

FINANCE & BANKING ALERT

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RECOVERING PRESCRIBED DEBTS - SECTION 126 OF THE NATIONAL CREDIT ACT

The case of *Kaknis v ABSA Bank Limited and Another* 2017 (4) SA 17 dealt with the question as to whether s126B(1)(b) of the National Credit Act, No 34 of 2005 has retrospective application.

TWIN PEAKS (FINANCIAL SECTOR REGULATION ACT) MOVES FORWARD: TRANSITIONAL ARRANGEMENTS

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The court a quo held that the section had no retrospective operation and granted summary judgment in favour of ABSA.

The case of *Kaknis v ABSA Bank Limited and Another 2017 (4) SA 17 (SCA)* dealt with the question as to whether s126B(1)(b) of the National Credit Act, No 34 of 2005 (NCA) has retrospective application.

Section 126B(1)(b) states, *inter alia*, that no person may continue to collect or re-activate a debt under a credit agreement to which the NCA applies:

- (i) which has been extinguished by the Prescription Act, No 68 of 1969 (Prescription Act); and
- (ii) where the defence of prescription is raised, or would have reasonably been raised, had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise. This section came into operation on 13 March 2015.

In this case, Kaknis concluded various Instalment Sale Agreements (Agreements) with ABSA. However, over time, Kaknis encountered financial complications which, in turn, affected his ability to pay in terms of the Agreements. It is noted that on 8 July 2014, the claim against Kaknis prescribed, nevertheless, on 3 October 2014, Kaknis concluded an acknowledgement of debt in favour of ABSA, which in essence purported to revive the debt in terms of the Agreements. In the court *a quo*, Kaknis averred that the claim prescribed and that s126B(1)(b) of the NCA, prevented ABSA from collecting the debt.

Considering the fact that s126B(1)(b) only came into effect on 13 March 2015 and the debt was revived on 3 October 2014,

the court *a quo* held that the section had no retrospective operation and granted summary judgment in favour of ABSA.

Kaknis appealed the decision of the court *a quo*.

The dissenting judgment, whilst not law, upheld the appeal for the following reasons:

1. the court *a quo* minimised the protection of consumers and overemphasised the undue certainty in commercial transactions;
2. the intention of s126B was to prevent a credit provider from benefiting from a debt which had prescribed, unbeknown to a naïve and vulnerable consumer;
3. should s126B not apply retrospectively, the legislature would have failed to reconcile the trend set by the Constitutional Court, which was to emphasise the protection of the consumer;
4. agreements entered into before the commencement of s126B would be afforded less protection than those agreements entered into after its commencement, thus creating a differentiation between classes of consumers; and
5. the principle against the retrospective operation of the law is not absolute.

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Accordingly, the majority of the court found that s126B(1)(b) has no retrospective application in respect of debts incurred prior to 13 March 2015.



The SCA, in its majority judgment, used the following legal principles, in relation to enactment of new laws, in dismissing the appeal with costs:

1. no statute is to be construed as impairing vested rights which were acquired under existing laws, unless it is clearly intended by the Legislature for the statute to have that effect;
2. it is the rule of law that legislation will only affect future matters;
3. where there is doubt about the retrospective effect of a provision, the presumption against retrospectivity is irrebuttable; and

4. the protection that the NCA affords consumers must be balanced against the rights of the credit providers.

Accordingly, the majority of the court found that s126B(1)(b) has no retrospective application in respect of debts incurred prior to 13 March 2015.

Therefore, where loan agreements were entered into prior to 13 March 2015 to which the NCA applies, the consumer borrowing the money, whose debt has prescribed and subsequently revived, will be unable to rely on the provisions of s126B(1)(B).

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TWIN PEAKS (FINANCIAL SECTOR REGULATION ACT) MOVES FORWARD: TRANSITIONAL ARRANGEMENTS

National Treasury published the draft regulations to the Financial Sector Regulation Act, 2017 (FSR Act) for public comment.

Accordingly, as it stands, the provisions of the FSR Act are not yet in force.



Just before the holidays, on 18 December 2017, National Treasury published the draft regulations to the Financial Sector Regulation Act, 2017 (FSR Act) for public comment. This followed National Treasury's statement of 24 August 2017, that the financial sector should expect draft regulations for public consultation setting out the proposed transitional arrangements for the transformation of the existing financial services regulators into the two new regulators (namely, the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA)).

In summary, and as promised by National Treasury, the draft regulations cater for the smooth implementation of the establishment of the two new regulators (FSCA & PA) by clarifying and delineating the various functions which each of them must perform in terms of the FSR Act during the transitional period leading up to their establishment.

Further, the draft regulations also cater for transitional arrangements which will apply until such time as the new Financial Services Tribunal is operational.

The draft regulations setting out these transitional arrangements can be accessed via <http://www.treasury.gov.za/twinpeaks/Draft%20Regulations%20in%20terms%20of%20section%20304%20of%20the%20FSR%20Act.pdf>.

Commencement of the FSR Act unknown

In respect of the commencement of the FSR Act, National Treasury has not yet published the commencement notice which is to set out the details of the commencement of different sections of the FSR Act, as well as the details of other laws which will be repealed or amended by the FSR Act (as recorded in their statement of 24 August 2017). Accordingly, as it stands, the provisions of the FSR Act are not yet in force.

Deadline for comments

Comments in respect of the draft regulations must be submitted to commentdraftlegislation@treasury.gov.za by close of business on 31 January 2018.

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