

✓ 7/11/17

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 36996/16

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
7/11/2017	

[Signature]

In the matter between:

NEDBANK LIMITED

APPLICANT

and

NAPE, MOYA CANDLISH N.O.

FIRST RESPONDENT

KGOHLOANE, MMAMOCHABO PERTUNIA SECOND RESPONDENT
N.O.

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] The applicant seeks an order against the respondents, as representatives of the Nape Family Trust (Master's Ref: IT 3728/07), in respect of the alleged breach of the provisions of loan agreements

secured by the registration of mortgage bonds over certain immovable property.

- [2] The relief sought includes payment of certain monies and that a specific immovable property of the trust be declared specially executable. In addition an order is sought that the Registrar of this honourable Court be directed to issue the relevant Writ of Execution. Furthermore, a punitive cost order is sought against the respondents.
- [3] The respondents oppose this application and have filed an answering affidavit. Mr Roos, who appears on behalf of the respondents, submitted that the opposition to this application can be summarise with reference to three issues, namely:
- (a) That the deponent to the founding affidavit on behalf of the applicant does not possess the required knowledge to depose to the relevant facts;
 - (b) That the required s 129 Notice in terms of the National Credit Act, No. 34 of 2005 was not received by the respondents;
 - (c) That in respect of the merits, firstly, the amount allegedly due by the trust to the applicant and set out in the Certificate of Indebtedness is not correct, the stipulated amount contained therein includes legal costs not taxed and the interest calculated on the outstanding amount has been calculated on the incorrect amount. Secondly, that the applicant has not made out a case for the relief that the immovable property is to be declared specially executable.
- [4] Mr Roos submitted that the deponent to the founding affidavit has not complied with the basic requirement indicating that he has the requisite personal knowledge or, alternatively, that he has acquired the requisite knowledge in a particular manner. Hence, it is submitted that the

application stands to be dismissed on that ground. It is further the case of the respondents that the deponent was not a party to the relevant loan agreements, nor did the deponent issue the Certificate of Indebtedness, all of which allegedly disqualifies the deponent from deposing to the affidavit.

- [5] The deponent to the founding affidavit provides his position within the applicant and attaches the document from which he derives his authority. The latter stipulates a number of personnel within the applicant who have the authority to institute legal proceeding on behalf of the applicant. It is clear from that list, that the holders of a variety of positions within the applicant are so authorised. It would follow that those persons so authorised, would have the required knowledge.
- [6] Furthermore, in my view, it is clear on a reading of the founding affidavit in its entire context that the deponent has the requisite knowledge. There is no merit in the respondents' contentions relating to the signing of the loan agreements and the Certificate of Indebtedness.
- [7] It follows that the respondents' contentions in respect of the alleged knowledge of the applicant's deponent to the founding affidavit cannot be upheld.
- [8] It is submitted on behalf of the respondents that the applicant has not discharged the onus resting upon it in respect of the requirements relating to the issue of s 129 Notice. Mr Roos submitted that the collecting Post Office mentioned in respect of the registered letter containing the s 129 Notice is incorrect and not the appropriate Post Office, hence the respondents did not receive the registered item. The respondents' statement in that regard as contained in the answering affidavit is essentially a bare denial and a bald statement. No facts to support their contentions in that regard have been provided.

- [9] Further in this regard the respondents gloss over the return of service of 11 March 2016 where service of the Notices in terms of s 129 and 130 were served at the residential address upon a family member who declined to identify him or herself. In my view, that return of service puts paid to the respondents contentions in respect of no receipt of the s 129 and 130 Notices. Clearly the respondents were appropriately served with the s 129 and 130 Notices. In addition, the respondents received the required notices when this application was served upon them. The respondents had amply time to act in accordance therewith, yet chose not to do so.
- [10] It follows that the respondents' contentions in this regard cannot be upheld.
- [11] The respondents' contentions in respect of the merits are equally untenable. The respondents admit that the trust is in breach of its obligations relating to the loan agreements and further admit that the trust is in arrears with its payments in respect of the loan agreements. Furthermore, the respondents categorically state that the trust refuses to pay the arrears because of the alleged incorrect calculations referred to above. On the other hand, the respondents state that once the applicant has provided a proper statement of account, it tenders payment thereof. These two aforementioned statements are contradictory of one another. What would constitute a "proper account statement" is not explained. The respondents were able to determine from the statements attached to the founding affidavit that untaxed legal costs were included. The correct amount due could readily be determined.
- [12] The applicant has attached to its replying affidavit revised Certificates of Indebtedness that exclude untaxed legal costs and interest thereon. A simple comparison of the initial Certificate of Indebtedness and the revised Certificates of Indebtedness reveals that after the exclusion of

the untaxed legal cost and the interest thereon, the indebtedness of the trust has increased.

