IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Application number: 4659/2021

In the application between:

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. 1298/98)	
ADRIAAN BENJAMIN VOSLOO N.O.	3rd Respondent
(In his capacity as a trustee of the Francois Els Trust, IT no. 1298/98)	
REGISTRAR OF DEEDS	4th Respondent

JUDGMENT BY: VAN ZYL, J

HEARD ON: 2 FEBRUARY 2022

DELIVERED ON: 9 SEPTEMBER 2022; 22 MARCH 2023

[1] On 9 September 2022 I made the following order in this matter:

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 Welverdiend 92, Extension 616, District Kroonstad, 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. 1298/98, 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] What follows are the reasons for the aforesaid order which are being made available to the parties on 22 March 2023.

[3] The applicant approached court for an order in the following terms:

"1. Declaring, in terms of the provisions of sections 89 and 90, read with section 164(1) of the NCA, the purported acknowledgment of debt (AOD) incorporating a power of attorney (POA) attached to the founding affidavit to dispose of certain Portion 3 of the Farm Welverdiend 92, district Kroonstad, Extension 616, District Kroonstad, Free State Province in extent 611.717 (*sic*) hectares (property) of which the first applicant is the owner, void from the date the AOD/POA was entered into.

2. Declaring the purported deed of sale dated respectively 7 September 2021 and 13 September 2021 in terms whereof the second and third respondents purportedly purchased the property from the first applicant void.

3. Ordering the fourth respondent to refrain from registering the property into the name of the second and third respondents.

4. Ordering the first respondent to pay the applicants' costs on the scale between attorney and client.

5. That, in the event of any one or more of the second to fourth respondents oppose the application, ordering such opposing respondent(s) to pay the costs on the scale as between attorney and client, jointly with the first respondent, the one to pay the other to be absolved."

[4] The first respondent opposed the application. In its answering affidavit the first respondent also requested that the said affidavit serves as founding affidavit for its counter application, in terms of which the first respondent sought the following relief:

"11.26.1 That the Acknowledgment of Debt and Power of Attorney (annexure "AB21" to the opposing affidavit) dated 17 March 2019 be declared valid as between first respondent and the applicants.

11.26.2 It is declared that first respondent may sell Portion 3 of the Farm Welverdiend 92 held by first applicant under Title Deed T161/1993, in accordance with clauses 2.3 to 2.10 of the 17 March 2019 Acknowledgment of Debt and Power of Attorney.

11.26.3 The Agreement of Sale dated 13 September 2021 (between first applicant and the Francois Els Trust), attached to annexure "AB28", is declared valid and enforceable.

11.26.4 Fourth respondent is authorised to register the aforesaid farm in the name of the second and third respondents (the Trustees of the Francois Els Trust).

11.26.5 The applicants to pay the costs of this counter application."

Background:

[5] The application consisted of lengthy affidavits and numerous annexures which stretched over 621 pages, with the two sets of heads of argument consisting of a further 83 pages. However, many of the allegations were repetitive in nature and furthermore I do not consider all the background facts pertaining to the business dealings between the applicants and the first respondent to be relevant for purposes of the adjudication of the

application. I will consequently only provide a succinct summary of the background facts which I consider to be pertinent to the present application.

[6] The relationship between the first applicant and the first respondent relating to the overdraft account relevant to this application, being account number 4057943170, commenced with an overdraft agreement in July 2003 with an overdraft limit of some R22 000.00 afforded to the first applicant at that stage. Over the years the overdraft limit was increased from time to time in terms of subsequent agreements which were signed between the parties. The last overdraft credit agreement regarding the said account was signed between the first applicant and the first respondent on 28 July 2014, which agreement is attached to the answering affidavit as annexure "AB10". At that stage the overdraft facility was R5 200 000.00 of which R2 000 000.00 had to be paid back to the first respondent by 25 July 2015.

[7] The first respondent registered first to fourth covering mortgage bonds over the property of the first applicant, described in the respective mortgage bonds as Portion 3 of the Farm Welverdiend 92, District Kroonstad, Free State Province, in extent 619.8736 hectares, held by the first applicant by way of Title Deed no. T161/1993 ("the property").

[8] The second respondent bound himself as surety and co-principal debtor in terms of a written deed of suretyship, dated 24 October 2006, to be jointly and severally liable towards the first respondent for the due fulfilment of the obligations of the first

applicant in favour of the first respondent. The deed of suretyship is attached to the answering affidavit as annexure "AB31". The first respondent also registered two covering bonds as security over the immovable property of the second applicant, being the Remaining Extent of the Farm Welverdiend, Extension 616, in the District of Kroonstad, in extent 950.0414 hectares, held by Title Deed no. T4019/1970.

[9] The first applicant failed to pay the abovementioned R2 000 000.00 back to the first respondent by 25 July 2015 as agreed between them. According to the first respondent this failure constituted a default as envisaged in clause 14 of annexure "C" (the Standard Terms and Conditions) to annexure "AB10" (the last overdraft credit agreement referred to earlier). The monthly interest on the overdraft as from July 2015 onwards amounted to more than R50 000.00 per month, which also remained unpaid, with the result that the outstanding overdraft amount escalated. On 31 August 2017 the full outstanding amount was R6 202 787.42. As a result of ongoing engagement between the first applicant and the first respondent an Acknowledgment of Debt was signed by the first applicant on 10 May 2018, which Acknowledgment of Debt is attached to the answering affidavit as annexure "AB14". In terms thereof the first applicant acknowledged, *inter alia,* to be "*truly and lawfully and unconditionally indebted to Absa Bank in the sum of R6 792 190.00...*".

