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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 05/11/2009
CASE NO: 48088/2008

UNREPORTABLE

In the matter between:

BAN KONSULT (PTY) LIMITED	APPLICANT
And	
ERROL MELVILLE KRUGER	1ST RESPONDENT
F.C. KIRK-COHEN	2ND RESPONDENT
A H JAFFER	3RD RESPONDENT
S ZILWA	4TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] In this review application which came before me, Mr Mundell appeared for the applicant and Mr Ginsburg SC assisted by Mr McNally appeared for the first respondent, which is the Registrar of Banks, duly designated as such by the South African Reserve Bank in accordance with the provisions of section 4(1) of the Banks Act, 94 of 1990 ("the Act").

[2] The second, third and fourth respondents constituted the Board of Review ("the Board"), which was duly established in terms of section 9(2) of the Act, and the decision of which was challenged in the application for review which came before me.

Background and Brief Synopsis

[3] In February 2007, the applicant applied to the first respondent ("the Registrar") in terms of section 12(1) of the Act for authorisation to establish a bank. The aim of the applicant was to conduct the business of a bank through the medium of a public company which was proposed to be named the Production Bank Controlling Company Limited.

[4] This application ("the February application") was launched after an earlier application in November 2005 ("the November application") had been rejected by the Registrar.

For purposes of the February application, the applicant appointed an agent, Deloitte en Touche, to represent the applicant as agent for purposes of submitting the application.

[5] The February application was also refused, and, in terms of section 9(1) of the Act, the applicant sought a review of that refusal by the Board.

[6] By a decision published in April 2008, the Board refused the review and confirmed the Registrar's decision.

[7] It is this decision of the Board which was challenged on review by the applicant. In terms of the notice of motion, the applicant seeks an order in the following terms:

> "1. Reviewing and setting aside the decision of the Banks Board of Review published on 23 April 2008 in terms of which:
>
> 1.1 The Board refused the applicant's review of the decision taken by the Registrar of Banks to reject the applicant's application for authorisation to establish a bank; and
>
> 1.2 The decision of the Registrar of Banks was confirmed."

Section 9(2A) of the Act versus the Promotion of Administration Justice Act, 3 of 2000 ("PAJA")

[8] Section 9(2A) of the Act reads as follows:

> "In any review under subsection (1), the board of review is, subject to the provisions of subsection (8), confined to establishing whether or not, in the taking of the relevant decision, the Registrar exercised his or her discretion properly and in good faith." (Emphasis added)

[9] Subsection (8) does not apply for purposes of this application.

[10] In its well reasoned and comprehensive judgment, the Board placed on record that, at no stage during the proceedings before it, any reliance was placed upon any absence of good faith on the part of the Registrar. It was common cause that the Registrar had acted in good faith.

[11] In the proceedings before the Board, the applicant argued that the review and the Registrar's decision are both subject to the provisions of PAJA read with section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996.

[12] Accordingly, it was argued on behalf of the applicant that the decision of the Registrar was in contravention of sections 6(2)(d), 6(2)(f) or 6(2)(h) of PAJA. In summary, it was argued, on the strength of these subsections, that the decision was materially influenced by an error of law, the decision was not rationally connected to the purpose for which it was taken, the purpose of the Act, the information before the Registrar or the reasons given for it by the Registrar and that the decision was so unreasonable that no reasonable person could have so exercised the power or performed the particular function.

[13] In its judgment, the Board pointed out, correctly, that section 9(2A) of the Act was introduced in terms of Act 19 of 2003, three years after the passing of PAJA in 2000. The legislature was obviously aware of PAJA when this particular subsection was enacted.

[14] The reasoning of the Board, with which I am in respectful agreement, continues along the following lines: section 9(2A) expressly provides a limitation upon the ambit of review. The legislature uses the word “confined”. In the present instance, where *bona fides* is not an issue, the Board is therefore “confined to establishing whether or not, in the taking of the relevant decision, the Registrar exercised his or her discretion properly …” in the words of the subsection, *supra*.

