FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 883/2006

In the matter between:-

TEBOHO DAVID NHLAPO Applicant

and

MAKABELO LYDIA NHLAPO Respondent

HEARD ON: 28 MARCH 2013

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 18 APRIL 2013

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[1] These were motion proceedings. The applicant applied to have a court order granted on 13 April 2006 varied through an amendment to clause 5.1 of the deed of settlement by deleting the word “the plaintiff”, in other words “the respondent” in these proceedings and substituting it with the word “defendant”, in other words “the applicant”. The application was opposed.

[2] The parties previously lived together as husband and wife. They were married to each other in community of property at Botshabelo on 3 November 1995. Their marriage was dissolved in Bloemfontein on 13 April 2006. There were two documents handed in as evidence during the course of the

divorce proceedings. Those documents were the marriage certificate, exhibit “a” and the deed of settlement, exhibit “b”.

[3] The final decree of divorce incorporated the deed of settlement. It reads as follows:

> “1. That the bonds of marriage subsisting between plaintiff and defendant be and are hereby dissolved.
>
> 2. That the Deed of Settlement between the parties with the exclusion of paragraph 4 thereof is made an order of Court.”

[4] There were two major assets in the joint estate. The proprietary rights of the parties in respect of the two immovable properties were set out in clause 5.1 of the deed of settlement. The clause reads:

> “5.1 **<u>IMMOVABLE PROPERTIES</u>**
>
> 5.1.1 The Plaintiff shall retain as her absolute and exclusive property the parties’ matrimonial home being the residential dwelling at **115 Klaradyn Street, Pellisier, Bloemfontein** and shall be liable for all future payment in respect of the said property.
>
> 5.1.2 The Plaintiff shall retain as her absolute and exclusive property the parties’ other residential dwelling being **1438 Zone 2, Thaba Nchu.**
>
> 5.1.3 The Defendant undertakes to sign all the necessary document within reasonable time after the Plaintiff’s request to do so, to enable the transfer of the said properties into the name of the Plaintiff.”

[5] The current application concerns paragraph 5.1.1. The purpose of the application is to have the Klaradyn property transferred to the applicant from the respondent by virtue of a cession agreement the parties signed in Bloemfontein on 18 November 2008. The first paragraph of annexure "b" reads:

> "I, the undersigned,
>
> **LYDIA MAKABELO NHLAPO**
> **(ID NO:)**
>
> do hereby irrevocably cedes, transfer and/or pass to **TEBOHO DAVID NHLAPO ID:** all my property rights, title and interest in respect of the immovable properties at **115 Klaradyn Street, Pellisier Park, Bloemfontein** which accrued to me in the **Order** of **Divorce** of the **Free State Provincial Division** of the **High Court** and I hereby assign to him all obligations thereunder."

[6] The applicant moved the current application on 5 April 2012. He sought the following relief:

> "1. That the court order dated 13 April 2006 granted by the above Honourable court under case number **883/2006** and paragraph 5.1 of the accompanying deed of settlement be amended with an order with the following terms:
>
> 1.(a) That the Applicant shall retain as his absolute and exclusive property the property situated at 115 Klaradyn Street, Pellisier, Bloemfontein as agreed upon by the parties in terms of the cession of rights agreement dated 18 November 2008.

2. Cost only in the event of opposition.

3. Further and/or alternative relief."

[7] The grounds on which the respondent opposed the grant of the aforesaid relief were set out in paragraph 6 of the answering affidavit. (the numbering is mine.) She stated as follows:

"6. **AD PARAGRAPH 8 HEREOF:**

The contents of this paragraph are noted; suffice to state that the said cession agreement was entered into after the Respondent held me hostage for days and repeatedly assaulting my (sic), from the 28th until the 31st October 2008 when the said cession was entered into on the 1st November 2008.

I am advised that the said cession is null and void to (sic) the fact that the property was mortgaged by (sic) Nedbank. A copy of the bond is attached hereto and marked Annexure 'MLN1'. It was an express term of the bond that the property should not be burdened further without the written consent of the bank."

[8] The crisp question in the matter is whether the cession agreement was a valid legal transaction generally enforceable against the world at large and the respondent in particular.

