REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 019229/22

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

12 December 2023
DATE SIGNATURE

In the matter between:

MAHORI GLADWELL TSAKANE	FIRST APPLICANT
MULEA CONSTANCE MASHUDU	SECOND APPLICAT
and	
FIRSTRAND BANK LTD	FIRST RESPONDENT
THE SHERIFF OF THE HIGH COURT, TEMBISA	SECOND RESPONDENT
MOKOSINYANE ALFRED	THIRD RESPONDENT
NEW AFRICA GATEWAY CHURCH	FOURTH RESPONDENT
THE REGISTRAR OF DEEDS, PRETORIA	FIFTH RESPONDENT
MOKOSINYANE VIOLET	SIXTH RESPONDENT

***Delivered**: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 12 December 2023.*

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] This application has a long history emanating from as far back as 2010 when the FirstRand Bank Limited, the First Respondent herein ("the Bank"), through what its counsel contends is 'a comedy of errors which should never have occurred', sold the residential property of the First and Second Applicants ("the Applicants"), in execution, to Mr Alfred Mokosinyane, the Third Respondent herein ("Mr Mokosinyane"). The property was sold onward by Mr Mokosinyane to the New Africa Church, the Fourth Respondent herein ("the Church"). These sales led to the Applicants instituting a number of actions against the Respondents, in trying to have the property registered back into their names.

[2] When the application was initially launched, it consisted of two parts being Part A and Part B. The relief sought under Part A was, in the main, for the deregistration of the mortgage bond which the Bank had registered over the Applicants' property in contravention of Uniform Rule 49(11),[1] together with other ancillary relieves. The relief sought in Part B is for the Bank to be found guilty of

[1] This subrule was repealed by GN R317 of 17 April 2015 (GG 38694 of 17 April 2015) with effect from 22 May 2015. The subrule dealt with, *inter alia*, the suspension of the operation and execution of an order pending the decision of an application for leave to appeal or appeal. The operation and execution of a decision which is the subject of an application for leave to appeal or appeal, and the suspension of such a decision, are now provided for in s 18 of the Superior Courts Act 10 of 2013. See Erasmus: Superior Court Practice Vol 2 pD1-680.

contravention of sections 3 and 127 of the National Credit Act ("the NCA");[2] to be found in contempt of Court; to be found guilty of fraud; and to be barred from making any claim regarding any indebtedness to the Bank by the Applicants, premised on the *par delictum* rule.

[3] The application is opposed only by the Bank, that has in its answering affidavit, raised a number of points *in limine* and a defence in opposition to the relief sought by the Applicants in Part A and Part B of the application.

[4] At the commencement of the hearing of the application, the Applicants abandoned Part A of the application, and proceeded only with Part B of the application. This necessitated that the Bank not proceed with the points *in limine* as they related mainly to Part A of the application.

[5] The Applicants appeared in Court unrepresented and the First Applicant argued the case on their behalf. On enquiry from the Bench, the First Applicant confirmed that they did not require legal representation, the papers filed on record on their behalf were drafted and prepared personally by them, and that they were prepared to represent themselves and argue the matter in Court.

[6] Predicated in the long and intricate nature of this application, it is imperative to set out a full background of the case in order to get a full understanding as to the premise upon which the application is based.

[2] Act 34 of 2005.

FACTUAL MATRIX

[7] The Applicants are the joint registered owners of the residential property described as Portion 51 (Remaining Extent) of Farm 410 Olifantsfontein Township, Registration Division J.R., Province of Gauteng (situate at 51 Olifantsfontein Road, Olifantsfontein (“the property”)). They jointly, duly entered into a Credit Agreement with the Bank. In terms of the said Credit Agreement, the Bank advanced the sum of R1 200 000 and an additional sum of R240 000 to the Applicants. Pursuant to the Credit Agreement, the Applicants caused a Continuing Covering Mortgage Bond to be registered over the property.

[8] When the Applicants failed to make regular payment in terms of the Credit Agreement and the Mortgage Bond, and the amount that was owed plus interest became due and payable, the Bank launched an action against the Applicants, amongst others, claiming payment of an amount of R1 241 290, 58 plus interest and, an order declaring the property, executable. On or about 11 November 2008, judgment by default was granted against the Applicants, in favour of the Bank. Pursuant to the judgment having been granted against the Applicants, a warrant of execution was issued and the property was sold at a sale in execution held on 11 August 2010 (“the sale in execution”).