The word “confined” is defined in the Shorter Oxford Dictionary and also the Oxford English Dictionary as being “to limit, restrict” and in Webster’s New Universal Dictionary as ”restricted within limits”.

This limitation is underscored by the provisions of section 9(9) of the Act which provides that the procedure at the review shall be determined by the Chairman of the Board of Review – “subject to the provisions of subsection (2A)”. The Board is not at liberty to alter or relax that provision.

[15] The Board also relied on the following remarks made by the learned judge in *Registrar of Banks v Regal Treasury Private Bank Limited* 2004 3 SA 560 (W) 567A:

> "The effect of section 9(2A) is accordingly to limit the grounds upon which the board of review may set aside or vary a decision of the Registrar."

[16] Counsel for the Registrar argued that this limitation of the ambit within which the Registrar's decision can be reviewed, probably flows from the fact that the provision deals with the review of a decision of the Registrar operating in his specialist capacity as Administrator of Banks, having special expertise and experience in the administration of banking matters.

The Registrar's decisions will in the circumstances not lightly be overruled by the courts, and it is entirely understandable, so the argument goes, that the legislature would, in deference to the special expertise and experience of the Registrar, have placed limits on the permissible ambit of any review of his decisions. In support for this argument,

counsel refers to Cora Hoexter with Rosmary Lyster (edited by Iain Currie), The New Constitutional and Administrative Law vol II: Administrative Law (2002) at pages 31 to 32 para 1.7.2.2 and the authorities there cited.

[17] Counsel for the Registrar point out, correctly in my view, that the Registrar plays a crucial role with regard to the stability and soundness of the South African Banking System. As such his role as “gatekeeper” with regard to the authorisation of prospective applicants to establish a bank is paramount. The Registrar has a duty to ensure that when an applicant ultimately progresses to the stage of consideration for registration as a bank, he can be content that he has taken all reasonable steps to assure himself that the bank will operate successfully as such, and is unlikely to fail or conduct itself in a manner which might place the South African Banking System at risk. These sentiments are in harmony with the provisions of section 13(2) of the Act, to which I shall shortly refer hereunder.

[18] In this regard the Registrar, in his opposing affidavit, and with the necessary humility, also makes the following submissions:

> "13. With the greatest respect to this Honourable Court I and my Deputy Registrars have an extensive and unparalleled understanding and knowledge of the banking system, both local and international, and of the particular weaknesses in that system and, therefore, the risks to which it is particularly susceptible.
>
> 14. I have been the Registrar since 1 November 2003, and before that I was the Deputy Registrar for a period of two years. In all, I have spent some twenty years in the office of the Registrar of Banks, and Mr Blackbeard thirteen years. (Note: Mr Blackbeard is the Deputy Registrar who took the actual decision which was also approved of by the Registrar).

19. The Registrar has particular expertise and experience that enables it (*sic*) to apply these principles reasonably, independently and in the interest of the South African Banking System. As such, I respectfully submit that this Honourable Court should accord due deference to decisions taken carefully and deliberately by the Registrar."

[19] On this subject, it is also appropriate, in my view, to revisit the words of O'REGAN J, in *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs* 2004 4 SA 490 (CC) at 514F-515B:

> "In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give

> weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker."

[20] In the proceedings before the Board, it was argued on behalf of the Registrar that this limited review does not intrude into the arena of whether the Registrar's decision was right or wrong, but is rather aimed at the regularity of the proceedings in terms of which the decision was reached. The Board, in endorsing these submissions, referred to the case of *S v Mohamed* 1977 2 SA 531 (A) where the Appeal Court was discussing a limited re-hearing and held, at 538E-F, that, on review, the duty of the court is "… to

determine not whether the decision was right or wrong, but whether he (the deciding officer) exercised his powers and discretion honestly and properly".

Against this background, the Board came to the following conclusion:

> "On the facts of this case as analysed in this decision, read as a whole, we are of the view that this is not an instance where the provisions of PAJA can or should supplant or extend the clear provisions of subsection (2A)."

