

**SELLING SECURITY WITHOUT COURT INTERVENTION
(MAY A CREDITOR SELL YOUR PROPERTY BASED ON CONSENT IN A POWER OF
ATTORNEY WITHOUT A COURT ORDER)**

A. INTRODUCTION

1. Earlier this month, the Supreme Court of Appeal delivered Judgment recently in *Absa Bank Limited v Johan Serfontein and Another* (740/2023) [2024] ZASCA 11 (10 February 2025).
2. The case dealt with the right of a creditor to sell security without court intervention unlawful provisions in supplementary credit agreements and inducement to sign agreements.

B. FACTS

3. ABSA granted an over-draft facility to Mr Serfontein in 2003 for more than R7 million plus 10% annual interest. He undertook to pay R2 million before 25 July 2015.
4. However, he defaulted. To curb the burgeoning debt, increasing at R50 000 monthly, ABSA initiated negotiations to avoid debt collection litigation.
5. Mr Serfontein and ABSA agreed and entered into Acknowledgement of Debt ("AOD") incorporating a Power of Attorney ("POA"). The POA included provisions:
 - 5.1. allowing Absa to sell Mr Serfontein's property without a Court Order/approval,
 - 5.2. renouncing various legal defences; and
 - 5.3. acknowledging that the AOD and POA are not subject to the National Credit Act.
6. In September 2021, ABSA completed a deed of sale for property worth R6,000,000. ABSA informed Mr Serfontein to prepare to vacate the premises for the new owner. In defence, Mr. Serfontein filed an application seeking orders to:
 - 6.1. Declare the AOD/POA void under the National Credit Act,
 - 6.2. Declare the deed of sale void, and

- 6.3. Instruct the Registrar of Deeds not to register the property transfer.

C. ISSUES

7. The Court examined the validity of an AOD and POA. The main legal issue was whether the agreement violated the National Credit Act ("NCA") and if it was invalid.

D. THE LAW

8. In *Bock and Others v Duburoro Investment (Pty) Ltd* this Court reaffirmed the trite principles of *parate executie*. The fundamental principle, being that: 'A clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgagor or the court by taking possession of the property and selling it is void.'
9. However, after default the mortgagor may grant the bondholder the necessary authority to sell the bonded property. It does not matter whether the goods are immovable or movable. In such instance, to perfect the security, the court's *permission* is required.'
10. Section 89(2) provides that a credit agreement is unlawful if it is a supplementary agreement or document prohibited by section 91(a). Furthermore, section 89(5)(a) provides that a credit agreement is unlawful, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that the credit agreement is void as from the date the agreement was entered into.

E. COURT A QUO (FREE STATE HIGH COURT)

11. The court contended that an agreement is "supplementary" if it pertains to the same subject matter as the main agreement.
12. Serfontein's primary argument was that the Acknowledgment of Debt/Power of Attorney (AOD/POA) constituted a supplementary agreement prohibited by Section 89, rendering it entirely unlawful and void.
13. ABSA argued that the AOD/POA was concluded after the credit agreement had ended, following a default.

F. RULING

14. The High Court determined that the AOD/POA were indeed supplementary agreements as they dealt with the same subject matter as the original credit agreements, specifically the acknowledgment of debt and repayment terms.
15. The Court also found that the AOD and POA contained unlawful provisions which stood contrary to sections 89, 90, and 91 of the NCA. Accordingly, such provisions were void from inception.
 - 15.1. Specifically, the Court highlighted provisions granting authority to sell without court intervention are unlawful in that-:
 - 15.1.1. Firstly, section 90(2)(a)(i) of the NCA 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.
 - 15.1.2. Secondly, by permitting sale of the property without court intervention, the POA violated the protections against arbitrary deprivation of property highlighted by the NCA and section 25 and 26 of the Constitution. Deprivation of ownership of immovable property by a creditor without the sanction of a court order is plainly arbitrary.

G. INDUCEMENT TO SIGN

16. The court concluded that the Mr Serfontein was effectively induced to sign the AOD/POA due to threat of litigation and sequestration, indicating they had no real choice but to agree to the terms. The court took into account the stern tone adopted by ABSA's legal team during the negotiation process.
17. The court did emphasize, however, that an inducement will not invalidate an AOD unless such an AOD contains prohibited clauses.

H. OUR COMMENTARY

18. The decision based on invalid clauses is very welcome as it would prevent abuse or circumvention in the debt collection process. **It is thus important, especially when using older templates of the AODs, Credit Applications, or other credit**

control instruments, to ensure that all clauses are lawful. Failure to do so may result in failed debt collection and a costs order against the creditor.

19. The findings and reasons regarding inducement, however, do not take the matter forward in a practical sense as the inducement leads to invalidity only if the agreement is already invalid due to the inclusion of prohibited clauses. Whether the debtor was induced or not is irrelevant – what matters is whether the agreement contains prohibited clauses. At best, the inducement only serves to confirm the invalidity.

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