

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

CASE NO: 16473/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
7/11/2012 DATE	<i>Pretorius</i> SIGNATURE

7/11/2012

In the matter between:

INVESTEC BANK

APPLICANT

AND

JUSTIN ANDRIAANSE N.O.
RESPONDENT

FIRST

HELENE CATHARINA ADRIAANSE N.O.

SECOND RESPONDENT

JUSTIN ADRIAANSE

THIRD RESPONDENT

W A DURAND N.O.

FOURTH RESPONDENT

JUDGMENT

PRETORIUS, J

- [1] The applicant is claiming payment from the Kudu Trust for an amount of R2 250 524-47 (two million two hundred and fifty thousand five hundred and twenty four rand and forty seven cents), and from the third respondent in his personal capacity as surety. The first, second and fourth respondents are trustees of the Kudu Trust.
- [2] The claim is based on the conclusion of an agreement of loan between the applicant and Kudu Trust. Certain mortgage bonds were registered by Kudu Trust in favour of the applicant to secure the debt. The third respondent entered into a deed of suretyship on behalf of the Kudu Trust in favour of the applicant.
- [3] The applicant and the Kudu Trust entered into a loan agreement on 28 June 2000 in respect of the capital amount of R3 000 000-00 (three million rand), as set out in the particulars of claim:
- “1. *The material explicit, alternatively tacit, further alternatively implied terms of Annexure “D” are as follows:*
- 1.1 *Applicant lent a sum of R3 000 000-00 to the Kudu Trust (see clause 2.7).*
- 1.2 *The loan was repayable in 240 monthly instalments of R34 181-58 each, commencing on the first day of the month following the month on which the loan was advanced (see clause 2.14).*

- 1.3 *Interest was repayable at a rate of 12.5% per annum.*
- 1.4 *The Kudu Trust acknowledges that instalments payable may fluctuate.*
- 1.5 *Should the Kudu Trust fail to punctually pay any amount due in terms of the loan, the full outstanding amount becomes due and payable.*
- 1.6 *A certificate of indebtedness shall serve as prima facie proof of its content."*

- [4] The Kudu Trust failed in repaying the instalments as agreed. In terms of the agreement the full amount of the outstanding balance has become due and payable. According to the certificate of balance issued on 9 September 2011 the Kudu Trust was indebted to the applicant in the amount of R2 250 524-47 (two million two hundred and fifty thousand five hundred and twenty four rand and forty seven cents). The interest agreed upon was prime less two percent and is payable from 9 February 2011 to date of payment. Interest would be calculated daily and compounded monthly, as agreed.
- [5] A covering mortgage bond was registered on 7 February 2000 by the Kudu Trust in favour of the applicant for a sum of R3 000 000-00 (three million rand).

- [6] The property is Portion 194, Farm 375, Rietfontein, Registration Divison J.R., Province Gauteng. The bonded property's street address is 13 Naval Escourt Street, Mooikloof, Pretoria. This covering mortgage bond was registered as first mortgage over the property referred to therein as security for all amounts due to the applicant by the Kudu Trust.
- [7] The third respondent bound himself as surety *in solidum* and co-principal debtor jointly and severally with the Kudu Trust for complying with the loan agreement of all and any monies which the Kudu Trust owe to the applicant from whatsoever cause and howsoever arising. The amount recoverable in terms of the Deed of Suretyship would be unlimited.
- [8] The respondent were invited in the pleadings to take cognisance of s 36 of the Constitution of the Republic of South Africa. The respondent did not deal with this aspect.
- [9] Notices had been sent to the respondents on 18 January 2011 demanding payment as agreed upon. There was no response.
- [10] This application has a history. The first three respondents were cited and the application was served on them on 23 March 2011. The first and third respondents served an opposing affidavit on 3 May 2011 in which it was

averred that the applicant had not cited Mr Werner Du Rand, as he had been appointed as a trustee in 2006. He was joined as the fourth respondent without any opposition from the respondents. He served a notice of opposition on 29 November 2011. Applicant then set the application down on the opposed roll of 26 March 2012. On 13 March 2012 the respondents served a supplementary answering affidavit which had to be replied to by the applicant, which resulted in a postponement.

