

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Mare and Others (A56/2019) [2020] ZAGPPHC 372; 2021 (2) SA 151 (GP) (20 August 2020)

[2020] ZAGPPHC 372

COURT

North Gauteng High Court, Pretoria

BEFORE

P.A. Meyer, MIA, Moosa

CASE / FILE NUMBER

A56/2019

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE: Yes.

(2)

OF INTEREST TO OTHER JUDGES: Yes.

(3)

REVISED.

Case

no: A56/2019

In

the matter between:

ABSA
BANK LIMITED
Appellant
and
ANET
MARE
First
Respondent
MPITSO
BENJAMIN MXAKWE
Second Respondent
SHERIFF
OF THE HIGH COURT, BELA-BELA, LIMPOPO
Third Respondent
REGISTRAR
OF DEEDS, PRETORIA
Fourth Respondent
Case
Summary: Practice –
Uniform Rules of Court – Rule 4(1)(a)(iv)
– Service of process of court - ‘by delivering or leaving
a copy thereof’ at a chosen domicilium
citandi – Default judgment
granted pursuant to summons served by ‘affixing a copy thereof
on the grass’ at chosen domicilium
citandi, a smallholding with a
dwelling erected on the property in which the debtor/owner resides –
Service in the circumstances
not effected in accordance with r
4(1)(a)(iv)
- Duty upon sheriff
to serve process at a domicilium
citandi by
delivering or leaving a copy thereof in a manner by which in the
ordinary course the process would come to the attention and
be
received by the intended recipient, and to report to the court how
the process was served and why it was served in that manner.
Execution
– Sale in Execution – Immovable property – Transfer
of ownership passed to bona fide purchaser - Judgment
that gave rise
to the sale in execution void ab initio – Registration of
property into purchaser’s name did not make
him owner of the
property – Owner entitled to relief aimed at reinstating her
registered ownership.

JUDGMENT

MEYER J (MIA J and MOOSA AJ concurring)

- [1] This appeal concerns the situation where a judgment is rescinded after an immovable property that had been declared specially executable was sold at a sale in execution and transferred to a bona fide purchaser who had no knowledge of the claim of the owner at the time of registration of transfer of ownership into the purchaser's name. The question is whether the judgment debtor's registered ownership of the property should be reinstated.
- [2] On 11 January 2019, the High Court, Gauteng Division, Pretoria (Kubushi J) granted an order rescinding a default judgment in terms of r 42(1)(a) of the Uniform Rules of Court that had been granted in favour of the appellant, ABSA Bank Limited (the bank), against the first respondent, Ms Anet Mare (Ms Mare). The court a quo also declared as null and void and set aside the attachment and subsequent sale in execution by the third respondent, the Sheriff of the High Court, Bela-Bela, Limpopo (the sheriff), of an immovable property - Portion [...] of the Farm Tweefontein [...], Registration Division KR, Limpopo Province (the property)
- to the second respondent, Mr Mpitso Benjamin Mxakwe (the purchaser), which property was previously held by Ms Mare under Deed of Transfer No. T94722/2012, as well as the registration of transfer of ownership of the property to the purchaser by the fourth respondent, the Registrar of Deeds, Pretoria (the registrar of deeds). The court a quo directed the registrar of deeds to reverse the registration of transfer and revert the title in respect of the property to Ms Mare. The bank was ordered to pay the costs occasioned by its opposition of the application. None of the other respondents opposed the application.
- [3] On 19 February 2019, the court a quo refused the bank leave to appeal against that part of the order in terms of which the default judgment was rescinded in terms of r 42(1)(a) and the adverse costs award against it. The court a quo, however, granted the bank leave to appeal to the full court of this division against that part of the order in terms of which the attachment, sale in execution and the registration of transfer of ownership of the property to the purchaser were declared null and void and set aside, and in terms of which the registrar of deeds was directed to reinstate Ms Mare's registered ownership of the property.
- [4] The facts are briefly as follows. On 24 July 2012, Ms Mare and the bank concluded a written loan agreement in terms whereof the bank lent and advanced an amount of almost R1,2 million to her, which amount plus interest she was obliged to repay in 240 equal monthly instalments (the loan agreement). The debt arising from the loan agreement was secured by registration in the deeds registry of a continuing covering mortgage bond with no. B57122/12 in favour of the bank over the property.

