Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 3204/12

In the matter between:

NEDBANK LIMITED	Plaintiff

and

JOHN ERNEST PRICE N.O.	First Defendant
SHAUNAGH MARGARET McEVOY N.O.	Second Defendant
ALEXANDER GEORGE PRINCE N.O.	Third Defendant
FRANCOIS FOUCHÉ N.O.	Fourth Defendant
JOHN ERNEST PRICE	Fifth Defendant
SHAUNAGH MARGARET McEVOY	Sixth Defendant

JUDGMENT

REVELAS J:

[1] This is an application for summary judgment. The plaintiff bank had entered into a loan agreement with the Tsitsikamma Trust (the Trust) on 9 December 2008, in terms whereof it advanced R5 million to the Trust. The loan was secured by a mortgage bond registered over a property in

Walmer (the property). The Trust fell into arrears with its monthly repayments instalments of R69 106.94 per month. As at 13 June 2012 the consolidated balance of the debt owing by the Trust was R4 614 912.96 plus finance charges and the Trust was in arrears for over four months. The plaintiff subsequently instituted action for payment of the consolidated debt.

[2] The first, second, third and fourth defendants were cited in their capacities as trustees of the Trust. The fifth and sixth defendants, who are married to each other in community of property, were cited as sureties who bound themselves as co-principal debtors for the repayment of the loan. The fifth and sixth respondents live in the property. Apart from the amount claimed and interest thereon, the plaintiff also seeks an order that the property be declared executable.

[3] Service of the summons herein was effected in terms of a court order, prescribing certain forms of service, other than personal such as service by registered mail and postings on a gate. The order was complied with and all the defendants are properly before court. The order was granted pursuant to an application brought by the by the plaintiff on the basis that the defendants, and the fifth defendant in particular, were deliberately evading personal service. This assertion was supported by comments on the Sheriff’s returns of service. An appearance to defend

was entered and the plaintiff applied for summary judgment. The attorneys for all the defendant's withdrew on 26 September 2013.

[4] The application was postponed on several occasions, the last as a result of the fifth defendant (Mr Price) stating that he was ill. Mr Price advised that he suffered from terminal prostate cancer. No medical evidence to that effect, or to what extent his health status would impair his abilities to argue his defence, was advanced when the matter came before me. Mr Price sought a further postponement for two weeks which I declined to grant and he appeared in person. The matter had been postponed previously for the same reason. Mr Price did not give any acceptable explanation for not instructing another attorney or why his erstwhile attorneys could not act on his behalf. According to him he could afford legal representation. Mr Price is also not the only trustee who was in a position to instruct attorneys. The sixth defendant, his wife, could have done so. I did not believe that any purpose would have been be served by postponing the matter. Mr Price's physical condition, on his own version, was hardly likely to improve within two weeks.

[5] It was not in dispute that the Trust owed the bank the sum sued for. Mr Price opposed the application for summary judgment on the following grounds:

(5.1) Summary judgment would inevitably infringe his right to adequate housing and not to be evicted from his home, which rights are protected by section 26 of the Constitution of this country.

(5.2) He has made alternative arrangements with the plaintiff regarding the repayment of his arrears.

(5.3) The plaintiff's attorneys of record had acted for the Trust in 2011 and were now acting on behalf of the plaintiff against the Trust and thus there was a serious conflict of interests.

(5.4) The failure to meet the Trust's obligations to the plaintiff was temporary, and could be remedied. Mr Price maintained that he had the means to repay the loan. Hence, as I understood his argument, the action instituted was precipitous. If summary judgment was granted the Trust would be seriously prejudiced since it would not be afforded a further loan from Standard Bank, which would also be secured by a second bond registered over the property. (This ground was not raised on the papers but only during argument).

[6] Mr Price's reliance on the rights protected by section 26 of the Constitution is misplaced. The property in question is valued (according to Mr Price) at R12 million. In my opinion, the drafters of the Constitution

did not have such expensive homes in mind and this ground does not constitute a *bona fide* defence.

[7] The second ground, namely that he had made an alternative arrangement with employees of the plaintiff i.e. that if he paid up his arrears all litigation against him would be ceased was pursued at length during argument. Two amounts (R252 000.000 and R26 000.00 respectively and totalling R278 000.00) had in fact been paid to the plaintiff in September 2013 a month ago, following e-mail correspondence between Mr Price and two employees of the plaintiff bank. The e-mail exchanges do not reflect that such an agreement arrived at. The aforesaid amounts in any event only covered the arrears and no repayments towards the actual loan amount was made thereafter. Even though the arrears were paid only a month ago, the fact remains and no payments were made in October. The Trust therefore remains in arrears and according to and Mr Price, further payments to be made by him would be dependent on him obtaining a further loan from Standard Bank. The Trust is at this point still in breach of the loan agreement which entitles the plaintiff to enforce the entire loan amount.

[8] The third ground (the alleged conflict of interests) was addressed by Mr Price in an affidavit in the form of a scathing attack on the integrity plaintiff's attorneys of record. The plaintiff bank was an existing client of

these attorneys, also in many similar matters, when the Trust was represented by them in only one case during 2011. This matter had no relevance to, or impacted in any way on the plaintiff's present litigation against the Trust. No conflict of interests was demonstrated on the facts before me. The objection appears to be one only on principle and is not founded on any real conflict of interests or any actual prejudice suffered as a result of the Trust once also being represented by the plaintiff's attorneys of record. In my view, if Mr Price was really convinced that the attorneys in question had acted unethically, he should have raised his concerns with the Law Society. His complaint however, does not extinguish the Trust's debt.

[9] Mr Price's assertion that he (or the Trust has the means to pay and therefore judgment should not be granted against the Trust, flies in the face of his statement that he actually needs a further loan to obtain funds. It is hardly likely that Standard Bank would approve a second bond over the Trust's property, in order to finance repayment of the first mortgage bond in favour of the plaintiff. Such an uncertain eventuality in the future is also not a *bona fide* defence.

[10] None of the grounds raised above constitute a *bona fide* defence. I therefore grant summary judgment against the defendants jointly and severally, the one paying the other to be absolved for:

1. Payment to the plaintiff of the sum of R4 614 912.96.

2. Payment of interest on the said amount of R4 614 912.96 at the variable mortgage bond rate, currently 7.25% per annum charged by the plaintiff from time to time, from 1 July 2012 to date of payment.

3. The immovable property specially hypothecated, being the Remainder of Erf 3875, Walmer, in the Nelson Mandela Metropolitan Municipality, Division of Port Elizabeth, Eastern Cape Province in extent 1989 (one thousand nine hundred and eighty nine square metres), held by Deed of Transfer No. T. 3551/09, is hereby declared executable.

4. Costs of suit to be taxed as between attorney and client, including the costs occasioned by the postponement on 25 September 2013.

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E REVELAS
Judge of the High Court

Counsel for the Plaintiff:	Adv Zietsman Port Elizabeth
Instructed by:	Pagdens Attorneys Port Elizabeth
For the Defendant's:	Mr Ernest Price in person
Date Heard:	15 October 2013
Date Delivered:	17 October 2013