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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT, MAKHANDA)

Not reportable

Case no. 98/2016

In the matter between:

BONGIWE FAVOURITE MBUWAKO	Applicant
and	
NEDBANK LIMITED	First respondent
SHERIFF OF THE HIGH COURT, MTHATHA	Second respondent
REGISTRAR OF DEEDS, MTHATHA	Third respondent
PURCHASER OF ERF 2[...], MTHATHA	Fourth respondent

Not reportable

Case no. 2925/2023

In the matter between:

NEDBANK LIMITED	Applicant
and	
BONGIWE FAVOURITE MBUWAKO	Respondent

JUDGMENT

LAING J

[1] The matters described above are closely intertwined and can be conveniently decided in terms of a single judgment. The applicant in the first matter (and the respondent in the second matter) is a medical practitioner, Dr Mbuwako, who resides at 4[…] W[...] Drive, Fort Gale, Mthatha, registered as erf 2[...], Mthatha ('the property'). She seeks, inter alia, an order that the attachment and sale in execution of the property be declared null and void, and that the subsequent registration of transfer be reversed and that the title therein reverts to her. The applicant in the second matter (and the first respondent in the first matter) seeks, inter alia, an order evicting Dr Mbuwako from the property.

Background

[2] The underlying facts are mostly common cause. From the papers, it is apparent that Nedbank lent an amount of R 1 660 683 to Dr Mbuwako on 1 September 2012 for the purchase of the property but she fell behind in repayments. Consequently, Nedbank obtained judgment against her on 22 March 2017 in the amount of R 1 687 443. The property was attached on 12 July 2017. The parties reached agreement to stave off a sale in execution, only for Dr Mbuwako to fail once more in the fulfilment of her obligations. The property was sold in execution to Nedbank on 17 August 2018 for the sum of R 1 300 000, which was used to reduce

the outstanding debt. Dr Mbuwako remained in occupation, despite demand that she vacates the property. Nedbank subsequently launched eviction proceedings.

[3] On 11 December 2023, Dr Mbuwako's attorneys wrote to Nedbank's attorneys. They indicated that she intended to pay the amount of R 1 687 443 and intended to have the property transferred back to her. They also requested that Nedbank's eviction application be removed from the court roll, pending settlement. At that stage, Dr Mbuwako still owed Nedbank the sum of R 1 653 501, comprising the capital amount, accumulated interest, and costs.[1] Nedbank's attorneys, represented by Mr Louis Schoeman, responded on 19 December 2023 as follows:

'1. The litigation for your client's eviction from the property will not be withdrawn or suspended and this will only be done if your client pays the amount referred to below timeously and if, thereafter, an agreement of sale, as envisaged below, is concluded between the parties timeously.

2. My client will accept the sum of R 1 687 443 in full and final settlement of its claims against your client, this sum to be paid into my firm's trust account, the details whereof are . . . subject to the following:

   2.1. The settlement amount is to be paid to my client by no later than the 4th of January 2024.

   2.2. Payment of the abovementioned amount will not entitle your client to transfer of the relevant property to her.

   2.3. My client will transfer the property to your client pursuant to the conclusion of an appropriate agreement of sale between the parties. The purchase price of the property is to be equivalent to what it has cost my client to acquire it, namely R 1 400 656, which is arrived at as follows:

Purchase price paid by my client	R 1 300 000
Transfer duty and conveyancing costs	R 100 656
Total	R 1 400 656

[1] Ms Moodley indicated that the amount was constituted as follows: R 835 941 (capital and accumulated interest) + R 817 560 (costs) = R 1 653 501.

2.4. If the settlement amount is not paid timeously or, that having been done, an agreement of sale in respect of the property has not been concluded between the parties by the 31st of January 2024, my client will proceed to sell the property on the open market, and to evict your client from it. If the agreement of sale is subject to any suspensive conditions and these are not fulfilled by the 28th of February 2024, the eviction proceedings will continue.

2.5. The fact that the parties may be negotiating does not affect your client's obligation to timeously file her papers in opposition to the application for her eviction.'

