REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

23/3/2016

Case No: 65724/2013

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

23/03/2016
DATE

SIGNATURE

In the matter between:

DORMELL PROPERTIES 521 (PTY) LTD	Applicant
and	
JAN CHRISTIAAN ELLIS	1st Respondent
REGISTRAR OF DEEDS, PIETERMARITZBURG	2nd Respondent
HENDRIK JOHANNES GREYLING	3rd Respondent

JUDGMENT

MAGARDIE AJ

1. The applicant initiated motion proceedings against the respondents after discovering a loan agreement purportedly concluded between the applicant, represented at the time by the third respondent, and the first respondent, who apparently represented an entity named Paforma Property Finance (Pty) Ltd ("Paforma") and himself respectively.

2. At the time of the conclusion of the alleged loan agreement, the third respondent was the only registered director of the applicant. The directorship of the applicant later changed; the third respondent was removed and Mr Furstenberg and Mr Botha became the new directors of the applicant with effect from 18 June 2011.

3. These proceedings were initiated late in 2013, which was approximately two years after Mr Furstenberg and Mr Botha became directors of the applicant.

4. The founding papers are replete with serious allegations of impropriety and fraud on the part of the third respondent. However, it is apposite to mention forthwith that the third respondent did not oppose the application and also did not file any papers to refute any of the allegations made against him.

LATE FILING OF THE REPLYING AFFIDAVIT

5. The counsel for the first respondent, the only party resisting the granting of the relief in this matter, was adamant that the applicant's replying affidavit should not be considered on the grounds that it was filed out of time and that the applicant did not make a formal application for condonation for the late filing thereof. The first respondent did not identify any particular prejudice he would suffer as a result of the late filing of the replying affidavit. This must also be considered against the backdrop that a respondent is not entitled to file any further sets of papers after the applicant had filed a reply, unless there are new issues raised in the replying affidavit.

6. The first respondent's argument is not founded on new issues raised in the replying affidavit. Whilst it is correct that the applicant filed its replying affidavit out of time without a formal application for condonation for its conduct, the objection raised by the first respondent against the replying affidavit is just a case of mere

formalism. In any event, the court has discretion to either admit or refuse to accept an affidavit filed out of time.

7. In **Trans-African Insurance Co Ltd v Maluleka**[1] it was held that while indeed their legal advisers should not be encouraged to become slack in the observance of the Rules of Court, which are an important element in the machinery for the administration of justice; however, technical objections against imperfect procedural steps should not be allowed, more so in the absence of prejudice, to thwart speedy resolution of matters on their merits.

8. In **Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission**[2] the court said *"naturally, it is for the Court to decide whether the matter is really one of urgency and whether the circumstances warrant a departure from the normal procedures. To hold otherwise would, in my view, make the Court the captive of the Rules. I prefer the view that the Rules exist for the Court, rather than the Court for the Rules".*

9. The issues that the applicant raises in its replying affidavit are germane and do not require the medium of a replying affidavit to be entertained by the court. The court can also raise those issues outside the framework of the replying affidavit. Whether the replying

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[1] 1956 (2) SA 273 (A).

[2] 1982 (3) SA 654 (A).

affidavit is accepted or not is of no moment inasmuch as the refusal of the affidavit does not enhance the first respondent's case. For this reason, the replying affidavit is admitted.

THE LOAN AGREEMENT(S)

10. One observes, from the copy of the alleged agreement annexed to the answering affidavit marked annexure **"B"**, that the third respondent purportedly signed a loan agreement on behalf of the applicant on 15 March 2010.

11. In paragraphs 38 to 54 of the answering affidavit, the first respondent went to great length to explain how the loan agreement between the applicant and Paforma came about with carefully selected words and syntaxes. What is puzzling from the elaborate explanation is that, nowhere is it ever mentioned that on a particular date Paforma effected transfer of any amount of money to the applicant and/or the third respondent or drew a cheque of a certain amount of money payable to the applicant and/or the third respondent. There is that glaring omission or allegation lacking from the first respondent's papers. What is clear is that the first respondent specifically chose the words as stated in paragraph 41 of the answering affidavit that it was the terms *"of the First Loan Agreement that the Applicant would sign all documentation necessary to register a first covering mortgage bond in favour of*

Paforma over the immovable property, in an amount of R2 million" (own emphasis).

