IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Application number: 4659/2021

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the application between:

ABSA BANK LTD	Applicant
And	
JOHAN SERFONTEIN	1st Respondent
JACOBUS HENDRIK SERFONTEIN	2nd Respondent
In re:	
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. 12[…])

ADRIAAN BENJAMIN VOSLOO N.O. 3rd Respondent
(In his capacity as a trustee of the
Francois Els Trust, IT no. 12[…])

REGISTRAR OF DEEDS 4th Respondent

JUDGMENT BY: VAN ZYL, J
HEARD ON: 29 MAART 2023
DELIVERED ON: 30 JUNE 2023

[1] This is an application for leave to appeal by the applicant (the first respondent in the main application) against the order and judgment which I delivered in the main application on 9 September 2022 and 22 March 2023 respectively. The said order reads as follows:

> "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 W[…] 9[…], Extension 6[…], District K[…], 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. 12[…], 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] The grounds of appeal are set out in the Notice of Application for Leave to Appeal, dated 23 March 2023, and entail the following:

1. The Learned Honourable Judge, with the greatest respect, erred in finding that the Acknowledgment of Debt dated **17 March 2019** (annexure "**AB21**" to the opposing affidavit), is a supplementary agreement as envisaged in Sections 89 and 91 of the National Credit Act, 2005.

1.1 The Learned Honourable Judge, with the greatest respect, erred in finding that the Acknowledgment of Debt dated **17 March 2019** (annexure "**AB21**" to the opposing affidavit), is a supplementary agreement as envisaged in Sections 89 and 91 of the National Credit Act, 2005, and thereafter, to find that it as a supplementary agreement transgresses Sections 90(2)(a) and (b), Section 90(2)(h)(i), Section 90(2)(k)(vi)(bb), Section 90(2)(j) and Section 90(2)(k)(ii) of the NCA.

2. The Learned Honourable Judge, with the greatest respect, erred in finding that the Acknowledgment of Debt dated **17 March 2019** is a credit agreement in terms of Section 8(4)(f) of the National Credit Act.

2.1 The Learned Honourable Judge, with the greatest respect, erred in finding that the Acknowledgment of Debt dated **17 March 2019** (annexure "**AB21**" to the opposing affidavit), is a Credit agreement as envisaged in Section 8(4)(f) of the National Credit Act, 2005, and thereafter, to find that it as a credit agreement transgresses Sections 90(2)(a) and (b), Section 90(2)(h)(i), Section 90(2)(k)(vi)(bb), Section 90(2)(j) and Section 90(2)(k)(ii) of the NCA.

3. The Judge with respect erred in not finding that the aforesaid Acknowledgment of Debt dated **17 March 2019** is valid and/or enforceable in terms of the common law and/or precedent and/or the National Credit Act, 2005.

4. The Learned Judge, with respect, erred in finding that Clauses 2.3 to 2.9 of the aforesaid acknowledgment of debt constitute a resort to parate executie, and therefore is void.

5. The Court with the greatest respect erred in not finding that an agreement between a debtor and creditor post default allowing the creditor the power and/or authority to sell movables and/or immovables to settle the debt without recourse to the Courts, is lawful.

> 5.1 The Honourable Court erred in not finding that it is lawful for a debtor to, after he/she fell in default, consent to the mortgagee selling the property mortgaged, provided a fair price is realized for and agreed upon.

6. The Learned Judge with respect, regarding the assertion that the aforesaid Acknowledgment of Debt is a supplementary agreement, erred not to follow the approach as in paragraphs [38] to [39] in **<u>Standard Bank of South Africa Limited v Wolmarans N.O. and others</u> (3949/2021) [2022] ZAFSHC 118 (16 May 2022)**, in order thereon to find that it is not a supplementary agreement.

7. The Learned Judge, with respect, erred in not following the approach as in paragraph [21] of **<u>Ratlou v MAN Financial Services</u> 2019 (5) SA 117 (SCA)** and thereon to find that the NCA was not aimed at settlement agreements like this particular acknowledgment of debt, and that the application of the NCA to such acknowledgment of debt will have a

devastating effect on the efficacy and the willingness of parties to conclude settlement agreements, and thereby to curtail litigation."

[3] Section 17(1)(a) of the Superior Courts Act, 10 of 2013, determines as follows with regard to leave to appeal:

> "1. Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
>
> (a) (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> (b) …"

[4] In the judgment of **Acting National Director of Public Prosecutions v Democratic Alliance *In Re* Democratic Alliance v Acting National Director of Public Prosecutions** (19577/09) [2016] ZAGPPHZ 489 (24 June 2016) the court held at para [25] of the judgment that the Superior Courts Act has raised the bar for granting leave to appeal and in this regard it referred to the judgment of **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others** 2014 JDR 2325 (LCC) at para [6]:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others** 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

See also **Njango v S** (06/2016) [2018] ZAFSHC 17 (27 February 2018) at paras [7] – [8] and **Pretoria Society of Advocates and Others v Nthai 2020 (1) SA 267 (LP)** at para [5].

