

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHERS: NO  
(3) REVISED: NO

20/01/2023

DATE

BARIT AJ

CASE NO: 33442/21

In the matter between:

**RESIDUAL DEBT SERVICES LIMITED**

**[PREVIOUSLY REGISTERED AS AFRICAN BANK LIMITED**

**AND THE AFRICAN BANK LIMITED]**

**Applicant**

and

**COMPANY UNIQUE FINANCE (PTY) LTD**

**1<sup>st</sup> Respondent**

**THE CHIEF REGISTRAR OF DEEDS**

**2<sup>nd</sup> Respondent**

**THE PRUDENTIAL AUTHORITY**

**3<sup>rd</sup> Respondent**

**THE MINISTER OF FINANCE**

**4<sup>th</sup> Respondent**

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**JUDGMENT**

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## **Introduction**

- [1] This is an application in which the applicant seeks that the first respondent legally registers, in the name of the first respondent, certain properties which were originally part of the assets of the applicant.
- [2] The applicant is Residual Debt Services Ltd (under curatorship). At its incorporation in 1975 the applicant had the name The African Bank Ltd. It subsequently changed its name to African Bank Ltd and on 4 April 2018, it again changed its name to Residual Debt Services Ltd (RDS).
- [3] The first respondent is Company Unique Finance (Pty) Ltd (CUF), a Company with registration number 1994/002755/07 duly incorporated in accordance with the company laws of South Africa.
- [4] The second respondent is the Chief Registrar of Deeds, a public official appointed in terms of section 2 (1) of the Deeds Registry's Act 47 of 1937.
- [5] The third respondent is the Prudential Authority, in his official capacity as such with offices at SARB building, 370 Helen Joseph Street, Pretoria Gauteng.
- [6] The fourth respondent is the Minister of Finance in his official capacity as such.

## **Substance of the matter**

- [7] In 1998, in terms of “the transaction agreement”, the first respondent (CUF) was appointed to manage what was known as the “Ring-Fenced Business”, which consisted of the entire book debt of the applicant. Subsequently on 20 November 2003 an agreement was concluded for the transfer of the ring-fenced business to CUF.
- [8] In summation, with effect from 25 October 2004, and in terms of the provisions of Section 54 (3) (a) and (d) of the Bank’s Act, all the assets of the applicant, which consisted of the “Ring-Fenced Business” (such as properties, securities, mortgage bonds, rights of mortgagees) were transferred and become invested in CUF.
- [9] This was approved and consented to by the Registrar of Banks and the then Minister of Finance. This was done in terms of section 54 of the Bank’s Act. This would result in the transfer of the Ring-Fenced business from the applicants to CUF.

## **The law**

- [10] In terms of Section 54 of the Banks Act 94 of 1990, a compromise or arrangement referred to in Chapter XII of the Companies Act which involves a bank in an arrangement of all or part of the assets and liabilities of a bank to

another person, shall have legal force unless the consent of the Minister of Finance is conveyed in writing, through the Registrar, beforehand.

Under the heading "Amalgamations, mergers, and arrangement, "Section 54 (1) states:

" The Minister must consent, in writing and convey through the Registrar, to -

- (a) an amalgamation, merger or arrangement referred to in Chapter 5 of the Companies Act and which involved the Bank as one of the principal parties to the relevant transaction and
- (b) an arrangement for the transfer of more than 25% of the assets, liabilities or assets and liabilities of a bank to another person;

....Provided further that the Minister's consent is granted beforehand.

### **The crux of the matter**

[11] From the details brought to this Court the crux of this matter can best be stated as follows. A "ring-fenced" extensive number of properties was transferred by the applicants to CUF. The properties ended up in two lists, both being part and parcel of the "ring-fenced" total listings. One of those two listings was registered in terms of the legal requirements. The second listing, though acquired by CUF as part of the "ring-fenced" business, was never registered as such in terms of the legal registering requirements. However, factually, both listings are part of CUF.

[12] Further the applicant maintains all the properties of the ring fenced business fall within the agreement. Hence the applicant is not asking for anything- no debt, no money. Just that the respondent (CUF) do what they are supposed to. This will make legal the de facto position. It's effect is not to acquire the assets. This has been already achieved.

[13] What RSD (the Applicant) is stating is that CUF must legally register all the properties on the second list so as to legally regularise the factual situation according to the "ring-fenced" agreement. CUF in turn is saying that they do not want the second listing of properties.

