

FORM A**FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT**

PARTIES:

Case No: 3361/2009

In the matter between:

NEDBANK LIMITED**Plaintiff**

and

**JOSEPH PHILLIP BEHR N.O
BRUNETTE BEHR N.O**Being the Trustees for the time being of the
BEHR FAMILY TRUST, (1614/2000/3)**Defendants**

- Case Number: **3361/2009**
- High Court: **EASTERN CAPE, PORT ELIZABETH**
- DATE HEARD: 26 January 2010
- DATE DELIVERED: 29 June 2010
- JUDGE(S): **NEPGEN J**

LEGAL REPRESENTATIVES –

Appearances:

- For the Plaintiff(s): Adv P Scott
- for the Defendant(s): Adv G Gajjar

Instructing attorneys:

- Plaintiff(s): Boqwana, Loon & Connellan
- Defendant(s): Messrs Burmeister, De Lange, Soni Inc

CASE INFORMATION -

- *Nature of proceedings:* **Civil Matter**
- *Topic:*
- *Key Words:*

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

Case No: 3361/2009

In the matter between:

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Plaintiff

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Being the Trustees for the time being of the
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Defendants

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JUDGMENT

NEPGEN, J

[1] The plaintiff, a commercial bank, instituted action against the defendants as the trustees of the Behr Family Trust (the Trust) claiming payment of an amount of R 891 157,40, which it was alleged represented the balance of “the principal debt together with finance charges thereon” in respect of a loan it made to the Trust (although the summons refers to the defendants). This loan was secured by mortgage bonds passed by the Trust in favour of the plaintiff. The property over which the mortgage bonds were passed is situated at 32 Smuts Drive, Vanes Estate, Uitenhage. The plaintiff further claimed interest at the rate of 9.5% per annum on the aforesaid amount from 1 October 2009 to date of payment; costs of suit on the attorney and client scale; and an order declaring the aforesaid immovable property executable. The defendants, in their aforesaid capacities, entered appearance to defend the action.

The plaintiff then sought summary judgment against the Trust. The application for summary judgment was opposed.

[2] After hearing argument I reserved judgment in this matter. After considering the matter and deciding what order to make I commenced preparing the judgment. Before it was completed (although a portion thereof had already been typed) the defendants' attorneys sent a letter to the registrar in which it was stated, *inter alia*, that "(the) property in question bonded to the plaintiff has since been sold and the outstanding amount settled in full". Having received this information I enquired as to whether a judgment was still required, as in the light of the settlement of the Trust's indebtedness to the plaintiff, the plaintiff could not obtain judgment against the Trust. The response that was received was that the question of costs was still outstanding and that my judgment "would have a bearing on how the parties resolve the issue of the outstanding costs between them". I assume this means that the question of the costs of the action has not been finalised.

[3] I have some difficulty in understanding what the parties require of me. I cannot give judgment against the Trust as the amount claimed by the plaintiff is no longer owed. To give a judgment as if the indebtedness had not been settled is a purely academic exercise and I do not propose to do so. The conclusion which I had reached in this matter was that I would grant the Trust leave to defend the action and make an order that the costs of the application for summary judgment be costs in the cause. The latter order was the one the defendants' counsel asked me to make.

[4] The reason why I decided the Trust should be granted leave to defend the action was, briefly, that I did not agree with the argument advanced on behalf of the plaintiff that the documents annexed to the opposing affidavit did not reflect the Trust as being part of the debt review process. The defendants, in their personal capacities, did not owe the plaintiff anything. It is clear, however, that the indebtedness to the plaintiff is reflected in the documentation annexed to the opposing affidavits. There is also the specific statement in the opposing affidavit that the Trust was part of the debt review process. In the circumstances I was unable to conclude that the plaintiff's case was unimpeachable and that the defence raised was bogus or bad in law.

[5] Other than granting the Trust leave to defend on the issue of costs, no order is made on the application for summary judgment. In so far as it is necessary, I make an order that the costs of the application for summary judgment are to be costs in the cause of the main action.

J J NEPGEN

JUDGE OF THE HIGH COURT

For the plaintiff: Adv. P Scott instructed by Boqwana, Loon & Connellan

For the defence: Adv. G Gajjar instructed by Messrs Burmeister, De Lange, Soni Inc