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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case no: 15785/2023

In the matter between:

WILLEM NERO

First Applicant

MAGRIETA NERO

Second Applicant

and

ABSA BANK LIMITED

First Respondent

THE SHERIFF OF THE HIGH COURT, CLANWILLIAM

Second Respondent

JULIE JACOBS

Third Respondent

MYRENE SYBIL JACOBS

Fourth Respondent

FOURIE BASSON & VELDTMAN

Fifth Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Sixth Respondent

CEDERBERG MUNICIPALITY

Seventh Respondent

JUDGMENT

BORGSTRÖM AJ:

INTRODUCTION

1. This matter, like many others before this Court in which mortgage bonds are considered, presents a tale full of lament and sadness.

2. The First and Second Applicants (“**Mr Nero**” and “**Mrs Nero**” respectively, or collectively “**the Neros**”) are a married couple¹ who are both 70 years old. Since 2004² they have owned and lived in a house situated on a property (“**the property**”)³ in the small coastal town of Lamberts Bay.

3. In 2005 the Neros obtained two loans (for R46 000 and R100 000) from the First Respondent (“**ABSA**”), with a structured repayment plan (over a period of 20 years), secured by two mortgage bonds over the property.

4. At times the Neros clearly struggled to make regular repayments to ABSA. Albert Einstein is credited with the aphorism that compound interest is the greatest force in the universe. This was illustrated for the Neros, as by 2013 (after 8 years of payments) the outstanding balance on the loans outstripped the capital amounts they obtained. At this stage ABSA issued summons out of this Court, and on 26 April

¹ The Neros are married in community of property.

² The Neros purchased the property on 15 September 2003 and transfer was registered on 10 June 2004.

³ Being erf 6[...], Elands Bay, situated at 3[...] A[...] Crescent, Elands Bay.

2013 this Court granted an Order against the Neros for R176 033.20, plus interest (“**the 2013 Order**”). Subsequently, this Court declared the property specially executable,⁴ and it was duly attached.⁵ However, by November 2014 the Neros managed to clear the arrears owed to ABSA, and the loan agreements were reinstated.

5. In the years that followed, the repayments made by the Neros continued to be spotty at best. In October 2019 ABSA again issued summons against the Neros. At this stage, the outstanding balance remained almost R94 000, with arrears of about R22 000. On 5 November 2019, the Neros managed to make a payment that satisfied ABSA, and those proceedings went no further.

6. But after that, the Neros made no payments at all during 2020 and early 2021. Those were of course financially challenging times for many people (with the lockdowns flowing from the COVID-19 epidemic). ABSA thus launched fresh proceedings in this Court on 11 March 2021,⁶ which were not opposed. On 3 September 2021 this Court (per Mr Justice Le Grange) granted an order in favour of ABSA, in the absence of the Neros (“**the 2021 Order**”). In terms of this Order:

6.1. The Neros were directed to pay ABSA an amount of R176 308.97, with interest at the rate of 6.65% from 27 January 2021; and

6.2. The property was specially executable, with a minimum reserve price of R160 000 for the sale in execution.

7. As I shall deal with below the outstanding balance reflected in the 2021 Order was incorrect. A recalculation by ABSA, contained in a schedule provided to the Neros in May 2023 (“**the ABSA schedule**”), indicates that on 27 January 2021 the outstanding balance was, in fact, R100 127.66 (with arrears of R62 313.59); and that

⁴ In an order of 26 June 2014.

⁵ A writ of attachment was issued by the Registrar of this Court on 19 June 2014.

⁶ On 11 March 2021 ABSA launched an action, under case number 4427/2021, for repayment of the outstanding balance; and on 13 July 2021 ABSA launched an application to declare the property specially executable, in accordance with Rule 46A of this Court’s Uniform Rules. launched on 11 March 2021

at the date that the 2021 Order was granted the outstanding balance was R129 307.92 (with arrears of R99 895.08).

8. Following the usual processes, a sale in execution was initially arranged for 13 June 2022. But this was delayed, as in June 2022 the Neros again managed to scramble and made payments to ABSA totalling R125 000. ABSA's schedule indicates that at this stage the outstanding balance was just R32 634.02, and the arrear payments owed were the same.

9. In January 2023 the Neros attempted to reach an arrangement with ABSA for the payment of R5 000 per month. But this was not acceptable to ABSA, which at this stage was still operating under the impression that the amount owing was higher (R70 300, when in fact it was just over R34 600).

