

SOUTH AFRICA / JUDGMENT

Nedbank Ltd v Hip Hop Pantsula Production Close Corporation (23465/2019) [2022] ZAGPJHC 299 (3 May 2022)

[2022] ZAGPJHC 299

COURT

South Gauteng High Court, Johannesburg

BEFORE

M.M.D Lenyai

CASE / FILE NUMBER

23465/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 23465/2019

REPORTABLE:

OF

INTEREST TO OTHER JUDGE:

REVISED:

3

May 2022

In

the matter between:

NEDBANK

LIMITED

Plaintiff

And

HIP

HOP PANTSULA PRODUCTION

CLOSE

CORPORATION

Defendant

(Registration

Number: 2008/042824/23)

This

matter has been heard in terms of the Directives of the Judge

President of this Division dated 25 March 2020, 24 April 2020

and 11

May 2020. The judgement and order are accordingly published and

distributed electronically. The date and time of hand-down

is deemed

to be 14h00 on 03 May 2022

JUDGMENT

LENYAI AJ:

[1] This is an opposed application for summary judgement in terms of which the plaintiff seeks an order against the defendant in the following terms:

1.1 Payment of the sum of R775 661.86 together with interest thereon at the rate of 9.30% per annum, compounded monthly in arrear from 1 February 2019 to date of final payment, both days inclusive;

1.2 An order declaring the following immovable property specially executable:

ERF [...] RANDPARKRIF EXTENSION23 TOWNSHIP,REGISTRATION DIVISION I.Q., THE PROVINCE OF GAUTENG, MEASURING 1041 (ONE THOUSAND AND FORTY-ONE) SQUARE METRES AND HELD BY DEED OF TRANSFER NO. [...], (the immovable property).

1.3 An order authorising the Registrar of the Court to issue the warrant of execution in respect of prayer 1.1 and 1.2 above; and

1.4 Costs of suit on the attorney and client scale.

[2] The common cause facts before court are the following:

2.1 the identity and company particulars of the plaintiff;

2.2 the identity and business particulars of the defendant

- 2.3 the court has the required jurisdiction to adjudicate and determine the action and consequently this application for summary judgement;
- 2.4 the plaintiff and the defendant entered into and concluded the agreement of loan;
- 2.5 the material express terms of the loan agreement;
- 2.6 the first covering mortgage bond was registered, at the instance of the defendant, over the immovable property in favour of the plaintiff;
- 2.7 the material express terms of the mortgage bond;
- 2.8 the plaintiff complied with its reciprocal obligations owing towards the defendant in terms of the loan agreement;
- 2.9 the defendant defaulted the agreement of loan by failing to make payment of the required monthly instalments in full and punctually towards the plaintiff;
- 2.10 the National Credit Act No 34 Of 2005 does not apply to the action before Court; and
- 2.11 because the defendant is a juristic entity, the Constitutional considerations normally applicable in declaring the primary residence of a natural person specially executable, in terms of Rule 46 and 46A of the Rules of Court, do not apply.

[3] The plaintiff avers that its cause of action against the defendant is founded amongst other things on:

- 3.1 the plaintiff and the defendant concluding an agreement of loan, which contract was referred to in the particulars of claim and affidavit and attached thereto;
- 3.2 the defendant registering a first mortgage bond over the immovable property in favour of the plaintiff as security for the defendant's indebtedness owing towards the plaintiff, which first covering mortgage bond was referred to in the particulars of claim and the affidavit and attached thereto;
- 3.3 the defendant's breach of the agreement of loan for failing to repay the required monthly instalments in full and punctually towards the plaintiff, the account summary from the plaintiff's system is referred to in the particulars of claim and affidavit and attached thereto
- 3.4 as a result of the above mentioned breaches of the agreement of loan, the full outstanding amount became due and owing towards the plaintiff.

[4] Rule 32 of the Rules of court deals with Summary judgement and provides as follows:

- (1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgement on each of such claims in the summons as is only-
- (a) on a liquid document;
- (b) for a liquidated amount;

- (c) for delivery of specified movable property; or
- (d) for ejectment.
- (2) Together with any claim for interest and costs.
- (a) Within 15 days after the delivery of the plea, the plaintiff shall deliver a notice of application for summary judgement, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.
- (b) The plaintiff shall, in the affidavit referred to in subrule 2(a) verify the cause of action and the amount, if any, and identify any point of law relied upon and the facts upon which the plaintiff's

claim is based and explain briefly why the defence pleaded does not raise any issue for trial.

- (c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgement shall state that the application will be set down

for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

- (3) The defendant may –

- (a)

- (b) Satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon.