[9] Section 16 of the Deeds Registries Act 47 of 1937 as amended provides that:

"**16 How real rights shall be transferred**

> 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: …"

[10] In his replying affidavit the applicant denied the respondent's allegation that he had held her hostage from 28 October 2008; that he forced her to sign away her rights in respect of the property in question against her will; that she unwillingly agreed to do so on 1st November 2008 in order to regain her freedom and that she eventually signed the cession agreement under duress on 18 November 2008. *Vide* paragraph 4.1 page 46 of the record.

[11] At paragraph 3.2 (sic) of the replying affidavit the applicant replied as follows as regards the respondent's averment that she had bonded the property in dispute:

> "I take note of the fact that the Respondent mortgaged the property to Nedbank. I was aware of the loan to the bank. I enquired from the Respondent what would happen with the cession and she informed me that she would continue paying the bank. She also informed me that she consulted with her lawyer prior to the drafting of the agreement. The only reference in the contract to a cession is paragraph 8 is cession of rentals and revenues. This refers to the letting of the mortgaged property and not the cession of the property."

[12] I deem it convenient to deal first with the respondent's second ground of resistance. The thrust of the defence was that the bilateral agreement or alienation agreement or cession agreement, call it what you like, on which the applicant relied was null and void. She asserted that such an agreement was legally unenforceable in that it sought to undermine the real rights which vested in Nedbank Limited (by virtue of a mortgage bond over the property), before she and the applicant concluded the bilateral agreement by virtue of a mortgage bond over the property.

[13] The applicant's reply to the respondent's defence was that he took note of the respondent's averment that she had mortgaged the property to Nedbank Ltd; that he was aware of the loan the respondent received from the bank; that he enquired from the respondent as to what would happen to the cession; that the respondent informed him that she would continue paying back the loan to the bank. That in brief was the sum total of the applicant's response to the respondents defence.

[14] In his replying affidavit the applicant did not deny the respondent's specific averment that the bilateral agreement, erroneously described a cession agreement, was of no legal consequences and thus generally unenforceable in law. All the same it was argued on behalf of the applicant, contrary to the respondent's contention, that the bilateral agreement which entailed the wholesale alienation of ownership between

the applicant and the respondent was perfectly valid in law but that the mortgage bond between the respondent and the bank, invoked by the respondents as a defence, was not.

[15] In the first place, counsel for the applicant submitted that the special mortgage bond was invalid because the property was transferred into the name of the respondent in contravention of clause 5.1.3 of the deed of settlement – annexure "b" to the founding affidavit. The clause in question reads as follows:

> "5.1.3 The Defendant undertakes to sign all the necessary documents within reasonable time after the Plaintiff's request to do so, to enable the transfer of the said properties into the name of the Plaintiff."

[16] The argument failed to persuade me. I could not see how the failure of the respondent, referred to as the plaintiff in the court order, annexure "a" and the deed of settlement, annexure "b", to comply with the clause invalidated the transfer of the property from the parties joint estate by virtue of the marriage in community of property to the respondent's separate estate by virtue of the final decree of divorce. The clause recorded the mutual agreement between the applicant and the respondent. Indeed it formed a mere procedural part of envisaged transfer process. However, such clause was purely inserted for the respondent's benefit.[1]

[1] **Impendle Properties CC v Comrie and Another** 1993 (3) SA 706 (N).

[17] Moreover it was not a prerequisite for the transfer of the property into the respondent's name. The respondent's failure to have the transfer deeds also signed by the applicant did not constitute breach of a material term of the deed of settlement, in my view. Therefore the applicant could not rely upon it to challenge *ex post facto* the respondent subsequent taking of the transfer of the exclusive ownership of the property and the burdening thereof in favour of a third party, Nedbank Ltd.

[18] In the second place, counsel for the applicant submitted that the special mortgage bond was invalid because the applicant was only aware of the bank loan but not the mortgage bond. It was undisputed that the respondent's answering affidavit was served on 31st August 2012. The applicant's contention was that before that date he was totally unaware that the respondent had mortgaged the property to the aforesaid bank.

[19] Again I had some reservations about the applicant's veracity. According to his replying affidavit he was aware that the respondent was indebted to the bank. It would appear that the applicant also knew that the respondent had encumbered the property as real security for the repayment of the loan to the bank. It seemed to me that it was probably such personal knowledge that prompted him to enquire from the respondent as to what would the fate of the alienation of the property by the respondent to him would be in view of the burdensome impact of the mortgaged bond. His apparent concern was seemingly allayed by the assurance she gave him that she

would carry on to repay the loan notwithstanding her alienation of the mortgage property to him. In the light of all this I gained the impression that the applicant had full knowledge of the mortgaged bond long prior to the service of the respondent's answering affidavit.

