



**IN THE NORTH WEST HIGH COURT
MAFIKENG**

CASE NO. 2151/10

In the matter between:

NEDBANK LIMITED

PLAINTIFF

and

PAAP ABEDNIGO SENNE NO

1ST DEFENDANT

ARTHUR BEN HUMA NO

2ND DEFENDANT

PHILEMON MACHENG KHUNOU NO

3RD DEFENDANT

OBED ANDREW SEKOATI NO

4TH DEFENDANT

CORNELIUS SHIMANE KHUNOU NO

5TH DEFENDANT

BHESSEL JOSIA MAKGATLHA NO

6TH DEFENDANT

CONSTANCE FRANCINA HUMA NO

7TH DEFENDANT

TAYFIN ABOO NO REPRESENTED BY MAHOME

MAHIER TAYOB

8TH DEFENDANT

PHILEMON MACHENG KHUNOU

9TH DEFENDANT

MATSHIDISO EDITH KHUNOU

10TH DEFENDANT

MOKETE FREDERICK MODIMOKWANE

11TH DEFENDANT

MOTLADILE JEANETTE MODIMOKWANE

12TH DEFENDANT

ARTHUR BEN HUMA

13TH DEFENDANT

ZIPPORAH MAMGIAL HUMA

14TH DEFENDANT

PAAPA ABEDNEGO SENNE	15 TH DEFENDANT
MAMOI VINOLIA SENNE	16 TH DEFENDANT
GEORGE SHIMANE KHUNOU	17 TH DEFENDANT
MOSONNGOA STELLA EMILY MONTY KHUNOU	18 TH DEFENDANT

DATE OF HEARING : 9 DECEMBER 2010

DATE OF JUDGMENT : 17 DECEMBER 2010

FOR THE PLAINTIFF : MR M WESSELS

FOR THE DEFENDANTS : NO APPEARANCE

JUDGMENT

LANDMAN J:

[1] The plaintiff, Nedbank Ltd, issued a summons out of this court on 22 September 2010 against the 18 (eighteen) defendants. Nedbank alleged that the defendants are jointly and severally liable for payment of R1 056 115.10 being the balance due and owing in respect of monies lent and advanced by Nedbank to the first to eight defendants (being Trustees for the time being of the Fike Trust, the owner of mortgage property) in terms of a loan agreement secured by a mortgage bond. The ninth to eighteenth defendants are alleged to have bonded themselves jointly and severally for an unlimited amount as sureties and co-principal debtors in *solidum* for repayment of any monies which may be owed to Nedbank by the Trust.

[2] The summons was served upon the defendants in October 2010. On 2

November 2010 the assistant Master of the North Gauteng High Court, Pretoria provided, on form J246, letters of authority for the Fike Trust showing that the Trustees were: The 2nd, 4th, 5th and 6th defendants as well as Khosi Moses Diale and Moshanti Martin Makgale.

[3] A notice of substitution in terms of Rule 15(3) dated 3 December 2010 was filed indicating that this action would proceed against the current Trustees who were named. In November 2010 the summons was served on the 9th, 13th, 15th and another defendant having his or her address at 174 Photsaneng. The return has been amended by hand and I am unable to determine to whom this return relates.

[4] The 6th and 9th defendants entered appearance to defend the matter on 3 November 2010.

[5] On 23 November 2010 a notice of application for summary judgment was delivered to the attorney for the 6th and 9th defendants. The application was filed with the Registrar on 24 November. The affidavit in support of the application is dated 19 October 2010. The deponent, Ms Sharon Janse van Rensburg, says in paragraph 4:

“In my opinion there is no *bona fide* defence to the action and that the Notice of Intention to Defend has been delivered solely for the purposes of delay.”

[6] The first aspect which requires attention is the fact that the plaintiff's affidavit alleges that the 6th to 9th defendants entered appearance to defend simply to delay the process. This, in so far as it relates to the entry of appearance to defend, is factually incorrect as no appearance to defend had been entered when the affidavit

was commissioned. However, as there has been no appearance for the defendants and no affidavits have been filed, I am of the view that this defect is not a fatal one.

[7] Secondly there is the issue of joinder. All the Trustees have been joined as is required. See **Moriolo and Others v Kage-Eddie NO and Others** 1995 (2) SA 728 (W) at 731E and **Van der Westhuizen v Sandwyk** 1996 (2) SA 490 (W). Trustees are obliged to act unanimously. Minority rule or majority rule is not permitted. See **Coetzee v Peet Smith Trust** 2003 (5) SA 674 (T).

[8] The situation here is that only one trustee, the 6th defendant, has entered appearance to defend. Although this step is a nominal one and probably done with the intention of delaying judgment, it has the effect that summary judgment can only be granted against one trustee, and a separate application would need to be made to obtain default judgment against the remaining Trustees. It seems to me that, although the judgment may only be executed against the property of the Fike Trust, that, I should grant summary judgment against the 6th defendant which shall be jointly and severally with any judgment that may be entered against the remaining current Trustees.

[9] As for the 9th defendant I will grant judgment against him jointly and severally with the judgment granted against the 6th defendant.

[10] In the result:

1. Summary judgment is granted against the 6th and 9th defendants jointly and severally for:

- 1.1 Payment of the amount of R1 056 115.10.
 - 1.2 Interest on the amount of R1 056 115.10 at 9% (prime less 1%) per annum from 05 August 2010 to date of payment.
 - 1.3 An order declaring the mortgaged property referred to in the summons executable for the said sums and costs.
 - 1.4 Costs on an attorney and client scale, to be taxed, plus Sheriff's charges and collection commission as provided for in the Mortgage Bond.
2. The judgment granted against the 6th defendant shall be joint and several with any judgment which might be granted against the remaining Trustees whose names are set out on form J246 issued on 2 November 2010 by the Master in respect of the Fike Trust.

A A LANDMAN
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE PLAINTIFF	:	VAN ROOYEN TLHAPI &
WESSELS		
FOR THE DEFENDANTS	:	SM MOOKELETSI.

