

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 9325/08

In the application between

CHRISTOPHER JOHN WATKINS-BALL N.O.

FIRST APPLICANT

JOHANNES BHEKUMUZI MAGWAZA N.O.

SECOND APPLICANT

ROBERT MICHAEL HEAD

THIRD APPLICANT

And

STEVEN LEGGATT

FIRST RESPONDENT

**SHERIFF OF THE HIGH COURT,
JOHANNESBURG NORTH**

SECOND RESPONDENT

ELIXA (PTY) LIMITED

THIRD RESPONDENT

JOSEPH ELWIN HORNE

FOURTH RESPONDENT

**THE COMPANIES & INTELLECTUAL
PROPERTY REGISTRATION OFFICE
(REGISTRAR OF COMPANIES)**

FIFTH RESPONDENT

JUDGMENT

EF DIPPENAAR AJ

- [1] This is an application in which the Applicants, the trustees of the Nedbank Group (1994) Employee Share Purchase Trust (“the trust”), seek certain declaratory relief regarding the validity of a pledge in respect of 3578 Nedcor Limited shares owned by the Fourth Respondent.
- [2] At the outset of the hearing, the Applicants sought an amendment of their notice of motion altering the declaratory relief sought, which was not opposed and was accordingly granted.
- [3] In its amended notice of motion, the Applicants seek the following relief:
- [3.1] A declaratory order that the sale in execution of the 3 578 Nedcor limited shares are subject to the pledge held by the trust granted to it by the Fourth Respondent as security for the Fourth Respondent’s obligations in terms of a loan granted to the Fourth Respondent by the trust.
- [3.2] A declaratory order that the First Respondent as the purchaser of the shares, pursuant to the sale in execution, acquired the Fourth Respondent’s interest in the shares subject to the pledge granted to the trust by the Fourth Respondent.

- [3.3] An order directing the First and Third Respondents to pay the costs of the application.
- [4] The application is opposed by the First and Third Respondents, the First Respondent acting in his capacity as director of the Third Respondent.
- [5] Neither of the parties has sought the referral of the matter to oral evidence and the parties are in agreement that the matter is to be determined on the papers. I specifically asked Mr Smith, who appeared for the Applicants whether a referral to oral evidence would clarify the issues surrounding the Nedbank documentation and the existence of the pledge. He indicated that it would not and disavowed any reliance on a request for such referral. I have been specifically requested by the Third Respondent to make a finding on the existence of the pledge in order to in order to resolve the issue as between the parties and to avoid future litigation on the same point.
- [6] The issues to be determined are: first; whether a valid pledge was in place in favour of the trust at the time when the 3 857 Nedcor Limited shares (“the shares”) were attached and sold by the Sheriff and secondly, whether the First Respondent acquired the shares subject to the said pledge. In the original notice of motion, the Applicants sought the setting aside of the sale in execution, which relief has now been abandoned.

[7] For its pledge, the Applicants rely on a written loan agreement concluded on or about 12 May 1998 between the trust and the Fourth Respondent in terms whereof:

[7.1] the trust agreed to lend the sum of R407 398.40 by payment to the Fourth Respondent;

[7.2] the Fourth Respondent was obliged and undertook to use the proceeds of the loan solely and exclusively for the purpose of the discharge of any liability that the Fourth Respondent may have at the time of signature of the loan or at any future date pursuant to and/or arising from the exercise by the Fourth Respondent of any option or other right which the Fourth Respondent may have obtained or in terms of the trust and/or employee share option scheme;

[7.3] the Fourth Respondent would not be entitled to dispose of any of the shares until the loan granted to it by the trust had been repaid in full; and

[7.4] as security for the loan granted to the Fourth Respondent by the trust the Fourth Respondent pledged the shares to the trust.

[8] The relevant clause of the agreement in which the pledge is contained, provides as follows:

“2.4 As security for the Debtor’s obligations in terms of this loan, the Debtor shall lodge with the trust in pledge all shares in Nedcor Limited acquired by him through the use of the proceeds of this loan....together with such additional Nedcor Ltd shares owned by the Debtor as will from time to time constitute in value...not less than two times the amount of the balance of the capital of the loan outstanding from time to time....”