[10] During 2018 the management of the first respondent transferred the first applicant's overdraft account to its Legal Recoveries

Division. The first respondent's attorney was mandated to engage with the applicants regarding the overdraft account. The said negotiations culminated in the signing of an Acknowledgment of Debt ("AOD"), which incorporates a Power of Attorney ("POA") authorising the first respondent to sell the first applicant's property, dated 17 March 2019, and which agreement forms the subject matter of the application. I will henceforth refer to the agreement as "the AOD/POA". In the AOD/POA the first and the second applicants are jointly referred to as "*the clients*".

[11] On the strength of the AOD/POA an auction was arranged for 17 July 2019 for the sale of the first applicant`s property. The first applicant also attended the auction. An offer of R3 800 000.00 was obtained at the auction, which was not acceptable to the first respondent. According to the first respondent it thereafter continuously endeavoured to obtain a buyer for the property for a reasonable amount. In the meantime, the overdraft balance escalated monthly by more than R50 000.00 per month due to the interest.

[12] A notice termed "NOTICE IN TERMS OF SECTION 129 READ TOGETHER WITH SECTION 130 OF THE NATIONAL CREDIT ACT, NO. 34 OF 2005", dated 24 February 2021 ("the section 21-notice"), was delivered to the first applicant by the sheriff on instructions of the first respondent. It pertained to the overdraft account relevant to the present application, as well as to a term loan account and a different smaller overdraft facility. In paragraph 7 thereof the first applicant was advised that he may

refer the matter to, *inter alia,* the Ombudsman. The section 29-notice is attached to the answering affidavit as annexure "AB 22".

[13] On 19 March 2021 the first respondent received a letter from HSL du Plessis Attorneys, on behalf of the first applicant, in which letter the first respondent was advised that the matter would be referred to the Ombudsman and a copy of the said referral was attached to the letter. The letter is attached to the answering affidavit as annexure "AB23" and the referral to the Ombudsman for Banking Services as annexure "AB24". In essence it was alleged that the first respondent had recklessly extended credit to the first applicant. On 27 May 2021 the first respondent addressed a response letter to the Ombudsman for Banking Services, which letter is attached to the answering affidavit as annexure "AB25". On 6 August 2021 the Ombudsman for Banking Services responded to the first applicant by means of the letter attached to the answering affidavit as annexure "AB26", in which letter it was stated that for the reasons explained in the said letter it concluded that there were no reasonable prospects of pursuing the matter further and that the file has been closed.

[14] On 13 September 2021, on the strength of the AOD/POA, an agreement of sale pertaining to the property of the first applicant was entered into with the Francois Els Trust, represented in the agreement and in this application by the second and third respondents as the trustees. A representative of the first respondent concluded and signed the agreement of sale on behalf of the first applicant. The purchase price is

R6 000 000.00, an amount of R9 740.00 per hectare, which amount, according to the first respondent, constitutes a market related price. A copy of the agreement of sale is attached to annexure "AB28" to the answering affidavit.

[15] On 22 September 2021 the first respondent's attorney addressed a letter to the first applicant in which the first applicant was advised of the sale of the property and notified that vacant possession of the property has to be provided on date of transfer, on which date the property must immediately be vacated. The said letter is attached to the answering affidavit as annexure "AB28".

[16] Subsequent correspondence followed between the relevant parties, whereupon the applicants launched the present application.

Contentions on behalf of the respective parties:

[17] References to certain sections of the "NCA" are to be understood to be references to the National Credit Act, 34 of 2005, to which Act I will henceforth refer to as "the Act".

[18] The applicants' main contention as set out in their heads of argument is AOD/POA "*in its entirety, is unlawful and accordingly void on account of the fact that it constitutes a supplementary agreement as forbidden by section 89 of the NCA*". Mr Du Plessis, who appeared on behalf of the applicants, advanced detailed submissions in his heads of argument in support of the

aforesaid contention, many of which he also highlighted during his oral argument in court.

[19] In the alternative, it is the applicants` contention that if the AOD/POA is held not to be a supplementary agreement, it is to be found to be a credit agreement "*which by virtue of the numerous contraventions of the provisions of section 90(2)...cannot be altered by the Court to constitute a legal binding agreement as is provided for by section 90(4)(a)...and is accordingly, in its entirety, to be regarded as unlawful and, as as provided by section 90(4)(b) to be declared unlawful as from the date that the agreement took effect*".

