



IN THE HIGH COURT OF SOUTH AFRICA  
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 3091/2017

(1) REPORTABLE: <del>YES</del> /NO
(2) OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO
(3) REVISED
28/02/2018 <i>MS. D. M. M.</i>
DATE
SIGNATURE

In the matter between:

**FIRSTRAND BANK LTD**

**APPLICANT**

and

**LAMBERTUS NICOLAAS DE BEER SRN N.O**

**1<sup>ST</sup> RESPONDENT**

**GERT JACOBUS DE BEER NO**

**2<sup>ND</sup> RESPONDENT**

**LAMBERTUS NICOLAAS DE BEER N.O (IN THEIR**

**CAPACITIES AS TRUSTEE OF THE TAMBOTIE**

**BOERDERY TRUST, IT2076/91)**

**3<sup>RD</sup> RESPONDENT**

**LAMBERTUS NICOLAAS DE BEER SRN**

**4<sup>TH</sup> RESPONDENT**

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**JUDGMENT**

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**M.G. PHATUDI J**

[1] In this application, the Applicant seeks judgment against the first three Respondents in their capacities as trustees of the Tambotie Boerdery Trust (IT205/91). Judgment is also sought against the remainder of the Respondents who are cited as sureties and co-principal debtors of the trust.

[2] The claims are founded on an overdraft facility as well as a term loan both of which are secured by mortgage bonds. The claims, as combined amount to the capital debt of R5 574 880.32 together with interest thereon at prime rate of 9.75% per annum and compounded monthly from 01 January 2016 to date of payment. The Applicant also claims costs of suit on an attorney and client scale. In addition, an order declaring the remaining extent of the farm Rietvlei 617 KQ, Limpopo Province held under consolidated Title T8653/1998, and the farm

Rietvlei 808 KQ held by certificate of consolidated Title T9510/14, specially executable in its favour

[3] The application is opposed by all the Respondents. The main contention as initially raised by the Respondents was that the court lack jurisdiction as the cause of action occurred mainly outside its area of jurisdiction. This point was, however, by agreement subsequently abandoned at the hearing of the matter. What remained extant was the submission that the application was not only capricious, but was also brought against the spirit of certain agreements or arrangements arrived at between the Applicant and De Beer Group of entities, inclusive of the Respondents. The Application, so the argument went, constituted a breach of contract by the Applicant.

#### SHORT BACKGROUND:

[4] The Applicant on 10 September 2014 offered a credit facility to some entities, one of which was the Tambotie Boerdery Trust (hereinafter called "the trust")

The credit facility offered to the trust comprised a short-term direct working capital and a long-term loan, the total of which amounted to R4

750.00.00 payable over forty months and upon demand. This document constituting a transaction document, contained several terms and conditions which bound the parties.

[5] Similarly, the document ("credit facility") in clause 2.1 makes provision that the short-term direct facility could be availed by way of overdraft or other facility which, in the Applicant's sole discretion, may be allowed.

[6] A further transaction concluded by the parties, in particular, the trust was a loan agreement concluded on the 29 September 2011. In terms of this document, the Applicant lent to the trust the sum of R7 500 000.00 appearing in Applicant's founding affidavit<sup>1</sup> ("FA")

[7] The loan agreement, stipulates in clause 1.2 that:

"Upon and subject to the terms and conditions hereinafter set out, the Bank will provide or procure for the Borrower who hereby borrows the sum of R7 500 000 (seven million five hundred thousand)". Once approved or granted, and subject to the conditions precedent, the Respondent ("the trust") would be entitled to the draw down the loan forthwith.

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<sup>1</sup> Annexure G P 73-84



[8] Clause 4.1 made provision for the repayment of the loan to the Applicant.

This loan, was undoubtedly secured by a general covering Bond registered in favour of the Applicant by the trust. (IT:2075/91) in the amount of and with ranking as indicated over the fixed properties namely, The Farm Reitvlei 617 KQ, Thabazimbi, Limpopo Province. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents, provided surety in the amount of R7 500 000.00 and interest thereon in favour of the Applicant.

