IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 2082/2021

In the matter between:

R FELLNER- FELDEGG	**APPLICANT**
and	
SKEMA HOLDINGS (PTY) LTD & ANOTHER	**FIRST RESPONDENT**
FRIEDRICH WILHELM GERHARD WORNER	**SECOND RESPONDENT**

ORDER

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1. Judgment is granted against the First and Second Respondents jointly and severally, the one paying the other to be absolved in favour of the Applicant for payment of the sum of €1 500 000.00(one million five hundred thousand euros).
2. The First and Second Respondents are directed to pay interest on the sum of €1 500 000.00 (one million five hundred thousand euros) at the rate of 5% per annum capitalized annually in arrears from 24 January 2017 to the date of payment, both days inclusive.

3. The immovable properties contained in Covering Mortgage Bond No […] which is annexure **A** to this order, are declared executable.

4. The First and Second Respondents are directed to pay the costs of this Application jointly and severally, the one paying the other to be absolved on an attorney and client scale, such to include the costs occasioned by the employment of senior counsel.

JUDGMENT

Bedderson J

Introduction

[1] The applicant, a business man who is resident in South Africa at Saxon Estate, Pietermaritzburg and who is also a resident of Germany, applies for judgment against both the first and second respondents for payment of the sum of €1 500 000.00 (one million five hundred thousand euros) together with interest and costs. He further seeks an order declaring executable a number of immovable properties which have been put up as security for the loan that he had advanced to the first respondent and which are subject to a covering mortgage bond registered in his favour. The amount claimed is a portion of a total loan amount of €2 500 000.00 (two million five hundred thousand euros) which he advanced to the first respondent in terms of a written loan agreement. The first respondent is the registered owner of the immovable properties that are subject to the covering mortgage bond (annexure 'A' to this order).

[2] The second respondent, who is the managing director of the first respondent, bound himself as surety and co-principal debtor to the applicant in respect of the first respondents' obligations to repay the loan amount advanced by the applicant to the first respondent.

[3] The application is opposed by the first and second respondent.

[4] The first and second respondents in a counter application seek an order in the following terms:

‘The Applicant is ordered to comply with clause 6.2.2 of the loan agreement a copy of which annexure “RF1” to the founding affidavit by releasing his security on each property sold as contemplated in that clause on payment of the net proceeds of that sale until the full amount of the loan amount and lawful interest thereon is paid to him on the basis that:

(a) each such property may be sold for not less than R2 million (or such lesser amount as may be agreed to in writing by the Applicant);

(b) an amount equivalent to Euro 75 0000 of each such sale shall be allocated to the initial loan referred to therein until payment in full thereof together with any lawful interest, and the balance of the said proceeds up to the amount of Euro 1250 00 shall be allocated to any loan balance owing to the Applicant until payment is full thereof together with any lawful interest.’

[5] The first and second respondents also seek to strike out certain paragraphs of the applicant’s replying affidavits on the basis that it contains direct and extraneous evidence of the intentions of the parties and prior negotiations, which is inadmissible.

THE ISSUE FOR DETERMINATION

[5] The central issue for determination in this application is whether on a proper interpretation of the loan agreement as amended, the amount claimed is due.

[6] On the applicant’s interpretation, repayment of the amount claimed fell due on 21 March 2021.

[7] On the respondents’ interpretation repayment in terms of the loan agreement sued upon by the applicant would only fall due from the proceeds of sales of the immovable properties that were put up as security for the loan and which are subject to the covering mortgage bond referred to in paragraph 1 above. If there were no sales, notwithstanding the best efforts of the first respondent, then no payments would accrue to the applicant.

[8] It follows that if the interpretation as contended for by the applicant is correct, then the applicant is entitled to the relief sought. However, if the interpretation as contended for by the respondents is correct, then the respondents are entitled to the relief sought in their counter application.

