DEFAULTING DEBTOR CAN TAKE THE STING OUT OF AN EXISTING DEFAULT JUDGMENT BY REINSTATING A CREDIT AGREEMENT

The NCA has a mechanism whereby a defaulting debtor can, in certain circumstances and by operation of law, reinstate a credit agreement by paying the full outstanding amount and whatever related enforcement costs which may exist at the time. The effect hereof is to render an existing default judgment useless in the hands of the judgment creditor, obliging him to obtain a new judgment should the creditor again default.

It is important for lenders to take note of the NCA mechanism described in the *Nkata v Firstrand Bank Limited* judgment recently handed down.

Ms Nkata bought a vacant plot and obtained two bonds to finance, on the one hand, the purchase price and on the other, the costs of building works to be performed. In the first bond Ms Nkata chose the mortgaged property as her *domicilium citandi et executandi*. In the second bond she chose a different address as her *domicilium*, being the address of a flat where she was residing until the completion of the house she was building.

During 2010 Ms Nkata fell into arrears with her mortgage bond repayments and in June 2010 the bank's ('FirstRand)'s attorneys sent a (requisite) letter to Ms Nkata in terms of s 129(1) of the National Credit Act 34 of 2005 ('the NCA'), requesting her to rectify the breach and setting out her various rights to obtain debt counselling as provided for in the NCA. This letter was addressed to the wrong house number in the street where she resided (she moved in when the building works were completed) and never reached her. A letter was also sent to the apartment where she used to stay, but she did not receive that letter either.

The bank issued summons in July 2010. Ms Nkata did not enter appearance to defend but, on 4 August 2010, she approached a debt counsellor and on 20 August 2010 an application for debt review was made. (The bank contended that she probably took these steps because she had received the summons, although Ms Nkata denied having received the summons.)

According to Ms Nkata, she only learnt of the judgment when she received a telephone call from the bank in October 2010 informing her that the property was to be sold in execution. She then approached attorneys to apply for rescission on her behalf ('the first rescission application'). The application was postponed because the parties reached settlement which they incorporated into a draft order. The agreement was that the sale in execution of the property was cancelled; that Ms Nkata will sign the bank's standard

Quicksell mandate; that while the mandate was in place, Ms Nkata would pay monthly instalments of R10,000. If the property was not successfully sold pursuant to the Quicksell mandate, Ms Nkata was to pay the full arrears to the bank within 14 days failing which the bank would be entitled to proceed to sell the property in execution. If she did pay the full arrears, the bank agreed not to sell the property but Ms Nkata was obliged to resume payment of the full monthly instalments. Ms Nkata was to pay the wasted costs of the cancelled sale and was also to pay the costs of the rescission application 'as taxed or agreed'.

The property was not sold pursuant to the Quicksell mandate. Ms Nkata paid a lump sum of R87,500 which extinguished her arrears, and she resumed monthly payments. However, over the following 12 months she again fell into arrears, but brought the account up to date in March 2012 by making a further lump sum payment. The lump sum payment included the legal fees incurred by the bank, and which it had debited to her account.

In April 2012, shortly after extinguishing the arrears for the second time, Ms Nkata asked the bank to agree to the rescission of the default judgment because the judgment was negatively affecting her credit record. The bank refused. Then, in May 2012, Ms Nkata submitted a distressed debt application but the bank rejected the application, stating that the matter was "under litigation".

In February 2013, after further default by Ms Nkata on her instalments, the bank caused the property to be sold in execution (in terms of the initial default judgment and writ of execution) to Kraaifontein Properties ('KP'). KP immediately effected some renovations to the house and put it on the market for on-selling. Pending re-sale, KP and Ms Nkata agreed that she could stay in the house and they entered into a lease agreement to this effect. Ms Nkata never mentioned that she intended to (again) seek rescission of the judgment. On 2 May 2013 KP sold the property to a third party, and on 13 May Ms Nkata brought an application for rescission (the second application). She sought: (1) rescission of the default judgment; (2) the setting aside of the writ of attachment issued by the Court registrar on 28 September 2010; and (3) an order declaring the sale of the property in execution on 24 April 2013 to KP to be invalid.

The bank and KP opposed the application.

The current (second) rescission application

Ms Nkata's claim for rescission of the judgment against her was based on various arguments. The one criticism that the Court found had merit, was the fact that there was non-compliance with section 129(1) of the NCA as this prescribed notice was not dispatched to her correct *domicilium* address. (A section 129 notice is a prerequisite before a creditor may commence enforcement proceedings against a debtor and sets out,

amongst other things, all the options open to a debtor to obtain debt relief.)

