THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 740/2023

In the matter between:

ABSA BANK LIMITED **APPELLANT**

and

JOHAN SERFONTEIN **FIRST RESPONDENT**

JACOBUS HENDRIK SERFONTEIN **SECOND RESPONDENT**

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

Coram: MOLEMELA P, KGOELE and KEIGHTLEY JJA, and KOEN and DOLAMO AJJA

Heard: 21 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date for hand down is deemed to be 10 February 2025 at 11h00**.**

Summary: National Credit Act 34 of 2005 (the NCA) – acknowledgement of debt and power of attorney – whether a 'supplementary agreement' containing unlawful provisions listed in s 90(2) – severance of unlawful provisions not reasonably possible – entire acknowledgment of debt and power of attorney declared unlawful from the date it took effect.

ORDER

On appeal from: The Free State Division of the High Court, Bloemfontein (Van Zyl J, sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Keightley JA and Dolamo AJA (Molemela P and Kgoele J and Koen AJA concurring):

Introduction

[1] The subject matter of this appeal is 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 is whether it is valid, or whether, as the Free State Division of the High Court, Bloemfontein (the high court) found, it contravenes the National Credit Act, 34 of 2005 (NCA) and is 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). If this Court upholds the high court's finding that the AOD/POA was unlawful, the remaining question is whether the high court was correct in declaring it void. ABSA contends that the high court ought to have severed the offending provisions, leaving the remainder of the AOD/POA, and the deed of sale, valid and enforceable. The appeal comes before this Court with leave of the high court.

[2] Central to the appeal are the meaning and effect of the impugned terms of the AOD/POA. Their validity must be assessed within the framework of the relevant provisions of the NCA, bearing in mind the statute's underlying purposes. These include the promotion and advancement of the social and economic welfare of South

Africans; the promotion of a fair, transparent, competitive, sustainable, effective and accessible credit market and industry; and the protection of consumers.[1]

[3] To achieve a balance between the interests of consumers and credit providers, the NCA provides measures to promote responsibility in the credit market. Of relevance to this appeal, they include: promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers, on the one hand, and consumers, on the other; and correcting the imbalances in the negotiating power between consumers and credit providers by, among others, protecting consumers from deception, unfair and fraudulent conduct by credit providers and credit bureaus.[2]

Facts

[4] 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, being Portion 3 of the Farm Welverdiend 92, District Kroonstad, Free State Province (the immovable property). As additional security, his father, Mr Serfontein senior, signed a deed of suretyship in terms of which he bound himself as surety and co-principal debtor in solidum to be jointly and severally liable for the due fulfilment of his son's obligations to ABSA. Furthermore, ABSA registered two covering bonds over Mr Serfontein senior's immovable property, being the Remaining Extent of the Farm Welverdiend 92, District Kroonstad, Free State Province.

[5] The last overdraft agreement was signed on 28 July 2014. At that date, the principal debt was R5.2 million. Mr Serfontein undertook to repay an amount of R2 million on or before 25 July 2015. However, he defaulted, with the consequence that by August 2016 an amount of R6 202 787.42 was outstanding. This amount was increasing by approximately R50 000.00 per month in respect of compound interest charged monthly and capitalised. To curb the burgeoning debt and, according to ABSA, to avoid inevitable litigation for the recovery of the debt, ABSA initiated negotiations

[1] Section 3 of the NCA.
[2] Section 3(*d*) and (*f*).

attempting to reach an amicable solution. ABSA's legal representative invited the Serfonteins to a meeting on 25 January 2019.

[6] What followed was an exchange of draft agreements between the legal representatives of both parties. In the first draft, signed by Mr Serfontein, he offered to sell the immovable property and, with the proceeds thereof, settle the debt owing to ABSA, in the event of his default under a proposed payment plan. This version was rejected by ABSA. Instead, ABSA presented an AOD/POA that provided for the sale of the immovable property, as well as that of Mr Serfontein senior. The Serfonteins objected to the inclusion of the sale of the latter. Ultimately, ABSA agreed to excise the clause relating to that property, which resulted in the parties' agreement on the final version of the AOD/POA on 17 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.

