LENDERS CONSTRAINED BY NCA PROVISIONS IN FORMULATING DEBT SETTLEMENT PROPOSALS

*Absa Bank Limited v Johan Serfontein and Another (*140/2023) [2025] ZASCA 11 (10 February 2025)

This appeal concerned an acknowledgement of debt, incorporating a power of attorney, that was entered into between a bank and a debtor in an attempt to reach a settlement in respect of outstanding debts. In part, the settlement agreement gave the bank authority to sell the debtor's property without recourse to a court. This, along with various other provisions, was found to be in contravention of the National Credit Act. The judgment is a reminder of the limitations placed on lenders when negotiating alternative repayment terms for an outstanding debt.

The judgment can be viewed here.

FACTS

In July 2003, ABSA granted Mr Serfontein an overdraft facility. Over the years the overdraft limit was increased, necessitating the bank to insist on security. At the time of the present proceedings, the bank had registered four covering mortgage bonds over Mr Serfontein's property. As additional security, his father, Mr Serfontein senior, signed a deed of suretyship to be jointly and severally liable for his son's obligations to the bank and the bank registered two covering bonds over Mr Serfontein senior's immovable property.

Mr Serfontein fell into arrears. During 2015, after negotiations with the bank, he undertook to repay an amount of R2 million in July 2015, but defaulted again.

Absa thereafter approached Mr Serfontein in an attempt to negotiate a solution. An exchange of draft agreements between the legal representatives of both parties followed. In the first draft, Mr Serfontein offered to sell his property and settle the debt owing to ABSA, in the event of his default under a proposed payment plan. This version was rejected. Instead, the bank presented an acknowledgment of debt incorporating a power of attorney (the 'AOD/POA') that provided for, amongst other things, the sale of the immovable property of both Serfonteins.

The Serfonteins objected to the inclusion of the sale of the property of Mr Serfontein senior. Ultimately, the bank agreed to excise the clause relating to that property, which resulted in the parties' agreement on the final version of the AOD/POA in March 2019.

The Serfonteins conceded that they had signed the final version of the AOD/POA after they had obtained 'practical legal advice with regard to the settlement of the debt' from their legal representative.

The AOD/POA was a comprehensive and detailed document.

- Clause 1 comprised the acknowledgment of debt for an amount of R7 131 019.14, plus interest. The Serfonteins further acknowledged that they had defaulted on their obligations and were unable to honour them.
- The power of attorney component of the AOD/POA was in clause 2, headed 'Power of attorney regarding immovable property'. In clause 2.3 thereof, the Serfonteins granted an irrevocable power of attorney, in favour of ABSA, to sell the immovable property by way of public auction, tender, or by private sale for the highest possible price. The proceeds of the sale would be paid towards settling any outstanding debt to the bank. Importantly, in terms of these provisions, the bank acquired the unconditional and irrevocable right to proceed immediately, and without an order of court, to sell the immovable property.

- The POA gave the bank ancillary powers, including the sole discretion to appoint auctioneers of its choice to conduct a public auction on such terms and conditions as the bank deemed fit; and that the bank would have the right to sign, on behalf of the Serfonteins, all documentation necessary to give effect to the sale and transfer of the property.
- Under clause 3 of the AOD/POA, the Serfonteins renounced the benefits attached to the legal exceptions of revision of accounts, no value received, and the *beneficium de duobus vel pluribus reis debendi* (a co-debtor's right to avoid paying more than their share of the joint debt). They acknowledged that they were fully acquainted with the full meaning and effect of these renunciations.
- Clause 13, headed 'Disclosures in terms of the NCA', recorded that the Serfonteins 'acknowledge[d] that this agreement is not subject to [the] applicability of the National Credit Act.'

ABSA eventually entered into an agreement of sale with a purchaser, for a purchase price of R6 million, which the bank maintained was a market-related price.

This prompted the Serfonteins to launch an application in the High Court. They argued that:

(i) the AOD/POA was a *supplementary agreement* prohibited by section 89 of the National Credit Act ('NCA') and was thus, in its entirety, unlawful and void;

(ii) in the alternative, that the AOD/POA was void because, as credit agreement, it contained provisions which are prohibited under section 90(2); and

(iii) that it would not be reasonable to sever the unlawful provisions from the remainder to render it lawful.