10. A sale in execution eventually took place on 22 February 2023, in an auction conducted by the Seventh Respondent ("**the Clanwilliam Sheriff**") at his offices in Clanwilliam. The property was bought by the Third and Fourth Respondents ("**the purchasers**") for R161 000. The Neros submit that this is far below the actual value of the property, which is illustrated by the fact that in March 2023 the purchasers indicated that if the Neros wished to re-acquire the property, they would only consider an offer of between R450 000 and R500 000.

11. Following the sale, the Neros obtained the services of their current attorneys of record, on a *pro bono* basis. Mr *Walters*, who represented the Neros before me, also acted on a *pro bono* basis. Both must be commended for their willingness to do so.

12. On 11 September 2023 the Neros launched the main application under the current case number ("**the main application**"). In it, the Neros present an array of arguments marked by their creative identification of alleged technical shortcomings in the sale in execution conducted by the Clanwilliam Sheriff; and the transfer of the property to the purchasers effected by the Sixth Respondent ("**the Registrar**").

13. However, after receiving ABSA's answering papers, the Neros and their legal representatives clearly recognised that they faced a challenge – based on the application of the ordinary approach to factual disputes in application proceedings.⁷ Thus, in a replying affidavit, Mr Nero contended that four issues should be referred to oral evidence.

14. In the proceedings that served before me, Mr *Walters* indicated that the Neros now only sought that one of the issues should be referred to oral evidence.

15. In essence the Neros allege that the corrected ABSA schedule (provided to them in May 2023, as referred to in paragraph 7 above) remains incorrect, and that oral evidence would show that it improperly inflates the outstanding balance and arrear amounts owed by the Neros to ABSA. This would be critical in that if allegedly improper charges could be stripped out, it would be evident that:

15.1. After the Neros made the payments of R125 000 in June 2022, they had in fact settled the full outstanding balance and owed nothing to ABSA any longer; and

15.2. There were no arrears owed to ABSA at the time of the sale in execution – thus reinstating the mortgage loan agreement in accordance with section 129(3) of the National Credit Act 34 of 2005 (“**the NCA**”).

16. Mr Jonker, who appeared on behalf of ABSA, argued that:

16.1. This Court should refuse the Neros' attempt to refer the matter to oral evidence, for reasons dealt with below; and

16.2. None of the arguments raised by the Neros were sustainable, and the main application should be dismissed.

THE DISPUTE OF FACTS ARISING FROM THE MAIN APPLICATION

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-I

17. As noted above, on 11 March 2021 ABSA issued summons against the Neros, in which ABSA claimed that (as at 27 January 2021) the outstanding balance owed by the Neros was R176 308,97.

18. The amount claimed by ABSA was repeated in the 2021 Order.

19. I note that in the main application, the Neros suggest that the process leading up to the 2021 Order was flawed – including that:

19.1. They did not receive a letter of demand sent by ABSA on 1 February 2021 by pre-paid registered post, and tracking results show that the letter was actually collected by a Mr Van Der Merwe on 12 February 2021.

19.2. Returns of service indicate that the summons was personally served on the Neros on 19 March 2021, and an application under Rule 46A of this Court's Uniform Rules was personally served on them on 13 July 2021. But Mr Nero alleges that they cannot recall receiving the summons.

20. In answer, ABSA submits that the Neros' allegations display *mala fides*. In addition, Mr *Jonker* pointed out that the Neros at no point sought to rescind the 2021 Order (on the basis that it was improperly granted in their absence), or to seek leave to appeal against the 2021 Order. Relief of this type is also not sought in the main application. As such, 2021 Order had to be respected, and it was not open to the Neros to challenge the validity of that Order.

21. I agree. As the Constitutional Court has asserted, "*all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside.*"⁸ This is a matter of profound importance, as "[a]llowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the

⁸ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and others* (2021 (5) SA 327 (CC) at para 59. See also *The Master of the High Court (North Gauteng High Court), Pretoria v Motala NO & Others* 2012 (3) SA 325 (SCA) at para 11.

*stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built”.*⁹

22. Returning to the current case: An execution sale was initially arranged for 13 June 2022, but that did not take place.

23. On 3 May 2022 Mr Nero was presented with “*cancellation figures*” indicating that by this stage the total amount owing to ABSA was R247 183.88 – with interest continuing to accrue at the rate of 7.4%.

