

Dispute Resolution

ALERT

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Borrowers beware: Acceleration clauses are easier to enforce than you think

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Borrowers beware: Acceleration clauses are easier to enforce than you think

Generally, lenders do not have an implicit contractual right to demand repayment of a full outstanding amount unless the loan agreement contains an acceleration clause. An acceleration clause is typically phrased in a manner that makes the full amount of the loan immediately due and payable in the event of a default.

In addition, any security that the lender may hold becomes immediately executable. This is one of the key rights available to a lender when an event of default has occurred. A lender may hold further rights, such as the right to cancel the agreement.

Recently, the Supreme Court of Appeal (SCA) was required to consider whether a lender is obliged to state the right that it will invoke in its breach notice if the borrower commits an event of default and fails to remedy such default. In the case of *Enforced Investment (Pty) Ltd and Others v Verifika Incorporated and Another* (599/2021) [2023] ZASCA 5, Enforced Investment (Pty) Ltd (Enforced Investment) concluded a loan agreement with Verifika Incorporated (Verifika). Clause 11 of the loan agreement provided that Verifika would commit an event of default if it failed *"to pay the lender any amount which becomes payable by it pursuant to this agreement*

strictly on due date, and the borrower fails to remedy such default within three business days of written demand". Clause 11 further provided that *"if an event of default occurs the lender shall be entitled, without notice to the borrower, [to] accelerate or place demand [on] all amounts owing by the borrower to the lender under this agreement"*. As security for the loan, the shares held in Verifika were ceded to Enforced Investment.

During the period of the loan agreement, Verifika failed to make payment of the interest due to Enforced Investment. In turn, Enforced Investment issued a breach notice calling on Verifika to make payment of the outstanding interest amount. Payment of the interest amount was not made by Verifika and Enforcement Investment invoked the acceleration clause contained in clause 11 and issued several demands for the full outstanding loan amount. Enforced investment also called on its security, being the cession of the shares held in Verifika.



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Verifika argued that the breach notice delivered by Enforced Investment was defective as it was not clear and unequivocal as to the consequences of a failure on its part to perform timeously. Verifika argued that if Enforced Investment intended to cancel the loan agreement, then Enforced Investment ought to have expressly stated this in the breach notice.

The SCA found that once an event of default occurred, there was no duty on Enforced Investment to inform Verifika of the right that it would exercise if Verifika committed an event of default. The purpose of Enforced Investment's demands was simply to notify Verifika that there was a breach of the loan agreement and a demand for payment. As Enforcement Investment complied with clause 11

of the loan agreement, it was entitled to claim the accelerated amount and once the first written demand was valid, Enforced Investment could perfect the security without further notice.

The conclusion reached by the SCA confirms that the legal purpose of a breach notice is to provide a defaulting party with an opportunity to remedy its breach. A breach notice is not intended to impose a burden on the aggrieved party to disclose to the defaulting party the right that the aggrieved party will invoke if the breach is not remedied unless the contract requires the aggrieved party to do so. This ensures that the aggrieved party is not entangled in further hurdles before it can invoke its contractual rights.

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The graphic features a central blue circular interface with a scale of justice icon, surrounded by icons for a book, a handshake, a group of people, a gavel, and a magnifying glass. A hand with a circuit-like pattern is shown interacting with the interface.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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