[21] It was within these narrow confines that the Board was obliged to (and did) deal with the review.

[22] At the commencement of the proceedings before me, Mr Mundell, quite properly and correctly in my opinion, announced that the applicant was no longer arguing that this approach adopted by the board was not the correct one.

Sections 12 and 13 of the Act

[23] Broadly speaking, the Act provides for a two stage process to be followed by an applicant for registration as a bank: sections 12 and 13 deal with an application for authorisation to establish a bank and sections 16 and 17 deal with the second stage, namely the actual application for registration as a bank, which may be launched within twelve months from the date when the authorisation was granted in terms of section13.

[24] Section 12 provides that an application for authorisation shall be made in the manner and on the form prescribed by regulation, and shall be accompanied by a statement containing the prescribed information. It also provides that the Registrar may require an applicant to furnish him or her with additional information and documents or a report by a public accountant or by any other knowledgeable person approved by the Registrar. (Emphasis added)

[25] Section 13 provides that the Registrar may, after considering all the information and documents and reports, grant or

refuse the application or grant the application subject to such conditions as he or she may determine.

[26] Section 13(2) is couched in peremptory terms and reads as follows:

> "(2) The Registrar shall not grant an application made under section 12 unless he or she is satisfied –
>
> (a) That the establishment of the proposed bank will be in the public interest;
>
> (b) That the business the applicant proposes to conduct, is that of a bank;
>
> (c) That the applicant will conduct the proposed business of a bank in the capacity of a public company incorporated and registered under the Companies Act;
>
> (d) That the applicant will be able to establish itself successfully as a bank;

(e) That the applicant will have the financial means to comply, in the capacity of a bank, with the requirements of this Act;

(f) That the business of the proposed bank will be conducted in a prudent manner;

(fA) That every person who is to be a director or an executive officer of the proposed bank is, as far as can reasonably be ascertained, a fit and proper person to hold the office of such director or executive officer;

(g) That every person who is to be an executive officer of the proposed bank has sufficient experience of the management of the kind of business it is intended to conduct; and

(h) that the composition of the Board of Directors of the proposed bank will be appropriate having regard to the nature and scale of the business it is intended to conduct." (Emphasis added)

[27] Before the Board it was argued on behalf of the applicant that the provisions of section 13(2) should not be so peremptorily or literally applied in the light of the later provisions of sections 14 and 16 of the Act. This, despite the clear wording of section 13(2).

It was pointed out on behalf of the applicant that once authorisation had been granted in terms of sections 12 and 13, the applicant has twelve months within which to satisfy the Registrar (before the section 16 second stage procedure) that the proposals contained in the application for authorisation have been met. In the result, and because authorisation to establish a bank in terms of section 13 does not confer on the applicant the right to conduct the business of a bank, that authority does not expose either the public or the banking industry to any risk.

Inasmuch as this may have been an attempt to water down the peremptory requirements of section 13(2), this argument was, correctly in my view, rejected by the Board. The Board concluded that the force and effect of the peremptory provisions of section 13(2) are not altered or to be read subject to the provisions of any of the later sections of the Act. In particular, so the Board held, there is no question of a lesser standard of proof at the section 13 stage.

The main thrust of the Applicant's submissions

[28] I have already pointed out that one of the applicant's arguments, namely that the Board erred in confining its approach to the limitations imposed by section 9(2A), *supra*, to the exclusion of the wider PAJA review grounds, was abandoned for purposes of the proceedings before me.

[29] What was left, stated in very basic terms, was an argument that the Board had erred in endorsing a decision by the Registrar, when considering the section 12 application, to insist on proof that the relevant or required capital had been paid into or was held in a trust account before the application

could be considered further and that the funds had been verified by an auditor as fully complying with the requirements of the Financial Intelligence Centre Act, 38 of 2001 and the Regulations issued in terms thereof.

[30] The main submissions on behalf of the applicant can perhaps be summarised along the following lines: at all material times the applicant intended to conduct the business of a bank through the medium of a public company which was proposed to be named the Production Bank Controlling Company Limited.