[20] The applicant's allegation in connection with those discussions was vague. He did not say precisely where and when such discussion took place. At best for him, such a discussion probably took place between 1 November 2008 being the date on which the parties agreed to retransfer the property to him and 31 December 2008 being the last date on which she could have caused a domestic violence interdict served on him. Upon an integrated reading of the papers as a whole it became apparent to me that after the service of the interdict the relational problems between the parties drastically deteriorated and that they could never had held any meaningful discussion about anything afterwards.

[21] Therefore I am inclined to reject his allegation that he had no knowledge of the mortgage bond when he signed a cession agreement as a cessionary. The cession agreement, so it appeared to me, was an abortive and disingenuous attempt deliberately designed to circumvent the mortgage bond agreement. Apart from that there is yet a more compelling reason as to why the applicant's argument based on his alleged ignorance of the true state of affairs falls to be rejected. The earlier registration of the mortgage bond served as a general informative notice whereby the real

security of the mortgagee in the property was published. Through the exercise of reasonable diligence the applicant would readily have ascertained the true state of affairs, before he signed the cession agreement, that the property was already mortgaged to the bank.

[22] Where, as in this instance, the applicant in motion proceedings seeks a final relief against the respondent, it is permissible for the court to take into account the (im)probabilities inherent in the conflicting versions. When that is done here, the foundation of the applicant's version begins to shake. The probabilities strongly tended to favour the conclusion that the applicant was well aware of the existence of the mortgage bond before he reluctantly vacated the property during January 2009 in accordance with the domestic violence interdict. He left the residential property less than two months after the property was alienated to him by way of a transaction disguised as a cession.

[23] It has been authoritatively held that a special mortgage bond is based on an agreement whereby a mortgagor contractually undertakes the obligation to pass a mortgage bond over a specified immovable property in favour of a mortgagee.[2] Such an initial agreement merely confers and imposes only personal rights and duties on the parties involved. A special mortgage bond has to be executed by the immovable property owner, in other words the mortgager or his

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[2] **Standard Bank of South Africa Ltd v Saunderson and Others** 2006 (2) SA 264 (SCA) at 269B

authorised agent. This is the first distinctive phase of the transfer process and it concerns the agreement in which only personal rights, agreed upon according to the bond agreement, are recognised and recorded.

[24] The mortgage bond confers real rights on the mortgagee only upon its registration in the deeds office. The signing of the bond by the registrar of deeds signifies that the bond has been legally registered. This then is the second phase of the transfer system. It concerns the registration, a distinctive phase which effectively establishes the real security in favour of the mortgagee over the burdened immovable property. Here real rights are recognised, recorded and published for the whole wide world to take note.[3]

[24] A cession in its simplest traditional form has three dimensions. A classic example is given in **Silberberg** *supra*, p 360, footnote 36:

> "The following example will illustrate the rule in the text: A owes B R1 000 in respect of which he has given to B a real security either in the form of a mortgage bond over immovable property …. If A pays this amount on due date B must agree to the cancellation of the mortgage bond …. Only if A fails to pay B, may the latter cause the immovable property … to be sold to satisfy his claim for R1 000 against A. B's rights as mortgagee … are thus clearly limited and in terms of the *nemo dat* rule he cannot confer any greater rights on another person. Assuming now that B in turn owes R1 000 to C and the latter demands

[3] **Silberberg & Schoeman's: The Law of Property**, firth edition, p 361, par 61.5 Badenhorts *it alie.*

> that B should provide him with a real security for his (C's) claim against him, then B may take the following course: first, B may cede his claim against A to C in *securitatem debiti* and, together with that principal claim, he may also cede to C his rights under mortgage …. If now B fails to pay C on due date, then C may claim payment from A and if A also fails to pay C then, and only then, may C realise the mortgaged property …, to satisfy his claim against B. It should further be noted that C acquires no greater rights against A than B had against him. Eg if the debt owed by B to C is due before the debt owed by A to B becomes payable then C cannot proceed against A until such time as A would be compelled to pay B."

