IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case no: 07/22367

In the matter between:

LAMULA PARTNERSHIP	Applicant
and	
MASINGITA GROUP (PTY) LIMITED	First Respondent
MASINGITA MINING AND MINERALS OF SOUTH AFRICA (PTY) LIMITED	Second Respondent

---

JUDGMENT

Van Rooyen AJ

[1] The Applicant ("Lamula") has applied for an order that Respondents ("Masingita") jointly and severally make payment to it of R8 787 500-00 plus interest. Furthermore for an order authorising and declaring that Lamula is entitled to cause all or any of the pledged securities to Lamula to be sold at a fair and reasonable market value; to apply the nett proceeds of such sale for the reduction or payment of the debt to Lamula by Masingita; and to pay the free residue to Masingita. A costs order on the scale of attorney and client was also sought. Lamula's claim is based on a loan agreement, secured by f pledges of share certificates.

[2] Masingita has raised various defences: (1) that the loan and pledge agreements were simulated transactions; (2) denied that Lamula loaned them the amount claimed or paid it on their behalf as alleged; (3) denied that MacDonald Temane ("MacDonald") was authorised to represent Masingita in concluding the loan agreement and the pledges; and (4) alleged that the suspensive condition in the loan agreement was not fulfilled and that, accordingly, the loan agreement was of no force or effect.

The Court's Role

[3] In spite of the fact that Lamula has possession of the pledged share certificates, it has sought a declarator regarding the enforceability of the pledges so as of protect the rights of a debtor against execution provisions which are possibly contra bonos mores. See Bock v Duburoro Investments (Pty) Ltd 2004 (2) SA 242 (SCA) at 247E-248D:

[7] The principles concerning parate executie (immediate execution) are trite. A clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgagor or the court by taking possession of the property and selling it is void. Nevertheless, after default the mortgagor may grant the bondholder the necessary authority to realise the bonded property. It does not matter whether the goods are immovable or movable: in the latter instance, to perfect the security, the court's imprimatur is required. It is different with movables held in pledge: a term in an agreement of pledge, which provides for the private sale of the pledged article and in the possession of the creditor, is valid but a debtor may 'seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him

in his rights'.
Smalberger JA put the proviso in slightly different terms when he said that for validity the private execution clause should not prejudice, or be likely to prejudice, rights of the debtor unduly, meaning that the clause should not contain execution provisions that would be contra bonos mores. (Emphasis added).

Section 34 of the Constitution, which guarantees the role of the Courts in the resolution of justiciable disputes, lurks in the background of this protection against instances where creditors are permitted to execute without intervention of the Courts. See SA Bank of Athens Ltd v Van Zyl 2005 (5) SA 93 (SCA) at para [10], [11] and [13].

[4] Lamula has therefore sought the Court's judicial sanction by seeking the declarators in regard to the stipulations of the pledges. Masingita has not attacked the provisions and stipulations of the pledges and the declaratory orders sought by Lamula as being unconscionable, illegal or immoral. It was, accordingly, contended by Mr Kairinos, on behalf of Lamula, that should the Court dismiss the defences raised by Masingita, the Court would be entitled to enforce the provisions of the pledges as sought in the notice of motion.
The Masingita Defences
[5] Masingita alleges that the loan agreement and the pledges were simulated transactions and that it was not contemplated by the parties that any rights would accrue to the parties in respect thereof. In this regard Masingita alleges that the real purpose of the documents was to protect Lamula's rights by preventing Masingita shareholding in Majorshelf and BSS from falling into the hands of a third party. Mr. Kairinos pointed out that no explanation is furnished in the answering affidavit as to how the signature of the documents would purportedly protect Lamula's rights as alleged or prevent Masingita's shareholding in Majorshelf and BSS from falling into the hands of third parties.
[6] Mr. Redman, on behalf of Masingita, argued that there were sufficient facts alleged by Masingita, to support the view that the transaction was simulated. Mr. Kairinos, for Lamula, however, submitted that none of the said expositions of the background circumstances supports Masingita's version that the documents were simulated transactions and such exposition is indeed, in his view, irrelevant in determining whether the Masingita version is plausible or probable. Mr. Kairinos ultimately submitted that the Masingita version that the documents were simulated transactions is untenable, improbable and implausible. I agree that throughout the exchange of correspondence between the parties and particularly when Lamula demanded repayment of the loan and also indicated that it was intending to enforce the provisions of the pledges, neither the Respondents nor their legal representatives, ever raised the version that the said documents were simulated transactions. I agree with the submission that it is highly improbable that a party faced with such a demand in respect of agreements which it believes were simulated transactions and in respect of which no rights accrued to Lamula, would remain silent in regard to this fact and not raise the fact that the agreements were never intended to be enforced and were simulated transactions.
[7] Furthermore, Masingita relies on the fact that the amounts set out in annexure "A" to the loan agreement are incorrect and suggest that the reason that such are incorrect was because they were fictitious amounts. Lamula, however, explains in the replying affidavit, read with the founding affidavit, that the amounts were in fact loaned to Masingita or paid on their behalf, but that the dates were incorrect because they were taken from general ledgers which reflected month end dates and did not indicate the exact date upon which the payments were made.

