

SOUTH AFRICA / JUDGMENT

Nortje and Another v Nedbank Ltd and Others (8667/2019)

[2019] ZAWCHC 88 (3 July 2019)

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COURT

Western Cape High Court, Cape Town

BEFORE

O L Rogers

CASE / FILE NUMBER

8667/2019

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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 8667/2019 In the matter between GARON KEVIN NORTJE FIRST APPLICANT ROSALIND MAGDELINE NORTJE SECOND APPLICANT and NEDBANK LTD FIRST RESPONDENT THE SHERIFF WYNBERG SOUTH SMITH TABATA BUCHANAN BOYES SECOND RESPONDENT RICARDO LESLIE RYNHARDT THIRD RESPONDENT TAMARA DELPHINE RYNHARDT FOURTH RESPONDENT THE REGISTRAR OF THE DEEDS OFFICE FIFTH RESPONDENT

Coram: Rogers J

Heard: 28 June 2019

Delivered: 3 July 2019

Rogers J

- [1] On 28 June 2019, and after hearing argument, I made an order dismissing, with costs, the application for the relief set out in the applicants' notice of motion dated 22 May 2019 and their amended notice of motion dated 24 June 2019. I postponed the first respondent's counter-application sine die. In making the order I stated I would give my reasons in due course. My reasons now follow.

- [2] The application and counter-application was set down for Tuesday 25 June 2019. They came before Steyn J in Third Division. Because this was an opposed matter and because of the volume of her roll, she ordered that the matter be heard before me in the urgent court on Friday 28 June 2019. Only the first and third respondents have participated actively in opposing the application. I refer to them collectively as the respondents. The first respondent is Nedbank Ltd ('Nedbank') while the third respondent is a firm of attorneys, Smith Tabata Buchanan Boyes ('STBB'), who are dealing with the transfer of the property pursuant to the sale in execution.
- [3] In essence, the applicants by way of the aforesaid notices of motion seek to prevent the transfer of their home in Heathfield ('the property') pursuant to a sale in execution pending the final determination of an application which they have launched (under case 8470/2019) for an order declaring that (a) the mortgage bond over the property is invalid; (b) that the related loan agreement has automatically terminated by virtue of the non-fulfilment of a suspensive condition requiring the registration of a mortgage bond; (c) that all steps taken to sell and transfer the property in execution are invalid and have been automatically terminated. I shall refer to case 8470/2019 as the declaratory application and to the present case – case 8667/2019 – as the interdict application. The declaratory application was launched on 20 May 2019 in terms of a notice of motion which specifies 9 July 2019 as the hearing date.
- [4] The applicants have no prospect of obtaining the relief they seek in the declaratory application and they thus have no prima facie right worthy of protection in the interdict application. There are two insuperable obstacles in their way.
- [5] The first insuperable obstacle is that on 30 November 2017 Nedbank obtained summary judgment against the applicants by way of an order granted by Davis J. In terms of that judgment the applicants were ordered to pay Nedbank R1 201 980,82 plus interest and costs, and the property was declared specially executable for the said amounts. This judgment was obtained on the strength of the loan agreement and mortgage bond which the applicants now seek to impugn. The applicants applied for leave to appeal against Davis J's order but applications for leave were dismissed by this court, by the Supreme Court of Appeal and finally – on 27 March 2019 – by the Constitutional Court.
- [6] Davis J's judgment is a final order and all avenues of appeal have been exhausted. Regardless of the validity, in the abstract, of the mortgage bond and loan agreement, the judgment stands as a final order by which the applicants must pay money to Nedbank and by which Nedbank has authority to execute against the property in satisfaction of its judgment. The applicants have not brought proceedings to have the judgment set aside and it seems to me that any such application at this stage would be perfectly hopeless.
- [7] In any event, the validity of the mortgage bond and loan agreement have been rendered res judicata by Davis J's judgment. It matters not whether the attack which the applicants now wish to pursue was advanced before Davis J. The simple fact is that he could not have

granted the judgment he did except on the basis that the loan agreement and mortgage bond were valid. Because validity was an essential foundation of the judgment, such validity is thereby rendered *res judicata* as fully as if the court had formally declared the loan agreement and bond to be valid (see *Boshoff v Union Government* 1932 TPD 345 and 350-351, quoted with approval in *Caesarstone Sdot-Yam Ltd v World of Marble and Granite* 2000 CC & others 2013 (6 SA 499 (SCA) paras 20-21; see also *Turk v Turk* 1954 (3) SA 971 (W); *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* [2017] ZASCA 95 para 26).