#### **The transfer**

[14] On 16 April 2007, the Chief Registrar of Deeds issued a circular, referring, in its paragraph 6 to "rubber stamps regarding the transfer of assets and liabilities'. The endorsement of the title deeds and mortgage bonds which was to be affected by the placing of the stamp on the signature thereof by the Relevant Registrar of Deeds, provided as follows:

"ENDORSEMENT BY VIRTUE OF SECTION 54 OF THE BANK'S ACT, 1990 (ACT NO 94 OF 1990).

THE WITHIN MENTIONED ASSET/S OF AFRICAN BANK LTD (NO 1975/002526/06)

HAVE BEEN TRANSFERRED TO COMPANY UNIQUE FINANCE (PTY) LTD (NO 1994/0027/55/07)."

[15] From the wording of the stamp relating to the endorsement the stated words are  
"have been transferred"

## **The Contract**

[16] Is the Contract between the parties a valid one and hence fulfilment is required by both sides. In this respect, the definition by Gibson, in South African Mercantile and Company Law (Sixth Edition, 1988 p10) is an all-encompassing definition of a contract:

*A contract is an agreement made between two or more persons within the limits of their contractual capacity, for the serious intention of creating a legal obligation, communicating such intention, without vagueness each to the other and being of the same mind as to the subject matter, to perform positive or negative acts, which are possible to performance.*

Gibson maintains that all the essentials that listed in this definition must be part of any valid contract. Without these essentials the contract become anulity. Hence, Gibson sub-divides the definition to specific items, any one of which if missing will invalidate, or what might be believed to be, a contract.

*(a) The Agreement must be lawful*

*(b) The Agreement must be made within the limits of the parties contractual capacity*

*(c) The parties must seriously intend to contract*

*(d) The parties must communicate their intention to each other*

*(e) The agreement must not be vague*

*(f) The parties must be in the same mind as the subject matter*

*(g) Performance must be possible*

Looking at the Agreement between the Applicant (RDS) and CUF, all the essentials are met. Hence, a valid contract between the parties, where both sides obligations must be fulfilled per the terms of the contract. This is particularly notable when considering the main factor which is the "ring-fenced" aspect.

[17] The position in this matter is that the transaction was approved by the Minister in terms of the Bank Act. Such was with respect to all the ringed-off properties. It came with its assets and liabilities. This is the purpose of the entire contract. Now, what the Applicant is basically stating is that CUF wants to pick and choose. However, the Applicant maintains that the ringed-off properties came as one parcel. And CUF acquired this parcel of assets. Hence, the applicant is stating that CUF must do the right thing by abiding by the original contract and calls on CUF to do so. The Applicant further maintains that it can not be a contract in which one party says yes to the assets, but to the liabilities "no".

## **Prescription**

[18] A great deal of attention was placed by the respondents to the factor of prescription. CUF claim that the cost involved in the transfer of the properties is a debt and therefore has prescribed.



The “prescription” that the respondents are referring to, does not bear similarity to normal debtor and creditor business transactions. In this instance we are dealing with special contractual arrangements, conducted between parties where benefits and obligations arose. For the respondents to try to use prescription in this instance, does not fulfil the reasoning and correctness of the word “prescription”. Should the meaning that the respondents are attempting to apply hold water, same would make many a business arrangement and/or agreement a potential nullity and not worthwhile entering into. The special contractual circumstances attaching to the agreement, which is before this Court, does not lend itself to prescription. Further one can’t contract out of the Banks Act or the effects of Section 54 of the Banks Act.

## **Arbitration**

- [19] The original agreement covering the “Ringed Fenced Business”, has a provision with respect to any disputes which may occur. This is contained in clause 21, which allowed for arbitration. It stated:

*“Save in respect of those provisions of this agreement which provide for their own remedy which would be incompatible with arbitration, all or any dispute which arise in connection with this agreement, out of or pursuant to this agreement (other than where an interdict is sought as a matter of urgency or other urgent relief may be obtained from a Court of competent jurisdiction) shall be submitted to and decided by arbitration in accordance with the rules of, and by arbitrator or arbitrators appointed by AFSA”*



In accordance with this provision the matter went to arbitration where RDS lost. However, RDS took the matter on appeal to the Arbitration Appeal Tribunal, where the matter was heard by LTC Harms, E Cameron, and MM Joffe JJ. The Arbitration appeal award went in favour of RDS. In paragraph 28 of the "reasons for the award", Harms stated as follows:

