

Business Law & Tax Review

Reverse mortgage

CONTINUED FROM PAGE 1

action is managed by the originator, who ensures that the bond which is in the investor's name is paid monthly by the former homeowner, together with various ancillary imposts such as rates and taxes.

The investor receives an amount in respect of interest (a portion of the additional 6,56%) for the duration of the repurchase agreement, until the property is re-registered into the name of the homeowner. This is the enticement for the investor: no money up front but an almost guaranteed income stream every month. An investor with 10 houses on their name can look forward to about R8 000 per month.

The originator also receives a portion of interest paid per month, ostensibly "for the administration of the agreement and collection and disbursements of the monthly instalments due in terms of this agreement and in its capacity as surety and safeguarding the obligations of the homeowner".

The three agreements constitute one composite transaction: none of the agreements would be entered into alone, all are interdependent.

The originator is an active participant in all: the agreements would not be concluded at all were it not for the involvement of the originator, neither the indebted homeowner nor the investor are the originators of the transaction.

The agreement provides that the three agreements together contain the entire agreement between the parties.

When considering the form of the agreement, one must have regard to the provisions of Section 8(4) which states that:

"An agreement, *irrespective of its form* (emphasis added) but not including an agreement in subsection (2), constitutes a credit transaction ..."

The transaction is a credit agreement in terms of the act, based on

S8(4)(f) which states that: "Any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of:

- The agreement; or
- The amount that has been deferred."

The purchase price of the property in the repurchase agreement is deferred for a period of 24 months, and interest is payable thereon. Nothing in the act indicates that a deed of sale in terms of the Alienation of Land Act is excluded from its ambit.

At the very least, the originator is a credit provider in terms of the structure. In terms of the repurchase agreement an amount is deferred for the entire period of the contract. On a true construction of the agreement, such amount is payable to the originator. Clearly this is an amount "owed by one person to another (which) is deferred". Interest is payable on the mortgage amount, which interest is divided between the investor and the originator. While interest is not paid on the additional amount, the originator is the recipient of interest generally in the arrangement.

The originator in this example has engaged in acts which are contrary to the provisions of the act, namely failure to register in terms of Section 40 and the intentional and knowing provision of reckless credit in terms of Section 80. The National Credit Regulator is currently investigating similar schemes, and while no decision has been taken yet, it may well be that these schemes are declared unlawful in the near future.

The result may be that the set of agreements is declared void, and in terms of S89 of the act monies received by the originator and the investor may be forfeit. Ironically, banks tightening up on 100% bonds is what is most likely to put a stop to these schemes.

Act sets up hurdles for honest creditors

Court ruling sheds light on the rights of legitimate creditors

LUCINDE RHOODIE
and LIUBA BALDJIEV
Cliffe Dekker Hofmeyr

THE introduction of the National Credit Act, 2005, has brought many difficulties for creditors who, in good faith, try to recover outstanding debts from their debtors.

In terms of section 86 of the act, any consumer may apply to a debt counselor established under the act to have himself declared to be overindebted. The counselor must take certain steps once he has made a recommendation.

He can recommend that the consumer is not overindebted but his credit providers should agree to a debt rearrangement, or that the consumer is overindebted and recommend to the court that the consumer's credit agreement or agreements be declared as reckless credit.

If all the particular consumer's credit providers accept the recommendation, then a consent order is obtained in court to the effect of the recommendation. Alternatively, court proceedings continue.

The position has to some extent improved with the recent decision by the Johannesburg High Court in *First Rand Bank v BL Smith & Another* (an unreported decision). The debt claimed by the plaintiff creditor was one that fell within the ambit of the act. Action was instituted after the defendants applied to a debt counselor to be declared to be overindebted.

The counselor found the defendants to be overindebted and notified

the plaintiff that the application for debt restructuring was successful.

The act itself does not provide for a time limit within which the debt counselor must take steps after notice has been given and no sanction is imposed in the event that the debt counselor fails to take further steps.

Section 88 of the act prohibits a credit provider from litigating against the consumer based on the credit agreement in a case where he has received a notice from the debt counselor, unless the consumer is in default under the credit agreement and fails to comply with a debt rearrangement or order of court, or the court has found the consumer not to be overindebted.