- [8] Even where *res judicata* is not applicable, the rationale which underlies this defence may operate to brand, as an abuse of process, the bringing forward of claims or defences which ought properly to have been raised in earlier proceedings (*Janse van Rensburg & others NNO v Steenkamp & another*; *Janse van Rensburg & others NNO v Myburgh & others* 2010 SA 649 (SCA) paras 27-30). I have no doubt that it is an abuse of process for the applicants at this late stage to seek to attack the loan agreement and mortgage bond. The applicants cannot claim that they were unaware, at the time summary judgment was granted, of the facts giving rise to their new attack. That attack, as shall presently appear, is based on an alleged formal defect in the bond. The defect – if such it be – appeared on the face of the bond. The bond was registered in March 2008. If the applicants did not at that time see the bond as registered, they would have seen it when Nedbank's summons was served in
2016. They could have taken the point in the summary judgment proceedings. I may mention, in this regard, that the first applicant is a qualified attorney.
- [9] The second insuperable obstacle is that, contrary to the applicants' contention, the mortgage bond does not suffer from a fatal defect. The applicants' complaint is that the name of the conveyancer who appeared before the registrar of deeds does not appear in the bond even though space was provided for the insertion of that name on the first page.
- [10] I accept that the name of the conveyancer would customarily appear on the first page of a deed and that this is a salutary practice. The question is, however, whether there is a statutory provision which requires the conveyancer's name to appear in the bond on pain of nullity if it does not. I asked the first applicant in argument whether he could direct me to any statutory provision which lays down such a requirement. He could not. The respondents' counsel informed me that he had not found any such provision in the Deeds Registries Act 47 of 1937 ('the Act') or in the regulations promulgated thereunder. He did, however, refer me to s 50 of the Act which is headed 'Execution of bonds'. Sub-section (1) reads thus:

'A mortgage bond shall be executed in the presence of the registrar by the owner of the immovable property therein described or by a conveyancer duly authorised by such owner by power of attorney, and shall be attested by the registrar.'

- [11] The requirement is thus that the bond be executed by the owner or by a duly authorised conveyancer on behalf of the owner, not that the name of the authorised conveyancer be recorded in the bond. The respondents have provided evidence that the applicants, as owners, signed a power of attorney authorising various conveyancers from the firm Strauss Daly, among others Mr E D Chisholm, to execute the bond on their behalf; and that Mr Chisholm in fact appeared before the registrar and executed the bond. Mr Chisholm has confirmed under oath that he appeared and executed the bond.
- [12] The applicants did not file a replying affidavit contesting the evidence that Mr Chisholm was duly authorised and appeared before the registrar to execute the bond. When questioned on this omission, the first applicant stated that the filing of such an affidavit would have been a further step in the litigation, which would have jeopardised their rule 30 complaint that the respondents had been guilty of various procedural irregularities. The rule 30 complaint was without merit but I nevertheless asked the first applicant whether he and his wife disputed that they had signed the power of attorney or that Mr Chisolm had appeared before the registrar to execute the bond. When the first applicant conveyed that the applicants wished to deal with this aspect, I allowed the matter to stand down so that they could file an affidavit. Later in the day they handed up affidavits and argument was completed.
- [13] In their supplementary affidavits the second applicant disputes her signature on the power of attorney while the first applicant expresses doubt as to his signature. For good measure the second applicant also denies her signature on her purported consent to the loan agreement and bond in terms of s 15(2) of the Matrimonial Property Act. The applicants seemingly base these assertions not on the ground that the signatures do not visually match their own but on the following circumstances:
- (a) that the only bond and transfer documents they signed were signed in Cape Town, not in Newlands (as the power of attorney and consent record); (b) that the consent would have been signed as part of the loan agreement at the premises of Nedbank, yet it purports to have been signed at the same place and witnessed by the same persons as the power of attorney, and the handwriting recording the date and place of signature on both documents appears to be the same; (c) that they do not know the persons who signed as witnesses. All of this,
- they say, ‘strengthens our argument that there was fraud involved with the signing of these documents’.
- [14] I do not consider that these affidavits raise genuine dispute of fact. The applicants do not deny that they sought a loan from Nedbank in order to buy the property and that a mortgage bond was a condition precedent to obtaining the loan. In accordance with usual conveyancing practice, they would have had to sign a power of attorney and the second applicant would have needed to sign a consent. Since they wanted the loan and were agreeable to the registration of a bond, they would have been happy to sign the necessary power of attorney and consent. The conveyancers attending to the registration of the bond

