IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 11492/2008

In the matter between:

KERNSIG 17 (EDMS) BPK Applicant

and

ABSA BANK BEPERK Respondent

JUDGMENT DELIVERED ON THIS 30TH DAY OF OCTOBER 2008

MEER, J:

INTRODUCTION:

[1] Applicant seeks, by way of a final interdict, the cancellation of a mortgage bond registered by respondent over immovable property owned by applicant, being the farm Karoovlakte in the district of Klawer, Western Cape, (hereinafter, "the property"). The bond was registered against the property as security for a loan of R1,100,000.00 (ONE MILLION ONE HUNDRED THOUSAND RAND) on 8 December 2005. Applicant contends that it is not liable to repay the loan amount for the purposes of the cancellation of the bond, as respondent approved the loan and registered the bond without the necessary authority from applicant's directors to do so.

BACKGROUND FACTS:

[2] The only directors and shareholders of the applicant are Petrus Greyling and his father Johannes Greyling ("the Greylings"). They farmed on the property in a partnership known as Karoovlakte Boerdery, ("the partnership"), which rented the property from applicant for farming purposes. Between 1984 and 2001, six bonds were registered against the property in favour of respondent, ABSA Bank, as security for a loan and overdraft facility granted to the partnership by respondent. The accounts in respect of these facilities were administered at the Vredendal Branch of ABSA.

[3] On 30 November 2005, the Greylings entered into a sale of shares agreement with Lionel and Christine Barnard for the sale of their shares in applicant. Paragraph 3 of the agreement below, which specified how the purchase price would be payable, included in the purchase price at subparagraph 3.2 a provision that the buyer would take over the debts of the company, as well as all bonds registered over the property in the name of the partnership totalling R1,137,750.00.

> ***"KOOPPRYS***
>
> *[3] Die koopsom is die bedrag van R2 000 000-00 (TWEE MILJOEN RAND) betaalbaar deur die Koper aan die Verkoper as volg;*
>
> *3.1 `n Bedrag van R150 000-00 (EENHONDERD EN VYFTIG DUISEND RAND) reeds betaal.*
>
> *3.2 Die oorname van alle skulde van die maatskappy insluitend die Landboudkredietlening ten bedrae van R57 750-00, asook die verbande wat oor die eiendom van die maatskappy geregistreer is in naam van Karoovlakte Boerdery, in totaliteit die bedrag van R1 137 750-00;*

3.3 Die balans van die koopsom nl R712 250-00 word in 12 jaarlikse paaiemente afbetaal waarvan die eerste betaling op 1 Augustus 2006 sal geskied en daarna jaarliks voor of op die einde van Julie.

3.3.1 Die koper sal rente teen 7% per jaar op die uitstaande kapitaal gemeld in 3.2 betaal, welke rente jaarliks tesame met die kapitaal delging betaalbaar sal wees.

3.3.2 As sekuriteit vir die uitstaande balans van die koopsom soos verwys in klousule 3.2 hierbo, asook vir die bedrag van R400 000-00 te wete die koopsom van die roerende bates soos verkoop deur JA Greyling aan LP Barnard en uiteengesit in klousule 3 van die genoemde koopooreenkoms, word 'n 2de verband van R1 112 250.00 as sekuriteit ten gunste van JA en PJ Greyling geregistreer oor Erwe 350,351 en 366 Wilderness.

3.3.3 Die koopprys is gebasseer as die veronderstelling dat die middel-en agterskot vir 2005 aan die koper uitbetaal word."

[4] On 8 December 2005, respondent approved a loan to applicant, represented by Barnard, in the sum of R1,100,000.00 (ONE MILLION ONE HUNDRED THOUSAND RAND, hereinafter "the contested loan") and the bonds registered over the property served as security for this loan. The memorandum of loan agreement, dated 8 December 2005[12], reflects that the loan was given to Lionel Patrick Barnard, representing applicant, in accordance with a director's resolution taken on 22 September 2005, citing Barnard as follows:

"LIONEL PATRICK BARNARD HANDELENDE NAMENS KERNSIG SEWENTIEN (EDMS) BPK REG NR:2002/000115/07 KRAGTENS 'N DIREKSIEBESLUIT GENEEM OP 22 SEPTEMBER 2005"

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[1] ABSA 4

The last five words in the quote are handwritten. Whilst the loan agreement was contained in the bundle of documents before Court, the director's resolution of 22 September 2005 was not. Applicant, as appears below, argued that by failing to annex the director's resolution to the agreement or produce it, respondent had failed to prove that the loan had been authorised by applicant.