[26] The aforegoing example illustrates that a mortgagee may, in turn, cede to his or her creditor a claim for payment of a debt due to him or her, in other words the principal obligation, together with his or her real rights as mortgagee in respect of a property mortgaged to him or her by his or her debtor. From the bond document, annexure "mln1", it can be readily ascertained that Nedbank Limited was the original mortgagee and Mrs Nhlapo the original mortgagor, in other words the principal debtor. As such Nedbank could validly have ceded its real rights to its creditor, say for instance Mr Nhlapo, the applicant. The cedent, in other words Nedbank Ltd, would become the mortgagor vis-à-vis the cessionary, in other words Mr Nhlapo, its creditor. The latter would in turn become a mortgagee. Since the mortgaging of the property by the respondent in favour of Nedbank Limited substantially diminished the real rights of the dominium or ownership in the property the respondent could not confer on the applicant any

greater rights than she actually had at the time she purported to transfer the property back to the applicant as per annexure "c". The legal position is therefore clear that even if the respondent supported the applicant's application, the applicant would still have had an insurmountable obstacle on his way in that the respondent, as the cedent, no longer had the contractual freedom to do as she pleased with the property. The mortgage bond had curtailed the real right over the property which she ordinarily had as the owner prior to the passing of the mortgage bond.

[27] One of the functions of a mortgage bond is that it constitutes an acknowledgment of debt or some other admission of liability.[4] The bond contains an outright acknowledgment of debt if it has been passed by the debtor who owes a principal obligation. The bond on which the respondent relied squarely fell into that category.

[27] In **Thienhaus** case *supra,* at 30E the court further found, as one of the requisites of a valid bond that every cession of a bond must set forth the *causa* of the cession. Almost two decades later the court per Joubert JA stated that in our modern law cession can be seen as an act of transfer (*translatio iuris*) to enable the transfer of a right to take place, accompanied by means of an agreement to transfer, between a cedent and a cessionary, arising out of a *justa causa*, from which the intention of the cedent to transfer the right to claim (*animus transferendi*) appears or can be inferred and from

[4] **Thienhaus v Metje & Ziegler Ltd and Another** 1965 (3) SA 25 (A) at 31.

which the intention of the cessionary to become the holder of the right (*animus acquirandi*) appears or can be inferred.[5]

[30] In this matter, no antecedent agreement to transfer between the respondent, described as the cedent, and the applicant, described as the cessionary, premised on a *justa causa* whatsoever was recorded in the so-called cession agreement. As a result of the omission it could not be established *ex facie* the document whether the cedent signed the purported cession *cum animo transferendi.* In much the same way it could not be established, *ex facie* the document, whether the cessionary signed it *cum amino acquirendi*.

[31] Moreover, I was left in the dark as to the *justa causa* of the cession. On the one hand, the respondent contended that the discrepancies were attributable to the fact that she executed the cession as evidenced by annexure "c", under duress. I shall revert to the question of coercion later. At this juncture it is sufficient to point out that the applicant, on the other hand, proffered no explanation at all. This is significant because the onus rested on him to show on a balance of probabilities that the cession on which his cause of action was based was valid in law.

[32] The real object of a mortgage bond is to give notice to the world in general that a specific property of a particular debtor is the subject of a specific charge in favour of a particular creditor. The registration of the instrument of hypothecation

[5] **Johnson v Incorporated General Insurance Ltd** 1983 (1) SA 318 (A) at 331F – H.

in the deeds office is the means of informing other creditors that an *ius in re aliena* exists in favour of the mortgagee in respect of the hypothecated property.[6]

[33] In *casu* it was common cause that the applicant as the purported cessionary or secondary mortgagee of real rights in an immovalbe property did not give such notice whereas Nedbank Limited the original mortgagee did give such notice to the world at large. Put differently: The cession was never registered but the bond was – section 16.

[34] The so-called cession boiled down to a complete alienation of an immovable property. Such a comprehensive transfer of ownership resembled a mortgage bond which omitted reference to a debt it intended to secure. Where the necessary ancillary obligation intended to be secured is not accurately described a dangerous avenue of mischief and consequent prejudice to the unwary third parties is created.