*"In this there was no distinction between the two books; they both comprised debts that were owed to the Bank....Beneath the verbal play and counterplay and the complex verbiage of the accumulated agreement, the feature is in our view decisively illuminates this meaning". As such, whether the properties were listed in the one listing or in the other, both fell within the ringed fenced agreement. "*

Referring to Clause 5 of the Agreement of March 2003, the Arbitration Appeal Tribunal made the following comment:

"The ring-fenced business was defined to mean- the business of running and liquidating the debtors book, which comprises inter alia;-

1.20.1 All assets and all contracts and securities relating to the debtors book, including, but not limited to, mortgage bonds, suretyships, collateral security and insurance policies (including all long-term and short-term policies) securing the debtors book any other assets forming part of the ring-fenced business, properties in possession arising out of security house in respect of the debtors book and leases associated with debtors book;

1.20.3 All income and expenses relating to the running and liquidating of the debtors book;

1.20.6 The management of and all risks and benefit relating to the Government book;

Including the extension of such business- and all and any business conducted by the managers of the ring-fenced business or (CUF's Loan Management Services division), in respect thereof".

With the award of the Arbitrator being set aside, Nugent J, granted the following award:

It is declared that Company Unique Finance Pty (Ltd) (CUF) acquired the ring-fenced business which comprised all and any business conducted before 5 January 1999 and all and any business conducted after 5 January 1999 thereafter by the managers of the ring-fenced business or LMS (CUF's Loan Management Services) which was in effect the entire mortgage and asset-based business conducted with Old Afbank, including the debtors book, which in turn included the government debtors book.

[20] There is no reason for this Court to deviate from what the Arbitration Appeal Tribunal found. The contractual arrangements, provided for any dispute which may arise to be decided by arbitration. From the facts before this Court, the decision of the Arbitration Appeal Tribunal is a sound one which confirms the original intent of the agreement.

[21] I am satisfied that a proper case has been made out and the following order is made.

## Judgement

1. That the Arbitration Appeal Award be made an order of this Court
2. That the immovable properties as listed in annexure "FA 22.1" to "FA 22.8" to the founding affidavit of the Applicant were transferred to the first Respondent on 25 October 2004 in terms of Section 54 of the Banks Act of 1990.
3. That all the rights and obligations of the Applicant as mortgagee, and the mortgage bonds as listed in annexure "FA 23.1" to "FA 23.3" to the founding affidavit were transferred to the first Respondent on 25 October 2004 in terms of Section 54 of the Banks Act 94 of 1990.
4. That an addition to the removable properties and mortgage bonds as listed in annexure "FA 22" and "FA 23" to the founding affidavit, all other removable properties, and the rights and obligations of the Applicant as mortgagee in respect of any mortgage bonds registered in any Deeds Registry in South Africa on 25 October 2004 were transferred to the first Respondent on 25 October 2004 in terms of the Section 34 of the Banks Act 94 of 1990.
5. Directing the Chief Registrar of Deeds (the second Respondent) to cause the title deeds of the immovable properties of the mortgage bonds, as listed in annexure "FA 22" and FA 23" to the founding affidavit to the extent that they remain registered in the name of the applicant, and any other immovable property and mortgage bonds which were on 25 October 2004 registered in the name of the Applicant to the extent that they remain registered in the name of the Applicant (including in one of its former

names), to be endorsed in the respective Deeds Registries to reflect that the right, title and interest of the Applicant in those immovable properties and the rights and obligations of the Applicant arising from the mortgage bonds were transferred to the first Respondent on 25 October 2004 in terms of Section 54 of the Banks Act of 1990.

6. That the Chief Registrar of Deeds (the second Respondent) to issue a Circular to the Registrars of Deeds falling under his control, and rubber stamps, the same or similar wording and to the same effect as appears from annexure "FA 17" and "FA 18" to the founding affidavit (of the Applicant) but to the relation to the lists of removable properties and mortgage bonds annexed to the founding affidavit as annexure "FA 22" and "FA 23" and any other immovable property and mortgage bonds which was were on 25 October 2004 registered in the name of or in favour of the Applicant (including in the name of one of its former names).
7. The first Respondent to pay the costs of the Applicant on a party and party scale.

SIGNED AT PRETORIA ON THIS THE 20/01/2023 DAY OF JANUARY 2023.



Barit AJ

Gauteng Division, Pretoria

## **Appearances**

Advocate Maritz S.C. for the Applicant  
Instructed by MacRobert Attorneys

Advocate Mundell S.C. for the Respondents  
Instructed by Marie-Lou Bester Inc