[20] The first respondent's contentions in opposition to the applicants' aforesaid contentions are set out as follows in its heads of argument:

> "3.6" [With reference to the definitions of "supplement" and "supplementary"] "[T]his proves that the Acknowledgment of Debt & Power of Attorney is not a supplementary agreement to the overdraft credit agreement. It does not add to the credit agreement as such. To the contrary, it was entered into four years after the credit agreement. After the credit agreement has run its course – and the default in terms thereof has occurred.
>
> 3.6.1 And furthermore, it does not further describe and/or define and/or arrange the overdraft and/or credit agreement, or add anything to the terms thereof. To the contrary, after a default has occurred and after the credit agreement has run its course, the parties entered into another type of

> agreement. Another type of agreement that is not a credit agreement whatsoever, namely an Acknowledgment of Debt & Power of Attorney to sell farms in an endeavour to reduce the overdraft amount."

[21] The first respondent consequently contended that the AOD/POA does not qualify under section 89(2) or 91(2) of the Act as a supplementary agreement. According to the first respondent the AOD/POA in any event does not constitute a transgression of any of the provisions of section 90(2) of the Act.

[22] It was further contended in the first respondent`s heads of argument, with reference to case law, that it is lawful for a debtor, after he/she is in default, to consent to the selling of mortgaged property and that the AOD/POA is therefore in principle valid and lawful.

[23] Mr Benade, who appeared on behalf of the first respondent, similarly advanced detailed submissions, both in his heads of argument and during oral argument, in support of the aforesaid contentions.

Determination of the nature/status of the AOD/POA and its provisions:

[24] The Act does not define a supplementary agreement. However, in **National Credit Regulator v Lewis Stores (Pty) Ltd** 2020 (2) SA 390 (SCA) at paras [31] – [32] the SCA pronounced as follows with regard to a supplementary agreement:

"[31] Thirdly, a 'supplementary agreement' is not defined in the NCA. The ordinary principles applicable to the interpretation of legislation find application in respect of the NCA. Moreover s 2 of the NCA enjoins a court in interpreting the provisions of the Act to do so in a manner that gives effect to the purposes of the Act set out in s 3 thereof. The over- riding purpose of the Act set out in s 3 is 'to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers...'.

[32] The starting point in interpreting the legislation, of necessity, is to give consideration to 'the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production'. The *Shorter Oxford English Dictionary* defines 'supplementary' as 'of the nature of, forming, or serving as, a supplement'. 'Supplement', in turn, is defined as 'something added to supply a deficiency; an auxiliary means, an aid;' or 'a part added to complete a literary work or any written account or document'. Giving the term its ordinary English meaning in the context of ch 5 of the NCA, an agreement can only, in my view, be 'supplementary' if it deals with the same subject-matter as the main agreement, ie the regulation of the credit and repayment thereof. Examples of supplementary agreements that spring to mind would be documents acknowledging that no representations had been made to the consumer, a waiver of statutory rights or an acknowledgment of receipt of goods in good order and condition." (Own emphasis)

[25] When considering whether the AOD/POA constitutes a supplementary agreement, it is to be noted that on the first respondent's own case the AOD/POA did not constitute an amendment of the existing credit agreements between the applicants and the first respondent. In this regard clause 12 of

the AOD/POA specifically determines that it does not constitute a novation of any of the "*clients' obligations to Absa in terms of the underpinning and main agreements*".

[26] I have to agree with the submission of Mr du Plessis that the aforesaid in itself shows that the AOD/POA "*deals with the same subject-matter as the main agreement, ie the regulation of the credit and repayment thereof*". See **Lewis Stores**-judgment, supra, at para [32].

[27] The aforesaid is explicitly evident from the introduction to the AOD/POA, read with paragraph 1 thereof. The AOD/POA deals with the same debt/credit as the underpinning agreements. It furthermore specifically deals with the repayment of the said debt/credit. In this regard paragraph 1.3 thereof determines that the principal debt "*is currently due and payable*" but then from a further reading of the AOD/POAit is evident that the payment of the debt to the first respondent will occur as soon as the proceeds of the sale of the property becomes available. In this regard clause 2.3 determines, *inter alia*, that the "*proceeds of the sale shall be paid towards any outstanding balance due and payable to Absa in terms of this agreement*". Clause 5 of the AOD/POA also contains provisions regarding the repayment of the debt/credit in that it makes provision for default by the applicants in which instance "*the full outstanding principal debt mentioned in paragraph 1.1 above and all other amounts owing by the clients in terms of this acknowledgment of debt, inclusive of costs, lease amounts already paid, will become immediately due and payable without further notice to the clients*".

[28] In addition to the aforesaid, the Supreme Court of Appeal in the **Lewis Stores**-judgment, *supra,* specifically mentioned documents which would contain a waiver of statutory rights as an example of a supplementary agreement. In the present matter the AOD/POA specifically contains such a waiver clause where the following is stated in clause 13 thereof:

"The clients further acknowledge that this agreement is not subject to applicability of the National Credit Act."

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

[30] Section 89(2)(c) of the Act determines as follows:

"**89. Unlawful credit agreements. –**

(1) ...

(2) Subject to subsections (3) and (4), a credit agreement is unlawful if –

(a) ...

(b) ...

(c) it is a supplementary agreement or document prohibited by section 91(a). ..."