[5] Respondent contends that the applicant applied for the contested loan at its Vredendal branch and it was granted on the basis that the bonds, which had been registered against the property, would serve as security for the loan. In this regard the affidavit of Petrus Truter, the manager of the legal division of the southern district of Absa Bank, refers to a copy of the relevant page of the loan application on which conditions for the loan are specified[3]. One of the conditions is recorded as follows:

"Karoovlakte se skuld moet uit opbrengs van hierdie lening afgelos word."

[6] The opposing affidavit of Truter, on behalf of respondent, the contents of which are confirmed by Johan Brand, a manager at respondent's Vredendal branch at the time the contested loan was granted, who was familiar with applicant's and the farming partnership's bank accounts, sets out the relevant background circumstances to the granting of the loan, as contended by respondent, as follows:

> 6.1 A few months before the loan was granted the Greylings' attorney, Ms Hanlie Visser (who is also the daughter of Greyling senior and sibling of Greyling junior), informed Brand that her family intended to sell the property to LP Barnard, a partner in her law firm.

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[3] ABSA5

6.2 At that stage the farming partnership had a cheque account with overdraft facilities at respondent's Vredendal branch and a loan account which was administered at the branch, for which the bonds registered against the property served as security.

6.3 Visser was known to Brand because her legal firm also had a bank account with respondent. Brand had not been satisfied with the state of applicant's bank accounts. The overdraft facility limit was regularly exceeded and the instalments on the loan not satisfactorily paid.

6.4 The property was sold to Barnard on the basis that the Greylings sold their shares in applicant to Barnard. From his discussions with Visser and the Greylings, Brand was aware that a term of the sale transaction was that Barnard, in the name of applicant, would take over the existing obligations of Karoovlakte Boerdery, the farming partnership as against the respondent. This, in effect, meant that the overdraft cheque account and the loan debt would be consolidated and paid by applicant to a new facility which would be granted to it.

6.5 Brand was also made aware that, in terms of the sale between the Greylings and the Barnards, Barnard was required to provide payment for the balance of the purchase price of the shares in applicant by registering bonds over certain properties which Barnard owned in the Wilderness. The Greylings were not prepared to transfer the shares to Barnard until such bonds were registered. It was of great importance to Brand that the shares had not been transferred to Barnard, and from this fact Brand decided that the applicant must apply for the loan, and not Barnard in his personal capacity. Barnard would not have qualified for the loan given the position of his own assets and liabilities.

6.6 Visser, Greyling and Barnard had negotiated the granting of the contested loan to applicant which was needed to repay the debts of the farming partnership to respondent. Barnard was authorised by the Greylings, in their capacity as directors and shareholders, to obtain the loan on behalf of applicant. Visser had phoned Brand on the day the loan was approved by respondent. She was anxious to obtain the outcome of the loan application given that Brand had expressed concern during the negotiations about the manner in which the applicant handled its bank account.

6.7 Truter added also that, because the shareholding in applicant had not been transferred to Barnard at the time of the application for the loan, the Greylings as directors and shareholders of applicant had to authorise Barnard to apply on behalf of applicant for the loan. Such authorisation was granted and made available to Brand on the strength of which the loan was approved and granted to applicant.

6.8 Truter characterised these proceedings for the cancellation of the bonds as opportunistic, unfounded and an attempt by applicant to evade paying its debt to respondent.

[7] In contrast to the version of respondent, applicant, as per the replying affidavit of Petrus Greyling, denied that applicant had authorised Barnard to apply for the loan of 8 December 2005.

[8] Greyling said he had no knowledge of the loan application document nor the conditions specified thereon. He emphasised that at no stage were LP and C Barnard, the names which appear on the loan application document, directors of applicant. They had been given neither express nor implied authority by applicant to apply to respondent for the contested loan. He emphasised that

applicant's shares had never been transferred to Barnard. Referring to the sale of shares agreement, he said it was intended that Barnard would pay the purchase price from his personal finances raised by registering security bonds over his Wilderness property, whereafter the shares would be transferred to him. Barnard, he emphasised, would also take over the debts of applicant and or the partnership. Greyling added moreover, that in terms of Section 38 of the Companies Act 61 of 1973, the applicant was not legally permitted to burden its own assets for the purpose of financing the sale of its shares.

