



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal
Date: 4 April 2024
Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Mhlari NO and Others v Nedbank Limited (251/2023) [2024] ZASCA 39 (4 April 2024)

Today, the Supreme Court of Appeal (SCA) upheld an appeal and a cross-appeal against a judgment of the Gauteng Division of the High Court, Johannesburg (the high court), in terms of which, amongst others, the Patrick Malabela Family Trust (the Trust) was ordered to pay Nedbank the sum of R12 316 632,37. The order also declared specially executable an immovable property owned by the Trust situated in Sandton, Johannesburg.

During May 2013, Nedbank and the Trust, represented by one of its trustees, purported to conclude a loan agreement in terms of which the former lent R14 million to the Trust. As security for the loan, a covering mortgage bond was registered over the Trust's immovable property and several of the appellants bound themselves as sureties for, and co-principal debtors with the Trust.

For approximately five years, the Trust duly paid the monthly instalments in accordance with the terms of the loan agreement. When it defaulted on the payments during 2018, Nedbank cancelled the agreement and issued summons against the trustees and the sureties for payment of the outstanding balance of the loan. It also sought an order declaring the mortgaged immovable property specially executable.

The trustees defended the action on the ground that the loan agreement was void and unenforceable because the Trust did not have the requisite number of trustees in office at the time it concluded the agreement. The trust deed provided that the Trust must have at least three trustees in office at any time. At the time it concluded the loan agreement there were only two trustees in office and the Trust consequently lacked contractual capacity.

In response, Nedbank filed an alternative claim based on unjust enrichment, asserting that it paid the money to the Trust in the mistaken belief that the loan agreement was valid and enforceable. The trustees in turn filed a counter-claim for the cancellation of the mortgage bond and amended their plea, averring that the unjust enrichment claim had become prescribed.

The high court found for Nedbank on its main claim on the basis that the Trust had ostensible authority to conclude the loan agreement. It was accordingly not necessary for the high court to decide the trustees' counter claim or prescription defence. The trustees appealed the judgment and Nedbank filed a cross-appeal in respect of its unjust enrichment claim. Both appeals were with the leave of the high court.

On appeal to the SCA, Nedbank conceded that the Trust lacked capacity to conclude the loan agreement and that it was therefore void and unenforceable. That concession meant that the main appeal should succeed.

Regarding the Trust's prescription defence, the SCA found that Nedbank could not reasonably have been expected to have knowledge of the Trust's lack of capacity before the point was raised by the trustees. It accordingly dismissed that defence, leaving only the issue of Nedbank's unjust enrichment claim for decision.

It was not disputed that the Trust had been enriched at Nedbank's expense and the only issue that therefore fell for decision by the SCA was whether Nedbank's mistake was reasonable and not as a result of inexcusable slackness on its part. In this regard the SCA found that when considered against the backdrop of the trustees' conduct, Nedbank's mistake was reasonable and excusable. The trustees had represented to Nedbank that the Trust had the necessary capacity to conclude the loan agreement and had provided it with various documents in proof of that assertion.

The SCA accordingly upheld both the main appeal and the cross-appeal. It also set aside the high court's order and substituted it with an order compelling the trustees to pay Nedbank the sum of R5 436 347.57, together with interests and its legal costs. It also directed Nedbank to take the necessary steps to cancel the mortgage bond.

-----oOo-----