[9] Relying on this clause, the Applicants contend that the Fourth Respondent pursuant to the conclusion of the agreement purchased 3488 ordinary Nedcor Limited shares and pledged same to the trust and later purchased and pledged further shares in a similar fashion, so that, at the date of the sale in execution, the total number of shares held in the Fourth Respondent’s scrip account was 3 857. They further contend that the Fourth Respondent is presently indebted to the trust in an amount of R1 182 295.89, that the amount of R407 398.48 advanced to purchase the shares, together with interest (“the loan”) has not been repaid to the trust by the Fourth Respondent and accordingly that the shares remain subject to the pledge granted to the trust by the Fourth Respondent in terms of the loan agreement.

[10] The Third Respondent attacks the validity of the pledge on three main grounds: First, that the pledge was not registered as required by the Security Services Act 36 of 2004 and consequently, no pledge was effected; secondly, the underlying indebtedness of the Fourth Respondent to the trust has been

extinguished and the pledge accordingly fell away and thirdly, that factually, the Applicants have failed to prove a valid pledge.

[11] The relevant common cause background facts are the following: During 2008 the Third Respondent instituted action against the Fourth Respondent under case number 9325/08 in respect of monies lent and advanced by it to the Fourth Respondent. Summary judgment was granted in its favour on 15 April 2008. Pursuant thereto, a writ of execution was issued by the Third Respondent on 10 December 2008, the shares were attached at the instance of the Third Respondent on or about 15 December 2008 and sold in execution to it on 7 April 2009 by the sheriff. The trust does not challenge the validity of the judgment against the Fourth Respondent nor the validity of the writ of execution.

[12] The trust received notice of the attachment at the time that the attachment was effected in December 2008. The trust referred the matter to the legal department of Nedbank Limited ("Nedbank"). Nedbank (who is not a party to this application but whom the Applicants contend assisted the trust in its administration) apparently gave an instruction to BOE not to transfer the shares at the request of the Third Respondent. The trust did not at the time contact the sheriff nor were directions or submissions made to the sheriff or the Third Respondent's attorneys by the trust.

- [13] The sale in execution proceeded on 7 April 2009 and the shares were sold. There is no challenge to the procedure followed by the sheriff and no contention is made that there were any irregularities in the sale *per se*.
- [14] The Third Respondent contends that it is the rightful owner of the shares and entitled to transfer thereof from BOE, thus having purchased the shares at the aforesaid sale in execution.
- [15] Nedbank had instituted two separate actions against the Fourth Respondent in this court under case numbers 22527/06 and 829/07 respectively.
- [16] Nedbank issued summons under case number 06/22527 and obtained judgment against the Fourth Respondent in respect of the loan account here at issue.
- [17] The Applicants contend in reply that this judgment was erroneously obtained and sough as Nedbank never had *locus standi* to institute the action. No steps have been taken by it to rescind the judgment, although it has professed its intention to do so.
- [18] The Applicants explain the transactions which occurred thus:
- [18.1] In order to facilitate the financial and administrative record keeping of the trust, Nedbank initially offered the trust a facility to record the

entries on the accounts held by the trust with its employees on the Nedbank system. This was merely an administrative function.

[18.2] In order to reflect debt owed to the trust by the Fourth Respondent, an account with number 118100110 (“the loan account”) was opened on Nedbank’s system. This function was taken over by BOE Stockbrokers (Pty) Limited (“BOE”) during or about August 2008 and subsequently by its subsidiary, Molebedi Trust.

[18.3] Initially, the trust received funding from Nedbank, which was during about November 2006 taken over by BOE. Significantly the nature and extent of this funding is not explained on the papers.

[18.4] The Fourth Respondent was advised that all existing loans would be transferred from Nedbank to BOE. The aforesaid account was later transferred to an account at BOE under account number 1459627.

[18.5] It is alleged, without detailed explanation that the opening of the loan account on the Nedbank system did not extinguish the debt owed to the trust or relinquish the pledge of the shares to the trust, but merely recorded the Fourth Respondent’s indebtedness to the trust.