[7] The AOD/POA was a comprehensive and detailed document. We focus only on those terms directly relevant to this appeal. Clause 1 comprised the acknowledgment of debt portion of the agreement. The Serfonteins acknowledged that, as of 20 November 2018, they were truly and lawfully indebted to ABSA in respect of monies lent and advanced in the amount of R7 131 019.14, plus interest at 10% per annum, capitalised monthly from 21 November 2018 to date of final payment. This amount they confirmed unconditionally to be due and payable. They further acknowledged that they had defaulted on their obligations and were unable to honour them.

[8] The power of attorney component of the AOD/POA was in clause 2, headed 'Power of attorney regarding immovable property'. It recorded Mr Serfontein's ownership of the immovable property and ABSA's four covering bonds registered against the title deed thereof as security. In clause 2.3 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 any outstanding balance due and payable to ABSA in terms of the agreement. Importantly, in terms of these provisions, ABSA acquired the unconditional and irrevocable right to proceed immediately, and without an order

of court, to sell the immovable property.

[9] The power of attorney gave ABSA additional, ancillary powers. They included the power, at ABSA's sole discretion, to appoint auctioneers of its choice to conduct a public auction on such terms and conditions as ABSA deemed fit. ABSA also would have the right to sign, on behalf of the Serfonteins, all documentation necessary to give effect to the sale and transfer of the immovable property.

[10] 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. A final, but by no means insignificant, aspect of the AOD/POA was clause 13, headed 'Disclosures in terms of the NCA'. In it the Serfonteins 'acknowledge[d] that this agreement is not subject to [the] applicability of the National Credit Act.'

[11] Armed with the AOD/POA, ABSA proceeded to auction the immovable property on the 17 July 2019. However, the offer made at the auction was unacceptable to ABSA and was rejected. Although ABSA continued to market the property, an alternative buyer was not found for some time. On 24 February in 2021, ABSA served Mr Serfontein with a notice in terms of s 129 of the NCA. The notice advised him that he was in breach of the overdraft agreements and called upon him to remedy the default by making payments directly to ABSA. In response, the Serfonteins exercised their rights under s 129(1)(a) of the NCA[3] and referred the matter to the Ombudsman for the Banking Services. One of their complaints was that the overdraft agreement between ABSA and Mr Serfontein amounted to reckless credit. The referral was unsuccessful.

[3] Section 129(1)(a) of the NCA provides that the credit provider 'may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.'

[12] ABSA eventually concluded a deed of sale for the immovable property on 13 September 2021 (the deed of sale) for the sum of R6 000 000.00. This sum translated to approximately R9 740.00 per hectare. ABSA maintained that the purchase price was a market-related price, although the Serfonteins disputed this. ABSA advised Mr Serfontein of the sale of the immovable property and demanded that, on registration of transfer, he should vacate the property to give vacant possession to the purchaser. This prompted the Serfonteins to launch their high court application. They sought an order: declaring the AOD/POA to be contrary to the NCA and void *ab initio*; declaring the deed of sale void; and directing the Registrar of Deeds (the Registrar) not to register the transfer of the immovable property to the purchaser. ABSA, the two trustees of the Trust that had purchased the immovable property, and the Registrar were cited as respondents. Only ABSA opposed the application. It also counter-claimed for a declaratory order to enforce the AOD/POA and for related relief.

The high court

[13] In the high court, the Serfonteins' main contention was 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, having regard to the agreement as a whole, they contended that it would not be reasonable to sever the unlawful provisions from the remainder to render it lawful.

[14] ABSA's argument, on the other hand, was that the AOD/POA was not a supplementary agreement in that it added nothing to the overdraft agreements, which had been concluded years before the AOD/POA. ABSA submitted that the AOD/POA did not deal with the same subject matter as the original overdraft agreement, nor did it regulate the circumstances under which credit was extended to Mr Serfontein. Further, the AOD/POA was concluded after the credit agreement had run its course and the default had occurred. ABSA argued that our courts have ruled that it is lawful for a debtor who is in default to consent to the sale of mortgaged property in settlement of the debt.