- [5] During the course of the year 2015, Ms Mare fell into arrears with payment of the monthly instalments on the due dates as contemplated in the loan agreement, but she nevertheless continued to make some payments to the bank, the last of which was made on 28 December 2016 in the amount of R14 900.00. The bank addressed a notice to Ms

Mare, dated 7 August 2015, in terms of s 129(1) of the National Credit Act 34 of 2005 (the statutory notice), inter alia drawing to her attention that she was at that time in arrears with her monthly payments in terms of the loan agreement in an amount of R75 975.19. Ex facie the sheriff's return of service, the statutory notice was served at the property by affixing it 'to the gate', which property, it is common cause, is Ms Mare's chosen domicilium citandi. The bank or its attorneys received no response to the statutory notice.

- [6] On 27 August 2015, the bank caused summons to be issued against Ms Mare by the registrar of this court under case no. 68973/15. Ex facie the sheriff's return of service, the summons was served at the property on 14 September 2015. The sheriff's return of service reads thus:

'I certify that on 14/09/2015 at 17 10 at [...] FARM TWEEFONTein, PORTION [...], BELA-BELA, I handled the abovenamed process in the manner indicated below

MANNER OF SERVICE

By proper service of a copy of the SUMMONS AND ANNEXURES upon the DEFENDANT by affixing a copy thereof on the grass at the DEFENDANT's

chosen domicilium citandi et executandi at the above address

ATTEMPT 03/09/2015 AT 10 35 NOT AVAILABLE (PROMISE TO COME AND COLLECT THE DOCUMENT

ATTEMPT 09/09/2015 AT 14 40 NOT AVAILABLE (PROMISE TO COME AND COLLECT'

- [7] No notice of intention to defend the action was given by or on behalf of Ms Mare. The bank applied for judgment by default, which was granted by this court (Mabuse AJ) 10 November 2015. Ms Mare was ordered to pay to the bank the amount of R1 295 440.05 plus interest and costs, the property was declared specially executable, and the

issuing of a warrant of execution and execution against the property were authorised. A writ of attachment attaching the property was issued on 16 November 2015, and a sale in execution was held on 9 March 2016, when the property was sold to the purchaser for a purchase consideration of R590 000.00.

- [8] Transfer and registration of ownership of the property into the name of the purchaser was done and executed at the deeds registry on 29 September 2016, and he holds the property under deed of transfer no. T80540/16. The sale proceeds, it is common cause, were not credited to Ms Mare's bond account, but the bank's attorneys, acting on its instructions, deposited the funds 'into a suspense account on 29 November 2016'.

- [9] According to Ms Mare she had no knowledge of the statutory notice, the action instituted and the default judgment that had been obtained against her, the sale in execution of the property and the registration of the passing of ownership of the property to the purchaser until 16 January 2017. On that date the purchaser attended at the property and informed her that he is the registered owner of the property and that he had purchased the property at an auction which was held by the sheriff on 9 March 2016. He showed her his title deed, which she perused. I have mentioned that the last instalment that Ms Mare paid to the bank was the amount of R14 900.00 on 28 December 2016, which was a few months after the registration of the passing of ownership of the property into the purchaser's name on 29 September 2016.
- [10] Ms Mare accordingly instituted the present proceedings in which she sought the rescission, in terms of r 42(1)(a) of the Uniform Rules of Court, of the default judgment under which the sale in execution was carried out and the reinstatement of her registered ownership of the property. Rule 42(1)(a) provides that a court may rescind or vary an order or judgment 'erroneously sought or erroneously granted in the absence of any party affected thereby'.
- [11] In *Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) para 24, Streicher JA said this:
- 'Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously. See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.'
- [12] In rescinding the default judgment in terms of r 42(1)(a) on the basis that it had been granted erroneously, which order is not appealed against, the court a quo concluded thus:

‘In my opinion, even though uniform rule 4(1)(a)(iv) allows for service at a chosen domicilium citandi by delivering or leaving a copy of the process at such address the rule does not, in my view, preclude strict compliance with the rules governing proper and effective service required by the rule. . . . By simply leaving the process to be served at the domicilium citandi, as happened in this instance where the section 129(1) notice was attached to the gate and the summons was affixed to the grass,

without taking the necessary precautions that same will come to the notice of the defendant, does not constitute effective service to me.’

