IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. A5012/2010

DATE:19/05/2011

In the matter of the appeal of:

IRWING 514 CC Appellant

and

STANDARD BANK OF SOUTH AFICA LIMITED Respondent

JUDGMENT

SATCHWELL J:

Introduction

1. I have read the judgment of my brother Monama J and, while I agree with the result and the order proposed by him, I do so for different reasons. I have seen the comments of Willis J and am in agreement therewith.

The Agreement

2. The parties entered into a loan agreement on 12 November 2008 which provided for *"facility*" in a total amount of R15 650 000.00 to be lent and/ or advanced and/or financed by the respondent to the appellant. This amount was limited and the agreement made no reference to any further entitlement to any additional amount.

3. The structure of the loan agreement and allocations and payments in terms thereof was as follows:

No.	Description	Amount
1.	Finance for the acquisition of the land	1 864 464.30
2.	Finance for the installation of services by way of the issuance of a performance guarantee in the *fixed* sum of R 8.5 million	8 500 000.00
3.	Finance by way of cash drawdown for the installation of services up to a maximum of R3.5 million	3 500 000.00
4.	Finance by way of capitalisation of interest up to a maximum of R1 617 285.70	1 617 285.70
5.	Finance for an administration fee in the amount of R 168 250.00	168 250.00
	TOTAL:	**R15 650 000.00**

4. The respondent made a number of payments in terms of the loan agreement,[1] and also issued a performance guarantee[2].

5. The agreement provided for all amounts advanced in terms thereof to be repaid after a period of twelve months and it is common cause that all amounts advanced were repayable by 12 November 2009.

Dispute

6. In essence, the appellant claimed an order for specific performance. It asked the court below to compel the respondent to advance a loan to it in the sum of R3 798 047.00, within seven days of the order. In the alternative to the specific performance order, the appellant sought a declarator to the effect that the respondent, by not advancing the sum of R3 798 047.00, is in breach of the respondent's obligation in terms of the loan agreement, "*rendering the applicant entitled to cancel the loan agreement*". The respondent contended that it had performed fully in terms of the loan agreement, by making available the total loan facility to the applicant and that appellant is attempting to interpret the agreement in a manner in which it seeks to unilaterally increase the loan by the amount now claimed.

7. The court *below* upheld the respondent's defence and dismissed the application with costs. There was also a counter-application which the respondent instituted against the appellant. The counter-application was also dismissed but no cost order was made in respect of the counter-application.

The issue is moot

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[1] On 12 February 2009, the respondent lent and advanced the cash sum of R1 864 464.30 to the appellant for the acquisition of the property, specifically in terms of clause 1.1.1 of the loan agreement. On 14 November 2008, the respondent lent and advanced the cash sum of R3.5 million to the appellant which was the finance required for the installation of certain services. Items 4 and 5 of the table were not amounts to be advanced, but were allocations in relation to interest to accrue on the capital sum in future, as well as an administration fee.

[2] For R8.5 million on 20 November 2008

8. On the facts before this appeal court, it is clear that any order for specific performance can now have no practical effect.

9. The loan agreement endured for a period of twelve months only. It expired on 11 November 2009 by which time all monies lent and advanced in terms thereof, were to be repaid.[3]

10. If the appeal court were to grant an order for specific performance then the court would be extending the period of the contract term which we cannot do.

11. Any judgment handed down by this appeal court would allow no practical or substantial redress to the appellant because it could have no practical consequence or effect.

12. In the course of argument before us, Mr Strydom for the appellants, made the concession that the appellants had, at the time of instituting proceedings, wanted to mitigate their damages and hence claim specific performance but that specific performance was now not practicable.

13. On this ground alone the appeal must fail.

Ambiguity in the Agreement

14. Appellants contention concerning the agreement rests on the argument that the respondent was obliged to furnish further cash advances to appellant which cash advances are provided for in that portion of the schedule dealing with "finance for installation of services".

15. As I understand appellant, it is suggested that respondent was obliged to make cash advances up to the amount of R8.5 million in addition to the performance guarantee for the same amount. It appears that the proposition

[3] This application was launched on 8 June 2009 and judgment handed down on 9 October 2009. This appeal was heard on 16 March 2011.

is that respondent would be entitled to deduct these cash advances from the performance guarantee.

16. The difficulty with this contention is twofold. Firstly, this would mean that the respondent would provide a loan facility beyond the maximum sum of R15 650 000.00 by an additional performance guarantee or cash advance of R8.5 million. Secondly, the performance guarantee is issued to a third party and, as is usual practice with any guarantee advises the third party that a sum of money is held available for a specific purpose on the fulfilment of certain conditions[4]. The guarantee is not available as a pool into which appellant can dip when it needs – it is already committed elsewhere and respondent must honour that commitment.