[19] On 2 November 2006 and prior to the summons being issued against the Fourth Respondent by Nedbank, the amount of R861 730.89 reflecting the outstanding amount owed by the Fourth Respondent in respect of the

purchase of the shares was repaid to Nedbank the previous funder of the trust by BOE. It may accordingly well be that on the papers, the indebtedness of the Fourth Respondent was not to Nedbank but to BOE, but that is not an issue which I am called upon to decide.

[20] I do not however agree with the Applicants' contention that these facts indicate that the liability is one of the Fourth Respondent to the trust. The payment by BOE to Nedbank rather indicates that the liability was to Nedbank. The details of the agreement between Nedbank and BOE have not been disclosed in the papers and I shall refrain from speculating on this issue.

[21] The Applicants in their founding affidavit as proof of the underlying indebtedness between the trust and the Fourth Respondent rely on a certificate of balance which however reflects that the debt is owed to BOE and does not render any support for their version. In the replying affidavit it is stated that the certificate is wrong and it is replaced by a document which reflects that as at 31 July 2009, the Fourth Respondent was indebted to "*Nedcor Group (1994) Employee Purchase Trust Ltd*", which is also not the trust. These documents are inherently contradictory and do not support the Applicants' version.

[22] The First and Third Respondents contend that the actions of Nedbank and the available documentation indicate that the liability of the Fourth Respondent to the trust was in the circumstances extinguished and that Nedbank took over

the liability of the trust, which was later transferred to BOE. It is common cause that no pledge of the shares exists in favour of Nedbank or BOE.

[23] The First and Third Respondents further contend that the loan amount has been repaid and accordingly that the pledge on the shares had been extinguished as a result of the judgment taken by Nedbank.

[24] In my view and on a conspectus of the papers:

[24.1] BOE was of the view that the debt was owed by the Fourth Respondent to it as certified in the founding papers;

[24.2] Nedbank was until recently of the view that the Fourth Respondent's debt was owed to Nedbank, as was certified in proceedings against the Fourth Respondent in this court by Nedbank;

[24.3] The latter view was shared by the Applicants as it was Nedbank (and not the Applicants on behalf of the trust) that issued summons claiming the debt from the Fourth Respondent;

[24.4] Nedbank confirmed the existence of the Fourth Respondent's liability to it under oath in the summary judgment proceedings launched by it in which it claimed the debt from the Fourth Respondent;

[24.5] On receipt of the Fourth Respondent's affidavit resisting the aforesaid summary judgment application in which he sets out the

origin of the loan account in terms of which the shares were purchased, Nedbank, who employs each of the Applicants, persisted in its application and took judgment against the Fourth Respondent for the amount outstanding.

[24.6] The Applicants' contentions that all the previous official bank actions taken, including the certificates previously issued, the summons issued against the Fourth Respondent and the judgment taken against him, were all incorrect, remain unmotivated and are in my view not satisfactorily explained.

[24.7] The only objective evidence that the trust proffers to support the allegation that this loan account arrangement was not a relationship between Nedbank and the Fourth Respondent is that there was a "funding agreement" between Nedbank and the trust and later between BOE and the trust following a transfer from Nedbank to BOE. Pursuant to a notice in terms of Rule 35(12), the Applicants could however not produce or identify any funding agreement and the Applicants could not even state whether it was a written or verbal agreement. In my view, this is a distinct shortcoming in the Applicants' case and it appears that the Applicants are attempting to reconstruct a case from inferences drawn from documents which do not support such inferences.