[4] On 5 January 2024, Dr Mbuwako arranged for payment. Her attorneys notified Nedbank's attorneys on 8 January 2024 and requested that the eviction application be removed from the roll. Mr Schoeman responded on 12 January 2024, acknowledging receipt of payment, but emphasising that there was no relationship between the parties. He stated that Dr Mbuwako was an unlawful occupier and a potential buyer like anyone else, but who would be required to pay only the purchase price indicated in his earlier correspondence. The eviction application would proceed unless Dr Mbuwako concluded an acceptable agreement of sale by the stipulated deadline. Her attorneys replied on 14 January 2024, offering a purchase price of R 1 000 000 on behalf of their client and requesting that eviction proceedings be suspended. To this, Mr Schoeman indicated on 18 January 2024 that there would be no further negotiation, except for what was necessary to ensure the sale of the property. On 7 February 2024, Dr Mbuwako's attorneys recorded that their client had already made payment of R 1 687 443 ad that Nedbank's attorneys had stipulated a deadline of 31 January 2024 by which the deed of sale was to have been concluded; they had not, however, received the document in question. They requested a copy, as well as a meeting so that agreement could be reached on the terms of the sale and the amount that Dr Mbuwako still owed, if any. This met with Mr Schoeman's response on 9 February 2024, stating that Dr Mbuwako had given no prior indication that she wished to purchase the property. He went on to say the following:

'1. By the close of business on the 15th instant, your client is to consent formally to an order for her eviction . . . An order for your client's eviction will be taken on the 20th instant by agreement. It will be used to evict your client and all who occupy the property only if, by the 29th instant, there is not in existence a binding deed of sale between the parties or, if by that date there is a deed of sale in existence and that

deed of sale is subject to suspensive conditions, <u>the suspensive conditions have not all been fulfilled by the 29th of March this year</u>.

2. Your client will be presented with an offer presently. The terms of the sale, apart from the formal ones, will be:

   2.1. a purchase price of R 1 400 656;

   2.2. the offer will be open for acceptance by your client until the close of business on the . . .

   2.3. if the sale is subject to any suspensive conditions, your client will be afforded until the 29th of March 2023 days to fulfil them;

   2.4. the transfer will be dealt with by my firm.

<u>Please make clear, by return email, whether your client accepts the terms set forth above or not. If she does not, the matter must simply proceed</u> . . .'[2]

[5] On 13 February 2024, Nedbank's' attorneys sent a deed of sale to Dr Mbuwako's attorneys for consideration, while emphasising that the eviction application would still proceed unless a binding deed of sale was concluded. Dr Mbuwako's attorneys sent a letter on 14 February 2024, referring to Mr Schoeman's letter of 19 December 2023 and confirming that the only outstanding issue was completion of the deed of sale. Their client sought, however, a breakdown of how Nedbank had determined the settlement amount of R 1 687 443, as well as the purchase price of R 1 400 656. Consequently, the attorneys in question requested that the eviction application be held in abeyance, pending agreement on the purchase price and the conclusion of the deed of sale. Mr Schoeman responded on 16 February 2024, indicating that Dr Mbuwako had had sufficient time within which to execute and return the deed of sale; the eviction application would not be suspended.

[6] On 19 February 2024, Nedbank's attorneys received a deed of sale executed by the purchaser, reflected as BF Medicare (Pty) Ltd. The deed of sale was unacceptable because, inter alia, it omitted to indicate whether mortgage finance would be required. This prompted Nedbank's attorneys to send a fresh deed of sale to Dr Mbuwako's attorneys on 21 February 2024, including instructions on how to

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[2] Sic. Original emphasis retained.

complete the document in relation to mortgage finance. Dr Mbuwako signed it on 28 February 2024, Ms Moodley signed it on behalf of Nedbank on 4 March 2024, and a copy of the document was sent to the former's attorneys on 7 March 2024. They contacted Nedbank's attorneys on 8 April 2024, however, saying that they never received the deed of sale; they confirmed that Dr Mbuwako required mortgage finance. Mr Schoeman responded on 9 May 2024, attaching a deed of sale executed by Nedbank and requesting its completion and return if BF Medicare (Pty) Ltd still wished to purchase the property. He indicated that, in terms thereof, the purchaser was afforded a month within which to secure mortgage finance; he also indicated that the eviction application would proceed until Nedbank was satisfied that the property would indeed be transferred to BF Medicare (Pty) Ltd. Dr Mbuwako's attorneys did not reply.

