REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 3931/2021

(1)REPORTABLE: YES/NO

(2)OF INTEREST TO THE JUDGES:YES/NO

(3)REVISED.

DATE:

SIGNATURE:

In the matter between:

THE LANDBANK AND AGRICULTURAL

DEVELOPMENT BANK OF SOUTH AFRICA **APPLICANT**

And

J & R HARTMAN BOERDERY CC **FIRST RESPONDENT**

RENE ELIZABETH HARTMAN **SECOND RESPONDENT**

GERHARDUS LOURENS HARTMAN **THIRD RESPONDENT**

JOHAN CHRISTIAAN RUDOLF HARTMAN **FOURTH RESPONDENT**

VLAKKELAND BOERDERY **FIFTH RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The applicant has brought an application seeking a monetary judgment for R15 002 558,62, R911 968.51 and R1 152 497.31 against the respondents flowing from a long-term loan entered into between the first respondent and the applicant's predecessor in title, Suidwes Agricultural (Pty) Ltd (Suidwes). The second to the fifth respondents stood as surety. The respondents have set as security certain immovable properties which the applicant seeks an order for their execution. The applicant claims judgment in its capacity as cessionary against the first respondent in its capacity as the principal debtor. The applicant avers that the second to the fifth respondents have bound themselves jointly and severally along with the first respondent as surety and co-principal debtors in favour of the applicant's predecessor. The respondents are opposing the applicant's application.

[2] According to the applicant, on 26th August 2013, the applicant concluded a written sale agreement regarding the sale, cession and delegation by Suidwes of its right, title and interest in and to its existing and future book debt. In terms of the sale agreement, Suidwes was obliged to sell and the applicant was obliged to purchase the rights in all further book debts, subject to such book debts satisfying the predetermined criteria, originated by Suidwes for the duration of the sale agreement. Again on 26th August 2013 the applicant and Suidwes entered into a service level agreement in terms of which Suidwes was appointed as a service provider to perform the services and, as lawful agent for and on behalf of the applicant to exercise the applicant's respective rights, powers and duties under the loan documents and related security to the extent required.

[3] The applicant avers that during October 2017 the first respondent represented by the second respondent, applied for a long-term loan agreement credit facility with Suidwes in order to consolidate the first respondent's then credit facilities, which consisted of a balance in respect of its 2017 summer production credit agreement and its loan terms. Following a credit assessment of the first respondent's assets and liabilities, as well as its repayment capabilities, Suidwes granted a loan term loan of R11 600 000.00 to the first respondent subject to the terms and conditions applicable to such types of loans.

[4] The parties have also incorporated into the agreement between them, a quotation in terms of which the calculation of the amount of the loan advanced and the financing costs incurred over the term of the loan was set out including the instalments payable by the first respondent over the term of the loan. The instalments payable by the first respondent over the period of the loan agreement was to be made annually in the amount of R1 830 469.63 on or before 31st July 2018, thereafter on or before the corresponding day of every subsequent year. The last payment was supposed to be made on 31st July 2031.

[5] In terms of the quotation incorporating Suidwes terms and conditions, certain properties were registered as security which are remaining portion of Portion 2 of the farm M[…], Registration Division K[…], Limpopo Province, and Portion 7 (a portion of Portion 3) of the farm M[...] 1[...] Registration Division K[...], Limpopo Province, registered as a second covering mortgage bond for an amount of R1 904 000.00; and Portion 9 (a portion of Portion 3) of the farm M[...] 1[...], Registration Division K[…], Limpopo Province, registered as a third covering bond for a amount of R686 000.00.

[6] During September 2018 the first respondent represented by the second respondent applied for a postponement in respect the then outstanding balance of the instalment that was due on 31st July 2018 in respect of the long-term loan agreement. The postponement was granted by Suidwes, in terms of which the first respondent was supposed to pay R1 438 758.95 together with interest at the rate of prime plus 9.5% on or before 31st December 2018. During October 2018 the first, third and fifth respondents applied for a summer production facility regarding the summer input costs, which application was granted by Suidwes in the amount of R1 300 000.00. The repayment of that loan was to be made on or before 1st October 2019 or on delivery of their crops, whichever occurred first.