[31] Although the aforesaid provision refers to section 91(a) of the Act, the Act has since been amended to the effect that section 91 now contains two subsections, which determine as follows:

"**91. Prohibition of unlawful provisions in credit agreements and supplementary agreements. -**

(1) A credit provider must not directly or indirectly, by false pretences or with the intent to defraud, offer, require or induce a consumer to enter into or sign a credit agreement that contains an unlawful provision as contemplated in section 90.

(2) A credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement."

[32] With regard to the wording "*directly or indirectly require or induce*" used in section 91(2) of the Act, the Constitutional Court held as follows in **University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services and Others** 2016 (6) SA 596 (CC) at para [117]:

"[117] The Flemix respondents also submit in the appeal that s 91(2) prohibits only specific conduct, namely when a credit provider 'directly or indirectly require[s] or induce[s] a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement'. They contend that a s 45 consent is a voluntary agreement that does not involve any inducing or requiring by the credit provider. But the facts patently illustrate how this assertion is wrong and that these consents are often induced and debtors are frequently subject to outside pressure. The wording of the statute also sets a low threshold — 'indirectly... induce'. By informing a debtor about the s 45 procedure and providing them with the necessary documents, the credit provider has indirectly induced the consumer to sign the consent. This interpretation is underscored by the purposes of the National Credit Act, one of which is 'to prohibit certain unfair credit and credit marketing practices'. And s 91 itself is titled 'Prohibition of

unlawful provisions in credit agreements and supplementary agreements'. The focus is on the unlawful provisions rather than the credit provider's conduct." (Own emphasis)

See also **National Credit Regulator v Golden Mile Loans CC t/a Cash 4 U** NCT/158460/2020/57(1) (24 September 2021) at para [56].

[33] Therefore, what I now have to determine is whether the AOD/POA is a supplementary agreement prohibited by section 91(2), as determined in section 89(2)(c). As previously recorded a supplementary agreement so prohibited is in terms of section 91(2) one that contains a provision that "*would be unlawful if it were included in a credit agreement*".

[34] Section 90 of the Act determines that a credit agreement must not contain an unlawful provision and then furthermore determines which provisions in a credit agreement are unlawful.

[35] I do not deem it necessary to deal with each and every clause of the AOD/POA.

Section 90(2)(a) and (b) of the Act:

[36] In terms of section 90(2)(a) and (b) of the Act a provision of a credit agreement is unlawful, *inter alia,* if –

"(a) its general purpose or effect is to –

(i) defeat the purposes or policies of this Act;

(ii) deceive the consumer; or

(iii) …

(b) directly or indirectly purports to –

(i) waive or deprive a consumer of a right set out in this Act;

(ii) avoid a credit provider's obligation or duty in terms of this Act;

(iii) set aside or override the effect of any provision of this Act;

(iv) Authorise the credit provider to -

(aa) do anything that is unlawful in terms of this Act; or

(bb) fail to do anything that is required in terms of this Act."

[37] As already indicated earlier, clause 13 of the AOD/POA determines as follows:

"The clients further acknowledge that this agreement is not subject to applicability of the National Credit Act."

[38] In my view clause 13 of the AOD/POA, being a supplementary agreement, constitutes the most flagrant transgression of section 90(2)(a) and (b) in that it completely excludes the applicability of the Act. It clearly constitutes "*a provision that would be unlawful if it were included in a credit agreement*" as prohibited by section 91(2) of the Act. This brings the AOD/POA squarely within the provisions of section 89(2)(c).

Section 90(2)(h)(i) of the Act:

[39] Section 90(2)(h)(i) of the Act determines that a provision of a credit agreement is unlawful if –

"(h) it expresses an acknowledgement by the consumer that -

(i) before the agreement was made, no representations or warranties were made in connection with the agreement by the credit provider or a person on behalf of the credit provider; or..."

[40] Clause 9 of the AOD/POA determines, *inter alia,* that "*in signing this acknowledgment of debt the clients cannot rely on any warranties or representations made by or attributable to Absa*". In my view the last-mentioned provision has the exact same meaning and implication as that which is prohibited by section 90(2)(h)(i) of the Act.

Section 90(2)(k)(vi)(bb) of the Act:

[41] Clause 8.2 of the AOD/POA determines as follows:

"The clients furthermore consent, as contemplated in section 65J(2)(a) of the Magistrate Court Act *(sic)*, to an emoluments attachment order being issued from the court of the district in which the clients' employer or debtors reside, carries on business or is employed ... to the extent necessary to cover the judgment ..."

[42] The reason for the aforesaid clause would be that previously section 65J of the Magistrates' Courts Act provided that only "*the court of the district in which the employer of the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is employed by the State, in which the judgment debtor is employed has jurisdiction to issue an emoluments attachment order*". The said section has since been amended, even prior to

the date of the conclusion of the AOD/POA. However, be that as it may, section 90(2)(k)(vi)(bb) of the Act prohibits a provision in a credit agreement which constitutes consent to the jurisdiction of "*any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept*". See **NBD Securitisation (Pty) Ltd v Booi** 2015 (5) SA 450 (FB). See also **University of Stellenbosch Legal Aid Clinic**, *supra,* at para [116].

[43] Clause 8.2 of the AOD/POA consequently also constitutes an unlawful provision in terms of section 90(2)(k)(vi)(bb) of the Act.

