IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A250/2021

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

DATE: 09 JUNE 2023

SIGNATURE:

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In the matter between:

MAHORI GLADWELL TSKANAE Appellant	First
MULEA CONSTANCE MASHUDU Appellant	Second

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

Summary: *Reinstatement of mortgage bond which had been cancelled as a result of a sale in execution of immovable property – sale in execution eventually set aside -bond, as security of a debt, to be reinstated — cancellation of the bond had not extinguished the debt.*

ORDER

The appeal is refused, with costs.

JUDGMENT

KHWINANA AJ

Introduction

[1] This is an appeal lodged against a judgment and order delivered by the court a quo on 3 May 2019 wherein the following order was made:

> "*1. Directing the Sixth Respondent (the fifth respondent herein) to reinstate the mortgage bond registered in favour of the Applicant (the first respondent herein) on or about 25 April 2007 over the First and Second Respondents' (the appellants herein) immovable property, being the Remaining Extent of Portion 51 of the Farm Olifantsfontein 410, JR, Province of Gauteng ("the property") a copy of which bond is attached to the Applicant's (the first respondent herein) founding papers*

marked "FA2"2 (Mortgage Bond No. B67860/2007 dated 25 April 2007);

2. *Directing the First and Second Respondents (the appellants herein) to pay the costs of this application jointly and severally, the one paying the other to be absolved*".

[2] The central issue in this appeal is the correctness of the decision to reinstate the mortgage bond in favour of the first respondent. Costs followed the event.

[3] The appellants have failed to comply with a number of the rules relating to the prosecution of the appeal but the respondent, wishing to have the appeal finalised has not raised any objections to this. Consequently, we heard the appeal even despite the absence of a formal application for condonation.

Background

[4] On or about 29 March 2006 the first respondent (Firstrand Bank Ltd) and the appellants (Mr Mahori and Mrs Mulea) entered into a credit agreement in which an amount of R1 200 000.00 was lent and advanced to the appellants by the first respondent. A mortgage bond was registered over the property to secure the loan. The appellants breached the terms of the credit agreement, leading to enforcement thereof by the first respondent.

[5] On 11 November 2008, default judgment was granted in favour of the first respondent. Subsequently, a sale in execution was arranged for 11 August 2010,

and the property was sold by the Sheriff of Tembisa, who features in the appeal as the second respondent, to the third respondent.

[6] It later transpired that the appellants had settled the arrears on the credit agreement prior to the sale in execution. Accordingly the first respondent (through the second respondent's offices) should not have sold the property in execution.

[7] After the arrears had been settled, an attorney employed by the first respondent had given an undertaking to the appellants, stating that the sale in execution scheduled for 11 August 2010 would be set aside. However, that undertaking was not communicated to the conveyancers, and the property was transferred to the third respondent, who subsequently on-sold it to the fourth respondent. The consequence of registration of the transfer to the third respondent, was also the cancellation of the bond registered in favour of the first respondent.

[8] On 24 May 2011, the appellants launched a second urgent application (having not pursued a prior first urgent application) seeking to set aside the sale in execution of 11 August 2010, the transfer of the property to the third respondent, and the subsequent sale to the fourth respondent. The parties reached an agreement not to oppose the application but would pay the costs incurred by the appellants.

[9] Consequently on 10 August 2011, Spilg J granted made the following order:

1. *Setting aside the sale in execution held on 11 August 2010;*

2. *Setting aside the transfer of the property to the third respondent at the sale in execution on 11 August 2010;*

3. *Setting aside the sale of the property to the fourth respondent;*

4. *Directing the fifth respondent to take necessary actions to implement the order.*

5. *Directing the first, third, and fourth respondents to take necessary actions to implement the order.*

6. *Ordering the first, third, and fourth respondents to pay the costs of the second urgent application jointly and severally; and*

7. *The appellants are to forward the papers in the application to the National Prosecuting Authority for investigation.*

[10] Despite the order, the third respondent again sold the property to the fourth respondent and it was subsequently registered in the name of the fourth respondent. The appellants then filed a third application seeking to set aside the registration of the property in the fourth respondent's name and requesting that the property be registered again in their names. The fourth respondent opposed the application, and on 2 April 2013, Kganyago J dismissed the application.