Although it was the applicant that applied for authority in terms of sections 12 and 13, it was never intended that the applicant would itself conduct the business of a bank. The applicant was only intended to be a minority shareholder. The proposed bank intended to focus its activities exclusively on investment and/or merchant banking activities and never sought to supply retail banking services. The motivation behind the application was that the retail banking sector in South Africa was adequately provided for through the existing four mainstream banks. In an environment in

which the active involvement of black South Africans in all aspects of commerce and business had expanded exponentially, a bank owned and controlled by blacks targeting the rapidly burgeoning fixed domestic expenditure programme was conspicuous by its absence.

[31] Some of the forms required to be completed for purposes of a section 12 and 13 application, could not be completed as certain potential shareholders of the banks controlling company would only consider participation once an indication had been received that the authorisation to establish a bank would be granted. (Emphasis added)

In my view, this was one of the main difficulties which hampered the progress and prospects of success of the application, as will be illustrated more fully hereunder.

[32] Only when the authority had been granted in terms of section 13, will the public company be registered and will interested shareholders be entitled to take up their interests. In the circumstances it was proposed that registration of both

the bank and the bank controlling company would only occur once authorisation to register a bank had been granted.

[33] After considering the application, exchanging correspondence with the applicant and holding meetings with representatives and proposed shareholders, the Registrar concluded that the application was incomplete and inadequate. The Registrar's decision was founded on what he describes to be the two cornerstones of banking:

1. The identification, fitness and propriety and financial strength of the ultimate shareholders of the bank; and

2. The nature and availability of the required capital.

[34] The applicant argued that the Registrar had misdirected himself by adopting this attitude:

One of the forms to be completed in an "application for authorisation to establish a bank or registration as a bank" is form DI 002. In section 4(x) thereof is required "a report by a public accountant, as defined in section 1 of the Public

Accountants' and Auditors' Act, 1991 (Act 80 of 1991), on funds received from anticipated shareholders and held in a trust account".

It was argued on behalf of the applicant that section 4(x) only comes into operation in circumstances in which such funds are held in trust. In that event the Regulations required a report by a public accountant.

It was argued that neither section 12 nor section 13 of the Act contains the requirement that an applicant who seeks authorisation to establish a bank is required to have paid any capital sum into a trust prior to submitting the application. It was also argued that support for the Registrar's approach cannot be found in the Regulations either.

It was also argued that the Registrar, erroneously, insisted on compliance with the requirements of section 70 of the Act, at the section 12 application stage whereas it only came into play during the second (section 16) stage. This section is aimed at regulating a minimum amount of primary and

secondary unimpaired reserve funds in the Republic which must be available to the bank at any given stage.

[35] Another ground of review advanced on behalf of the applicant was that the Board had erred in paying regard to an argument on behalf of the Registrar that the applicant, in its section 12 application, had failed to comply with the peremptory requirements of section 13(fA), 13(g) and 13(h), *supra*. As appears from the wording of these subsections, quoted above, they deal with certainty having to be provided with regard to the fitness of directors, executive officers and the composition of the board of directors.

This objection by the Registrar flows from the total uncertainty as to the identity and capacity of proposed shareholders and directors and executive officers of the proposed bank.

It was argued on behalf of the applicant that this objection is “an afterthought” and was not raised initially by the Registrar prior to refusal of the application.

[36] With regard to the main attack, namely that the requirement for funds to be deposited in advance is not provided for in the enabling legislation, Mr Mundell, if I understood him correctly, relied on the provisions of section 6(2)(e)(iii) of PAJA. This is an attack on the administrative action which was taken "because irrelevant considerations were taken into account or relevant considerations were not considered".

In view of the concession regarding the section 9(2A) argument, I find it difficult to understand on what basis Mr Mundell could revert to an argument based on this subsection of the section 6 PAJA review grounds. As I understand the record, this argument was also not advanced before the board where reliance was placed on sections 6(2)(d)(f) and/or (h) of PAJA. Perhaps because of the concession made, none of these subsections were relied on during the proceedings before me.

