IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 56438/2010

27/11/2014

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
27/11/14
DATE
SIGNATURE

INVESTEC BANK LIMITED Plaintiff.

and

QUICK LEAP INVESTMENTS 34 (PTY) LTD Defendant.

JUDGMENT

2014 November 20, 21; November 27.

ROSSOUW, A.J.

[1] The dramatis personae in this matter are Investec Bank, the Plaintiff; Quick Leap Investments 34 (Pty) Ltd, the Defendant; the late Mr. Gotfried Jacob Rautenbach, in his lifetime the only director of Defendant Company and also one of two trustees of LEAP TRUST IT 6093/05, the other trustee being one Mr. Pieter Stephanus Janse van Rensburg, both appointed in terms of Letters

of authority dated the 9th November 2005, by the Master of the High Court, Pretoria.

[2] Rautenbach passed away on the 22nd January 2009 whereupon one Mr. Gerhardus Petrus Koekemoer was appointed as director of Defendant Company on the 30th June 2009. He is at present the only director of Defendant Company.

[3] Defendant Company is the registered owner of Erf 1916 Waterkloof Ridge Extension 6 Township Registration Division J.R.; Province Gauteng. The said property is still and has at all material times been occupied by Mr. Gerhardus Petrus Koekemoer and his family, which includes his mother in law, Mrs. Vos, a beneficiary of LEAP TRUST.

[4] The only shareholder of Defendant Company is LEAP TRUST, having acquired the shares in Defendant Company from the late Mr. Rautenbach on the 9th November 2005.

[5] On the 12th January 2008 Plaintiff concluded a written Loan Agreement with Rautenbach, the principal debtor, in his personal capacity in terms of which Plaintiff lent to the principal debtor the sum of R4,200,000.00 to be repaid in 240 monthly instalments of R46,308.38 each, commencing on the first day of the month following in which the loan was granted and on the further conditions stipulated in the loan agreement.

[6] The outstanding balance as at 17th September 2010 amounted to R3,740,994.42 plus interest at 7.5% per annum payable from the 17th September 2010 to date of payment. Summons was issued against the surety, QUICK LEAP INVESTMENTS 34 (PTY) LTD, on the 18th November 2010 for payment of the amount of R3,740,994.42 plus interest on the aforesaid amount at 7.5% per annum payable from 17th September 2010 to date of payment; and also for an order declaring the immovable property executable, the property being bonded under a covering security for all and any sum of money claimable by Plaintiff in respect of the Mortgagor's indebtedness flowing from the suretyship agreement concluded between the surety, the Defendant, and the Plaintiff on the 15th December 2006, for the indebtedness of the principal debtor Mr. Rautenbach, the director of the Defendant Company.

[7] Plaintiff obtained a judgment by default against the Defendant on the 13th December 2010. Defendant brought an application for rescission of the default judgment successfully and was granted leave to defend the action.

[8] Defendant filed a Special Plea; a Plea on the merits and a Counter claim. Plaintiff countered with a Replication.

[9] At the commencement of the trial the Court was informed that the parties had come to an agreement in regard to aspects which are to be considered as common cause as well as to the specific issues in dispute. This had been recorded in writing and was handed in by agreement as Exhibit "A".

The said Exhibit "A" is recorded herein for the sake of completeness.

"INVESTEC BANK LTD v. QUICK LEAP INVESTMENTS 34 (PTY) LTD
(Case no: 56438/2010)

A. ASPECTS COMMON CAUSE:

1. Plaintiff the principal debtor ("Rautenbach") concluded a written loan agreement on 12 February 2008 ("the loan") – the terms of which appear from Annexure "B" to the Particulars of Claim.

2. As at 19 November 2014 the outstanding balance in terms of the loan amounted to R5,022,491.04 together with interest at 7.25% per annum from such date.

3. The principal debtor or his deceased estate defaulted in repaying the aforesaid loan.

4. On 6 February 2008 Rautenbach signed a resolution (at p. 254 of the Trial Bundle) and Deed of Suretyship ("the Suretyship") on

Defendant's behalf – which suretyship is annexed as Annexure "D" to the Particulars of Claim (without admitting that Defendant is bound by the Suretyship).

5. A covering mortgage bond number B30264/2008 ("the bond") was registered on or about 26 March 2008 as is evident from Annexure "E" to the Particulars of Claim – without conceding that Defendant is bound by the bond.

6. The Suretyship and the mortgage bond amount to the provision of security for an obligation of Defendant's director, Rautenbach as envisaged in Section 226 of the previous Companies Act, 61 of 1973, for the loan referred to in paragraph 1 above.