[35] On Thursday, 28 March 2013 I gave an *ex tempore* judgment in which I decided that the respondent was the rightful and exclusive owner of the same property I am here dealing with and that Nedbank Ltd was the rightful holder of a valid mortgage bond passed over the property by the respondent alone and without the active participation of the applicant: vide case 1927/2012. The mortgage bond document contained an acceleration clause. In terms of the acceleration clause the full outstanding amount of the loan

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6 **Thienhaus** *supra* at 30E – H.

immediately becomes payable in the event of a breach in regular payments. When the respondent breached the payment terms of the loan agreement the bank as the mortgagee sued the respondent for the immediate repayment of the entire loan. The respondent did not defend the action and default judgment was given against her.

[36] Subsequently the bank launched an application to have the mortgage bond declared especially executable. Again the respondent did not oppose the application but her ex-husband, the current applicant did. On his behalf it was contended that the property could not be declared specially executable because, so it was submitted, the mortgage bond was tainted by some illegality. I rejected that submission.

[37] I found that the property could never be declared inexecutable on account of an unregistered limited real right in an immovable property sought to be executed by virtue of a registered real right. To find otherwise would defeat the entire commercial purpose of securing a mortgage bond over an immovable property. Moreover, to find otherwise would also mean that a mortgagee has a real right but no real remedy.[7] Such an absurd situation the law would not countenance.

[38] The transfer transaction between the parties as evidenced by annexure “b” constituted a serious interference with the entire dominium of the mortgage property:

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[7] **Nedcor Bank Ltd v Kindo and Another** 2002 (3) SA 185 (C) at 188D.

> "…do hereby irrevocably cedes, transfer and/or pass to **TEBOHO DAVID NHLAPO ID: 730122 5441 083** all my proprietary rights, title and interest in respect of the immovable properties at **115 Klaradyn Street, Pellisier Park,** Bloemfontein which accrued to me in the **Order** of **Divorce** of the **Free State Provincial Division** of the **High Court** and I hereby assign to him all obligations thereunder."

[40] The aforesaid transfer transaction clearly had a huge adverse impact on the mortgage which constitutes a charge upon the entire dominium of the land. Similarly the relief now sought by the applicant in these proceedings if it were to be granted would undoubtedly impose an interference with the mortgagee's real security. The essence of the application is to have the applicant declared the sole owner of the mortgaged property irrespective of the real rights currently held by Nedbank Ltd, without prior cancellation of the mortgage bond. That the court cannot do.

[41] The purported comprehensive alienation of the mortgaged land by the respondent in favour of the applicant without the retail bank's consent was of no legal consequences. Clause 7.1 of the mortgage bond document - annexure "mln1" provided:

> "7.1 The title deeds of the mortgaged property will be lodged and remain with the Bank until this bond is cancelled and **the mortgaged property will not be further burdened in**

> **any way without the written consent of, and on the conditions prescribed by, the Bank.**"

By signing the cession agreement which was tantamount to the wholesale alienation of the land without the consent of the mortgagee, the respondent, as the mortgagor, breached a material clause of the mortgage agreement.

[42] The mortgagee has since called up the bond. The property will be sold in due course subject to the real rights which third parties, if any, had acquired in it at the time the bond was registered or the real rights of others subsequently acquired with the mortgagees consent. In determining the preferential order of those real rights the applicant would not qualify to be considered. His alleged real right does not meet the basic requirements. At best for the applicant, what he has a personal right against the respondent but no real right against may be the bank.

[43] The value of the mortgage bond, as an instrument of security, lies in the confidence of the financial world that the law will generally give effect to its terms. The mere fact that the mortgaged property is residential in character is not *per se* enough to ground the conclusion that constitutional infringement of sec 26(1) will necessarily occur as was argued in *casu*.[8] This then is the complete answer to the applicant's collateral argument that the dismissal of his

[8] **<u>Standard Bank of South Africa Ltd v Saunderson and Others</u>** 2006 (2) SA 264 (SCA) per Cameron JA *et* Nugent JA.

application would effectively render him homeless and thereby infringe his right of access to adequate housing.

[44] It has to be borne in mind that the respondent and not the applicant is supposed to be occupying the residential property. The applicant should have vacated the property way back in 2006 when his real right of ownership was effectively terminated by the court order. Since then he had ample opportunity of finding an alternative shelter. In any event the mortgaged property has long ceased to be his primary place of residence. It will be recalled that he owns a fixed residential property at Thaba Nchu. In this city there are thousands of people who work here but stay at that particular town.