As compliance with section 129(1) is a substantive legal prerequisite for the valid institution of legal proceedings on a credit transaction to which the Act applies, the non-compliance meant that default judgment was erroneously sought and granted.

Delay and related considerations

However, the fact that Ms Nkata had a *bona fide* defence to the initial default judgment action and that the judgment was erroneously sought and granted, did not without more entitle her to rescission. The Court Rules require a rescission application to be brought within 20 days of the defendant's acquiring knowledge of the default judgment. The present application (the second rescission application, the first having been settled) was launched nearly two and a half years after Ms Nkata learnt of the default judgment.

Ms Nkata had not satisfactorily explained the lengthy delay in seeking rescission, also at a time when the property had been sold in execution to a purchaser who had already on-sold it. Clearly there will be prejudice to third parties, and as such, the prayer for condonation of her non-compliance with the time limits was refused.

Peremption

Quite apart from the aforegoing considerations, the Court noted that the bank and KP correctly contended that Ms Nkata lost the right to seek rescission when she settled the first rescission application. That is because of the principles of peremption (which applies to appeals and to the remedy of rescission), being that 'no person can be allowed to take up two positions inconsistent with one another' or, as is commonly expressed, 'to blow hot and cold, to approbate and reprobate'. In order to show that a person has not acquiesced in a judgment, the Court must be satisfied upon the evidence 'that he has done an act which is necessarily inconsistent with his continued intention to have the case reopened or to appeal'. Ms Nkata's conduct in settling the first rescission application is entirely inconsistent with a continued intention on her part to have the case reopened by way of a future application for rescission.

Reinstatement of the credit agreements (application of section 129(3) of the NCA)

Sections 129(3) and (4) of the NCA provide as follows:

> *"(3) Subject to subsection (4), a consumer may –*
>
> > *(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that*

are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and –

(b) after complying with para (a), may resume possession of any property that has been repossessed by the credit provider pursuant to an attachment order.

(4) A consumer may not re-instate a credit agreement after –

(a) the sale of any property pursuant to –

(i) an attachment order; or

(ii) ...

(b) the execution of any other court order enforcing that agreement; or

(c) ..."

(Our emphasis)

It appears on the facts that the agreement was reinstated, although unwittingly, by Ms Nkata.This was because:

- Both in March 2011 and 2012 Ms Nkata made payments to the bank which wiped out the full amount of her arrears at the relevant dates.
- In compliance with section 129(3)(a) it appears that the outstanding "default charges and reasonable cost of enforcing the agreement" were paid as well. (The mechanism by which this was done was criticised by the Court. The bank merely debited the fees to her account and there was no agreement or taxation of the costs, as was required in the settlement reached in the first rescission application. Even without the settlement, the costs had to be taxed before they could be included as a cost to be executed on.)
- The agreement was also not cancelled by FirstRand (section 129(3)(a)). FirstRand, in all these proceedings, did not cancel the agreement but rather chose to seek specific performance of the mortgage loan agreements by relying on the acceleration clause.
- The provisions of section 129(4), prohibiting reinstatement if there was a sale of any property pursuant to 'an attachment order' or 'execution of an other order', was also not applicable in the present matter.
- The Court noted that it did not appear that obtaining default judgment or a writ of execution constituted "an order for the attachment" of property as used in section 129(4)– the former processes constituted *steps* in the process but the creditor (bank) retained the choice to decide how to proceed. The Court orders did not oblige the bank to execute against the property, but merely entitled it to do so. Neither did the default judgment and writ constitute "execution of a judgment". In themselves, the steps of obtaining a writ and causing property to be attached are merely the build-up towards execution and can be undone (at common law) if the judgment debtor pays the full judgment debt. The judgment is only actually

- 'executed' when money is raised pursuant to a sale of attached property and paid to the judgment creditor.

As a result, the Court concluded that the loan agreements were reinstated both in March 2011 and in March 2012 when Ms Nkata paid the full outstanding amounts and costs, automatically by the working of the law. Ms Nkata did not need to be aware of the fact of reinstatement.

Reinstatement means that execution could no longer be levied against the property in terms of the existing default judgment. If Ms Nkata again fell into arrears, the bank would have had to re-apply for a new default judgment.

CONTACT US

- CAPE TOWN Tel: 021 406 9100
- SOMERSET MALL Tel: 021 850 6400
- ILLOVO Tel: 011 219 6200
- CLAREMONT Tel: 021 673 4700
- TABLE VIEW Tel: 021 521 4000
- CENTURION Tel: 012 001 1546
- FISH HOEK Tel: 021 784 1580
- TYGERVALLEY Tel: 021 943 3800
- BEDFORDVIEW Tel: 011 453 0577