REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **33174/2016**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED ✓

Date: 31/10/17 **WHG VAN DER LINDE**

In the matter between:

National Empowerment Fund **Applicant**

and

Gidani International (Pty) Ltd **Respondent**

JUDGMENT

Van der Linde, J:

Introduction

[1] This is an application to perfect a general notarial bond over all the respondent's movable property *"of every description, generally and without limitation, (whether corporeal or incorporeal and wheresoever situated, whether or not in the area of jurisdiction of the deeds registry in which this Bond is registered but subject to the applicable laws) including ...*

nothing excepted ... both such as the Mortgagor may now possess or in the future become possessed ...". The bond was executed before a public notary on 25 August 2015 to secure an indebtedness of R48,000,100 and registered in the deeds registry on 2 September 2015.

[2] The bond was given as security for the due repayment by the respondent to the applicant of advances to be made under a facility, following on the applicant having agreed to grant advances and financial assistance to the respondent up to the extent of R48,000,100. It was a condition of the facility so to be granted that the respondent would pass a general notarial bond over its assets on the terms set out in the bond.

[3] In terms of clause 5.1.3 of the bond, all amounts owing under the bond become immediately due and payable should the mortgagor fail to comply with any of the terms and conditions of the agreement under which the facilities afforded by the bond have been granted. In such event, the mortgagee is entitled amongst other things, to: take possession of the assets; remove and store them at another location; hold them as security; dispose of them by public auction or private treaty in its sole discretion; or have them excussed or attached by legal process (clause 5.2).

[4] In terms of clause 5.3 of the bond, the parties agreed that if the mortgagor refuses or fails to give possession of the assets to the mortgagor on demand, the mortgagor may apply to court for an order for delivery of the assets. This application is being brought under that entitlement.

[5] The indebtedness secured by the bond derives from the facility availed pursuant to a senior loan facility agreement between the parties. That agreement provides in clause 2.2 that the applicant agreed to make available to the respondent a facility of R48,000,100. It provides too, in clause 7.1, that the amount owing under the facility would be repayable in sixty monthly instalments, the first instalment being payable on the first business day of the first month following the first *"disbursement date"*.

[6] The subsequent instalments were to be made on every successive month until the facility was repaid in full. The agreement provides further in clause 14.1.1 that an event of default occurs when the respondent fails to pay any instalment and fails to remedy the failure within seven business days of having been called upon to do so. When that occurs, the applicant is entitled, in terms of clause 14.2.2, *"... on the giving of written notice to the Borrower, demand that the Borrower, within 7 (seven) Business Days after receipt of the aforesaid notice discharge the whole of its indebtedness to the Lender, which amount shall be the aggregate of all amounts which have become payable in respect of the Facility ..."*.

[7] It is necessary, before proceeding, to reflect back on the import of what has been stated thus far. The acceleration clause in the bond is triggered upon the respondent first having failed to comply with the terms of the senior loan facility agreement (clause 5.1.3). In turn, under that agreement, for acceleration to occur, a prior seven days' notice is required to afford the respondent an opportunity to remedy its failure to have paid say an instalment on due date (clause 14.1.1). The applicant is then entitled thereafter to demand that the respondent within seven days discharge the whole of the indebtedness to the applicant (clause 14.2.2).

[8] Put differently, should the respondent default in paying an instalment on due date, the applicant acquires the right under clause 14.2.2 of the loan agreement to give the respondent a notice to pay the entire amount outstanding, but only after it will first have given the respondent a written notice within seven days to remedy its default. This relationship between the bond and the loan fits the legal notion that the bond is accessory to the loan. The bond is not the primary obligation; the loan is.[1]

[9] The founding affidavit explained that of the facility of R48,000,100 the amount of R36,179,615 was advanced by way of draw-downs on the facility.

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[1] LAWSA, 2nd ed, vol 17, part 2, para 400.

The respondent's resistance to the application

[10]The respondent, represented by Mr Cohen, raised three points: that mora has not occurred; that the court should not grant the order asked in the exercise of its discretion; and that clause 5.3.5 of the notarial bond is unconstitutional.

