

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: 1683/2015

LA MER JEFFREYS AKKOMMODASIE BK

Applicant

And

FLASHCOR 182 CC

First Respondent

REGISTRAR OF DEEDS

Second Respondent

Coram: Chetty J

Heard: 27 August 2015

Delivered: 8 September 2015

Summary: **National Credit Act 34 of 2005** – *Whether agreement concluded between parties constituting credit agreement in terms of s 8 – Whether mortgage bond distinct from underlying agreement – Indivisibility – Agreement unlawful in terms of s 89 (2) (d) – Whether just and equitable to cancel deed of transfer and re-transfer immovable property to applicant – Application granted*

JUDGMENT

Chetty J:

[1] The applicant seeks relief formulated as: -

- "1. That it be ordered that the agreement between the Applicant and First Respondent marked annexure "MK1" to the Founding Affidavit be declared invalid and/or null and void.
2. That the Second Respondent be directed and authorised to cancel the Deed of Transfer No. T000038633/2013 and the Mortgage Bond No. B000021573/2013 and re-transfer the immovable property known as Erf 8832 (Portion of Erf 5622) Jeffrey's Bay, situated in the area of the Kouga Municipality, Division of Humansdorp, Eastern Cape Province in extent 743m.
3. In the event of any documents required to be signed by the First Respondent that in that event the Sheriff of the High Court Port Elizabeth be permitted to sign such documents.
4. That the First Respondent be ordered to pay the costs of this Applicant inclusive of all costs attendant upon the cancellation and re-registration referred to herein before."

[2] Annexure "MK1" is a document titled, "**Koopkontrak**" concluded between the parties on 7 August 2012 relating to the sale of a property described as "**Erf 8832 (’n Gedeelte van Erf 5622 Jeffreysbaai, Geleë in die gebied van die Kouga Munisipaliteit Afdeling Humansdorp, Oos-Kaap Provinsie, Groot: 766 (Sewe Honderd ses en sestig) vierkante meter, soos aangedui op landmeter diagram S.G. No 594/2012**" by the applicant to the respondent for the purchase price of R1.9 million rand. Clause 4.1 of the agreement, under the rubric "**Betaling**", provided that the purchase price was payable by the purchaser to the seller by way of a 100% mortgage bond to be registered contemporaneously over the property on the date of registration of transfer. It is common cause that the deed of mortgage identified the applicant as the mortgagee and the first respondent as the mortgagor.

[3] In its founding affidavit, the deponent, the applicant's managing member, averred that the agreement constituted a credit agreement as contemplated in s 8 of the **National Credit Act**¹ (the Act), and, *ipso facto* unlawful, for want of compliance with the provisions of s 89 (2) (d) of the Act. It provides as follows: -

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

(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered;" (emphasis supplied)

¹ Act No, 34 of 2005

[4] It is not in dispute that at the time the agreement was concluded, the applicant was not a registered credit provider. But, says counsel for the respondent, it matters not – “MK1” and the loan agreement embodied in the mortgage bond are distinct, disparate agreements. Ergo, so the argument unfolded, “MK1” remains untainted by the unlawfulness of the mortgage bond, is a valid agreement of purchase and sale and precludes the grant of the relief sought. Mr Scott submitted further, that in any event, the invalidity of the mortgage bond merely entitled the applicant to restitution of the purchase consideration of R1.9 million and not the re-transfer of the property to it.

[5] The submission is devoid of all merit. “MK1” and the mortgage bond are indivisible and not disparate. A mortgage is accessory to a principal obligation – its existence and continued existence is dependent upon the corporeality of the principal obligation which it secures, in *casu*, payment of the purchase price pursuant to the provisions of Clause 4.1 of the agreement. See **Thienhaus N.O v Metje & Ziegler Ltd and Another**². The kindred nature of the mortgage bond and the underlying obligation secured thereby was articulated by Wessels J.A in **Lief, N.O v Dettmann**³ as follows: -

“It is convenient at this stage to set out what I conceive to be the true nature of a mortgage bond, because, in my opinion, this may shed some light on the various problems arising from the contrary

² 1965 (3) SA 25 (AD) @ 32F

³ 1964 (2) SA 252 (AD) @ 264H-265D

contentions put forward on behalf of appellant and respondent respectively.