[7] Suidwes as security for the indebtedness of the first respondent caused a first ranking covering mortgage bond to be registered hypothecating the first respondent's property for R9 100 000.00. A further mortgage bond over the first respondent's immovable property was registered for a further amount of R1 280 000.00, being additional sum in respect of the costs of preserving and realising the mortgage

property and any insurance premiums paid or payable by the first respondent as mortgagor, to and in respect of the property and all costs of whatever nature Suidwes may incur and may disburse on the mortgagor's behalf. In terms of the bond, the costs and disbursements were recoverable from the first respondent. On 30th April 2015 Suidwes ceded all right, title and interest in and to the covering bond to and in favour of the applicant.

[8] On 19th March 2018, Suidwes caused a second ranking covering bond to be registered hypothecating the first respondent's property to a combined amount of R1 904 000.00. The covering bond was for the capital sum arising from and in respect of various causes, including monies lent and advanced by Suidwes to first respondent from time to time. The mortgage bond over the first respondent was registered for a further amount of R380 800.00 being the additional sum in respect of preserving and realising the mortgaged property and any insurance premiums paid or payable by the first respondent as the mortgagor, to and in respect of the properties and all costs of whatever nature which Suidwes may incur and may disburse on the first respondent's behalf. In terms of the bond, such costs and disbursements were recoverable from the first respondent. On 19th March 2018 Suidwes ceded all its right, title and interest in and to the covering mortgage bond, to and in favour of the applicant.

[9] On 30th April 2015 Suidwes caused a first ranking covering mortgage bond to be registered hypothecating the third's respondent's property known as Portion 9 (a portion of Portion 3) of the farm M[...] 1[...], Registration Division K[...], Limpopo Province. In terms of the covering bond, the liability of the third respondent as surety for the first respondent, was acknowledged and secured for an amount of R2 600 000.00, being the capital sum arising from and in respect of various causes, including in respect of monies lent and advanced by Suidwes to the first respondent, from time to time. The mortgage bond over the third respondent's immovable property was registered for a further amount of R520 000.00 being the additional sum in respect of the costs of preserving and realising the mortgaged property and any insurance premiums paid or payable by the third respondent as mortgagor, to and in respect of the property and all costs of whatever nature which Suidwes may incur and may disburse on behalf of the third respondent. In terms of the bond, such costs and disbursements are recoverable from the third respondent. On 30th April 2015 Suidwes

ceded all its right, title and interest in and to the covering mortgage bond, to and in favour of the applicant.

[10] On 14th December 2016 Suidwes caused a second ranking covering bond to be registered hypothecating the third respondent's Portion 9 (a portion of Portion 3) of the farm M[...] 1[...], Registration Division K[...], Limpopo Province. In terms of the covering mortgage bond, the liability of the third respondent as surety for the first respondent was secured for an amount of R410 000.00, being the capital sum, arising from and in respect of various causes, including in respect of monies lent and advanced by Suidwes to the first respondent from time to time. The mortgage bond over the third respondent's property was registered for a further amount of R82 000.00, being the additional sum in respect of the costs of preserving and realising the mortgaged property and any insurance premiums paid or payable by the third respondent as mortgagor, to and in respect of the property and all costs of whatever nature which Suidwes may incur and may disburse on the mortgagor's behalf. In terms of the bond such disbursements are recoverable from the third respondent. On 14th December 2016 Suidwes ceded all its right, title and interest in and to the covering mortgage bond, to and in favour of the applicant.