12. The first respondent then proceeded to explain that the covering bond papers were duly prepared but not registered with the registrar of deeds. The first respondent made no mention whatsoever that there was indeed payment of the R1 000 000.00 to the third respondent, despite being alive to the fact that payment of money was a contested issue. The first respondent went further to explain the agreement for the amount of R2 000 000.00, without any elucidation of how the first amount of R1 000 000.00 was to be paid and what the terms of repayment were.

13. In terms of the first loan agreement marked annexure B to the answering affidavit, the applicant, purportedly represented by the third respondent, had until 15 June 2010 to repay the entire amount of that loan allegedly advanced to the applicant, though allegedly payable to the third respondent, basically given a period of three month to repay the entire loan amount. It is clear from the first respondent's answering affidavit that 15 June 2010 came and passed without the applicant and/or the third respondent repaying the alleged loan. No legal action whatsoever was taken or even initiated against either the applicant or the third respondent for the recovery of the amount allegedly paid to the third respondent. There is only an allegation in paragraph 54 of the answering papers that

"the Applicant was pressurised by Paforma to repay the loan amount and interest to Paforma" (own emphasis). The nature and extent of the alleged pressure remain unexplained. As matters stand, the alleged loan, strongly defended by the first respondent, remains in serious doubt.

14. On or about 15 September 2010, an even more bewildering action came to the fore, namely the alleged conclusion of a loan agreement between the applicant, represented by the third respondent, and the first respondent, in his personal capacity, for an alleged amount of R2 000 000.00. The alleged new loan agreement marked annexure 3 to the founding papers, was concluded despite the fact that neither the applicant nor the third respondent repaid the first loan.

15. At this point, I deem it necessary to digress herein to traverse certain provisions of the National Credit Act (NCA).[3] There was a registered mortgage bond purporting to secure the amount of the alleged loan, as claimed by the first respondent. For all intents and purposes, the alleged second loan agreement has all the hallmarks of a credit agreement as defined in section 8 of the NCA.

16. Section 81(2)(a) of the NCA provides, *inter alia*, that a credit provider should not enter into any credit agreement without

[3] National Credit Act, 34 of 2005 as amended.

assessing the debtor's repayment history and existing financial means, prospects and obligations. Section 81(2)(b) provides that a credit provider should assess, prior to granting a loan, reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

17. The first respondent failed to divulge information relating to the purpose for which the alleged loan was paid to the third respondent. The first respondent did not furnish information relating to the purpose for which money was to be advanced to either the applicant or the third respondent. It is implausible that the first respondent could have just been happy and contented himself with advancing such large sums of money without establishing what the purpose for same was.

18. Having been aware that the third respondent and/or the applicant failed to repay the initial amount of R1 000 000.00 allegedly for the first loan, the action of the first respondent of advancing even double the amount which the third respondent and/or the applicant failed to repay was a classic case of reckless lending. It is more astonishing that the first respondent again stipulated a three months repayment period for double the amount of the original loan, despite knowledge about the debtor's failure to honour the terms of the first loan agreement. The first respondent does not even explain how

the third respondent and/or the applicant intended to repay the money or from what resources such repayment would be made. One cannot think of a more appalling act of reckless lending that could surpass this one, if any money really exchanged hands. I mention this alive to the fact that the jury is still out on whether there was any money that either Paforma or the first respondent paid to the third respondent. No single document proving payment of money of any sort to the third respondent was ever placed before me.

19. Returning to the salient facts of this matter, basically the terms of the second loan agreement were for the first respondent to repay the total amount of the applicant's alleged indebtedness to Paforma. According to the first respondent, the second loan agreement was intended to *"partially settle the indebtedness of the Applicant and Broad Brush"* (own emphasis). Again, the first respondent neither made allegations whatsoever that the third respondent indeed paid any alleged amount to Paforma nor furnished proof of the alleged payment.