- [11] The only defence the respondents advanced was by way of a supplementary answering affidavit in which the third respondent makes the bald allegation that the loan agreement is invalid as only one unidentified person had signed on behalf of the Kudu Trust. He further denied that all the trustees had acted jointly in concluding the agreement and did not authorize the third respondent to act on behalf of the Trust.
- [12] The third respondent is very careful in wording his affidavit and does not deny that he had signed the loan agreement, but only mentioned that an unidentified person signed on behalf of the Kudu Trust. The only conclusion that can be drawn from this agreement is that the third respondent had signed the agreement on behalf of the Trust.
- [13] The authority to sign the agreement on behalf of the Trust was not challenged when the respondents filed the first opposing affidavit on 20 April 2011. The

first time it was challenged was after the fourth respondent had been joined on 12 March 2012, almost a year after the first answering affidavit had been served.

[14] Clause 8 of the Trust Deed provides:

"8.2 Besluite was die trustees neem, geskied:

8.2.1 as daar meer as twee trustees is, by wyse van 'n gewone meerderheid van stemme;

8.2.2 as daar slegs twee trustees is, deur 'n eenstemmige besluit van albei van hulle."

[15] It is clear from the minutes of the meeting held on 7 June 2000 by the trustees that the Kudu Trust was authorised to enter into agreements with Investec Bank Limited. At the meeting it was resolved that Mr Justin Adriaanse, in his capacity as trustee was:

" ... be and is hereby authorised and empowered in his/her sole discretion to settle the terms and conditions of and sign all such documents as may be necessary in order to implement this resolution." (Court's emphasis)

The agreement with the applicant was signed on 7 June 2000 by the third respondent. The agreement was concluded on 28 June 2000 when the

representatives of Investec signed the agreement. The only conclusion the court can draw is that the third respondent was authorized to enter into the agreement as the minutes relate to the same day that the agreement was signed by the third respondent.

- [16] It is set out in the annexure to the agreement, signed by the third respondent that:

"The borrower hereby authorises the persons identified below to sign any drawdown request ... Where the borrower is a ... trust ... the borrower warranted that the authorised signatory/ies have the necessary capacity and authority to sign any draw-down request and undertakes irrevocably not to challenge the authority of the authorised signatory/ies or the validity of any act performed by Investec pursuant to the exercise thereof". (Court's emphasis)

- [17] The signatures on the agreement and on the opposing affidavits correspond with one another. These affidavits were all made by the third respondent. It is thus clear that it was the third respondent who signed the agreement on behalf of the Kudu Trust as well as as surety and co-principal debtor.

- [18] There is no denial at any stage that the Kudu Trust had received the R3 000 000-00 (three million rand) from the applicant. It is also clear that the third

respondent signed the agreement “for and on behalf of borrower, duly authorised and warranting his authority”.

- [19] This agreement formed part of the founding affidavit. In Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa (5th Ed) Vol 1 the learned authors set out at p 439:

“The necessary allegation must appear in the supporting affidavits, for the court will not, save in exceptional circumstances, allow the applicant to make or supplement a case in a replying affidavit, and will order any matter appearing in it that should have been in the supporting affidavits to be struck out. If however, the new matter in the replying affidavits is in answer to a defence raised by the respondent and is not such that it should have been included in the supporting affidavits in order to set out a cause of action, the court will refuse an application to strike out. It is well established that there exists a general rule that new matter may not be introduced by an applicant in the replying affidavit, but this is not an absolute rule and the court may in an appropriate case allow an applicant to do so.” (Court’s emphasis)

And in **Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd 1984 (3) 202 TPD:**

“The general rule on which the appellant relied, that in motion proceedings an applicant has to make out his case in his founding affidavit, is well established. I need only refer to authorities such as Mauerberger v

Mauerberger 1948 (3) SA 731 (C) at 723; Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 368B-369A' Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635-636F. This rule is however, not an absolute one. In Bayat and Others v Hansa and Another 1955 (3) SA 547 (N), Caney J said at 553D:

" ... that it applies save in exceptional circumstances."