Parate executie and Section 90(2)(j) of the Act:

[44] Clause 2 of the AOD/POA bears the heading "POWER OF ATTORNEY REGARDING IMMOVABLE PROPERTY". Clause 2.1 records that the first applicant is the registered owner of an immovable property against which the first respondent has registered four covering bonds as security and the description of the property. Clause 2.2 records similar details pertaining to the second applicant, but this clause has become irrelevant since it was deleted after the second applicant declined to agree to the selling of his immovable property.

[45] Although a tedious exercise, I deem it necessary to quote the rest of clause 2:

"2.3 The clients herewith grant and provide an irrevocable power of attorney in favour of Absa, as represented by Ciraaj Ismail, or any other nominated employee of Absa, to sell the abovementioned immovable properties together with any and all improvements thereupon by way of public auction, alternatively by a tender, alternatively by private sale, for the highest possible price, which proceeds of the sale shall be paid towards any outstanding balance due and payable to Absa in terms of this agreement.

2.4 Absa shall, at its sole discretion, have the right to appoint any auctioneers of their choice, to conduct a public auction, on such terms and conditions as Absa may deem fit and further shall have the right to sign any agreement of sale, power of attorney or any other documentation on behalf of the clients which shall include, but not be limited to any/all documentation that might be necessary and required by the South Africa Revenue Services and/or any other Local Authority to give effect to the sale and transfer of the immovable property. The abovementioned power of attorney is irrevocable and shall not be subject to any withdrawals for any reason whatsoever, and shall be binding and in force for a period of 5 (five) years calculated from 28 January 2019, alternatively until such time as the immovable property is sold and transferred, alternatively until Absa cancels this power of attorney in writing, or whichever event occurs first.

2.5 The clients herewith agree and consent to be liable for the reasonable auctioneer's commission and any/all other reasonable disbursements occasioned by the public auction which shall include, but not be limited to, advertising costs and valuation costs.

2.6 Absa shall further be entitled, but not compelled, to accept the highest offer that is reached at the auction, alternatively thereafter and shall sign all necessary documentation on behalf of the clients in order to give effect to the sale and to transfer the immovable property to the purchaser.

2.7 Absa shall further be entitled to request the elected auctioneer to compile a valuation of the abovementioned immovable property, prior to the auction and the clients herewith undertake to provide their full co-operation to the auctioneer and/or any potential purchasers and to grant them full access to the immovable property and to any improvements thereon.

2.8 Absa shall further be entitled, at its sole discretion, to determine and compile the terms and conditions of sale in terms whereof the immovable property shall be sold.

2.9 The parties further agree that Absa shall, after the sale of the abovementioned immovable property, nominate and appoint attorneys, of its choice, to attend to transfer the property to the purchaser.

2.10 The parties further agree Absa shall be entitled to take any and all actions necessary to conclude and execute an agreement of sale of the abovementioned immovable property, with a purchaser, which rights shall also include, but not be limited to, the right to cancel an agreement of sale, should the purchaser default in any obligations in terms of the agreements of sale, alternatively the right to grant the purchaser any extensions for fulfilment of his/her/its obligations in terms of the agreement of sale."

[46] The aforesaid clause 2 entitles the first respondent to resort to *parate executie,* which means that the first respondent, as creditor, is authorised to sell the immovable property without having to go through the court processes.

[47] It is trite that a *parate executie* clause in a mortgage bond permitting the bondholder to execute without recourse to the court by taking possession of the property and selling it, is void. See **Bock v Duburoro Investments (Pty) Ltd** 2004 (2) SA 242 (SCA) at para [7].

[48] Mr Benade submitted that it is lawful for a debtor, after he/she fell in default, to consent to the mortgagee selling the immovable property, provided a fair price is realised or agreed upon. In this regard he firstly relied on the judgment in **Iscor Housing Utility Company v Chief Registrar of Deeds** 1971 (1) SA 613 (T) at 616E and 617H:

> "The second observation to be made is that where a *parate executie* power is granted, whether in respect of movables or immovables, and the parties were to agree after the debtor be in default that the creditor may proceed to realise that bonded property, he no longer does so by the virtue of the original power, but virtue of the fresh agreement after the debtor's default. The objection then to exercising a *parate executie* has fallen away. See *Israel v Solomon,* 1910 T.P.D. 1183 at p. 1186. ...
> I think the principle is clear, that if there is consent by the debtor after he is in default there can be no objection in law to the mortgagee selling the property mortgaged provided a fair price is realised or agreed upon."

[49] Mr Benade furthermore contended that the aforesaid legal position was confirmed by the Supreme Court of Appeal in the **Bock**-judgment, *supra,* at para [7], with specific reference to the aforesaid **Iscor**-judgment:

> "Nevertheless, after default the mortgagor may grant the bondholder the necessary authority to realise the bonded property."

[50] In addition to remark that the **Bock**-judgment actually dealt with pledged shares and that the abovementioned remark by the SCA may very well be considered to have been made *obiter,* it is

necessary to be mindful of the fact that both the aforesaid judgments pre-dated the commencement of the Act. This fact was also duly pointed out by Mr du Plessis. Furthermore, the SCA stated the following in the very same paragraph [7]:

"It does not matter whether the goods are immovable or movable: in the latter instance, to perfect the security, the court's imprimatur is required."