[11] The appellants sought leave to appeal, which was initially refused but eventually granted by the Supreme Court of Appeal. The appeal was to a full court of the Gauteng High Court, Johannesburg. The full court heard the matter on 18 November 2015 and granted the following order:

1. *Setting aside the registration of the property in the name of the fourth respondent.*

2. *Registering the property in the names of the appellants.*

3. *Directing the second respondent to take necessary actions and sign required documents to implement the order.*

4. *……..*

5. *Ordering the first, third, and fourth respondents to pay the costs of the application, including reserved costs from 30 January 2013.*

[12] The property was then registered back into the appellants' names. This was done however, without the mortgage bond securing their indebtedness to the first respondent also being re-registered. Consequently, the first respondent launched an application in court a quo and successfully obtained the order mentioned in paragraph 1 above. It is this order for the reregistration of the mortgage bond that is being appealed.

Grounds of appeal

[13] The appellant's notice of appeal states the following as their grounds of appeal:

1. *The court erred in directing the reinstatement of the mortgage bond, as the first respondent had cancelled the bond and reinstatement is not allowed by law.*

2. *The court correctly held that the mortgage bond over the property was cancelled when the transfer of ownership from the appellants to the third respondent took place.*

3. *The court failed to understand that the first respondent's consent is required for the re-registration, and the first respondent cannot reverse this consent. Only the appellants, whose consent is not needed, can reverse the situation. The appellant relies on ABSA Bank Ltd v Moore and Another, as stated in its judgment, which affirms that the appellants had no*

involvement in the cancellation of the mortgage bond and therefore cannot refuse its reinstatement.

4. *The court a quo erred in agreeing to reinstate the bond, as the consent of the creditor is required to cancel the bond, unlike the debtor. Thus, a creditor is not allowed to reinstate a bond that they consented to cancel. Reference is made to section 129(4) of the National Credit Act, 34 of 2005 ("the NCA") and ABSA v Moore-supra.*

5. *The court erred in not finding that reinstatement is prohibited.*

6. *The court erred in not finding that reinstatement is prohibited under section 129(4)(d) of the NCA when the sale in execution of the property and the realization of the proceeds occurred. The appellant refers to ABSA Bank Limited v Malibongwe Noel Vokwani case number 35579/2017.*

7. *The court erred in failing to examine the contents of a letter dated 3 March 2011, marked "MG2," written by the first respondent to reinstate the property or bond to the appellants when requested to do so. The application to the court a quo exhibits elements of both approval and disapproval, whereas the law requires a litigant to choose one of the two.*

8. *The court failed to properly examine the reinstatement of the bond on or about 25 April 2007, as the appellants received different amounts communicated to them. Reference is again made to ABSA Bank Limited v Malibongwe-supra, which deals with foreclosure and monetary judgment.*

9. *Erred in not dismissing the application, as the first respondent was the orchestrator of its own dilemma, in that:*

    9.1 The first respondent sold the property without a valid judgment and compromised the judgment.

    9.2 The first respondent agreed to cancel the sale but allowed it to proceed without proper explanation.

    9.3 After the unlawful transfer of the property to the third respondent, the first respondent refused to reverse the transfer.

    9.4 The first respondent refused to comply with the judgment of Judge Spilg, which required certain actions to be performed.

    9.5 The first respondent wrote dubious letters with the intention of depriving the appellants of their property, incurring future legal costs, and defying a court order. See paragraph 50 of the founding affidavit. Additionally, after the payment of R150 000.00, the loan agreement and mortgage bond were reinstated between the parties, and

the first respondent's judgment was compromised under section 129(3) of the NCA. The appellants argue that the court below erred by not distinguishing between sections 129(3) and 129(4) of the NCA, which deal with reinstatement and prevention of reinstatement after the property is sold, respectively.

9.6 The court failed to recognize that the application was tainted with wrongdoing (turpitude), and relief could not be claimed under such circumstances. The court should have dismissed the application based on the par delictum rule.

9.7 The emphasis placed on the principle that a mortgagee or pledgee has the right to retain hold of the secured property until the debt is paid and, in case of default, to sell the property and obtain payment from the proceeds. It is the appellants' contention that the property was sold in execution on 11 August 2010, and the process described above took place.

9.7.1 The sale in execution occurred, and the proceeds of the sale were realized. Therefore, the matter is closed. Cadit quaestio.

9.7.2 The mortgage bonds are accessory to the main obligation, which is the loan agreement. Once the main obligation was validly cancelled, it logically follows that the accessory obligation is also discharged.

The law

[14] The National Credit Act (the NCA) stipulates as follows:

> "*(3) Subject to subsection (4), a consumer may…*
>
> *(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and-*
>
> *(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.*
>
> *(a) the sale of any property pursuant to- (i) an attachment order; or*
>
> *(b) the execution of any other court order enforcing that agreement; or*
>
> *(c) the termination thereof in accordance with section 123"*.