[11] On 19th March 2018 Suidwes caused a third ranking covering mortgage bond to be registered hypothecating the third respondent's Portion 9 (a portion of Portion 3) of the farm M[...] 1[...], Registration Division K[...], Limpopo Province. In terms of the covering mortgage bond, the liability of the third respondent as surety for the first respondent, was secured for an amount of R686 000.00, being the capital sum arising from and in respect of various causes, including in respect of monies lent and advanced by Suidwes to the first respondent, from time to time. The mortgage bond over the third respondent's immovable property was registered for a further amount of R137 200.00, being the additional sum in respect of the costs of preserving and realising the mortgaged property and any insurance premiums paid or payable by the third respondent as mortgagor, to and in respect of the property and all costs of whatever nature which Suidwes may incur and may disburse on the third respondent's behalf. In terms of the bond, such costs and disbursements are recoverable from the third respondent. On 13th March 2018 Suidwes ceded all its right, title and interest in and to the covering mortgage bond, to and favour of the applicant.

[12] The applicant avers that the first respondent is in breach of the terms of the long-term loan agreement, its carry term loan, as well as its 2019 summer production credit agreement. According to the applicant, the first respondent has failed to make payment of the instalments that were due and payable by itself in terms of the provisions of the long-term loan agreement and as at 1st April 2021, it was in arrears in the amount of R3 776 326.86. Further that the first respondent failed to make payment of the carry term loan which was due on 31st December 2018, and that the outstanding amount is R911 968.51. In addition, the applicant avers that the first respondent has failed to repay its 2019 summer production credit facilities on or before 1st October 2019 and as at 1st April 2021, the outstanding amount was R1 152 497.31.

[13] It is the applicant's contention that as at date of demand, the first respondent and its sureties were jointly and severally indebted to it in the amount of R17 067 024.00, and were in arrears in the amount of R3 776 326.86. The applicant is also seeking an order declaring the first respondent's as well as the third respondent's immovable properties executable.

[14] The respondents in their answering affidavit have admitted that the first respondent had applied for a credit facility with Suidwes. The respondents admit that it did not make payment timeously in terms of the agreements, but that it had made payments as follows: R393 487.90 on 25th September 2015; R635 000.00 on 25th September 2018; R2 775.51 on 25th September 2018; R450 000.00 on 28th January 2019; R200 000.00 on 29th May 2019; R333 158.79 on 8th July 2019; and R168 090.00 on 7th August 2019. The first respondent avers that during the take-over Suidwes did not provide it with any statements, and therefore it was unable to verify whether the amounts set out in the certificates of balance are correct. The respondents also alleges that it did not receive notices in terms of the National Credit Act 34 of 2005, and therefore were unable to exercise their rights in terms of that Act. The respondents also alleges that the properties which the applicant seeks to declare them specially executable constitute primary residence of the second and fourth respondents.

[15] The respondents further avers that the first respondent is a commercial farm, and that it is continuing with its farming activities and expects to obtain substantial

yield in respect of the current crops in the near future. It is the respondents' contention that once this occurs, the first respondent will be in a position to make payment of any amounts which may be found to be owing to the applicant. The respondents submit that there is a possibility that the respondents' liabilities to the applicant may be liquidated within a reasonable period without having to execute the immovable properties. The respondents further submit that the second and fourth respondents have no alternative accommodation, and will be left homeless as a result of this order.

[16] The respondents does not deny that monies were lent and advanced to the first respondent in the form of a credit facility by Suidwes, which was later taken over by the applicant together with its book debts. The respondents does not dispute that the second to fifth respondents have stood as sureties for the first respondent. The applicant to its application had attached certificates of balance of the alleged amount owed by the respondents. The terms and conditions of the agreement signed by the parties regarding the loan agreements, provides that a certificate of balance signed by an official of Suidwes shall be *prima facie* proof of the amount of any amount of indebtedness by the first respondent. It is trite a certificate of balance is designed to facilitate proof of the amount of liability, but does not in itself establish liability. (See *Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others*[1]).