17. I am in agreement with the finding of the learned judge in the court below that: "*a plain reading of the relevant clauses of the loan agreement does not lend themselves to the interpretation relied upon by the applicant*". In order to rely on the interpretation proffered by the appellant, "*one will have to read into the agreement terms which are not there and which, in any event, cannot be readily read into the agreement*".

Alternative Claim for declaratory order

18. A declaratory order must be made in order to resolve a real and pertinent dispute on liability on the basis of certain assumed facts. The Court does not lend itself to declaring rights where there is no dispute or to make an order where no relief is necessary.

19. In the present case there is no need for a declarator. The matter has become moot as the loan agreement has expired and no relief can be obtained in regard thereto. Secondly, if the applicant fails on the main

[4] The guarantee issued to Westonaria Local Municipality reads *"At the instance of Irwing 514 CC, registration number 2001/048751/23, we advise that we hold at your disposal an amount not exceeding the sum of R8.5 million (Eight Million Five Hundred Thousand Rand). This amount or such lesser sum, which may be due to you, will be paid to you subject to the following conditions:"*

relief as it must, the matter between the applicant and the respondent is *res judicata* on the question of the interpretation of the agreement.

20. The issue of a declarator is (as with specific performance) a matter within the discretion of the court. The present case is not one where such discretion should be exercised in favour of the appellant. Any breach which might ever have been shown would have been in relation to past obligations and have no current or future application. [5]

Appellants own breach

21. It is noted that respondent's obligations in terms of the performance guarantee were subject to the condition that any advance was subject to the respondent receiving confirmation from the appellant that the appellant had secured acceptable pre-sales of 75 stands with a net sales income of at least R10 875 000.00. and that such condition pertaining to the pre-sales targets has not been fulfilled

22. It is further noted that, contrary to the terms of clause 12 of the loan agreement, there was a change in membership of the appellant close corporation of which notice was not given and which constituted a default in terms of the loan agreement[6].

23. Upon the occurrence of an event of default, the respondent was entitled at any time to suspend any further borrowing, to terminate the loan agreement and require payment of all outstanding indebtedness under the loan agreement as well impose a penalty interest of prime plus 1%. Respondent elected to cancel and counterclaimed the applicant to make payment of the sum of R5 364 464.30 plus the relevant interest calculated thereon in terms of the counterclaim as well as costs.

[5] See also section 19(1)(a)(iii) of the Supreme Court Act which grants a court a discretionary power to determine 'any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'
[6] See Clause 13 of the agreement.

24. The court below commented as follows on the change in membership: "*…on the applicant's own case there was a change in membership when Vrey left the firm. That was in contravention of the agreement. The respondent was consequently not remiss in taking that point as a default event.*"

25. Again irrespective of the issue of interpretation, applicant was in default of the agreement and therefore not entitled to the relief sought of specific performance.

Conclusion

26. For these reasons I am in agreement with the order of Monama J the appeal should be dismissed with costs, such costs to include those attendant upon the employment of two counsel. That is the order of the court.

DATED AT JOHANNESBURG THIS 11th day of May 2011

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K. Satchwell

Judge of the High Court

WILLIS J:

I agree with the order proposed by Monama J. I do not, however, share his views as to the lack of ambiguity in the loan agreement. Ultimately, this disagreement between Monama J and me has no bearing on the result. I share his views that the appeal is moot. The facility has expired and no order can now be made granting the loan. Furthermore, the appellant came to court seeking an order for specific performance. Specific performance is a matter within the discretion of the court. See **Benson v SA**

Mutual Life Assurance Society 1986 (1) SA 776 (A). I would not have compelled an unwilling banker to lend money in the circumstances of this case. Even if the appellant had succeeded in establishing breach of contract on the part of the bank, the appropriate remedy would have been damages, if any. The appellant did not allege and prove damages for the alleged breach. During the appeal hearing, there was some debate with counsel as to whether the court below should have granted a declarator that the respondent was in breach of contract. Here again, the court has a discretion. See, for example, **J.T. Publishing (Pty) Ltd v Minister of Safety and Security** 1997 (3) Sa 514 (CC) at pargraph [15] and **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd** 2005 (6) SA 205 (SCA) at paragraphs [15] to [19]. Besides, even if the respondent had been in breach, the right or obligation would have been a past one and not an existing, future or contingent obligation. A declarator would have been inappropriate. Finally, I agree with Monama J that the appellant itself was in breach of a material term of the agreement. There had been a substantive change in the appellant's membership interest at a critical time which was not brought to the attention of the respondent. In all the circumstances of the matter, Monama J has proposed an order which I endorse.