[7] On 7 June 2024, Dr Mbuwako's new attorneys sent correspondence to Nedbank's attorneys, requesting a copy of the papers upon which Nedbank originally secured judgment. Mr Schoeman responded on 13 June 2024, saying that the papers could be obtained from Dr Mbuwako's previous attorneys. The debt had, nonetheless, been settled; the only remaining issue was whether Dr Mbuwako or BF Medicare (Pty) Ltd still intended to purchase the property. This was followed by a letter on 20 June 2024, under which Mr Schoeman pointed out that the time within which the purchaser was required to secure mortgage finance had lapsed. Consequently, the most recent deed of sale was no longer acceptable; the eviction application would proceed. Dr Mbuwako's new attorneys did not reply.

Issues for determination

[8] The main question confronting the court pertains to whether there is, in the first matter, a basis for granting the declarator and that the registration of transfer be reversed, with the result that title in the property reverts to Dr Mbuwako. In this regard, she appears to have framed her challenge in terms of the relevant provisions of the National Credit Act 34 of 2005 (NCA); alternatively, she has relied on broad contractual principles or those associated with unjust enrichment. The precise outlines of her challenge are difficult to discern. The determination thereof will,

however, decide the question underpinning the second matter, viz. whether Nedbank is entitled to an eviction order.

The immediate issue is Nedbank's argument that the first matter is *res judicata*. This will be discussed below.

Res judicata

[9] Nedbank stated that Dr Mbuwako brought an application on 4 October 2018 for the same relief that she sought in the present matter, which Plasket J dismissed. Consequently, Dr Mbuwako brought an application to rescind the above order, which Lowe J granted on 25 February 2020; the court directed that the original application be set down afresh for argument. The matter came before Gxarisa AJ, who, on 5 August 2021, granted the relief sought and set aside the sale in execution. On appeal, a full bench set aside Gxarisa AJ's order on 30 November 2022. Dr Mbuwako took no further steps.

[10] In *Evins v Shield Insurance Co Ltd*,[3] Corbett JA addressed the principle of *res judicata*, saying that if a final judgment has been given, then subsequent litigation between the same parties in regard to the same subject-matter, and based upon the same cause of action, is impermissible.[4] The object of the principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions, and the possibility of conflicting decisions.[5] In *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others*,[6] the Constitutional Court, per Khampepe J, approved the views expressed in *Evins*, and went on to hold that:

'The requirements of *res judicata*, although trite, can be summed up as follows: (i) there must be a previous judgment by a competent court; (ii) between the same parties; (iii) based on the same cause of action; and (iv) with respect to the same subject-matter, or thing.'[7]

[3] 1980 (2) SA 814 (A).
[4] 835F.
[5] Ibid.
[6] 2020 (1) SA 327 (CC).
[7] Paragraph 71.

[11] From the appeal judgment in the first matter, it is apparent that Dr Mbuwako previously sought an order declaring the sale in execution on 17 August 2018 to be null and void. The full bench set out the basis for her application as follows:

‘In the founding affidavit, the respondent [Dr Mbuwako] alleged that the first respondent [the sheriff] and the appellant [Nedbank] had not complied with the provisions of rule 46 of the Uniform Rules of Court and that [Dr Mbuwako] was prejudiced in the result. She stated the following:

> “The facts of the matter at the time of drafting of this application are that: there are no signed conditions of sale according to [the sheriff] and/or [the sheriff] refuses to disclose the signed conditions of sale to [Dr Mbuwako]. Further, the facts of the matter at the time of drafting of this application are that the auction (sale) of the property did not take place in public and was not sold to the highest bidder. The facts of the matter at the time of drafting this application are that the property was sold in prejudice to [Dr Mbuwako] without a reserve price. [Dr Mbuwako] will expound the severe consequences (prejudice) of the abovementioned material irregularities to [her] in detail in the latter part of this affidavit.”[8]