[15] Having conducted a detailed review of the AOD/POA the high court found in favour of the Serfonteins. It granted an order in the following terms:

'1. In terms of the provisions of sections 89, 90, and 91, read with section 164(1) of the National Credit Act, 34 of 2005, the Acknowledgement of Debt, incorporating a Power of Attorney to dispose of Portion 3 of the Farm Welverdiend 92, Extension 616, District Kroonstad, Free State Province, in extent 616,717 hectares ("the property") of which the first applicant is the owner, entered into between the applicants and the first respondent on the 17 March 2019, is declared void from the date it was entered into.

2. The agreement of sale of the property to the Francois Els trust IT no. 1298/98, represented by the second and third respondents, signed on 7 September 2021 and 13 September 2021 respectively, is declared *void ab initio*.

3. The fourth respondent is prohibited from registering the property on the basis of the agreement of sale referred to in paragraph 2 into the names of the second and third respondents.

4. The counter application is dismissed.

5. The first respondent is ordered to pay the costs of the application and the counter application.'

Statutory framework

[16] 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. There are also provisions which set out the mechanisms for dealing with contraventions, and the consequences of those contraventions. As noted at the commencement of this judgment, the provisions central to this appeal are ss 89, 90, and 91.

[17] Section 89(2) provides, in relevant part:

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

…

(*c*) it is a supplementary agreement or document prohibited by section 91(a):

. . .'

Further, in terms of s 89(5)(*a*):

'If a credit agreement is unlawful in terms of this section, 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-

(*a*) the credit agreement is void as from the date the agreement was entered into.'

[18] The cross-reference in s 89(2) to s 91(a) is misleading, as the latter subsection no longer exists.[4] Instead, s 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 unlawful provision as contemplated in section 90.

(2) A credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement.'

[19] While subsection (1) deals specifically with unlawful provisions in the main credit agreement, subsection (2) has broader reach. It extends the prohibition to agreements that supplement the main credit agreement, thus ensuring that they, too, do not contain unlawful provisions. The parties were agreed that s 91(2) finds application in this appeal. This brings s 90(2) into play, which is the section that lists the types of provisions that would be unlawful if included in a supplementary agreement.

[20] The list of prohibited provisions in s 90(2) is extensive. It is not necessary to set them out in full. The following subparagraphs 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;

. . .

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[4] As originally promulgated, the NCA did include a s 91(a). It provided that '[a] credit provider must not . . .directly or indirectly require or induce a customer to enter into a supplementary agreement, or sign any document that contains a provision that would be unlawful if it were included in a credit agreement'.
Section 91 was substituted by s 28 of the National Credit Amendment Act 19 of 2014 (the Amendment Act) with the effect that it now comprises subsections (1) and (2). Unfortunately, the drafters of the Amendment Act overlooked the need simultaneously to amend the cross-reference in s 89(2).

(*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;

. . .'

[21] Two further subsections of s 90 are relevant, being subsection (3) and (4). They read:

'(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 to give effect to the principles of section 89(5) with respect to that unlawful provision, or entire agreement, as the case may be.'

Issues for determination

[22] 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 it contain provisions that would be unlawful if included in a credit agreement? In other words, do any of the AOD/POA provisions fall foul of the prohibitions listed in s 90(2)?

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

(d) If the first three questions are answered in the affirmative, the impugned provisions of the AOD/POA are unlawful. The issue then is whether the high court exercised its discretion, accorded under ss 89(5), 90(3) and 90(4), properly in declaring the entire AOD/POA void *ab initio*.

Supplementary agreement

[23] What is meant by a supplementary agreement is not defined in the NCA. In *National Credit Regulator v Lewis Stores (Pty) Ltd and Another*[5] this Court, applying the settled rules of interpretation, held that:

'The starting point in interpreting the legislation, of necessity, is to give consideration to 'the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. The *Shorter Oxford English Dictionary* defines 'supplementary' as 'of the nature of, forming, or serving as, a supplement'. 'Supplement', in turn, is defined as 'something added to supply a deficiency; an auxiliary means, an aid;' or 'a part added to complete a literary work or any written account or document.' Giving the term its ordinary English meaning in the context of ch 5 of the NCA, an agreement can only, in my view, 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.'[6]

