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Sec 103(5) Proposed Guidelines

CIRCULAR NO. 03 OF 2015-PROPOSED GUIDELINES FOR THE INTERPRETATION AND APPLICATION OF SECTION 103(5) OF THE NATIONAL CREDIT ACT 34 OF 2005

There has been uncertainty in the credit industry regarding the implementation of Section 103(5) of the National Credit Act ("the Act"). The National Credit Regulator ("the NCR") therefore publishes these proposed guidelines for information and comment by the credit industry. Interested parties are required to submit their written comments to Lesiba Mashapa at lmashapa@ncr.org.za by 27 February 2015.

For more information

Please email The National Credit Regulator at info@ncr.org.za



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PROPOSED GUIDELINES FOR THE INTERPRETATION AND APPLICATION OF SECTION 103(5) OF THE NATIONAL CREDIT ACT 34 OF 2005

1. Purpose

- 1.1. These guidelines are intended to provide guidance to credit providers, debt collectors, debt counsellors and payment distribution agents on the interpretation and application of section 103(5) of the National Credit Act 34 of 2005 ("NCA").

2. Application

- 2.1. These guidelines apply to credit providers, debt collectors, debt counsellors and payment distribution agents in respect of the recovery of debt from consumers arising from credit agreements to which the NCA applies.

3. Section 103(5) of the NCA

- 3.1. Section 103(5) provides that:-

"Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under a 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."

- 3.2. The amounts set out in sections 101(1)(b) – (g) are initiation fees (s 101(1)(b)), service fees (s 101(1)(c)), interest (s 101(1)(d)), cost of credit insurance (s101(1)(e)), default administration charge (s101(1)(f) and collection costs (s101(1)(g)).
- 3.3. Section 103(5) came into effect on 1 June 2007 and all credit providers and debt collectors should have implemented and applied it from that date.

4. Principles

The following principles should be followed when section 103(5) is implemented and applied by credit providers, debt collectors, debt counsellors and payment distribution agents:-

- 4.1. The consumer cannot waive his or her right to the protection of section 103(5) at anytime by agreement with the credit provider or debt collector.
- 4.2. Once the consumer has purged the default by paying all the arrears in relation to the section 101(1)(b)-(g) charges, section 103(5) no longer applies. If the consumer defaults again, section 103(5) becomes operative and the amounts that accrued during the first period of default should be added to the amounts that accrue during the second period of default and any subsequent periods of default to determine the amount of the section 101(1)(b)-(g) charges that should not exceed the balance of the unpaid principal debt. The balance of the unpaid principal debt that should be used in these circumstances is as at the second period of default and any subsequent periods of default.
- 4.3. The legal position under the common law *in duplum* rule is that unpaid arrear interest ceases to run when it reaches the unpaid capital amount. When, due to payment, unpaid interest drops below the outstanding capital amount, interest again begins to run until it once again equals the amount of the outstanding capital amount.

The position in terms of section 103(5) as outlined by the Supreme Court of Appeal in *Nedbank Ltd and others v National Credit Regulator and Another (2011) 3 SA 581 (SCA)* is that once the total charges in sections 101(1)(b)-(g) equal the amount of the unpaid balance of the principal debt, no further charges may be levied and payments made by a consumer thereafter during the period of default do not have the effect of permitting the credit provider to charge further charges while such default persists. It therefore means that after the section 101(1)(b)-(g) charges had reached the balance of the unpaid principal debt, the credit provider or debt collector should not levy further charges. Where the consumer had made payments while in default, the section 101(1)(b)-(g) charges will not accrue again until they reach the balance of the unpaid principal debt and the credit provider and debt collector can no longer charge these amounts in these circumstances.

- 4.4. Collection costs are defined in section 1 of the NCA as an amount that may be charged by a credit provider in respect of the enforcement of the consumer's monetary obligations under the credit agreement. The fees charged by and payable to attorneys, advocates, and debt collectors are incurred by the credit providers when collecting the debt and accordingly form part of collection costs. These fees are therefore covered by section 103(5) as collection costs and should be included as part of the calculation of the total charges in terms of section 101(1)(b)-(g) for the purposes of section 103(5).
- 4.5. The operation of section 103(5) is not affected by the commencement of legal proceedings by the credit provider or debt collector against the consumer. If during the course of the legal proceedings, the section 101(b)-(g) charges accrue to equal the balance of the unpaid principal debt, section 103(5) will prevent these charges from exceeding the balance of the unpaid principal debt. The credit provider or debt collector should not levy further charges anymore once the charges have accrued to equal the balance of the unpaid principal debt. This principle also applies to applications to the court or National Consumer Tribunal in terms of section 86 of the NCA to restructure the repayment obligations of consumers.
- 4.6. After judgment has been granted, interest at the rate granted by the court will start to run afresh on the judgment debt. If the consumer defaults on the judgment debt, the unpaid arrear interest stops running once it equals the unpaid balance of the capital amount of the judgment debt. This principle also applies to debt review orders granted by the court or the National Consumer Tribunal.
- 4.7. Section 103(5) applies to credit facilities only in respect of the amount of the credit facility that has been utilised by the consumer. The amount utilised by the consumer serves as the principal debt for the purposes of section 103(5) and the section 101(1)(b)-(g) charges that accrue during the time that the consumer is in default should not exceed the balance of the unpaid utilised amount. For example, if a credit provider grants the consumer an overdraft of R100 000.00 and the consumer only utilises R20 000.00 and subsequently defaults, the section 101(1)(b)-(g) charges that accrue while the consumer is in default should not exceed R20 000.00.