7. Plaintiff complied with the National Credit Act, 34 of 2005 as far as may have been necessary.

8. Plaintiff waives its alternative claim against

Defendant based on enrichment (as set out in paragraph 6 of the Particulars of Claim).

9. Defendant waives its Special Plea as contained in paragraph 1A of its Amended Plea.

10. The citation of the parties.

11. Rautenbach at all relevant times was the only director of the Defendant.

12. The relevant Memorandum of Incorporation and Certificates of Articles of the Defendant is the document discovered by the Plaintiff (p 255 – 267 Trial bundle).

13. The Leap Trust was the only shareholder of the Defendant from 9 November 2005 and at all relevant times thereafter.

14. At the time when the loan was

concluded the trustees of the Leap Trust were Rautenbach and Mr. Van Rensburg.

B. ISSUES IN DISPUTE.

1. Whether Defendant is bound by the Suretyship and the mortgage bond and whether they are void by virtue of:

1.1. Section 226 of Act 61 of 1973,or

1.2 The allegation that security was provided for a purpose other than the main object of the Defendant.

2. Whether Defendant's counterclaim for cancellation of the mortgage bond and the declaration that the suretyship is void should succeed on the strength of one or more of the following factors:

2.1. Section 226 of the previous Companies Act, or

2.2. The allegation that security was provided for a purpose other than the main object of the Defendant.

3. Whether all the members of Defendant had consented to the provision of security for the loan (by virtue of the suretyship and/or Bond) explicitly, tacitly or by virtue of Article 61 of Defendant's Articles of Association as quoted in paragraph 2.1 of the Replication.

4. Whether the Court should regard the de facto shareholder of Defendant at all relevant times as Gerhardus Petrus Koekemoer on the basis set out in paragraph 2.2 of the Replication.

5. Whether the suretyship and mortgage bond are enforceable by virtue of the Turquad-rule as set out in paragraph 2.3 of the Replication.

6. Whether the main object and main business of the Defendant was: "INVESTMENT IN MOVABLE AND IMMOVABLE PROPERTY AS PRINCIPAL".

[10] The first witness called by the Plaintiff was Mrs. A. Joshi. She testified that in February 2008 she was employed as a legal risk consultant by Plaintiff and responsible for the implementation of the Loan Agreement concluded

with Rautenbach. Her duties required of her to ensure compliance with relevant legislation and to see that all conditions were satisfied, also in relation to securities. Her duties necessitated that she had to have regard to the Memorandum of Incorporation and the Articles of Association of the Defendant. To this end she obtained copies of these documents and had regard particularly to Article 61 of the Articles of Association, which provides as follows:

> "The directors may execute all the powers of the company to borrow money and to mortgage or bind its undertaking and property or any part thereof, and to issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or any third party".

[11] It is not clear what weight, if any, she attached to the fact that the Memorandum of Association of Defendant specified its main object as "Investment in movable and immovable property as principal". What emerged from her evidence is that Article 61 of the Articles of Association of Defendant to her mind was sufficient to satisfy her that the transaction and in particular the giving of the suretyship by the Defendant for the debt of the principal debtor, Rautenbach as director, would be in order.

[12] She also testified that in general Plaintiff does not second guess reports of a company giving suretyship. She knew that Rautenbach was the only director. She had been provided by a resolution of the Board of Directors of Defendant Company. The resolution taken on the 6th February 2008 provided:

> "That the company stands surety and guarantor for an unlimited amount for all indebtedness and all the obligations of Godfried Jacob Rautenbach (the debtor) ...
> That the Company pass a first covering mortgage bond/bonds over the following properties Erf 1916 of Township Waterkloof Ridge Ext. 6 in favour of Investec in the amount of R5,000,000.00 plus 20% to cover costs...
> That the company made payment to the Investec Bank Limited by direct debit order...
> ...."

[13] She testified under cross examination that she holds a LLB degree, which she obtained cum laude, as well as a LLM in corporate Law. She had to ensure that the documentation complied with all legal requirements.
She was aware that the Loan Agreement was with Rautenbach, the director of Defendant, in his personal capacity.
She in fact signed the Agreement on behalf of the Plaintiff Bank. She knew that it was not Defendant borrowing the money.
She agreed that the resolution of the Board of Directors of Defendant was not a resolution of the shareholders of the Defendant.

She agreed that she was the responsible person and that she should have insisted on a resolution by the shareholders of the Defendant.
She also agreed that the documents from the auditors of Defendant said nothing concerning the shareholders and/or approval by them and specifically nothing about Section 226 of the Companies Act 1973.

