IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 12882/2010

DATE: 24 NOVEMBER 2010

In the matter between:

FIRSTRAND BANK LIMITED Applicant

and

ANTHONY KARMIS PROPERTY (PTY) LTD Respondent

J U D G M E N T

DAVIS, J:

There are two opposed applications for the provisional winding up of two corporate entities being Erf 15461 Brackenfell CC and Anthony Karmis Properties (Pty) Ltd. It is common cause that the factual matrix upon which the applications are predicated are the same, the legal arguments are the same and accordingly I shall deal exclusively with argument with regard to Erf 15461 Brackenfell. The analysis is equally applicable to Anthony Karmis Properties (Pty) Ltd.

The background to this dispute can be summarised thus. The applicant advanced R82 million to a principal debtor, Olympian Developing Company (Pty) Ltd ("Olympian"), which Olympian

then used to purchase and commence a development of a property (Zeekoe property). Applicant extended the funding in terms of two loan agreements, one referred to as the senior loan agreement in the amount of R58 million, another referred to as the mezzanine agreement in an amount of R24 million. These loan agreements required security and limited suretyship from the respondent (as mentioned earlier I am hereby referring to Erf 15461 Brackenfell CC).

In terms of this suretyship agreement, respondent bound itself as surety and co-principal debtor *in solidum* with Olympian for the due and punctual payment by Olympian of R700 000,00 plus interest in such amount which Olympian then owed or might in the future own to the applicant. Having bound itself as co-principal debtor, it appears to be common cause that respondent renounced the benefits of the excussion. Consequently, applicant is entitled to recover from the respondent any amounts owed by Olympian to the applicant up to the maximum provided for in the suretyship agreement without having to first proceed against Olympian.

In terms of clause 8 to the suretyship agreement, the applicant was permitted to recover the full amount owing by the respondent on the winding up of Olympian. In terms of its loan agreement with Olympian, the applicant was entitled to claim

immediate repayment of all amounts owed by Olympian on the latter's winding up. Since Olympian has been wound up, it follows there can be no impediment, according to Mr Melunsky, appearing on behalf of the applicant, to the applicant proceeding against the respondent of whatever was owed by Olympian up to the maximum of R700 000,00.

The full amount owing by Olympian by the applicant in terms of the senior loan agreement, had a repayment period of 12 months. It fell due for payment on 5 November 2008. At this stage Olympian could not pay this amount. This, in turn, led to a settlement agreement between the applicant, Olympian and the respondent. It was concluded on 19 December 2008. Olympian and the respondent acknowledged that, as at 1 December 2008, the former was indebted to the applicant to the amount of R80 124 174,15. In terms of clause 4.3 thereof, the parties agreed that the full amount would be due and payable on the signature date, that is 22 December 2008.

In terms of this settlement agreement, applicant was authorised to sell Olympian's property and if those proceeds were insufficient, to settle the indebtedness of Olympian to applicant. The latter was authorised to sell respondent's property which had been mortgaged to security for its obligation. The settlement agreement was subject to various

suspensive conditions, which are no longer central to the dispute between the parties. The applicant's attempt to sell Olympian's property in July 2009, was opposed by Olympian, which issued interdictory proceedings.

This application was dismissed with costs on 26 November 2009. On 11 December 2009, and prior to the registration of the property into the name of the purchaser, as I have already mentioned, Olympian was provisionally wound up. The final order was granted on 29 January 2010, on the basis that Olympian was commercially insolvent. As at the date of its liquidation, Olympian had failed to discharge its indebtedness to the applicant in the amount of R88 931 493,77. This does not appear to be in dispute. The applicant has, therefore, in terms of clause 15 of the suretyship agreement, established Olympian's indebtedness by way of a certificate.

The key issue, when the dispute was debated in this court, turned on what Mr Murphy, who appeared on behalf of the respondent, referred to as a prejudice defence. The respondent contended that the applicant, in its dealings and conduct with the respondent, had acted in a prejudicial manner towards the suretyship (that is respondent) for the loans of Olympian. Accordingly respondent had a defence that it should be released from its suretyship liabilities, a defence I

might add that Mr Murphy contended could be classified as *bona fide* for the purposes of justifying an opposition to an order of provisional liquidation.

