IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29142/2014

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

....
DATE SIGNATURE

FACTAPROPS 52 CC Applicant

And

NEDBANK LIMITED Respondent

JUDGMENT

KATHREE-SETILOANE J

[1] Factaprops 52 CC ("the applicant") seeks an order for specific performance against Nedbank Ltd ("the respondent") in the following terms:

'1. Ordering the respondent to forthwith comply with its undertaking of 21 July 2014 to pay all outstanding rates and imposts that are due to the City of Johannesburg in respect of erf 159 and portion 1 of erf 161 Selby, Johannesburg, ("the property") so as to enable the conveyancer attending to the registration of transfer of the property (Roy Stoler attorneys) ("the conveyancer") to obtain a clearance certificate from the City of Johannesburg to facilitate same;

2. directing the respondent to abide timeously with all its obligations in terms of the agreement with the applicant that is dated 20 November 2013 ("the loan agreement") when called upon to do so by the conveyancers;

3. directing the respondent to do all acts, if any, necessary for the respondent to procure the registration of the transfer of the property to the applicant, the cancellation of the existing mortgage bond over the property and the simultaneous registration of a fresh mortgage bond over the property in terms of the loan agreement;

4. ordering the respondent to pay the costs of this application."

[2] On the 30 of July 2013, the applicant acquired the property from Celebration Investments (Pty) Ltd in terms of a written deed of sale, which was concluded on 20 November 2013. The applicant applied to the respondent on the 15th of August 2013 for a mortgage bond with an access facility over the property. In a letter dated, 21 October 2013, the respondent informed the applicant that it was in the "process of finalising the granting of a loan". On 29 October 2013, additional documents were supplied by the applicant to the respondent. On the 12 November 2013, the respondent, represented by Innocent Mnisi ("Mnisi") confirmed the terms of the loan in writing and that he awaited the respondent's final credit approval. On the 19 November 2013, Mnisi and Claudine Van Wyk advised the applicant, in writing, that its application for the loan had been approved. On the 20 November 2013, the applicant and the respondent entered into a written loan agreement. Thereafter, on 26 November 2013, the respondent appointed Lowndes Dhlamini to attend to the registration of the mortgage bond for the applicant. On the same day Stoler, the conveyancer, provided the guarantee requirements to Lowndes Dhlamini. On 5

December 2013, the applicant issued a letter of authority to the respondent for the issuing of a guarantee as required by clause 13 of the loan agreement. On 9 December 2013, the respondent issued the guarantee. During February 2014, Stoler expressed concern to Wingate-Pearse of the applicant that the sale proceeds were insufficient to cover amounts due to the City of Johannesburg and the respondent. Then, on the 19 February 2014, the conveyancer had discussed this with Fogolin, a recoveries manager of the respondent, and communicated their concerns to Strauss Daly (who were attending to cancellation of an existing mortgage bond over the property in favour of the respondent).

[3] On the 16th of April 2014, a meeting was held amongst all the parties to attempt to ensure that the transfer of the property and registration of the new bond in favour of the respondent would go ahead - Fogolin and Potgieter (head of legal recoveries) of the respondent, Govender and Akker of Strauss Daly and Stoler attended this meeting. On the 22 April 2014, a follow-up meeting was held, which was attended by Stoler and Wingate-Pearse of the applicant, Fogolin, Akker, Woolfson and Rodney Beck of High Street Auctioneers through whom the applicant had purchased the property. Stoler informed the parties that in addition to the R2.2 million that the seller, Celebration Investments, owed to the City of Johannesburg, it also owed a judgment debt of approximately R2.5 million to Phakisa and an amount of approximately R2 million to PG Bison. Nothing resolved at this meeting , and they attended another meeting on 12 June 2014.

[4] At the meeting held on 12 June 2014, Fogolin informed those present that the respondent might be prepared to pay R1.4 million towards the outstanding rates and taxes, which the Celebration Investments owed to the City of Johannesburg, to procure a clearance certificate. Potgieter said that he would attempt to prevail on the City of Johannesburg to reduce the indebtedness owed by Celebration Investments. Potgieter met with a representative of the City of Johannesburg on 24 June 2014, but the City of Johannesburg refused to reduce the debt. On the 26 June 2014, Fogolin informed Stoler that the City would not budge, and that he had requested the respondent’s property finance division to structure the loan agreement at a lower rate

than the prime lending rate agreed with the applicant, so the loan could be increased by R500 000.00 without prejudicing the applicant. Fogolin said that the additional R500 000.00 could then be used as part of the payment that the respondent would make to procure the clearance certificate from the City of Johannesburg.