[13] I now turn to the question on appeal before us, which is whether the court a quo correctly granted the relief aimed at reinstating Ms Mare’s registered ownership of the property. In *Knox NO v Mofokeng and others* 2013 (4) SA 46 (GSJ), LJ van der Merwe AJ undertook an analysis of authoritative case law and common-law principles on the topic, and summarised the present legal position as follows:

‘[5] It appears from the analysis of the case law and the relevant common-law principles dealt with below that the judgment debtor’s

entitlement to claim restoration of the property once the judgment in terms whereof the property had been sold in execution has been rescinded, depends on the factual circumstances present at the time of rescission. At least three factual scenarios can in general be envisaged, although other factual permutations are possible. The first scenario is where the sale in execution had not been perfected by delivery in the case of movables and registration of transfer in the case of immovables. As indicated above, in such event the owner is in principle entitled to claim recovery of the property in question following the rescission of the judgment. See *Vosal Investments (Pty) Ltd v City of Johannesburg and Others* 2010 (1) SA 595 (GSJ); *Jubb v Sheriff, Magistrate’s Court, Inanda District and Others*; *Gottschalk v Sheriff, Magistrate’s Court, Inanda District and Others* 1999 (4) SA 596 (D) at 605F – G. The second scenario is where the sale in execution had been perfected by delivery in the case of movables, or registration of transfer in the case of immovables, but the purchaser had knowledge of the proceedings instituted by the judgment debtor for the rescission of the judgment in question prior to delivery or registration of transfer. In such event, the owner is also in principle entitled to recovery of the property in question, even where transfer had already been effected. See the *Vosal Investments* judgment above in para 16. The third scenario is where the sale in execution has been perfected by delivery in the case of movables, or by registration of transfer in the case of immovables, to a bona fide purchaser who had no knowledge of the judgment debtor’s proceedings for the rescission of the judgment, or where transfer of ownership has been effected prior to the institution of the rescission proceedings. The conclusion reached in the analysis below is that where transfer of ownership had been effected pursuant to the sale in execution by the time the judgment has been rescinded, the judgment debtor is not entitled to recover possession of the property in question, unless it can be established that the judgment and/or the sale in execution constituted a nullity. This conclusion is dictated and explained, in my view, by the application of the abstract theory for the transfer of ownership, which will be dealt with in greater detail elsewhere in this

judgment.’

- [14] It is the third scenario referred to in Knox that presents itself in this instance. As to the application of the abstract theory for the transfer of ownership and the applicable common law principles, LJ van der Merwe AJ concluded thus:
- [18] It follows that the first common-law principle to be applied in the present instance is that, as a general rule, property sold at a sale in execution in terms of a valid, existing judgment cannot be vindicated from a bona fide purchaser once the property had been transferred to the purchaser, provided the sale in execution was not a nullity. This implies that even where a valid judgment has been rescinded after the sale in execution had taken place, the property cannot be vindicated from a bona fide purchaser who had taken transfer of the property, merely on the ground that the judgment had been rescinded. The second relevant common-law principle is that the first principle only applies where a valid judgment was in existence at the time of the execution sale and where a valid execution sale complying with the essential applicable rules of court and statutory measures had taken place. Where there was no judgment, or where the judgment was void ab initio, or where the essential statutory formalities pertaining to the sale of an immovable property had not been complied with, the immovable property in question can in principle be vindicated even from a bona fide purchaser who had taken transfer of the property. The reason for the second rule is that where the sale in execution was invalid, the sheriff had no authority to conduct the sale and to transfer the property to the purchaser. The result is not only that the underlying sale agreement concluded at the sale in execution is invalid, but also that the real agreement is defective, since the sheriff does not have authority to transfer the property to the purchaser. The sheriff only has such authority where a valid sale in execution had taken place.
- [19] The principles of the common law pertaining to the abstract theory for the passing of ownership have been stated as follows by Brand JA in *Legator McKenna Inc and Another v Shea and Others* [2010]
- (1) SA 35 (SCA)] in para 22 (and referred to with approval by Shongwe JA in *Meintjes NO v Coetzer and Others* [2010
- (5) SA 186 (SCA)] in para 8):

“In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery — which in the case of immovable property is effected by registration of transfer in the deeds office — coupled with a so-called real agreement or saaklike ooreenkoms. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. . . . Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass — despite registration of transfer — if there is a defect in the real agreement. . . .”