24. The Neros only later learned that the actual outstanding amount at this stage (i.e on 3 May 2022) was R133 543.84. Be that as it may, Mr Nero undertook to pay R100 000 on 1 June 2022, and R50 000 at the end of June 2021.

25. The Neros managed to pay the amount of R100 000 on 1 June 2022, as promised; and made two further payments on 8 and 10 June 2022 totalling R25 000. Based on these payments, and the promise of further payment, ABSA held the sale in execution (scheduled for 13 June 2022) in abeyance.

26. Sadly, the Neros could not make the further payment – as they had hoped – at the end of June 2022. In fact, they made no further payments at all after this stage.

27. The Neros note that on 12 December 2022 ABSA’s attorneys arranged for the property to be sold in execution on February 2023 – and annex a copy of the Notice of Sale. Curiously, they avoid stating whether they were aware of the Sale Notice. The notice indicates that the sale would be conducted by auction at the offices of the Clanwilliam Sheriff, subject to the reserve price of R161 000.

28. The sale was also advertised in *Die Burger* newspaper and the *Government Gazette* on 10 February 2023.

⁹ *Department of Transport and Others v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) at para 183.

29. Mr Nero alleges that during February 2023 he called ABSA's attorneys, and "*arranged*" with a Ms Sonja Thiart that payments would be made of R5 000 per month, commencing on 28 February 2023. This undertaking was confirmed in a handwritten letter sent by Mr Nero to Ms Thiart. Mr Nero now presents this as an "*agreement*", even though his contemporaneous note makes no such bold claim. In answer, ABSA notes that Ms Thiart has left the employment of its attorneys. However, her file notes indicate that she promised only Mr Nero that she would take instructions from ABSA and revert. She duly spoke to ABSA's point employee, who refused to accept Mr Nero's offer; and required payment of 95% of the arrears (which ABSA believed to be R70 300 at the time). Ms Thiart conveyed to Mr Nero that his offer was not accepted.

30. The sale in execution continued on 22 February 2023. As noted above, the property was sold to the purchasers for R161 000.

31. On 27 March 2023 the Nero's attorney approached the purchasers, indicating that his clients wished to purchase the property back. It was at this stage that the purchasers indicated that they would only consider an offer of between R450 000 and R500 000.

32. After this the Nero's attorney approached ABSA and sought a detailed statement of account. On 9 May 2023 ABSA provided the schedule, referred to in paragraph 7 above, which detailed all activity on the Nero's loan accounts since 23 February 2005 until 6 May 2023. Two aspects of this schedule are noteworthy:

32.1. **First**, as dealt with above, the outstanding amount reflected in the action proceedings brought by ABSA in this Court on 11 March 2021, and which was carried forward to the 2021 Order, is incorrect. In the action proceedings, ABSA suggested that on 27 January 2021 the outstanding balance was R176 308.97; whereas ABSA now accepts it was R100 127.66 (with arrears of R62 313.59). At the time that the 2021 Order was granted, the outstanding balance was R129 307.92 (with arrears of R99 895.08).

32.2. **Second**, a column of the ABSA schedule (headed “*description*”) lists codes in respect of each line item. For reasons which become important below, on 22 May 2023 ABSA’s attorneys provided the Neros’ attorney with a document explaining all of the codes used in the statement.

33. The ABSA schedule clearly caused fresh heartbreak for the Neros.

33.1. After they made the payments in June 2022, totalling R125 000, the outstanding balance and arear amounts were both just R32 634.02.

33.2. When Mr Nero sought to enter an arrangement in February 2023, ABSA considered the matter, and refused Mr Nero’s request, based on the mistaken assumption that the outstanding balance was R70 300; whereas it was actually just over R34 665.14.

34. If the Neros had known the correct outstanding balance at these times, things may have turned out differently.

35. But, as Mr *Jonker* noted – correctly in my view – none of this assists the Neros in pursuit of the relief now sought:

35.1. The 2021 Order is not negated because the outstanding balance is incorrectly recorded. The Neros have not sought to challenge the 2021 Order, and as such it stands and cannot be disregarded.

35.2. If the Neros had settled the arrears after the 2021 Order was granted, they could have relied on section 129(3) of the NCA to reinstate the original loan repayment schedule (and stopped the sale in execution). But, based on the figures contained in the ABSA schedule, this did not happen at any stage. The closest that the Neros came was in June 2022, but even then their account remained in arrears. Section 129(3) of the NCA finds no application in these circumstances.

