

**IN HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 5545/2012

**HOME OBLIGORS MORTGAGE ENHANCED  
SECURITIES (PTY) LIMITED**

**PLAINTIFF**

And

**LOUIS FREDERICK LOUW  
GERDA LOUW**

**FIRST DEFENDANT  
SECOND DEFENDANT**

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**JUDGMENT**

Delivered: 30 May 2016

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**MBATHA J:**

[1] The plaintiff in this action seeks an order in the following terms:

- (a) An order declaring the following immovable property executable:  
**ERF 4.... T..... (EXTENSION 3....) REGISTRATION DIVISION FU,  
PROVINCE OF KWAZULU-NATAL IN EXTENT 3..... (THREE  
HUNDRED AND ELEVEN) SQUARE METERS  
HELD BY DEED OF TRANSFER NO. T1..... SUBJECT TO THE  
CONDITIONS CONTAINED THEREIN**

Against the defendants jointly and severally the one paying and the other to be absolved for:

- (b) Payment of R364 243.63;
- (c) Interest thereon at the legal rate of 7.70% per annum from 26 January 2012 to date of final payment, both days inclusive;
- (d) Costs of suit on the scale as between attorney and client.

[2] The plaintiff avers that on or about March 2007 at La Lucia Ridge, ABSA Bank Limited and the defendants concluded a written loan agreement. The material terms of that agreement were that ABSA would lend and advance to the defendants a specified amount of money set out in the loan agreement for the purchase of the immovable property. The defendants would repay the said monies in specified instalments and cause a mortgage bond, over the immovable property to be registered in favour of ABSA. In the event of the defendants defaulting with payments of their instalments, ABSA would be entitled, without further notice to reclaim the full balance outstanding, interest thereto and legal costs.

[3] A mortgage bond was subsequently registered over Erf 4..... T..... (Extension 3.....) Registration Division FU, Province of KwaZulu-Natal in extent 3..... (Three hundred and eleven) square meters, Held by Deed of Transfer No. T1..... subject to the conditions contained therein.

[4] On or about 25 January 2012 the defendants were in default to the plaintiff in the sum of R364 243.63, which was confirmed by a certificate of balance signed by the bank manager, one Hans Combrink. The defendants had defaulted with their monthly payment and this led to the institution of these proceedings before court.

[5] The action is defended by the first defendant only and the plaintiff seeks relief against the first defendant only as the defendants are now divorced. The second defendant does not oppose the relief sought by the plaintiff on the basis that the settlement agreement to their divorce action provides that the property in question would remain the sole property of the first defendant as of 29 October 2008. This is

not disputed by the first defendant and is confirmed by Exhibit “A” being a copy of the Deed of Settlement to the Divorce. In the light thereof the plaintiff seeks judgment against the first defendant only.

- [6] The first defendant has raised a number of defences to the plaintiff’s action.
- (a) He denies that he is indebted to the plaintiff as he had entered into a contract with ABSA and not the plaintiff;
  - (b) He denies that he received the Section 129 notices in terms of the National Credit Act;<sup>1</sup>
  - (c) He denies that the copies of the loan agreement and mortgage bond are genuine copies as the fire in the Kempton Park offices of ABSA destroyed the loan agreements;
  - (d) The first defendant avers that the cession by ABSA to the plaintiff is invalid on the basis that his consent was not obtained and that it is in violation of Section 78 of the Banks Act;<sup>2</sup>
  - (e) He avers that ABSA denied him proof of ownership of the debt and that is the reason he stopped making payments; and
  - (f) He also challenged the jurisdiction of this court.

[7] In proving its case the plaintiff called as witnesses, Gerda Hechter, the first defendant’s ex-wife, David John Toerien, a banker from ABSA in charge of the Debt Collection and Restructuring teams and Imtiaz Mohamed from the Legal Collections Department of ABSA. The first defendant also gave evidence in these proceedings.

[8] The evidence before the court as given by Toerien, has shown that the plaintiff has *locus standi* to bring the action against the defendants. His evidence is that ABSA entered into the loan agreement with the defendants whereby ABSA paid the seller of the immovable property to the Defendants the purchase price. His evidence is that after six or twelve months from the date of the payment of the first instalment by the mortgagee, seasoned loans from ABSA are transferred for securitisation. In this case ABSA entered into a securitisation agreement with the plaintiff, whereby a schedule of claims were ceded to the plaintiff including the

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<sup>1</sup> Act 34 of 2005.

<sup>2</sup> Act 94 of 1990.

defendants. The sale agreement between ABSA and the plaintiff was handed in by Toerien. Thereafter ABSA entered into a Servicing Agreement with the plaintiff, whereby ABSA continued to administer the loans, monitoring payments, effecting changes in interest rates, etc., as ABSA has the necessary facilities for such administrative functions. ABSA therefore acts as an agent for the plaintiff. He confirmed that a valid cession agreement was concluded between ABSA and the plaintiff. He handed in Bundle 2 as Exhibit "B" which incorporates the following documents:

1. Sale Agreement – Plaintiff and ABSA Bank Limited dated 14/8/07
2. Serving Agreement – Plaintiff and Absa Bank Limited dated 14/8/07
3. Deed of Cession dated 13/11/07 – Registered 27/11/07
4. ABSA Mortgage Bond No. 1416/07
5. Letter by ABSA Bank Limited to Defendants dated 12/10/11
6. Common Terms Agreement between Plaintiff and ABSA Bank Limited dated 14 August 2016

[9] I am satisfied that the cession is valid as the loan agreement, together with the mortgage bond are endorsed to indicate that a cession has taken place. In this matter the endorsement appears on the mortgage bond.