. . . In amplification of the aforegoing, [Dr Mbuwako] set out the prejudice complained of as follows:

> “ . . . the immovable property was not sold at a public auction; . . . no reserve price was set for the immovable property; and . . . there were no signed conditions of sale.”’[9]

[12] The full bench found that the court *a quo* had incorrectly held that there had been non-compliance with rule 46 of the Uniform Rules of Court (URC). Consequently, it upheld the appeal.

[13] In the first matter, Dr Mbuwako has adopted a different approach. Although not readily apparent from her founding papers, the underlying cause of action seems to be based on the contention that the parties agreed that payment of the judgment debt would amount to full and final settlement of the dispute, with the result that ownership of the property would revert to Dr Mbuwako. It is not based on compliance or otherwise with rule 46. Whereas the relief sought in the first matter, i.e. an order declaring the sale in execution to be null and void, is the same as that in her earlier application, it cannot be said that the cause of action is the same. The point in issue

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[8] Sic.

[9] *Nedbank Limited v Bongiwe Favourite Mbuwako* (unreported, case no. CA 17/2022, Eastern Cape Division, Makhanda), paragraphs 8–9.

is whether payment of the judgment debt, in the circumstances, must result in the reversion of ownership in the property to Dr Mbuwako.

[14] Consequently, there is no basis for Nedbank's argument that the first matter is *res judicata*. The merits must be considered.

The first matter — application for a declarator

[15] At the outset, it is necessary to remark that Dr Mbuwako's papers were badly drafted and certainly not the embodiment of perspicuity. The relief sought in her notice of motion is for:

'an order directing that the attachment and sale in execution . . . transfer and registration of [the property] . . . be declared null and void and [be] set aside.'

[16] She also sought an order directing the Registrar of Deeds to:

'reverse the registration of transfer of the property in the name of [Nedbank] and revert the title in respect of the said property in the names of the applicant.'[10]

[17] No procedural shortcomings were relied upon. Instead, Dr Mbuwako built her case on the following allegations:

'[O]n or about December 2023, [the parties] entered into settlement negotiations in terms of which it was agreed that, in full and final settlement of the debt, an amount of R 1 687 443 should be paid by [Dr Mbuwako]. Annexed herein . . . is proof of payment . . .

Consequent to these sums being paid, aforesaid, and despite the knowledge by [Nedbank] of such payment, [Nedbank], through its attorneys, boldly delivered a letter to [Dr Mbuwako], demanding the signing of an offer to purchase . . . the same property, [Dr Mbuwako] has settled for . . . R 1 400 000.

Surely, this came as shocking news to [Dr Mbuwako] as this was not what [she] was expecting. All [that] she was expecting from [Nedbank] was to be furnished with [the] prepared documents for her to sign for transfer and registration of the property into her own name . . .

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[10] Sic.

When [Dr Mbuwako] demanded answers and clarity as to what . . . [the] amount of R 1 687 443 [was] for, if it was not for settling [Nedbank's] debt, there was no satisfactory explanation forthcoming, except being threatened with eviction proceedings . . .

I then demand that if [Nedbank] does not want the house to be transferred into my name as before, refund me . . . the R 1 687 443 [that] I paid them.'[11]

[18] In argument, Dr Mbuwako contended that Nedbank's right to retain the property was dependent on the existence of the debt. Once Dr Mbuwako paid the outstanding amount, the need for security fell away and Nedbank was obliged to transfer ownership back to her.

[19] To that effect, reference was made to section 129 (3) of the NCA.[12] The provisions in question state that:

'(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.'

[20] The above provisions must be interpreted, however, with reference to the relevant portion of subsection (4), which provides that:

'(4) A credit provider may not reinstate or revive a credit agreement after –

(a) the sale of any property pursuant to –

(i) an attachment order; or

(ii) . . .