[45] Any contention that the respondent and the bank did not act in good faith in their dealings which ultimately brought about the burdening of the property by the passing of the mortgage bond over it, was flawed. The intervention of the applicant in that relationship cannot affect their rights or impose on them further obligations. None of them was supposed to be a custodian of the applicant's interest, if there were any in the property.

[46] The mortgagee may cede his or her rights under a mortgage without the consent of a mortgagor.[9] However, a mortgagor, in this instance the respondent, has no right to cede her encumbered real right in the mortgaged property without the

[9] **Corinth Properties (Pty) Ltd v Firstrand Bank Ltd** 2002 (6) SA 540 (W).

consent of the mortgagee. Her right remains frozen until such time as the bond is cancelled and the property released. Accordingly the purported cession tended to impair the secured position of the respondent's creditor, Nedbank Ltd. Therefore the applicant is not entitled to enforce his rights, if any, under the cession in so far as they are in conflict with the obligations of the respondent in terms of the mortgage bond. It is our law that a *mala fide* cession, intended to deprive the mortgagee of his rights, was not enforceable by the cessionary.

[47] In the circumstances I am inclined to uphold the respondent's defence or contention that to grant the current application would undermine the real right or real security held by the aforesaid bank.

[48] Now I turn to the respondent's second defensive challenge. I have earlier found that the applicant had probably known about the mortgage bond before the cession document, annexure "c" was signed. The respondent has thrown her full weight behind the bank. She opposed the applicant's application for the retransfer of the property to him. It is her case that she never intended to have the property retransferred to the applicant. She alleged that she did not freely sign the cession documents. She claimed that she did so under duress. It was contended by the applicant that the version of the respondent was false and that she signed the cession documents on her own free will.

[49] A very striking feature of the cession was the apparent lack of *causa* of the cession. **Johnson's** case *supra.* The applicant averred no *justa causa* on which the cession was based. Therefore it has to be accepted that there was no *quid pro quo* in this whole transaction. There was nothing in it for the respondent. There was everything in it for the applicant. I find it rather strange that a person in the respondent's financial predicament would generously volunteer to give away a major asset in her modest separate estate for virtually nothing in return. The respondent would like me to believe that the woman who recently divorced him because she no longer loved him and who was obviously struggling to make ends meet, for no apparent reason, chose to give him her seemingly biggest and most valuable property instead of surrendering such property to the bank in order to defray her huge debt of over R340 000,00. I find that version difficult to believe.

[50] Although the conduct of the respondent was not unfairly criticised, her version remained a more credible and probable account than that of the applicant concerning the circumstances which were prevailing prior to or at the time the cession deal was clinched. I tend to believe her. If it is accepted, and I think it should, that her act of signing the cession document was induced by undue pressure emanating from the applicant - then it has to follow that no valid cession ever came into existence. The transaction on which the applicant relied was accordingly impaired by lack of voluntariness, an elementary requisite of any agreement.

[51] I have earlier found that the bilateral agreement, annexure "c" was erroneously described as a cession. It was not. It was in fact a wholesale alienation of land. The legal position is very clear. In our law **the real rights** of 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 of deeds and not a deed of cession.

The other **limited real rights** in the land, such as servitudes or leases, 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 of deeds – section 16.

[52] It follows therefore, that since an attempt was made in *casu*, to convey the real rights in land from the respondent to the applicant by means of a deed of cession instead of a deed of transfer, the transaction was defective. Since the purported transfer was never executed or attested by the registrar, the transaction was fatally defective.

[53] In my view the whole transaction was null and void. Accordingly it had no force and effect whatsoever in law. It has to be regarded as *pro non scripto* for the reasons I have given. That being the case, it cannot be enforced against the respondent either. Her second challenge also succeeds.

[54] In the circumstances, I have come to the conclusion that the purported cession which the parties signed in Bloemfontein

on the 18th November 2008 was null and void and of no legal consequences. It was not binding on the respondent as well in the same way as it was not binding on her creditor, Nedbank Ltd.

[55] In the circumstances I make the following order:

55.1 The application is dismissed;

55.2 The applicant is directed to pay the costs.

M. H. RAMPAI, J

On behalf of plaintiff: Adv. B. S. Nene
Instructed by:
Fixane Attorneys
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On behalf of respondent: Attorney M. Moholo
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