[51] Mr Benade furthermore submitted in his heads of argument that the aforesaid "*position was confirmed*" in **Smit v Origize 166 Strand Real Estate (Pty) Ltd** (710/19) [2020] ZASCA 132 (19 October 2020) at para [28]:

"These decisions, stretching back more than 125 years, set out the development of our law and the establishment of the principle that the power of attorney given as security for a debt owing, is irrevocable, at least for as long as the debt remains unpaid."

[52] I cannot agree with Mr Benade that the aforesaid judgment confirmed the position regarding the lawfulness of an agreement of *parate executie* post default. The issue in that appeal related to "*the interpretation, enforcement and revocability of two powers of attorney*" and in circumstances different to the present circumstances. The basis of the attack on those two powers of attorney was also completely different from the present matter. Furthermore, and most importantly, the Act was not applicable in that matter.

[53] During my research for purposes of this judgment I came across the judgment in **Business Partners Ltd v Mahamba** [2019] JOL 41220 (ECG). Although the facts and circumstances in that matter are in some respects similar to the present matter, there are also crucial differences, which I will point out shortly. I deem is necessary to quote the following extracts from the said judgment:

"[24] It is clear from the background presented above that after the respondent had defaulted, summons which sought, *inter alia*, to declare the property executable were issued; that constituted due process of law in accordance with which the respondent was availed the opportunity to seek the court's assistance to protect her interests. She spurned that opportunity.

[25] The respondent instead opted for an out of court settlement whereby she voluntarily concluded the agreement to pay the debt and sign the power of attorney in terms of which she voluntarily agreed that the appellant could sell the property, in the event of her once again being in default. ...

[27] In these circumstances, it is hard to fathom how the court *a quo* arrived at the conclusion it did namely, that the sale of the property by private treaty had been without due process. ...

[30] Here is the conclusion of the matter. Upon the principal debtor and the respondent being indebted to the appellant and not liquidating such indebtedness the appellant instituted an action before the court *a quo* seeking, *inter alia*, an order declaring the property executable. In that way, the respondent's right to access to courts and entitlement to solicit the court's assistance was given effect to. The respondent elected not to avail herself of such assistance, but instead consented to the appellant selling the property when she was in default of paying in terms of the agreement

to pay debt. In these circumstances, the sale was lawful, having been consented to by the respondent. The court *a quo* was misguided in deciding to the contrary."

[54] In the aforesaid judgment the original loan agreements were concluded between a close corporation, represented by the respondent in her capacity as sole member, and the appellant. In terms of the loan agreements, the principal debtor, being the close corporation, had to provide security in the form of a surety bond over the respondent's property. Therefore, again very importantly, the Act was not at all applicable in those circumstances. The further difference lies therein that in that matter the court specifically found that the agreement pertaining to the sale of the property followed after due court process with the result that "*the respondent's right to access to courts and entitlement to solicit the court's assistance was given effect to*".

[55] In terms of section 90(2)(j) of the Act a provision in a credit agreement is unlawful if -

"it purports to appoint the credit provider, or any employee or agent of the credit provider, as an agent of the consumer for any purpose other than those contemplated in section 102 or deem such an appointment to have been made."

The exception referred to, being an agent in terms of section 102, is not relevant to the present matter.

[56] In **Guide to the National Credit Act**, JW Scholtz *et al,* My Lexis Nexis, at para 9.3.3, footnote 59, the following is stated with reference to section 90(2)(j) of the Act:

"This is to prevent a person hitherto unknown to the debtor from becoming his agent (merely because of a provision in the contract), whereas that person has acted as the creditor's agent for all practical purposes. Were such a clause allowed, the consumer would be responsible for the acts and omissions of the agent with no right of action against the credit provider."

[57] In the article **Pledge of Movables under the National Credit Act: Secured Loans, Pawn Transactions and Summary Execution Clauses,** Reghardt Britz, (2013) 25 SA NERC LJ 555 – 577 the learned author considered, *inter alia*, the lawfulness, or not, of a summary execution clause when included in secured loans over movables which fall within the ambit of the Act. However, in my view the reasoning behind the learned author's conclusion is *mutatis mutandis* applicable to a credit agreement pertaining to immovable property. I respectfully agree with the following conclusion at p. 570:

"The fact that the NCA refers to an 'agent [...] for any purpose' (except for one exception) indicates to my mind that the legislature probably had in mind agency in its widest possible meaning, unavoidably including a contract of mandate in terms of which the creditor is instructed (or authorised) to sell the debtor's property on his behalf – in other words, the summary execution clause. Therefore, a summary execution clause qualifies as an unlawful provision for the purposes of the Act and my no longer be included in secured loans."

[58] In my view clauses 2.3 – 2.10 of the AOD/POA fall squarely within the prohibition contained in section 90(2)(j) of the Act and are therefore unlawful provisions of a credit agreement and are consequently also prohibited for purposes of a supplementary agreement, as determined by section 91(2) of the Act.

