

# DISPUTE RESOLUTION ALERT

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#### **THE EXECUTION AGAINST THE HOMES OF INDIGENT DEBTORS**

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# BANKING: THE EXECUTION AGAINST THE HOMES OF INDIGENT DEBTORS

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**As seen in the case of *FirstRand Bank Limited v Mdletye and another* (98145/2015) [2016] ZAKZDHC 22 (1 July 2016) banks are often faced with the burdensome task of collecting bond payments when a client has fallen in arrears and often as a last resort will approach the court to obtain an order declaring the immovable property executable.**

In the *Mdletye* case, the residents of the property had fallen into arrears in respect of their loan obligations and the bank then approached the court for a money judgment and an order declaring their immovable property executable. The main issue decided in this case was whether it was appropriate for the High Court, in exercising judicial oversight, to dismiss an application to declare immovable property executable where a debtor had resumed payment of monthly instalments. The High Court also scrutinised the fine balance between the means used in the execution process to exact payment of the judgment debt, compared to other available means to achieve the same purpose.

In *Gundwana v Steko Development & others* 2011 (3) SA 608 (CC) the Constitutional Court held that “where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought, after judgment on a money debt, further judicial oversight by a court of law, of the execution process, is a must”. However, execution in itself is not an “odious” thing and it is part and parcel of normal economic life. The Constitutional Court held that “in instances where there are no other proportionate means to attain the same end, execution may not be avoided”.

In *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* [2004] ZACC 25; 2005 (2) SA 140 (CC) the Constitutional Court referred to factors to take into account when a court exercises such judicial oversight which include examining whether there is any disproportionality between this form of execution and other possible means to exact payment.

In reaching the *Mdletye* decision, the High Court took into account the above factors, including the issue of re-instatement of a credit agreement dealt with in the decision of *Nkata v FirstRand Bank Limited & others (Socio-Economic Rights Institute of South Africa as Amicus Curiae)* [2016] ZACC 12; 2016 (6) BCLR 794 (CC). The significance of considering re-instatement of a credit agreement is that, unlike the other factors which relate to alternative ways of satisfying the entire judgment debt, re-instatement does not require payment of the full judgment debt, only arrears and specified amounts.

In terms of s129(3) and s129(4) of the National Credit Act, No 34 of 2005 (NCA), consumers who fall into arrears with their loan repayments can reinstate the agreement by bringing their accounts up to date, even after the bank has obtained judgment for the full amount, provided that the lender did not cancel the agreement. The effect being that

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*The High Court held that the bank may still be entitled to this relief dependant on the track record of the debtors in the ensuing period but for present purposes the granting of the order would amount to “disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose”.*

if debtors bring their bond repayments up to date, the prior default judgment obtained by the creditor will lose its force. However, if the property is sold following an order declaring the property executable, the agreement is not capable of re-instatement.

During the *Mdletye* hearing, the bank argued that the execution process takes time and that, if the debtors continued to tender payments, the agreement may be re-instated before the property is sold in execution. The High Court agreed that execution takes time but held that if a sale occurred, pursuant to an attachment but before reinstatement,

s129(4) of the NCA would close the door to re-instatement of the agreement and declined to grant the order declaring the property executable but postponed this aspect of the application. The High Court held that the bank may still be entitled to this relief dependant on the track record of the debtors in the ensuing period but for present purposes the granting of the order would amount to “disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose”.

*Luanne Chance and  
Stephanie Goncalves*



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Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2016 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2014–2016 in Band 3 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 in Band 4 for construction.



## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Grant Ford**  
Regional Practice Head  
Director  
T +27 (0)21 405 6111  
E grant.ford@cdhlegal.com

**Roy Barendse**  
Director  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Lionel Egypt**  
Director  
T +27 (0)21 481 6400  
E lionel.egypt@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Thabile Fuhrmann**  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Willem Janse van Rensburg**  
Director  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)21 405 1140  
E byron.oconnor@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Jonathan Ripley-Evans**  
Director  
T +27 (0)11 562 1051  
E jonathan.ripleyevans@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Jonathan Witts-Hewinson**  
Director  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Marius Potgieter**  
Executive Consultant  
T +27 (0)11 562 1142  
E marius.potgieter@cdhlegal.com

**Nicole Amoretti**  
Professional Support Lawyer  
T +27 (0)11 562 1420  
E nicole.amoretti@cdhlegal.com

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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