[9] On or about 7 September 2010, the Applicants launched an urgent application seeking, amongst others, to set aside the sale in execution (“the first urgent application”). Shortly after the launch of the first urgent application, a certain Ms Karien Slabbert ("Ms Slabbert”), an attorney in the employ of the Bank’s attorneys of record (Messrs Hammond Pole), undertook, in favour of the

Applicants, that the sale in execution, would be set aside and cancelled in terms of Uniform Rule 46(11), as the party that had purchased the property at the sale in execution had failed to perform in terms of the conditions of sale, and that, therefore, there was no need for the Applicants to pursue the first urgent application. By virtue of the undertaking provided by Ms Slabbert, the Applicants did not pursue the first urgent application. Unbeknown to the Applicants, not long after the granting of the undertaking by Ms Slabbert, the purchaser at the sale in execution, being Mr Mokosinyane, performed in terms of the conditions of sale, as Ms Slabbert had not communicated the undertaking which she had given in favour of the Applicants to her firms' conveyancing department, the latter proceeded to transfer the property to Mr Mokosinyane. It is conceded by the Bank that this transfer of the property was merely the result of Ms Slabbert's failure to communicate with her firm's conveyancing department. Mr Mokosinyane, then proceeded to sell the property to the Church.

[10] When the Applicants became aware that the sale in execution has not been cancelled as undertaken by Ms Slabbert on behalf of the Bank, and that the property has, even, been transferred to the Church, they, on or about 24 May 2011, launched an urgent application, wherein they sought an order to set aside: the sale in execution; the transfer of the property into the name of Mr Mokosinyane; and the subsequent onward sale of the property to the Church ("the second urgent application"). The Bank was cited as the Second Respondent in the second urgent application. It, however, did not oppose this application, instead, its attorneys of record made an agreement with the Applicants' attorneys of record that the Bank will not oppose the second urgent application, and

tendered costs of the application. The agreement was, subsequently, reduced to an order of Court which included an order, amongst others, directing the setting aside: of the sale in execution of the property by the Bank to Mr Mokosinyane; the transfer of the property into the name of Mr Mokosinyane pursuant to the sale in execution; and the sale of the property by Mr Mokosinyane to the Church. The Court order, further, directed: the Bank, the Sheriff of the High Court, Tembisa, who is the Second Respondent herein ("the Sheriff"), Mr Mokosinyane, together with, the Registrar of Deeds, Pretoria, the Fifth Respondent herein ("the Registrar"), to do all such things, take all such steps and sign all documents as may be necessary to give effect to the provisions of the afore stated orders. The Court Order, furthermore, directed the Applicants to forward the papers in the second urgent application to the National Prosecuting Authority ("the NPA"), to consider the need for an investigation ("the Judge Spilg Order"). Regardless of the Judge Spilg Order, Mr Mokosinyane, proceeded with the sale of the property to the Church and the property was subsequently transferred to and registered in the Church's name.

[11] The Applicants had to launch another application, seeking an order to, amongst others, set aside the registration of the property into the Church's name and further sought that the property be registered in their names ("the third application"). Only the Church opposed this application. None of the other parties cited in the third application, including the Bank, opposed the relief sought by the Applicants. The application was on 25 April 2013, dismissed with costs. The Applicants, aggrieved by the outcome of the third application, applied and were granted leave to appeal against that judgment. The application for leave to appeal

was dismissed. Pursuant to their unsuccessful application for leave to appeal, the Applicants launched an application for special leave to appeal to the Supreme Court of Appeal, which granted them leave to appeal to a Full Court of the South Gauteng High Court ("the Full Court"). The Full Court handed down judgment on 18 November 2015, in favour of the Applicants. Based upon the judgment of the Full Court, the Applicants had secured the transfer of the property back into their joint names. The effect, thereof, was that the mortgage bond which secured the Applicants indebtedness to the Bank was no longer registered over the property and, as a result, the Applicants' indebtedness to the Bank was no longer secured, as was agreed between the parties when entering into the Credit Agreement during 2006.