36. In the founding papers in the main application now before this Court, the Neros adopted a different strategy: They argued that the balances reflected in the ABSA schedule were still incorrect, and were inflated as a result of:

36.1. *“Unexplained large debits, totalling R101 727.22, which is clearly not interest and seems to be an overcharging of bank fees. These debits are marked by the code ‘HMP’”*. The Neros refer to 8 line items making up the total of R101 727.22, spanning from 1 June 2015 to 8 June 2022, and contend that these exceed the maximum charges allowed in terms of the NCA, which are limited to R69 per month).

36.2. Other *“unexplained annual charges”* dating back to 2011.

36.3. An *“annual fee of R3 689.10 every year on 1 June since 2009 to 2022, which I assume is a facility fee.”* Mr Nero notes that these amounts total R51 647.40, and far exceed the maximum prescribed fee of R60 per month, which over the same period would have amounted to R11 592.00 – resulting in an overcharge of R40 055.40.

36.4. The inclusion of untaxed legal costs, between 16 June 2013 and 31 August 2022, totalling R85 552.76.

36.5. The use of a variable interest rate, while the 2013 default judgment of this Court only allowed a fixed interest rate of 8.65%.

37. The Neros contended that if some or all of these additional, improper charges, are excluded, it would be evident that they owed nothing to ABSA at the date of the sale in execution. Alternatively, they would have at least settled any arrears – thus reinstating the mortgage loan agreement in accordance with section 129(3) of the NCA.

38. But, unfortunately for the Neros, ABSA’s answering papers efficiently undermined the factual bases for the arguments above:

38.1. The Neros arguments rest on assumptions, or suppositions, that the disputed amounts refer to bank fees, unexplained annual charges, or facility fees. In fact, each line item in the ABSA schedule is marked by a code.

38.2. These codes were explained in the document sought by the Nero's attorneys, and provided by ABSA on 22 May 2023 – almost four months before the main application was launched.

38.3. Having regard to the codes, the Neros and their attorneys could never have believed that the disputed amounts related to bank fees or facility charges, or were unexplained. Rather, as the Neros themselves noted, these charges were described in the statement with the code "*HMP*". In the document provided to the Neros' attorney on 22 May 2023, it was explained that this code related to "*Home Owners' Mortgage Protection*".

38.4. Similarly, other charges were described with the code "*HOC*", which related to "*Home Owners' Comprehensive Insurance*".

38.5. The Neros could not contest the inclusion of the HMP and HOC amounts. Even though the total amount reflected in the September 2021 Order was overstated, the Court had a statement before it which included all of these HMP and HOC charges. The inclusion of HMP and HOC charges was thus *res judicata*.

38.6. It is evident from the statement that the amounts identified as untaxed legal fees were not taken into account in the calculation of the outstanding balances and arrears.

38.7. The Neros attack on the use of a variable interest rate, and the suggestion that the 2013 Order imposed a fixed rate of 8.65% was incorrect. The loan agreements imposed a variable rate, linked to the prime rate. Moreover, the property was sold pursuant to the 2021 Order, and not the 2013 Order – which had fallen away. On the pleadings before the Court in

2021, a variable rate was pleaded in ABSA's Particulars of Claim; and the Order was granted on this basis. This issue was thus also *res judicata*.

39. In their replying papers, the Neros thus now claimed that there were "*material disputes, which were not foreseen at the time that the application was launched*", which this Court should refer to oral evidence.

40. With regard to the disputed amounts in the ABSA schedule, the Neros do not dispute that:

40.1. They mischaracterised most of the alleged, improper additional charges reflected in the statement; and

40.2. The line items for untaxed legal fees were not taken into account in the calculation of the outstanding balances and arrears.

41. However, the Neros now argued that the original mortgage loan agreements concluded with ABSA back in 2005 only referred to "*normal Home Owners' Insurance*" – which had a starting premium of R1 117.96, or R93.16 per month. This was included in the line items in the ABSA schedule marked with the code "*HOC*". But, the Neros now state, this "*does not detract from the fact that the loan agreements did not make provision for Home Owners' Mortgage Protection and the exorbitant fees associated with it*". and as such, all of the charges on the ABSA schedule reflected as HMP amounts were improper.

42. The Neros thus contend that their liability for these HMP amounts should be referred to oral evidence, which would also allow them to call for proper discovery of all relevant documents on which ABSA claimed that they had agreed to take out Home Owners' Mortgage Protection cover.

