REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes☐/ No ☒ (2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒ (3) REVISED: Yes ☐ / No ☒ Date: 14 August 2023 WJ du	CASE NO: 2022/004866

In the matter between:

FIRSTRAND BANK LIMITED	**PLAINTIFF / APPLICANT**
and	
SEAN MICHEAL BUTLER	**1ST DEFENDANT / RESPONDENT**
PALESA PRECIOUS BUTLER	**2ND DEFENDANT / RESPONDENT**
EMFULENI LOCAL MUNICIPALITY	**3RD DEFENDANT / RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] Introduction

[1] This is an application for a summary judgment in terms of Rule 32 and an order declaring immovable property executable, pursuant to the First and Second Respondents' breach of the payment terms under a loan agreement.

[2] The Applicant is the bank that provided the home loan to the Respondents. The First and Second Respondents were married in community of property, and bound themselves to the home loan agreement during the marriage. For ease of reference the Applicant will be referred to as the bank, the First Respondent as Mr Butler, and the Second Respondent Ms Moloto.

[3] Ms Moloto represented herself at the hearing (and before). She disagrees that the bank is entitled to hold her accountable based on the divorce settlement that was made an order of the court. She, therefore, filed her plea, after which the summary judgment was brought. She then filed an opposing affidavit. The bank, however, persists that the parties are in arrears and have not entered a repayment arrangement. The bank also states that the house is not the primary residence of either party.

[2] Background

[4] Both parties applied for a loan and signed a loan agreement around 1 October 2009. They then registered a written mortgage bond on the property. Both parties agree that these loan agreements exist and that the terms were breached.

[5] Ms Moloto's argument is based on the divorce settlement between her and Mr Butler. According to that settlement, they agreed to divide their shared assets, with Mr Butler having sole ownership of the property and him to continue making monthly payments as outlined in clause 12 of the settlement agreement. Ms Moloto claims that this settlement agreement binds the bank as it is an order of the court, and they cannot pursue legal action against her, only Mr Butler.

[6] She raises two other defences, namely that she did not receive the notice in terms of s 129 of the National Credit Act (NCA),[1] and that there was a complaint before the bank ombudsman when the summons was issued.

[1] 34 of 2005.

(i) The homeloan agreement and the court order

[7] The bank says that these are not defences to the claim because there is a signed loan agreement that both Ms Moloto and Mr Butler signed. Ms Moloto does not dispute that she signed the agreement.

[8] The bank also says that when they decided if Ms Moloto and her Mr Butler could afford to borrow money from the bank, they looked at her and her Mr Butler's income and expenses. This is also what the NCA requires from the bank. Ms Moloto's predicament is because of Mr Butler not giving effect to the court order to replace her at the bank as a debtor. As a result, both Ms Moloto and her Mr Butler are still responsible for the home loan agreement.

[9] The bank set out the law about the execution of immovable property and the possible home of the debtors. They cite case law that deals with the rights of the bank to execute property and the protection of owners' rights when their house will be executed. They cite the well known cases of *Jaftha v Schoeman*[2] and *Gundwana v Steko Development*.[3]

[10] To address the defence of the divorce order, they discuss *Nedbank Limited v Finin,*[4] where the second defendant made a similar argument as Ms Moloto. In that case, the second defendant also stated that a settlement agreement at divorce that was made an order of divorce indicated that she is absolved from paying the mortgage loan, as the settlement agreement stated that it was the first respondent who must do so. The High Court found both respondents liable, as the second respondent was never discharged from the debt.

[11] The bank argues that the parties agree that there is a loan agreement and a covering mortgage bond. Both parties entered into the home loan agreement. The affordability of the home loan agreement took into account both Ms Moloto's and Mr Butler's income and expenses, as the NCA requires. Should only Mr Butler be

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[2] [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

[3] [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

[4] [2014] ZAGPPJC 693.

liable for the home loan agreement, the bank will have to do another affordability calculation, using only Mr Butler's income and expenses. Mr Butler then needs to apply to substitute Ms Moloto as a debtor. Mr Butler did not apply, which is why both Ms Moloto and her Mr Butler are still bound by the home loan agreement. They cannot force Mr Butler to apply for substitution.

[12] The covering mortgage bond is also registered in Ms Moloto's and Mr Butler's names. Until the covering mortgage bond has been changed, the bank can enforce its security and institute proceedings against both Ms Moloto and Mr Butler. The immovable property is also still registered in both parties' names.

[13] The legal principle of *res inter alios acta* applies. In this case it means that a divorce settlement agreement between Ms Moloto and Mr Butler does not bind, and cannot be enforced against, the bank, as they did not also sign the settlement agreement.