[5] On 14 July 2014, Fogolin informed Stoler in an e-mail that the respondent's property finance division was still considering the matter. Then on 21 July 2014 Phakisa, a judgment creditor of the seller, attached the property and Fogolin informed Govender and Akker of Straus Daly in an e-mail, sent also to Stoler, Potgieter and Van Reenen of High Street Auctioneers, that the respondent had made a decision to advance the rates and taxes to finalise the transaction. Shortly before Stoler received Fogolin's email of 21 July 2013, in which the respondent undertook to pay the outstanding rates and taxes on the property, he learnt from Celebration Investments that Phakisa had attached the property pursuant to the judgment debt. Stoler then informed Fogolin of the attachment in a letter dated 22 July 2014. Fogolin asked Stoler to try and uplift the attachment on the same day.

[6] On 24 July 2014, the respondent, without any prior communication or notice to the applicant, informed the applicant, in a letter of the same date, that it had decided to withdraw the loan in terms of clause 2 and 11 of the loan agreement. The applicant's attorneys (KWP Attorneys) immediately addressed a letter to the respondent in which it requested the respondent to indicate which specific sections of the loan agreement the it relied on. The letter of KWP Attorneys, which was written on behalf of the applicant, was not answered directly by the respondent. Instead on 25 July 2014, the respondent (Le Roux) informed the applicant that "[t]he facility under contract number 30146390 has not been approved by the bank's credit committee". On the same day, the applicant wrote to the respondent demanding written undertakings from the respondent that it would abide by its obligations under the loan agreement.

[7] Finally, on 6 August 2014, the conveyancer procured a settlement with Phakisa and the attachment was up-lifted. On the 23rd of September 2014, Le Roux on behalf of the respondent deposed to an answering affidavit stating, inter alia, that the applicant was in default of the loan agreement due to its failure to lodge valuations in the deeds office, which failure he alleged entitled the respondent to elect to cancel the agreement.

[8] The applicant contends in its founding affidavit that: (a) its rights embodied in the agreement and in the undertaking to pay the outstanding rates to the City of Johannesburg are contractual and entitle the applicant to exact performance from the respondent in terms thereof; (b) the respondent's repudiation of the agreement through its purported withdrawal from the loan is an act of interference with the applicant's contractual rights; and (c) the applicant has no other satisfactory remedy available to it. With reference to the purported withdrawal, by the respondent, of the loan, on 24 July 2014 (the initial purported withdrawal thereof), the applicant contends that this was not in accordance with the exercise of a discretion in terms of either clause 2 or 11 of the loan agreement. It contends further that the respondent's statement that the facility was not approved was manifestly false in view of the prior incontrovertible facts and documents attached to the founding affidavit, in which it was made clear by the respondent that the loan had been approved. Accordingly, it submits that the respondent's decision to resile from the loan was unlawful and contrary to the terms of the agreement by which it was bound.

[9] The respondent alleges in support of its opposition to the application for specific performance, that in terms of the loan agreement which it entered into with the respondent, they agreed that that:

(a) the respondent would lend to the applicant, and the applicant agreed to borrow from the respondent the capital sum of R5 328.000,00 subject to the terms and conditions contained in the loan agreement;

(b) provided that the applicant complied with all of its obligations in terms of the loan agreement, that the capital would be advanced by the

respondent to the applicant or on its behalf, on or after the commencement date, as follows:

(i) R5 267.000,00 for the purchase of Property One, i.e. the property described as Erf 159 and Portion 1 of Erf 161, Selby on registration of the mortgage bond that the respondent required as security for the loan;

(ii) R60 739,00 for the respondent's service fee on registration of the mortgage bond/s that it requires as security for the loan.

(c) The applicant agreed to provide the respondent with the following security for its obligations to the respondent under the loan agreement:

(i) registration by the respondent of the first covering mortgage bond in the amount of R5 328 000,00 plus an additional sum of R1332 000,00 for securing certain costs and disbursements which the respondents may pay, incur or make in favour of the respondent over Property One;

(ii) registration by the applicant of a first covering mortgage bond in the amount of R5 million plus an additional sum of R1 250 000,00 for securing certain costs and disbursements which the respondent may pay, incur or make in favour of the respondent over Property Two;

(d) In terms of the provisions of the loan agreement an event of default would occur inter alia in the event that the applicant breaches any provision of the loan agreement, the mortgage bond or any other agreement with the respondent. On the occurrence of an event of default or on the happening of any other event, which is material the respondent has the right to cancel the loan agreement.

[10] The respondent contends that the applicant further agreed that it would be obliged to *inter alia* provide the respondent with a valuation from a valuer nominated by the respondent in terms of which Property One is valued at no less than R11.2

million and Property Two is valued at no less than R10 million and compliance by the applicant with any conditions which may be imposed by the respondents valuer.