[10] I also find that there is no breach of the Banks Act<sup>3</sup> or any rules in terms of the Reserve Bank Act.<sup>4</sup> This is in fact common practice in the banking business.

[11] In general a creditor is free to cede its rights to any person. It does not need the consent of the debtor to do so, nor is it obliged to give notice to the mortgagee. I have not found any limiting provision in the agreement that was concluded by ABSA and the defendants. A notice to a debtor is not a pre-requirement for the validity of the cession, although the entire contract involves the cedent, the cessionary and the debtor. The standard conditions of the defendants' bond in Exhibit "C" paragraph 12 also state as follows:

- '12. Cession of mortgage bond.

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<sup>3</sup> Act 94 of 1990.

<sup>4</sup> Act 90 of 1989.

The bank shall be entitled at any time to cede any or all of its rights under the mortgage bond to any person and to register such cession in the appropriate deeds register and the Mortgagor hereby agrees and consents to any such cession or any increase in the number of mortgagees.'

This put paid to any argument that the first defendant's consent was required. In the case where the cessionary, in this case the plaintiff, acquires the rights to a principal debt, it is logical that he steps into the shoes of the cedent. This does not create any novation of the contract as the first defendant believes that it has such an effect. See *National Sorghum Breweries Ltd v Corpcapital Bank Ltd*<sup>5</sup> at para 15, where it was held:

'The "sale" agreement between Afinta Financial Services and Afinta Finance regulated the transfer of the rights in the lease agreements referred to in the annexure (annexure A). Their later agreements – concluded by their conduct in preparing the two further lists when seen in the context in which they did so – to transfer the rights in seven further leases did not purport to amend any of the terms of the former transaction. They were no more than later transactions in similar terms, which the sale agreement did not preclude them from concluding, and which required no formalities to be valid. The defendant's reliance on the non-variation clause in the "sale" agreement was quite misconceived because no amendment to that agreement purported to be effected at all. It follows that the rights relating to all eighteen vehicles leased to the defendant were properly transferred to Afinta Finance.'

In this case ABSA informed the defendants in writing on 12 October 2011, informing them of the cession and consequences.

[12] It is accepted that should the debtor raise a defence that he had paid the cedent instead of the cessionary that would be a valid defence in law. There was no reason for the default on the part of the first defendant. The first defendant when he was informed of the fire at the warehouse of ABSA, he should have continued to make payments to ABSA. It is only the original documents that were destroyed by the fire. The documents which were electronically captured kept the terms of the agreement alive and nothing suggests that they had been tampered with.

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<sup>5</sup> [2006] 2 All SA 376 (SCA).

[13] The first defendant's argument that he could not transfer the mortgage bond to his name because ABSA required that he pay the amount of R15 000.00 costs occasioned by the securitisation agreement does not hold water. It is common cause that transfers of property occur only by registration, the transfer from the joint estate to his name could only be effected by payment of transfer costs.

[14] I also find that the summons was not premature, as the plaintiff sufficiently complied with the provisions of Section 129 read with Section 130 of the National Credit Act.<sup>6</sup>

[15] The certificate of balance issued by the manager Combrink at the institution of the action is attached to the summons as well as the last certificate of balance presented by Mohamed as Exhibit "E" are accepted as valid, irrespective that there had been mistakes with the other two which were issued prior to the institution of this action by the plaintiff. This also forms part of the mortgage terms which the first defendant signed for. This appears in paragraph 9 on page 88 of Bundle 2 in Exhibit "B":

'9. PROOF OF INDEBTEDNESS

- 9.1 The amounts at any time owing by the Mortgagor to the Bank which are secured under this bond (including interest and the rate or rates at which and the period or periods for which interest is calculable) and the fact that such indebtedness is due and payable may be determined and proved by a certificate signed by any manager or the Bank, whose appointment and authority to sign such certificate need not be proved.
- 9.2 Such certificate shall be accepted as proof of the facts stated therein, unless the Mortgagor is able to prove the facts incorrect.'

[16] On the issue of jurisdiction, this court has concurrent jurisdiction with the Durban High Court. I cannot see why the first defendant refers to it as forum shopping.

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<sup>6</sup> Act 34 of 2005.

[17] I accept the evidence of the plaintiff in all respects and reject that of the first defendant.

[18] I therefore make the following order against the first defendant:

- (a) Declaring the following immovable property executable:  
Erf 4..... T..... (Extension 31) Registration Division FU, Province of KwaZulu-Natal in extent 3..... (Three hundred and eleven) square meters. Held by Deed of Transfer No. T1..... subject to the conditions contained therein;
- (b) The first defendant is ordered to pay the amount of R534 609.12;
- (c) Interest thereon at the rate of 9.20% per annum, capitalised monthly, from 19 May 2016 to date of payment;
- (d) Costs of suit on the scale between attorney and client.

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MBATHA J

Date of hearing : 23 May 2016

Date delivered : 30 May 2016

**Appearances:**

For the Applicant : Adv. S Hoar

Instructed by : GEYSER DU TOIT LOUW & KITCHING  
PINETOWN INC ATTORNEYS  
7 Greathead Lane  
Pinetown

First Defendant : Mr LF Louw (In Person)  
7 Salom Street  
Seatides  
Tongaat