[15] It does however not follow that payment of arrears results in the discharge of the debt. *Absa Bank Ltd v Lombard Insurance Company Ltd*, *Firstrand Bank Ltd v Lombard Insurance Company Ltd* [1] confirmed this in the following terms: *"To discharge a debt it must be paid in the name of the true debtor. Generally, the discharge of a debt requires an agreement between the parties to that effect …. It requires the parties to be in agreement as to the debt, whether that of the payer or that of a third party, to be paid*."

[1] [2012] ZASCA 139; 2012 (6) SA 569 (SCA) (*Lombard*) at para 18

[16] In *Volkskas Bank Bpk v Bankorp Bpk (t/a Trust Bank)*[2] the court also explicitly rejected the proposition that "payment may be made without knowledge thereof by the creditor". It asserted instead that payment is a bilateral juristic act that, unless agreed otherwise, requires the cooperation of debtor (or payer) and creditor.

[17] In *Nulliah v Harper*[3], the Appellate Division (the predecessor of the SCA) held that where immovable property is mortgaged, payment of the mortgaged debt obliges the mortgagee *pari passu* to cancel the bond or cause it to be cancelled in the Deeds Registry.

[18] The purposes of the NCA are manifold[4]. While it aims to correct imbalances by providing additional rights and protections to the consumer, it also aims to ensure that South Africa's credit market becomes and remains "competitive, sustainable, responsible [and] efficient"[5].

[19] The Constitutional Court has also emphasised that *"…the purpose of the [NCA] is not only to protect consumers, but also to create a 'harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements'."*

[20] In addition, it has found that *"[o]ne of the main aims of the [NCA] is to enable previously marginalised people to enter the credit market and access much needed credit. Credit is an invaluable tool in our economy. It must, however, be used wisely, ethically and responsibly. Just as these obligations of ethical and*

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[2] [1991] ZASCA 57; 1991 (3) SA 605 (A) at 612C-D

[3] 1930 AD 141 at 151-2 and 155

[4] *Nkata v Firstrand Bank Limited and Others* (CCT73/15) [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC) (21 April 2016))*Nkata*).

[5] The preamble to the NCA

responsible behaviour apply to providers of credit, so too to consumers … . The notion of a 'reasonable consumer' implies obligations for both credit providers and consumers."[6]

Analysis

[21] From a reading of the affidavits in the main application, it is evident that the following relevant facts are agreed common cause:

15.1 The appellants and the first respondent had entered into a credit agreement in 2006, whereby the first respondent lent them an amount of R1 200 000.00 based on the terms of the credit agreement.

15.2 The loan amount of R1 200 000.00, together with an additional amount of R240 000.00, would be secured by registering a bond for a maximum amount of R1 440 000.00, subject to the terms of the first respondent's standard terms.

15.3 The security was effected by the registration of the mortgage bond in question over the property.

15.4 The appellants defaulted on their repayment terms and a judgment was obtained against them. In satisfaction of that judgment, execution was levied against the property. The proceeds of the sale were insufficient to satisfy the judgment debt, bur resulted in the cancellation of the bond.

15.4 Following the events described in paragraph 5 to 9, the appellants successfully obtained the transfer of the property back into their names.

[6] *Nkata* supra at para 38

15.5 The appellants are the property owners, and the property is unencumbered.

15.6 The appellants are still indebted to the first respondent, and they have refused to consent to the reregistration of the mortgage bond over the property.

[22] Based on the abovementioned facts, there is no defense to the relief claimed by the first respondent, and the court a quo correctly granted the requested relief. None of the other grounds of appeal can detract from this fact. The case law recited in the notice of appeal are all distinguishable on their own facts and all that the first respondent actually sought from the court was that both the lender and the borrower be placed in as close as possible situation as they were prior to the erroneously pursued sale in execution and its consequences. The appellants' alleged consent requirement herein, is misplaced and has no legal basis.

[23] The appellants' further argument that granting the relief requested would force them to enter into a new credit agreement with the first respondent is also flawed, both in fact and in law. The appellants and the first respondent entered into a credit agreement in 2006, and that debt was never extinguished. The reregistration of the mortgage bond is merely a measure to reinstate the security of the outstanding debt to which the parties had agreed. No new credit agreement is being imposed on the appellants by such reregistration.

