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UPDATE: ADDITIONAL PROTECTIONS AFFORDED TO CONSUMERS IN RESPECT OF THE EXECUTION OF PRIMARY RESIDENCE

This newsflash is an update to our September 2018 newsflash published on this topic. We previously discussed the landmark judgment as handed down by 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* (the “**Mokebe Case**”)

On 14 December 2018 the High Court of South Africa, Western Cape Division, Cape Town, The Supreme Court of Appeal handed down a confirmatory judgment on 28 September 2018 in respect of various applications heard together (case numbers: 11294/18; 15134/18; 12777/18; 12285/18; 13809/18; 22263/17 and 12365/18) which cases involved Absa Bank Limited and the Standard Bank of South Africa Limited, various defendants, respondents and *amicus curiae* (the “**Hendricks Case**”).

In the Hendricks case the High Court Rule 46A which governs execution against residential immovable property was affirmed and further discussed. In the Hendricks case the following principles were decided:

- In matters where leave to execute against immovable property, which might be someone’s home is sought, it was agreed that the bringing of notice of the proceedings to the attention of the debtor must be by means of personal service on them. Where personal service is not possible the Court must be approached to order service in another manner.
- Danger fees and/or urgency fees are no longer allowed to be charged by the sheriff’s as such fees are unacceptable, often charged against those that can least afford them and should not be permitted to continue.
- Banks and creditors must bring their entire case at the same time, by seeking to enforce the repayment of the accelerated money debt and the execution of the immovable property in the same proceeding. The practice of first seeking to execute the money debt and then pursuing the execution of the immovable property thereafter is more costly and is prejudicial to debtors. As an example of the undesirability and unfairness of this practice the Court discussed the affidavit of Mrs Molokomme. Her husband purchased their home in 1989 for R38 970. After judgment was taken against them the sheriff attached movable goods including the sewing machine Mrs Molokomme used for her business. The house was sold in execution on auction and was purchased by a bank for R10.00.
- The Bank’s stated practice of first providing debtors a number of months to settle outstanding arrears was confirmed as opposed to the Bank’s approaching the courts for a trifling debt after a limited period without appropriate steps having first been taken to resolve the matter.
- The National Credit Act was affirmed, in that debtors are able to reinstate their home loans by repaying their debts at any time right up until the property is sold in execution (debtors can still settle their debts even after judgment is taken against them at any time up until their house is sold).
- The approach of Mokebe regarding the setting of a reserve price was agreed to, in that courts should generally set a reserve price having regard to the circumstances and it will be as an exception that courts do not set a reserve price.

In the Hendricks case it was discussed that a more uniform national and regional approach to the execution of residential immovable property would be beneficial. The Court further proposed a draft Practice Directive to provide

for the manner and form in which information should be placed on affidavit before a court. They proposed that the practice directive be adopted as the Western Cape Practice Directive 33A being in substantially the same form as the Gauteng: Johannesburg Practice Manual. The following is noted in respect of this Practice Directive:

- It must be complied with in every matter where a judgment is sought for execution against immovable property *which might be the defendant's primary residence or home.*
- The Foreclosure Affidavit forming part of the Practice Directive, which is submitted by the attorney needs to contain the following (amongst other declarations):
 - ☞ That the debtor has been informed of all of his rights in terms of the Constitution, Rule 46 and Rule 46A including having all of the relevant circumstances placed before the court;
 - ☞ Whether the property is occupied/unoccupied;
 - ☞ Whether the property is utilised for residential/commercial purposes;
 - ☞ The financial strengths of the creditor and debtor;
 - ☞ The proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead with a loss of his home;
 - ☞ Whether or not the creditor has instituted action with an ulterior motive;
 - ☞ The position of the debtor's dependants and other occupiers of the house;
 - ☞ Confirmation of personal service on the debtor;
 - ☞ The assessed value of the property at the time of the loan;
 - ☞ The market value of the property;
 - ☞ The local authority valuation;
 - ☞ The amounts owing to the local authority and to the body corporate.

The Hendricks case together with the Mokebe case are lauded as benchmarks in protecting consumer rights and the right to housing. They together with the relevant new Rules should go a long way in protecting individuals and their families, particularly those that can't afford good or any legal representation from having their homes arbitrarily or unfairly taken away when they are in financial difficulty and will also mitigate having their biggest investments being sold for little to no value, which has been known to happen in sales in execution.

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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