43. Mr *Walters* referred me to the fact that this Court has a discretion, under Rule 6(5)(g) of the Uniform Rules, to determine the appropriate manner to resolve a dispute of fact arising in motion proceedings; and pointed me to the well-established principles that when the probabilities are evenly balanced in competing affidavits,

and oral evidence may tip the balance in favour of the applicants, it is appropriate to refer the dispute to oral evidence.¹⁰

44. But, in my view, there are several factors that weigh heavily against a referral to oral evidence of the factual disputes relating to the amounts reflected in the ABSA schedule:

45. **First**, the Neros bore the duty to establish their case in their founding papers. They did not do so. Instead, as seen above, the case set out in their founding papers was premised on speculative assertions and mischaracterisations of the disputed amounts – which were patently unsustainable if the Neros and their representatives had given even the most perfunctory attention to the explanation of the codes set out in the document provided by ABSA on 22 May 2023 (almost four months before the main application was launched).

46. **Second**, ABSA was only called on to answer the case that was presented by the Neros, which it did, by pointing out that the disputed charges related to insurance charges. It is not open to applicants in motion proceedings to rely on statements presented in answering papers to sustain the relief they seek.¹¹ It thus does not assist the Neros to point out that ABSA failed to establish the basis for charging amounts for “*Home Owners’ Mortgage Protection*” (under the code HMP). This was not the case that ABSA was called to answer.

47. **Third**, the factual dispute upon which the Neros now rely is an entirely new argument raised in reply, which on ordinary principles would fall to be struck out and disregarded.

48. **Fourth**, the Neros elected to approach this Court in motion proceedings. But, where a litigant “*has reason to believe that facts essential to the success of his claim will probably be disputed,*” they choose “*that procedural form at [their] peril, for the*

¹⁰ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1115 (T) at 1163-1164, and *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 979H-I

¹¹ *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A); most recently affirmed by this Court in *Goldstar Finance (Pty) Ltd and Others v Capitec Bank (Pty) Ltd and Another* [2024] 1 All SA 727 (WCC) at para 55

Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application.”¹²

49. In this case the Neros chose to employ motion proceedings when they had no proper understanding of the basis of the disputed charges, or the bases on which they disputed these charges. These issues could have been, and should have been, considered and addressed before the main application was launched. In the absence of any understanding, the overwhelming prospect of a factual dispute should have loomed large.

50. At the very least, when the Neros sought to introduce their new argument in reply (disputing ABSA's right to impose charges for insurances), they clearly realised that their case in this regard now turned on disputed factual issues – which could not be addressed in ordinary motion proceedings. Hence the need to now refer the matter to oral evidence. But if this is so, then it must follow that the Neros accept that if they had raised the same arguments at the outset (as they should have done), then pursuing their case in motion proceedings would have been inappropriate. The Neros cannot, in my view, be in a better position because they only introduced their arguments in reply.

51. **Fifth**, the Neros bear a duty to establish a genuine dispute of fact. In motion proceedings this Court is entitled to reject factual assertions that are fanciful or untenable.¹³ This cannot be avoided through the simple expedient of referring disputes to oral evidence.

52. Mr *Jonker* argued that the Neros face a difficulty in this regard: namely that even if ABSA's recalculations now show that the total amount reflected in the 2021 Order is wrong, this does not change the fact that the amount ordered by the Court was based on a calculation which included all HMP charges until that point. The numerical error in the 2021 Order did not change the fact that the amount ordered

¹² *Tamarillo v BN Aitken* 1982 (4) SA 398 (A) at 430G, citing *Room Hire*, *supra* fn 10 at 1168; *Ngqumba v Staatspresident*; *Damons NO v Staatspresident* 1988 (4) SA 224 (A) at 261C-D

¹³ *Bester NO & Another v Pieters* 2023 (1) SA 466 (WCC) at para 35

included HMP charges. It would also not change the fact that interest after 27 January 2021 was regulated by the 2021 Order, and not the 2013 Order. As dealt with above, the 2021 Order is not challenged.

53. Mr *Walters* argued that even if this was all accepted, the 2021 Order only related to amounts levied against the Neros' account until 27 January 2021; and they remained free to challenge all HMP amounts imposed after 27 January 2021. This would include amounts of R16 887.52 and R3 689.10 on 1 June 2021; and R3 689.10 and R19 420.64 on 1 June 2022. If these amounts could be excluded, it would mean that after the Neros made the payments in June 2022, the outstanding balance (of R32 634.02) would have been settled in full.

