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Collection costs under the National Credit Act, 2005

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Collection costs

In accordance with the judgment handed down by Hack, AJ, on 13 December 2019, in the matter between The University of Stellenbosch Law Clinic and Others vs The National Credit Regulator and Others, the court ruled in favour of the applicants and granted three declaratory orders, namely that:

1. collection costs as referred to in section 101(1)(g), as defined in section 1, and as contemplated in sections 103(5) of the National Credit Act, 2005 ("**NCA**"), includes all legal fees incurred by a credit provider in enforcing the monetary obligations of a consumer under a credit agreement, whether such legal fees were charged before, during or after litigation;
2. section 103(5) of the NCA applies for so long as a consumer remains in default of his/her monetary obligations under a credit agreement, from the date of such default up to the date of final payment of all amounts owing, irrespective of whether judgment in relation to such default has been granted or not during such period; and
3. legal fees, including the fees of attorneys and advocates, inasmuch as they comprise part of the "*collection costs*" contemplated in section 101(1)(g) of the NCA, may not be claimed from a consumer or recovered by a credit provider pursuant to a judgment to enforce the monetary obligations under a credit agreement, unless such costs are agreed by the consumer or have been taxed accordingly.

Interpretation of the NCA

The applicants in this matter sought the intervention of our courts as it was their contention that the interpretation of the NCA would give true effect to the provisions of the NCA, whilst the current practice of excluding legal fees from the scope of "*collection costs*" under the NCA was in fact undermining the protection, which was sought to be afforded to consumers pursuant to the provisions of the NCA.

The applicants argued that, whilst credit providers' rights to recover legal costs were curtailed in terms of the provisions of the NCA, credit providers were nonetheless enjoying the protection of recovering legal fees resulting in the exploitation of consumers.

The applicants further contended that the spiralling of debt amongst consumers was as a result of collection charges being levied against them, with the biggest expense being that of legal fees.

Accordingly, the court was required to consider whether legal fees were lawfully and properly incurred, whether such legal costs should be included in the definition of collection costs under the NCA and if such costs should therefore be curtailed in terms of the relevant sections of the NCA.

In considering the matter before court, Hack, AJ, was necessitated to apply the rules of interpretation. It was the applicants' argument that the language used to define "*collection costs*" was clear and unambiguous and should be interpreted

consistently with the words in the NCA, such that "*collection costs*" would include legal costs as part of enforcing a consumer's monetary obligation up until payment of the outstanding amount.

The respondents however argued that the word "*enforce*" was limited up to the time of the commencement of proceedings and that once litigation proceeded the credit agreement was cancelled and legal proceedings were then initiated for a judgment against the consumer as well as for the recovery of the judgment. In turn, the applicants, relying on the authority of *Nkata vs FirstRand Bank Limited*[1], argued that court proceedings are an enforcement of the monetary obligations as provided for in the NCA for which collection costs would include legal fees and that legal costs could only be recovered if agreed or taxed.

In considering the merits of the matter, Hack, AJ, agreed with the applicants' contention that the definition of collection costs is intentionally broad as it was not possible for the legislature to anticipate all possible costs and as such there was no express decision to exclude legal costs from the scope of the definition. In interpreting the provisions of the NCA, the court was guided by the decision in *Bothma Batho Transport (Edms) Bpk vs S Bothma & Seun Transport (Edms) Bpk*[2].

In that decision, it was held that, whilst the starting point in "interpreting" always remains the words of the document, being the medium through which the parties express their contractual intention, the process of interpretation must not stop at the literal meaning of such words, but must consider such words in light of the relevant and admissible context, including the circumstances under which the document came into being.

Interpretation is therefore no longer a process which occurs in stages, but is a unitary exercise. Furthermore, the court held that it is not constrained to the strict rules of interpretation and must seek to ensure that justice is done. The process of interpretation should be a unitary exercise in terms of which all relevant and admissible context, including background and surrounding circumstances, should be considered.

Cognisance must be taken of the language of the relevant provision and then placed contextually within the provisions of the relevant section and purpose of the legislative instrument itself. Furthermore, in considering the intention of the legislature, the question to be considered is "what was the ill which the legislation sought to cure".

In following this approach, Hack, AJ, held that the consumers who obtain micro loans are in most instances the poorer members of the community, who should be protected, which would accord with the legislature's intention pursuant to the promulgation of the NCA.

The legislature intervened, pursuant to the promulgation of the NCA, in order to curb the exploitation of poorer communities and to remove the disparity amongst wealth in the country. In following this interpretative approach, the court held that "*collection costs*" would include all legal fees incurred by a credit provider in order to enforce the obligations of a consumer under a credit agreement, being fees incurred both before, during and after litigation.

The court was further of the view that any such legal costs comprising "*collection costs*" could only be recovered from a consumer to the extent that such costs were either agreed to by the consumer or had been taxed.

Given the outcome of this judgement, credit providers need to review their policies in order to ensure that the amounts ultimately recovered from consumers pursuant to "*collection costs*" are in accordance with the provisions of the NCA and that such amounts do not exceed the legal limits set by section 103(5) of the NCA. Credit should only be extended to consumers who are able to afford it and who would not become over indebted as a result of such credit.

Should small loans be determined to be too costly to collect for credit providers, such credit providers would then need to ensure that the credit extended under such loans are extended responsibly. Finally, whilst the result of this judgment would likely impact the profitability of various credit providers, the court was of the view that this was an acceptable result if as a consequence thereof the poorer members of communities would not be exposed to further spiralling debt.

As a result of this decision, it is now settled that "*collection costs*" as contemplated under the NCA includes all legal fees incurred by a credit provider in enforcing the monetary obligations of a consumer under a credit agreement and that such costs will either have to be agreed to by a consumer or taxed in order for a credit provider to recover same.

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[1] 2014(2)SA 412(WCC).

[2] 2014(2)SA 494(SCA).



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