had no reason not to call upon them to do so.

- [15] The signatures of both applicants on the power of attorney purport to have been witnessed by Ms D D Kemp of Strauss Daly whose certificate of preparation as conveyancer is affixed to the power of attorney and mortgage bond. She was also one of the conveyancers named in the power of attorney. The other witness, Mr M C Tucker, was also a professional employee of Strauss

Daly. The address recorded for these witnesses is the Newlands office of that firm. To judge by the handwriting, it was Mr Tucker who inserted the place and date of signature. It is common practice for clients to sign conveyancing documents at the offices of the responsible firm. Ms Kemp and Mr Tucker had no incentive to forge the applicants' signatures or to act as a false witness or to falsely record the place and date of signature.

- [16] On the applicants' own admission they signed transfer and bond documents though they say this was in Cape Town rather than Newlands. The 'bond documents' would in the ordinary course have included a power of attorney. They do not explain how they can remember precisely where they signed these documents 12 years ago. They also do not say at whose office in Cape Town they signed the documents.

- [17] To the applicants' knowledge the loan was granted, the property transferred and the mortgage bond registered. For more than ten years this state of affairs prevailed without complaint and they made frequent bond payments to Nedbank. Even when they belatedly attacked the bond, their case was not that its registration was unauthorised but that it was formally defective. Their conduct in contesting Davis J's judgment all the way to the Constitutional Court, and the timing of various applications lodged by them (including very late applications for leave to appeal and certain other urgent applications which I have not found it necessary to detail), manifest a concerted and sustained endeavour to delay the implementation of this court's judgment and to remain in occupation despite the fact that they have paid only a fraction of the instalments due since September 2015. According to the respondents, the arrears (disregarding the acceleration and judgment granted by Davis J) amount to R546 425.

- [18] The applicants have not, in their latest affidavits, disputed that Mr Chisholm appeared before the registrar and executed the bond. I would not expect them to be in a position to deny it. I simply record that the registrar would not have attested the bond if a conveyancer had not appeared before him to execute it, and that ex facie the last page of the bond it was signed by the registrar and by a conveyancer whose signature is the same as the signature on Mr Chisholm's affidavit in the present proceedings.

- [19] I thus have no hesitation in rejecting, as far-fetched and untenable, the applicants' assertion that they did not sign the power of attorney. In any event, their subsequent conduct over more than ten years shows that they authorised or at least ratified the registration of the bond.

[20] To return to the supposed defect in the mortgage bond. Even if the omission of the conveyancer's name were a defect in the bond, s 100 of the Act provides as follows in respect of 'formal defects':

'No act in connection with any registration in a deeds registry shall be invalidated by any formal defect, whether such defect occurs in any deed passed or registered, or in any document upon the authority of which any such deed has been passed or registered or which is required to be produced in connection with the passing or registration of such deed, unless a substantial injustice has by such act been done which in the opinion of the court cannot be remedied by any order of the court.'

