ON BREACH OF DEBT RESTRUCTURING ORDER, LENDERS' RIGHTS TRUMP

With the coming into operation of the National Credit Act, many lenders felt that (too) much leniency is afforded to borrowers when they default on their repayments. The good and necessary aims of the Act aside, there are instances where borrowers appear to abuse the relief options afforded by the Act. There is, however, always a point of no return, where the money must be repaid or the asset is lost.

The following judgment is a case in point and important for the banking sector and its customers, as the Constitutional Court confirmed how and when a credit provider may enforce a loan that is subject to a debt restructuring order that has been breached.

Ferris and Another v Firstrand Bank Limited and Another (CCT 52/13) [2013] ZACC 46 (12 December 2013)

In October 2007, Mr and Mrs Ferris borrowed money from FirstRand Bank Limited ('FirstRand') to buy their home. The loan was secured by registration of a mortgage bond over the property. Mr and Mrs Ferris fell into arrears with their loan repayments and, in February 2009, they applied to a debt counsellor for debt review in terms of the National Credit Act 34 of 2005 ('the NCA'). In March 2009 the debt counsellor made an offer to FirstRand for repayment of the loan, but no agreement was reached.

In September 2009 the debt counsellor brought an application in the Randburg Magistrate's Court to have Mr and Mrs Ferris declared over-indebted and to rearrange their debt obligations. In April 2010, and while the aforementioned application was pending, FirstRand sent a notice under section 86(10) of the NCA to Mr and Mrs Ferris and the debt counsellor purporting to terminate the debt review. It appeared later that this notice was not properly delivered.

Some 10 days later, the Magistrate's Court granted a debt restructuring order. The order (a) declared Mr and Mrs Ferris over indebted, (b) rearranged their debt obligations, and (c) specified that the original credit agreement would "be revived and be fully enforceable" if the restructuring order was breached.

On 7 May 2010, i.e. only a week later, Mr and Mrs Ferris fell behind with their payments under the debt restructuring order and by June that year, they had fallen even further behind, having paid only R1,000 out of almost R9,000 owed.

FirstRand then issued summons for payment of the full balance of the loan plus interest

and for an order declaring their home specially executable ('enforcement action'). After some skirmishes in Court, FirstRand eventually obtained default judgment.

More than six months after default judgment was entered, Mr and Mrs Ferris applied for rescission thereof. In the application they argued that the default judgment was wrongly granted because FirstRand's section 86(10) notice was not properly delivered and that a sale in execution would unjustifiably infringe their right of access to adequate housing.

The High Court dismissed the rescission application, holding amongst other things, that they had no *bona fide* defence to the enforcement action. Mr and Mrs Ferris applied to the High Court for leave to appeal; it was refused. They then petitioned the Supreme Court of Appeal for leave to appeal, which was also refused and the present matter deals with their application to the Constitutional Court for leave to appeal.

Were the requirements for rescission met?

The rescission application was brought in terms of Rule 42(1)(a) of the Rules of Court, allowing a court to rescind a default judgment if it was "erroneously sought or erroneously granted". There was, however, no error in the default judgment granted against Mr and Mrs Ferris. They breached the debt restructuring order, whereupon, as provided for in the NCA, FirstRand became entitled to enforce the loan without further notice.

In addition, the wording of the debt restructuring order itself indicated that the original loan would be enforceable without more, if the debt restructuring order was breached. It follows that Mr and Mrs Ferris' breach of the debt restructuring order entitled FirstRand to enforce the loan without further notice to them.

What about the defective delivery of the section 86(1) notice?

The defective delivery of the section 86(10) notice did not preclude enforcement of the loan. Section 86(10) permits a credit provider to terminate a debt review by giving notice at least 60 business days after the debtor applied for debt review. Because notice was not properly given, FirstRand was not entitled to rely on this section for enforcement of the loan. However, it was independently entitled to enforce the loan on the basis of the breach of the debt restructuring order (as provided for in the NCA) and the provisions of the debt restructuring order itself.

Can Mr & Mrs Ferris argue that they had "substantially" complied with the debt restructuring order so as to preclude Firstrand from enforcing the loan?

There was also no merit in this argument. On the contrary, the Court noted that the wording of the NCA appears not to accommodate anything less than actual compliance

with the provisions of a restructuring order. (In any event, Mr and Mrs Ferris had not substantially complied by the time summons was issued – at that stage, they had only paid R1,000 of the almost R9,000 owing under the order.)

The requirements for rescission under Rule 42(1)(a) were therefore not met as the default judgment was not erroneously granted.

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