(b) . . .

(c) . . .'

[21] It is common cause that the property was sold in execution after its attachment pursuant to the order granted in favour of Nedbank on 22 March 2017. The underlying mortgage agreement was, therefore, incapable of reinstatement or

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[11] Sic.

[12] Dr Mbuwako's legal representative referred to section 129 (3) (a), but the provisions were amended in terms of the National Credit Amendment Act 19 of 2014.

revival; Dr Mbuwako could not, *ex lege*, remedy her default. The provisions of section 129 (3) of the NCA do not assist.

[22] Reference was made to the case law. In *Nullah v Harper*,[13] the erstwhile Appellate Division confirmed that there are reciprocal obligations between mortgagor and mortgagee: the former is required to pay the amount due under a mortgage bond on the due date, and the latter is required to discharge and cancel the bond *pari passu* with such payment.[14] The issue in the first matter, however, is not Nedbank's refusal or failure to cancel the bond. The case is irrelevant. In *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n Ander,*[15] to which Dr Mbuwako also referred, the issue before the erstwhile Appellate Division was at what precise moment, during its clearing process, can payment of a cheque be said to have been effected.[16] The case is clearly irrelevant. Reference was made, too, to *Standard Bank of South Africa Ltd v Saunderson and Others*,[17] where the Supreme Court of Appeal dealt with the constitutionality of the sale of residential property for the recovery of bond repayments. The case is also irrelevant, save for the court's observation that:

'A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.'[18]

[23] If anything, then *Saunderson* is authority for the principle that Dr Mbuwako's right to continued ownership and occupation of the property was dependent on her repayment of the amounts owed under the bond. The debt was, however, never repaid. Nedbank consequently exercised its right as bondholder to sell the property in satisfaction thereof.

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[13] 1930 AD 141.
[14] 151.
[15] 1991 (3) SA 605 (A).
[16] Headnote, 607C.
[17] 2006 (2) SA 264 (SCA).
[18] Paragraph 2.

[24] Dr Mbuwako also referred to *ABSA Bank Ltd v Mokebe and Related Cases*,[19] where the court held that the reinstatement of a credit agreement was permissible until the creditor realised the proceeds of a sale in execution.[20] The case does not assist. The decision in *Le Feuvre v Standard Bank of South Africa Limited and Others*,[21] was mentioned, too. In that regard, the applicant claimed that a sale in execution was unlawful and invalid because he had allegedly reinstated the credit agreement in accordance with section 129 (3) (a) of the NCA *prior* to the sale in execution.[22] Similarly, the case does not assist. None of the remaining decisions cited by Dr Mbuwako was remotely relevant to the first matter.[23]

[25] The payment of R 1 647 443 did not, strictly speaking, constitute settlement of the outstanding debt still owed in terms of the mortgage bond. From the exchange of correspondence between the parties, it was clearly intended as payment 'in full and final settlement of [Nedbank's] claims against [Dr Mbuwako]', including the capital amount, accumulated interest, and costs,[24] and as envisaged under paragraph 2 of Mr Schoeman's correspondence, dated 19 December 2023. Crucially, it was made only after Nedbank had already attached and sold the property in execution of the judgment debt. Dr Mbuwako's contention that Nedbank no longer had a right to the property after payment because there was no longer any need for security, is entirely misplaced. The horse has already bolted — and has disappeared into the sunset. Dr Mbuwako's contention conveniently ignores the common cause fact that Nedbank attached and sold the property when she failed to repay the debt. Nedbank simply exercised its right as bondholder. There was, moreover, nothing at that stage to have prevented it from continuing to pursue recovery of whatever remaining amount Dr Mbuwako still owed.

[26] In *Nkata v Firstrand Bank Ltd*,[25] the Constitutional Court held, with reference to sections 129 (3) and (4) of the NCA, that:

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[19] 2018 (6) SA 492 (GJ).
[20] Paragraph 43.
[21] 2024 JDR 4261 (GJ).
[22] Paragraph 3.
[23] *Serfontein and Another v ABSA Bank Ltd and Others* 2023 (5) SA 579 (FB); *Cohen v ABSA Bank Limited* 2024 JDR 0430 (SCA); and *Maree N.O. and Others v Standard Bank of SA Ltd* (6038/2023) [2024] ZAFSHC 27 (2 February 2024).
[24] See n 1 above.
[25] 2016 (4) SA 257 (CC).