The High Court agreed with the Serfonteins. Aggrieved, ABSA approached the Supreme Court of Appeal with leave from the high court.

Statutory framework

At the core of chapter 5 of the NCA is the protection of the consumer by outlawing certain agreements between credit providers and consumers; prohibiting the inclusion of certain unlawful clauses in those agreements; and prohibiting certain conduct by credit providers. The provisions central to this matter are sections 89, 90, and 91.

Section 89(2) provides, in relevant part:

'(2) Subject to subsections (3) and (4), a credit agreement is <u>unlawful</u> if-

...

(c) it is a <u>supplementary agreement</u> or document <u>prohibited by section 91(a)</u>.

...

(5) <u>If a credit agreement is unlawful</u> in terms of this section, despite…any provision of an agreement to the contrary, <u>a court must make a just and equitable order</u> including but not limited to an order that-

(a) the credit <u>agreement is void</u> as from the date the agreement was entered into.'

Section 91 reads: 'Prohibition of unlawful provisions in credit agreements and supplementary agreements

(1) A credit provider must not directly or indirectly, by false pretences or with the intent to defraud, offer, require or induce a consumer to enter into or sign a credit agreement that contains an <u>unlawful provision as contemplated in section 90</u>.

(2) A credit provider <u>must not</u> directly or indirectly require or <u>induce</u> a consumer to enter into a supplementary agreement…<u>that contains a provision that would be unlawful</u> if it were included in a credit agreement.'

While subsection (1) deals specifically with unlawful provisions in the main credit agreement, subsection (2) extends the prohibition to agreements that supplement the main credit agreement, thus ensuring that they, too, do not contain unlawful provisions.

The list of prohibited provisions in s 90(2) is extensive.. The following have particular relevance in this case:

'(2) A provision of a credit agreement is unlawful if-

(a) its general purpose or effect is to-

(i) defeat the purpose or policies of this Act;

....

(c) it purports to waive any common law rights that-

(i) may be applicable to the credit agreement; and

(ii) have been prescribed in terms of subsection (5); …

(j) it purports to appoint the credit provider, or any employee or agent of the credit provider, as an agent of the consumer for any purpose other than those contemplated in section 102 or deems such an appointment to have been made;

(k) it expresses, on behalf of the consumer-

. . .

(ii) a grant of a power of attorney in advance to the credit provider in respect of any matter related to the granting of credit in terms of this Act…'

(Our underlining)

Two further subsections of section 90 are relevant:

'(3) In any credit agreement, a provision that is unlawful in terms of this section is void as from the date that the provision purported to take effect.

(4) In any matter before it respecting a credit agreement that contains a provision contemplated in subsection (2), the court must-

(a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or

(b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,

and make any further order that is just and reasonable in the circumstances…'

In terms of this statutory scheme, the following issues arise for determination:

(a) Is the AOD/POA a supplementary agreement?

(b) If it is a supplementary agreement, does its provisions fall foul of the prohibitions listed in section 90(2)?

(c) In addition, were the Serfonteins induced or required to sign the AOD/POA?

HELD

Supplementary agreement

- What is meant by a supplementary agreement is not defined in the NCA but our courts have held that in the context of the NCA 'an agreement can only…be 'supplementary' if it deals with the same subject matter as the main agreement, ie the regulation of the credit and repayment thereof. Examples of supplementary agreements that spring to mind would be documents acknowledging that no representations had been made to the consumer, a waiver of statutory rights or an acknowledgment of receipt of goods in good order and condition.'

- It is evident that the AOD/POA dealt with the same subject matter as the main agreement, which is subject to the provisions of the NCA.
- By its very nature, an overdraft agreement regulates the extension and repayment of credit between the credit provider and the consumer. One purpose of the AOD/POA was to record the Serfonteins' concession that they were indebted to ABSA under the overdraft and surety agreements, that they had defaulted on the debt, and that the amount outstanding was due and payable. A further purpose was to regulate the recovery of the debt by giving ABSA the irrevocable right to sell the immovable property. There can thus be no question that the underlying agreements and the AOD/POA were intrinsically intertwined, and that the latter supplemented the former.
- Plainly, both the underlying agreements and the AOP/POA involved a credit provider-consumer relationship, the regulation of which lies at the heart of the NCA.