20. What is starkly glaring is that, from the first respondent's version, the third respondent, having been the only registered director of the applicant, tried to use the applicant's only asset, namely the fixed property in Zimbali Estate, to secure a personal loan. This information was clearly known to the first respondent insofar as the

alleged loan agreement stipulated that the money should be paid into the third respondent's personal bank account. It must have occurred to the first respondent that something was certainly amiss when a loan to be paid to the third respondent was being secured by a bond over the applicant's property; it certainly did not require rocket science to discern this fact.

21. Of further significance, as was the case with the first loan, the applicant had already demonstrated to the first respondent that it was not able to repay the alleged loan to Paforma within a period of three months. Despite that knowledge, the first respondent wants this court to believe that he unflinchingly went ahead to conclude a loan agreement to advance his personal amount of R2 000 000.00 to partly extinguish the applicant's indebtedness to Paforma in terms of the first loan and another debt of an unrelated entity styled Broad Brush. I certainly find it hard to accept this; nowhere in the answering affidavit is any explanation given as to how the first respondent satisfied himself that the applicant, which had earlier allegedly defaulted on the repayment of the same amount, would be able to repay double the amount of the so-called original loan agreement.

22. One only finds allegations of a new covering bond of R3 000 000.00 to cover the applicant's indebtedness. However, the first respondent specifically stated that the R2 000 000.00 that he allegedly

personally advanced, was to partly pay the applicant and Broad Brush's indebtedness to Paforma. It is not explained why the applicant suddenly had to become responsible for the indebtedness of Broad Brush. When all is said and done, there is again absence of an unequivocal allegation that on a particular date the first respondent indeed effected transfer of a particular amount of money allegedly owed by the applicant. The first respondent failed to attach any shred of evidence of any payment of money to his answering affidavit.

23. The second loan agreement claims that the applicant is indebted to the first respondent for an amount of R3 000 000.00, plus an additional amount of R600 000.00. However, there is no computation of how the amounts were arrived at. Again, as was the case with the first loan agreement, the first respondent's choice of words is also telling. The allegations are couched in the language of "*would conclude a loan agreement*" or "*would pay*"; there is no subsequent allegation that, on a particular date the first respondent indeed, in accordance with the loan agreement, paid the alleged amount of money to Paforma.

24. What is further disturbing is the fact that the first respondent took a completely technical approach to the application against him. He tried to argue his way out of the confines of the provisions of the Companies Act, denouncing them as completely irrelevant to the

matter. Unfortunately, I am less than persuaded by such an approach. There are palpable acts of impropriety herein and the first respondent cannot be allowed to shirk responsibility by raising technical legal argument and applicability or otherwise of certain provisions of the statute(s). The papers are crying out loud for substantive averments and evidence of certain deeds and the first respondent has elected to counter such by technical legal arguments and abuse of rules. The first respondent wants this court to accept his version that the events happened as he explained. I certainly have serious problems with the first respondent's version, more so that it is not supported by any other documentary proof of payment except the say so of the first respondent.

25. Although the first respondent disputes that the second loan agreement was concluded after the applicant's attorney's letter of 09 December 2010, he attaches no confirmatory affidavit from the third respondent with whom he concluded the loan agreement. It remains unexplained why the first respondent did not find it necessary at any stage to pursue the third respondent for recovery of the loan allegedly advanced. After all, the amount of the alleged loan was advanced to the third respondent personally. It is common cause that neither Paforma nor the first respondent nor the third respondent paid any money to the applicant.

26. At the end of the hearing of this matter, I was furnished with a copy of an ABSA proof of payment by EFT of an amount of R2 000 000.00 to an entity called Bridgeway Limited, made on 17 September 2010. The document identifies Mr Neil Esterhuysen as the person who transferred the money. Mr Esterhuysen is the first respondent's attorney.

27. Attached to the proof of payment are four copies of trust receipts from Neil Esterhuysen Attorneys, all issued on the same date, apparently presented to demonstrate the alleged payment and also breaking down the R2 000 000.00 into four different amounts. However, the receipts do not make any reference to the amount of R2 000 000.00 received.

28. What is also confusing about the proof of payment is that the reference for the payment is "**NEA-BF2980 BF2981**", whereas the copied receipts attached thereto are referenced "**J C ELLIS/DORMELLPROPERTIES 521**." In addition, the payment was effected on 17 September, whereas the receipts are dated 16 September 2010. No plausible explanation was proffered for these glaring discrepancies.

