IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: **24430/2009**

In the matter between:

IMPERIAL BANK BEPERK Applicant

v

EATON STAPHANUS GERBER First Respondent
CLAIRE DENISE GERBER Second Respondent
in their capacity as trustees of the
Pepperwood Estate Trust (IT3099/2006)

JUDGMENT HANDED DOWN ON TUESDAY, 2 NOVEMBER 2010

CLEAVER J

[1] On the return day of a provisional order of sequestration granted against the Pepperwood Estate Trust ("the Trust"), Mr E S Gerber ("Gerber"), representing himself and his co-trustee Ms C D Gerber appeared in person to oppose the granting of a final order.

[2] Gerber had submitted full written submissions and he expanded thereon at some length during the course of argument before me. Much of what he had to say concerned the history of the matter and was not strictly speaking relevant to the application. To start with he contended that he had not been afforded sufficient time to address the court when the provisional order was granted. He explained that due to the country-wide strikes which were on the go at the time, a judge was not available to hear the matter in the normal course, but that an *"alternate"* judge had agreed to hear the matter under trying circumstances. The judge had

indicated at the outset that 30 minutes only would be available for hearing the application which resulted in him being placed under considerable pressure. He contended that in the circumstances he had not been able to present his case properly to the court. I indicated to Gerber that whatever the position might have been at the previous hearing, precisely the same issue which was before the court on that occasion was to be finally adjudicated by me, the only difference being the heavier onus resting on the applicant for the grant of a final order. I accordingly allowed him as much leeway as possible in order to present his case.

[3] Gerber made much of the fact that an application for summary judgment had been refused in an action which the applicant as plaintiff had instituted against the trustees of the Trust in this court. In that action under case no 3564/2009 the applicant as plaintiff had sued the trustees of the Trust for payment of the sum of R3 952 770,76 said to be the balance of the principal debt together with finance charges thereon owing in respect of moneys lent and advanced by the plaintiff to the defendants pursuant to a mortgage bond which had been registered by the Trust in favour of the applicant. The judgment refusing the application for summary judgment has not been transcribed, but Gerber submitted that the judge refused to grant the application because the papers before him did not contain appropriate allegations as to the basis on which the plaintiff had been entitled to call up the bond.

[4] Gerber then submitted that the finding in respect of the summary judgment application effectively meant that the applicant had not been able to establish its case in the application before me. As will become apparent from this judgment

however, the applicant's case for the sequestration of the Trust is based on the inability of the Trust to pay its debts including the amount admittedly owing and due under the bond.

[5] The facts which appear to be common cause are the following:

5.1 The applicant advanced funds to the Trust in terms of a loan agreement to enable the Trust to provide the services which were to be installed in a property development undertaken by the Trust before the erven making up the development could be transferred. The initial loan agreement was replaced by later agreements.

5.2 The amount so advanced was to be repaid to the applicant out of the proceeds of the initial sales of erven in the development, it being a condition of the loan that the applicant was to be satisfied as to the existence of an agreed number of sales ("the pre-sales") before it would pay out any amounts in terms of the loan. It would appear that documentation reflecting the sale of some 20 erven was placed before the applicant for this purpose, thus fulfilling the condition.

5.3 The amount lent to the Trust was secured by the registration of what is referred to as a development bond, but is termed a continuing covering bond in Deeds Office parlance. The bond secured the Trust's liability for payment of the sum of R4.6 million plus an additional amount of R920 000.

5.4 According to the applicant, the amount of the envisaged loan was decreased due to an insufficient number of pre-sales.

5.5 The agreement of loan provided that the amount lent to the Trust was to be repaid by not later than six months from the date of registration of the covering bond referred to. Registration was effected on 7 November 2007.

5.6 Funds were duly advanced by the applicant to the Trust in terms of the loan agreement, but at least 15 of the pre-sales were cancelled by the proposed purchasers, due, it would seem, to the delay experienced by the applicant in finalising the installation of services in the township and/or failing to comply timeously with the requirements of the local authority.

5.7 The Trust having failed to repay the amount advanced to it under the bond within the time stipulated, summons was issued by the applicant as plaintiff against the trustees as indicated in para [3] above.

5.8 In his affidavit filed in opposition to the application for summary judgment, Gerber recorded *inter alia* that the applicant had made payments totalling some R3,9 million to the Trust in accordance with the loan; that pre-sales which were a precondition for the granting of the loan had been cancelled and that the Trust has not made payment of any amount to the applicant as no transfers of erven had taken place.