In *First Rand Bank v BL Smith & Another*, the plaintiff had received the notice at the time it instituted action. However, neither the debt counselor nor the consumer took further steps under the legislation.

The court found the failure by the

counselor to follow provisions set out in section 86 should prevent him or the consumer from benefiting from the abovementioned prohibition on action by the credit provider.

A dishonest debtor could otherwise frustrate the rights of legitimate creditors by initiating proceedings under the act and then unilaterally staying the process mid-stream. A credit provider would then never be able to enforce its right to payment through litigation as he does not control the debt restructuring process.

The court found that, where the process was not followed by the debt counselor or debtor to its conclusion, then the notice would lapse once a reasonable time (namely, three months) had expired for the process to have been followed. Upon expiry of the three-month period, the notice would no longer validly interrupt the creditor's right to institute legal proceedings against the debtor.



Picture: STOCK.XCHNG

SOMETHING TO DECLARE

Your rights and obligations after a detention notice



Virusha Subban

If an importer's goods are detained, he has, in effect, no immediate remedy against SARS

A DETENTION for customs purposes occurs when the South African Revenue Service (SARS) takes possession of a person's goods to determine whether an offence has been committed under the Customs Act. The Customs Act also empowers detention for the purposes of any other law. For instance, environmental law provisions.

This article is part one of a two-part series that will cover what an importer's rights and obligations are should SARS, firstly, detain and, thereafter, seize his or her goods.

The Customs Act provides that any of the following individuals may detain goods: a customs officer, a magistrate or a member of the police force.

The following goods may be detained: any ship, vehicle, plant, material or goods. "Goods" is defined broadly in the act to include "all wares, articles, merchandise, animals, currency, matter or things". In other words, anything can be subject to detention.

The detention may involve physical removal of the goods into the custody

and care of SARS, or the goods may be removed to a secure place as SARS may determine, or it may involve detention at the premises of the taxpayer. Should the goods be removed to a place of security, this shall be at the cost and risk of the owner, importer, exporter, manufacturer, or the person in whose possession or on whose premises they are found.

If an importer is advised that his goods are to be detained under the Customs Act, he should be served with a detention notice, in terms of section 88(1)(a) of the act. This notice should stipulate and describe the goods, and say where they are to be detained.

If an importer's goods are detained, he has, in effect, no immediate remedy against SARS. It would be premature to immediately institute any form of proceedings to attempt to regain possession of the goods. The courts have said that "the right to detain goods only endures for a period of time reasonable for the investigation which the section contemplates to be made, but no longer" [see

Commissioner for South African Revenue Service v Trend Finance Pty Ltd and Another [2007] JOL 1997 (SCA)].

The question remains: what is a reasonable time to enable SARS to investigate whether the goods are liable to forfeiture? The courts have not ventured to define what would constitute a reasonable time. It would, arguably, depend on the circumstances of each case. If, for example, the goods are perishables, more than a few days may be regarded as unreasonable.

The right to be heard does not exist prior to the decision being taken to detain. It is only after the detention phase, and during the actual investigation stage that a taxpayer has a right to be heard. It is during this phase that a taxpayer ought to provide proof of compliance in order to secure release from detention. If requested to do so, an importer must furnish SARS with all documents and records in respect of the goods to enable the Receiver to investigate whether any offence has been committed in respect of the goods.

Once goods have been detained, they may not be removed in contravention of the detention. It is a punishable offence under the Customs Act to remove detained goods.

It is advisable to request that the official that intends to effect the detention be requested to provide some form of identification. It is also advisable to request the official to provide his personal details, such as his full name and contact details, on the detention notice. This is important should one try to follow up on the progress with the investigation after the person has left your premises, especially if he has left with your possessions in hand. This is because the act absolves the state and SARS from liability for claims arising out of the detention or examination of goods.

The goods may only be "seized" once the investigation has disclosed they are liable to forfeiture in terms of the act. Part two of this article will deal with the matter of "seizure".

■ Virusha Subban is a senior associate at Edward Nathan Sonnenbergs.