[14] With regard to the report by the independant auditor dated the 2o February 2008, furnished by du Toit Van Der Walt, it is important to note that in the heading it is clearly stated that it is a report "with respect to a certificate for a loan to a Company. For: Erf 1916 Waterkloofrif."
(the underlining is mine).
It was not intended as a certificate for a loan to the Director of the Company. This is clearly not a report that ought to have been acted upon for purposes of a loan to a director of the Company in his personal capacity.

[15] All statements were sent to Rautenbach and as at date of his demise there were no arrears reflected on the account.

[16] The next and last witness for Plaintiff was one Mrs. M. Nel a property valuator. Her evidence about the valuation done is not of any consequence and need not be discussed in detail.

[17] Defendant called Mr. Pieter Stefanus Janse van Rensburg, a trustee of LEAP

TRUST, the shareholder of all the shares in Defendant Company. He was appointed a trustee by letters of authority issued by the Master of the High Court, Pretoria on the 9th November 2005. After the demise of his co-trustee Mr. Godfried Jacob Rautenbach on 22 January 2009, he was issued with fresh letters of authority by the Master of the High Court, Pretoria, on the 25th February 2009 wherein a new co-trustee was also appointed namely Mr. Gerhardus Petrus Koekemoer.

[18] Mr. Koekemoer is the occupant of the property belonging to Defendant. The late Rautenbach was Koekemoer's friend and auditor. Prior to Koekemoer being appointed a Trustee of LEAP TRUST on the 25th February 2009, he had no say in the affairs of the Trust.

[19] Mr. Van Rensburg testified that as trustee of LEAP TRUST, he was aware of the fact that the Trust was formed for purposes of protecting the interest of the family of Mr. Koekemoer. He also knew that the trust was not conducting any business in the ordinary sense of the word. He knew of the Company which was the registered owner of the property. He was never approached in regard to the business done by Rautenbach with Plaintiff Bank.

He was the only witness called to testify on behalf of the Defendant.

[20] Koekemoer was in Court but was not called by any of the parties to testify in this action. Counsel for Plaintiff in his address to the Court submitted that

an adverse inference ought to be drawn against Defendant for not calling Koekemoer to testify. This he submitted in light of the fact that in the application for rescission of the default judgment Koekemoer in the founding affidavit indicated that Rautenbach had sought his consent for the registration, first of a bond in favour of Absa and later for the registration of the bond in favour of Plaintiff. He was at the relevant times not a director of Defendant because as stated in the said affidavit he knew if he agreed to be appointed a director he would be required to sign as surety for the debts of Defendant. Counsel submitted that on the facts Koekemoer is to be regarded as a de facto director of Defendant but stopped short of asking that he be considered a shareholder.

Taking all facts into consideration I am of the view that there is no merit in this submission for the following reasons namely that Koekemoer, albeit hearsay, in his affidavit gave a cogent reason why he did not want to be a director and secondly that on the evidence of Van Rensburg there was a close relationship that existed between Koekemoer and Rautenbach and that they shared certain business interests.

[21] Both counsel have provided the Court with written Heads of Argument which heads were used by them in argument. The Court is indebted to them for the effort put into preparation of the heads which have been of great assistance to the Court.

[22] Plaintiff's counsel dealt with the provisions of Section 226 of Act 61 of 1973 and correctly pointed out that Section 226 (1) provides as follows:

"No company shall ... provide any security to any person in connection with an obligation of such director... of the company".

[23] This prohibition is qualified in Section 226 (2) which provides that:

"The provisions of subsection (1) shall not apply –

(a) in respect of –

(i) ...

(ii) the provisions of security by a company in connection with an obligation of its own director ...

(iii) ...

(iv) ...

with the prior consent of all the members of the company or in terms of a special resolution relating to a specific transaction ...".

[24] It was also correctly submitted that the purpose of the Section is the protection of the members of the Company against improper use of its resources not for its own benefit but for the benefit of those referred to in Section 226 (1). In casu for the benefit of Rautenbach, a director.

[25] It is also correct to state that the consent of members may be given by resolution adopted at a general meeting or by each member giving it separately orally or in writing bearing in mind that however given, it must be

brought up in the annual financial statements of the company and the auditor will require proof to his satisfaction that the consent was in truth given. (See Section 295 (1) of Act 61 of 1973).