[9] In binding themselves jointly and severally as co-sureties and co-principal debtors as outlined, the Respondents, also renounced the usual defences of the benefits of **excussio, division and cession of action, including the benefits of exceptio erroris calculi, exceptio non numerate pecuniae and that of non causa debiti.**

[10] The stipulations in the loan agreement constituted the entire agreement *inter partes* and any "amendment," addition, alteration or cancellation to the provisions thereof, shall only be deemed to be of force and affect if such amendment, addition, alteration or cancellation is reduced to writing and signed by the parties"<sup>2</sup>.

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<sup>2</sup> Clause 14 loan agreement, annexure G, P82, "FA".

[11] In a letter addressed to the trustees of Tambotie, (the trust) dated 06 October 2011, the Applicant accentuated in detail the nature of the loan, in summary, the amount thereof, the duration of the loan and its termination date being 07 October 2016<sup>3</sup>. Annexure H, also affects the extended life span of the loan ending 07 August 2017 with an outstanding balance of R877 974 as at 28 March 2015. It appears that at the time of the launching of the present application, the balance due owing and payable by the trust and its trustees as sureties, amounted to R4 230 572.02 as at 16 January 2016<sup>4</sup>.

[12] Failure by the Respondents for not having serviced either the credit facility and/or the loan agreement, squarely placed them in deep debt. As a result, the Applicant's attorneys addressed a letter of demand to the trustees of the trust dated 03 December 2015, claiming payment of the capital debt due then amounting to R4 155 945.50. It appears that despite demand, the Respondents were unable to discharge the debt due and payable by them.

[13] As a result of the default, application was then launched claiming payment against the Respondents.

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<sup>3</sup> Paginated Index P98 "FA".

<sup>4</sup> Paginated Index, P 98 "FA"

[14] I point out that the provisions of the National Credit Act 2005<sup>5</sup> do not qualify to either of the agreements between the Applicants and the trust in that despite being categorized as a juristic person given the number of its trustees, the trust in addition it appears, has an asset value or annual turnover cumulatively with combined asset value of the joint juristic entities when the agreements were reached, equal to or in excess of the threshold amounting to R1 000 000.00 inclusive of the unnumbered immovable assets in favour of the Applicant.

[15] Bearing in mind the foregoing considerations it was submitted on behalf of the Applicants that it is entitled to payments as claimed.

[16] The respondents in an attempt to resist the application, submitted in the main that the application is made mala fide and offend the spirit of the alleged agreements or arrangements the parties agreed on with the De Beers Group of entities.

[17] In contextualizing their apparent defence stated above, the following factors appear to be common cause:-

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<sup>5</sup> Section 1 Act 34 of 2005-the trust being a juristic person under this Act, it being having three or more individual trustees.



17.1 The Respondents jointly conduct farming activities on various neighbouring farms adjacent to the Crocodile River, Thabazimbi.

17.2 The immovable properties at issue are all registered in the name of the individual trustees.

17.3 The credit facility relied on refers not only to the trust, but also other entities, e.g Koedoskop River Farm Alfa CC and Seringhoek Boerdery CC. These credit facility cover also the 04<sup>th</sup> to 06<sup>th</sup> Respondents.

17.4 It is not disputed that cross securities were given to such different entities and to the said Respondents. These entities are known as the De Beer Group.

[18] The respondent's further contention was that the Applicant allegedly agreed and undertook not to pursue litigation in this matter. The Respondents seems to place reliance on a " draft letter of undertaking on behalf of the First Rand Bank Ltd and Wesbank Ltd<sup>6</sup>" ( undated and unsigned)

[19] On closer examination of the alleged undertaking, it does not seem to me to constitute a valid document giving rise to a "settlement agreement" as alleged by the Respondents. In any event, the document relied on

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<sup>6</sup> Annexure "L4" pp 220-221, Buddle 3



has not been signed nor does it bear a date upon which it has been generated either. The document, furthermore, even if it were signed, it would have been operative as between the Applicant, the trustees (who are also co-sureties) and Koedoskop River Farm Alfa CC ("Koedoskop"). The latter entity is not, in my view, a party to the Loan Agreement referred to in annexure "G" herein.

