

National Credit Regulator hails court judgment as a boost for consumer protection

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The National Credit Regulator (NCR) welcomes last week's judgment by the North Gauteng High Court in a case brought by African Bank as a major step forward in the interpretation of consumer protection legislation. The matter involved the legality of Section 58 of the Magistrates Courts Act, which is used by credit providers to obtain a judgment against consumers who are in default of making repayments in terms of their credit agreements. The NCR intervened in the matter to ensure that rights afforded to consumers in terms of the NCA are upheld.

"Concerns were raised about credit providers utilising this section to obtain judgment against consumers without these consumers being afforded adequate protection under the provisions of the National Credit Act (NCA)," says Peter Setou, Senior Manager: Education and Strategy at the NCR. "There were also concerns that clerks of the Magistrates Court were simply acting as a rubber stamp in granting judgment without looking at the lawfulness of the credit agreement."

Section 58 of the Magistrates Courts Act (consent to judgment proceedings in the Magistrates Court) is a quick and cost effective method for credit providers to obtain a judgment against defaulting consumers. The main feature of the section 58 procedure involves consumers providing written consent to the credit provider applying for judgment against them.

"The problem arose when consumers who had not been properly informed of their rights under the NCA would sign a consent to judgment for being in default, while in fact the granting of that credit in the first place amounted to the extension of reckless credit," says Setou. "The clerk would not have been in a position to enquire whether the credit agreement in fact amounted to reckless credit and would simply grant judgment against the consumer."

He says the court's decision is significant because it ruled that the Magistrates Courts must take into consideration the legal relationship between credit providers and consumers when obtaining a judgment against a consumer. The effect of this is that the provisions of the NCA are applicable and must be taken into account.

Under the NCA, consumers in default have the right to be sent a Section 129 notice (required procedures before debt enforcement).

Ten days after receiving the notice, the credit provider may send the consumer a sum-

mons or letter of demand envisaged in section 58, but it must comply with the NCA by including the following:

- the fact that the consumer has been in default for at least 20 days and that 10 days have lapsed since delivery of the notice.
- the fact that the consumer did not respond to the notice or that they rejected proposals laid out by the credit provider in the section 129 notice.
- Compliance with each requirements of section 130 (3) of the NCA which includes amongst others that the credit provider has not approached the Court at a time when the consumer has applied for debt counseling.

“The ruling specifically indicated that each of these aspects in the summons or letter of demand must be dealt with adequately and separately in order to enable the debtor to be fully informed and give proper consent to judgment,” says Setou.

If the consumer then consents to judgment in writing, the summons or letter of demand is then submitted to the clerk of the Magistrates Court. The clerk must consider its contents to ensure that it complies with the requirements of the NCA.

“After perusing the documents, the clerk must also consider whether there is a reasonable possibility that the underlying credit agreement involved the extension of reckless credit,” says Setou. “The clerk must also consider whether there are any allegations that the consumer is over-indebted; or that the computation of debt was not in accordance with the NCA, for example if it is above the minimum prescribed rate of interest. Other factors the clerk must consider include whether the credit provider is properly registered in terms of the NCA and whether the consumer fully understood his rights when giving consent to judgment.

“If the clerk has reason to suspect any of the above, he must refer the matter to a Magistrate for interrogation,” says Setou. “The Magistrate can then call for evidence and decide whether judgment may be granted or not.”

“The major thrust of this judgment is that it obliges clerks of the court and Magistrates to take cognisance of the provision of the NCA before consent orders are granted. The result thereof is that consumers’ rights will be protected”, concluded Setou. You can download the full judgment on the NCR’s website: www.ncr.org.za

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