[12] This led to the Bank launching an application in terms of which, amongst others, it sought an order directing the Registrar to reinstate the mortgage bond that was registered in favour of the Bank over the Applicants' property ("the Bank's application"). The Bank's application, which the Applicants opposed, was granted in its favour on 3 May 2019. The mortgage bond was reinstated and registered over the property in favour of the Bank. The Applicants, not satisfied with this decision, launched an application for leave to appeal against the order and judgment granted on 3 May 2019, and leave to appeal to the Full Court, was granted. The judgment of the Full Court was delivered on 18 July 2023, and it confirmed the order and judgment of the Court below, amongst others, *'directing the Sixth Respondent* [the Registrar] *to reinstate the mortgage bond registered in favour of the Applicant* [the Bank] *on or about 25 April 2007 over the First and Second Respondents'* [the Applicants*] immovable property'*.

[13] Prior to the delivery of the judgment of the Full Court referred to in paragraph [12] of this judgment, the Applicants instituted the current application. By virtue of that judgment, the Applicants were obliged to abandon the relief they sought in Part A of the current application.

RELIEF SOUGHT

[14] In Part B of the application the Applicants seek the following relief:

14.1. That the First Respondent [the Bank] be found guilty of contravention of section 3 of the NCA, in that, subsequent to the First Applicant launching the first urgent application, Karien Slabbert [Ms Slabbert], representing the First Respondent [the Bank], made an undertaking to the Applicants that the sale in execution of 11 August 2010 would be set aside and cancelled, which conduct was intended to deceive as the sale went through and the property was transferred to the Third Respondent [Mr Mokosinyane].

14.2. That the First Respondent [the Bank] be found guilty of contravening section 3 of the NCA in that, after the transfer of the property to the Third Respondent [Mr Mokosinyane], the First Applicant wrote a letter, dated 3 March 2011, requesting the First Respondent [the Bank] to commence proceedings for the setting aside of the transfer of the property and the First Respondent [the Bank] responded on 11 March 2011 stating that it will not commence proceedings for the setting aside of the property but

that, should an application be brought, same will be considered and if need be opposed.

14.3. That the First Respondent [the Bank] be found guilty of contempt of court in that it failed, without reasons given, to abide by the order of Judge Spilg and Mr Gomes,[3] to be found guilty in his personal capacity as well.

14.4. That the First Respondent [the Bank] be found guilty of an offence contravening section 127(5)(a) and (b) of the NCA, and Mr Gomes to be found guilty in his personal capacity, as well.

14.5. That the First Respondent [the Bank] be found guilty of fraud in that on 8 October 2019, the First Respondent [the Bank] advised the Applicants that the settlement values as at 7 October 2019 amounts to R2 482 581.16, knowing it to be false, with an intention to defraud the Applicants, and Mr Gomes to be found guilty in his personal capacity, as well.

14.6. With regard to paragraph 91 of the First Respondent's [the Bank] affidavit, to make an order which bars the First Respondent [the Bank] to make any claim regarding any indebtedness to the Bank by the Applicants premised on the *par delictum* rule.

14.7. The First Respondent [the Bank] to pay the costs of Part B of the application.

[3] Mr Roy Gomes ("Mr Gomes") is the legal manager employed by the Bank and is, also, the deponent to the Bank's answering affidavit.

ISSUES FOR DETERMINATION

[15] Based on the relief sought and the arguments of the Applicants, the following issues have to be determined:

15.1. Whether the Bank should be found guilty of contravention of the provisions of the NCA, in particular, sections 3 and 127, thereof;

15.2. Whether the Bank and Mr Gomes should be found in contempt of Judge Spilg's Court Order.

15.3. Whether the Bank and Mr Gomes should be found guilty of fraud.

15.4. Whether the Bank should be barred from making any claim in respect of the indebtedness owed to it by the Applicants by reason of the *par dilictum* rule.

[16] The issues are dealt with hereunder, in turn.

DISCUSSION

[17] As a point of departure, it needs to be stated that any relief sought by the Applicants against Mr Gomes cannot be entertained because he is not cited as a party to the proceedings. No adverse findings can be granted against Mr Gomes when he has not been afforded an opportunity to defend himself.