[14] Ms Moloto states that the bank knows about the divorce and the settlement agreement. She says that at a divorce of a marriage in community of property, the joint estate is divided into two equal shares. The effect is that they are free co-owners entitled to the division of the estate, with their shares divisible.[5]

[15] She also refers the court to the case of *Eke v Parsons,*[6] which states that once a settlement agreement is made an order of court, it is an order like any other. It brings finality to the parties and becomes an enforceable court order. Based on this, Ms Moloto argues that "the court order which incorporated the settlement agreement should be enforced and/or adhered to by all persons including the applicant before court".[7] She later contends that the doctrine of *res inter alios* is not applicable, as it is not an agreement between parties but a court order, which applies to all.

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[5] *Ex Parte Menzies and Uxor* 1993(3) SA 799(C).

[6] [2015] ZACC 30; 2015 (11) BCLR 1319 (CC).

[7] Para 19 of the HOA.

[16] She argues based on contract law, stating that a contract can only come into being with the meeting of minds. Also, since the bank knew about the settlement agreement and took the instalments from Mr Butler's bank account, their intention and conduct showed that they saw themselves bound to the settlement agreement in the court order. This is even more so because they paid back the instalment debited from Ms Moloto's account after they could not debit it from Mr Butler's account. This showed a recognition that they regard themselves bound by the court order, Ms Moloto, in a nutshell, argues. This is a defence that should ward off the application for summary judgment.

[17] She makes the argument further that based on *CB v ABSA Bank Limited*[8] dealing with a wife agreeing to her then-husband signing surety to bind the joint estate, ordering ABSA to pay damages.

[18] She disagrees that she can only be relieved from the obligations once Mr Butler applied to have the home loan only in his name and after an NCA affordability investigation. Ms Moloto's frustration, which she also re-iterates in her argument, was: a valid court order cannot simply be ignored, and the administrative processes of the bank cannot supersede the court order.

[19] Lastly, she also argues that a negative registration system means that the deeds registry does not necessarily reflect the true state of affairs, as there are exceptions to the rules that the acquisition of a real right of ownership in movable property must be by registration. She then refers to the acquisition of ownership by a marriage in community of property. She makes an argument similar to the one accepted in that at a divorce of a marriage in community of property, no registration of transfer is needed.

(ii) The section 129 notice

[20] Regarding the section 129 notice, the bank says it was sent through registered mail to the selected address provided by both respondents for receiving official documents. It was also sent to the address of the property owned by both

[8] [202] ZAGPJHC 230.

respondents. Ms Moloto says that it did reach the correct post office but that it is still there. The bank's track and trace report does not show that the notice was dispatched to her or that she received it. She did not see it before the summons was served.

[21] The bank relies on *Sebola v Standard Bank of South Africa Ltd,*[9] which said that the applicant, such as the bank, must satisfy the court that the notice was sent to the correct address and post office. It is not for the banks to ensure that the respondents received it personally or have subjective knowledge of the notice. A reasonable person would have received the post slip and gone to the post office to collect the letter.

(iii) The bank ombud

[22] The matter brought before the Banking Ombudsman was the argument that, according to the divorce settlement agreement, only the first respondent is responsible for the monthly mortgage bond payments and has sole ownership of the property. Ms Moloto hoped that the Banking Ombud could help remove her name from the home loan agreement and mortgage bond. She was informed that she must apply for "Substitution of Debtors" to do this. The bank, therefore, regards the issue as resolved.

[23] The bank argues that these points raised by the respondent are not defences based on the facts of the case. Instead, they are legal arguments, which means the court can decide. The bank ends its argument by showing why they are entitled to an execution order and making it clear that the bank is open to a reasonable settlement proposal that is commercially viable.

[24] Ms Moloto persists with this case despite the Banking Ombud's ruling that Mr Butler will have to make a credit application before the loan can be in his name alone and that until then, both Ms Moloto and Mr Butler are jointly and severally liable. She says the bank cannot simply ignore the court order. She says the

[9] 2012(5) SA 142 (CC).

reliance on *Nedbank Limited v Finin*[10] is also incorrect, as the wife there remained in the house while the husband paid. In her case, the husband stays in the house while he is paying for it. Also, in that case, the wife was against the foreclosure in total, while here, Ms Moloto is only against the foreclosure against her.

