



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

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Absa Bank Limited v Johan Serfontein and Another (740/2023) [2024] ZASCA 11 (10 February 2025)

Today the Supreme Court of Appeal (SCA) dismissed an appeal against the judgment of the Free State Division of the High Court, Bloemfontein (the high court).

The appeal concerned an acknowledgement of debt, incorporating a power of attorney (AOD/POA), that was entered into between the appellant, ABSA Bank Limited (ABSA), and the respondents, Messrs J H Serfontein (Mr Serfontein senior) and J Serfontein (Mr Serfontein), collectively, the 'Serfonteins'. The primary question was whether it was valid, or whether, as found by the high court, it contravened the National Credit Act, 34 of 2005 (NCA) and was therefore invalid. The high court found that the AOD/POA was a supplementary agreement containing unlawful provisions in contravention of ss 89, 90, and 91, read together with s 164(1) of the NCA. It declared the AOD/POA, as well as a subsequent deed of sale concluded pursuant thereto, void *ab initio* (having no legal effect from the outset).

In July 2003, ABSA granted Mr Serfontein an overdraft facility. Over the years the limit of the overdraft was increased. Security was provided by the registration of four covering mortgage bonds in favour of ABSA over Mr Serfontein's property (the immovable 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 ABSA. Furthermore, ABSA registered two covering bonds over Mr Serfontein senior's immovable property. Mr Serfontein undertook to repay an amount of R2 million on or before 25 July 2015, however, he defaulted. Consequently, ABSA initiated negotiations for a solution. ABSA presented an AOD/POA that provided for the sale of the immovable property, as well as Mr Serfontein senior's immovable property. The Serfonteins objected, ultimately, ABSA agreed to excise that clause and the final version of the AOD/POA was signed on 17 March 2019, with the Serfonteins having obtained practical legal advice.

Clause 2 of the AOD/POA recorded Mr Serfontein's ownership of the immovable property and the four covering bonds, therein the Serfonteins granted an irrevocable power of attorney, in favour of ABSA, to sell the immovable property without an order of court and unilaterally. Under clause 3 of the AOD/POA, the Serfonteins renounced a co-debtor's right to avoid paying more than their share of the joint debt, which they acknowledged to fully understand. In clause 13, the Serfonteins acknowledged that the agreement was not subject to National Credit Act. ABSA eventually sold the immovable property, consequently asking Mr Serfontein to vacate the immovable property.

In the high court, the Serfonteins' contended that the AOD/POA was a supplementary agreement prohibited by s 89 of the NCA and was thus, in its entirety, unlawful and void. In the alternative, they argued that it was void in that it was a credit agreement, several provisions of which were prohibited under s 90(2). Further, they contended 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 and ordered as said afore. Aggrieved, ABSA approached the SCA with leave from the high court.

In the SCA, ABSA contended that the high court erred in its finding. The SCA then had to determine the primary question aforementioned. The SCA found that the AOD/POA dealt with the same subject matter as the main agreement. That the underlying agreements and the AOD/POA were intrinsically intertwined, and that the latter supplemented the former, therefore the AOD/POA was a supplementary agreement. ABSA argued that even if it were to be found to be a supplementary agreement, its provisions were not unlawful under s 90(2). The SCA found that the first fundamental contravention was in clause 13 of the AOD/POA's exclusion of the NCA. Regarding clause 2, the SCA held that it did not pass muster under the NCA. That judicial supervision in all matters involving execution against a debtor's immovable property are required and can only happen when judgment has been granted by a court. Therefore, ABSA's execution was unlawful. The SCA had to address whether the Serfonteins were required or induced to sign the AOD/POA. It found that since the Serfonteins were warned of possible institution of legal proceedings, the Serfonteins were directly or indirectly required or induced to sign the AOD/POA.

Finally, the SCA had to decide whether the high court erred in declaring the AOD/POA, and the consequent agreement of sale, void *ab initio*. Because ABSA had argued the offending provisions be severed, however, had not ventured to mention which offending clauses of the AOD/POA could be severed so that the remaining provisions could be implemented, the SCA held that severance would only be reasonable, and thus permissible, if thereafter a valid agreement, capable of implementation, would remain. In *casu*, it found it was impossible to render it lawful through severance, highlighting that the high court did not err in declaring both the AOD/POA and the deed of sale void *ab initio*. Appeal was dismissed with Costs.

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