This implies that the transferor must be legally competent to transfer the property, the transferee must be legally competent to acquire the property, and that the golden rule of the law of property, that no one can transfer more rights than he himself has, also applies to the real agreement. See Badenhorst, Pienaar & Mostert Silberberg and Schoeman's The Law of Property 5 ed at 73.'

[15] The question is whether the default judgment constituted a nullity ab initio. In *Nkutha and another v Standard Bank of South Africa Limited and others* (23213/2011)

[2017] ZAGPJHC 282 (11 August 2017), Van der Linde J said the following:

'[18] When is a default judgment void ab initio? At best for the applicants, this would be the case where there was no power to have granted it in the first place, such as where service of the process did not occur in accordance with the rules of the court. The effect of the rescission of such a judgment, which would operate ex tunc, would therefore be different from the effect of the rescission of a judgment where although service of the summons had occurred in accordance with the rules of court, the summons did not, as a fact, come to the attention of the defendant. In such a case, a rescission would operate pro nunc. This is because there was a power to have granted the default judgment; it was not erroneously granted.

[19] This proposition may also be put this way: a distinction is necessary between service of a summons which is not effected in accordance with the rules of court and for that reason does not come to the attention of the defendant and s/he therefore does not enter appearance to defend; and the case where service of the summons actually occurs in accordance with the rules of court, but the summons simply does not come to the attention of the defendant. In both cases a rescission of the judgment may be granted, but in the former the judgment will have been void ab initio, yet not so in the latter.'

[16] The bank argues that the statutory notice and the summons were left at Ms Mare's chosen domicilium citandi, a perfectly lawful method of service in terms of r 4(1)(a)(iv) of the Uniform Rules of Court. Ms Mare, on the other hand, argues that service of the summons by the sheriff 'affixing a copy thereof on the grass' at her chosen domicilium citandi was not effected in accordance with r 4(1)(a)(iv), and for that reason did not come to her attention. She therefore did not enter appearance to defend.

[17] The property comprises 7,3767 hectares of land and is a portion of the farm Tweefontein [...] in the province of Limpopo. It may only be used for residential and agricultural purposes. A dwelling consisting of a lounge, kitchen, bathroom and two bedrooms is erected on the property, and it has a double carport. Ms Mare resides in the dwelling. According to the evidence of Ms Mare the property has no perimeter fence nor any gate. She was present at the property at the times when, according to the sheriff's returns of service, the statutory notice and the summons were left at the property. She denies that she had any discussion with the sheriff indicating that she would collect the summons from his office.

- [18] The sheriff's return of service does not state who was not available on 3 and on 9 September 2015 when he made attempts to serve the summons nor who promised to collect the summons, although, I assume, his return of service refers to Ms Mare in that regard. One also wonders why the sheriff, according to his returns of service, would have served the statutory notice by affixing it 'to the gate', but the summons by affixing it 'on the grass'.
- [19] A return of service, it is trite, is regarded as prima facie evidence of its content. Indeed, s 43(2) of the Superior Courts Act 10 of 2013 expressly provides that '[t]he return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated'. It follows that such evidence may be challenged by adducing the clearest evidence. (See, for example, *Greeff v Firstrand Bank Ltd* 2012 (3) SA 157 (NCK), para 10; *Deputy Sheriff, Witwatersrand v Goldberg* 1905 TS 680.) This is exactly what Ms Mare did in her founding affidavit.
- [20] Ms Mare's factual allegations that the property has no perimeter fence nor any gate, that she was present at the property when the statutory notice and the summons were respectively allegedly left at the property, and that she did not have any telephonic discussion with the sheriff about collecting the summons at his office, were not refuted by the generalised and bold denials of those factual averments by the bank's senior legal counsel, Ms Sabashnee Naidoo, who deposed to its answering affidavit. She did not on behalf of the bank engage with Ms Mare's factual allegations in this regard (*Wightman t/a JW Construction v Headfour (Pty) Ltd* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at 375F-376B) nor could she, on the face of it, have any first-hand knowledge of whether and how the sheriff served the statutory notice and summons and what communications have transpired between the sheriff and Ms Mare. Her generalised and bold denials cannot be said to have created a genuine factual dispute. The sheriff, who is a party to these proceedings, did not file an affidavit nor was one obtained from him to take issue with the veracity or accuracy of Ms Mare's factual averments in this regard. In the circumstances, Ms Mare's factual averments must be accepted as correct. (See *Greeff* paras 13-14.)
- [21] Absent a plausible explanation by the sheriff, I am thus unable to find that service of the statutory notice by affixing it to a gate at the domicilium address, which according to Ms Mare did not exist, constituted service thereof. This finding renders it unnecessary to consider the question whether service of the statutory notice as reported in the sheriff's return of service constitutes compliance with the requirements of the National Credit Act 34 of 2005 to bring s 129 notices to the attention of consumers. The next question is whether service of the summons by having left a copy thereof 'on the grass' at Ms Mare's domicilium address, constituted service in accordance with r 4(1)(a)(iv) of the Uniform Rules of Court in the circumstances of this case.
- [22] The purpose of a summons or notice of motion, so *Rumpf JA* held in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780D, is to implicate or involve a defendant or respondent into a lawsuit, and that such a party is only implicated or involved in the lawsuit once service of the summons or notice of motion