Relying on clause 2 of the loan agreement, the respondent submits that it has reserved the right to cancel the loan agreement and withdraw from the loan at any time before the commencement date, if in its discretion there is *inter alia* a change of circumstances, which might prejudice the respondent, its rights or its security or materially alter the risk relating to the loan. It contends further that in terms of clause 13.2.1 of the loan agreement, the applicant was obliged to provide the respondent with a valuation report from a valuer nominated by the respondent in terms of which Property One is valued at no less than 11.2 million, but according to the valuation provided by the applicant, Property One was only valued in the amount of R8.9 million. The valuation of Property One, it contends, did not meet the requirements as set out in the loan agreement, as it required a valuation in the amount of R11,2 million. In addition, it contends that the applicant failed to allow unfettered access to Property Two in order to allow the respondent's valuer to conduct the valuation.

[11] The respondent contends that on a proper construction of the loan agreement and in circumstances where the respondent is to advance money to the applicant, the respondent is entitled to cancel the loan agreement where the valuation provided by the applicant in respect of Property One was not sufficient, and where no valuation in respect of Property Two could be conducted. It argues that the determination of the value of Property One and Property Two is crucial to safeguarding the respondent's risk, as it cannot be expected to advance money to the applicant without sufficient value being found in Property One and Property Two.

[12] The respondent takes issue with the literal interpretation, which the applicant places on the words "before lodgement of documents in deeds office" in the heading of clause 13.2.1 of the loan agreement. The effect of a literal interpretation, it argues, is that the documents contemplated in clause 13.2.1 can be produced at any time before lodgement in the Deeds Office. This interpretation, it contends, negates the fact that lodgement in this matter is impossible as the required valuations have

neither been obtained nor tendered. It argues that in the circumstances of this matter, the applicant cannot produce the required valuations as Property One was only valued in the amount of R 8,9 million and no valuation was obtained in respect of Property Two. It further contends that the valuations are a pre-requisite or pre-condition of the loan agreement, since the loan agreement cannot be implemented until the valuations have been provided. Only once the required valuations have been obtained, can the next step be taken to register the mortgage bonds as security over Property One and Two. It contends that without the required valuations and the subsequent registration of the mortgage bonds, the loan amount cannot be advanced. In this regard, it points out that in terms of clause 8 of the loan agreement, the applicant agreed to register, in favour of the applicant, first mortgage bonds over Property One and Two.

[13] In furtherance of its contention relating to the applicant's non-compliance with clause 13.2.1 of the loan agreement, the respondent contends for an alternative construction of the loan agreement entitling it to cancel the loan agreement if sufficient value could not be found in the properties. I am of the view that by construing the loan agreement in this manner, the respondent attempts to elevate the term of the agreement requiring the provision valuations, by the applicant to the respondent, prior to lodgement of documents at the Deeds Office into a condition precedent for the continued existence of the agreement. This, in my view does not provide a defence to the application for specific performance, because on a proper interpretation of clause 13.2.1 of the loan agreement which gives effect to it's plain meaning, the documents listed thereunder only have to be provided to the respondent "before lodgement of documents in deeds office". This is acknowledged by the respondent in paragraph 9.7 of the answering affidavit. More importantly, the applicant abides by the loan agreement, and has tendered compliance with all its obligations, which includes providing the respondent with the valuations which are required in terms of clause 13.2.1 of the loan agreement. It is notable that the respondent does not allege that documents have been lodged in the Deeds Office. Nor does it allege that prior to cancelling the loan agreement, it put the applicant on notice to produce the valuations or allow its valuator unfettered access to the

properties to obtain the valuations. In the circumstances, the third attempt by the respondent to cancel the loan agreement is not sustainable in law.

[14] A further defence raised by the respondent is that the loan agreement precludes reliance by the applicant on the undertaking given by Fogolin in the email of 21 July 2014 that the respondent has resolved to advance the rates and taxes amount owing by the seller of the property to the City of Johannesburg in order to finalise the transaction. The respondent relies for this defence on clause 18.8 of the standard terms and conditions in which the parties agreed that the agreement constituted the whole of the agreement between the parties relating to the subject matter and that no amendment, alteration, addition, variation or consensual cancellation thereof would be of any force or effect unless reduced to writing and signed by the parties. However, whereas clause 18.8 is concerned with the loan agreement and more specifically with the money to be lent by the respondent to the applicant in terms thereof and the mortgage bond to be registered over the property as security therefore, the undertaking by the respondent to advance the rates and taxes owing to the City of Johannesburg is not. On the contrary, the undertaking is concerned entirely with the registration of the transfer of the property to the applicant, and only incidentally to the cancellation of the respondent's first mortgage bond over the property and the registration of a new mortgage bond in favour of the respondent. Accordingly, I find that the undertaking made by Fogolin, on behalf of the respondent, in the e-mail dated 21 July 2014, that the respondent has "made the decision to advance the rates and taxes amount owing in order to finalise this transaction" is not subject to the provisions of the standard terms and conditions of the loan agreement and does not offend against any of the provisions therein. Accordingly, the respondent's objection based on clause 18.8 of the general terms and conditions similarly does not constitute a valid defence to the relief sought by the applicant in the application.