[11]Before dealing with the respondent's submissions, it is necessary to point out that the applicant is established as a trust in terms of s.2 of the National Empowerment Fund Act 105 of 1998. That would ordinarily imply, in the case of a trust properly so called, that all the trustees must join in the litigation.[2]

[12]A trust in our common law is not a juristic person,[3] but some statutes have begun to define it as such.[4] For purposes of our common law it is best described as *"... merely an accumulation of assets and liabilities which, in aggregate, constitute the 'trust estate' which is a separate entity, though it is not a persona."*[5]

[13]However, the National Empowerment Fund Trust is not a trust in the common law sense of that word. S.4 of its establishing Act provides as follows (emphasis supplied):

"4 The Trust

(1) The Trust is constituted as a body corporate with perpetual succession, and subject to the provisions of this Act, will be capable in law, in its own name, of suing and being sued, of acquiring, holding and alienating movable and immovable property, and of performing such acts as a body corporate may by law perform."

[14]With the applicant's locus standi out of the way, one may turn now to the contractual prerequisites for the entitlement of the applicant to apply for the relief it seeks, with one reservation. It is necessary first to say something about the object of the application.

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[2] Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA); Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA). See also Lupacchini NO and Another v Minister of Safety and Security, 2010 (6) SA 457 (SCA); Rupert Investments (Pty) Ltd v J.H. Petzer Inc and Others, (36878/2013) [2015] ZAGPPHC 118 (13 February 2015); Desai-Chilwan NO v Ross and Another, 2003 (2) SA 644 (C), and Vogel, N.O. v Melamed and Others, (35494/16) [2017] ZAGPJHC 127 (5 April 2017).

[3] Commissioner for Inland Revenue v MacNeillie's Estate, 1961 (3) SA 833 (A); Commissioner for Inland Revenue v Jacobson's Estate, 1961 (3) SA 841 (A); Commissioner for Inland Revenue v Friedman, 1993 (1) SA 353 (A).

[4] For example *"juristic person"* in s.1 of The Consumer Protection Act, 68 of 2008; *"person"* in s.1 of the Income Tax Act 58 of 1962.

[5] LAWSA, First Reissue, vol 31, para 531.

[15] A good place to start is to remark that in the absence of a clause entitling the holder of general notarial bond to take possession of the assets bonded, the mortgagee has no such power.[6] Here there is the express power to do so (clause 5.2.1, 5.2.2 and 5.3).

[16]The holder of a general notarial bond, such as this one – to be distinguished from a special notarial bond, covered by the Security by Means of Movable Property Act 57 of 1993 – enjoys no real right against third parties in the assets secured by the bond. The mortgagee is not a secured creditor, and is upon the insolvency of the mortgagor entitled only to a preference over the concurrent creditors with respect to the proceeds of assets covered by the bond, and then only in so far as they fall into the free residue of the estate.[7]

[17]So as to enhance this relatively tepid position, the mortgagee would generally be desirous of obtaining possession of the assets through a court order, for then his/her position is akin to that of a common law pledgee, and s/he would have acquired a real right over those assets enforceable against third parties.[8]

[18]The applicant appreciates this fact, and expressly says:[9]

> *"With this application the applicant seeks to perfect its security over some generally described movables in terms of a general notarial bond concluded between it and the respondent. The applicant as bondholder accordingly seeks to do so since by the nature of the instrument of the security, it does not acquire any real right over the hypothecated movables of the respondent. It accordingly will acquire such real rights of security over the movables only upon perfection of its security."*

[19]Has the applicant here complied with the contractual prerequisites for obtaining the court imprimatur for possession of the assets? It has been pointed out that the first instalment was due on the first business day of the first month following the first *"disbursement date"* (clause 7.1). That concept is defined as the as *"the date on which the Facility, or part thereof,*

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[6] Eerste Nasionale Bank van SA Bpk v Schulenburg 1992 (2) SA 827 (T).
[7] LAWSA op cit, para 405.
[8] Ibid.
[9] Founding affidavit para 5.

is disbursed by the Lender to the Borrower." On the applicant's case, this occurred on 30 September 2015,[10] and thus the first instalment was due on 2 November 2015.[11]

[20]The applicant's case for breach is that the respondent failed to pay the first instalment due on due date, that instalment being R816,797,74.[12] The applicant says that it then demanded that the respondent remedy its breach within seven days, by means of a demand dated 26 August 2016.[13]

