reinstatement in the mortgage foreclosure context, it appears that the idea behind reinstatement is that the enforcement of a credit agreement should not go ahead if the amounts outstanding have been brought up to date, despite the creditor's reliance on the acceleration clause. Attached property should also be returned to the debtor's possession. Debt enforcement can however not be prevented when the property that is subject to the credit agreement has been sold. At this stage enforcement would have gone too far for reinstatement to take place, even if the required amounts are paid up.

In the mortgage context the right of reinstatement is of significant value. It provides a way for homeowners who default on their home loans to prevent the full effects of foreclosure. If they can get the outstanding amounts up to date, the NCA guarantees that enforcement of the mortgage agreement will be prevented and that their homes will not be sold. As the court in *Fraser* recommended (correctly in my opinion), debtors should be advised of their right to reinstate the credit agreement. This advice should be given along with the order that declares the property executable.<sup>82</sup> The result is that in cases where the size of the accelerated debt justifies sale in execution (in terms of *Jaftha*,<sup>83</sup> *Saunderson*<sup>84</sup> and *Gundwana v Steko Development Gundwana*)<sup>85</sup> but the amount of the actual default seems relatively small (as in *Ntsane*, for example), the execution order should still be granted, since this is what the bank is entitled to in terms of trite mortgage principles. However, the debtor should be encouraged to make use of the right of reinstatement by, for instance, liquidating other assets to get the arrears up to date. Although this contribution did not address the debt review option, the court can of course also deem the particular case worthy of referral to a debt counsellor before going forward with full debt enforcement.<sup>86</sup>

In conclusion, role players in the credit market should take cognisance of the right of reinstatement and make use of it where applicable. Courts and debt counsellors should advise and encourage debtors in default to make use of this right, especially where homes are at stake. Banks should also develop their systems to take account of the fact that debt enforcement will be prevented by lawful reinstatement in terms of the NCA. The possibility of reinstatement may even provide an incentive for mortgage creditors to wait for arrears to accumulate before instituting foreclosure action, since the risk of reinstatement would become less as the size of the default increases.<sup>87</sup>

The right of reinstatement is a favourable development in South African credit law, as it does not overthrow creditors' proprietary entitlements in

<sup>82</sup> *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ) para 42

<sup>83</sup> 2005 2 SA 140 (CC)

<sup>84</sup> 2006 2 SA 264 (SCA)

<sup>85</sup> 2011 3 SA 608 (CC)

<sup>86</sup> S 85 of the NCA

<sup>87</sup> If the commendable attitude of the mortgage creditor in *ABSA Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) is anything to go by (see particularly paras 10-16), it appears that the major financial institutions are already very accommodating and rarely resort to debt enforcement action before debtors are behind with at least two or three months' instalments. They also appear to do everything that is within their power to prevent legal enforcement of credit agreements.

terms of the limited real right of mortgage, but it provides much needed consumer protection to enable home-owning debtors to save their homes if at all financially possible. Through this mechanism (as well as through the other debt relief remedies), the Act finds a more equitable balance – than pre-NCA at least – between mortgage creditors’ proprietary security rights in hypothecated homes and the constitutional imperative to respect peoples’ access to adequate housing.

### **SUMMARY**

Section 129(3) and (4) of the National Credit Act provides debtors who are in default with their credit agreements with the right to reinstate such agreements by paying the actual amounts that are overdue as well as permitted default charges and enforcement costs. Particularly in the mortgage foreclosure context, this mechanism provides relief for credit consumers and it might just be the last opportunity for mortgage debtors to save their homes. Mortgagees are traditionally entitled to refuse the late payment of home loan instalments and therefore to continue with foreclosure, the result being sale in execution of the home. However, the Act has changed this state of affairs and now allows debtors to prevent and even reverse the creditor’s election to foreclose by complying with the requirements for reinstatement. Therefore, the operation of acceleration clauses is now qualified by the principles of reinstatement. It is possible to reinstate the mortgage agreement after judgment has been granted, and even after the property has been declared specially executable and attached. However, from the point that the property is sold at the auction, reinstatement is no longer possible. The result of reinstatement is that the attached property is released from the execution process and returned to the debtor. The credit agreement will continue to operate as it did prior to default.