

SOUTH AFRICA / JUDGMENT

Absa Bank Ltd v Serfontein and Another - Leave to appeal (4659/2021)

[2023] ZAFSHC 264 (30 June 2023)

[2023] ZAFSHC 264

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

4659/2021

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Policy

IN THE HIGH COURT

OF SOUTH AFRICA

FREE STATE

DIVISION, BLOEMFONTEIN

Application number:

4659/2021

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO
MAGISTRATES:

YES/NO

In the application

between:

ABSA
BANK LTD
Applicant
And
JOHAN
SERFONTEIN
1st
Respondent
JACOBUS
HENDRIK SERFONTEIN
2nd
Respondent
In

re:

JOHAN
SERFONTEIN
1st
Applicant
JACOBUS
HENDRIK SERFONTEIN
2nd
Applicant
And
ABSA
BANK LTD
1st
Respondent
FRANCOIS
ELS N.O.
2nd
Respondent
(In
his capacity as a trustee of the
Francois
Els Trust, IT no. 12[...])
ADRIAAN
BENJAMIN VOSLOO N.O.
3rd
Respondent
(In
his capacity as a trustee of the
Francois
Els Trust, IT no. 12[...])
REGISTRAR
OF DEEDS
4th
Respondent

JUDGMENT

BY: VAN ZYL, J

HEARD ON: 29 MAART 2023

DELIVERED ON: 30 JUNE 2023

[1] This is an application for leave to appeal by the applicant (the first respondent in the main application) against the order and judgment which I delivered in the main application on 9 September 2022 and 22 March 2023 respectively. The said order reads as follows:

“1. In terms of the provisions of sections 89, 90 and 91, read with section 164(1) of the National Credit Act, 34 of 2005, the acknowledgement of debt, incorporating a power of attorney to dispose of Portion 3 of the farm W[...] 9[...], Extension 6[...], District K[...], Free State Province, in extent 616.717 hectares (“the property”), of which the first applicant is the owner, entered into between the applicants and the first respondent on 17 March 2019, is declared void from the date it was entered into.

2. The agreement of sale of the property to the Francois Els Trust, IT no. 12[...], represented by the second and third respondents, signed by the parties on 7 September 2021 and 13 September 2021 respectively, is declared void ab initio.
3. The fourth respondent is prohibited from registering the property on the basis of the agreement of sale referred to in paragraph 2 above into the names of the second and third respondents.
4. The counter application is dismissed.
5. The first respondent is ordered to pay the costs of the application and the counter application.”

[2] The grounds of appeal are set out in the Notice of Application for Leave to Appeal, dated 23 March 2023, and entail the following:

1. The Learned Honourable Judge, with the greatest respect, erred in finding that the Acknowledgment of Debt dated 17 March 2019 (annexure "AB21" to the opposing affidavit), is a supplementary agreement as envisaged in Sections 89 and 91 of the National Credit Act, 2005.

1.1 The Learned Honourable Judge, with the greatest respect, erred in finding that the Acknowledgment of Debt dated 17 March 2019 (annexure "AB21" to the opposing affidavit), is a supplementary agreement as envisaged in Sections 89 and 91 of the National Credit Act, 2005, and thereafter, to find that it as a supplementary agreement transgresses Sections 90(2)(a) and (b), Section 90(2)(h)(i), Section 90(2)(k)(vi)(bb), Section 90(2)(j) and Section 90(2)(k)(ii) of the NCA.

2. The Learned Honourable Judge, with the greatest respect, erred in finding that the Acknowledgment of Debt dated 17 March 2019 is a credit agreement in terms of Section 8(4) (f) of the National Credit Act.
 3. The Judge with respect erred in not finding that the aforesaid Acknowledgment of Debt dated 17 March 2019 is valid and/or enforceable in terms of the common law and/or precedent and/or the National Credit Act, 2005.
 4. The Learned Judge, with respect, erred in finding that Clauses 2.3 to 2.9 of the aforesaid acknowledgment of debt constitute a resort to parate executie, and therefore is void.
 5. The Court with the greatest respect erred in not finding that an agreement between a debtor and creditor post default allowing the creditor the power and/or authority to sell movables and/or immovables to settle the debt without recourse to the Courts, is lawful.
- 5.1 The Honourable Court erred in not finding that it is lawful for a debtor to, after he/she fell in default, consent to the mortgagee selling the property mortgaged, provided a fair price is realized for and agreed upon.
6. The Learned Judge with respect, regarding the assertion that the aforesaid Acknowledgment of Debt is a supplementary agreement, erred not to follow the approach as in paragraphs [38] to [39] in *Standard Bank of South Africa Limited v Wolmarans N.O. and others* (3949/2021) [2022] ZAFSHC 118 (16 May 2022), in order thereon to find that it is not a supplementary agreement.
 7. The Learned Judge, with respect, erred in not following the approach as in paragraph [21] of *Ratlou v MAN Financial Services* 2019 (5) SA 117 (SCA) and thereon to find that the NCA was not aimed at settlement agreements like this particular acknowledgment of debt, and that the application of the NCA to such acknowledgment of debt will have a devastating effect on the efficacy and the willingness of parties to conclude settlement agreements, and thereby to curtail litigation.”
- [3] Section 17(1)(a) of the Superior Courts Act, 10 of 2013, determines as follows with regard to leave to appeal:
- “1. Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
- (a)
 - (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) ...”