BACKGROUND FACTS

[6] The undisputed background facts, which are material to the determination of the dispute between the parties, set out in paragraph 8.1 to 8.17 of the applicant's heads of argument. For ease of reference, these are set out hereunder:

'8.1 On 18 January 2017 the Applicant on the one hand and the Respondent on the other hand concluded the written loan agreement in terms of which the Applicant agreed to lend the First Respondent an amount of up to €2 500 000. The written terms of the loan agreement are common cause.[1]

8.2 The loan would bear simple interest at a rate of 5% per annum;[2]

8.3 The loan was subject to and conditional upon the First Respondent providing the Applicant with written proof that the loan had been approved by the South African Reserve Bank on conditions acceptable to the parties and the registration of a first covering mortgage bond in the Applicant's favour over the First Respondent's immovable properties.[3] Such proof was provided and the mortgage bond was registered;[4]

8.4 The loan world be drawn down in two tranches of €1,5 million ("the Initial Loan") and €1 million ("the Loan Balance") respectively;[5]

8.5 Clause 5.1 and 5.2 of the loan agreement provided for the repayment of the Initial Loan and the Loan Balance in specified instalments on specific dates;[6]

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[1] The application papers vol. 1, applicant's affidavit, at 28-33, paras 6, 7 and 8, and at 48-55, annexure "RF1"'; the application papers vol. 2, respondents' affidavit, at 110, paras 38, 39 and 40, and at 48-55, annexure "RF1".

[2] The application papers vol. 1 at 50, clause 4 of annexure "RF1".

[3] The application papers vol. 1, at 49, clause 2.1 of annexure "RF1".

[4] The application papers vol. 1, applicant's affidavit, at 33, paragraph 9; and at 56-57, annexure "RF2"; the application papers vol. 2, respondents' affidavit, at 110, para 41; the application papers vol. 1, applicant's affidavit, at 34-38, para 10, and at 58-76, annexure "RF3"; the application papers vol. 2, respondents' affidavit, at 111, para 48.

[5] The application papers vol. 1, at 49, clause 3 of annexure "RF1".

[6] The exact terms of clause 5.1 and 5.2 are dealt with in paragraph 10 herein.

8.6 The Second Respondent bound himself jointly and severally as surety and co-principal debtor in favour of the Applicant for the First Respondent's obligations in terms of the loan agreement and the security provided for in clause 6 of the loan agreement;[7]

8.7 The loan agreement contained an acceleration clause in that clause 5.3 provided that in the event of the First Respondent defaulting on any of the instalments payable and should such payment not be made within fourteen days of receipt of written notice, the Applicant could declare the entire loan plus interest repayable forthwith;[8]

8.8 In terms of the clause 9.1 of the loan agreement, the parties agreed that the written loan agreement was the whole agreement between the parties containing all of the express provisions agreed on with regard to the subject matter of the loan agreement;[9]

8.9 Clause 9.3 of the loan agreement provided that:

"No agreement varying, adding to, deleting from or cancelling this Agreement and no waiver of nay right under this Agreement shall be effective unless in writing and signed by or on behalf of the parties."[10]

8.10 On 24 January 2017 the First Respondent drew and was paid the Initial Loan of €1,5 million and on 27 March 2017 the First Respondent drew and was paid the Loan Balance of €1 million;[11]

8.11 On 12 February 2018 the Applicant and the Respondents concluded the first addendum to the loan agreement. The written terms of the first addendum are common cause;[12]

8.12 On 12 May 2019 the Applicant and the Respondent concluded the second addendum to the loan agreement. The written terms of the second addendum are common cause;[13]

8.13 On 29 October 2018 one of the immovable properties subject to the mortgage bond was released from the mortgage bond with the Applicant's consent. No portion of the proceeds of the sale of the immovable property was used towards payment of the Respondents' liability to the Applicant;[14]

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[7] The application papers, vol. 1, at 51, clause 7 of annexure "RF1".
[8] The application papers, vol. 1, at 50, annexure "RF3".
[9] The application papers, vol. 1, at 53, annexure "RF1".
[10] The application papers vol. 1, at 53, annexure "RF1".
[11] The application papers vol 1, applicant's affidavit, at 38- 39, para 11, and at 77- 80, annexures "RF4", "RF5" & "RF6"; The application papers vol. 2, respondents' affidavit, at 112, para 49.
[12] The application papers vol. 1, applicant's affidavit, at 39- 40, para 12, and at 82-84, annexure "RF7"; the application papers vol. 2, respondents' affidavit, at 112, para 50.
[13] The application papers vol.1,applicant's affidavit , at 41-42, para 13, and at 85-87, annexure "RF8". The application papers, vol.2, respondents' affidavit, at 112, para 51.
[14] The application papers vol. 1, applicant's affidavit, at 44, para 15; the application papers vol.2, applicant's affidavit, at 161, para 6.5.13, and at 191, annexure "RF11".