[3] The law

(i) Sale in execution and the divorce order

[25] In South Africa, we rely on the Roman-Dutch law principle that distinguishes between original acquisition and derivative acquisition of ownership. A derivative mode of acquisition requires delivery of the thing from one person to another in terms of an agreement. For immovable property, this means a judicial transfer together with a public record of the facts of the transfer. In South Africa, transfer is by registration before the Registrar.[11]

[26] The Deeds Registries Act[12] codified this principle. It requires an act of conveyance to pass transfer of immovable property before the Registrar in terms of s 16. S45*bis*(1)(a) of the Deeds Registries Act 47 of 1937 is such an act of transfer when an endorsement is made on the title deed. It states

> "If immovable property or a lease under any law relating to land settlement or a bond is registered in the deeds registry and it –
>
> (a) formed an asset in a joint estate of spouses who have been divorced, and one of them has lawfully acquired the share of his or her former spouse in the property, lease or bond; (b) ...
>
> the registrar may on written application by the spouse concerned and accompanied by such documents as the registrar deems necessary, endorse on the title deeds of the property, or on the lease or the bond that such spouse is entitled to deal with such property, lease or bond, and thereupon such spouse shall be entitled to deal therewith as if he or she had taken formal transfer or cession into his or her name of the share of the former spouse or his or her spouse, as the case may be, in the property, lease or bond.')"

[27] S 16 of the Act spells out how the rights must be transferred

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[10] [2014] ZAGPPHC 673.

[11] *Jordaan v City of Tshwane Metropolitan Municipality* (2017) 6 SA 287 (CC) par 34.

[12] 47 of 1937.

> "Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar....'"

[28] It says "save as otherwise provided by this Act or in any other law", indicating that there might be instances where the registration of a deed is not necessary. The question is then, what is meant by "any other law"? Does this include the Divorce Act s 7(1)?

[29] In such a case, the question is whether a divorce settlement made an order of the court is enough to transfer the ownership of the property concerned. This was answered by the Supreme Court of Appeal in *Fischer v Uhomi Ushishi Trading*.[13] In this case, the Supreme Court of Appeal had to answer the question of whether a divorce order has the effect that one spouse's half share in immovable property vested in the other spouse in terms of the divorce order or whether additional steps need to be taken before such vesting takes place. Therefore, whether a transfer by a deed of transfer or an endorsement is essential or merely a formality.

[30] The two parties were also married in community of property. They also had a settlement agreement. In that settlement agreement, it was stipulated that the husband waives his interest in the property in favour of his wife while she remains responsible for the mortgage payment. A few years later, Fischer wanted to enforce the payment of debts against the husband. Since he did not have enough movable property, he applied at the High Court to have the husband's half the share declared executable.

[31] The immovable property remained registered in the name of both spouses, as the husband's half share in the immovable property was never registered in the name of the wife after the divorce. The wife said the half share could not be sold in execution, as she became the only owner of the house in terms of the divorce order. She made two arguments: one, she became the owner of the property because of the divorce order; or alternatively, she acquired a personal right to the property before Fischer's claim, and thus in preference to his claim.

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[13] 2019 (2) SA 117 (SCA).

[32] The court did not agree. The court found that in terms of s 16 of the Deeds Registry Act, transfer must take place because it serves the important publicity principle. But more importantly, it gives effect to derivative acquisition of ownership of immovable property by one person to the other, which requires registration. The transfer of the undivided share in the property in terms of the settlement agreement is derivative. In other words, the agreement gave one spouse a personal right to enforce registration against the other spouse, but the agreement did not vest ownership. This is like when one signs a contract to buy property – it is not the contract itself that vests the ownership, it is only once the property is registered.

[33] The other question that must be answered is whether the divorce order that said that Mr Butler must take over the instalments end the contractual relationship as per the loan agreement between the bank and Ms Moloto. Ms Moloto refers to the *Corporate Liquidators (Pty) Ltd v Wiggill*[14] case, but this does not really help her, as the court states, "at the time when the agreement was made an order of court there was a bond registered over the property and there was an amount of approximately R165 000 owing in terms of the bond. It is self evident that spouses cannot through a divorce settlement divest their creditors of claims against them."[15]

[34] Likewise, she cites *Sivemangal v AM Gas & General Suppliers (Pty) Ltd.*[16] This case dealt with an acknowledgement of debt and a surety agreement signed by the husband. The parties were also married in community of property. They had a dissolution agreement that was made an order of the court upon divorce, where the husband indemnified the wife of all debts he incurred on the date of the parties' separation. The (ex)-wife content that she cannot be held liable for the debts. The plaintiff stated that as the acknowledgement of debt and surety was signed during the marriage, such debt in law is deemed debt of the joint estate. The dissolution agreement created personal rights that are only enforceable between the parties.

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[14] 2007 (2) SA 520 (T).

[15] Para 18.

[16] 2020 ZAKZPHC 8.

The court, referring to *Reynders v Rand Bank BPK*[17] and *Allen v Allen,*[18] makes it clear that the agreement made an order of court is only enforceable between the two parties.

[35] Ms Moloto argument about the formation of contracts and the fact that there must be a meeting of minds is not valid. Contracts are binding once entered into, and the contractual relationship can only be ended in terms of the law. This is either in terms of the contract or, as in this case, by Ms Moloto using the court order to enforce a personal right against Mr Butler to ensure that the house is transferred in his name and that he substitutes her as a debtor at the bank. The court order can only be enforced against Mr Butler.