And in the case of Registrar of Insurance v Johannesburg Insurance Co Ltd (1) 1962 (4) SA 546, Hiemstra J at 547A-B emphasised that: "since rules of procedure are made to facilitate litigation, they are always subject to the overriding discretion of the Court",

It may in an appropriate case allow an applicant to introduce new matter in his replying affidavit." (Court's emphasis)

- [20] The applicant could not have anticipated that the trust would deny that the trustees acted jointly, having regard to the respondent not denying that the person who had signed the agreement on his behalf, had no authority to do so or was not connected to the trust. The minutes of the meeting of 7 June 2000 were then attached to the replying affidavit. In this instance it is appropriate to allow it, as it only confirmed further what had been set out in the founding affidavit.

[21] No application to strike these annexure to the replying affidavit had been received, although the replying affidavit had already been served on 18 April 2012. The respondents had 6 months to apply to strike these annexures.

[22] Paragraph 4.7 of the founding affidavit sets out:

"4.7 The agreement referred to were entered into at Pretoria and the parties were represented by the individuals whose details appear from the agreement itself."

This was only denied in general terms by the third respondent and he repeated that there is not a valid agreement between the parties.

[23] It is quite clear that the respondents have tried to delay the inevitable as can be seen from the history of the matter. There is no doubt that the R3 000 000-00 (three million rand) was advanced to the respondents by the applicant, after a valid agreement was entered into by the Kudu Trust and Investec. The surety has also been proved and the third respondent should therefore be liable if the Kudu Trust cannot pay.

[24] I make the following order:

24.1 The Kudu Trust is ordered to pay the amount of R 2 250 524-47 (two million two hundred and fifty thousand five hundred and twenty four

rand and forty seven cents) together with interest thereon at the rate of prime less 2% per annum, payable from 9 February 2011 to date of payment, calculated daily and compounded monthly, to the applicant, the one paying the other to be absolved;

24.2 The following property is declared especially executable: Portion 194 of Farm 375 Rietfontein, Registration Division J.R., Province Gauteng, also known as 13 Naval Escourt Street, Mooikloof, Pretoria

24.3 The Kudu Trust is ordered to pay the applicant's costs of suit on an attorney and client scale, to be taxed.

24.4 The third respondent (J Adriaanse), jointly and severally with the Kudu Trust, is ordered to pay the amount of R2 250 524-47, together with interest thereon at the rate of prime less 2% per annum, payable from 9 February 2011 to date of final payment, calculated daily and compounded monthly, to the applicant, the one to pay the other to be absolved.

24.5 The third respondent, jointly and severally with the Kudu Trust, is ordered to pay the applicant's costs of suit on an attorney and client scale, to be taxed. The one to pay the other to be absolved.

A handwritten signature in black ink, appearing to read 'P. J. Adriaanse', with a long horizontal line extending from the end of the signature.

C PRETORIUS
JUDGE OF THE HIGH COURT

ATTORNEY FOR APPLICANT: VAN DER MERWE DU TOIT INC
BROOKLYN

ADVOCATE FOR APPLICANT: ADV F J ERASMUS

ATTORNEY FOR RESPONDENTS: ETIENNE NAUDE ATTORNEYS
BROOKLYN

ADVOCATE FOR RESPONDENTS: ADV M SNYMAN

DATE OF HEARING: 25 OCTOBER 2012

DATE OF JUDGMENT: 7 NOVEMBER 2012