

SUMMARY OF THE JUDGMENT

SECURITISATION: MY BOND IS WITH BANK 'X': CAN 'Y' SUE ME FOR PAYMENT?

Home Obligors Mortgage Enhanced Securities (Pty) Limited v Louw and Another (5545/2012) [2016] ZAKZPHC 44 (30 May 2016)

Property owners are often taken aback when, after defaulting on the loan repayment, they receive a summons from an entity other than the bank that granted the mortgage finance. In many instances this is due to securitisation, a process briefly explained in this judgment. The question that follows is whether the defaulting home owner can avoid execution against his home on the basis that he had no knowledge and gave no consent to the loan being securitised in this way?

The Judgment can be viewed [here](#).

FACTS

Louw bought immovable property in March 2007 and obtained a loan from ABSA bank with which to pay the purchase price. A mortgage bond was registered in ABSA's favour over the property.

Subsequent hereto, ABSA transferred the loan for securitisation to Home Obligors Mortgage Enhanced Securities (Pty) Ltd (Home Obligors). (On a very basic level, securitisation is the process of conversion of existing assets or future cash flows into marketable securities. Some of the assets that can be securitised are loans like car loans, housing loans, etc and even future cash flows like ticket sales, credit card payments, car rentals or any other form of future receivables. Securitisation usually involves three key steps: Firstly, the company that originally owns the asset (i.e. ABSA bank that owns the loan, referred to as 'the originator') sells them to a newly formed company or trust known as 'the issuer'; secondly, the issuer issues securities (either bonds or notes) secured by the cash flows of the underlying assets; and thirdly, the securities are purchased by investors, usually institutions, who either trade them or place them in their investment portfolios.)

When Louw subsequently defaulted on his payments under the bond, ABSA sent him the required section 129 notice (as required in the National Credit Act) alerting him to the default and his rights. He failed to rectify the default and Home Obligors then instituted proceedings for an order declaring Louw's mortgaged property executable.

Louw defended the action and argued, amongst other things, that:

- He was not indebted to Home Obligors as he had entered into a contract with ABSA and not Home Obligors; and that
- The cession by ABSA to Home Obligors was invalid because his consent was not obtained.

The evidence showed that Home Obligors had *locus standi* to bring the action against Louw, following on the securitisation. It was testified in this regard that: (i) ABSA had entered into the loan agreement with Louw whereby ABSA paid the purchase price of Louw's property to the sellers, against registration of a mortgage bond against the title deed to secure the repayment of the loan; (ii) after six or twelve months from the date of the payment of the first instalment by a borrower, ABSA transferred seasoned loans for securitisation. In this case, it entered into a securitisation agreement with Home Obligors, whereby a schedule of claims were ceded to the latter including the loan owing by Louw. Thereafter ABSA entered into a Servicing Agreement with Home Obligors, 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 acted as an agent for Home Obligors after a valid cession agreement was concluded.

The loan agreement and the mortgage bond were endorsed to indicate that a cession has taken place.

HELD:

- In general, a creditor is free to cede its rights to any person and does not need the consent of the debtor (borrower), nor is it obliged to give the former notice.
- There also was no limiting provision in the agreement that was concluded by ABSA and Louw requiring such consent or notice.
- A notice to a debtor is not a pre-requirement for the validity of a cession, despite the resulting position being that the entire contract involves the cedent (ABSA), the cessionary (Home Obligors) and the debtor (Louw). In the case where the cessionary (Home obligors) acquires the rights to a principal debt, it is logical that he steps into the shoes of the cedent (ABSA). This does not create any novation of the agreement.
- ABSA's standard conditions in its mortgage bond also stated as follows:

'12. Cession of mortgage bond.

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 Louw's consent was required. ABSA did, in any event, inform Louw in writing in October 2011 of the cession and consequences.
- 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.

Judgment was accordingly granted in favour of Home Obligors and Louw's property declared executable.

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