- [24.8] The trust's reliance on the various statements attached to their papers do not assist their cause in that the transfer from Nedbank to BOE records the initiating transaction in the BOE account as "*Nedbank loan repayment*" and does not refer to the trust. In my view, and from the available evidence and documents, there is no probability emerging therefrom that the money was owed to the trust. The converse appears more probable.
- [25] Furthermore, the Applicants do not in their founding papers, make out a case for a pledge and seek to do so in reply. This approach should not be countenanced. See: **Johannesburg City Council v Bruma Thirty Two (Pty) Ltd**, 1984 (4) SA 87 (T); **Triomf Kunsmis (Edms) Bpk v AE&CI Bpk**, 1974 (2) SA 261 (W). For the reasons stated above, I am in any event not satisfied that the further evidence provided in the replying affidavit makes out a case for a valid pledge.
- [26] The Third Respondent, based on the available documents, contends that after the loan agreement had been concluded between the trust and the Fourth Respondent, an account was opened by Nedbank and not the trust for the Fourth Respondent and that Nedbank had debited the loan account with the purchase price of the shares and paid the Fourth Respondent's liability to the trust. It accordingly assumed the debt and from that time, the loan agreement which existed was between the Fourth Respondent and Nedbank and not the agreement relied on by the Applicants, which fell away as the underlying debt was extinguished when the principal debt owed to the trust by the Fourth

Respondent was discharged. It is trite law that if the underlying debt was distinguished, the pledge fell away. See: **Standard Bank of SA Limited v Neethling NO**, 1958 (2) SA 25 (C) 30A-D and **Grobler v Oosthuizen**, 2009 (5) SA 500 SCA, paragraph [20].

[27] In my view, there is merit in this argument. This construction is borne out by the contents of the papers filed in the aforementioned proceedings under case number 06/22527 and is supported by the version of the Fourth Respondent provided under oath at the time in summary judgment proceedings under case number 07/829. *Ex facie* the documentation relied upon in the application papers, the indebtedness of the Fourth Respondent was to Nedbank and later to BOE and no liability to the trust appears therefrom. The Applicants bear the risk of any confusion occasioned hereby in the absence of a request for a referral to oral evidence to clarify these issues.

[28] It appears from a conspectus of the papers that the Applicants have in the circumstances in my view failed to discharge any onus regarding the underlying indebtedness of the Fourth Respondent to it.

[29] Moreover, no pledge was registered in terms of and as required by Section 43 of the Security Services Act 36 of 2004. It is common cause between the parties that the statements of account which were sent to the Fourth Respondent bear no sign of any pledge being held over the shares, either by Nedbank, BOE or the trust and the records of Nedbank and BOE do not bear any endorsement to this effect, as is required by rules 6.7.2 and specifically

6.7.4.3 of the Rules of Share Transactions Totally Electronically Limited (“STRATE”) published under GN2190 in GG20476 of 23 September 1999, as amended. Rule 6.7.4.3 provides: *“Where a Participant records a pledge or cession to secure a debt on behalf of a Client in a Securities account ... it must, in its statements to its Clients, indicate which Securities have been pledged or ceded and specify the nominal amount or number of such Securities...”*.

[30] No registration of the pledge appears *ex facie* the relevant documents and there is no notification of the pledge to third parties without reference to extrinsic evidence as is required by the Security Services Act. See: **Ikea Trading and Design AG v BOE Bank Limited**, 2005 (2) SA 7 (SCA), p15, paragraphs [13] to [22]. There also appears to have been no compliance with Section 91(A) of the Companies Act, 1973 as the shares were and remain to be listed as uncertificated securities in terms of the said section. At the time of the attachment, there was no pledge registered and consequently no valid pledge was affected.

[31] Mindful of the test enunciated in relation to the adjudication of motion proceedings in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**, 1984 (3) SA 623 (A) at 634 – 635, the Applicants have, in my view, failed to prove that they are entitled to relief and have not proved the existence of a valid pledge.

[32] In light of the amendment of the Applicants' notice of motion, it is not necessary for me to deal with the issue whether the existence of a pledge precludes a sale in execution. In my view, such relief was properly abandoned by the Applicants as the Uniform Rules of Court provide for such eventuality in Uniform Rule 45(8) and 45(10).

[33] I accordingly make the following order:

[33.1] The application is dismissed with costs.

EF DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	10 May 2010
Date of judgement	:	24 November 2010
For Applicants	:	Adv H Smith Cliffe Dekker Hofmeyer Inc
For First and Third Respondents	:	Adv DA Turner Adv K S McLean Knowles Husain Lindsay Inc