[26] Plaintiff's counsel submitted that Defendant's members did in fact consent to the provision of the security i.e. the surety contract and covering bond. This submission is premised on the basis that Rautenbach was the only active trustee and Van Rensburg a trustee only in name, taking no active part in the affairs of LEAP TRUST. And on the basis that Rautenbach was "clearly delegated to consent to mortgage bonds on behalf of the trust". This submission loses sight of a number of aspects, inter alia, first, there is no evidence of any delegation by Van Rensburg of his powers as a trustee to Rautenbach; secondly, it is trite law that where you have more than one trustee the general rule is that they must, absent a delegation, act in unison to bring about a valid result binding the trust; thirdly, there is no direct evidence that Van Rensburg was ever consulted and or his consent sought by Rautenbach; lastly that, merely because the trust was the only shareholder in Defendant Company and not engaged in any other business activity, it cannot on that account alone be considered as nothing but "a sham".
This submission in my opinion has no merit and is to be rejected.

[27] Plaintiff's counsel further submitted that the members gave prior consent by virtue of the provisions of Defendant's Articles of Association. He quoted in this regard Article 61 referred to and quoted in paragraph [10].

This submission by counsel for Plaintiff would have it that Article 61 is to be elevated above the provisions of Section 226 of Act 61 of 1973. This is untenable. I agree with Adv. Ferreira's submission on behalf of Defendant relying on LSK UK LIMITED v. IMPALA PLATINUM HOLDINGS LTD [2009] JOL 6308 (A) at p 1:

> "... our law recognises the doctrine of supremacy of the articles of association. This means that the founding members may order the internal affairs of their company as they deem fit, subject to such prohibitions as may exist in statute or common law".

[28] Provisions in articles which conflict with the general law or with the provisions of, or the assumptions underlying, the Act are invalid (In re PEVERIL GOLD MINES LTD (1998) 1 CH 122 (CA) AT 131,132; ROSSLARE (PTY) LTD V. REGISTRAR OF COMPANIES 1972 (2) SA 524 (B) 525).

[29] Articles must always be consistent with the provisions of the Act and not run counter thereto.
(HENOCHSBERG, 5TH ED VOL 1 AT P 1001.)

[30] I also agree with the submission on behalf of Defendant that, inter alia, the directors may only exercise powers of the Company i.e. do what the company may validly do. The company if it wants to provide security for a

director requires the consent of all its members or a special resolution relating to the transaction: Sans such consent or resolution the company does not have the power and the directors cannot exercise such power. Always bearing in mind that a company is a legal persona distinct from its members. The article, to the extent that it runs counter to the clear provisions of the Act is invalid. (HENOCHSBERG supra p 112; p 113 and p 1001; LSK UK LTD case supra.)

[31] The aim and purpose of the provisions of Section 226 of Act 61 of 1973 have been dealt with exhaustively in the matter STANDARD BANK OF SA LTD v. NEUGARTEN AND OTHERS 1987 (3) SA 695 (W) at 705 F – I and on appeal reported as NEUGARTEN AND OTHERS v. STANDARD BANK OF SOUTH AFRICA LTD 1989 (1) SA 797 (A) at 802 B.

[32] Non compliance with Section 226 renders the transaction entered into void and therefore unenforceable even against a bona fide Third Party. (See NEUGARTEN supra p 802 E – F; p 805 A – D; p 807 D and 809 D. HENOCHSBERG supra, p 432.)

[33] Whether or not consent was given is a factual question. The fact that neither party to a transaction is aware of the provisions of Section 226 negates any argument that there was consent. (BENRAY INVESTMENTS (EDMS) BPK v. BOLAND BANK BEPERK 1993 (3) SA 5797 (SCA)).

[34] Where a trust is the shareholder having more than one trustee, both trustees have to consent. If one consents and the other is unaware of the transaction there is no compliance with the provisions of Section 226. (243 HENDRIK POTGIETER ROAD RUIMSIG (PTY) LTD v. GOBEL N.O. 2011 (5) SA 1 (SCA) .

See also: FARREN v. SUN SERVICES SA PHOTO TRIP MANAGEMENT (PTY) LTD 2004 (2) SA 146 (C).

Both decisions were given in relation to the provisions of Section 228 of Act 61 of 1973, but the aim and purpose of Section 228 are similar to that of Section 226 and consequently the decisions are opposite to the matter in hand and in line with the principles enunciated in KLERCK N.O. v. VAN ZYL AND MARITZ NNO AND ANOTHER AND RELATED CASES 1989 (4) SA 263 (SECLD) at 280 E – I, to the effect that what the legislature has decreed in the public interest to be illegal and/or invalid cannot be validated by a defence which would negate such invalidity.