[24] Counsel for the Serfonteins accepted in oral argument that not all acknowledgements of debt fall foul of the NCA. This concession was correctly made because the question of unlawfulness will always depend on the particular provisions of the agreement under consideration. However, the antecedent inquiry is whether the NCA applies at all. The jurisprudence of this Court clearly establishes that not all settlement agreements or acknowledgments of debt fall within the ambit of the Act. In *Ratlou v Man Financial Services (Pty) Ltd*[7] this Court endorsed a purposive approach

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[5] *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190; 2020 (2) SA 390(SCA); [2020] 2 All SA 31 (SCA) (*Lewis Stores*).
[6] *Lewis Stores* fn 4, para 32.
[7] *Ratlou v Man Financial Services (Pty) Ltd* [2019] ZASCA 49 (SCA); 2019 (5) SA 117 (SCA) (*Ratlou*). See also *Ribeiro & Another v Slip Knot Investments 777 (Pty) Ltd* [2010] ZASCA 174; 2011 (1) SA 575 (SCA).

to determining whether the NCA applies to agreements of compromise. This involves examining the relationship between the underlying *causa* (cause) and the settlement agreement. This Court concluded that 'the NCA was not designed to regulate settlement agreements where the underlying agreements or cause would not have been considered by the Act.' In that case, the underlying agreement – a rental agreement for trucks – did not fall within the ambit of the NCA because it was a large agreement concluded with a juristic person. For this reason, the subsequent acknowledgment of debt also fell outside the NCA's scope.

[25] This approach to agreements of compromise informs the inquiry into whether the AOD/POA was a supplementary agreement and thus fell within the regulatory ambit of chapter 5 of the NCA. The interconnectedness between the underlying agreement and the AOD/POA is a determining factor. This involves a consideration of the subject-matter of each agreement, and their respective natures: do they share the same subject-matter, and does that subject-matter involve the extension and repayment of credit? Following from *Ratlou*, one might add to the inquiry the question whether the underlying agreement falls within the ambit of the NCA. If these features are present, it will follow that the AOD/POA supplements the overdraft agreements and accordingly fell within the scope of s 91(2).

[26] It is evident that the AOD/POA dealt with the same subject matter as the main agreement. By its very nature, an overdraft agreement regulates the extension and repayment of credit between the credit provider and the consumer. There was no suggestion that the overdraft and surety agreements between ABSA and the Serfonteins were not governed by the NCA. 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.

[27] For these reasons we conclude that the AOD/POA was a supplementary agreement within the meaning of the phrase in s 91(2). The next stage of the inquiry is to determine whether any of its provisions fell foul of the prohibitions listed in s 90(2).

Unlawful provisions

[28] Did the AOD/POA contain provisions that would be unlawful if included in a credit 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). Although the high court considered and pronounced on the unlawfulness of several of the provisions of the AOD/POA, it is sufficient for purposes of this appeal to refer only to those most relevant to the outcome.

[29] The first fundamental contravention 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 s 90(2)(*a*)(i) and is unlawful. It is worth pointing out that the clause is in any event unenforceable, as it is for the court, and not the parties, to determine whether the NCA applies to an agreement of compromise.

[30] 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 ABSA a full complement of rights to sell the immovable property. As we noted earlier, the effect of clause 2, which was irrevocable, was that it entitled ABSA immediately, and without resort to court processes, to execute against the immovable property (the right of *parate executie*). The high court found that these provisions fell within the prohibitions contained in s 90(2)(*k*) and 90(2)(*j*).

[31] In Bock and Others v Du*buroro Investment (Pty) Ltd*[8] 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.'

The Court went on to explain that there is an important proviso to this principle:

[8] *Bock and Others v Duburoro Investment (Pty) Ltd* 2004 (2) SA 242 (SCA) (*Bock*) para 7.

'Nevertheless, *after default the mortgagor may grant the bondholder the necessary authority to realise the bonded property*. It does not matter whether the goods are immovable or movable: in the latter instance, to perfect the security, the court's imprimatur is required.' (Emphasis added.)