[36] Lastly, the *C B v Absa Bank Limited*[19] case Ms Moloto relied on dealt with a husband who signed surety for a close corporation while married in community of property. The wife signed a document consenting to the joint estate being bound. They divorced, and the settlement agreement was made an order of the court. The settlement stated that the husband would attain full ownership interests in the close corporation and that the wife would be released from any liability. The divorce was finalised, and the closed corporation became insolvent. ABSA then called up the surety, serving summons on the wife's chosen *domicilium citandi et executandi,* where she no longer lived. A default judgment was granted against her and her Mr Butler jointly and severally. After a writ of execution was served on both parties, the wife's bank accounts were attached. However, in that case, ABSA made errors in the process of attaching the movables, rendering the attachment itself wrongful and a nullity. It is for that purpose that ABSA was ordered to pay damages. In this case, the bank is following the process set out in the Rules, and both parties are aware of the proceedings, unlike in the CB case. That case is, therefore, not applicable.

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[17] 1978 (2) SA 630 (T).

[18] 1951 (3) SA 320 (A) at 330E.

[19] [2020] ZAGPJHC 230.

[37] Based on the authorities discussed, Ms Moloto does not have a defence on the merits.

(ii) S 129 notice

[38] The bank correctly set out the legal position concerning s 129 notices. Since Ms Moloto admitted to the notice being at the post office, the bank has complied with its obligations. This is, therefore, not a valid defence on the merits.

(iii) Bank ombud

[39] The finding of the bank ombud is in line with the law. It is not that the bank ombud's ruling overturns the order of the court. The court order binds Mr Butler and Ms Moloto, and Ms Moloto must seek recourse against Mr Butler, by, for instance, seeking an order to compel him to give effect to the court order. This is, therefore, not a valid defence on the merits.

[4] Conclusion

[40] The court is aware that Ms Moloto must be frustrated as she was hoping for a clean break from Mr Butler, with whom she is no longer on speaking terms, only to find out they are both still bound by the loan agreement. However, it is not so much that the bank's administrative processes override a court order. The bank is not legally obliged to give effect to the settlement agreement made an order of the court, as it only binds the divorcing parties. Ms Moloto's recourse is against Mr Butler.

[41] The bank also indicated that the property's market value is R400 000, the municipal value is R350 000, the arrears are R76 231,90 (20 months), and the balance R273 214,14. The rates and taxes outstanding is about R30 000. They suggest a reserve price of R241 439. Taking into all the factors a reserve price of R290 000 seems reasonable. To afford Ms Moloto time to enforce her rights against Mr Butler, sell the property privately, or make a repayment arrangement, the bank agreed to an order being suspended.

[5] Order

[42] I, therefore, make the following order:

1. Summary judgment is granted against the first and second respondents, jointly and severally, the one paying the other to be absolved, for the following:

   1.1. Payment in the sum of R211 519,75.

   1.2. Interest in the amount mentioned above at the variable rate of 9,55% nominal *per annum* calculated daily and compounded monthly from 31 May 2022 to the date of final payment.

   1.3. That the immovable property known as Erf 2095 Stretforn Extension 1 Township, Registration division I.Q., the province of Gauteng, measuring 243 (two hundred and forty-htree) square meters, T74743/2009, subject to the conditions therein contained, be declared specially executable.

   1.4. That the Registrar of this court is authorised to issue a writ(s) of attachment herein.

   1.5. That the Sheriff of this court is authorised to execute the warrant(s) of attachment in respect to the immovable property.

   1.6. That the immovable property may be sold by the Sheriff with a reserve price of R290 000.

   1.7. That a copy of this order is to be served on the first and second respondents as soon as practically possible after this order is granted but prior to any sale in execution.

   1.8. The first and second respondents are advised that the provisions of section 129(3) and (4) of the National Credit Act 34 of 2005 apply to the judgment granted in favour of the applicant. The first and second respondents may prevent the sale of the abovementioned property, if they pay the applicant the amounts that are overdue together with the applicant's prescribed default administration charges and reasonable costs of enforcing the credit agreement up to the time the default was remedied, prior to the property being sold in execution.

   1.9. The overdue amounts referred to above may be obtained from the applicant. The first and second respondents are advised that the due arrear amounts may not be the total amount of the judgment debt but the amount owing by the first and second respondents to the applicant, without reference to the accelerated amount.

   1.10. The first and second respondents are directed to pay the costs of this application.

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WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Ms R Carvalheira
Instructed by:	Glover Kannieappen Inc
Counsel for the second respondent:	Ms Moloto represented herself
Date of the hearing:	20 July 2023
Date of judgment:	14 August 2023