[20] In consequence, I find that there can be no breach of a non-existent contract, the business operations of Koedoeskop which were otherwise limping, are in my view irrelevant for the purposes of determining the Respondent's guarantees' under the credit facility, loan and deeds of suretyship they bound themselves to the Applicant.

[21] The Respondents, on their own papers, concede that Koedoeskop was sometime before the launching of the current application, placed under provisional business rescue. That alone is indicative that it traded under insolvent circumstances, if I may put it bluntly. At one point while placed under supervision, Koedoeskop made an attempt to salvage itself and was placed under yet another third party, namely, Chicundo Properties (Pty) Ltd. This was done with full knowledge of the liquidators:

[22] The latter company allegedly made part payment of R3.6 million for distribution pursuant to the business rescue plan then in place for Koedoskop.

[23] There is, however, no cogent evidence to substantiate this allegation. The alleged agreement in terms of the final liquidation order granted against Koedoeskop is to, in my mind, neither here nor there. That redeeming process is immaterial to these proceedings.

[24] What remains is whether the debt/s had been fully serviced as the Respondents were obliged to.

[25] In the circumstances, I am unable to infer any palpable mala fides on the part of the Applicant. I cannot even see how the business rescue plans enter the picture in this claim, in as much as no breach of contract could have been committed as between the parties.

[26] There exist no reason for the relief sought not be granted as prayed for.

[27] In the result, I make an order as follows:

ORDER:

[1] Judgment against the First, Second and Third Respondent (in their capacities as trustees of the Tambotie Boerdery Trust, IT205/91) and

the Fourth, Fifth and Sixth Respondents Jointly and severally, the one paying, the other to be absolved is granted for:-

- 1.1 Payment of the sum of R1 121 880.47;
  - 1.2 Interest on the sum of R1 121 880.47 at the Applicant's prime rate of interest (currently 9.75)% per annum, calculated on the daily balance outstanding and compounded monthly from 1 January 2016, until date of payment;
  - 1.3 Payment of the sum of R4 252 99.85;
  - 1.4 Interest on the sum of R4 252 99.85 at the Applicant's prime rate of interest (currently 9.75%) plus 1% per annum, calculated on the daily balance outstanding and compounded monthly from 26 January 2016 until date of payment;
  - 1.5 Cost of suit on the scale as between attorney and own client.
- [2] An order declaring the following immovable properties specially executable in favour of the Applicant:-
- 2.1 Remaining Extent of the Farm Rietvlei 617, Registration Division KQ, Limpopo Province, measuring 229, 1995 (TWO HUNDRED-AND-TWENTY-NINE COMMA ONE NINE NINE NINE FIVE) hectares held by certificate of consolidated Title T86563/1998;and
  - 2.2 The Farm Rietvlei 808, Registration Division KQ, Limpopo Province, measuring 643/8664 (SIX HUNDRED-AND-FORTY-THREE COMMA EIGHT SIX SIX FOUR) hectares held by certificate of consolidated Title T9510/14.

M.G. Phatudi

**M.G PHATUDI**

**Judge of the High Court**

**Limpopo Division**

**REPRESENTATIVES:**

1. Counsel for Applicant : Adv D.M Leathern SC  
  
Instructed by : Rorich, Wolmarans and Luderity Inc  
Brocklyn, Pretoria
2. Counsel for Respondents : Adv. G.F Heyns  
Instructed by Hertenberg Inc  
Hartfield, Pretoria
3. Date heard : 11 October 2017
4. Date Delivered: : 28 February 2018