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The interpretation of section 129 of National Credit Act and implications thereof: Nkata v First Rand Bank Limited and others

A consumer under the National Credit Act, 2005 (Act No. 34 of 2005) (NCA) as amended, who has defaulted with his/her instalments, can remedy his/her default by simply paying all the arrears, default charges and reasonable costs for enforcement of the agreement at any time before a credit provider has cancelled the credit agreement – [Section 129(3)] of the NCA.

However, this remedy is only available to a consumer before completion of a sale in execution pursuant to an attachment of property or a surrendered property – (Section 129(4) of the NCA). Under this Section there has been some uncertainties regarding the following:

- exactly which amount must the consumer pay in order to revive the agreement;
- under what circumstances can the fees be deemed reasonable in terms of section 129(3);
- whether this revival must be negotiated between the parties and be formalised in writing; and
- at what point is the execution of judgement or sale in execution complete.

Regarding the above-mentioned uncertainties, the Constitutional Court ("CC") has recently handed down a judgment on the interpretation of the provisions of section 129 in *Nkata v First Rand Bank Limited and Others [2016] 16 CC.* The dispute between Mrs Nkata and the Bank arose from a credit agreement in terms of which Nkata registered two bonds over her property in favour of the Bank. She chose different *domicilium* addresses for each bond. She defaulted repeatedly. This triggered many phone calls and letters from the Bank including two notices in terms of section 129(1) which were delivered in the wrong address. The bank subsequently issued summons in which it alleged compliance with section 129(1) of the NCA. The sheriff served the summons by affixing a copy of the summons to the outer door in one of the chosen *domicilium* addresses. She did not enter the appearance to defend claiming she never received the summons. The Registrar of the Western Cape High Court granted default judgment against her for the outstanding amount owed to the Bank. While the bank was in the process of the execution, Nkata brought and application in the High Court for rescission of judgement.

The court did not grant her a rescission order because she could not give satisfactory explanation for the delay. The court, on its own accord, raised the issue of whether or not the credit agreement was reinstated when Nkata paid all the areas she owed together with other charges. The Court relied on section 129(3) of the NCA. The only fees she did not pay was reasonable costs for enforcement of a credit agreement. The Court reasoned that because the bank had debited her account with those legal costs the latter lost their separate character as costs of enforcing the agreement. The High Court therefore found that her credit agreement was reinstated.

The bank appealed to the Supreme Court of Appeal which found in favour of the bank. She appealed to Constitutional Court (Con Court). When interpreting section 129(3) of the NCA, the Con Court, per Moseneke, DCJ held as follows: -

- Reinstatement of a credit agreement can only occur if three requirements have been met, namely payment of
  (i) all the arrears;
  (ii) default charges; and
  (iii) reasonable costs.
- The consumer is not required to indicate his/her intention to reinstate the agreement by any act other than paying the required arrears and costs pursuant to 129 (3). Once all arears and other costs have been paid the agreement is reinstated.
- In order to reinstate the agreement in terms of section 129(3), the consumer need not pay the whole accelerated debt pursuant to the accelerated clause in the agreement, but need to pay the defaulted arrears, defaults costs and other reasonable costs as per section 129(3).

The Con Court held that costs are reasonable if determined, taxed, or agreed and the consumer is consulted. If the consumer does not agree to the costs, these costs must be taxed for them to be reasonable, due and payable under section 129(3).

The Con Court found that Ms Nkata's credit agreement was reinstated at the time when she paid all the arrears owing and other charges. It held further that the reasonable costs were not due and payable because (i) they were never brought to the attention of the consumer, not agreed or taxed; (ii) they were not resultant from a legitimate court process. The Con Court further held that the completion of the execution process occurs at the time when the proceeds of the execution have been realised.

The implications of this judgment is that the credit providers must make sure that all legal costs are brought to the attention of the consumer without delay. It is also worth bearing in mind that there is currently a National Credit Amendment Act of 2014 in place which amends certain provisions in the Act to ensure that it fulfils its potential in terms of balancing credit market. The amendments in section 129(1) notice is that the notice was now be delivered by registered mail or personal service. Further, the Amendment Act also replaces the word "reinstate" with the "remedy" in section 129(3). There are other areas of the Act that has been amended but are not relevant for the purposes of this discussion.

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The validity of default judgment granted by the Registrar of the Court: What does the Act says?

Section 130 of the National Credit Act (NCA) sets out the procedure that the court must adopt when dealing with the proceedings relating to the enforcement of credit agreements that are subject to the NCA. One of the important elements of the procedure is that the court may determine the matter before it only if it is satisfied that the pre-litigation procedures in terms section 129 have been met.

Generally, in other matters which are not subject to the NCA, the registrar of the court can, in terms of Rule 31(5)(a), grant the default judgment and then subsequent orders for attachment and so forth would follow. But, does the same procedure prevail under the NCA?

This issue was resolved in *Nkata v First Rand Bank Limited ZACC [2016] 16.* The facts of this appear on our first article. Justice Jafta who delivered a concurring judgement but based on differing reasons held that the reasonable costs could not be due and payable because they resultant of the flawed legal proceedings: His reasoning was based on the following:

- The section 129(1) notices and summons were not properly served; and
- That only a court of law and not a registrar of court may grant a default judment in terms of section 130 of the NCA.