I shall return to this defence presently. The question which, of course, underpins this entire dispute, is what constitutes the *bona fide* defence, is sufficient to justify opposition to an application such as the present. The so called Badenhorst principle, as articulated in Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 347 (T) at 348, asserted a foundational principle, that liquidation proceedings are not a legitimate mechanism for seeking to enforce payment of a debt which is *bona fide* disputed by the debtor. As the Court when on to state:

> "A petition presented ostensibly for a winding up order, but really to exercise pressure, will be dismissed and under circumstances may be stigmatised as a scandalise abuse to the process by the Court. Some years ago, petition founded on disputed debts, were directed to stand over till the debt established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petition,

but, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order."

The question, of course, which has vexed Courts since Badenhorst is what is meant by "on some substantial ground", bearing in mind that these applications come to court on paper without the benefit of oral evidence. In his careful and considered fashion, Thring, J in Hulse-Reutter v Heg Consulting enterprises (Pty) Ltd 1998 (2) SA 208 (C) at 219-220 sought to tease out a substantial answer to this question. The learned judge noted that it was not necessary for the respondent to produce on paper actual evidence on which it would rely at a trial. In other words, there is a difference to be drawn between the Badenhorst principle on the one hand and an application for summary judgment in terms of Rule 32 on the other.

What is required from a party such as respondent, is to allege facts which, if proved, would constitute a good defence to the claims made against it. In other words, the Court is enjoined to examine the answering affidavit and to decide whether the facts as alleged, if proved on the evidence, comprised a defence of substance to the claims which are alleged. In this case, the scope of this inquiry is narrowed to a considerable

extent by virtue of the fact that this suretyship agreement and accordingly with a dispute which falls within the scope of a dictum of the Supreme Court of Appeal ion Absa Bank Limited v Davidson 2000 (1) SA 1117 (SCA), para 19, where Olivier, JA said:

> "As a general proposition, prejudice caused to a surety can only release a surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer."

The critical question is the legal basis for the respondent as a surety to claim that a legal duty or obligation has been breached by the applicant as a result of which the surety now suffers prejudice. To this, Mr Murphy submitted that in terms of clause 11.1 of the principal agreement which had been entered into between Olympian and the applicant "the outstanding balance as a ratio to the value of the mortgage

properties, is not to exceed the percentage reflected in the facility schedule for the duration of the facility". The ratio for this particular facility in terms of the facility schedule records "ratio not to exceed 50% (existing value) in respect of remainder of the farm Klein Zeekoe Vallei Number 681 in the City of Cape Town, Cape Division, Western Cape Province ... and 50% (existing value) and erven 3488, 3993, 3576 Simon's Town and erven 15461 and 15462 Brackenfell.

Mr Murphy submitted that as these particular ratios had to be monitored "for the duration of the facility", the argument of respondent that the property values were insufficient to meet these ratios, implied there had been a breach of the clause which was thus to the legal prejudice of the surety.

It is difficult to divine the precise basis of this argument from the opposing affidavit in that, as I shall note presently, the opposing affidavit opposed to by Mr Karmis, is hardly precise about the value of the properties. In other words, whilst Mr Karmis contends that the provisions of clause 11.1 were not complied with strictly and, therefore, the lack of cover for the loans acted to his prejudice, he is also keen to inform the Court that the property values are much higher than would be required in terms of clause 11.1. This forms the basis now for an argument that applicant has prejudiced the respondent by

seeking to sell properties at a price vastly lower than that which they might fetch. For example, in paragraph 48 of the answering affidavit he says:

> "As mentioned above, I am convinced that this property generates far more than the 88 million outstanding on the bond. It should be noted that the applicant failed to provide the Court of any valuation by a property specialist or local reputable agency, would no doubt have placed a much higher value on the property than the R70 million mentioned by the applicants."

This then forms the basis for the general argument that the ratios has not been made in terms of clause 11.1 of the agreement. At para 54 of his affidavit he says:

> "In my view the properties are worth more than 100 million and if properly marketed, and not just to a few friends and the bank, generally enough for the sureties to be absolved from any liability."

In the applicant's replying affidavit, mention is made of Mr Karmis' allegation that the property is worth some R240 million. It is difficult, therefore, to understand precisely the

factual basis upon which his defence is predicated.

