



EMOLUMENT ATTACHMENT ORDERS AND OTHER RELATED MATTERS

CIRCULAR 6 OF 2023

1. INTRODUCTION

1.1. The National Credit Regulator (“NCR”), with the assistance of **the Stellenbosch University Law Clinic**, has observed with great concern the exploitation of consumers by unscrupulous credit providers and debt collectors, and on occasion, their legal representatives, through the unilateral charging of excessive and unlimited legal costs and fees on debtors’ accounts in the collection of judgment debts through emoluments attachment orders (“EAOs”), leaving the poorest of the poor with little-to-no wages, despite amendments made to the Magistrates’ Courts Act, 32 of 1944 (“Magistrates’ Courts Act”) to prevent this. The NCR has in particular noted that, inter alia due to the lack of continued judicial involvement after the issuing of EAOs, small debts are continuously unreasonably inflated, in that the legal costs charged thereon far exceed the capital debt. This abuse is exacerbated by the fact that normally no taxing of the legal costs charged on the capital debt occurs after an EAO has been issued.

1.2. An EAO is a civil debt collection process in which a court order stipulates the terms whereby the judgment creditor can attach or deduct part of the salary of the judgment debtor. In terms of the order, the employer of the debtor is obliged to deduct the amount from the debtor's salary, failing which the employer will be held personally liable for their employee’s debts.

1.3. After the Stellenbosch University Legal Aid Clinic Constitutional Court case¹, section 65J of the Magistrates’ Courts Act was amended in several important respects. Section 65J sets out the process for issuing and processing an EAO. In particular, it prescribes that an EAO may not be issued unless the court has so authorised after satisfying itself that it is just and equitable that an EAO be issued. The effect of this amendment is that no EAO may be issued unless the court, after satisfying itself that it is just and equitable and that the amount is appropriate, has authorised it.

¹ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC).

Disclaimer:

While the NCR has taken reasonable care to ensure the factual accuracy of this Circular, it cannot guarantee such accuracy, especially with regards to future events. Accordingly, NCR does not accept any liability for damages incurred by any party as a result of decisions or actions taken on the basis of information supplied in this Circular.

Furthermore, section 65J(1A)(a) of the Magistrates' Courts Act states that the employer must check that the total amount payable under one or more EAOs applied for may not exceed 25% of the employee's basic salary. Employers thus have a role to play in ensuring that they inform the relevant creditor and court that an employee cannot manage any further attachments to their salary, in this way not over burdening the employee.

1.4. Despite the 2018 amendments to the Magistrates' Courts Act, EAOs in place before the amendments are still being exploited as there is no mechanism for verifying that those existing EAOs are collected accurately. In addition, after new EAOs are issued under judicial oversight, the continued overcollection occurs without further judicial input, unless the debtor or their employers intervene, and without taxing of the legal costs.

1.5. The objective of this circular is to advise the credit industry against the exploitation of vulnerable consumers through EAOs, and to reiterate the provisions of the National Credit Act, 34 of 2005 ("NCA") and the principles laid out in the Constitutional Court's majority judgment in **Nkata v FirstRand Bank Limited and Others** concerning legal costs for the enforcement of credit agreements.

2. APPLICATION OF THE COMMON LAW IN DUPLUM RULE AND SECTION 103(5) OF THE NATIONAL CREDIT ACT

2.1. It is important to unpack the 2 mechanisms that should be applied in limiting the value of the costs/fees levied on a debt: section 103(5) of the NCA and the common law *in duplum* rule.

2.2. Section 103(5) of the NCA

2.2.1. The fees, costs and/or charges that credit providers may charge in respect of credit agreements are set out in the NCA. Section 101(1) (a) to (g) of the NCA states that a credit agreement must not require payment by the consumer of any money or other consideration, except: the principal debt; an initiation fee; a service fee; interest; cost of any credit insurance; default administration charges and collection costs (which may not exceed the prescribed maximum for the category of credit agreement concerned). These costs are referred to as the "cost of credit". Section 102(1) of the NCA further sets out other fees or charges that may be included in the principal debt in respect of certain types of credit agreements. These fees, depending on the type of credit agreement, include an initiation fee; the cost of an extended warranty agreement; delivery, installation and initial fuelling charges; connection fees, levies or charges; taxes, licence or registration fees; and premiums of any credit insurance payable in respect of that credit agreement.

2.2.2. Section 103(5) of the NCA provides that despite any contrary provision of the common law or a credit agreement, the "cost of credit" amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs. This means that once the total cost of credit charges in sections 101(1)(b) to (g) equal the amount of the unpaid balance of the principal debt, no further charges may be levied. In addition, where payments are made by a consumer thereafter during the period of default, the credit provider is not permitted to charge further charges while such default persists.

2.2.3. The operation of section 103(5) of the NCA is not affected by the commencement of legal proceedings by the credit provider or debt collector against the consumer. If during the course of legal proceedings, the cost of credit charges accrue to equal the balance of the unpaid principal debt, section 103(5) prevents these charges from exceeding the balance of the unpaid principal debt.

2.2.4. With regards to changes in interest, credit fees or charges, the NCA, in section 104, explicitly states that a credit provider may not unilaterally increase the periodic or incidental service fees, or the method of calculating such fees, that may be charged under the credit agreement, or the rate of interest applicable to a credit agreement, except with respect to a credit agreement with a variable interest rate. A credit provider must give written notice to the consumer setting out particulars of a change concerning the interest rate, the amount of a credit fee or charge, or a change in the frequency or time for payment of a credit fee or charge. The above-mentioned provisions of the NCA must be read together with the provisions of section 65J of the Magistrates' Courts Act referenced above.