[35] In light of what is stated in the preceding paragraphs in relation to the effect of non compliance with the provisions of Section 226 of Act 61 of 1973, I consider it unnecessary to make a finding in regard to the dispute whether or not the transaction falls within the main object of the Defendant Company. Either way the finding in respect of the compliance or non compliance with Section 226 (2) is determinant of the case i.e. was there the requisite consent or not. If not, cadit quaestio.

[36] A defence based on the provisions of Section 36 of Act 61 of 1973 would in any event not be competent in view of the express provisions of Section 226 (1) and (2) of the Companies Act 1973.

[37] The final issue to be considered is whether "the suretyship and mortgage bond are enforceable by virtue of the Turquand rule set out in paragraph 2.3 of the Replication".

37.1. In casu the documentation, and in particular the resolution by the board of directors, furnished to the Plaintiff could not have led Plaintiff to believe that it was a members resolution.

37.2. The documentation further clearly indicated who the borrower was and that he was a director of the Defendant Company.

37.3. The suretyship and covering mortgage bond similarly was unequivocal that security was being provided by Defendant to its director.

37.4. Mrs. Joshi, representing the Plaintiff and a highly qualified person in law could in no way have been under a misapprehension as to what the true factual situation was.

37.5. Rautenbach did not sign the resolution as trustee of LEAP TRUST but as director of Defendant and it was not a document relating to the Trust or a document whereby Plaintiff could have concluded the loan agreement on an assumption that all the trustees had consented and Rautenbach had been empowered to sign the contract.

37.6. The ambit of authority conferred in a trust deed is not a matter of "internal management" with which outsiders need not concern themselves.

37.7. For all the above reasons I am of the view that in casu The Turquand rule finds no application.

(See: NIEWOUDT AND ANOTHER NNO v. VRYSTAAT MIELIES (EDMS) BPK 2004 (3) SA 486 (SCA) para [20; 22]; and also 243 HENDRIK POTGIETER ROAD RUIMSIG (PTY) LTD, supra, the dictum that the Turquand rule does not override the restriction contained in Section 228 of the Companies Act 1973, being equally opposite in respect of Section 226 on account of the fact that the aim and purpose of Section 228 is the same as that of Section 226.;) also FARREN v. SUN SERVICES SA PHOTO TRIP MANAGEMENT (PTY) LTD 2004 (2) SA 146 (C) at 16

> "In my view the clear meaning of S 228 is that the shareholders must give their consent... If the purpose of S 228 is the protection of the shareholders, then the application of the Turquand rule would deprive them of protection. The section would then serve no purpose. It would be cold comfort to a shareholder ... to be told to sue the directors who have acted without approval."

And on p 22 to the effect that even if only the approval of a general meeting of shareholders is necessary to satisfy the prohibition of Section 228, which is in line with Section 226, its decision would still have been the same.

See Also: LEVY v. ZALRUT INVESTMENTS (PTY) LTD 1986 (4) SA 479 (W) at 485 A.

[38] In the result I conclude that Plaintiff's claim stands to be dismissed and Defendant's counter claims to be upheld.

[39] Judgment is accordingly granted as follows:

1. Plaintiff's claim is dismissed with costs.

2. Defendant's counter claims are upheld and the following order made in regard thereto:

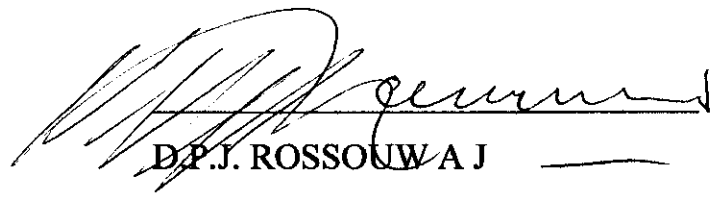
2.1. The suretyship agreement, Annexure "D" to the Particulars of Claim be and is hereby declared void and of no force and effect.

2.2. The Covering Mortgage Bond No BO30264/08, annexure "E" to the Particulars of Claim be and is hereby declared void and of nor force and effect.

2.3. Plaintiff is ordered to immediately take all necessary steps and actions to cause and bring about cancellation of the Covering Mortgage Bond referred to in paragraph 2.2 supra.

2.4. If Plaintiff fails and/or neglects and/or refuses to comply with the relief ordered in paragraph 2.3 supra within a period of 3 months from date of this order, the Sheriff is directed and authorised to sign all necessary documents on Plaintiff's behalf and in its stead to bring about cancellation of the covering Mortgage Bond referred to in paragraph 2.2 supra.

2.5. Plaintiff is ordered to pay Defendant's costs of this action.



D.P.J. ROSSOUW A J

HIGH COURT OF SOUTH AFRICA.

GAUTENG DIVISION, PRETORIA.