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N.P Willis

JUDGE OF THE HIGH COURT

MONAMA J:

[1] This is an appeal against the order granted by Horn J on 9 October 2009 in which he dismissed the appellant's application for specific performance of the loan facility agreement.

Factual Background

[2] On 12 November 2008, the parties herein concluded a written Property Finance Development Loan Agreement ("Loan Agreement") for its building

projects in Extension 10, Westonaria, Gauteng. The total value of the loan was an agreed amount of R15 650 000.00. The security for the said loan amount was the mortgage bond registered on 12 February 2009 over Portion 11 of the farm Panvlakte 21, Western Extension 10, Gauteng.

[3] The Loan Agreement was effective for the period of twelve months from 12 November 2008 to 11 November 2009. The agreement provided that at the end of the said term the appellant would have repaid the loan amount (including the agreed interest and administration fees) in full.

The purpose of the facility

[4] The loan facility was for certain specified purposes only. These purposes were to finance the acquisition of land, to pay for the installation of the services and to issue a erformance guarantee in favour of the Westonaria Local Municipality. The obligation for the issue of the performance guarantee was fulfilled on 20 November 2008. The last obligation resting on the respondent in respect of the acquisition of the land was fulfilled on 12 February 2009.

[5] The amount payable in respect of the items referred to in paragraph 4 above are, as follows:

- Service installation fee R3 500 000.00

  (Paid on 14 November 2008)

- Performance guarantee R8 500 000.00

  (Issued on 20 November 2008)

- Acquisition of land fee R1 864 464.30

  (Paid on 12 February 2009)

- Capitalized interest R1 617 285.70

- Administration R 168 259.00

The respondent duly performed its agreed obligation in terms of the Loan Agreement.

[6] On 12 February 2009 and with the payment of the acquisition the agreed, the loan facility was fully exhausted. Notwithstanding the said exhaustion, during 20 February 2009 and 16 May 2009 the appellant demanded a further payment of some R3 798 047.90 from the respondent. The appellant alleged that the said amount so demanded constituted:

> *"-the second draw down"*

in terms of the loan facility. The respondent did not pay. As a result of such failure to pay, the appellant instituted proceedings in the court below for specific performance alternatively for a declaratory order an allegation that the respondent was in breach of its obligation in terms of the Loan Agreement. The appellant alleged that the breach entitled it to cancel the Loan Agreement.

[7] The application was dismissed with costs.

[8] The appeal from court below is with the leave of that court.

Grounds of appeal

[9] The appellant's based its appeal on the ground that the court below wrongly interpreted the terms of the loan facility by holding that the said terms are ambiguous. The appellant submitted that the loan agreement should be interpreted with due regard being heard to the factual matrix that existed prior, during and after its conclusion.

[10] The alleged unclear and ambiguous terms of the loan facility are to be found in clauses **1.1.2** and **1.1.5** of the Loan Agreement. Clause 1.1.2 provides that:

> *"to finance the installation of services up to a maximum of R12, 000 000 (Twelve Million Rand)"*

On the other hand, clause 1.1.5 provides that:

> *"to allow for the issuing of a performance guarantee in the sum of R8, 500,00 (Eight Million Five Hundred*

Thousand Rand) which amounts will de deducted from 1.1.2 above."

I will revert to these clauses in more details later in my judgment. At this stage it is important to understand that the deduction referred to in clause 1.1.5 above refers to.

The value of the installation fee being R3,5 million and the value of the performance guarantee in the sum of R8,5 million which once deducted from the amount of R12 million refers to.

[11] The respondent opposes the appeal. The following are the grounds of opposition. First, the respondent submitted that the issues in the appeal have became moot. Accordingly the appeal should be struck off the roll in terms of Section 21(A) of the Supreme Court Act, 59 of 1959. The respondent based its submission on the fact that the time frames for performance in terms of the Loan Agreement have elapsed. The second ground was that the terms of the Loan Agreement are clear and unambiguous and accordingly should be accorded their ordinary meaning.

[12] Before dealing with the appeal *per se* I wish to comment on certain non compliances. First, the appellant failed to comply with Rule 7(2). The said rule provides:

"- The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorizing him to appeal and such power of attorney shall be filed together with the application for a date of hearing."

These provisions are, according to the case law peremptory. They must be complied with as held in the full bench decision of **Aymac CC v Widgerow** 2009(6) SA 433 (WLD) at 446 G –H where it is said:

"- Unless the power of attorney is filed together with the application for a date of hearing, the appellant cannot be considered properly to

have written application in terms of Rule 49(6). In the absence of a proper making of an application for a date of hearing the appeal, the appeal is not properly set down and should be struck."

[13] *In casu* the power of attorney was only provided on 14 March 2011. Therefore the appeal was not properly set down in compliance with the Rules.