Contravention of the Provisions of the NCA

[18] The Applicants seeks in Prayers 1, 2, and 4 of the Notice of Motion for the Bank to be found guilty of infringing the provisions of the NCA. The relief the Applicants' seek, in this regard, is predicated on the provisions of sections 3 and

127, of the NCA. They, as a result, invoke the provisions of the said sections to establish the contraventions complained of.

Section 3 of the NCA

[19] It is worthy to note that section 3 of the NCA consists of numerous subsections. In oral argument, it was submitted on behalf of the Applicants that the actual subsection alleged to be contravened by the conduct of the Bank is subsection 3(e)(iii), thereof.

[20] The relief the Applicants seek in connection with section 3(e)(iii) of the NCA, is founded on two specified incidents, namely -

20.1 The first incident, which pertains to Prayer 1 of the Notice of Motion, is said to be the failure by the Bank to set aside and cancel the sale in execution and the subsequent transfer of the property to Mr Mokosinyane, when the Bank, through its attorneys of record, had undertaken, to do so. To reinforce this argument, the Applicants rely on paragraphs 42 to 46 of the Bank's answering affidavit, wherein Mr Gomes confirms that Ms Slabbert, made such an undertaking and explains that the undertaking was not complied with because Ms Slabbert failed to inform the firm's conveyancing department about the undertaking. The Applicants contend that the undertaking was a lie and was made with the intention to deceive the Applicants not to pursue the first urgent application by promising to set aside and cancel the sale in execution, because the sale in execution went through and the property was sold in execution and

eventually transferred to Mr Mokosinyane. They argue that, since they cannot be expected to know the inter-departmental working processes of the firm of the attorneys of record of the Bank, the averments of Mr Gomes, in this regard, do not constitute a legal reasonable explanation and, furthermore, amount to hearsay because Ms Slabbert did not attach a confirmatory affidavit. The submission is that by this conduct of Ms Slabbert, the Bank contravened section 3(e)(iii) of the NCA, and, the Bank should be found guilty of such infringement.

20.2. The second incident, which relates to Prayer 2 of the Notice of Motion, is the refusal and/or failure by the Bank to reverse the transfer of the property from Mr Mokosinyane back to the Applicants. The argument is that when the Applicants became aware of the transfer of the property to Mr Mokosinyane, they wrote a letter to the Bank requesting the Bank to commence proceedings to set aside the transfer of the property to Mr Mokosinyane. The Bank responded in a letter to the Applicants and refused to reverse the transfer and threatened to oppose any application which may be brought by the Applicants in this regard. The Applicants' contention is that such conduct by the Bank was immoral, bearing in mind that the Bank had already undertaken in an earlier letter they wrote to the Applicant, that it (the Bank) was in the process of setting aside and cancelling the sale in execution and that the affidavit in respect of the application to set aside the sale in

execution, had already been sent to the Sheriff for signature. The Applicants submit that the conduct of the Bank to refuse to reverse transfer of the property, when requested to do so, constitutes contravention of section 3(e)(iii) of the NCA and that the Bank should be found guilty of such contravention.

[21] Section 3(e)(iii), which the Applicants rely on in their submission, stipulates as follows:

> 3. The purposes of this Act are 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 by –
>
> (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by –
>
> (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux.

[22] The Constitutional Court in *Waymark*,[4] stated the principles of statutory interpretation in the following terms:

> "The principles of statutory interpretation are by now well-settled. In *Endumeni*, the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation.[5] The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in

[4] Road Traffic Management Corporation v Waymark Infotech (Pty) Limited 2019 (6) BCLR 749 (CC) para 29 and 30.
[5] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

legislation. This process, it emphasised, entails a simultaneous consideration of—

(a) the language used in the light of the ordinary rules of grammar and syntax;

(b) the context in which the provision appears; and

(c) the apparent purpose to which it is directed.

What this Court said in *Cool Ideas* in the context of statutory interpretation is particularly apposite. It said:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[6] (Footnotes omitted.)