54. Mr *Jonker* countered that the 2021 Order established that ABSA was entitled to charge HMP amounts before 27 January 2021, and that this issue was thus *res judicata*. It was thus not open to the Neros to raise this issue now, so as to challenge the imposition of HMP charges after 27 January 2021. The issue had been decided. I am not convinced by this argument. It does not seem to me that the Court considered whether HMP charges could be imposed after 27 January 2021, or after the date that the 2021 Order was actually granted (on 3 September 2021).

55. But a greater problem seems to me to be that the Neros argument (i.e. that they never agreed to take out Home-Owners Protection cover) is not one that seems particularly likely. ABSA had imposed charges for such cover every year, and the Neros did not ever question this. In addition, it is relatively standard practice for credit providers to require such cover (in addition to ordinary comprehensive home-owners' cover). It is also not particularly striking that the HOC charges on the Neros account increased as time went on – in light of their far-from-perfect repayment record; and the fact that ABSA had to bring proceedings against them on several occasions.

56. In all of these circumstances, I do not see any compelling reason to exercise this Court's discretion to refer the issue to oral evidence.

57. Finally in this regard, Mr *Walters* referred to the Constitutional Court's findings in the *Nkata* case,¹⁴ which held that the NCA “*seeks to infuse values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate*”. This imposed “*not only rights but also responsibilities*” on credit providers to ensure that the resolution of any dispute “*must bear the hallmarks of equity, good faith, reasonableness and equality.*”

58. The suggestion appeared to be that ABSA bore a duty to correct the calculation errors underpinning the 2021 Order. Furthermore, even if new arguments were raised in reply, ABSA bore a duty to ensure that the Neros were treated fairly and properly. Thus, after the Neros filed their replying papers, ABSA could not simply rely on the ordinary rules applicable in motion proceedings, and ask that the main application be dismissed. Rather, ABSA should have investigated the matter, and applied for leave to file further affidavits demonstrating their right to charge the HMC amounts.

59. But to my mind the right to be treated with fairness and compassion, does not excuse the Neros from all procedural requirements that apply to all litigants. The Neros, after all, had the benefit of legal representation. As such, the application to refer the matter to oral evidence must fail.

THE REMAINING ISSUES IN THE MAIN APPLICATION

60. In addition to the issue above, the main application raised three other arguments on behalf of the Neros.

(a) The correct Sheriff to undertake the sale in execution

61. The Neros pointed out that the property is situated in the service area of the Sheriff for Piketberg. As such (pursuant to Rule 46(4)(b) of this Court's Uniform Rules) the Piketberg Sheriff was required to conduct the sale in execution in the Piketberg Magisterial district.

¹⁴ *Nkata v First National Bank Ltd* 2016 (4) SA 257 (CC) at para 94

61.1. The Neros note that returns of service indicate that the summons preceding the 2021 Order was served (on 19 March 2021) by the Sheriff of this Court for Moorreesburg (**“the Moorreesburg Sheriff”**), who at this stage was also the Acting Sheriff for the Piketberg area.

61.2. So too, returns of service indicate that an application to declare the property specially executable was served (on 13 July 2021) by the Moorreesburg Sheriff – in his continuing role as the Acting Sheriff for the Piketberg area.

61.3. Furthermore, on 15 September 2021 the Registrar of this Court issued a Writ of Attachment, pursuant to which the Sheriff of Moorreesburg attached the property on 1 October 2021. The Sheriff’s Notice of Attachment again indicates that at this stage he was the Acting Sheriff for the Piketberg and Porterville areas. On this basis a sale in execution was scheduled for June 2022. As noted above, this did not take place.

61.4. But, the Neros note, on 12 December 2022 ABSA’s attorneys arranged for the property on February 2023 – and annex a copy of the Notice of Sale. Curiously, they avoid stating whether they were aware of the Sale Notice. What is pointed out though is that the Notice indicates that the sale would now be conducted by auction at the offices of the Clanwilliam Sheriff. This is what also occurred on 22 February 2023.