8.14 On 02 March 2021 the Applicant addressed written demands for repayment of the Initial Loan of €1 5000 000 together with interest thereon to the Respondents;

8.15 All the immovable properties subject to the mortgage bond are unimproved and uninhabited properties;[15]

8.16 The provisions of the National Credit Act No. 34 of 2005 are not applicable to the matter;[16]

8.17 To date the Respondents have not made any payment towards settlement of their admitted liability in the sum of €2 5, million to the Application.'

[7] It is the applicant's case that in terms of the loan agreement and in particular the second addendum to the loan agreement, that was concluded between the applicant and the first respondent on 12 May 2019, the parties agreed that the initial loan (€1.5 million), together with interest would be repayable on or before 1 March 2021, and similarly the loan balance (€1 million), plus interest would be repayable on or before 1 July 2022. The first respondent has failed to pay the initial loan and as a result, the applicant is entitled to payment of that amount.

[8] In support of the foregoing, the applicant sets out in paragraphs 6.5.4 to 6.5.12 of the replying affidavit the circumstances, which gave rise to the conclusion of the addendum referred to in paragraph 7 above. It is these paragraphs that the respondents seek to have struck out.

[9] The respondents on the other hand contend that the replacing of clauses 5.1, 5.2 and 5.3 of the loan agreement with the second addendum must be read together with clause 6 of the agreement and, in context.

[10] Counsel for the respondent, Mr Harpur SC, submitted that the effect of extending the time period for the repayment of the loan was to allow sufficient time to enable the sale of the immovable properties to take place, because it was clear from a proper reading and interpretation of the agreement that the loan would be repaid from the proceeds

[15] The application papers vol.1, applicant's affidavit, at 45, para 18, at 88- 91, annexures "RF9" and RF10"; the application papers vol.2, respondent's affidavit, at 113, para 58.

[16] The application papers vol.1, applicant's affidavit, at 47, para 21, the application papers vol.2, respondents' affidavit, at 114, para 62.

generated from the sale of the properties. He submits that this is supported by the contents of the two (2) e-mails dated 31 July 2020 and 22 October 2020 that were exchanged between the parties. Further, these e-mails constitute a variation of the agreement, as contemplated by the non-variation clause of the agreement, read together with section 13(3) of the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act).

[11] In his heads of arguments, he submits that it is not the respondents case that should none of the properties be sold that there would be no repayment of the loan at all. Clause 6.2 of the loan agreement, Mr Harpur submits, provides that the first respondent 'must use its best endeavours to sell the properties'. The only reason he submits why this wording is used is because it was envisaged that the proceeds from the sale of the properties would be used to repay the loan which, once again is supported by the contents of the emails referred to in paragraph 10 above. Further, the counter application is in effect designed to achieve this purpose.

[12] It is important, in my view, to set out clause 6 of the agreement in its entirety to understand the respondents defense to the claim. It reads as follows:

"SECURITY

6.1 As security of the loan, Skema must at its cost cause a first covering mortgage bond to be registered by its attorneys, Shepstone & Wylie, in favour of the Lender over Skema's 48 freehold immovable properties, described as Portions 2 to 50(but excluding Portion 14) of the Farm Saxony New No. 18520 (the Properties), for an amount of Euro 2 500 000.

6.2 Skema must use its best endeavours to sell the Properties and, as and when a sale takes place:

6.2.1 if only the Initial Loan has been drawn down, Euro 75 000 of the net proceeds of every sale must be paid to the Lender in return for the Lender releasing the security of the Property:

6.2.2 if the Loan Balance has also been drawn down, Euro 125 000 of the net proceeds of every sale must be paid to the Lender in return for the Lender releasing the security on that Property on the basis that Euro 75 000 is allocated to the Initial Loan AND Euro 50 000 to the Loan Balance".