2.3. Distinction between collection costs and legal costs/fees

2.3.1. There is, however, a distinction between collection costs (which are included in the cost of credit) and legal fees. Collection costs incurred by a credit provider to enforce a credit agreement do not include legal fees. Collection costs are defined in the NCA as amounts that 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. The credit provider or debt collector should not levy any further collection charges once the charges have accrued to equal the balance of the unpaid principal debt.

2.3.2. Legal costs, which include the cost of litigation, constitute costs which are incurred through the rendering of professional legal services by attorneys and advocates who are lawfully entitled to charge such fees by the Legal Practice Council of South Africa. These legal fees/costs must be reasonable and should be taxed and agreed upon by both the consumer and the credit provider before they can be collected from the consumer.

2.4. Common-law In Duplum Rule

2.4.1. After an EAO is issued, the *in duplum rule* also applies, limiting interest that may accrue on the judgment debt so as to not exceed the outstanding judgment debt. In other words, interest on a debt will cease to run where the total amount of arrear interest has accrued to an amount equal to the outstanding principal debt. This is the position even if the cause of action does not relate to the NCA. The mischief within the industry is found where interest and other fees/costs levied by credit providers, debt collectors and/or their legal representatives after EAOs are issued far exceed the outstanding judgment debt. If the consumer defaults on a judgment debt, the unpaid arrear interest charged thereon should stop running once it equals the unpaid balance of the capital amount of the judgment debt. In addition, the legal fees/costs incurred for the enforcement of the judgment debt and the issuing of the EAO should be taxed and agreed upon by both the consumer and the credit provider.

2.4.2. The NCR urges all registrants to ensure that they comply with the provisions of the NCA and refrain from engaging in excessive charging of legal fees on debtors' accounts. The NCR condemns the *mala fide* and unconscionable practice where collections of small debts are inflated to the point where completely disproportional amounts (up to ten times the capital debt) are collected from impoverished debtors. This conduct results in devastating socio-economic consequences for consumers and perpetuates the cycle of over-indebtedness amongst vulnerable consumers.

3. PRINCIPLES LAID OUT IN NKATA JUDGMENT

3.1. Bearing the above in mind, the NCR wishes to highlight and remind all credit providers, debt collectors, debt counsellors and other registrants of the principles laid out in the Constitutional Court judgment in ***Nkata v FirstRand Bank Limited and Others*** in relation to section 129 of the NCA and legal costs for the enforcement of credit agreements:

3.1.1. “[c]redit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution.”²

3.1.2. “[t]he credit provider is required to take the appropriate steps if it wants to recover the costs for enforcing an agreement with the consumer. . . [It] is entitled to reasonable costs only. It must take steps to place its legal costs within this statutory pigeon hole”;³

3.1.3. “legal costs . . . become due and payable only when they are reasonable, agreed or taxed, and on due notice to the consumer”;⁴

3.1.4. a credit provider is obliged to properly quantify and give due notice of the legal costs to the consumer.⁵

3.2. Indeed, credit providers have an important role to play in our society; however, this role must not be used to take advantage of consumers. In light of the ***Nkata*** judgment, creditors should therefore take great care when unilaterally adding their legal costs to debtors' accounts and continuing EAO deductions post the period that the judgment debt would have been paid in full, had it not been for the unreasonable inflations of debtors' liabilities. Currently, vulnerable debtors are not able to verify whether the fees that creditors continue to levy on their accounts are legal and in order and are often in no position to be able to agree to legal fees as they are not informed as to what the difference between 'attorney and client fees' and 'party and party fees' are. Creditors must therefore, in terms of the ***Nkata*** judgment, ensure that legal costs charged on debtors' accounts are reasonable. This means that legal fees must be taxed and/or limited to clear, consistent and unambiguous amounts that are easily quantifiable and verifiable, taking into account the scale of the debt so as not to demand tens of thousands of rands in legal costs to collect insignificant amounts of hundreds of rands.

²*Nkata v FirstRand Bank Limited and Others [2016] ZACC 12 at para 94.*

³*Nkata v FirstRand Bank Limited and Others [2016] ZACC 12 at para 122.*

⁴*Nkata v FirstRand Bank Limited and Others [2016] ZACC 12 at para 123.*

⁵*Nkata v FirstRand Bank Limited and Others [2016] ZACC 12 at para 125.*

4. THE WAY FORWARD

4.1. Credit providers, debt collectors and attorneys must cease the conduct of over inflating debtors' accounts with unreasonable fees and collection costs that far exceed their outstanding debts. When legal representatives are involved, legal fees/costs should be taxed and/or agreed upon by both the consumer and the credit provider. In other cases, credit providers must apply section 103(5) of the NCA during the time that a consumer is in default under the credit agreement and follow the debt enforcement procedures set out in section 129 of the NCA.

4.2. Section 65J(1A)(a) of the Magistrates' Courts Act further states that an employer must check that the total amount payable under one or more EAOs applied for may not exceed 25% of the employee's basic salary. Employers thus also have a role to play in ensuring that they inform the relevant creditor and court that an employee cannot manage any further attachments to their salary, in this way not over burdening the employee.

4.3. The NCR will continue to monitor this trend within the credit industry. Any failure to comply with the provisions of the NCA will be met with investigation by the NCR, and where applicable, further prosecution and/or referral to the National Consumer Tribunal.

FOR MORE INFORMATION OR TO REPORT ANY OBSERVED PROHIBITED CONDUCT

Please contact the NCR on info@ncr.org.za to report this conduct or complaints@ncr.org.za to file a complaint regarding this conduct.

Disclaimer:

While the NCR has taken reasonable care to ensure the factual accuracy of this Circular, it cannot guarantee such accuracy, especially with regards to future events. Accordingly, NCR does not accept any liability for damages incurred by any party as a result of decisions or actions taken on the basis of information supplied in this Circular.