61.5. The Neros contest that the Clanwilliam Sheriff did not have the authority to conduct the sale in execution. They assert that in late March 2023 their attorney confirmed that the Moorreesburg Sheriff was still the Acting Sheriff for the Piketberg area, and as such was the only person with authority to conduct the sale. Contrary to this, the sale was conducted by the Clanwilliam Sheriff (in his offices some 60 kilometres from Lamberts Bay, in the Magisterial district of Caledon).

62. In answering papers, ABSA provided evidence that in October 2022 the Moorreesburg Sheriff informed the transferring attorneys that a process was underway to transfer responsibility for Elands Bay to the Clanwilliam Sheriff; and as such the matter was referred to the Clanwilliam Sheriff. Pursuant to this, the Clanwilliam Sheriff was appointed on an *ad hoc* basis to deal with the sale in execution in this case.

63. In their replying papers, the Neros can only indicate that their attorney had attempted to contact the Sheriff's Board to verify that the Clanwilliam Sheriff was appointed on an *ad hoc* basis, but this had not been answered. They asserted that this aspect should be referred to oral evidence so that they can "*subpoena the Board to shed light on this dispute of fact*".

64. But, as noted, the attempt to refer this dispute to oral evidence was not pursued.

(b) Notifications of the sale in execution

65. In terms of Rule 46(7)(a), at least 10 days before a sale in execution, the sheriff conducting the sale must: **(a)** post a notice on the noticeboard of the Magistrate's Court of the district in which the property is situated; and **(b)** post a notice as near as may be to where the sale is actually to take place.

66. The Neros state that their attorney spoke to the office manager of Clanwilliam Court (Mr Hannie Muller) who confirmed that no notice of the sale was posted on the notice board of that Court.

67. The Neros further submit, rather cryptically, that based on "*the modus operandi*" of ABSA and the Clanwilliam Sheriff, this Court can "*safely accept*" that no notice was placed on the board of the Magistrate's Court for the District of Piketberg either.

68. In its answering papers, ABSA notes, quite correctly in my view, that the Neros' reliance on supposed statements made by Mr Muller (the Clanwilliam court

manager) to their attorney, constitute inadmissible hearsay evidence of the fact whether there was a notice placed on the board at the Clanwilliam court. In any event, the Clanwilliam Sheriff provided an affidavit confirming that he attached a copy of the notice on the board of the Magistrate's Court in Clanwilliam, which was reflected in his returns.

69. In his replying affidavit, Mr Nero attempts to argue that the Sheriff's return is not sufficient to prove that the notice was properly posted, and to expand the argument. On this basis Mr Nero contended that oral evidence is required to cross-examine the Clanwilliam Sheriff to determine:

69.1. *"Whether the Sheriff has informed all other sheriffs appointed in the district of Piketberg ... of the day and place of the sale [Rule 46(7)(a)]."*

69.2. *"Whether the Sheriff has affixed a copy of the notice of sale in execution to the notice board at the Magistrate's Court of Clanwilliam [Rule 46(7)(e)(i)] ..."*

69.3. *"Whether the Sheriff has furnished a copy of the conditions of sale to all other sheriffs appointed in the district of Piketberg ... [Rule 46(8)(b)(i)] ..."*

69.4. *"Whether the Sheriff has furnished a copy of the conditions of sale to [the Neros] not less than 15 days prior to the date of sale, or at all [Rule 46(8)(c)]."*

69.5. *"Whether the Sherrif conducted the sale upon the conditions of sale in that he read the conditions of sale out to the persons present before the start of the sale [Rule 46(12)(a)]."*

70. In argument the Neros also did not persist in their attempt to refer this matter to oral evidence.

(c) The requirements for transfer

71. The Neros allege that enquiries by their attorney (on 2 June 2023) indicated that the Seventh Respondent ("**the Municipality**") had not issued a rates clearance

certificate in respect of the property before its transfer to the purchasers – contrary to the peremptory requirements of section 118 of the Local Government: Municipal Systems Act 32 of 2000.

72. Instead, the documents in the Deeds Office (obtained on 10 July 2023) indicated that the transferring attorneys had only obtained a certificate from the Municipality in terms of section 28(1) of the Municipality's By-Law on Municipal Land Use Planning, 2019 (**"the By-Law certificate"**). This certificate does not relate to rates, but to the fact that the buildings on the property accorded with local planning and land use restrictions, and that all structures on the property have approved building plans.

