

**IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**CASE NO: 9940/06**

In the matter between:

**JONAS DANIEL CHARLES DE BRUYN**  
**MARGARET MARIA DE BRUYN**  
and

First Applicant  
Second Applicant

**ABSA BANK LIMITED**

First Respondent

**THE SHERIFF, KUILSRIVER MAGISTRATE COURT**  
**BRIAN LEONARD DAVIDS**  
**ENVER JASON DILLON DE BRUYN**  
**THE RESGISTRAR OF DEEDS, CAPE TOWN**

Second Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent

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**JUDGMENT**

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**NDITA, J:**

**Introduction**

[1] This is an urgent application for an interdict restraining the first, second and sixth respondents from causing the transfer and registration of Erf 1129, Blue Downs into the names of the third and fourth respondents, free of the preference of the right of *habitatio* in favour of the applicants, pending the

determination of the applicants' application before the Magistrate Court that:

- i) the applicants be joined with the fifth respondent as co-defendants in the action instituted by the first respondent against the fifth respondent;
- ii) the late application for rescission of the judgment in favour of the first respondent be condoned and rescission of the default judgment granted to the first respondent, as the plaintiff in the said matter, be rescinded to the extent that the property was declared executable free of the preference in respect of the right of *habitation* in favour of the applicants as detailed in the Deed of Transfer;
- iii) directing that the sale in execution by the second respondent to the third and fourth respondents be nullified;

### **The parties**

[2] The applicants are married to each in community of property and are both residing, under a right of *habitation*, in a dwelling house situated at 24 Visser Street, Blue Downs, Cape Town, commonly referred to Erf 1129 ("the property"). The respondents are:

- i) First Respondent: ABSA BANK LIMITED, a registered bank duly incorporated according to the banking laws of the Republic of South Africa, the holder of a Mortgage Bond registered over the property and passed by the fifth respondent in its favour as security for monies lent and advanced;

- ii) Second Respondent: the Sheriff of the Magistrate Court for the District of Kuils River, Mr IJ Hugo, who has sold to the third and fourth respondents the property in a sale in execution under a Magistrate's Court judgment granted in favour of the first respondent against the fifth respondent in a mortgage bond foreclosure action;
- iii) Third and Fourth Respondents: Mr Brian Leonard Davids and Mrs Renee Christine Davids, who are married to each other in community of property, the present purchasers of the property in a sale in execution;
- iv) Fifth Respondent: Enver Jason Dillon De Bruyn, a training sales manager of Blue Downs Ways, Tuscany Glen, the present bare dominium owner of the property which has been sold by the second respondent to the third and fourth respondents;
- v) Sixth Respondent: the Registrar of Deeds who is empowered, in terms of the Deeds Registry Act of 1937 (as amended), to effect the registration of transfer of the property.

### **Application for an amendment of the relief sought**

[3] On 30 October 2006, the date of this hearing, the applicants sought an order for the amendment of the relief set out in the Notice of Motion, that these proceedings be postponed, pending determination by this court of an action by way of combined summons, which it intended to institute against the first and sixth respondents and conveyancer, Julene Zimmerman ("Zimmerman"). I refused the application on the basis that the respondents, although apprised of the amendment on the day of this hearing, had not had the fullest opportunity to deal with the claim for the alternative relief sought, more so that it was substantially dissimilar to the relief sought in the Notice of Motion. (See

**Combustion Technology (Pty) LTD 2003 (1) SA 265.)****Factual Background**

[4] The background facts may be stated briefly as follows. The applicants are the holders of a limited real right of *habitatio* in respect of the property. The fifth respondent is the applicants' son and owner of the property. He purchased the property from the applicants and others who were joint owners thereof. The property was bonded in favour of the first respondent for a sum of R109 270-96. The fifth respondent defaulted on the loan and, after action was instituted against him, default judgment was granted on 3 March 2006 at the Magistrate's Court in Kuils River, as he had failed to enter an appearance to defend. The applicants were not cited as defendants in the aforesaid action. Because there was no intervention from the fifth respondent, the Sheriff was directed to execute against the property. The property was sold at a public auction to the third and fourth respondents.

[5] It is common cause that there is a right of *habitatio* in terms of the bond which was waived in favour of the first respondent. Originally, the applicants had the right of *habitatio* over the property, but that changed on 16 August

2002 when Zimmerman drew up a power of attorney waiving the mentioned right of *habitatio* in favour of the first respondent.

[6] The applicants challenge the validity of the waiver of *habitatio* in favour of the first respondent on the basis that Zimmerman, as the agent of the first respondent, unilaterally effected the waiver of the applicants' right of *habitatio* without explaining and clarifying the meaning and import of the waiver to them. Furthermore, so allege the applicants, they were hurried into signing it without given an opportunity to apply their minds. In addition thereto, the applicants aver that the sale of the property is unconstitutional and null and void because they ought to have been joined as co-defendants in the main action since they were the holders of the right of *habitatio* in the bonded property.

[7] The first respondent, on the other hand, avers that, because the applicants had waived their right in favour of it, the first respondent's rights under the bond are free of any real impediment which could detract it from seeking an order that the property be declared executable. Stated differently, the right of *habitatio* relied upon by the applicants does not, in any manner,

affect the order of court declaring the property to be executable.