had been effected. Rumpf JA also referred to *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D, where it was held that '[a]lthough an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him'.

[23] In general terms, as was said by Ndlovu J in *Mouritzen v Greysones Enterprises (Pty) Ltd and another* 2012 (5) SA 74 (KZD) para 28, the purpose of service:

'... is, firstly, to notify the person intended to be served of the nature, contents and exigency of the process of court or other

document served upon such person and, secondly, to return to the court proof of such service in the manner prescribed by law.

Indeed, the Appellate Division (now the Supreme Court of Appeal) once observed in *S v Watson* [1969 (3) SA 405 (A) at 410A-C] that the term:

"Served . . . has the ordinary connotation of legally delivered in accordance with the law so as to notify the person on whom it is served of its contents."

[24] Rule 4 of the Uniform Rules of Court prescribes the manners in which service of the process of court 'shall be effected by the sheriff'. There are also other statutory provisions which provide for methods of service of process of court, such as s 44 of the Superior Courts Act 10 of 2013, but this appeal concerns the manner of service prescribed in r 4(1)(a)(iv), which provides for service of any process 'if the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen'.

[25] In *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at 5H-6D, Nicholas AJA said this:

'It is a matter of frequent occurrence that a domicilium citandi et executandi is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode: see *Pretoria Hypotheek Maatschappij v Groenewald* 1915 TPD 170.) It is a well-established practice (which is recognised by Rule 4(1)(a)(iv) of the Uniform Rules of Court) that, if a defendant has chosen a domicilium citandi, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident

abroad, or has abandoned the property, or cannot be found. (Herbstein and Van Winsen *The Civil Practice of the Superior Courts of South Africa* 3rd ed at 210. See *Muller v Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 (W) at 331H - 333A, *Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 847D - F.) It is generally accepted in our practice that the choice without more of a domicilium citandi is applicable only to the service of process in legal proceedings. (*Ficksburg Transport (Edms) Bpk v Rautenbach en 'n Ander* (supra 333C

- D). Parties to a contract may, however, choose an address for the service of notices under the contract. The consequences of such a choice must in principle be the same as the choice of a *domicilium citandi et executandi* (cf the Ficksburg Transport case *ubi cit*), namely that service at the address chosen is good service, whether or not the addressee is present at the time.'
- [26] The manner in which a process may be delivered or left at a domicile in terms of r 4(1)(a)(iv) is not prescribed and depends on the prevailing circumstances. The relevant provisions of the loan agreement in question (clause
- 37) also do not prescribe the manner of delivery or of acceptance at Ms Mare's chosen domicile address. The duty upon a sheriff is to serve a notice or process of court at a domicile citandi by delivering or leaving the notice or process in a manner by which in the ordinary course the notice or process would come to the attention and be received by the intended recipient, and to report to the court how the process was served and why it was served in that manner. The delivery requirement at a domicile citandi, as was said by Margo J in *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 849A-B, '... presupposes delivery in any manner by which in the ordinary course the notice would come to the attention of and be received by the lessor. The obvious method would be by handing the notice to a responsible employee, or by pushing it under the front door, or by placing it in the mailbox.'
- [27] Leaving the summons on the grass where it can be blown away, taken away or be invisible, was not an appropriate place for delivery in the particular circumstances. Where delivery of a notice or process is to be effected at a residence chosen as a domicile citandi, it would equally not have been enough merely to drop the process over a perimeter fence or to put it into a hedge. (Cf. *Loryan* at 847H-I.) Ms Mare's chosen domicile citandi is not a vacant piece of land, but a smallholding with a dwelling on it, which is her private residence. The obvious method of delivery by which in the ordinary course the summons would have come to her attention and received by her, and which the sheriff
- in casu was required to do in order to comply with the method of service prescribed in terms of r 4(1)(a)(iv), was to hand a copy of the summons to Ms Mare personally (I accept her evidence that she was present at the time of service of the summons), to a responsible employee, if there was someone present, by slipping it under or affixing it to the front door of her home, or even by placing it in a post box, if there was one.
- [28] There was, therefore, not proper service of the summons effected at Ms Mare's chosen domicile citandi in accordance with r 4(1)(a)(iv), and a valid judgment was not in existence at the time of the execution sale. The judgment was void ab initio. The sale in execution was invalid, and the sheriff had no authority to conduct the sale on the authority of a void judgment and to transfer the property to the purchaser. The property can thus in principle be vindicated from the bona fide purchaser who had taken transfer of the property.