[15] A further defence to the relief sought by the applicant in relation to the "undertaking" given in the letter, dated 21 July 2014, is that it was a business decision made by the respondent in order to finalise the transaction. The respondent

contends, in this regard, that Celebration Investments, in conjunction with the respondent, agreed to conclude the offer to purchase the property with the applicant. In order to enable the transaction to proceed, the respondent made the decision to advance the amount owed in respect of rates and taxes for and on behalf of Celebration Investments. Accordingly, it contends that the decision taken was not taken in favour of or for the benefit of the applicant and the applicant, therefore, has no basis to seek an order against the respondent to pay the outstanding rates and taxes that are due to the City of Johannesburg in respect of the property, as no undertaking was given in favour of the applicant that it can enforce.

[16] The decision to pay the rates and taxes, it contends, was made by the respondent in favour of Celebration Investments and not the applicant, in an attempt to finalise the transaction and on the clear understanding that the rates and taxes would only be paid in the event that the transaction was capable of being proceeded with, but the transaction could not be proceeded with, as the applicant had not complied with the terms of the loan agreement. I am unable to accept that the undertaking was made entirely for the benefit of Celebration Investments, because without the undertaking the sale of the property to the applicant would have fallen through, with no benefit to either the applicant or the respondent. It follows, therefore that the undertaking had to have been made for the benefit of both the applicant and the respondent. This much is evident from the allegation in the Founding Affidavit that, on 26 June 2014 Fogolin informed Stoler that because the City of Johannesburg was not prepared to reduce the indebtedness of the R2.2 million owed to it by the seller (Celebration Investments):

‘[Fogolin] had requested the respondent’s finance division to restructure the loan agreement at a lower interest rate than that agreed with the applicant. The agreed rate was the prime lending rate but Fogolin proposed that by reducing it to prime less one percent, the amount of the loan could be increased by approximately R500 000.00 without prejudicing the applicant, which additional amount could be used as part of the payment that the respondent would make to procure a clearance certificate from the City of Johannesburg.’

Crucially, the respondent has failed to respond to this allegation in its answering affidavit. In the circumstances, I find that there is no valid defence raised by the respondent to the application for specific performance.

[17] The applicant's right is that embodied in the loan agreement, and the undertaking of 21 July 2014 to pay the outstanding rates and taxes owing to the City of Johannesburg. The respondent's repudiation of the agreement through its withdrawal of the loan is clearly an interference with applicant's right as referred to above. In addition, the applicant has no alternative remedy available to it, because the only way in which the transaction can proceed, is if a clearance certificate is issued by the City of Johannesburg. As indicated, the respondent undertook to pay the seller's indebtedness to the City of Johannesburg so that a clearance certificate can be issued, its existing bond cancelled, and a new bond registered over the property. It is precisely because the respondent already has an interest in the property, and agreed to pay the seller's indebtedness to the City of Johannesburg that prevents the applicant from procuring other funding for the transaction. In the circumstances, I am of the view that the applicant has no alternative remedy but to seek the Court's assistance to enforce its rights against the respondent in terms of the undertaking and the loan agreement. Accordingly, the applicant is entitled to the relief sought in prayers 1, 2, 3, and 4 of the notice of motion.

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

1. The respondent is ordered to forthwith comply with its undertaking of 21 July 2014 to pay all outstanding rates and imposts that are due to the City of Johannesburg in respect of erf 159 and portion 1 of erf 161 Selby, Johannesburg, ("the property") so as to enable the conveyancer attending to the registration of transfer of the property (Roy Stoler attorneys) to obtain a clearance certificate from the City of Johannesburg to facilitate same;

2. The respondent is directed to abide timeously with all its obligations in terms of the agreement with the applicant that is dated 20 November 2013 ("the loan agreement") when called upon to do so by the conveyancers;

3. The respondent is directed to do all acts, if any, necessary for the respondent to procure the registration of the transfer of the property to the applicant, the cancellation of the existing mortgage bond over the property and the simultaneous registration of a fresh mortgage bond over the property in terms of the loan agreement;

4. The respondent is ordered to pay the costs of this application.

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F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT: I MILTZ SC
INSTRUCTED BY: KWP ATTORNEYS

COUNSEL FOR THE RESPONDENT: HJ SMITH

INSTRUCTED BY: CLIFF DEKKER HOFMEYR INC

DATE OF HEARING: 8 JUNE 2015

DATE OF JUDGMENT: 26 JUNE 2015