[9] Greyling conceded that Visser contacted Brand at respondent's Vredendal branch and informed him that the family intended to sell the property to Barnard. There was, however, no discussion that a loan would be granted to the applicant for the purpose of settling the debts of the partnership.

[10] Greyling emphasised also that the directors of applicant were not contacted after September 2005 in connection either with payments or breach of payments on the loan. No documents substantiating respondent's submission that applicant had authorised the loan had been produced by respondent. The director's resolution of 22 September was not at hand, and Greyling suggested no such document existed.

[11] According to Greyling, respondent's opposition to these proceedings was an attempt to cover up respondent's negligence and its failure to ensure that the requisite documents in support of an application for finance were not in place. The granting of a loan to Barnard in the absence of the necessary authority from applicant or without applicant being bound as surety was fatal to respondent's defence and applicant could not be held liable for Barnard's debt.

[12] The chronology of events after the granting of the contested loan continued as follows. By late November 2005 Barnard had taken occupation of

the property. On about 28 November 2005, the Greylings signed a resolution giving permission for the registration of a further bond on the property for the sum of R200 000.00 (TWO HUNDRED THOUSAND RAND) on condition that the respondent released applicant from any responsibility in the event of the sale agreement not being honoured by Barnard. This condition was unacceptable to respondent, who was also aware that a dispute had developed between the Greylings and Barnard over the sale of shares agreement. Respondent contends its failure to accept this condition supports its version that it would not have authorised the contested loan.

[13] It is common cause that applicant fully settled the loan and overdraft facilities for which the bonds served as security by 25 January 2006. Applicant, however, did not cancel the bonds at that stage. Respondent contends that attorney Visser and the Greylings did not insist that the bonds be cancelled after the payment of applicant's debts, because they knew that the bonds also served as security for applicant's loan of R1,1,000,000.00 (ONE POINT ONE MILLION RAND).

[14] It is common cause that the shares in applicant were never transferred to the Barnards, and that in February 2008 the Barnards left the property and returned the keys. The Greylings accepted that the sale agreement had been repudiated. The agreement was accordingly cancelled and the property repossessed by the Greylings.

[15] In May 2008, applicant received a written offer to purchase the property, which it accepted. Attorney Visser, on behalf of applicant, wrote to respondent seeking the formal cancellation of its bonds which were still registered against the property. The letter dated 5 May 2008, records that as part of the purchase price of the shares in applicant, Barnard took over applicant's outstanding debt to respondent of R1,100,000.00. It records also that in September 2005, Brand

of ABSA's Vredendal branch informed the offices of Hanlie Visser Inc. that Barnard's application for the taking over of the debt in that amount was successful, and on the grounds of such confirmation occupation and possession of the farm was given to Barnard. The letter emphasised that Barnard's repudiation of the contract did not free Barnard from his obligations to ABSA. It requests an undertaking from Absa Bank that the bond be cancelled on the date of registration without any liability to applicant.

[16] On 27 June 2008, respondent requested payment of the sum of R1,254,597.18 owing by applicant before the bonds could be cancelled. This was followed by a request by applicant in June 2008 for information about this amount, the Greylings conveying that they were not aware of any further credit given to applicant. Respondent replied that the outstanding amount flowed from the loan of R1,100,000.00 which, as per respondent's version, was granted to applicant represented by Barnard, the respondent's stance being it will not cancel the bond unless the contested loan is settled.

[17] Applicant has in the meanwhile instructed its attorney to arrange for the transfer of the property to the new purchaser who has already taken occupation of the property and pays occupational rent of R12 000.00 per month. Applicant is adamant that respondent cannot rely on the authority it alleges applicant granted to Barnard to secure the contested loan, as respondent has not proved the authority, an onus which it bears.

[18] In view of the apparent disputes of facts, I raised with Counsel the question of oral evidence. Whilst respondent was amenable to oral evidence being heard, applicant elected to argue the application on the papers. The general test as formulated in **Plascon-Evans Paints v Van Riebeek Paints** 1984 (3) SA 623 (AD) at 634H for the granting of a final interdict in motion proceedings where there are disputes of fact, as is well known, is that an

interdict may be granted if those facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

[19] Referring to the general rule, Mr Du Preez, for applicant, emphasised, as was also stated in the **Plascon Evans** case at 634I, that the power of a court to give such final relief on the papers is, however, not confined to such a situation. A final interdict could be granted over and above the general rule where a denial by a respondent of a fact alleged by the applicant does not raise a real, genuine or bona fide dispute of fact. It could also be granted, he submitted, where the allegations or denials of the respondent are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[20] Mr Du Preez submitted that, applying the exception to the general rule to the evidence of respondent as emphasised by him, respondent had not proved Barnard was authorised to represent the applicant and there was no supporting evidence that the loan had been granted to the applicant. Respondent had not satisfied the onus to prove authorisation of the loan. In the circumstances, there could be no material disputes of fact between the applicant and the respondent and a final interdict should be granted against the respondent.