The main thrust of the arguments advanced on behalf of the Registrar

[37] As part of the proceedings before the Board, the Registrar submitted a lengthy and comprehensive affidavit deposed to by Mr Blackbeard, the Deputy Registrar, and supported fully by the Registrar in a verifying and supporting affidavit in which the Registrar states that he also considered, prior to each of the rulings having been taken by Blackbeard, the first and second applications as submitted by the applicants for purposes of an authorisation to establish a bank controlling company and a bank. He agreed, for the reasons set forth in the Blackbeard affidavit, with the rulings made by Blackbeard in respect of each of the applications.

[38] I have referred, briefly, to the fact that the attitude adopted by the applicant was that authorisation in terms of sections 12 and 13 first had to be obtained before shareholders and potential executive officers would commit themselves to the proposed bank.

[39] After sketching, in some detail, the inability of the applicants to furnish names and details of proposed shareholders and executive officers, Blackbeard says the following:

> "53. In the light of these responses and the obligation imposed upon the Registrar to satisfy himself with regard to various matters which relate to an application for authorisation made under section 12 of the Act, I came to the conclusion that it was impossible for me to satisfy myself, as I was required to do in terms of section 13(2) of the Act that:
>
> 53.1 Every person who was to be a director or executive officer of the proposed bank was a fit and proper person to hold office of such director or executive officer; or
>
> 53.2 Every person who was to be an executive officer of the proposed bank had sufficient experience of the management of the kind of business it intended to conduct, or that

the composition of the board of directors of the proposed bank would be appropriate having regard to the nature and scale of the business it intended to conduct.

54. Paragraphs (l), (n) and (x) of Part 4 of Form DI 002 call for certain financial information required to satisfy me of the ability of the applicant to establish itself as a bank, and not of its financial means to do so. It is apparent from paragraph (x) that Form DI 002 contemplates the attachment of a report by a public accountant that funds have been received from anticipated shareholders and are held in a trust account.

55. This requirement is fundamental to any application for authorisation to establish a bank in circumstances where the capital adequacy of the proposed bank cannot otherwise be established. (Emphasis added)

56. It is a striking feature of the applicant's application for authorisation that no information whatsoever is provided upon which I would be in a position to form any responsible view as to whether the proposed bank will have the financial means to comply with the requirements of the Act, or will be able successfully to establish itself as a bank. In addition the applicant did not include, in its application, completed forms DI 300 (liquidity risk) and DI 400 (capital adequacy).

56.1 The financial viability of the proposed bank is dealt with in the supporting schedule attached to the applicant's application. In the executive summary (page 3) it is dealt with as follows:

> '1.8 Financial viability
>
> The production bank's capital will comprise a combination of ordinary share capital, share

premium and preference shares alike as indicated in Part 6 of the supporting schedules. The bank is seeking to raise some R12 billion from various sources. In this regard, negotiations are presently in progress in terms of which:

- Finance will be availed to the BEE entities for purposes of contributing to their share of the equity;

- Several institutions have expressed interest in equity participation in the bank; and

- Certain European government supported

institutions, known to be anxious to broaden support to African project development, have also indicated their interest in funding the bank's operations. Provided the opportunities presented by the new bank are appropriately marketed through a series of well-constructed presentations to potentially interested parties, there is no reason why other international agencies, whose concentration is on emerging markets and Africa in particular cannot participate …' (The

emphasis is that of the author Blackbeard)

56.2 In the section headed ‘risk management’ liquidity risk is recognised and dealt with, but on an entirely theoretical basis. There is no indication of the actual funding available to the proposed bank.

56.3 Solvency (capital adequacy) risk is also dealt with, but again it is dealt with in general terms and there is no indication of the level of capital which will actually be available to the proposed bank.