‘ . . . the barrier to the revival of [a] credit agreement applies only when the proceeds of a sale in execution have been realised. Only then would the revival be of no use to either party.’[26]

[27] Dr Mbuwako’s subsequent payment, *after* the sale in execution, never resuscitated the mortgagor-mortgagee relationship between the parties. By that stage, Nedbank itself had purchased the property and become the registered owner.

[28] It was, moreover, suggested in argument that Nedbank’s refusal to transfer the property back to Dr Mbuwako was a breach of contract. There was nothing in the papers, however, to support this; there was no allegation that the underlying mortgage agreement made provision for such an eventuality. In any event, any obligation to do so would have run contrary to the provisions of section 129 (4) of the NCA, as well as the principles apparent from the various authorities already discussed.

[29] Similarly, it was suggested that Nedbank’s refusal gave rise to unjust enrichment. The immediate difficulty is that Dr Mbuwako made no allegations to that effect in her papers; on the common cause facts there is simply no evidence to support any contention that Nedbank was unjustly enriched at her expense. Whereas Dr Mbuwako’s payment of R 1 647 443 may well have settled all outstanding claims, she should not have expected the return of the property, simpliciter, when Nedbank had previously reduced the outstanding amount owed at the time of the sale itself (comprising the capital amount, accumulated interest, and costs) by the value of the purchase price, i.e. R 1 300 000. To put it differently, Nedbank was entitled to receive fair value in exchange for its disposal of an asset to Dr Mbuwako — or to anyone else, for that matter. Insofar as Nedbank may or may not have been entitled to payment of the full amount, that is not an issue for this court to decide. At the very least, it cannot be said that the papers support the granting of an order for the relief sought based on the principles of unjust enrichment.

[30] There is, in the end, no merit in Dr Mbuwako’s application. Her payment of R 1 647 443 did not revive the underlying mortgage agreement or require Nedbank to return ownership in the property. The correspondence between the parties reveals,

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[26] Paragraph 131.

moreover, that the parties never reached agreement on the terms of the deed of sale; alternatively, to the extent that it could be said that they did, the suspensive conditions regarding Dr Mbuwako's securing mortgage finance were never fulfilled. There was also no evidence on the papers to support any argument that Nedbank was contractually obligated to return ownership after payment or that it was unjustly enriched at her expense.

The second matter — application for eviction

[31] Nedbank relies on essentially the same set of common cause facts in support of its eviction application. On 12 April 2023, Nedbank's attorneys demanded that Dr Mbuwako vacates the property. Subsequently, Nedbank commenced proceedings in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). An order was granted on 14 November 2023, authorising service of a written notice on Dr Mbuwako and the King Sabata Dalindyebo Local Municipality, respectively; the sheriff executed same on 20 and 21 November 2023.

[32] Dr Mbuwako opposed the application on 11 December 2023. She contended that she had fulfilled the terms contained in Mr Schoeman's letter of 19 December 2023 by paying the settlement amount of R 1 647 443 and signing the deed of sale; all suspensive conditions had been met. Consequently, there was a binding contract between the parties, preventing Nedbank from proceeding.

[33] The common cause facts do not support Dr Mbuwako's assertions. Admittedly, she paid the settlement amount on 5 January 2024, but despite the extensive exchange of correspondence between the attorneys it was apparent by 20 June 2024 that no deed of sale had been concluded by either Dr Mbuwako or her company, BF Medicare (Pty) Ltd. Alternatively, if a deed of sale had been concluded at an earlier date, then the suspensive conditions regarding Dr Mbuwako's securing mortgage finance were never fulfilled. Considering the correspondence, however, it seems that the real reason why a binding deed of sale never came into effect was because Dr Mbuwako was unhappy about the calculation of the purchase price; she

had just paid an amount of R 1 647 443 in settlement of Nedbank's claims and expected (wrongly, as it has already been shown) that ownership in the property would (or should) consequently have reverted to her without need for further payment.