[14] Notwithstanding the late filing of power of attorney, the court has discretion to condone such lapses in appropriate cases and on good cause show and also on application. *In casu* there is no such application in respect of the non compliance rule 7(2). However, I am of the view that this is an appropriate case where I should *mero motu* condone such lapses in the interest of justice and to bring this matter to finality.

[15] Insofar as the non compliance with rule 49(6) there is a proper condonation application. In this application the grounds are well motivated. They range from ignorance of the provisions of this Rule to the difficulties in obtaining the record from the transcribers. In the interest of justice I am persuaded to reinstate, enroll and hear the appeal. We have prepared ourselves to hear the appeal.

Evaluation of the merits of appeal

[16] In determining whether the agreement in unclear and ambiguous the appellant bears the onus. The amount of the Loan agreement is specific, namely an amount of R15 560.000.00. The duration of the agreement is one year and the entities to be paid are well identified and so are the various amount for such payment. In my view, there is not ambiguity. The respondent fulfilled its obligation.

[17] The appellant claims force specific performance remedy was misplaced. Such a remedy can only be invoked once there is a breach of the terms of the Loan Agreement. Even when there is a breach, the court, has discretion to order or refuse specific performance. This is a remedy invoked to enforce that which the parties agreed upon. *In casu* the parties agreed upon the payment of the fee

for the acquisition of land, to secure the performance guarantee in favour of the local authority and the payment of the installation services fee. As at 12 February 2009 the respondent had fully complied. In my view, there was no basis for the remedy of the specific performance. The court below was correct in dismissing the prayer to force the respondent to pay the demanded amount.

[18] The declaratory prayer is without substance and legal foundation. There is no basis to declare that the respondent is in breach and accordingly the appellant was entitled to resile form the agreement. As stated above the respondent complied fully. Any suggestion that the amount reserved for performance guarantee could have been diverted and used is absurd. The respondent was obliged to keep the funds available until properly released therefrom by the Westonaria Local Municipality.

[19] I have stated above that the Loan Agreement was clear and unambiguous and so is the performance guarantee. The appellant argued that the portion of the money earmarked for the performance guarantee should become available to it. Such submission is both absurd and illogical as any diversion of funds as suggested would have negatively impacted on the undertaking by the respondent towards third parties.

[20] The guarantee was issued in favour of the third party and the respondent as a bank was expected to honour same on the basis of *pacta sunt servanda* principle. At all material times, the respondent should have had these funds readily available to discharge its obligation to the local authority if and when called upon to do so.

[21] The appellant has failed to identify the contractual basis and source of the said amount of R3 798 047.90 in terms of the demand of 20 February 2009 and 16 May 2009.

Mootness of the appeal

[22] The respondent submits that the appeal is moot. I am in full agreement therewith. In **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2000 (2) SA 1 (CC) the following was said about mootness:

> *"-A case is moot and therefore not justifiable if it no longer presents as existing or live controversy which should exist if the Court is to avoid giving advisor opinions on abstract proposition of law."*

I am persuaded that the issues in this appeal are no longer alive. The appeal will not serve any practical purpose.

[23] I am not persuaded by the appellant's argument that this appeal has:

> *" an effect on a related matter in terms of which the respondent as the applicant claim from the applicant (appellant) an amount of R6 210 981.22…The legal basis for the respondent's claim in the related matter is that the applicant breached the exact same agreement"*

Section 21(A) of the Supreme Court Act provides that:

> *"-when at the hearing of any civil appeal to the appellant division or ant provincial or local division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result. The appeal may be dismissed on this ground alone."*

The courts have repeatedly held that they do not offer litigant legal advice as held in **Radio Pretoria v Chairman, Independent Communication of South Africa and Another** 2005 (1) AS 47 (SCA) and several decisions referred to therein. The appellant argument in respect of unrelated and pending matter elsewhere is a calculated attempt to circumvent the issue of mootness. Such the argument must fail.

[23] The other reason why this appeal should fail is the material non disclosure by the appellant. It withheld the critical information about its changed membership which was material tern of the contract between the parties.

[24] In my view there is no breach which can be attributed to the respondent in respect of its obligations *vis-à-vis* the appellant.

[25] In the result I make the following order:

1. The application for the condonation for the reinstatement is granted.

2. The appellant is ordered to pay the costs of such condonation.

3. The appeal is dismissed with costs including the costs occasioned by the engagement of two Counsel.

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R.E Monama

JUDGE OF THE HIGH COURT

Counsel for the Appellant: Adv. *R. Strydom* SC

Attorneys for the Appellant: Tintingers Inc.

Counsel for the Respondent: Adv. *S.E. Weiner* SC (with her, *G.M. Ameer*)

Attorneys for the Respondent: Bowman Gilfillan

Date of hearing: 16 March 2011

Date of judgment: 19 May 2011