In terms of the provisions of sec. 102 of the Deeds Registries Act, 47 of 1937, a mortgage bond is defined as 'a bond attested by the Registrar specially hypothecating immovable property'. In *Oliff v Minnie*, 1953 (1) SA 1 (AD), it was stated by VAN DEN HEEVER, J.A., (at p. 3) that,

'a mortgage bond as we know it is an acknowledgment of debt and at the same time an instrument hypothecating landed property or other goods'.

In *Union Government v Chatwin*, 1931 T.P.D. 317, reference is made to the fact that the object of a mortgage bond is not merely hypothecation but the settlement of the terms of the loan as well. The obligation of the mortgagee to lend the money to the mortgagor and the latter's obligation to furnish the security stipulated for and to comply with the conditions as to repayment of the amount of the loan flow from their common consent to undertake the transaction. By their common consent alone, however, they only create personal rights and obligations, notwithstanding the fact that in part their consent aims at the constitution of a real right in immovable property which is to inhere in the lender. A consensual right to claim hypothecation of immovable property is prior to registration a personal right available only against the debtor. When the debtor gives effect to the reciprocal obligation in this respect by causing the mortgage bond to be registered in the Deeds Registry then, and only then, is the real right properly constituted in favour of the mortgagee.

(Registrar of Deeds (Tvl.) v. Ferreira Deep Ltd., 1930 AD 169 at p. 180). Registration does not affect the nature of the principal obligation, which throughout retains its character as a personal right of action available to the mortgagee against the mortgagor for the payment of the interest and capital due in terms of the bond." (emphasis supplied)

In *casu*, the "common consent" referred to in the foregoing passage finds embodiment in clause 4.1 of the agreement.

[6] Furthermore, reliance on the heading of the agreement as evincing a classic agreement of purchase and sale is entirely misplaced. Its appellation is completely inaccurate. As Hoexter J.A concluded in **Vasco Dry Cleaners v Twycross**⁴, labels can be misleading. At the trial the point had been taken that although the financial arrangements between the relevant parties had been cast in the mould of a sale and resale, the outward form of the contract was misleading and that the true substance of the contract between them was rather one of pledge. In upholding the appeal, the learned judge stated: - **"The question here was not so much whether, if the contract were a genuine agreement of sale, transfer of ownership of the machinery could be effected by means of a constitutum possessorium. The question was rather whether, having regard to all the attendant circumstances, the true transaction between the plaintiff and Air Capricorn was one of sale or pledge."**

⁴ 1979 (1) SA 603 (AD) at 615B-G

[7] In my judgment, “MK1’s” title, “*Koopkontrak*” is entirely misleading and conceals the true character of the transaction concluded between the parties. The phraseology of clause 4 of “MK1” is clear and ambiguous. It unequivocally manifests an agreement of mortgage and constitutes a credit agreement as envisaged by s 8 of the Act. It provides that: -

“(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is-

(a) a credit facility, as described in subsection (3);

(b) a credit transaction, as described in subsection (4);”

Given the wide reach of the aforesaid subsections, there is in my view, no room to contend that “MK1” is not a credit agreement. Non-compliance with the prescripts of s 89 (2) (d) rendered the agreement unlawful, *caedit quaestio*.

[8] A declaration of invalidity triggers the operation of s 89 (5) (a) of the Act which provides: -

“89 Unlawful credit agreements

(5) 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."

[9] The applicant contends that save for a single payment of R21, 000.00 during July 2014, the respondent has persistently defaulted in fulfilling its contractual obligations. The papers evidence, not only the respondent's cavalier attitude to repayment of its indebtedness, but its arrogance as well. Justice and equity compel the relief sought. In the result the following orders will issue: -

1. The agreement concluded between the parties, "MK1", is declared void *ab initio*.
2. The second respondent is directed and authorised to cancel the Deed of Transfer No. T000038633/2013 and the Mortgage Bond No. B000021573/2013 and re-transfer the immovable property known as Erf 8836 (Portion of Erf 5622) Jeffrey's Bay, situated in the area of the Kouga Municipality, Division of Humansdorp, Eastern Cape Province in extent 743m.
3. Where necessary, the Sheriff of the High Court is authorised to sign any document(s) in lieu of the first respondent.
4. The First Respondent is ordered to pay the costs of this application, inclusive of all costs attendant upon the cancellation of the Deed of

Transfer No. T000038633/2013 and the Mortgage Bond No. B000021573/2013, and the re-transfer of the immovable property known as Erf 8836 (Portion of Erf 5622) Jeffrey's Bay.

D CHETTY

JUDGE OF THE HIGH COURT

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