

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case no: 6032/2012

In the matter between:

**NEDBANK LIMITED**

**Plaintiff**

and

**DIRK ARNO COETZEE**

**Defendant**

**Heard: 6 November 2012**

**Delivered: 12 November 2012**

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**JUDGMENT**

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**SAVAGE AJ**

[1] This is an application for summary judgment in which the plaintiff seeks judgment against the defendant in the amount of R1 819 261,10 with interest and costs. The amount is due in terms of a mortgage loan advanced to the defendant against security of two mortgage bonds

registered over erf 3947 Betty's Bay, in respect of which loan the defendant at the date of the summons was R419 520,87 or 39 months of arrears. The plaintiff has complied with its obligations in terms of the National Credit Act 34 of 2005. It seeks an order declaring the immovable property specially executable, conceding that the property constitutes the defendant's primary residence.

- [2] Following the filing of a notice of intention to defend the action, the plaintiff launched the present application for summary judgment.

#### Grounds of opposition

- [3] The defendant's only defence raised to the claim is that the plaintiff has sold and/or ceded its rights in terms of the mortgage bonds to an unknown third party prior to instituting this action, resulting in the plaintiff lacking the necessary *locus standi* to institute the present proceedings. This cession, it is claimed, was conveyed to the defendant by a Mr Johnson, an employee of Nedbank Private Bank, on 19 January 2009 who indicated that –

*'Nedbank had already sold and ceded its claims as secured by the mentioned mortgage bonds to a third party. If I recall he specifically made mention of a European Bank'.*

- [4] Consequently, the defendant disputes that Nedbank is the owner of the relevant mortgage bonds in that it was appointed as the 'managing agent'

charged with collecting bond payments on behalf of a third party to whom the rights were sold and ceded.

[5] No evidence is placed before me, apart from the claim of a conversation with a Mr Johnson, to substantiate the defence that the plaintiff has sold and/or ceded any of its rights in terms of the mortgage bonds to a third party. The defendant put up a document compiled by the plaintiff dealing with the concept of securitisation in the South African market to support his claim that the plaintiff has ceded its rights in terms of the mortgage bonds to a third party and accordingly lacks *locus standi* in these proceedings. He claims that the plaintiff has sold its rights in terms of the mortgage bonds to a Special Purpose Vehicle ("SPV") or Issuer, an entity specifically created for the purpose of securitisation that issues securities which are sold to investors and traded on the capital markets. It is this SPV or Issuer that the defendant contends to be the new legal owner of the asset. However, this document does nothing to support a conclusion that the rights to his mortgage bonds have been sold and/or ceded in the manner claimed.

[6] There is no evidence of any sale or cession of the plaintiff's rights in terms of the mortgage bonds. The plaintiff contends that as the legal holder of the mortgage bonds it holds the requisite *locus standi* to sue.

[7] Given the extraordinary and stringent nature of the remedy of summary judgment, a court has an overriding discretion to refuse such application.

See *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*

2009 (5) SA 1 (SCA) para 10-11. Where there exists a *bona fide* defence to a claim, summary judgment should be refused so as not to “*deprive a defendant with a triable issue or a sustainable defence of his/her day in court*”. A *bona fide* defence must however be one of substance which if proved is capable of providing a sustainable defence to the claim.

[8] Having regard to the defence raised by the defendant, I am not persuaded that there is any evidence before me to support a conclusion that the plaintiff has transferred, sold or ceded its rights in terms of the relevant mortgage bonds to a third party. I am therefore unable to conclude that the defendant has raised a *bona fide* defence to plaintiff's claim.

[9] I was referred to the judgments of Louw J in *Absa Bank v Richard James Hill* (unreported WC Case No 2588/12 (delivered 22 August 2012) and the matter of Griesel J in *Nedbank Limited v Paul Lawrence Coxie Killian N.O. and others* (unreported WC Case No 8148/12 (delivered 8 November 2012) in which a similar defence was rejected. I am in agreement with Griesel J at para 7 that –

*‘In any event, should the defendants pay the amount presently claimed by the plaintiff and should the ‘true’ holder of those rights at some stage in the future emerge and claim payment of the same debt from the defendants, they would have a solid defence that the debt has been extinguished.’*

[10] In the circumstances, the summary judgment application must succeed.

[11] With regards to the order of special execution sought against the immovable property, the defendant did not raise on the papers that the immovable property constitutes his primary residence. I have applied my mind to the amount in arrears, the period over which the arrears have arisen, the value of the mortgage loan amount, the reference in the particulars of claim to section 26 of the Constitution and rule 46(1) and the fact that the defendant is legally represented in these proceedings. I am satisfied that on a consideration of these factors and given the absence of bad faith or abuse of court process on the part of the plaintiff, an order of special execution against the immovable property is justified.

[12] In the result, I make the following order:

1. Summary judgment is granted as follows against the defendant:

(a) Payment in the amount of R1 819 261,10;

(b) Interest on the aforesaid sum at the rate of 7,20% per annum, calculated daily and compounded monthly from 2 March 2012 to date of payment, both days inclusive;

(c) An order declaring

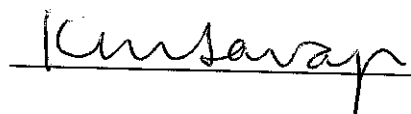
Erf 3947 Bettys Bay, situate in the Overstrand Municipality,  
Division Caledon, Province of the Western Cape,

In extent 981 square meters

Held by virtue of Deed of Transfer T60826/2001

to be specially executable;

(d) Costs of suit as between attorney and client.

A handwritten signature in black ink, appearing to read 'K M Savage', written over a horizontal line.

K M Savage

Acting Judge of the High Court

Appearances

Plaintiff: Adv W Jonker

Instructed by Minde Shapiro & Smith Inc.

Defendant: Mr Geel

Instructed by Matileze Venter Attorneys