[21] I do not accept this proposition. The version of respondent as to how the contested loan came about, Greyling and Visser's involvement in negotiating the loan to Barnard, and the reason for which it was obtained juxtaposed against applicant's version, does, in my view, give rise to factual disputes which are material. The failure to annex a resolution of directors to the memorandum of loan agreement as proof that the loan was given to Barnard, representing applicant, in terms of a resolution of directors taken on 22 September 2005, does not, in my view, negate these factual disputes.

[22] Nor, I believe, can it be said in the light of all the evidence that respondent's allegations pertaining to Barnard's authority to represent applicant, are so farfetched or clearly untenable that they stand to be rejected merely on the papers. In this regard it is worth noting that Greyling, on behalf of applicant, makes no attempt to explain what enquiries were made upon discovery of the loan as to precisely where the money went to or, what it had been used for as perhaps would have been expected of company directors in the Greylings' position.

[23] One is also left somewhat puzzled as to how directors of a company could remain in the dark for over two years, between December 2005 and March 2008, about a significant loan of R1,100,000.00 to the company. On applicant's version to, as per the letter of Visser of May 2008, this was the amount of the partnership debt which Barnard was to take over, albeit its denial that the financing thereof was to come from a loan to applicant. It is to be noted also that in March 2008, applicant received a statement from respondent dated 17 March 2008, in respect of the contested loan[4], and notwithstanding that the statement is clearly addressed to applicant, the affidavit of Greyling states it appeared this was a new loan taken by the buyer, a reference to Barnard. It is not explained how applicant could not have known about the contested loan when it sought cancellation of the bond in June 2008, Greyling having received this statement in March.

[24] In **Ngqumba/Damons NO/Jooste v Staatspresident** 1988 (4) SA 224, Rabie WnHR, at 260 I to 262 H, commented on the general rule as formulated in the **Plascon-Evans** case in relation to onus, the risk to an applicant who elects to proceed by way of motion proceedings when faced with a defence by respondent in answering papers, and the Court's discretion to grant an order in

[4] PJG9

the absence of oral evidence. The principles relevant to the instant case, distilled from his discussion, are as follows:

[24.1] It does not follow from the general rule that an applicant in motion proceedings bears the onus and is accordingly obliged, where there are factual disputes, to accept the version of the respondent if he seeks a final order. The underlying principle of the general rule appears to be that a party, who decides to make use of motion proceedings, knows there is a danger that his factual submissions can be opposed, and that he can then be compelled to accept the respondent's submissions if he wants a final order on the papers.

[24.2] The general rule also applies to submissions that the respondent makes against the applicant in his answering affidavit. If the respondent's submissions disclose a defence, then the applicant cannot succeed on the papers, even if he denies these submissions in reply, and even if the onus in respect of the defence according to the ordinary rules rests on the respondent.

[24.3] Where the onus is on the respondent and he does not discharge it on the papers, he does not have to give oral evidence if he wants to prevent the application from being granted. In this regard, where an applicant must expect that his version will be disputed, he is not entitled to an order if respondent does not ask for oral evidence. The court can in its discretion dismiss the application. As Greenberg J stated in **Meyers V Braude** 1927 TPD 393 at 396:

> *"And as the applicant claims a decision on the matter and does not ask for evidence to be heard, I do not think I am justified in ordering the hearing of evidence."*

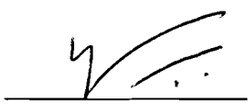
[24.4] These principles apply full square in the instant matter. There are factual disputes. The respondent's version, in my view, can be said to disclose a

defence and the applicant did not ask for oral evidence. It was in fact the respondent who asked for oral evidence in the alternative.

[25] Applying the general rule as formulated in **Plascon-Evans** to the factual disputes, I find that the facts, as stated by the respondent, *inter alia*, that the loan was granted to applicant as represented by Barnard, together with those facts in applicant's affidavit admitted by respondent, which, *inter alia,* are that the loan agreement refers to a loan to applicant as so represented, do not justify the order sought.

[26] I order as follows:

The application is dismissed with costs.



MEER, J