Section 90(2)(k)(ii) of the Act:

[59] Section 90(2)(k)(ii) of the Act determines as follows:

> "A provision of a credit agreement is unlawful if it expresses, on behalf of the consumer –
>
> (i) …
>
> (ii) a grant of a power of attorney in advance to the credit provider in respect of any matter related to the granting of credit in terms of this Act. …"

[60] "In advance" is defined in **DICTIONARY.COM**. as "beforehand, ahead of time". The **Collins English Dictionary** states that: "If you do something in advance, you do it before a particular date or event." Synonyms listed for "in advance" are, *inter alia,* beforehand, ahead.

[61] Although the applicants were in default at the time when the AOD/POA was signed, the POA contained therein related to future events and were therefore granted in advance, contrary to the provisions of Section 90(2)(k)(ii) of the Act.

[62] The Act prescribes very specific requirements in order for creditors to enforce credit agreements. When a debtor is in default under a credit agreement and a creditor wants to enforce the agreement, the creditor has to follow the steps set out in part C of chapter 6 of the Act, which consists of sections 129 – 133. The practical effect of the power of attorney which the first respondent obtained in advance from the applicants is that the first respondent is enforcing the debt without having launched judicial enforcement proceedings. It therefore has the direct and/or indirect effect of allowing the first respondent to bypass the debt enforcement requirements of the Act, which is again contrary to the provisions of Section 90(2)(a) and (b) already dealt with above.

[63] In addition to the aforesaid, clause 1.1 of the AOD/POA determines that the applicants "*acknowledge, unconditionally, that they are truly and lawfully indebted towards Absa in the following amounts* ..." and clause 1.3 determines that the applicants "*further unconditionally confirm that the principal debt is currently due and payable*".

[64] The aforesaid "unconditional" acknowledgment and confirmation must be considered against the background that the AOD/POA was entered into without the applicants having been advised by means of a section 129-notice of their rights in terms of section 129(1)(a), being:

"129(1) **Required procedures before debt enforcement.** -If the consumer is in default under a credit agreement, the credit provider –

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plant to bring the payments under the agreement up to date. ..."

In this regard one has to be mindful of the fact that the section 129-notice pertaining to the original credit agreement was only sent out on 24 February 2021, hence, after the conclusion of the AOD/POA.

[65] By having "unconditionally" acknowledged and confirmed their indebtedness, the applicants not only waived their rights set out in the Act, but also did so without having been properly advised by the first respondent of their rights, which is also prohibited by Section 90(2)(a) and (b) of the Act.

[66] Clauses 1.1, 1.3 and 2.3 to 2.10 of the AOD/POA would therefore have been unlawful if it had been contained in a credit agreement and consequently also constitutes a contravention of section 91(2) of the Act.

Consequences of the aforesaid unlawful provisions in the supplementary agreement (the AOD/POA):

[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.

[68] In terms of section 89(5) I am to "*make a just and equitable order including but not limited to an order that the credit agreement is void as from the date the agreement was entered into.*"

[69] The amendment of section 89(5) of the Act to its current terms, virtually reinstated the rules of the common law. This includes the common law right to restitution. See **Sedwin Investments (Pty) Ltd v Datnow** (1819/2017) [2017] ZAECPEHC 40 (24 August 2017) at para [23]. In the present matter no amount of money was transferred to the applicants as a result of the conclusion of the AOD/POA. The first respondent did also not seek in its counterclaim an alternative claim for payment of costs and other expenses to date as a result of the execution of the AOD/POA.

[70] In the circumstances I considered it just and equitable to declare the AOD/POA void as from the date the agreement was entered into. This had the consequential result that I also had to grant the further relief which was sought by the applicants in the notice of motion and also had to dismiss the counter application.

Consideration of further legislation and relevant applicable legal principles:

[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.

[72] Section 8 of the Act provides for the classification of credit agreements. Section 8(4)(f) provides for a catch-all category of credit agreements which fall outside the other definitions in section 8 and determines as follows:

> "(4) An agreement, irrespective of its form but not including an agreement contemplated in sub-section (2) constitutes a credit transaction if it is
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –
>
> (i) the agreement; or

(ii) the amount that has been deferred."

[73] On a literal interpretation of the AOD/POA it meets the aforesaid definition of a credit transaction since payment of the amount owed is deferred until the sale of the property and interest, charges and fees are payable.

[74] In **Ratlou v Man Financial Services SA (Pty) Ltd** 2019 (5) SA 117 (SCA) it was confirmed at para [24] that a "*purposive approach in determining whether the NCA was applicable to settlement agreements*" should be followed. The SCA further held at para [19] as follows:

"If the underlying causa did not fall within the parameters of the NCA, then its compromise in terms of the settlement agreement cannot logically result in the agreement being converted to one that does."

It furthermore concluded as follows at para [26]:

"There can only be one conclusion: that the NCA was not designed to regulate settlement agreements where the underlying agreements, or cause, would not have been considered by the Act."

[75] It is common cause between the parties that the "underpinning and main agreements" which the applicants originally concluded with the first respondent constitute credit agreements which were and still are at all times regulated by the Act.

[76] I agree with the contention by Mr du Plessis that it could never have been the legislator's intention to allow a credit provider who

entered into a credit agreement with a debtor to escape its obligations in terms of the Act by simply entering into a settlement agreement; not even after default by the debtor.