- [5] The defendant contends that the applicant has not complied with rule 32 in that plaintiff has not verified the cause of action, the amount claimed and has also not identified the point of law relied upon. The plaintiff on the other hand states in its affidavit that its claim is based on a mortgage agreement between the parties which has been referred to in its particulars of claim and such agreement has been attached to the particulars of claim and affidavit. The plaintiff also avers that a mortgage bond registered at the deeds office in favour of the applicant which has also been referred to in its particulars of claim and the affidavit has been attached to the particulars of claim and the affidavit. The amount claimed is also referred to in the particulars of claim and the affidavit and the account summary from the plaintiff's system which states the amount outstanding is attached to both the particulars of claim and the affidavit. The plaintiff further avers that the defendant has breached the terms of the agreement in not making the monthly instalments and despite repeated requests has failed to effect payment

[6] The defendant has raised three defences in its affidavit resisting summary judgement which it contends raise issues for trial.

6.1 The first defence is that the sole member of the defendant has passed away and the administration of his estate must first be wound up before the debts of the defendant can be attended to.

6.2 The second defence is that, as a result of the passing of the sole member of the defendant, defendant has been unable to pay the monthly instalments and the passing away of the sole member of the defendant constitutes a supervening impossibility.

6.3 The third defence is that, plaintiff is in possession of a life insurance which should cover the outstanding balance owed to the plaintiff.

[7] The plaintiff submits that the first defence is not available to the defendant. The identity of the defendant is separate from that of its members. The defendant is a separate legal entity from its members and has legal rights and responsibilities. It is capable of entering into legally binding agreements and can sue or be sued in a court of

law. The Salmon Rule has been rigidly applied in our law for over a century, which was devised by the House of Lords in the matter of *Salmon v Salmon & Co Ltd* 1897 AC 22; 1895 -99 All ER Rep 33 (HL), where it was held that a company, duly formed to take over the business of a person who became the beneficial owner of all its

shares, was nevertheless in law a different person altogether from that person. In the matter of *Francis George Hill Family Trust v SA Reserve Bank* 1992 3 SA 91 (A) at 97 the court held that "It is trite that a company with limited interest is an independent legal person and separate from its shareholders or directors.

[8] Turning to the matter before me, and applying the Salomon Rule, the defendant is a Close Corporation which is a separate legal entity from its members, and therefore distinct from its deceased sole member. This defence by the defendant is not valid in these circumstances.

[9] The second defence is the defence of economic hardship or a change in economic circumstances of the defendant because of the passing of its sole member. The plaintiff contends that this is not a defence in law and is not relevant to the operation of the agreement of loan. Plaintiff submits that its agreement was with the defendant and not its sole member and its inability to make payment of the monthly instalments to the plaintiff does not constitute an impossibility in law.

[10] In the matter of *Rosebank Mall (Pty) v Graddock Heights (Pty) Ltd* 2004 (2) SA 353 (W), court held that initial impossibility that precludes the legal effects of a purported contract must be distinguished from supervening

impossibility that extinguishes the obligations under the contract when performance becomes impossible after the conclusion of the contract.

- [11] In the matter of Scoin Trading v Bernstein 2011 (2) SA 118 (SCA) at 124A, the court held that “The law does not regard mere personal incapability to perform as constituting impossibility.”
- [12] In my view the defendant is not able to make monthly payments and is therefore not complying with the terms of the agreement. The parties to the agreement foresaw the possibility that the defendant might fall into arrears and made provision in the contract to deal with that eventuality and furthermore the registering of the mortgage bond in favour of the plaintiff was further security for the plaintiff. The defence of impossibility by the defendant is rejected by the court.
- [13] The last defence is that the plaintiff is in possession of a life insurance. The plaintiff avers that this is not supported by the loan agreement which the basis of the contractual relationship of the parties. In my view the life insurance is not relevant to the facts before court as it relates to the deceased member and not the defendant. The defences by the defended are rejected by the court and they do not raise any issue for trial.
- [14] In the premises, the following order is made:
- (a) Payment of the sum of R775 661.86 together with interest thereon at the rate of 9.30% per annum, compounded monthly in arrear from 1 February 2019 to date of final payment, both days inclusive;
- (b) The following immovable property specially executable:
- ERF[...] RANDPARKRIF EXTENSION 23 TOWNSHIP, REGISTRATION DIVISION I.Q., THE PROVINCE OF GAUTENG, MEASURING 1041 (ONE THOUSAND AND FORTY ONE) SQUARE METRES AND HELD BY DEED OF TRANSFER NO.[...], (the immovable property).
- (c) The Registrar of the Court is authorised to issue the warrant of execution in respect of prayer 1.1 and 1.2 above; and
- (d) Costs of suit.

M.M.D LENYAI

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff:

Adv Peter

Instructed by:

Lowndes Dlamini Attorneys

Counsel for the Defendant: B Bhabha

Instructed by:

Lawtons Africa

Date of hearing:

02 February 2022

Date of judgment:

03 May 2022

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