[23] There is no ambiguity in the words used in the provisions of section 3(e)(iii) of the NCA. In their interpretation, the words therein, must be given their ordinary grammatical meaning. The Constitutional Court in *Afriforum*,[7] held:

> "[C]ontextual interpretation requires that regard be had to the setting of the word or provision to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. This exercise might even

[6] Cool Ideas 1186 CC v Hubbard [2014] ZACC 16; 2014 (4) SA 474 (CC) at para 28.
[7] AfriForum v University of the Free State [2017] ZACC 48; 2018 (2) SA 185 (CC) at para 43.

require that consideration be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located."

[24] Section 3 of the NCA is located under Chapter 1 of the Act, which deals with 'Interpretation, Purpose and Application of the Act'. The Chapter is divided into Part A and Part B. Section 3 itself, falls under Part B which deals with 'Purpose and Application of the Act', and section 3 provides for the 'Purpose of the Act'. In general, section 3 sets out the purpose of the NCA. That purpose 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. In addition, the purpose, amongst others, is to protect consumers by addressing and correcting imbalances in negotiating power between consumers and credit providers by providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux.

[25] Thus, the gist of section 3(e)(iii) is mainly to set out the purpose of the NCA in relation to the relationship between consumers and credit providers by providing consumers with protection against the negotiating power of credit providers and credit bureaux. In understanding the gist of this subsection, it is clear that a credit provider, as is the case in this instance, nor a credit bureau, for that matter, cannot be said to have conducted itself in such a manner that it has contravened the provisions of this subsection or even the section as a whole. Nor can it be said that the conduct referred to in the context of the incidents on which the Applicants rely, constitutes an offence. Moreover, section 3 does not provide

for any offence which it can be said the conduct complained of by the Applicants, constitutes such an offence.

Section 127(5)(a) and (b)

[26] In accordance with Prayer 4 of the Notice of Motion, the Applicants seek that the Bank together with Mr Gomes in his personal capacity, be found guilty of an offence of contravening section 127(5)(a) and (b) of NCA.

[27] As with section 3 above, there is no ambiguity with the words used in the provisions of section 127(5)(a) and (b) of the NCA. The section is contained under Chapter 6 of the Act, which provides for 'Collection, Repayment, Surrender and Debt Enforcement'. The Chapter consists of three parts - Part A, Part B and Part C. Part B incorporates section 127 and relates to 'Surrender of Goods'. Section 127 of the NCA deals strictly with the surrender of assets.

[28] The Applicants are, in fact, completely wrong in their reading and understanding of the provisions of section 127 of the NCA. They have never surrendered their property to the Bank. The property was attached and sold in execution. This can never have been a surrender of the property to the Bank. Section 127(1)(a) provides that a consumer under an instalment agreement, secured loan or lease may give written notice to the credit provider to terminate the agreement. That the property was not surrendered is proven by the fact that the Applicants did not give a written notice to the Bank to terminate the Credit Agreement. This is exacerbated by the fact that when the Applicants realised that the property was sold in execution, they approached the Court on an urgent basis seeking an order to set aside the sale in execution. They launched a further

urgent application when it came to their attention that the property has been transferred to Mr Mokosinyane and onwards to the Church. They pursued these applications up to the Supreme Court of Appeal seeking the property to be reversed back into their names, which they eventually achieved. This is not the conduct of persons who have surrendered their property. The provisions of section 127 of the NCA are, in that sense, not applicable.

[29] Moreover, this Court is not a Criminal Court and does not have the jurisdiction to find the Bank guilty of any offence. That is why in the Judge Spilg Order, the Court directed the Applicants to forward the papers therein to the NPA, to consider the need for an investigation. It is obvious that that Court did not find itself empowered to conduct itself as a Criminal Court where it could find a person guilty of an offence, hence it referred the matter to the NPA that has the power to investigate any offence that the Bank might have committed, and if so, prosecute same in the Criminal Court. In any event, the Applicants have failed to prove any offence committed or proven to be committed.

Contempt of Court

[30] The relief the Applicants seek in Prayer 3 of the Notice of Motion is that the Bank be found guilty of contempt of court in that it (the Bank) failed, without reasons given, to abide by the order of Judge Spilg.

