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ADDITIONAL PROTECTIONS AFFORDED TO CONSUMERS IN RESPECT OF THE EXECUTION OF PRIMARY RESIDENCES

A landmark judgment has been handed down by the bench of the High Court of South Africa in the Gauteng Local Division, Johannesburg on 12 September 2018 in respect of various applications heard together (case numbers: 2018/00612; 2017/48091; 2018/1459 and 2017/35579) which cases involved Absa Bank Limited and the Standard Bank of South Africa Limited, various defendants, respondents and amicus curiae (for ease of reference this case will be referred to as the “Residential Consumer Case”).

The Residential Consumer Case considered a number of questions placed before it, but for the purposes of this newsflash and given the length of the case we have only sought to deal with the outcome of a few of the key decisions made by it.

In the judgment it was acknowledged that courts “have dealt with matters where banks exercise their rights in terms of the loan agreements and mortgage bonds for many years. They were dealt with as ordinary commercial matters. However, since the right to adequate housing is a fundamental human right enshrined in the Bill of Rights of our Constitution the orders to levy execution against property, which are primary residences, are required to be in harmony with the Constitution, which applies to all law.”

The Residential Consumer Case acknowledged developments in law in advancing consumers rights in regard to sales in execution such as the amendments to Uniform Rule 46A and the Practice Directive issued within its Division but acknowledged the importance of uniformity within our courts and as such sought to clarify the role of courts in granting orders affecting consumers rights to immovable property.

The Residential Consumer Case ruled that courts should generally set a reserve price for residential properties which are to be sold at auction (provided that the property is the primary residence of the debtor). It was stated that the courts power and duty to impose a reserve price is founded, amongst others in section 26(3) of the Constitution. The process of granting judgment against the home owner is the first step that may lead to his or her eviction from the property. Accordingly, “a court is to consider all relevant factors when declaring a property specially executable at the behest of the bondholder. It is thus incumbent upon the bank or bondholder to place ‘all relevant circumstances’ before the court when it seeks an order for execution. This, in our view, includes a proper valuation of the property (under oath), the outstanding arrears, municipal accounts and the like information. This is not to thwart the mortgagee’s right to execution, to which it may be entitled, but to secure a just and equitable outcome”.

It was noted that this process is to ensure that the debtor is not worse off due to unrealistically low prices being obtained and accepted at sales in execution. If a low price is achieved at auction, which often occurs, the debtor loses his/her home, investment in an asset and still remains liable to the bank for the outstanding debt which was not recovered from the sale of the property.

In the Residential Consumer Case it was ruled that:

- In all matters where execution (sale of immovable property on auction) is sought against a primary residence, the entire claim, including the monetary judgment, must be adjudicated at the same time. There is a duty on banks to bring their entire case including the money judgment, based on a mortgage bond, in

one proceeding simultaneously. Should the matter require postponement for whatever reason, the entire matter falls to be postponed.

- A court order for the execution against moveable and immovable property does not limit the Consumer's right (in the National Credit Act) to revive the credit agreement by paying the outstanding debt and agreed reasonable or taxed costs at any time before the proceeds (purchase price) of the execution have been realized.
- Any document initiating proceedings where a mortgaged property may be declared executable must contain the following statement in a reasonably prominent manner:
'The defendant's (or respondent's) attention is drawn to section 129(3) of the National Credit Act No. 34 of 2005 that he / she may pay to the credit grantor all amounts that are overdue together with the credit provider's permitted default charges and reasonable taxed or agreed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement.'
- Save in exceptional circumstances, a reserve price should be set by a court in all matters where execution is granted against immovable property, which is the primary residence of a debtor, where the facts disclosed justify such an order.

This judgment is in our view demonstrates a perfect balancing act of promoting the Constitution, the right to property and consumer rights in an equitable and just manner without eroding the commercial rights and recourse of financial institutions in mortgage finance. While this judgment is currently only binding on the Gauteng Divisions of the High Court and Magistrates Courts, it is anticipated that this approach will be and should be followed nationally by the other divisions in time.

This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.

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