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DISPUTE RESOLUTION ALERT

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Creditors v fraudsters – the gloves come off

It was Nassim Nicholas Taleb who said, "If you see fraud and do not say fraud, you are a fraud". In the case of the *National Credit Regulator v Southern African Fraud Prevention Services NPC* (560/2018) [2019] ZASCA 92 (3 June 2019) the overarching question that had to be resolved by the Supreme Court of Appeal (SCA) is for how long the Southern African Fraud Prevention Services NPC (SAFPS)'s obligation to cry 'fraud!' persists.

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The Supreme Court of Appeal in the case of *NPGS Protection and Security Services CC and Another v FirstRand Bank Ltd (314/2018) [2019] ZASCA 94* had to consider the relationship between summary judgment applications and the requirements established in the Uniform Rules of Court relating to foreclosures on primary residences.

Summary judgment is a mechanism utilised by plaintiffs in action proceedings when it is believed that the defendant does not have a bona fide defence to the plaintiff's claim and has simply entered an appearance to defend in order to delay the matter. Essentially, it prevents the abuse of the court process by the defendant. On 6 June 2019, the Supreme Court of Appeal (SCA) in the case of *NPGS Protection and Security Services CC and Another v FirstRand Bank Ltd (314/2018) [2019] ZASCA 94* had to consider the relationship between summary judgment applications and the requirements established in the Uniform Rules of Court relating to foreclosures on primary residences.

In this case, FirstRand Bank sought payment by NPGS Protection and Security Services CC (NPGS) in terms of a credit facility provided to NPGS as well as payment by Llewellyn Rwaxa (Rwaxa), the sole member of NPGS, who bound himself as surety and co-principal debtor in favour of FirstRand Bank for the debts of NPGS. In addition, FirstRand Bank sought to declare Rwaxa's primary residence specially executable on the basis that the credit facility provided to NPGS was secured by a mortgage bond registered over Rwaxa's primary residence. After both NPGS and Rwaxa gave notice of their intention to defend the action, FirstRand Bank applied for summary judgment. Summary judgment was granted by the Johannesburg High Court and the decision was then taken on appeal to the SCA.

In its summons, FirstRand Bank drew Rwaxa's attention to the provisions of s26 of the Constitution, informing Rwaxa that he may not be evicted from his home, or his home may not be declared executable and sold in execution, without a court order, which could only be granted after a court had considered all the relevant circumstances. The summons drew further attention to the provisions of Rule 46(1)(a)(ii) of the Uniform Rules of Court, which set out in greater detail the protection afforded to a debtor in terms of s26 of the Constitution. Rules 46(1) and 46A afford a judgment debtor an opportunity to oppose the grant of an order of special execution against a residential property.

The SCA held that:

"in the case of an application for summary judgment, provided the creditor has complied with the requirements of rule 46A, there is an onus on the debtor, at the very least, to provide the court with information concerning whether the property is his or her personal residence, whether it is a primary residence, whether there are other means available to discharge the debt and whether there is a disproportionality between the execution and other possible means to exact payment of the judgment debt."

Warning: Defendants may lose their homes for failure to comply with Rules 46 and 46A at summary judgment stage...*continued*

This judgment neatly summarises the importance for the defendant to set out all relevant facts in an affidavit opposing summary judgment.

Rwaxa put forward three superfluous defences in his affidavit opposing summary judgment but was completely silent on the information required for Rules 46 and 46A. From the time of deposing to the affidavit opposing summary judgment to the time of the hearing of the matter in both the High Court and the SCA, Rwaxa failed at all opportunities to provide the court with the necessary information. The appeal against the granting of summary judgment was therefore dismissed.

This judgment neatly summarises the importance for the defendant to set out all relevant facts in an affidavit opposing summary judgment. This burden is further increased in an action or application to have residential property declared specially executable due to the fact that Rules 46 and 46A call on the defendant to put certain information before the court. A defendant should take this burden seriously, as a failure to do so could have dire consequences.

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Creditors v fraudsters – the gloves come off

The overarching question that had to be resolved by the Supreme Court of Appeal is for how long the Southern African Fraud Prevention Services NPC (SAFPS)'s obligation to cry 'fraud!' persists.

It was Nassim Nicholas Taleb who said, "If you see fraud and do not say fraud, you are a fraud". In the case of the *National Credit Regulator v Southern African Fraud Prevention Services NPC (560/2018) [2019] ZASCA 92 (3 June 2019)* the overarching question that had to be resolved by the Supreme Court of Appeal (SCA) is for how long the Southern African Fraud Prevention Services NPC (SAFPS)'s obligation to cry 'fraud!' persists.

The SAFPS is a credit bureau tasked with the obligation to combat fraud in commerce. As a credit bureau, it is regulated by the National Credit Act, No 34 of 2005 (NCA). In this case the National Credit Regulator (NCR) alleged that the SAFPS was in contravention of s70(2)(f) of the NCA, read with regulation 17. In terms of s70(2)(f), SAFPS is required to promptly expunge from its records any prescribed consumer credit information that, in terms of the regulations, is not permitted to be entered in its records or is required to be removed from its records. The NCR contended that the SAFPS was retaining information, which NCR regarded as consumer credit information; more specifically the adverse classification of consumer behaviour, for longer than one year as prescribed in regulation 17.

In terms of the agreement between SAFPS and its members, each member agrees that all fraud detected by it during the normal course of its business will be filed in the SAFPS's database within two business days of the fraud being detected.

The NCR therefore contended that the information obtained by SAFPS from its members constitutes consumer credit information as defined in s70(1) of the NCA. Conversely, SAFPS contended that a listing relating to fraud or suspected fraud constitutes other information, ie fraud information as envisaged in s70(3)(a) of the NCA and therefore falls outside of the ambit of s70(1).

Regulation 18(6) stipulates that in addition to the consumer credit information contemplated in s70(1), a registered credit bureau may receive, compile and report information in respect of consumer information that is relevant for the purpose of credit fraud detection and prevention. The NCR contended that such information constitutes an adverse classification of consumer behaviour and should therefore be expunged within one year of the listing.

The SCA disagreed with the NCR and held that, an adverse classification of consumer behaviour is a subjective classification of consumer behaviour that is directed at the behaviours of the consumer once credit has been advanced rather than behaviour aimed at defrauding a credit provider in a prospective credit application. An adverse classification by a credit provider such as 'delinquent' or 'non-paying' is entirely subjective and based on the classifier's own observations or preferences which may be viewed differently by another creditor and for that reason such classifications warrant being retained for a shorter period.

Creditors v fraudsters – the gloves come off...*continued*

As the court emphasised, there is absolutely no reason why such benevolence of expunging fraud information from the SAFPS database within one year must be afforded to fraudsters when it is withheld from rehabilitated insolvents whose listings are only expunged after a period of ten years.

On the other hand, fraud listings on the SAFPS database are generally classified on the basis of facts and objective criteria, for example, supplying a false identity document. The court acceded to the fact that recording and making available fraud information is a proper function of a credit bureau. Further, the SCA held that there is nothing in regulation 17 that suggests that fraud information may only be retained for a limited period.

Should the SAFPS be compelled to expunge fraud information from its database within a year, it would undoubtedly undermine the ability of the

financial industry to protect itself against fraud and in doing so, protect fraudsters and not the victims of fraud.

As the court emphasised, there is absolutely no reason why such benevolence of expunging fraud information from the SAFPS database within one year must be afforded to fraudsters when it is withheld from rehabilitated insolvents whose listings are only expunged after a period of ten years. Applying the NCA with the effect of protecting fraudsters is untenable and patently insensible in light of the aim and purport of the NCA.

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