[8] Much of the respondents' version is not disputed except for the waiver instituted by Zimmerman. There having been no request for a referral of such dispute to oral evidence and these being motion proceedings, the final relief which is sought by the applicants should be granted if the facts alleged by the applicants, that are not denied by the respondents, together with facts asserted by the respondents, justify such an order. **Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited** 1984 (3) SA 623 (A) at 634E-635 C.

[9] The first respondent, without making any formal admissions, agreed that the transfer of the property would be stayed pending the hearing of this matter. The agreement was made an order of court on 14 September 2006.

## **The Issues**

[10] The crisp issue to be determined in this matter is whether the applicants waived their right of *habitatio* in favour of the first respondent and whether such right establishes a clear right as requisite in applications of this nature.

## **Analysis and Applicable Law**

[11] I have indicated earlier on that the sale of the property by the first respondent to the fifth respondent was subject to a right of *habitatio* in favour of both applicants. It is also not disputed that, on 28 August 2002, the fifth respondent declared the right of *habitatio* in favour of the third respondent in the following words:

*“And the said appearer on behalf of the said JONAS DANIEL CHARLES DE BRUYN and MARGARET MARIA DE BRUYN, declared to waive and postpone, as they hereby waive and postpone, in favour of the mortgage bond, the habitatio over the said property held by their principal to the intent that their said principal shall not at any time be in a position by virtue of such habitatio to compete with said mortgagee, but in the event of the said property being sold in execution or in insolvency, the mortgagee shall have the right to have the property transferred to the purchaser thereof free from such habitatio and to have the whole proceeds of such sale applied towards payment of such moneys as shall then be due and owing to the mortgagee under this bond, plus all costs and interest due.”*



[12] The applicants also admit that they attended upon the offices of Zimmerman and signed the power of attorney entitling Zimmerman to effect the waiver. Thus, the Deed of Transfer reflects that the applicants and others authorised their attorney, GREGORY MARK HARPER, in the presence of the Registrar of Deeds, to renounce all their rights and title to the property. The record reveals that Zimmerman was duly authorised by the first respondent, in writing, to execute the bond on behalf of the applicants. In her affidavit she admits receiving instructions from the first respondent to register a First Mortgage Bond in the sum of R96 000-00 against the property granted to the first applicant. Zimmerman further avers that, after ascertaining that a right of *habitatio* was preferred in favour of the applicants, she drew a Power of Attorney to waive the aforesaid *habitatio* in favour of the first respondent. Furthermore she alleges that she explained the nature and contents of such Power of Attorney to the applicants as follows:

*“I fully and in detail explained the contents and nature of the aforesaid Power of Attorney and waiver of habitation to Jonas Daniel Charles De Bruyn and Margaret Maria De Bruyn and also requested that they read the Power of Attorney before signing same. They duly read the Power of Attorney and after assuring myself that Jonas Daniel Charles De Bruyn and Margaret Maria De Bruyn were fully aware of the contents and nature of the said Power of Attorney, I obtained their signatures thereto.”*

[13] The applicants and the fifth respondent appended their signatures on the document, but protest in these proceedings that they were not aware that by signing the document, which was, according to them, never explained, they waived their right of *habitatio*.

[14] One finds the above averments by the applicants difficult to accept for the following reasons. Firstly, the right of *habitatio* is inextricably linked to the continued payment of the bond by the fifth respondent to the first respondent. The applicants' right to occupation depends on the repayment of the secured loan. Without such repayment they are not entitled to occupy the property against the right of the first respondent. It is inconceivable that the applicants would have an enforceable right against the fifth respondent in the circumstances of this case. Secondly, the evidence points towards a probability that the applicants and the fifth respondent were aware that they were waiving their right of *habitatio*. For example, as previous bond holders, one would expect them to have knowledge of signing documents pertaining to a mortgage bond. Furthermore, according to the mortgage bond contract, the *domicilium citandi et executandi* is the physical address of the mortgaged property. Accordingly, whatever process was executed during the commencement of the proceedings must have been served on the occupiers, i.e. the applicants, of the property, and yet it took the execution of the property for them to come up with this defence. Applying the *caveat subscriptor* substantive rule of evidence, it stands to reason that the conduct of the applicants, in signing the document presented to them by Zimmerman, gives

support to the probability that they were aware of its contents and understood it. (See **Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd** 1979 (3) SA 210.)

[15] Thirdly, the applicants have no defence to the first respondent's monetary claims. Although a judgment *ad pecuniam solvendam* is an indispensable prerequisite for the issuing of a writ of execution, relief declaring immovable property executable is not a claim of any kind, but merely a request for a direction with regard to the execution of a judgment, it is ancillary thereto and a matter of procedure. It does not constitute the exercise of any jurisdiction over the immovable property by the Court. (See **Ivorl Properties (Pty) Limited v Sheriff Cape Town & Others** 2005(6) SA 96(C) at 113H-114C.)

[16] In the Notice of Motion the applicants have set out that the first respondent has infringed their constitutionally protected right to adequate housing, but have not shown in the founding affidavit how the order of execution would infringe their right to same. (See **Standard Bank of SA Ltd v Saunderson & Others**, 2006 (2) SA 264.)

**Conclusion**

[17] For the reasons stated above, it is my judgment that the applicants have not satisfied the requirement of establishing a *prima facie* right.

[18] Accordingly, in the circumstances, the application is dismissed with costs.

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**NDITA, J**