56.4 In section 10 of the schedule (commencing at page 51 thereof), which is headed ‘five year financial projections’ the ‘capital structure’ of the proposed bank is discussed. However, it is discussed in vague and general terms setting out only what the bank ‘is seeking to raise’ and

what is ‘envisaged’. There is no hard evidence of the availability of capital at all.

56.5 The ‘capital raising strategy’ is set out at page 42, but it is a theoretical strategy which provides no information which might serve to verify that the strategy will in fact succeed.

57. Although certain financial information and projections were included in the application, these did not comply with the requirements of the DI forms and in any event did not address my concerns regarding the capitalisation of the proposed bank and the identification, fitness and financial strength of the ultimate shareholders of the bank.

58. As a result of the lack of real evidence put up in the application, I concluded that there was insufficient information for me to satisfy myself of the various matters referred to in section 13(2) of

the Act. I accordingly requested the applicant to attend a meeting with me, and to provide proof that sufficient capital had been paid into and is held in a trust account, and that the funds so paid in complied fully with the requirement of the Financial Intelligence Centre Act 38 of 2001 and the Regulations issued in terms thereof. I refer in this regard to my letter of 18 April 2007 (annexure MB10 hereto).

59. In response to my query, I received from the applicant a document entitled 'Memorandum to the Registrar of Banks regarding the establishment of the Production Bank of South Africa'. A copy of the memorandum is annexed hereto marked MB12.

60. In my view, the details of the memorandum failed again to provide sufficient information to enable me to satisfy myself either that the applicant would have the financial means to comply with the requirements of the Act, or that the directors

and executive officers of the proposed bank would be fit and proper to hold office as such, and would have sufficient experience of the management of the business of the proposed bank.

60.1 In relation to the applicant's financial means, the memorandum set out merely the expectations of the applicant and provided no evidence that those expectations would be met. Having set out the basis of its 'anticipation' and 'expectation' in relation to the initial capitalisation of the proposed bank in the amount of R12 billion, the memorandum concludes with the paragraph headed 'minimum capital levels' as follows:

> 'The founders have indicated that they consider it critical the new bank should be adequately funded. Though they accept that the sum of

R12 billion is considerable, nevertheless in the circumstances of a new bank and one that is controlled by shareholders with a modest understanding of banking requirements, they believe it is important to encourage investors by demonstrating a strong underlying balance sheet.

In addition, and though they accept that the new bank's capital adequacy ratio far exceeds the minimum requirements laid down by the Reserve Bank, they are concerned to be able to show investors that prudence is a key attribute of the production bank.

In these circumstances, they will be reluctant to proceed in the event the

> capital raising exercises deliver less than R8 billion.'

In this regard it is appropriate to record that the capital adequacy requirements are not laid down by the "Reserve Bank" but in terms of section 70 of the Act. The minimum requirements are R250 million or 10% of risk weighted assets, whichever is the greater.

60.2 As to the attributes of the management personnel, the memorandum states the following under the heading 'Management':

> 'The selections of suitably qualified personnel to fill the critical positions of non-executive chairman and chief executive have not been concluded. The appointment to these posts will determine the acceptability of the new bank to potential investors and

to the manner in which the new bank will develop an acceptable culture and style.

Though discussions are ongoing with potential candidates for both positions, it follows that no such appointments will be made without the express prior approval of the Registrar.'

61. Because of my continuing dissatisfaction with the tangible content of the information I have received, I met with Mr Gelink of Deloitte and Touche, Mr Phalatse of the applicant and a number of individuals representing some of the proposed shareholders of the applicant on 26 April 2007. I put my concerns to the representatives of the applicant.

62. It was clear from the responses to my concerns that none of the proposed shareholders would be

able to supply the required capital and it was acknowledged that the capital of the proposed bank would have to be borrowed. There was nothing put to me which reasonably satisfied me that the applicant or the proposed shareholders would be able to borrow capital to the extent required. In any event borrowed capital, on its own, is not acceptable and it is a requirement that there be a certain proportion of unencumbered capital as start-up capital … I formed the view that I would not be in a position to satisfy myself of the financial viability of the proposed bank unless appropriate capital was made available and placed in trust prior to my exercising my discretion as to whether to grant or refuse the application for authorisation. (My emphasis)

63. In addition and in relation to the suitability of those persons who were proposed as directors or executive officers of the proposed bank, a number of names, well-known in commercial

circles, were suggested in the first application as the type of potential directors or executive officers of the proposed bank. Among the names suggested were those of … (some well-known names are mentioned).