29. The presentation of the aforementioned document is disquieting, more so when the first respondent resisted the request to furnish proof that payment of any amount claimed by him was ever made.

In his answering affidavit, the first respondent does not make any mention of Esterhuysen transferring R2 000 000.00 and why the amount was broken down into smaller denominations. It is also not clear how Bridgeway Limited fits into the scheme of things. If the proof of payment is worth anything, no cogent reasons were furnished as to why the document was only just conveniently coming to the surface towards the end of the hearing. In fact, I must mention that, in paragraph 148 of the answering affidavit, the first respondent categorically stated that he was under no obligation to furnish any proof of payment.

30. In paragraph 57 of the answering affidavit it is specifically stated that the R2 000 000.00 was to be paid into Paforma's bank account. The proof of payment of R2 000 000.00 mentioned above was neither done by the first respondent nor was it made to Paforma, but to Bridgeway Limited.

31. The covering bond registered against the applicant's property is a total of R3 600 000.00. It was the first respondent's case that the amount of R1 000 000.00 was paid to the applicant under the first loan agreement. However, on perusal of annexure B to the first respondent's papers, the money was not supposed to be paid to the applicant, but into the third respondent's personal bank account.

32. The first respondent is himself a businessman and director of companies; as such, he is not a beginner on issues of corporate governance. The alleged transactions of advancing money to the third respondent and attempting to use the fixed property of the applicant as security for a transaction that had nothing to do with the applicant, on its own, smacks of illegality. To even go further to again use the applicant's fixed property as security for money allegedly advanced to Broad Bush, which had no relation whatsoever with the applicant, is utterly unconscionable.

33. There was every reason why the first respondent did not elect to go after the third respondent to recover the money allegedly advanced to him as they were both in cohorts in the perpetration of the unlawful deeds. Although in paragraph 63 of his answering affidavit the first respondent alleged that the applicant had to pay the interest of R58 000.00 in three equal instalments, when regard is had to clause 7.2 of the alleged loan agreement, one finds mention of the payment of the amount of R66 000.00 on the dates specified in the answering affidavit.

34. The first respondent's explanations smack of a dishonest scheme aimed at deceiving the applicant regarding liability for money that was neither paid to the applicant nor to the third respondent. The inescapable conclusion that one reaches is that the first

respondent's version is contrived and tailored to create nonexistent disputes of fact.

35. It is also apposite at this stage to mention that it is trite that a litigant is not entitled to conceal material allegations in order to obtain an advantage of placing the onus on his opponent. Court proceedings are not a game where one party may seek some tactical advantage by concealing facts from his opponents. No litigant is entitled to plead his case in such a manner as to place the burden on the opponent to prove such facts as are best known to such party.[4]

36. As judicial officers, we must and are enjoined to dispense justice fairly and should not allow strict adherence to the rules to prevent applying common sense to the facts of any case. **In Soffiantini v Mould 1956 (4) SA 150 (E)** it was held that it is necessary to make a robust, common-sense approach to a dispute on motion as otherwise, the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.

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[4] Nieuwoudt v Joubert 1998 (3) SA (SE).

37. For this court to come to the first respondent's aid in the sense of protecting his rights and interests, there must be a factual basis. Before me are clear averments of the applicant placing doubt on the existence of a loan or payment of any money supposedly secured by means of a mortgage bond over the applicant's property. The first respondent dismally failed to present documentary evidence of payment of money either to the third respondent or the applicant. If payments of money were indeed made as alleged, it was the easiest thing to present bank statements.

Applicability of the Companies Act or Shareblocks Control Act 59 of 1980

38. The applicability of the provisions of the Companies Act relating to the disposal of assets, can only come to the fore if the registration of a mortgage bond over the applicant's property constituted an act of disposal of such property. The third respondent could only carry the obligation to obtain consent of the applicant's shareholders if he intended to dispose of the applicant's asset.

39. It is accepted that the act of registering a mortgage bond over an asset of a company does not constitute disposal of the asset. The reason for this is that the person who is borrowing money and putting the company asset as security is not in anyway selling the asset, but intending to unencumber the said asset as soon as

he/she extinguishes his debt. Encumbering an asset does not bring about transfer of ownership of the immovable property involved.

