13 SEPTEMBER 2018

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

BREAKING NEWS

FORECLOSURE APPLICATIONS, THE WAIT IS OVER... AT LEAST, FOR NOW.

The full bench of the High Court of South Africa, Gauteng Local Division Johannesburg, finally adjudicated on the future of foreclosure applications, after an extensive period of indeterminacy. The judgment, handed down on 12 September 2018, is premised on s26 of the Constitution, guaranteeing everyone the right to adequate housing.

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We identify and explain four of the court's key findings below:

1. "In all matters where execution is sought against a primary residence, the entire claim, including the monetary judgment, must be adjudicated at the same time".

   In the past, foreclosure applications brought by bond creditors against defaulting debtors were postponed by the court for a few months to afford homeowners an opportunity to pay the arrears on their bond account. Practice has, however, developed where the application to declare the property specially executable was postponed, the bond creditor would apply for a money judgment for the accelerated full outstanding balance under the bond. Upon the granting of the money judgment, the bond creditor issues a warrant of execution to attach the movable property of the debtor in order to satisfy the balance of the mortgage bond.

   The court held that the money judgment is "inextricably linked" to the application for an order for execution. If it were not for the monetary judgment, a bond creditor cannot obtain an order for executability and it is therefore desirable that both issues be resolved by the same court at the same time. Further, the court held that no prejudice would ensue to the bond creditor in the event that the money judgment and the order for execution are granted simultaneously.

   Banks, as bond creditors, therefore have a duty to bring the entire case, including the money judgment, based on a mortgage bond, in one application simultaneously. Consequently, in our view, where a bank has brought an application for a money judgment only, such application must now be formally withdrawn. It follows that there is now "a duty on banks to bring their entire case, including the money judgment, based on a mortgage bond, in one proceeding simultaneously". Therefore, a piecemeal adjudication of the matter will not be entertained.

2. "Execution against moveable and immovable property is not a bar to the revival of the agreement until the proceeds of the execution have been realised".

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The judgment has gone some way in resolving the present impasse in respect of the legal process by which banks can recover their outstanding loans from defaulting debtors.

In terms of s129(3) of the National Credit Act (NCA), a debtor may reinstate a credit agreement where they have fallen into arrears, "by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement". This remedy is, however, only available if the creditor has not cancelled the underlying agreement.

Section 129(4)(a)(i) of the NCA states further that the credit agreement may not be reinstated after a sale of any property pursuant to an attachment order.

Taking the above two sections into account, the court in this instance has ordered that, "the mere attachment is no hindrance to the reinstatement of the agreement". In other words, where the *proceeds* from the sale in execution have not been *realised* by the bond creditor, the reinstatement of the agreement by the debtor is still permissible.

3. "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 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.

This means that in the future a letter of demand sent to the debtor by the bond creditor in terms of s129 of the NCA must, in addition to drawing the debtor's attention to the default and debt management mechanisms, also draw the debtor's attention to the fact that the agreement may be revived in terms of s129(3) of the NCA.

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Whether this is the final word on this emotive legal issue, remains to be seen.

4. "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".

   In a bid to prevent unjust or inequitable outcomes, the court has ordered that except in exceptional circumstances, a reserve price must be set for a sale in execution of immovable property by taking the factors of each case into account.

   It is now incumbent on the bond creditor to include all relevant documentation in its application to the court when applying for an order for execution, which will support the request for a certain reserve price.

   Similarly, the debtor has a duty to place all facts before the court. The reserve price will therefore be set on a case-by-case basis at the discretion of the court.

Conclusion

It must, however, be kept in mind that this judgment applies only to foreclosure applications in the case of immovable property, which is the primary residence of debtors who are individual consumers and natural persons.

The judgment has gone some way in resolving the present impasse in respect of the legal process by which banks can recover their outstanding loans from defaulting debtors. Whether this is the final word on this emotive legal issue, remains to be seen.