[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.

Consequences of constituting 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.

[80] Section 90(3) and (4) of the Act determine as follows:

> "(3) In any credit agreement, a provision that is unlawful in terms of this section is void as from the date that the provision purported to take effect.
>
> (4) In any matter before it respecting a credit agreement that contains a provision contemplated in sub-section (2) the court must –
>
> (a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or
>
> (b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,
>
> and make any further order that is just and reasonable in the circumstances to give effect to the principles of section 89(5) with respect to that unlawful provision, or entire agreement, as the case may be."

[81] The following useful discussion regarding the approach a Court should follow when considering an appropriate order in terms of section 90(4) of the Act is contained in **Guide to the National Credit Act**, *supra*, at para 9.3.4.2:

> "A court will sever an unlawful provision from the contract if possible and enforce the remainder of the contract, unless the severance will leave the parties with a contract substantially different from the one they intended. More often than not, this will be the result when several contractual terms fall foul of the dictates of public policy with the result that the whole contract becomes tainted. It is submitted that this should also be the courts' approach when they are called upon to apply section 90(4) of the National Credit Act."

See also **Sasfin (Pty) Ltd v Beukes** 1989 (1) SA 1 (A).

[82] In the present matter most of the essential provisions contained in the AOD/POA are unlawful. Should the unlawful provisions be severed from the rest of the AOD/POA, the substance of the AOD/POA will fall away or be eliminated to the extent that the remaining provisions will render the AOD/POA nonsensical and unenforceable. The substantial character of the AOD/POA will be changed to the extent that the parties would not have entered into the agreement without the said provisions. The number, nature and gravity of the unlawful provisions, in my view, in any event have the result that the whole agreement is tainted.

[83] It was consequently in my view just and equitable to declare the entire AOD/POA void as from the date that the agreement was entered into also when considered on the basis of being a credit agreement. Also on this basis it had the consequential result that I also had to grant the further relief which was sought by the applicants in the notice of motion and also had to dismiss the counter application.

Costs:

[84] In terms of the notice of motion the applicants requested that the first respondent be ordered to pay the applicants' costs on the scale as between attorney and client.

[85] In his argument Mr du Plessis pointed out that the applicants forewarned the first respondent of the unlawfulness of the AOD/POA and afforded the first respondent the opportunity to refrain from the execution thereof, which it refused to do. This

was done by means of a letter of demand, dated 30 September 2021, attached to the founding affidavit as annexure "JS15". The respondent's refusal to accede to the demand is contained in a letter from the first respondent's attorney of record, dated 4 October 2021, attached to the founding affidavit as annexure "JS16".

[86] It is trite that the awarding of costs is in the discretion of the court, which discretion should be exercised judicially. The general rule is that costs follow the outcome, which costs, unless expressly stated differently, are costs on a party and party scale.

[87] The present matter required the interpretation of the Act. In this regard one has to be mindful of the remarks regarding the drafting of the Act as contained in previous judgments. A compilation of some of those remarks is contained in **Guide to the National Credit Act**, *supra,* at para 2.1, footnote 19:

"In *Nedbank v The National Credit Regulator* 2011 (3) SA 581 (SCA), Malan JA said (par 2): "Unfortunately the NCA cannot be described as the 'best drafted Act of Parliament which was ever passed', nor can it be said to have been blessed with the 'draftmanship of a Chalmers'. Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise. Indeed, these appeals demonstrate the numerous disputes that have arisen around the construction of the NCA." See also *Firstrand Bank Ltd v Collett* 2010 (6) SA 351 (ECG) pars 6 and 17; and *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC) par 17, where the court described the Act as "notorious for its lack of clarity". In *Renier Nel Inc v Cash on Demand (KZN) (Pty)*

Ltd 2011 (5) SA 239 (GSJ) Willis J said that it had "become a notorious fact that cases requiring the interpretation of the National Credit Act result in a scarcely muffled cry of exasperation resounding from the leathered benches of the judiciary" (par 15) and referred to the "widespread lack of clarity and certainty which various judicial colleagues around the country have experienced when trying to interpret the NCA. If judges have such difficulty, how much more so among the men and women of business?" (par 27). In *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) the Constitutional Court laments the "dismal drafting" of the Act. ...See also *Edwards v Firstrand Bank Ltd t/a Wesbank* 2017 (1) SA 316 (SCA) where the court states at par 1 that "It is well known that the draughtsmanship of the National Credit Act . . . is far from being a model of elegance."

[88] In my view it is consequently to be expected that different legally trained individuals may hold different views regarding the interpretation of specific sections of the Act.

[89] Therefore, in the circumstances and in the exercise of my discretion, I did not consider a punitive order of costs to be appropriate.

[90] There is, however, no reason why the costs should not follow the outcome of the application.

Order:

[91] I consequently made the order recorded at the beginning of the judgment.

C. VAN ZYL, J

On behalf of the applicants:	Mr. H.S.L du Plessis Instructed by: Blair Attorneys BLOEMFONTEIN
On behalf the of the first respondent:	Adv. H.J Benade Instructed by: Symington & De Kok BLOEMFONTEIN