[32] ABSA relied on this proviso in support of its submission that the high court had erred in finding that clause 2 of the AOD/POA contravened the NCA. It relied, too, on the following dictum in *Iscor Housing Utility and Another v Chief Registrar of Deeds and Another*, [9] which was cited with approval in *Bock*:[10]

'. . . where a *parate executie* power is granted, whether in respect of movables or immovables, and the parties were to agree after the debtor be in default that the creditor may proceed to realise that bonded property, he no longer does so by virtue of the original power, but by virtue of the fresh agreement after the debtor's default.'

[33] In sum, ABSA's contention was that AOD/POA fell within the scope of the proviso to the *parate executie* prohibition. It pointed out that the impugned provisions were not included in advance in the mortgage bond agreement between ABSA and the Serfonteins. Instead, they formed part of an agreement reached between the parties after the Serfonteins had fallen into default. As such, ABSA submitted, on the recognised principles of our common law, as confirmed in the judgments referred to above, the grant of an irrevocable power of attorney to ABSA to execute immediately against the immovable property was lawful.

[34] The fundamental difficulty with ABSA's reliance on *Bock* and *Iscor* is that both cases were decided before the promulgation of the NCA, with the result that they considered only the pre-statutory, common-law position. The legal landscape of the creditor-consumer relationship has undergone fundamental changes since then. This is not to say that existing common-law principles no longer have any application. That is an issue that does not require further consideration in this case. However, what it does mean is that once an agreement falls within the ambit of the NCA, the lawfulness of its provisions must be determined under the legislation. We have found that the

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[9] *Iscor Housing Utility and Another v Chief Registrar of Deeds and Another* 1971 (1) SA 613 (T) (*Iscor*) at 616E.
[10] *Bock* fn 8 para 7.

AOD/POA was a supplementary agreement within the meaning of that term in the NCA. The simple question, then, is whether the grant in clause 2 of an irrevocable power to execute against the immovable property without resort to court processes was prohibited under s 90(2).

[35] A provision of this nature does not pass muster under the NCA. 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, in s 25(1), and eviction, in s 26(3), of the Constitution. Under the latter provision, eviction in the absence of a court order is expressly prohibited.[11] 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.

[36] As we noted earlier, the purposes of the NCA include the protection of consumers and the promotion of equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers. 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.

[37] We conclude that two key provisions of the AOD/POA, namely clauses 2 and 13, were prohibited under s 90(2). In light of this conclusion, it is unnecessary to consider the high court's finding that other provisions in the AOD/POA were also unlawful under that section.

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[11] Section 26(3) provides:
'No one may be evicted from their home, or have their home demolished, without an order of court made after consideration of all the relevant circumstances. No legislation may permit arbitrary evictions.'

Induced or required to sign

[38] 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. They are therefore to bear their ordinary grammatical meaning. 'Require', according to the Shorter Oxford English Dictionary means to instruct or expect someone to do something. As to the meaning of 'induce' in the NCA, in *Barko Financial Services (Pty) Ltd v National Credit Regulator*[12] this Court found:

'To "induce", according to the Shorter Oxford English Dictionary 6 ed, is to succeed in *persuading or leading someone to do something*. In presenting the suite of documents to the consumer, it is Bako's employees who explain the advantages to the consumer of Annexure D5. That exercise, no doubt, is intended to persuade the consumer that it is in their best interests to sign that agreement. The stress laid in the affidavits on the advantages of the ADEO system from the perspective of the consumer would undoubtedly have been at the forefront of the presentation to prospective customers and informing them that ADEOs were less expensive than other forms of payment would clearly be directed at inducing them to agree to use this system. In view of the benefits to Barko of that system it is inconceivable that it would adopt a neutral stance in regard to the use of an ADEO in preference to some other means of payment. *The fact that a consumer may have been free to decline to conclude the agreement is, in my view, thus irrelevant to the question whether or not they were induced to do so*.' (Emphasis added.)

[39] Counsel for ABSA was at pains to emphasise that the AOD/POA was a product of a negotiation process, where both sides enjoyed legal representation, culminating in a settlement agreement acceptable to both parties. Counsel also submitted that, had it not been for the signing of the AOD/POA, expensive litigation to enforce ABSA's claim and execute thereon would have ensued. This, in a matter where the Serfonteins had no defence, and the immovable property was bonded to provide security for the debt. In defending the validity of the subsequent sale agreement counsel submitted that the selling price was market related. ABSA submitted that there was a distinction between the facts of this case and those in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*.[13] It highlighted

[12] *Barko Financial Services (Pty) Ltd v National Credit Regulator* [2014] ZASCA 114 (SCA); [2014] 4 All SA 411 (SCA) para 16.

