

SUMMARY OF THE JUDGMENT

A PROMISE TO PAY NEEDS MORE THAN GOOD INTENTIONS

Nedbank Limited v Blue Sands Trading 537 CC and Others (9840/2014) [2016] ZAKZDHC 4 (15 February 2016)

It is often seen in tough times that homeowners approach their bondholders to negotiate alternative repayment terms. But a second chance requires nurturing, lest it counts against an owner when the crunch comes. The outcome here is illustrative of considerations at play when a court is asked to declare someone's home executable, the judgment noting that "[f]or the purpose of the present application ... the issue of the debtors' payment history ... was a factor that weighed heavily with me."

The Judgment can be viewed [here](#).

FACTS

Nedbank held a surety bond over property owned by Blue Sands Trading 537 CC (Blue Sands) as security for a loan advanced to DDK Solutions CC (DDK). The bank also extended an overdraft to DDK, for which Mr and Mrs Schutte stood surety.

Mr Schutte was the sole member of Blue Sands.

In addition, Nedbank lent and advanced certain monies to Blue Sands, for which Mr and Mrs Schutte stood surety.

Blue Sands fell into arrears in respect of its various loans. Meetings between it and the bank were held and payment options were discussed. On two occasions new payment plans were agreed upon, followed by Blue Sands' failure each time to maintain the payments as agreed upon.

Nedbank subsequently instituted action against Blue Sands and the sureties. No appearance to defend was entered and Nedbank obtained default judgment in respect of the monetary claims.

It then sought to sell the movable assets of the judgment debtors, but the available assets would raise only some R80,000 and this was too little to satisfy the debt of roughly R3,5 million. (In any event, at this time, Blue Sands and the Schuttes launched an urgent application for the sale in execution to be stayed. They sought, and were granted, an order in terms of which they committed themselves to pay R100,000 monthly until the judgment debt was fully extinguished. The order provided that, in the event of failure to

comply, the stay of the writ of execution would fall away. The order was taken by consent. Although some payments were made in terms of this order, the Schuttes fell into arrears yet again.)

The present application deals with the bank's next step to obtain an order allowing it to execute against the immovable property of Blue Sands. The property was the family residence and was valued at approximately R8 million.

Nedbank argued that if this property was declared specially executable and disposed of in satisfaction of the judgment debt, the Schuttes' constitutional right to housing would not be adversely affected.

It is at this moment that Blue Sands and the Schuttes entered appearance to defend for the first time, arguing that it was still open to them to do so as the default judgment was granted in respect of the monetary claims only and that the issue of the decision to declare the property executable was still before the court, and therefore a 'live' issue.

HELD:

- In the absence of an application for rescission of the default judgment, it was not open to Blue Sands and the sureties to enter appearance to defend the initial proceedings. They had in any event not averred that they were not liable for the money claimed.
- A notice to defend can sometimes be filed outside of the period prescribed; however, plainly, it should be before default judgment has been granted.
- As such, having obtained the default judgment, the bank was entitled to proceed and claim an order declaring the property specially executable. The only defence available to the sureties then would be to argue that it would not be fair and just to order execution against the immovable property.
- The facts showed that Nedbank had ascertained that there was inadequate movable assets to satisfy the outstanding debt. The only option at its disposal was to pursue an order declaring the immovable property executable, the property being valued well in excess of the amount of the judgment.

Declaring the immovable property executable

- Mr and Mrs Schutte argued that they purchased the property in 2007 for R360,000.00 and thereafter carried out various improvements to the property, utilising their own funds. In February 2011, they secured the first of two loans from Nedbank and

effected substantial improvements to the property. They had repaid some R980,000 in respect of the amounts owing .

- Although there was an effort on the side of the Schuttes to honour the repayment agreements entered into with the bank, the matter was a tale of broken promises. The courts approach a creditor's action for an order to sell a primary residence in execution as follows:

"If there are other reasonable ways in which the debt can be paid, an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorizing the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate."

- Against this background, the primary issue here was whether it was shown that execution would infringe the Schuttes' right to adequate housing. Despite the facts submitted by them, they could not do away with the bank's contention that they had access to two other immovable properties (the sectional title units) which they could dispose of in the event of their primary residence being sold in execution.
- In addition, the value of the current property far outstripped the amount of the judgment debt. Thus, were the property sold, they would have adequate balance (approximately R 4,5 million) to acquire a new home.
- Accordingly, in light of the amount of the judgment debt, the non-availability of sufficient movables that could be sold in satisfaction of the debt, the application to declare the immovable property specially executable could not be construed as an abuse of process by the bank, nor would it be a disproportionate remedy. In this regard, the court in *Jaftha v Schoeman* noted that:

"This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless."

It is for this reason that the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor. However, this will depend on the circumstances of the case. As has been pointed out above it may often be difficult to conclude that a debt is insignificant. In this regard, it is important too to bear in mind that there is a widely recognised legal and social value that must be acknowledged in debtors meeting the debts that they incur."

The court accordingly found in favour of the bank and declared the property specially executable.

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