But, assume for the purposes of argument and in favour of the respondent, that a value of R70 million would not have covered an ongoing obligation pursuant to clause 11.1. Mr Melunsky, who appeared on behalf of the applicant, correctly pointed out that in order to examine the issue of the property ratios, the clauses of the contract had to be assessed in the totality of their context. In other words, clause 11.1 was qualified by clause 11.5. It read:

> "In the event that the ratio in 11.1 has exceeded, you undertake (you being Olympian) within 20 business days a receipt of a notice from us advising you that the afore-mentioned ratio has been exceeded, to offer additional properties to us as security. The identity of such properties to be agreed upon by both of us."

It is clear that this clause envisaged that there was an obligation on the part of the debtor to keep the creditor in knowledge about the values of the mortgage properties. If the value of the mortgage properties did not meet the ratios, then there was an obligation to inform the applicant of this fact so that it could offer additional properties as security. Mr Murphy

was constrained to concede that clause 11.5 did not in any way provide that in the absence of such an undertaking, the contract was immediately void. Indeed clause 11.5 indicates that the entire purpose of the ratio provision was to protect the creditor. There is no suggestion that the debtor would benefit thereby. What makes the argument of respondent even more problematic is that, as Mr Karmis was the alter ego of the respondent, it was for him to advise the creditor of the non-compliance with the ratio provision.

There is no legal basis as set out in this clause, which was the critical focal point of respondent's argument, that the surety, being respondent, could divine a legal right which imposed a legal obligation upon the creditor sufficient for respondent to bring itself within the scope of the Davidson principle as I have outlined it. Furthermore, there are additional difficulties which confronted respondent. There is a settlement agreement which, as I have noted, took place in 2008. There is no suggestion in that agreement that the question of ratios constitutes any obstacle to the rights being pursued by the applicant.

Indeed, though the cause of action appears to be predicated on the suretyship agreement, the settlement agreement certainly casts some considerable doubt on the *bona fides* of a

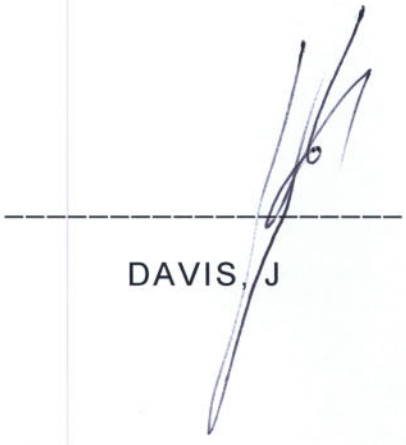
party who entered into this agreement without raising obstacles which it now seeks to do in order to stave off an application for liquidation. However, for the reasons that I have already set out regarding the question as to whether the suretyship has the kind of legal obligation which would justify prejudice, it is not necessary to decide this question. Neither is it necessary to decide the further point which Mr Melunsky pressed, namely that there are two loans, the mezzanine and the senior loan, that even if the property value was exceeded by the value of the senior loan, this was not the case with regard to the mezzanine loan.

In short, in order for the respondent to show on the papers that it has a *bona fide* defence, a defence which if the facts it avers would prove the trial would justify its argument, it was required to show the line of argument it took that it had suffered prejudice. To have suffered prejudice, it was required to show that there was a legal obligation which was imposed upon the applicant pursuant to clause 11 of the agreement to maintain the ratios in the fashion argued by the respondent, and to the benefit of a surety who was not a party to that agreement. There is no legal authority to justify some residual right which the suretyship was entitled to rely upon and the clause read as its whole, does not appear to sustain any basis for the argument so advanced.

For these reasons, therefore, and given that both the applications, that is for erf 15461 Brackenfell CC and Anthony Karmis Properties (Pty) Ltd were predicated on the same arguments and the same facts, I am justified in granting the order as sought.

The respondent, in both cases, is placed under a provisional order of liquidation in the hand of the Master of this court. A *rule nisi* is issued, calling upon the respondent and all parties interested to show cause, if any, on Thursday, 3 February 2010, why respondent should not be placed under a final order of liquidation and why the costs of the application should not be costs in the liquidation.

This order will be effected on the respondent on the South African Revenue Services and by one publication each at Cape Town in Die Burger newspapers. In the light that Mr Melunsky has handed up draft orders, I simply read out the basis of the order and I am going to sign the two orders as reflecting the order of this Court.



DAVIS, J

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