[6] In response to the applicant's demand for payment, made prior to the issue of summons, Gerber addressed a letter to the applicant on 10 February 2009 which is crucial to the applicant's case. The initial portion of the letter reads as follows:

"Met verwysing tot ons telefoongesprek vanmiddag, die volgende:-

1. *Ek neem kennis daarvan dat u Imperial Bank se regsafdeling nou gaan opdrag gee om met 'n invorderingsaksie teen Pepperwood Estate te begin om die ontwikkelingslening op te eis.*
2. *Graag wil ek dit noem dat jul takbestuurder in George vir my in Oktober 2009 meegedeel het dat Imperial Bank my nog tot*

28 Februarie 2009 kans sal gee om die lening terug te betaal – of met 'n alternatiewe oplossing voorendag te kom – en dat die bank daarna regsaksie gaan neem. Dit is vandag die 10de Februarie 2009.

3. *U het dit oor die telefoon aan my gestel dat al manier hoe hierdie regsaksie nie sal voortgaan nie, is indien ek die rente op die lening maandeliks kan diens. Ek het geantwoord dat al manier wat ek hierdie rente oor 'n lang periode kan diens, is indien ek die rente kan verdiskonteer teen erwe wat ek kan verkoop. U het aan my verduidelik dat dit nie moontlik is nie – aangesien die erwe dien as die bank se sekuriteit – en elke keer wanneer nog 'n erf verkoop word, sal die bank al meer van sy sekuriteit verloor.*

Pepperwood Estate is in 'n finansiële verknorsing as gevolg van buitegewone verloop van omstandighede. On is 'n rat voor die oë gedraai deur die Propco groep wat 15 erwe gekoop het – met wie ons prokureurs op 'n gereëlde basis in verbinding was. Ons het in die laaste drie dae voor die kansellasie nog by drie geleenthede e-poste van hul prokureurs ontvang. Ingeslote is 'n afskrif wat ons nog 14 dae voor kansellasie ontvang het. Die feit dat alle partye egter van die 2-jaar kansellasieklosule 'vergeet' het, is uiters toevallig. Vertragings met hersonerings- en onderverdelings is baie algemeen. Die munisipaliteit het by drie geleenthede my uitlegplanne verlore laat raak. Die plaaslike landmeter het sewe maande geneem on die Landmeter-Generaal se handtekening op die onderverdelingsplan te kry – nadat die erwe reeds opgemeet was. Ons was almal oortuig daarvan dat die sekuriteit wat Imperial Bank vir hul lening verlang het, voldoende sou wees om die projek sonder enige skuld te laat na registrasie. Ek is met vele ontwikkelaars en ander instansie besig om 'n oplossing vir die probleem te vind – tot dusver sonder sukses – hoofsaaklik omdat die banke tans feitlik geen lenings wil toestaan nie."

Then follows a proposal as to the initial sale of two erven and a procedure for the application of the proceeds following sales, the letter concluding with the following:

"Imperial Bank se samewerking sal baie hoog op prys gestel word om 'n oplossing te vind vir hierdie onnodige finansiële verknorsing waarin Pepperwood Estate tans verkeer. Ons hoor graag dringend van u. Sodra ek weet wat Imperial Bank as 'n delgingspaket sal aanvaar om hierdie lening so spoedig moontlik terug te betaal, kan ek pro-aktief optree om die probleem op te los."

[7] On the strength of the admissions made by Gerber in the affidavit filed in opposition to the summary judgment application and the letter to the applicant of 10 February 2009 counsel for the applicant contends that it is clearly apparent

that the Trust is unable to repay the loan and unable even to pay the interest thereon. In the result it contends that the letter constitutes an act of insolvency within the meaning of section 8(g) of the Insolvency Act No 24 of 1936. There can be no doubt that this is so.

[8] The defences put up by the respondents, which are to my mind no defences, are the following:

* Firstly, the defence raised in the summary judgment application, namely that the papers in the action did not spell out in detail the terms of the loan on which the applicant had relied to call up the bond. Clearly this is no defence to the Trust's admitted inability to pay the amount within the time stipulated in the loan agreement.
* The applicant should not have proceeded with the loans when final approval for the development was delayed.
* The applicant should not have accepted pre-sale agreements which provided the purchasers with the right to cancel the agreement in the event of the sellers not being able to effect transfer timeously.
* Once it became apparent that the respondents would not be able to remit payment in terms of the loan agreement timeously since the pre-sales had been cancelled, the applicant ought to have agreed to an addendum to the loan agreement so as to accommodate the respondents.
* The fact that the applicant reduced the amount of the loan by approximately R1 million. The respondents contend that this was effected unilaterally, but in fact the reduction was permissible in terms of the contractual

arrangements and was recorded in an agreement signed on behalf of the Trust.

* The applicant repudiated the agreement by failing to pay the claims of contractors employed by the Trust out of the proceeds of the loan agreement. The applicant points out that this was due to the fact that when payment was sought, the amount due to the Trust in terms of the loan agreement had been fully drawn by the Trust.