[24] With reference to *ABSA Bank Ltd v Mokebe*[7] *(Mokebe)* and related cases, the court aquo had correctly relied on what had been stated by the learned author Scott

[7] 2018 (6) SA 492 (GJ),

in *Willes' Mortgage and Pledge in South Africa* 3ed (1987) on p.5 as follows: "*The right of the mortgagee or pledgee is to retain his hold over the secured property until his debt is paid and, if the mortgagor or pledgor is in default, to have the property sold and obtain payment of his debt out of the proceeds of the sale*."

[25] The court a quo referenced *Mokebe*, citing *Standard Bank of South Africa v Saunderson and Others*, which held that a mortgage bond is an agreement between the borrower and the lender. Once registered against the property's title, it binds third parties and entitles the lender, in the event of default, to have the property sold to satisfy the outstanding debt. The mortgage bond restricts the borrower's ownership rights until the debt is repaid. Therefore, it is evident that the mortgage bond is crucial to secure the loan advanced. The court a quo correctly concluded that the appellants' claims of alternative means of securing the indebtedness, such as attachment or sequestration, lack merit.

[26] Regarding the alleged compromise of the first respondent's claim when the appellants paid R150 000.00 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 to having the mortgage bond being cancelled.

[27] The appellants complain that they have been disadvantaged by the actions of the 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 the third respondent and the sale to the fourth respondent. These failures have however been dealt with in the judgments and orders by which the appellants 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.

[28] It is undisputed that, while ownership of the immovable property has been reinstated to the appellants, the mortgage bond had not formed part of the reinstatement order. It is understandable why the bank will require security for their debt which has not been extinguished. It is evident that the property was sold whilst there was still an outstanding amount from the appellants' mortgage bond repayments. The fact that the property was erroneously sold at an auction which had resulted in the bank consenting to cancellation of the mortgage bond remains exactly that: an error. This error has only partially been rectified in that only the immovable property has been reinstated to the appellants but the security for the mortgage bond has not.

[29] The appellants can therefore not want to have rights without responsibilities. The mortgage bond does not qualify as a debt that ought to have been extinguished by virtue of a mistake and the appellant can therefore not rely on that alone. The appellants themselves acknowledged that as at the time when the immovable property was sold on auction, they had only paid arrears and not the full outstanding mortgage bond amount.

[30] The appellants raised what they considered an important point, namely the amount to be considered as the mortgage bond amount. The bond, when

reinstated, even at its original amount, only constitutes security. The bond amount does not equate to the outstanding amount. That is a matter that the appellants must sort out with the first respondent. I agree with the previous Judge that there remains a judgment for the outstanding loan amount, secured by the mortgage bond. That judgment has not been rescinded and interest calculated will be in terms of the court order obtained therein.

[31] This court is however only required to determine whether reinstatement of the security for the original loan, which has later been converted to a judgment debt, had been correctly ordered. As pointed out above, that has been done by the court a quo and the appeal against that order must fail. As neither the rescission nor the calculation of the outstanding amount legally formed part of the appeal, this court would be overstepping its boundaries if it were to pronounce on the correctness of the outstanding amount, be that in respect of capital, interest or the application of the proceeds of a cancelled sale in execution.

Costs

[32] The first respondent submitted that the appellant should pay the costs of the appeal on attorney and client scale. It is however important to note that the first respondent through its attorney had created or even exacerbated the initial situation, leading to the sale in execution.

[33] Despite this, and although first respondent was author of its own misfortune at the time of the sale and the subsequent application for reinstatement of the bond, once having obtained that order, there was no merit in the appellants' attempts to stop what was in effect restitution of the security to which they had initially agreed. Their appeal amounts to an attempt at retaining an unencumbered property whilst the debt which had initially been secured, had not been satisfied. Costs should therefore follow the event but, in the exercise of our discretion, on the customary party and party scale.

Order

[34] The appeal is refused, with costs.

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ENB KHWINANA
ACTING JUDGE OF GAUTENG DIVISION
HIGH COURT, PRETORIA

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N DAVIS
JUDGE OF GAUTENG DIVISION
HIGH COURT, PRETORIA

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P MANAMELA
ACTING JUDGE OF GAUTENG DIVISION
HIGH COURT, PRETORIA

Date of hearing: 15 March 2023

Date of judgment: 18 July 2023

For the Appellant:	In Person
For the Respondent:	Adv M Minnaar
Attorney for the First Respondent:	Hammond Pole Majola c/o NVA Attorneys, Pretoria