[17] The first respondent in its answering affidavit has stated that it did not make payment timeously in terms of the agreements. That in itself is a concession that it was in breach of the agreements. The first respondent has stated that for the period 25th September 2018 to 7th August 2019 it was making sporadic payments which amounted to R2 182 512.20. However, as at 1st April 2021 the first respondent was in arrears with its long-term loan in the amount of R3 776 326.86; it carry term loan which was supposed to have been paid by 31st December 2018 was never paid, and was having an outstanding amount of R911 968.51; and the summer production credit facilities which was supposed to have been paid by 1st October 2019 was never paid, and had an outstanding amount of R1 152 497.31.

[18] The first respondent alleges that during the take-over of Suidwes by the applicant, it was not provided with statements to enable it to verify the amounts set out

[1] 1989 (3) SA 750 (T)

in the certificates of balance. However, from the first respondent's own version, it has made sporadic payments which was not in terms of the agreements up to the 7th August 2019. It does not dispute that it had failed to make any payment for carry term loan that was due on 31st December 2018 and also summer production credit facilities that was due on 1st October 2019. The facts from the first respondent's own version shows that from 7th August 2019 up to 1st April 2021 the first respondent did not make any payments towards its loan agreements.

[19] For a period of almost two years the first respondent did not make payments towards its loan agreements, did complain to the applicant or Suidwes that it was not receiving monthly statements. The first respondent in its answering affidavit is merely making a bare denial of its indebtedness towards the applicant. It had failed to disclose fully the nature and grounds of its defence, and the material facts relied upon.

[20] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[2] Heher JA said:

"A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can be expected from him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing the party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from the broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessary recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he

[2] 2008 (3) SA 371 (SCA) at para 13

commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view on the matter."

[21] The first respondent is not alleging that its failure to service its loan account for almost two years was in protest of it not receiving monthly statements. The first respondent has failed to give reasons for its failure to service its loan agreements. The first respondent is merely stating that it is a commercial farmer, its farming activities are continuing, and expects to obtain substantial yield in respect of its current crops in the near future, and that once this occurs the first respondent will be in a position to make payment of any amount which may be found to be owing to the applicant. This is a further concession by the first respondent that it is aware what it owes the applicant, and its bare denial is merely a delaying tactic to prevent the applicant from obtaining the relief it is seeking. The first respondent had therefore no bona fide defence against the applicant's claim.

[22] The respondents have conceded that the second to the fifth respondents have bound themselves jointly and severally along with the first respondent as surety and co-principal debtors in favour of Suidwes. Therefore, the applicant is entitled to also claim from the second to the fifth respondents in case the first respondent fail and/or neglect to make payments to the applicant by virtue of the deed of suretyship. Since the respondents have failed to raise a serious dispute to the applicant's claim, the court is satisfied that the applicant is entitled to judgment been granted in its favour.

[23] What the court must also determine is whether to declare the immovable properties of the respondents specially executable. It is trite that when a party seeks execution against immovable property judicial oversight enshrined in section 26(3) of the Constitution is required to determine whether the rights in terms of section 26(1) of the Constitution are implicated. In *Mkhize v Umvoti Municipality*[3] Navsa JA and Snyders JA said:

[3] 2012 (1) SA 1 at para 26

"The object of judicial oversight is to determine whether the rights in terms of s 26(1) of the Constitution are implicated. In the main a number of cases grappling with Jafta sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight? We are unable to understand the difficulty of applying the principle that it is necessary in every case to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are implicated. To not undertake such an enquiry would in fact render the procedure unconstitutional."

[24] The applicant in the founding affidavit had brought it to the attention of the respondents that it will be seeking an order specially declaring their immovable properties executable, and that they should deal with certain factors and to place certain relevant information that will assist the court in considering that prayer. The first respondent in dealing with that issue has stated that the immovable properties which the applicant seeks to declare specially executable constitute the primary residences of the second and fourth respondents. Further that the commercial farming activities would come end, there would be loss of jobs and residences for farm workers, and also that the second and fourth respondents will have no alternative accommodation and will be left homeless as a result of the order.