73. The Neros contend that the transferring attorneys confused the requirements for a section 118 certificate and the By-Law certificate. The certificates serve different purposes, and both are required as pre-requisites for transfer. The Neros continue that as a result of the transferring attorney's confusion, *"the Registrar of Deeds was unintentionally misled"* and allowed the transfer to proceed in circumstances where this should not have occurred.

74. In the replying papers, ABSA's deponent argues that section 118 of the Systems Act does not provide that a transfer completed without a rates clearance certificate is void; and that the Neros have no standing to claim that the transfer was voidable on this basis. This is because section 118 of the Systems Act is a provision for the benefit of the Municipality, and could not be raised by the Neros.

75. Furthermore, ABSA's deponent noted that there was no evidence of any arrear rates owing to the Municipality; and the conditions of sale protected the Municipality adequately, as they made the purchasers liable for all rates, levies and duties owing to the Municipality in respect of the property.

CAN THIS COURT DECIDE THE MAIN APPLICATION AT THIS STAGE?

76. In his written argument, Mr *Jonker* contended that if the Neros failed in their attempt to refer the main application for oral evidence, then this Court should dismiss the main application. This followed in that:

76.1. On the evidence before the Court, the Neros had failed to establish a factual basis for the arguments that: the ABSA schedule improperly inflated the balance owed by the Neros; the Clanwilliam Sherrif lacked authority to conduct a sale in execution; or that proper notice of the sale was not placed on the notice board of the Clanwilliam Magistrate's Court.

76.2. As a matter of law, section 118 of the Systems Act did not affect the validity of the sale in execution. Non-compliance also did not render the transfer of the property to be void, and the Neros had no standing to set aside the transfer based on non-compliance with section 118.

77. However, Mr *Walters* indicated that his argument was restricted to the application to refer one issue to oral evidence. If this was unsuccessful, he contended that the Neros deserved the right to present full argument on all possible arguments – including the application of section 118 of the Systems Act (which Mr *Walters* did not address at all).

78. Furthermore, as I understood the argument, Mr *Walters* suggested that if the application to refer the matter to oral evidence was unsuccessful, his clients would possibly consider withdrawing the main application; and launching action proceedings dealing with the same issues. Indeed, Mr *Walters* suggested that this prospect should tilt this Court towards granting the relief sought to refer the main application to oral evidence, on a purely practical consideration.

79. In my view the parties should have been prepared to deal with the merits of the main application, in the event that the application to refer the case to oral evidence was unsuccessful.

80. However, I accept that I did not enjoy the benefit of full argument on all of the issues mentioned above. That being said, I agree with Mr *Jonker* that on the papers

before me, the main application is almost certainly doomed to fail. This outcome cannot be frustrated by the main application being left in a state of limbo.

81. Accordingly, I am of the view that if the Neros do not take steps to re-enroll the main application for hearing within three months, the main application shall be deemed to have been dismissed with costs.

CONCLUSION

82. It would take a hard person not to be moved when considering the facts of this case. This is so in many cases involving mortgage bonds, but it is particularly acute in this case. After many years of making repayments, two elderly people face the prospect of losing the house in which they have lived for 20 years. They made sincere efforts to settle their debts in June 2022, and only a small amount was left outstanding. The result is that their house was sold at auction for a 'fire-sale' price.

83. In these circumstances, the Neros were well within their rights to test whether ABSA followed the legal requirements at every step – and to demand punctilious compliance with those requirements. But when banks and credit providers banks follow all requirements, their ability to rely on orders of this Court cannot be overshadowed by maudlin pleas alone – no matter how heart-wrenching the story may be; or how close the clients came to settling their debt. ABSA is entitled to expect that its agreements with its clients are enforced, the security it holds can be called up and utilised effectively, and that the order it obtains from this Court are respected.

ORDER

1. I accordingly make the following order:

1.1. The application to refer the current matter to oral evidence, is dismissed.

1.2. The Applicants shall pay the costs incurred by the First Respondent.

1.3. In the event that the Applicants fail to take steps, within three months of this Order, to once again set down the main application under the current case number for hearing, then the main application shall be deemed to have been dismissed, with costs.

D.P BORGSTRÖM
ACTING JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION

APPEARANCES

For the Applicant: Adv André Walters

Instructed by:

Mr Yan Smit
Smit & Co Attorneys

For the First Respondent: Adv Wynand Jonker

Instructed by:

Mr JC Fourie
Fourie Bosman & Veldtman Attorneys

Date of hearing: 6 August 2024

Date of judgment: 10 December 2024 (Electronically)