

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:
.....
DATE
.....
SIGNATURE

Case No: 2021/9127

In the matter between:

WILLIAM MOTHABI
TSENKO JOHANNA MOTHABI

FIRST APPLICANT
SECOND APPLICANT

AND

ABSA BANK LIMITED
MOLAWA ERNEST MOSHOBANE

FIRST RESPONDENT
SECOND RESPONDENT

MOELELWA SARAH MOSHOBANE

THIRD RESPONDENT

In re the matter between:

ABSA BANK LIMITED

PLAINTIFF

AND

MOLAWA ERNEST MOSHOBANE

FIRST DEFENDANT

MOELELWA SARAH MOSHOBANE

SECOND DEFENDANT

JUDGMENT

KAPLAN AJ:

1. On 24 February 2021 the first respondent in this application, Absa Bank Limited ("**Absa**") (qua plaintiff) instituted action proceedings out of this Court under the above case number against second respondent in this application, Mr Moshobane (qua first defendant) and third respondent in this application, Mrs Moshobane (qua second defendant) ("***the action proceedings brought by Absa***").
2. The cause of action in the particulars of claim in the action proceedings brought by Absa is in summary as follows:

- 2.1 on 29 January 2014 Absa and Mr and Mrs Moshobane concluded a written mortgage loan agreement, a copy of which is attached thereto marked "POC2".
- 2.2 The terms of the loan agreement were that:
- (a) Absa would lend and advance the sum of R340 000,00 to Mr and Mrs Moshobane which amount would attract interest at the rate of 11.450% per annum;
 - (b) the amount loaned would be repaid over a period of 360 months;
 - (c) the agreement was subject to a mortgage bond in favour of Absa over Erf 287, Mapetla Township, Registration Division IQ, Province of Gauteng, measuring 262 m² ("***the property***").
- 2.3 Absa paid the capital amount to Mr and Mrs Moshobane and the property was given as security for their debt;
- 2.4 Mr and Mrs Moshobane failed to make payment in accordance with the terms and conditions of the loan agreement;
- 2.5 Absa seeks the following orders against Mr and Mrs Moshobane:

- (a) payment of the capital sum in the amount of R378 084.76 together with interest thereon;
 - (b) an order declaring the property specially executable;
 - (c) an order authorising the issuing of a warrant of execution in respect of the property.
3. In this application for joinder launched by first and second applicants on 22 March 2022, they seek an order joining them as third and fourth defendants in the action proceedings brought by Absa. It is averred by first and second applicants in their founding affidavit, in summary, as follows:
- 3.1 the property previously belonged to Susan Khoinyane Mashagone ("**the deceased**") who passed away on 24 May 2006;
 - 3.2 in the deceased's last will and testament, a copy of which is attached to the founding affidavit, she bequeathed the property to first applicant and nominated him as executor of her estate;
 - 3.3 in early September 2014 the first applicant received an application brought by Mr and Mrs Moshobane for his eviction from the property. First applicant ascertained therefrom that a certain Motlagomang Patricia Mokobe ("**Mokobe**") had been appointed as executor of the deceased's estate and had sold the property to Mr and Mrs Moshobane.

4. First applicant instituted action in 2017 under case number 16621/17 against Mr and Mrs Moshobane and Mokobe for the following orders:
 - 4.1 that the appointment of Mokobe as executor of the estate of the deceased be declared to be null and void and/or invalid;
 - 4.2 that the sale of the property by Mokobe to Mr and Mrs Moshobane be declared illegal and invalid;
 - 4.3 that the Registrar of Deeds cancel the names of Mr and Mrs Moshobane in the Title Deed of the property and insert therein the name of first applicant.
5. The action instituted by first applicant under case number 16621/17 is pending.
6. Absa resists the relief sought in this application for the joinder of first and second applicants on the basis that the first applicant failed to prosecute his rights diligently, that it took him more than three years to institute the action under case number 16621/17 wherein he seeks the aforesaid declaratory relief and that as a result thereof, applicants are estopped from asserting their rights to the property which has changed hands several times. In addition, Absa avers that any rights that applicants may have to the property have prescribed in terms of Section 11 of the Prescription Act.

7. It is settled law that the joinder of a party is only required as a matter of necessity, as opposed to a matter of convenience, if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the Court in the proceedings concerned. ***Bowring N O v Vrededorp Properties CC*** 2007 (5) SA 391 (SCA), ***Judicial Service Commission v Cape Bar Council*** 2013(1) SA 170 (SCA).
8. In my view the first applicant has a direct and substantial interest in the action proceedings brought by Absa. As a result thereof, he qualifies to be joined as a party thereto.
9. The question is whether I ought, at this stage, to accede to Absa's argument that the first applicant is estopped from asserting his claim against the property or that his claim has prescribed. In my view, it would be unwise for me to do so. This is because these issues will, in due course, be fully ventilated in the Trial Court which will be in a better position to adjudicate same.
10. In the result I am of the view that the first and second applicants must be joined to the action proceedings brought by Absa as third and fourth defendants.
11. I thus order that:
 - 11.1 the first and second applicants be joined as third and fourth defendants to the action proceedings under the above case number;

11.2 that the costs of this application be paid by first respondent.

JL KAPLAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 16 November 2023.

Appearances:

Appearance for Applicants:	Adv M Makoko
Instructed by:	L P Molope Incorporated
Appearance for First Respondent:	Adv N Alli
Instructed by:	Poswa Incorporated
Date of hearing:	6 November 2023
Date of judgment:	8 December 2023