- [4] In the judgment of Acting National Director of Public Prosecutions v Democratic Alliance In Re Democratic Alliance v Acting National Director of Public Prosecutions (19577/09) [2016] ZAGPPHZ 489 (24 June 2016) the court held at para
- [25] of the judgment that the Superior Courts Act has raised the bar for granting leave to appeal and in this regard it referred to the judgment of The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others 2014 JDR 2325 (LCC) at para [6]:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different

conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

See also Njango v S (06/2016) [2018] ZAFSHC 17 (27 February 2018) at paras [7] –

- [8] and Pretoria Society of Advocates and Others v Nthai 2020 (1) SA 267 (LP) at para [5].

- [5] I will refer to the parties as cited in the present application.

- [6] Mr Benade appeared on behalf of the applicant, like he also did during the hearing of the main application when the applicant was the first respondent. Mr Van der Merwe appeared on behalf of the respondents. Mr Van der Merwe was not involved during the hearing of the main application.

- [7] The main application dealt with the interpretation of certain sections of the National Credit Act, 34 of 2005 (“the NCA”). The crux of the merits of the main application pertained to an Acknowledgment of Debt, which incorporated a Power of Attorney authorising the applicant to sell the first respondent’s immovable property, dated 17 March 2019, and which document I referred to in my judgment as the AOD/POA. In my judgment I referred to the NCA as “the

Act”.

- [8] The main findings I made in my judgment were the following:

“[29] I consequently find that the AOD/POA constitutes a supplementary agreement.”

“[67] In my view the AOD/POA consequently constitutes a supplementary agreement which contains unlawful provisions as prohibited by section 91(2) of the Act and therefore constitutes an unlawful agreement in terms of section 89(2)(c) of the Act.”

“[71] In so far as I may have erred in coming to the conclusion that the AOD/POA constitutes a supplementary agreement prohibited by section 91(2) of the Act and therefore constitutes an unlawful agreement in terms of section 89(2)(c) of the Act, I deem it necessary to consider the alternative basis of the applicants’ case, being that the AOD/POA firstly constitutes a credit agreement and secondly contains unlawful provisions as prohibited by section 90 of the Act.”

“[77] Consequently and in so far as I may have erred in coming to the conclusion that the AOD/POA constitutes a supplementary agreement, I found in the alternative that it constitutes a credit agreement.”

“[78] Earlier in this judgment when I dealt with the AOD/POA on the basis that it constitutes a supplementary agreement, I dealt with the respective provisions contained therein which would have been lawful if they were included in a credit agreement, as provided in section 91(2), read with section 90 of the Act. In view of my alternative finding that the document constitutes a credit agreement, my earlier findings with regard to the provisions which constitute unlawful provisions in terms of section 90 of the Act, are mutatis mutandis applicable when the AOD/POA is considered as being a credit agreement.

[79] There is one distinction though. When I considered the AOD/POA on the basis of being a supplementary agreement, I found it to be an unlawful agreement in terms of section 89(2)(c), read with section 91(2) of the Act. When considered on the basis of constituting a credit agreement, the presence of the unlawful provisions therein constitutes a transgression of sections 90(1) and (2) of the Act.”

[9] In the judgment of *Standard Bank of South Africa Limited v Wolmarans N.O. and Others* (3949/2021) [2022] ZAFSHC 118 (16 May 2022) Daffue, J dealt with similar issues regarding the interpretation of certain sections of the NCA in relation to two Settlement Agreements/Acknowledgement of Debts. I adjudicated the application for leave to appeal in relation to the Wolmarans-judgment after it was allocated to me in terms of section 17(2)(a) of the Superior Courts Act.

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Prepared on 11 October 2026 · Esheria