[8] Lamula furthermore states that the dates and amounts set out in its schedule of payments as annexed are indeed accurate. This is furthermore confirmed by the Lamula accountant in accordance with the provisions of clause 7.1 of the loan agreement. This sub-clause provides that the amount of the Masingita indebtedness to Lamula would be determined and proved by a certificate stating such amount, to be signed by a representative of Lamula, who would be an accountant and whose authority to sign such would be unassailable.

[9] The high-water mark of the Masingita case, argued Mr. Kairinos, is a bald denial coupled with an allegation that it appears from the Masingita investigations that certain of the dates and amounts reflected in the annexure coincide with amounts lent and advanced by Lamula to Majorshelf and recorded in the books of Majorshelf as credits to Lamula's loan account.

[10] Lamula explains in its replying affidavit that the reason why payments were made directly to Majorshelf, on Masingita's behalf, was because a previous payment to Masingita, which was in turn supposed to be paid by Masingita to Majorshelf, was never so paid by Masingita. In the circumstances the parties agreed that Lamula would make payment directly to Majorshelf, on Masingita's behalf. Furthermore, Majorshelf's accountant confirms that the reason such payments were reflected to the credit of Lamula's loan account was because they were received directly from Lamula.

[11] Masingita furthermore, according to Mr. Kairinos, attempts to make some issue of the fact that in terms of the shareholders' agreement, Masingita was not entitled to pledge the said shares without compliance with the requirements of the said clause. Whilst this may be so, he argues that this does not detract from the fact that Lamula is not a party to the said shareholders' agreement and is therefore not bound thereto. Furthermore, if Masingita's pledge of the shares to Lamula constitutes a breach of the pre-emptive rights of its fellow shareholders, it is the fellow shareholders' right to take action against Masingita or Lamula.

None of the other shareholders has taken issue with the pledge of the shares to Lamula and it was submitted that the point is therefore moot.

[12] It was submitted by Mr. Kairinos that it must be borne in mind that the Respondent bears the onus of proving that the documents were in fact simulated transactions. Furthermore and importantly, Lamula alleges that not only were the agreements genuine, but that Masingita in fact considered them, applied their minds to such and requested certain amendments thereto. It is highly improbable that a party would require amendments to an agreement which it does not believe is binding and is merely a simulated or sham transaction.

[13] I agree with Mr. Kairinos. The circumstances, as set out in the papers, do not support the view that the transaction was simulated. The onus rests on the party which alleges simulation and Masingita has failed in its attempt to do so. See Zandberg v Van Zyl 1910 AD 302 at 314.Also see Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner of Inland Revenue 1996(3) SA 942(A) per Hefer JA at 952.

Masingita's denial that Lamula loaned them the amount claimed or paid it on their behalf as alleged

[14] The denial that Lamula loaned Masingita the amount claimed or paid such on Masingita's behalf has to a certain extent been dealt with in the previous paragraphs. However, Lamula has also proved that it indeed paid the amounts claimed either directly to Masingita or at least on their behalf. In this regard Lamula corrects Masingita's allegation as to how much Masingita paid for the shareholding and proves its assertion by attaching the

documentation from the Compass Group, which verifies Lamula's version in this regard. Lamula has contended that it has paid the amounts on Masingita's behalf and Masingita has not countered such allegation, other than with a bald denial. Masingita has also not attached any documentation to prove that they indeed paid for their shareholding or made payments to capitalise Majorshelf (as was their obligation).Masingita has also not discharged the onus upon them of disproving the certificate of balance provided by Lomnitz, which constitutes prima facie proof of their indebtedness. Upon demand Masingita did not raise a real or bona fide dispute other than to question how the amount was calculated and to state that "it was under the impression that any amounts which may have been due would have been repaid by virtue of its shareholding in Headline Leisure (Pty) Ltd and Majorshelf 194 (Pty) Ltd by now. Masingita also did not explain on what basis they disputed their indebtedness other than to state that they were not aware of precisely how much they owed Lamula and that they sought a reconciliation of such.The following comments of Cameron JA in Fakie v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 348-349, are particularly apposite:
[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634-5 per Corbett JA, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.
[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence. (footnotes omitted)