Luanne Chance, Nicole Meyer and Nomlayo Mabhena

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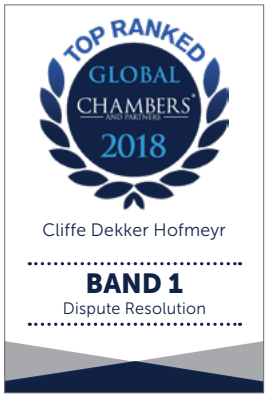

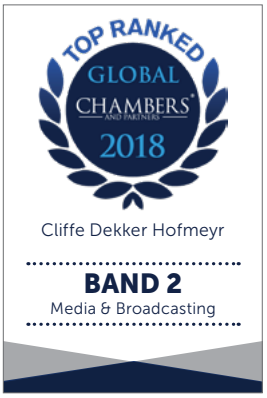

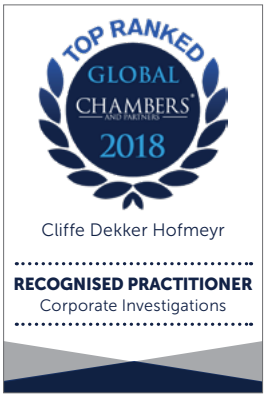

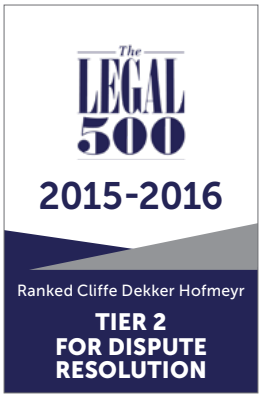

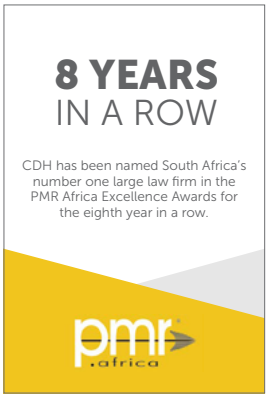

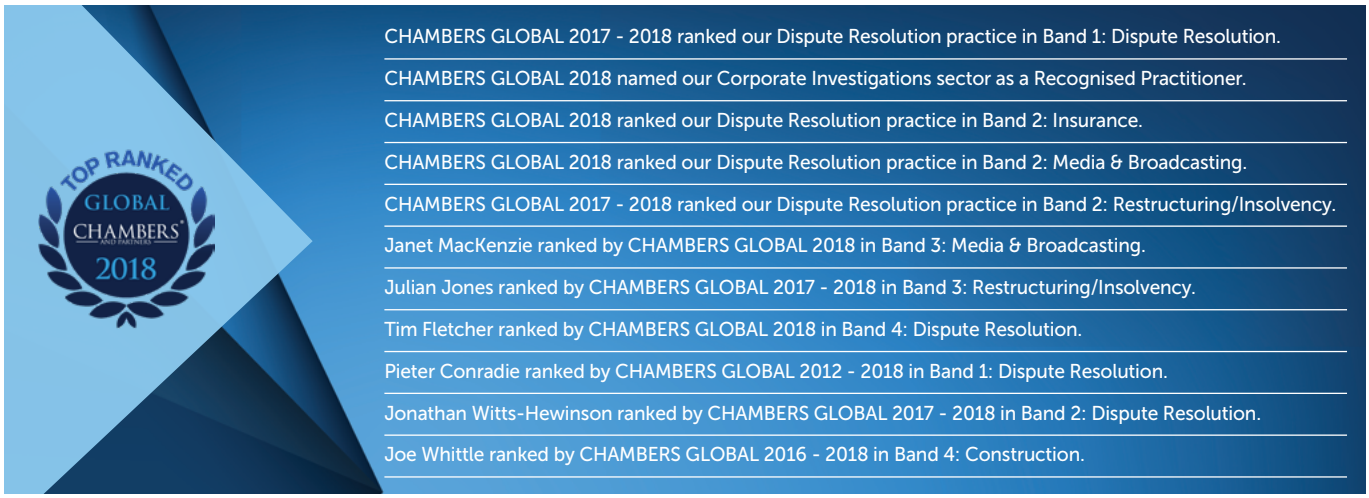

CDH
CLIFFE DEKKER HOFMEYR

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

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

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@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

Tracy Cohen
Director
Business Development
T +27 (0)11 562 1617
E tracy.cohen@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

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

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@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

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

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

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@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

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

Willem Janse van Rensburg
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@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

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

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

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. 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.

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

CDH
CLIFFE DEKKER HOFMEYR