THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2152/2010

In the matter between:

FIRST RAND BANK LIMITED **t/a RMB PRIVATE BANK**	Plaintiff

and

PINNACLE POINT INVESTMENTS (PTY) LIMITED	First Defendant
SUPRADOR 103 CC	Second Defendant
PINNACLE POINT RESORTS (PTY) LIMITED	Third Defendant
PINNACLE POINT HOLDINGS (PTY) LIMITED	Fourth Defendant
IVOR CHARLES STRATFORD	Fifth Defendant
DAVID CARL MOSTERT	Sixth Defendant

MERVYN RODERICK KEY	Seventh Defendant
RAGAVAN MOONSAMY	Eighth Defendant
POLELO LAZARUS ZIM	Ninth Defendant
WEDGEWOOD VILLAGE GOLF AND COUNTRY ESTATE	Tenth Defendant
CLARENS GOLF ESTATE	Eleventh Defendant
WESSWLHEIM ESTATE (PTY) LIMITED	Twelfth Defendant
PROPERTY PROMOTIONS AND MANAGEMENT (PTY) LIMITED	Thirteenth Defendant
THE IC STRATFORD TRUST	Fourteenth Defendant

JUDGMENT : 27 JUNE 2011

VELDHUIZEN J:

[1] This is an application for summary judgment against:

a) The first, second, third, fourth, fifth, tenth, eleventh, twelfth, thirteenth and fourteenth defendants, jointly and severally, for payment of the sum of R19 100 503,92 together with interest thereon at the rate of 11% per annum from 8 December 2010 until date of payment.

b) The sixth, seventh, eighth and ninth defendants, jointly and severally, for payment of the sum of R500 000.

And an order against:

c) The second defendant declaring erf 16766 Mossel Bay, situate in the Mossel Bay Municipality, Mossel Bay, Province of the Western Cape in extent 637 square metres and held under Deed of Transfer T41184/2004 but subject to a restriction of alienation in favour of the Pinnacle Point Lodge Homeowners Association, to be specially executable.

d) The twelfth defendant declaring remainder of the farm Wesselheim 1793 District Bethlehem, Province Free State in extent 45,5815 hectares and held under Deed of Transfer T10755/2006, to be specially executable.

And in any event and order that the defendants pay:

e) The costs of suit on an attorney and own client scale.

[2] On 25 September 2007 the plaintiff and the first defendant entered into an agreement ('the agreement'), replacing their previous agreement, in terms of which the plaintiff granted to the first defendant a loan of R22 500 000. The second to fourteenth defendants entered into suretyship agreements with the plaintiff in respect of the loan. The sixth, seventh, eighth and ninth defendants suretyship agreements limited their liability to R500 000.

[3] In terms of the agreement the loan was repayable on demand. The first defendant failed to meet its monthly payments in terms of the agreement and the plaintiff, after granting the first defendant a period of twenty days to rectify its default, demanded repayment of the loan. The sureties were also notified that they were being held liable in terms of their suretyships. No payment was forthcoming and the plaintiff issued summons claiming

repayment of the loan. The defendants filed a Notice of Intention to Defend and hence the present application.

[4] An affidavit of one Steven Kruger was filed, on behalf of the first and third defendants as well as the tenth to fourteenth defendants, opposing the application. The other defendants also filed affidavits in which they confirm the facts set out in Kruger's affidavit and associate themselves with the request that summary judgment be refused.

[5] The main ground of opposition is that on or about 3 August 2009 the agreement was amended to replace the loan facility from one repayable on demand to one repayable after a fixed term of 3 years. It is alleged that this was done in terms of clause 14.3 of the agreement. This clause reads:

> 'The Bank may agree to vary the Facility at your request and any such variations shall be recorded in a new Facility letter addressed by the Bank to you.'

In support of this contention Kruger refers to various letters that were exchanged between the plaintiff, the first defendant and other financiers. He concludes 'It is apparent from the above that the facility agreement concluded between the parties was amended on or about 3 August 2009. The facility was thereby converted into a three-year "term facility" with interest capitalised.'

[6] The defendants overlook the fact that any such variation, to be binding, must be reduced to writing and signed by the parties. This is a requirement in terms of clause 15.1 of the agreement which reads as follows:

> 'No alleged terms or conditions of any Facility letter shall be of any force and effect unless reduced to writing and signed by you and the Bank.'

[7] It is submitted on behalf of the defendants that 'a new Facility letter' in terms of clause 14.3 is sufficient to convert the agreement from a 'demand facility' to a 'term facility' and that clause 15.1 of the agreement does not find application in this case. I do not agree. The clear wording of clause 15.1 of the agreement demands that any 'Facility letter' be reduced to writing and be signed by the parties before it can constitute a binding amendment of the agreement. This was not done and accordingly this contention cannot be upheld.

[8] It was further submitted that the plaintiff failed to prove the applicable interest rate to be 11%. The 'CERTIFICATE OF BALANCE' of the authorised officials of the plaintiff state the interest rate. This is in my view in accordance with the agreement.

[9] I am satisfied that the affidavit of Kruger does not disclose a bona fide defence which is good in law. I accordingly grant the plaintiff's application for summary.

A.H. VELDHUIZEN
JUDGE OF THE HIGH COURT