64. The Registrar telephoned Messrs … (some of the well-known names) to confirm with them that these individuals had been approached by the applicant, and that they were considering the position of director or executive officer of the proposed bank. Although certain of these individuals had had general discussions of one kind or another with representatives of the applicant, they had certainly not agreed or made any commitment to becoming actively involved in the business of the proposed bank at all, still less in the capacity of director or executive officer. These individuals were not only surprised, but taken aback by their names being used in support of the application. A supporting

statement by the Registrar accompanies my statement. …"

[40] Mr Blackbeard's conclusions, at the end of his statement, are crafted along these lines:

"66. On the basis of my consideration of the applicant's application, and my interaction with representatives of the applicant, I was satisfied that the applicant had applied its mind to the requirements of in respect of which I would have to satisfy myself in order to authorise the applicant to establish a bank. The applicant had sought, by way of the various memoranda submitted simultaneously with its application, and in response to certain particular queries, to provide theoretical solutions to those requirements. The applicant had singularly failed to provide any evidence whatsoever that the requirements would in fact be satisfied.

67. In considering what attitude to take to the applicant's application, I was mindful both of my duties in terms of the Act, and of my experience, while in the office of the Registrar, of difficulties experienced by certain registered banks in recent years. In particular I was aware of the fact that weakness in the banking system of South Africa can threaten financial stability within the country as a whole.

68. In the light of my experience with difficulties in the banking sector in recent years, and of my understanding of the protective role which the Registrar must play in seeking to ensure, in accordance with the dictates of the Act, that only viable banks are permitted into the market, I formed the view that the applicant's application was inadequate and incomplete. In particular, I was satisfied that the applicant had not placed sufficient information before me to enable me to satisfy myself of the various requirements set out in section 13(2) of the Act (emphasises added).

69. In the circumstances, I submit that my ruling is proper and justifiable, and that there is no basis for a review thereof. I submit that, insofar as it is held that my ruling constituted a decision as contemplated in section 9 of the Act, I exercised my discretion properly and in good faith in taking such decision."

[41] From the aforegoing it is clear, in my view, that the applicant failed to satisfy the Registrar that the peremptory requirements of section 13(2) had or could be met. This includes the requirements relating to the fitness of proposed directors or executive officers as stated in section 13(2)(fA), (g) and (h).

[42] It is also obvious, in my view, that the Registrar did not adopt the attitude that it is a requirement of all applications of this nature that sufficient funds should be deposited in trust in advance. This requirement was only set in the Registrar's discretion in view of the failure of the applicant <u>in this particular case</u> to provide any tangible or reliable information

or proof both as to funding and staffing of the proposed bank. (My emphasis)

[43] The Board, in its comprehensive and well-reasoned judgment, came to the same conclusions. I see no basis for interfering with the findings of the Board, particularly where the review proceedings were conducted, correctly, within the confines of the section 9(2A) limitations, *supra*.

[44] In the result, I have come to the conclusion that the review application must fail.

The Order

[45] I make the following order:

1. The application is dismissed;

2. The applicant is ordered to pay the costs of the first respondent, which is to include the costs flowing from the employment of two counsel.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

JUDGE OF THE NORTH GAUTENG HIGH COURT

48088/2008/sg

Heard on:	14 August 2009
For the Applicant:	Adv A R G Mundell
Instructed by:	Messrs Edelstein-Bosman Inc, Pretoria
For the Respondents:	Adv P Ginsburg SC with Adv J P V McNally
Instructed by:	Messrs Werksmans, Pretoria
Date of Judgment:	05 November 2009