[5] I will refer to the parties as cited in the present application.

[6] Mr Benade appeared on behalf of the applicant, like he also did during the hearing of the main application when the applicant was the first respondent. Mr Van der Merwe appeared on behalf of the respondents. Mr Van der Merwe was not involved during the hearing of the main application.

[7] The main application dealt with the interpretation of certain sections of the National Credit Act, 34 of 2005 ("the NCA"). The crux of the merits of the main application pertained to an Acknowledgment of Debt, which incorporated a Power of Attorney authorising the applicant to sell the first respondent`s immovable property, dated 17 March 2019, and which document I referred to in my judgment as the AOD/POA. In my judgment I referred to the NCA as "the Act".

[8] The main findings I made in my judgment were the following:

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

"[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."

"[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."

[9] In the judgment of **Standard Bank of South Africa Limited v Wolmarans N.O. and Others** (**3949/2021) [2022] ZAFSHC 118 (16 May 2022)** Daffue, J dealt with similar issues regarding the interpretation of certain sections of the NCA in relation to two Settlement Agreements/Acknowledgement of Debts. I adjudicated the application for leave to appeal in relation to the **Wolmarans**-judgment after it was allocated to me in terms of section 17(2)(a) of the Superior Courts Act.

[10] In my judgment in the aforesaid Wolmarans-application for leave to appeal, dated 17 April 2023, I, *inter alia,* stated and found as follows:

> "[11] The crux of the judgment turns on the interpretation of certain sections of the NCA, read in conjunction with certain applicable case law. In the process it pertinently dealt with the question whether the two settlement agreements are subject to the provisions of the NCA, or not. In the process the court also dealt with the question whether, in an instance where the underlying facility is regulated by the NCA, a subsequent settlement agreement constitutes a supplementary agreement in terms of the NCA.
>
> [12] I presided over an application similar to the present main application and counter-application. Although there may be factual differences in respect of certain aspects between the application I dealt with and the present application, which may impact upon the relevant questions of law, I had to make similar determinations with regard to the interpretation of the NCA. I delivered judgment in the matter of **<u>Serfontein and 1 Other v Absa Bank Ltd and 3 Others,</u>** application number 4659 /2021, which judgment was delivered on 22 March 2023. My most important findings therein contradict the findings made by Daffue, J *in casu*.
>
> [13] I am of the opinion that the proposed appeal has a reasonable prospect of success and furthermore that the aforesaid **<u>Serfontein</u>-**judgment and the judgment *in casu*, in my view, constitute "*conflicting judgments of the matter under consideration"* as determined in section 17(1)(a)(ii) of the Act. I am consequently of the opinion that in addition to the prospects of success, there is a compelling reason why the appeal should be heard.
>
> [14] In terms of section 16(1)(a)(i) of the Act the proposed appeal lies either to the Supreme Court of Appeal or a full court of this Division, depending on the direction issued in terms of section 17(6). Section 17(6)(a) of the Act determines the following:

"(6) *(a)* If leave is granted under subsection (2) *(a)* or *(b)* to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision,
in which case they must direct that the appeal be heard by the Supreme Court of Appeal."

[15] Mr Snellenburg submitted and requested that leave to appeal to the Supreme Court of Appeal should be granted. Mr Zietsman, on the other hand, submitted and requested that should leave to appeal be granted, such leave is to be granted to appeal to the full court of this Division.

[16] In my view the questions of law involved in the proposed appeal are of utmost importance because of its general application and that the administration of justice, generally, requires consideration of the judgment *in casu* by the Supreme Court of Appeal."

[11] In the circumstances and for the same reasons as stated in my **Wolmarans**-judgment in that application for leave to appeal, I am of the view that leave to appeal is also to be granted in the present application and that it is to be granted to appeal to the Supreme Court of Appeal.

[12] There is no reason why the usual order that the costs of this application be costs in the appeal, is not to be granted.

Order:

[13] I consequently make the following order:

1. The applicant is granted leave to appeal to the Supreme Court of Appeal against the whole of the order and judgment issued and delivered in the main application.

2. The costs of the application for leave to appeal are costs in the appeal.

C. VAN ZYL, J

On behalf the of the applicant:	Adv. H.J Benade
Instructed by:	Symington & De Kok
	BLOEMFONTEIN
On behalf of the respondents:	Adv. R. van der Merwe
Instructed by:	Blair Attorneys
	BLOEMFONTEIN