[25] There is no evidence that the second and fourth respondents are indigent. The third respondent had willingly put his property as security for the debt of the first respondent, and was well were aware of the implications that follows. No evidence has been placed before court that the applicant was abusing the court process with the procedure that it had followed. The respondents have been in default of their bond repayments for almost two years. The respondents have filed their answering affidavit more than a year before this matter could be heard in court. In their answering affidavit they have stated that they expected to obtain substantial yield in respect of its current crops in the near future, and that the first respondent will be in a position to make payment of any amount which may be found to be owing to the applicant.

[26] The current crops it was referring to, was crops as at the time of deposing the answering affidavit. It is more than a year since the undertaking was made and it does not seem that any payment was made. Had the respondents made substantial payments in reduction of their loans as promised, this matter would not have been before court. The respondents even when this matter was argued before court, have failed to explain as what had happened to the undertaking to settle any amount that might be found to be owing to the applicant.

[27] In *Gundwana v Steko Development*[4] Froneman J said:

"Some further cautionary remarks are called for. It is rather ironic that the effect of this judgment is to restore to the courts a function that they exercised for close to a century before the introduction of rule 31(5) in 1994. The change to the original position has been necessitated by constitutional considerations not in existence earlier, but these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that, in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and the risk of loosing their homes. If the judgment debt can be can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially considered before granting execution orders."

[28] No evidence has been placed before court that the second and fourth respondents are poor. The properties which the applicant is seeking to execute is registered into the names of the first and third respondents. However, the respondents are alleging that the respondents who will be rendered homeless are second and fourth. In my view, the third respondent will still be able to accommodate them as he will not be rendered homeless if the execution order is granted. There is no evidence that the applicant was acting in bad faith when instituting these proceedings and the relief it is seeking. In fact, the applicant had given the respondents ample opportunity to remedy the breach before it instituted these proceedings against the respondents. In my view, it will be appropriate to order the respondents' immovable properties which have been put as security in favour of the first respondent specially executable.

[4] 2011 (3) SA 608 (CC) at para 53

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

29.1 Judgment is granted against all the respondents, jointly and severally, the one paying the other to be absolved, in favour of the applicant, for payment in the amount of:

29.1.1 R15 002 558.62 together with compounded interest at the rate of 9.5% per annum, such interest to be calculated daily and capitalised monthly from 31st March 2021 to date of payment;

29.1.2 R911 968.51 together with compounded interest at a rate of 10.75% per annum, such interest to be calculated daily and capitalised monthly from 31st March 2021 to date of payment;

29.1.3 R1 152 497.31 together with compounded interest at a rate of 9.75% per annum, such interest to be calculated daily and capitalised monthly from 31st March 2021 to date of payment;

29.2 The immovable properties registered in the name of the first respondent better known as:

29.2.1 Portion 7 (a portion of Portion 3) of the farm M[...] 1[...], registration Division K[...]., Limpopo Province, measuring 124,7561 hectares, held by Deed of Transfer T129641/1998;

is declared specially executable in favour of the applicant.

29.3 The immovable property registered in the name of the third respondent better known as:

29.3.1 Portion 9 (a portion of Portion 3) of the farm M[...] 1[...], registration division K[...]., Limpopo Province, measuring 77,0879 hectares, held by Deed of Transfer T129640/1998;

is declared specially executable in favour of the applicant

29.4 The properties referred to in paragraph 29.2 & 29.3 above be sold by the applicant or its appointed agent in conjunction with the sheriff of the court by public auction or private treaty;

29.5 Costs of the suit on a scale as between attorney and client.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION,POLOKWANE

APPEARANCES:

Counsel for the applicant	: Adv C Richard
Instructed by	: Leahy Attorneys
Counsel for the respondent	: Adv NG Louw
Instructed by	: Dawie Beyers Attorneys Inc
Date heard	: 23rd November 2022
Electronically circulated on	: 26th January 2023