[21]That demand reads in relevant part as follows (emphasis supplied):

> *"We act on the instructions of the National Empowerment Fund ("our client").*
> *We refer to the senior loan facility agreement dated 31 March 2015 between yourselves, Gidani International (Pty) Ltd ("as Borrower") and our client ("as Lender"), (the "Loan Agreement"). Terms defined in the Loan Agreement have the same meanings in this letter unless otherwise defined.*
> *We refer to clause 14.1 of the Loan Agreement which provides that it shall be an Event of Default if the Borrower fails to pay any amount pursuant to this agreement strictly on due date and fails to remedy such failure within 7 (seven) Business Days of being called upon in writing by the Lender to do so.*
> *We hereby give you notice to pay the portion of the principal debt and interest due to our client within 7 (seven) Business Days as required by Clause 14.1 of the Loan Agreement, which amount has now become due and payable. The amount due and payable as at 24 August 2016 is R40,551,747,46 (Fourty Million, Five Hundred Fifty One Thousand, Seven Hundred Fourty Seven Rand, Fourty Six Cents).*
> *Please note that failure by yourselves to pay the portion of the principal debt and interest due on our client's loan within 7 (seven) days as required by Clause 14.1 of the Loan Agreement shall be an Event of Default."*

[22]The following comment is applicable to the underscored portion of this demand. First, clause 14.1 does not oblige the respondent to pay to the applicant R40,551,747,46 within seven days. The closest provision is clause 14.1.1, which requires that *"any amount due"* be payable within seven days of demand. The applicant does not make out a case for any earlier demands in terms of that clause having been sent. That being so, all that could have been due by that date, at best for the applicant, would have been the then accumulated

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[10] Founding affidavit, para 18.
[11] Founding affidavit para 20.
[12] Founding affidavit paras 20, 21.
[13] Founding affidavit para 22; annexure NEF 13, p97.

monthly instalments, some ten of them since November 2015, amounting in all to R8,167,977,40, plus interest.

[23]Second, it is clear that the author of the letter conflated clause 14.1.1 and clause 14.2.2. Acceleration is envisaged in that clause. But acceleration only occurs once an Event of Default will have occurred; and an Event of Default only occurs once the applicant will have called upon the respondent, under clause 14.1.1, in writing to remedy a failure to have paid all amounts due pursuant to the agreement.

[24]Here, the only written demand relied on by the applicant did not call on the respondent to remedy a failure to have paid all amounts due pursuant to the agreement. It called on the respondent to pay the aggregate of all amounts which will have become payable in respect of the facility, contending that acceleration has already taken place. That was not a demand under clause 14.1.1, and so it did not serve to trigger the acceleration for which the demand provided, and which is legitimised only under and in terms of clause 14.2.2.

[25]Third, clause 14.1.1 does speak to the contents of the demand. It says that the demand should, in terms, call on the respondent *"to do so"*, which throws back to the earlier part of the clause. Read in context, the notice must call on the respondent to remedy its failure to have paid *"any"* (included within which are meanings such as "an") *"amount due pursuant to this Agreement strictly on due date"*. This notice did not do that.

[26]Fourth, the applicant states in its founding affidavit, with reference to the demand and the respondent's response to it, that *"As appears therein, the applicant has demanded payment of the instalments as per the senior loan facility without success."*[14] But that is, in my view, an incorrect take on the demand: in fact, it did not demand payment of the instalments at all, but rather of the accelerated balance of all amounts due pursuant to the facility that had been granted.

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[14] Founding affidavit, para 24.

Conclusion

[27]It follows that in my view an Event of Default had not occurred, and the precondition set in clause 5.1.3 of the bond for relief under clauses 5.2.1 and 5.2.2, and clause 5.3 of the bond, has not been met. It follows that in my view the applicant is not entitled to the relief it seeks. It follows too that it is not necessary that I consider the remaining two points raised by the respondent, and probably advisable not to do so.

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

The application is dismissed with costs.

WHG van der Linde
Judge, High Court
Johannesburg

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Date hearing: 25 October, 2017
Date judgment: 1 November , 2017