[31] The Applicants' contention is that the Bank was ordered to reverse the transfer of the property from Mr Mokosinyane back to the Applicant. The Bank failed to do so, and as a result the property was transferred onwards to the Church. Although the Applicants' gravamen is that even though the property was

eventually transferred back to them, it took five years to get the property back, the argument was succinctly, correctly so, dealt with in the judgment of the Full Court as follows:

> "The Appellants [the Applicants] complain that they have been disadvantaged by the actions of attorney Ms Slabbert in failing to honour the undertaking that she had made to them. This is a valid complaint and it is lamentable that this failure had persisted until the property had been transferred to third respondent [Mr Mokosinyane] and the sale to the fourth respondent [the Church]. These failures have however been dealt with in the judgments and orders by which the appellants [the Applicants] had obtained reregistration of the property in their name and do not detract from the fact that neither the original debt nor the judgment debt had been extinguished by payment by the appellants [the Applicants]."[8]

[32] It is common cause that the property has been reregistered into the names of the Applicants. To address the issue of prejudice that they suffered over the years, the Courts that dealt with the matter over those years, have awarded costs in their favour where they were entitled to do so.

Fraud

[33] The fifth relief sought by the Applicants is that the Bank and Mr Gomes, in his personal capacity, be found guilty of fraud in that on 8 October 2019, the Bank advised the Applicants that the settlement value of the property, as at 7 October 2019 was an amount of R2 482 581, 16, knowing it to be false, with the intention to defraud the Applicants.

[8] Unreported Judgment in Mahori Gladwell Tsikanae & Another v FirstRand Bank Ltd & Others Case No. A250/2021 (18 July 2023) para 27.

[34] The Applicants' evidence in support of this prayer is that when the Bank provided the said settlement value, it knew that the amount it is giving as a settlement value is false, and that the Bank's whole intention was to defraud the Applicants. Fraud, as argued by the Applicants, is the unlawful and intentional making of misrepresentation that causes actual or potential prejudice to another, and accordingly, the Bank should be found guilty of this offence.

[35] The Bank's response in this regard is that there is no basis upon which the Bank can be found guilty of fraud under the circumstances sketched by the Applicants. The Bank submits that as at 24 January 2011 when the old account was closed after the property was registered in the name of Mr Mokosinyane, the residual value was R885 219.88, and the amount was transferred to the new account that was opened. Since the account was not settled, interest remained running and the arrears and outstanding balance accumulated on the account. *In duplum* was eventually reached, and the outstanding balance as at the end of October 2019 was an amount of R2 453 058. 44.

[36] The general rule is that an applicant who seeks final relief on notice of motion proceedings must, in the event of a dispute of fact, accept the version set up by his or her opponent unless the latter's allegations are, in the opinion of the court, not such to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[9] On reading of the papers, it cannot be said that the Bank's version

[9] See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E - 634C.

raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected. Thus, in deciding the issue of whether the settlement amount provided by the Bank is false, the *Plascon-Evans Rule* is to be applied and the version of the Bank accepted. Besides, as already indicated, this Court does not have the required jurisdiction to entertain criminal matters.

Par Delictum Rule

[37] In terms of Prayer 6 of the Notice of Motion, the Applicants, relying on paragraph 91 of the Bank's answering affidavit, seek an order that bars the Bank to make any claim regarding any indebtedness to the Bank by the Applicants. The Applicants are pleading "*par delictum rule*", in which they allege the principle is concerned with the moral guilt of contracting parties and the clean hands doctrine.

[38] The Applicants argue that in this Prayer, they are Relying on paragraph 91 of the Bank's answering affidavit which states that the mortgage bond was indeed registered as alleged, to secure the debt of the existing Credit Agreement between the parties. According to the Applicants, Paragraph 91 of the Bank's answering affidavit states that the proceeds received from the sale in execution were insufficient to satisfy the Applicant's indebtedness to the Bank.

[39] The contention is that the effect of the contraventions in Prayers 1 to 5 should be that the Bank should be barred from claiming the amount which is still due by the Applicants in respect of the mortgage bond, in terms of the *par*

delictum rule, which requires a litigant not to come to Court with dirty hands. Put differently, the contention is that, if the Bank is found guilty of any of the contraventions of the NCA or any of the criminal offences afore cited by the Applicants, the logical or legal approach to the relief sought under Prayer 6, is that the Bank should be barred from claiming, against the Applicants, any of the amount which is still due by the Applicants in respect of the mortgage bond. To reinforce their submissions on this point, the Applicants refer to and rely on the judgment in *Nkata*.[10]

[40] The reliance by the Applicants on Paragraph 91 of the Bank's answering affidavit was dead in the water from inception. The paragraph was in response to paragraph 60 of the Applicants' founding affidavit which stated that –

> "60. Irrespective that First Respondent [the Bank] was aware of the application for leave to appeal and have extended its Notice to oppose the application, First Respondent [the Bank] registered a mortgage bond on the 04-06-2019, which is seven days after noting its intention to oppose, in contravention of rules, Rule 48(11) of Uniform Rules of High Court 2009, in that it didn't have the permission of the judge to register the mortgage bond."