40. In **Standard Bank v Hunkydory Investments 188 (Pty) Ltd (No 2) 2010 (1) 634 (WCC)** the court had to decide the applicability of section 228 of the Companies Act[5] to a transaction of registration of a mortgage bond over the immovable property of a company. The court found that the registration of a mortgage bond did not amount to a disposal of a company's immovable asset and did not require the adoption of a special resolution contemplated in section 228 of the Companies Act.

41. From the foregoing, if the third respondent genuinely sought a loan and wanted to use the applicant's only immovable property as security, there was no need for the third respondent to first obtain the special resolution of the shareholders of the applicant to authorise him to do so.

42. Although the applicant is a fractional ownership vehicle used to acquire the immovable property, such did not mean that section 14(1) of the Shareblocks Control Act, 59 of 1980 as amended, applied to the transaction. The applicant did not use the term *"share block"* as part of its name as required in term of the Act.

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[5] Act 61 of 1973.

Accordingly, the Shareblocks Control Act is of no relevance to the matter.

43. The first respondent being the person who allegedly advanced the loan amount of R2 000 000.00, was extremely secretive about the details of the loan, more especially where, when and how it was paid. There is certainly no document whatsoever to demonstrate the payment of money to any person. The lack of this pertinent information inescapably gives the impression that the transaction(s) are simulated. It was for the respondent to present cogent proof of the entire transaction(s) to satisfy the court that the transaction(s) indeed existed and money exchanged hands, especially in circumstances where the applicant made allegations of fraud against the third respondent.

44. It was strongly contended by the first respondent that the applicant should have issued summons instead of motion proceedings for the relief sought insofar as there are dispute of facts not capable of resolution on the papers. I do not share the third respondent's view of dispute of fact in this regard. My view is that there are points of law to be resolved on the existence of the alleged loan agreement, whether money was paid to the applicant for the benefit and/or advancement of the interest of the applicant and whether the third respondent was authorised to encumber the applicant's property

without the resolution adopted by 75% of the applicant's shareholders authorising him to do so.

45. It is clear that the applicant has done what it could insofar as reasoning with and engaging the third respondent regarding the existence of the loan agreement is concerned. The applicant has also registered a criminal case against the third respondent.

46. On the totality of the facts before me, the conclusion that the first respondent was complicit in the schemes aimed at defrauding the applicant is inescapable. The short space within which the alleged loans were granted and substituted and the failure to take legal action for the recovery of such loans are all telling.

47. As already indicated elsewhere herein, an attempt was made to mislead the court with the presentation of copies of an electronic funds transfer (EFT) by the first respondent's attorney to another company, and whose relationship with any of the parties before me remained unexplained. If it was so simple for the first respondent to obtain a copy of such electronic transfer of funds, it boggles the mind why the bank statements proving all the transactions were not presented at the time of the filing of the answering affidavit.

48. I am particularly concerned by the involvement of Neil Esterhuysen Attorneys in these suspicious transactions. The document furnished

to me as proof of payment certainly raises questions, and I think I am entitled to conclude that it may have been intended to mislead the court into believing that there was repayment of money, when in truth there wasn't. Should that be the case, such conduct is certainly unbecoming of an attorney and raises issues of impropriety. I direct the registrar of this court to furnish the Law Society of the Northern Provinces with a copy of this judgment with a view to enquire into the conduct of Neil Esterhuysen Attorneys insofar as it pertains to the following:

48.1 Whether the first respondent indeed paid different amounts totaling R2 000 000.00 into the trust account of Neil Esterhuysen Attorneys on 16 September 2010;

48.2 The origin of the amount of R2 000 000.00 transferred to Bridgeway Limited on 17 September 2010;

48.3 The matter to which the reference number inserted in respect of the above payment relates;

48.4 The state of affairs of the firm's trust account; and

48.5 Any other matter which the Law Society of the Northern Provinces may consider relevant.

49. I am of the considered view that the applicant has succeeded to present sufficient facts to support the relief sought in the notice of motion. In the result, I grant the orders in the notice of motion.

S.L. MAGARDIE

ACTING JUDGE OF THE HIGH COURT