[21] The applicants submitted that a 'mortgage bond', a defined term in the Act, is not a 'deed' for purposes of s 100. This contention is without merit. The word 'deed' is not defined. In this setting it means a legal document executed by the person or persons whose position the terms in the document affect. The Act refers to many types of deeds – deeds of transfer, of cession, of grant, deeds creating servitudes and so forth. The word may also apply to documents which are not capable of registration, as for example a deed of sale. The fact that 'mortgage bond' is defined in the Act does not mean that it is not a 'deed'. A mortgage bond falls within the ordinary meaning of that word.

[22] There is both legislative and judicial support for this meaning. Section 6(1) of the Act refers inter alia to a 'deed conferring . . . any real right in land other than a mortgage bond'. The exclusion of mortgage bonds from the scope of that particular section would have been unnecessary if a mortgage bond were not a 'deed'. Regulation 29 of the regulations promulgated under the Act refers to 'land . . . hypothecated in a deed of bond'. The former Appellate Division described one of the functions of a mortgage bond as being a 'deed of hypothecation' (*Thienhaus NO v Metje & Ziegler Ltd & another* 1965

(3) SA 25 (A) at 32B-D; see also *Reeskens v Registrar of Deeds* 1964

(4) SA 369 (N) at 372B-C; *Nedcor Bank Ltd v Kindo & another* [20 02] ZAWCHC 10 p 5). There is also no conceivable reason why the lawmaker would have wished to exclude mortgage bonds from the scope of s 100.

[23] Finally, it is necessary to deal with para 72 of the respondents' opposing affidavit, because the applicants placed great store on it in argument. In para 10.13 of his founding affidavit the first applicant referred to an email he had sent to STBB on 21 May 2019 seeking an undertaking that the firm would not re-lodge the transfer documents (they had been rejected on technical grounds earlier that day) pending a determination of the applicants' declaratory application. After referring to the fact that transfer is usually affected within five to seven working days of lodging, the first applicant said that the absence of a response to his email was a clear indication that STBB intended to re-lodge the papers. The answering affidavit, deposed to on 11 June 2019, was made by STBB's Mr T M C Chase. In answer to the allegations I have just summarised, he said the following in para 72 (my underlining) :

‘After the lodging of the transfer at the Deeds Office was rejected, and after this application was launched, I took the view that, out of an abundance of caution, it would be prudent to halt further steps to transfer the property until this application and the main application were heard.’

- [24] The ‘main application’ in the above passage is the declaratory application set down for 9 July 2019. The applicants argued that Mr Chase had effectively given an undertaking that the respondents would not proceed with transfer until the declaratory application was decided; and that for this reason the interdict application and the counter-application should be removed from the roll and the undertaking enforced.
- [25] The quoted passage from Mr Chase’s affidavit cannot be construed as an undertaking. At most it is an explanation as to why, in the days immediately following 21 May 2019, his firm refrained from re-lodging the transfer documents. By the time the answering papers were filed, however, the respondents had quite clearly come to the view that there should be no delay and that the applicants’ declaratory and interdict applications were completely without merit. The passage in question comes from an affidavit in which the respondents were opposing the interdict application and asking for it to be dismissed. The interdict application was enrolled for hearing on 25 June 2019 and that is when the respondents intended to argue that it should be dismissed. Mr Chase’s affidavit was also the founding affidavit in the respondents’ counter-application. They wanted the counter-application heard simultaneously with the interdict application on 25 June 2019. The relief they sought in the counter-application showed beyond doubt that they had no intention of allowing any delay in transfer beyond that date.
- [26] In context, therefore, Mr Chase could not have intended, when he made his affidavit, that everything should be held over until the declaratory application was determined. At the earliest that would have happened on 9 July 2019 though whether it would in fact be heard on that day would depend on whether the applicants could persuade the duty judge to hear the declaratory application during recess.

Judge O L Rogers

APPEARANCES

For applicants In person [...] Road Heathfield For first and third respondents Mr D van Reenen (with him Ms N van Zyl) Instructed by Smith Tabata Buchanan Boyes, Claremont c/o Smith Tabata Buchanan Boyes 8th Floor, 5 St Georges Mall Cape Town

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