Section 130(3) of the NCA provides that in any proceedings commenced in a court in respect of a credit agreement to which the NCA applies, the court may determine the matter only if the court is satisfied that—in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with.

The provisions of the Act only require the court to make an order only if it is satisfied that there was compliance with section 129. The registrar was not construed to be a court in Nkata case.

The lesson from this case is that a default judgment granted by the registrar of the court under the NCA is invalid and cannot be enforceable. The implication here is that all applications for default judgement based on credit agreements to which the NCA applies must be processed by the court, not the registrar.

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A bid evaluation criteria set the parameters within which a tender must be evaluated. Are there any other consideration outside the tender documents?

The South African public procurement process is confined to the provisions of section 217 of the Constitution, Preferential Procurement Policy Framework Act, 2003 (Act No. 2003), Preferential Procurement Regulations and the supply chain management policy of each organ of state. The tender document must be prepared in accordance with and be in keeping with the provisions of all the aforesaid prescripts. The tender document must prescribe the criteria to be used for evaluation of a tender, and only this criteria will guide and inform the considerations to be taken into account during evaluation process. Taking into account any considerations falling outside the set evaluation criteria, as set out in the invitation to bid, amounts to unlawfulness and is procedurally unfair. Any decision to award or not to award a tender flowing from this process invalid. This position in our procurement law has recently confirmed by the Supreme Court of Appeal in the matter between *Westinghouse v Eskom Holdings and Another [2015] SCA 208.* In this case Eskom had issued an invitation to tender for services in respect of the replacement of six steam generators at the Koeberg nuclear power station in the Western Cape. The tender was divided into three lots. The first lot was for manufacture and delivery of replacement generators. The second was for installation, and the third was for engineering and safety analyses. This replacement project would cost Eskom about R5 billion and had to be up and running by June 2018. So, time was of essence to Eskom. Only two bidders availed themselves for this tender, namely: - Westinghouse Electric Belgium Societe Anonyme (Westinghouse) and Areva NP Incorporated in France (Areva). Eskom, in terms of its SCM policy, is obliged to formulate clear and unambiguous tender criteria, to attach weightings to each criterion and to evaluate and rank bidders on the basis of their total points allocated in respect of each criterion. The technical committee evaluated both tenders in terms of the evaluation criteria that is set out in the invitation to bid. It made recommendations to the Executive Procurement Sub-Committee (EXCOPS) that the tender be awarded to Westinghouse in respect first and third lots, and that Areva be awarded the second lot. EXCOPS made the same recommendations to the Board Tender Committee (BTC) – the final decision making body. The BTC resolved not to accept the recommendations by EXCOPS. They were of the view that they did not have the necessary expertise to make final determination as to who to be awarded what. They decided to appoint an external expert to help them, and this was duly done. This external expert made recommendations that certain strategic considerations had to be taken into account and guide the BTC when making final determination. The expert also recommended that the tender must be awarded to one bidder for all three lots.

The recommended considerations fell outside the evaluation criteria parameters, which remained unchanged throughout the process. It was common course that both bidders were equally capable of executing the required task after having been assessed in terms of the set evaluation criteria. The only factor(s) that made one of them preferable over the other was the strategic considerations. Guided by these strategic considerations, the BTC resolved to award the tender to Areva. Aggrieved by the decision, Westinghouse instituted review proceedings in the Gauteng Local Division of the High Court, Johannesburg in terms of section 6 of Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). The matter came before Carelse J who was of the view that strategic considerations were relevant considerations for the selection of the successful bidder. She held thus that the BTC's decision was not arbitrary and that the tender process was procedurally fair. She dismissed the application. Westinghouse appealed to the Supreme Court of Appeal (SCA). The SCA held that Carelse J overlooked the principle that in assessing the lawfulness of the tender process a court must consider only whether the bids have been properly evaluated against the tender criteria, other considerations are not relevant. And therefore, held that proper compliance with the procurement process as prescribed by the constitutional and legislative procurement framework is necessary for the process to be lawful. The court further held, at para 43, that the tender invitation , which sets out the evaluation criteria, together with constitutional and legislative procurement provisions, constitute a legally binding framework within which tenders have to be submitted, evaluated and awarded, and that there is no room for departure from these provisions. The court eventually held that the BTC's conduct of taking into account the strategic considerations was unlawful and procedurally unfair. The decision to award the tender to Areva was accordingly held invalid. The appeal was upheld.

This case law serves as a legal authority with regards to the principle that the contents of a tender document that has been officially issued to the public will be the basis against which tenders or proposals will be evaluated. This is an important principle to observe particularly for an organ of the State to which the PFMA and its Regulations are applicable.

A public procurement process in South Africa is a highly legislated area of law in which every step needs to be in line with the legislative framework that is relevant to procurement. The procurement spend in South Africa is a significant percentage to the Gross Domestic Product and therefore in light of the large procurement project such as the one between Westinghouse and Eskom, a lot of legal challenges will follow. It is important to ensure that the legal challenge are avoided and accordingly the expensive legal costs will also be avoid.

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