[13] *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535. (CC) (*University of Stellenbosch LAC*).

that in that case, the credit provider had engaged in reprehensible conduct, demanding that consumers sign documents and in some instances, forging signatures when they refused. According to ABSA, this was a far cry from the facts of the case on appeal.

[40] Closer scrutiny of the circumstances leading to the signing of the AOD/POA, however, paint a different picture to the one portrayed by ABSA. In January 2019, ABSA rejected the first offer by the Serfontein's of a negotiated settlement. In the exchange of letters that followed, ABSA's legal representative adopted a stern tone, and it must have been clear to the Serfonteins, that unless they came to an agreement acceptable to ABSA, they would face litigation and possible sequestration. In other words, 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 to enable ABSA to sell the immovable property.

[41] The correspondence discloses that on 27 February 2019 ABSA's legal representatives informed the Serfonteins that the AOD/POA must be signed by the Serfonteins and two witnesses and returned to ABSA's legal representative on or before the close of business on 1 March 2019. The Serfonteins were warned that a failure to sign the AOD/POA would lead to formal steps being 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.

[42] 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. In this respect, the facts of this case are a starker example of inducement than those in *Barko*.

[43] ABSA contended in its submissions that a broad interpretation of the terms 'require' and 'induce' in s 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 ABSA

was that this would have the effect of outlawing most acknowledgments of debt under the NCA.

[44] 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 s 91, it is only if the debtor is induced to agree to terms that are prohibited under s 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 s 89(2), read with s 91.

[45] For these reasons we are satisfied that the Serfonteins were directly or indirectly required or induced to sign the AOD/POA. Consequently, we conclude that the high court was correct in finding that the AOD/POA contravened the provisions of the NCA and was unlawful. The remaining issue is whether the high court erred in declaring the AOD/POA, and the consequent agreement of sale, void *ab initio*.

Validity of the AOD/POA

[46] In terms of s 90(4) read with s 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, if it is reasonable to do so, or declaring the entire agreement unlawful. The effect of an order of severance is that the credit agreement, with the unlawful provisions severed from it, will remain in force. On the other hand, if it is not reasonable to sever the offending provisions, the court is required to declare it unlawful *ab initio*. In that case, the unlawful credit agreement is void and cannot be enforced. The court may also make any further order that is just and reasonable in the circumstances to give effect to the principles of s 89(5).

[47] ABSA submitted that in the peculiar circumstances of this case, a finding of unlawfulness should not necessarily lead to a striking down of the AOD/POA and reversing its consequences. It submitted that a just and equitable order would be to sever from the AOD/POA any provision that may be found to be offensive. ABSA, however, did not venture to mention which offending clauses of the AOD/POA could

be severed so that the remaining provisions could be implemented. Severance will only be reasonable, and thus permissible, if thereafter a valid agreement, capable of implementation, remains. The unlawful provisions, in our view, permeated the entire AOD/POA, thus making it impossible to render it lawful through severance of the offending clauses.

[48] In the circumstances, the AOD/POA could not be saved through severance. The high court was correct in so finding, and in declaring it unlawful as from the date it was concluded. As the AOD/POA was the basis on which ABSA entered into the deed of sale in respect of the immovable property, the high court correctly ordered that that agreement, too, was rendered void *ab initio*.

Conclusion and order

[49] For all the above reasons, we conclude that the high court cannot be faulted in granting the relief sought by the Serfonteins. We make an order in the following terms:

The appeal is dismissed with costs.

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R M KEIGHTLEY

JUDGE OF APPEAL

_____

M J DOLAMO

ACTING JUDGE APPEAL

Appearances

For the appellants:	MP van der Merwe SC and HJ Benade
Instructed by	Symington De Kok Attorneys, Bloemfontein
For the respondents:	N Snellenburg SC
Instructed by:	Blair Attorneys, Bloemfontein.