[13] It is clear from a reading of the heading and from the content of clause 6 that it deals with the security that the first respondent is obliged to furnish to the applicant in respect of the loan amount. It also deals with the manner in which that security is to be released in respect of both the initial loan (€1.5 million) and the loan balance (€1million).

[14] In my view clause 6.2 merely provides a mechanism to reduce the first respondents exposure to the applicant. In other words as and when a particular property (depending upon whether it relates to the initial loan or the loan balance) is sold, a particular amount from the proceeds of the sale is to be paid over to the applicant. The clause does not oblige the first respondent to pay over the entire proceeds of the sale to the applicant.

[15] Based upon the foregoing, I am not persuaded that repayment of the loan amount is dependent upon the sales of the immovable properties that were furnished as security.

[16] The e-mails referred to in paragraph 10 above, in my view have to be read in conjunction with paragraphs 6.5.4 to 6.5.12 of the applicant's replying affidavit in order to give context to the agreement as a whole. The e-mails also in my view do not constitute a variation of the agreement as contemplated in the non variation clause because in order to rely on the provisions of section 13 of the ECT Act, the respondents would have to show that the parties have agreed that variations can take place electronically and that the mere type written names of the authors at the foot of those e-mails will satisfy the signature requirement of section 13(3) of the ECT Act. For ease of reference section 13(3) of the ECT Act reads as follows:

'Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if—

(a) a method is used to identify the person and to indicate the person's approval of the information communicated: and

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.'

[17] The respondents have failed to demonstrate on these papers that variations of the agreement could take place in this fashion. The two addenda which are annexures "RF7" and "RF8" to the applicant's founding affidavit militates against this finding and further that clause 9.3 of the agreement requires variations or cancellation to be reduced to writing and signed by both the parties. The reliance on section 13(3) of the ECT Act by the respondents is misplaced and is not supported by the judgement of Mojapelo AJA in *Global & Local Investments Advisors (Pty) Ltd v Fouché*.[17]

[18] I agree with the submissions made by counsel for the applicant, Mr Lotz SC, that to strike out these paragraphs would have the results that this court would be compelled to interpret the agreements (which in my view must also include the contents of the e-mails referred to above) in a vacuum and as such will offend the principles of interpretation as set out by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[18]

[19] I also agree with the submissions in the applicant's heads of arguments that the interpretations of the agreements relating to repayments of the loan as contended for by the respondents is flawed in fact and logic, and that the interpretation of the respondents results in an insensible and unbusinesslike construction of the terms of the loan agreement relating to repayment of the loan. Such construction offends the principles of interpretation.[19]

[20] In conclusion and for the reasons set forth above, I find that the applicant is entitled to the relief sought.

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[17] *Global & Local Investments Advisors (Pty) Ltd v Fouché* [2019] ZASCA 8, 2021 (1) SA 371 (SCA).
[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA), [2012] 2 All SA 262 (SCA) para 18.
[19] Ibid, see generally para 18.

[21] I accordingly grant an order in the following terms:

1. Judgment is granted against the First and Second Respondents jointly and severally, the one paying the other to be absolved in favour of the Applicant for payment of the sum of €1 500 000.00(one million five hundred thousand euros).

2. The First and Second Respondents are directed to pay interest on the sum of €1 500 000.00 (one million five hundred thousand euros) at the rate of 5% per annum capitalized annually in arrears from 24 January 2017 to the date of payment, both days inclusive.

3. The immovable properties contained in Covering Mortgage Bond No […] which is annexure A to this order, are declared executable.

4. The First and Second Respondents are directed to pay the costs of this Application jointly and severally, the one paying the other to be absolved on an attorney and client scale, such to include the costs occasioned by the employment of senior counsel.

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BEDDERSON J

APPEARANCES

Dates of hearing	: 18 August 2021
Date of judgment	: 23 September 2021
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