[34] In terms of section 4 (7) of PIE:

'If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.'

[35] Dr Mbuwako indicated in her papers that she had resided at the property since at least 2010. There were five minor children who stayed with her, all attending local schools. In addition, Dr Mbuwako's partner as well as her adult son and his wife resided at the property; all were unemployed. She went on to aver that she would be unable to find suitable alternative accommodation in the immediate future because she had exhausted her savings after paying the settlement amount of R 1 647 443.

[36] For the reasons already discussed in relation to the first matter, the court is satisfied that no valid defence has been raised by Dr Mbuwako for her continued occupation of the property. Furthermore, the court is satisfied that the requirements of section 4 of PIE have been met. It would be just and equitable for an eviction order to be granted.

Relief and order

[37] Dr Mbuwako has failed to establish a basis for granting the relief sought in the first matter. There is no reason, either in fact or law, why the attachment and sale in execution of the property must be declared null and void; similarly, there is no reason

why the registration of transfer must be reversed or why title in the property must revert to Dr Mbuwako.

[38] Regarding the second matter, Nedbank has successfully demonstrated why an order for eviction must be granted. The court is of the opinion, moreover, that it would be just and equitable to do so. In determining a date by which Dr Mbuwako and the residents of the property must vacate, the interests of the children must be considered; there must be as little disruption as possible to their schooling. Although Dr Mbuwako pointed out that she has limited resources to find alternative accommodation in the short term, she admitted that she is a medical practitioner, presumably with access to a reasonable income. Furthermore, it would not be unfair to observe that she has been aware of the risk of eviction from the property for a period of at least two years, Nedbank's having commenced proceedings on 21 August 2023. It would, in the circumstances, be just and equitable to determine the deadline for vacation of the property as being 31 December 2025; a further period of two weeks should be allowed, prior to the start of the school year, before the eviction order may be carried out.

[39] In relation to costs, the full bench in the appeal remarked that Dr Mbuwako's conduct was vexatious and deserved the censure of the court, as expressed in a punitive costs order. The same, regrettably, must be said of her conduct in the first matter. As previously mentioned, the papers were badly drafted and her challenge to the attachment of the property and its sale in execution was completely without merit. From the correspondence between the parties, it is difficult not to believe that Dr Mbuwako had no real intention of purchasing the property and that the various overtures made in this regard were motivated chiefly by the need to avoid eviction. The above comments do not, however, apply to her conduct in the second matter. She was entitled to oppose the eviction application, notwithstanding the flawed basis upon which she did so. The costs to be awarded must be tailored accordingly. Considering the complexity and nature of the proceedings, scale B is applicable.

[40] In the circumstances, the following order is made:

(a) regarding the first matter (case no. 98/2016):

(i) the application is dismissed; and

(ii) the applicant therein, Dr Mbuwako, is ordered to pay the attorney-and-client costs of the first respondent, Nedbank Limited, on scale B, as envisaged under rule 67A, read with rules 69 and 70, of the Uniform Rules of Court;

(b) regarding the second matter (case no. 2925/2023):

(i) the respondent therein, Dr Mbuwako, and all those occupying the property situated at 4[...] W[...] Drive, Fort Gale, Mthatha, registered as erf 2[...], Mthatha, are hereby evicted therefrom on or before 31 December 2025;

(ii) the sheriff is hereby ordered to take such steps as may be necessary to carry out the above eviction on or before 15 January 2026 if the respondent and all those occupying the above property have failed to vacate by the date stipulated in subparagraph (i);

(iii) the respondent is ordered to pay the party-and-party costs of the applicant, Nedbank Limited, on scale B, as envisaged under the rules described in paragraph (a) (ii), above.

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JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant in the first matter	
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(and applicant in the second matter):	Adv KL Watt
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Date heard:	29 May 2025.
Date delivered:	30 September 2025.