Unlawful provisions

- The first fundamental contravention of section 90(2), NCA, is to be found in clause 13 of the AOD/POA, which purports to exclude the application of the NCA to its terms. The general purpose or effect of an express ouster clause of this nature is to defeat the purposes or polices of the NCA. Accordingly, it offends against section 90(2)(a)(i) and is unlawful.
- A key feature of the AOD/POA is that it combined, in one agreement, not only an acknowledgement of debt, but also a power of attorney, giving the bank a full complement of irrevocable rights to sell the immovable property; it entitled ABSA immediately, and without resort to court processes, to execute against the immovable property.
- In our constitutional dispensation, procedural constraints are placed on the powers of mortgagors to execute against immovable property. This is necessary to promote the constitutional protections against the arbitrary deprivation of property. Deprivation of ownership of immovable property by a creditor without the sanction of a court order is plainly arbitrary. This position is confirmed by the introduction of rules 46 and 46A into the Uniform Rules of Court. These amended rules require judicial supervision in all matters involving execution against a debtor's immovable property, and only when judgment has been granted by a court.
- Section 90(2)(a)(i) prohibits provisions that have the effect of defeating the NCA's purposes. In permitting ABSA to execute against the immovable property immediately and without a court order the AOD/POA fundamentally defeated these central purposes of the NCA and was unlawful.
- Accordingly it is held that two key provisions of the AOD/POA are prohibited under section 90(2), NCA.

Induced or required to sign

- The third issue is whether the Serfonteins were required or induced to sign the AOD/POA. The words 'require' and 'induce' are not defined in the NCA.
- Scrutiny of the circumstances leading to the signing of the AOD/POA, shows that in January 2019, ABSA rejected the first offer by the Serfonteins. In the exchange of letters that followed, the bank's legal representative adopted a stern tone, making it clear that unless the Serfonteins came to an agreement acceptable to the bank, they would face litigation and possible sequestration. The Serfonteins were made aware that they were involved in a last-ditch effort to settle the matter by agreeing to the unconditional acknowledgement of debt and power of attorney.
- The correspondence further discloses that on 27 February 2019, the bank's legal representatives informed the Serfonteins that the AOD/POA must be signed before the close of business on 1 March 2019, failing which formal steps will be taken to recover the outstanding balance owed. It is clear from the terms of this letter that the alternative, in case of failure to sign the AOD/POA, would be the

institution of legal proceedings.

- To avoid the express threat of the institution of legal proceedings, which could have included sequestration, the Serfonteins signed the AOD/POA. They effectively had no option but to accede.
- The bank contended that a broad interpretation of the terms 'require' and 'induce' in section 91 would have a chilling effect on the banking industry and would effectively preclude commercial banks from settling disputes with defaulting clients out of court. This is because of the reality that, when faced with the option of settling with a credit lender, or facing litigation, a defaulting debtor does not have any real option but to settle by acknowledging his or her debt. The fear expressed by the bank was that this would have the effect of outlawing most acknowledgments of debt under the NCA.
- The fear contained in this submission is more apparent than real. Firstly, every case must be decided on its own facts. Secondly, it is important to bear in mind that an 'inducement' – in this broad sense – on its own will not invalidate an acknowledgment of debt. Under section 91, it is only if the debtor is induced to agree to terms that are prohibited under section 90(2) that the acknowledgment of debt will be unlawful and invalid. If an acknowledgement of debt does not include prohibited provisions, it will not be unlawful under section 89(2), read with section 91.
- For these reasons it is apparent that the Serfonteins were directly or indirectly required or induced to sign the AOD/POA.
- Consequently, the High Court was correct in finding that the AOD/POA contravened the provisions of the NCA and was unlawful.

Validity of the AOD/POA or severance of the unlawful provisions

- In terms of section 90(4) read with section 89(5), if a court finds any provisions in a credit agreement to be unlawful, it has the option of either severing the unlawful provisions from the rest of the agreement (the credit agreement, with the unlawful provisions severed from it, will remain in force), if it is reasonable to do so, or declaring the entire agreement unlawful *ab initio*.
- Severance will only be reasonable, and thus permissible, if thereafter a valid agreement, capable of implementation, remains.
- The unlawful provisions in the present matter, permeated the entire AOD/POA, thus making it impossible to render it lawful through severance of the offending clauses.
- In the circumstances, the AOD/POA could not be saved through severance. The high court was correct in so finding, and in declaring it void *ab initio*.

.CONCLUSION

The appeal is dismissed.