The respondents also disputed a number of allegations in the papers which are not relevant to the basis on which the liquidation is sought. The final contention made by the respondents is that the applicant acted recklessly or at least negligently and is itself responsible for the unsatisfactory position in which the respondents find themselves.

[9] All these defences clearly have no application to the facts on which the applicant relies, namely the undisputed inability of the respondents to pay amounts advanced to the Trust in terms of the bond.

[10] Gerber also contends that the value of the property bonded to the applicant far exceeds the amount of the applicant's claim and that consequently the Trust is not insolvent. Unfortunately for the Trust though, since the applicant relies on an act of insolvency, the factual solvency of the Trust need not be considered as the court is entitled to order the sequestration of the Trust, even if its assets (fairly valued) exceed its liabilities.[1]

---

[1] *D P Du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 (T) at 1335F-G.
De Villiers NO v Maursen Properties (Pty) Ltd 1983 (4) SA 670 (T) at 676E.

[11] The respondents also resist the grant of the final order on the basis that the Trust has a counter-claim against the applicant, the amount of which is far in excess of the amount owing to the applicant. The counter-claim is recorded in the action to which I have already referred and comprises a main claim and an alternative claim. The main claim is for R10 million said to be for financial and emotional damage brought about by the applicant to the trustees of the Trust in their personal capacities, as well as damage to their development project (*"aan hulle ontwikkelingsprojek in sy geheel"*) by the reckless and unprofessional manner in which the applicant is said to have dealt with the loan agreement and to have repudiated it. The main grounds relied on are similar to those advanced in opposition to the application, namely:

* The applicant should never have granted the loan having regard to the faulty security which was offered.
* Alternatively, the applicant should have secured the loan properly before payment was made to the Trust.
* The applicant should not have granted the final loan facility as it was aware of the cancellation clauses in 15 of the pre-sales which could be invoked in six months.
* The applicant repudiated the loan agreement six months before the expected completion of the installation of services by reducing the loan by R1 million.
* The applicant repudiated the loan agreement by refusing to pay the last creditors.

* The applicant repudiated the loan agreement by refusing to allow the respondents to continue to sell individual erven after the pre-sales fell through.

The alternative claim is said to be for R40 million which will apply in the event of the applicant attempting to sell the mortgage property by means of a judicial sale.

[12] Since it has been established that the Trust is unable to pay its debts and that a final order of sequestration should normally ensue, the onus rests on the respondents to satisfy me on a balance of probabilities that its counter-claim may succeed. To start with, the claim is clearly unliquidated and it is doubtful whether as presently framed it will withstand the test of an exception. Furthermore, it ignores the fact that all the steps taken which culminated in the arrangement which the Trust made with the applicant to secure the loan, including the provision of succeeding loan agreements, occurred with the consent and cooperation of the trustees. Most, if not all of the averments upon which the trustees rely have no legal basis and are in effect contentions to the effect that since the applicant was aware of the difficulties being experienced by the trustees and in particular the cancellation of the pre-sales, there was a duty of some form on the applicant to relinquish its rights and to adjust its arrangements in order to suit the Trust.

[13] I am mindful of the fact that the Trust may well own property whose value, once sales of the serviced erven can be effected, can exceed the amount due to the applicant, but the fact is that as matters stand, the Trust is unable to pay the amount owing in terms of the bond and such proposals as Gerber has made to

the applicant with a view to future sales have not been acceptable to the applicant.

[14] As far as the alleged counter-claim is concerned, I am not persuaded that this is a matter where *viva voce* examination and cross-examination will disturb the balance of probability which is clearly in the applicant's favour.[2] That there will be an advantage to creditors in the event of the Trust's Estate being sequestrated is clear. It is not in dispute that the Trust is the owner of a valuable property which a trustee will no doubt be able to dispose of to the benefit of the creditors of the Trust.

[15] In all the circumstances I consider that the applicant has satisfied the three essential elements for the grant of a final order of sequestration, namely:

15.1 The undisputed amount of its claim against the Trust.

15.2 That the Trust is unable to pay its debts.

15.3 That it will be in the interest of creditors if a final order of sequestration is granted.

It is of course so that even though a proper case has been made out, I still have a discretion to decline to make a final order. In order to do so, the respondents must satisfy me that there are special circumstances present which justify the withholding of the final order. For the reasons which I have set out above, that is not a finding which I can make.

---

[2] *Mohamed v Malk* 1930 TPD; *Priest v Collett* 1930 CPD.

[16] In the result the following order is granted:

16.1 The provisional order of sequestration granted on 18 August 2008 is confirmed and the estate of the Pepperwood Estate Trust is finally sequestrated and placed in the hands of the Master of this Court.

16.2 The costs of the application will be costs in the sequestration.

R B CLEAVER