The Masingita' denial that MacDonald Temane was authorised to represent the Masingita in concluding the loan agreement and the pledges

[15] The denial that MacDonald was authorised to represent Masingita is similarly lacking in credence and plausibility if regard is had to the circumstances of the matter. MacDonald was instrumental in representing Masingita throughout the negotiations in regard to the acquisition of the shareholding in BSS and Majorshelf and Masingita has never denied this. Furthermore, Lamula correctly points out that not only was MacDonald always representing Masingita in these transactions, but that Peter Temane (the deponent to the Masingita answering affidavit) was clearly aware of this.The agreements contained a resolution purportedly passed by the Board of Directors of Masingita authorising MacDonald to represent Masingita in the conclusion of the loan agreement and the pledges. Such resolutions contain the signature of MacDonald as representing Masingita as Chairman or Company Secretary and in his capacity as Director of Masingita (it has not been denied that

MacDonald is indeed a director of Masingita).MacDonald also represented Masingita in the conclusion of the share sale agreements and all other agreements attached to Masingita's answering affidavits and upon which Masingita rely. At no stage was it brought to Lamula's attention that MacDonald is not authorised to represent Masingita in any transactions.It is, accordingly, reasonable to infer that that not only was MacDonald actually authorised to represent Masingita, but that at the very least MacDonald was impliedly authorised to represent Masingita by virtue of his position within Masingita, namely a director and person who normally represented Masingita.In the case of companies a third party contracting with a company is entitled to assume that certain classes of company officials have implied authority to do what is usually associated with the duties exercised by that class. See Wolpert v Uitzigt Properties (Pty) Ltd and Others 1961 (2) SA 257 (W) at 265D-267A;Tuckers Land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T) at 14C-15H; Glofinco v ABSA Bank Ltd t/a United Bank 2002(6) SA 470(SCA).

[16] In the circumstances it is reasonable to infer that MacDonald had either actual, implied or ostensible authority to represent Masingita in concluding the loan agreement and the pledges. Furthermore, Masingita's denial of such authority is in the circumstances a bald denial and implausible. Masingita has not attempted to explain how it was that MacDonald was representing Masingita in all other transactions but in these specific ones, he did not have authority.

Masingita allegation that the suspensive condition in the loan agreement was not fulfilled and accordingly the loan agreement is of no force or effect

[17] Even if the Masingita is correct in its contention that the suspensive condition was not fulfilled since the full amount set out in the loan agreement was not advanced to them and that therefore the agreement is of no force and effect, this does not mean that Lamula is not entitled to repayment of the amounts advanced on Masingita's behalf. Where there has been a failure of an agreement due to non-fulfillment of a suspensive condition, the parties are entitled to restoration of any performance in terms of the inchoate agreement. Christie The Law of Contract in South Africa 5th Edition page 146; Melamed v BP Southern Africa (Pty) Ltd 2000(2) SA 614 (W) at 625G-626I per Blieden J (with whom Malan J and Coppin AJ concurred).

[18] The pledges clearly state in clause 2.1 thereof, that Masingita as security for the proper and timeous performance by them of their obligations of whatsoever nature and howsoever arising or arising from payments made by the Lamula to any other person or persons on behalf of the respective Masingita, pledged to Lamula all right, title and interest which Masingita may have had to and arising from the securities, together will all rights of action thereunder.

Disputes of Fact

[19] In so far as there are disputes of fact, I am satisfied that having regard to the test set out in Fakie (supra) and Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) Lamula has discharged its onus of proving that Masingita is indebted to it in the amount claimed. Therefore it is entitled to rely on the provisions and stipulations of the pledges with regard to execution upon its security. Masingita has failed to show that the transaction was simulated.

[20] As to costs I do not believe that an order to pay costs at the scale of attorney and client is justified. I could find no such stipulation in the agreements and

there are no aggravating circumstances which would justify such an order.

Order

1 .The application, as set out in the notice of motion, is granted.

2. The first and second Respondents, jointly and severally, must pay the Costs of the application.

…….

JCW van Rooyen 18 February 2008

Acting Judge of the High Court

For the Applicant : G Kairinos instructed by Christodoulo & Mavrikis Inc, Johannesburg

For the Respondent: NPG Redman instructed by Mageza Le Roux Vivier & Associates, Johannesburg