[29] In *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA), execution was issued against a residential immovable property owned by Markom without judicial supervision, pursuant to a judgment for the payment of a money debt obtained against him. It was sold in execution, transferred to the purchaser, Menqa, and the bond in favour of Nedbank was cancelled. Menqa subsequently sold the property to Roux, but it was not yet transferred to him at the time of the institution of the legal proceedings. Although the sale in execution and transfer of the property to Menqa, as well as the subsequent sale to Roux, were declared null and void, the Supreme Court of Appeal held that it did not appear fair under the circumstances to direct the registrar of deeds to reregister the property in the owner's name and that it would be much fairer to the parties if the vindicatory claim of the owner and possible enrichment claim of the purchaser be dealt with in future proceedings. In this regard Van Heerden JA said the following:

'[25] It follows that, in the present case, the registration of the property in Menqa's name did not make him owner of the property. Theoretically, therefore, Markom is entitled to recover the property in vindicatory proceedings. However,

simply to direct the Registrar of Deeds to reregister the property in Markom's name would not, in my view, properly take into account the fact that Menqa has paid more than R140 000 in respect of the property and that, by virtue of the extinction of Markom's bond debt to Nedbank . . . Markom appears to have been unjustifiably enriched at Menqa's expense. It will be much fairer to both parties if these claims are dealt with, preferably simultaneously, in future proceedings which will no doubt be instituted in due course. Neither Markom nor Menqa requires the leave of any court to institute such proceedings. . . . '

(Footnotes omitted.)

[30] The sale proceeds in casu were not credited to Ms Mare's bond debt but deposited into a 'suspense account' of the bank. Furthermore, the purchaser did not oppose any of the relief sought by Ms Mare nor does that part of the order granted by the court a quo aimed at the reinstating Ms Mare's registered ownership of the property preclude him from instituting proceedings to recover any losses suffered by him.

[31] The bank argues that the retransfer of the property to Ms Mare would leave it without real security over the property for the satisfaction of its claim against her. Whether or not the mortgage bond in favour of the bank is reinstated upon the cancellation of the purchaser's title deed and the revival of the Ms Mare's title deed in terms of s 6 of the Deeds Registries Act 47 of 1937, is a question that we do not need to consider. It was not one of the considerations taken into account in the decision for the parties to pursue their vindicatory and enrichment claims in future proceedings in Menqa, nor was it a consideration taken into account in Knox where not only declaratory relief was granted but also relief aimed at the restoration of ownership of the property concerned.

[32] I am of the view, therefore, that the court a quo correctly granted the relief relating to the reinstatement of Ms Mare's registered ownership of the property.

[33] In the result the following order is made:

The appeal is dismissed with costs, including those of the application for leave to appeal.

P.A. MEYER

JUDGE OF THE HIGH COURT

Heard:

22 June 2020

Judgment:

20 August 2020

Appellant's counsel: Adv J Eastes

Instructed by:

Delpont Van den Berg, Menlyn, Pretoria

First Respondent's counsel: Adv BH Steyn

Instructed by:

Le Roux Attorneys, Cape Town

C/o Mare Attorneys, Centurion, Pretoria

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/absa-bank-limited-v-mare-and-others-unknown-topic-agpphc-2020>

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