- [13] On behalf of the respondents it is submitted that on the applicant's version, the trust is in arrears for approximately 3 months, hence an order declaring the immovable property specially executable is not warranted. However, the applicant specifically states in its founding affidavit, that due to the trusts' erratic payments, it effectively was in arrears for at least 10 months at the time when the founding affidavit was deposed to, i.e. 9 May 2016. The trusts' debit orders were in most events returned due to insufficient funds.
- [14] Mr Roos further submitted that it is trite that where a company or Close Corporation or for that matter a trust, is a property holding entity, either a director or member or beneficiary of a trust may be the beneficial occupier of the immovable property so held. Hence the further submission is that in that regard, the requirements relating to a declaration that such immovable property be declared specially executable ought to be considered as if the property is the primary residence of the defaulting party. In my view, it is not necessary to decide that issue. The common cause facts in the present matter weigh against the respondents. The trust is admittedly in financial distress, the amounts due and owing is substantial and no effort has been made on behalf of the trust to make good of its obligations. The contrary is stated. The trust refuses to make payment, alternatively half-heartedly tenders payment without any real commitment.
- [15] As a last resort, Mr Roos requested that should an order be granted declaring the immovable property specially executable, such order should be suspended for a period of at least six months. The premise of that submission was not explained. However, there may be merit in that request.

[16] It follows that the respondents' contentions cannot be upheld and that the applicant is entitled to the relief it seeks.

I grant the following order:

- (a) The Nape Family Trust (Master's Reference IT13728/07) as represented by the first and second respondents is ordered to pay:

In respect of the first loan agreement:-

- (i) The sum of R3 645 359.91 (Three Million Six Hundred and Forty Five Thousand Three Hundred and Fifty Nine Rand and Ninety One Cents);
- (ii) Interest on the amount of R3 645 359.91 (Three Million Six Hundred and Forty Five Thousand Three Hundred and Fifty Nine Rand and Ninety One Cents) plus interest thereon at the prime lending rate of interest charged by the Applicant from time to time (currently 10.50% per *annum*) calculated daily and capitalised monthly in arrears from 1 April 2016 to date of payment, both dates inclusive;

In respect of the second loan agreement:-

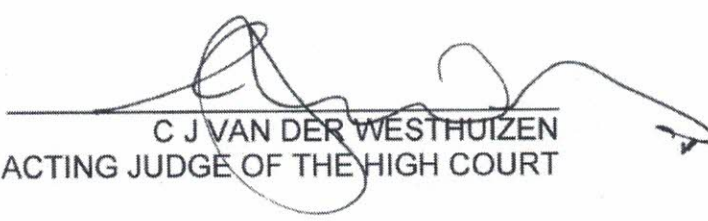
- (iii) The sum of R434 103.43 (Four Hundred and Thirty Four Thousand One Hundred and Three Rand and Forty Three Cents);
- (iv) Interest on the amount of R434 103.43 (Four Hundred and Thirty Four Thousand One Hundred and Three Rand and Forty Three Cents) plus interest thereon at the prime lending rate of interest charged by the Applicant from time to time (currently 10.50% per *annum*) plus 1% (one percent),

calculated daily and capitalised monthly in arrears from 1 April 2016 to date of payment, both dates inclusive;

- (b) The following immovable property of the Nape Family Trust is declared specially executable in favour of the Applicant:-

Erf 768 Irene Extension 10 Township, Registration Division J.R., Province of Gauteng, measuring 990 (nine hundred and ninety) square metres, held by Deed of Transfer Number T46092/2013, subject to the conditions therein contained and especially subject to the conditions imposed by the Cornwall Hill Home Owners Association NPC;

- (c) The Registrar is directed to issue the Writ of Execution in terms of prayers (a) and (b) above;
- (d) The order of prayer (c) is stayed for a period of six months from the date of this order;
- (e) The Nape Family Trust is to pay the costs on the scale as between attorney and client.



C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: Mr L Van Rhyn van Tonder
Instructed by: Lowndes Dlamini Attorneys

On behalf of Respondent: Mr W Roos
Instructed by: Ka-Mbonane Attorneys