[41] The Bank responded as follows to paragraph 60 of the founding affidavit:

> "91. The mortgage bond was indeed registered as alleged. Same was done to secure the debt of the existing credit agreement between the parties. This much was conveyed to the Applicants in terms of Annexure "AB3" to the founding affidavit.
>
> 92. The registration of same does not have any adverse impact on the Applicants and same will be adjudicated upon when the appeal is heard on 18 March 2023.

[10] Nkata v First Rand Bank Limited & Others 2016 (4) SA 257 (CC) at paras 90, 93, 94, 95, 96, 99, 104 and 105.

93. The fact of the matter is that the Applicants indebtedness to the First Respondent remains undisputed. Should the Applicants, for instance, wish to sell the property, their indebtedness to the First Respondent will have to be settled before the property can be registered in the name of any prospective purchaser."

[42] The response by the Bank to the Applicants' paragraph 60 of the founding affidavit is correct. The Applicants had raised this issue in the Appeal that had already been instituted by the Applicant at the time the current application was launched. There was no need for the Applicants to raise the issue afresh in this application, as it was to be adjudicated in the appeal. Hence, when the appeal judgment was delivered, the Applicants had to abandon the relief they sought in connection with the reinstatement of the mortgage bond. Similarly, they should have abandoned their reliance on paragraph 91 of the Bank's answering affidavit.

[43] Importantly, having found that the Bank has not contravened the provisions of the NCA or any of the criminal offences cited by the Applicants, the Bank cannot be said to have approached the Court with dirty hands. The *par delictum* rule cannot be invoked in such circumstances.

[44] Having perused the judgment in *Nkata*, it is not clear how it would have been of assistance to the Applicants' case on this issue. The judgment pertains to the provisions of section 129 of the NCA. The paragraphs which the Applicant refer to deals, in particular, with the requirements for the reinstatement of a credit agreement in terms of section 129(3) of the NCA. The said paragraphs, or the judgment as whole, for that matter, have nothing to do with the principle of *par delictum*.

[45] The Applicants cannot raise argument that they had, perhaps, somehow reinstated their Credit Agreement. This issue was adjudicated upon in the appeal judgment delivered on 18 July 2023. In paragraph [26] of that judgment, the Court remarked that

> "Regarding the alleged compromise of the First Respondent's [the Bank] claim when the appellants [the Applicants] paid R150 000 in August 2010, it should be emphasised that this payment was made to settle the arrears and not the full balance of the loan agreement. Consequently, section 129(3) and the *Nkata* principle apply. This payment did not result in whole of the debt secured by the mortgage bond having been discharged and neither did it entitle the appellants [the Applicants] to having the mortgage bond being cancelled."

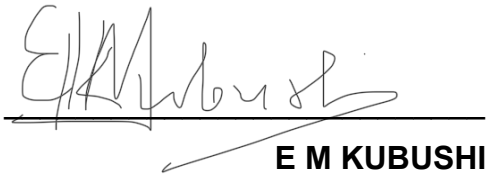
[46] This Prayer falls to be dismissed as well.

CONCLUSION

[47] It is trite that in support of the principles of legal certainty and finality of judgments, litigation must, at some point, come to an end. This matter has taken its time in the Courts and must now come to finality. It is mainly on that basis that no order as to costs is to be made. Each party to pay own costs.

ORDER

[48] The application is dismissed and no order as to costs is made.



E M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 18 October 2023

Date of judgment: 12 December 2023

APPEARANCES:

For the First and Second Applicant: In Person

For the First & Second Respondents: Adv J Minnaar instructed by Hammond Pole Majola Attorneys.