

SOUTH AFRICA / JUDGMENT

Bowden NO and Others v SA Rice Mills (Pty) Ltd (38133/2017) [2018] ZAGPJHC 434 (18 May 2018)

[2018] ZAGPJHC 434

COURT

South Gauteng High Court, Johannesburg

BEFORE

Maier-Frawley

CASE / FILE NUMBER

38133/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 38133/2017

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

STEPHEN
FLETCHER BOWDEN
N.O. First
Applicant
YVETTE
BOWDEN
N.O Second
Applicant
CONTINUITY
TRUSTS (PTY) LTD
N.O Third
Applicant
and
SA

RICE MILLS (PTY)
LTD Respondent

JUDGMENT

MAIER-FRAWLEY AJ:

Introduction

1. This is an application wherein the Casey Property Trust ('the Trust') seeks repayment to it of monies that were loaned and advanced to the respondent. The individual trustees of the Trust have been cited as applicants in the application. The Trust also seeks inter alia, to perfect its security under a General Covering Notarial Bond that had been registered in its favour by the respondent.
2. The following order is sought:
 - 2.1. Payment of the sum of R4,378,021.00, together with interest a tempore mora thereon;
 - 2.2. An order declaring that the Trust can take possession of certain equipment (comprising of a maize milling plant and silos) and failing payment, that it be entitled to sell and dispose of the equipment; and
 - 2.3. costs of the application.
3. The respondent, SA Rice Mills (Pty) Ltd, initially opposed the application on the following grounds:
 - 3.1. That the applicant failed to establish a cause of action by virtue of the fact that the underlying loan agreement automatically terminated for want of compliance with the condition contained in clause 3.1 thereof, thereby rendering the Notarial Bond a nullity as a consequence of the automatic termination;
 - 3.2. That the Trust lacked the necessary authority to bring this application;
 - 3.3. That the Trust failed to set out facts in support of this court's jurisdiction;
 - 3.4. That the application was instituted prematurely, by virtue of the Trust's failure to give notice to the respondent of the failure of settlement negotiations before launching the application, as was incumbent upon it to do;
 - 3.5. That the amount loaned is not yet repayable by virtue of the provisions of a shareholders' agreement concluded on 6 December 2016. [1]
4. Mr. Stephen Fletcher Bowden deposed to the founding and replying affidavits of the Trust whilst Mz. Jo Galloway deposed to the answering affidavit on behalf of the respondent.

5. The respondent indicated at the hearing of the matter that it would no longer pursue its opposition on the grounds mentioned in paragraphs 3.1 to 3.3 above.

Background factual matrix

6. On 6 December 2016 the parties entered into a written Facility Loan Agreement ('loan agreement')[2] in terms of which the Trust loaned and advanced the capital amount of R4,488,021.00[3] to the respondent on condition that a first ranking special notarial bond be registered by the respondent in favour of the Trust as security for the repayment of the amount loaned.[4]
7. The sole purpose of the loan was to finance the respondent's purchase of assets described as 'the Roff R70 maize milling plant and adjacent silos' ('the Roff') in an amount not exceeding R4,488,021.00. [5]
8. The loan agreement[6] itself records that various amounts (the aggregate total of which amounted to R4,488,021.00) were already paid by the Trust to the respondent by 6 December 2018[7] in discharge of its obligations to loan the capital amount.
9. In terms of clause 3.2 of the loan agreement, a 'Notarial Bond shall be registered by the Lender's Attorneys, the costs of which shall be borne by the Lender' [Trust].
10. The respondent was obliged, in terms of clause 6.1 of the loan agreement, to repay the capital amount, together with interest, in 60 monthly instalments of R95,000.00 each during the repayment period. The repayment period was to commence on 1 January 2017, ending on 1 December 2021.[8]
11. In terms of clause 11 of the loan agreement, an event of default would occur, inter alia, in the event of the respondent failing to make punctual payment of any sum of money owing to the Trust on due date and failing to remedy such breach within 10 business days after receipt of written notice to that effect,[9] or in the event of the respondent entering into any compromise with its creditors generally.[10]
12. In terms of clause 11.2[11] of the loan agreement, the full outstanding balance owing by the respondent to the Trust would become due and payable to the Trust forthwith upon the date of the occurrence of a default event. In terms of clause 11.3 thereof, the Trust thereupon became entitled to claim immediate payment of the outstanding balance, which, in terms of clause 1.1.13 thereof, is the total amount owing by the respondent to the Trust in terms of the loan agreement, together with interest and any costs.
13. Clause 14[12] of the loan agreement provides that a certificate may be furnished by the Trust, specifying the amount of the respondent's

indebtedness to it (including any interest accrued on the amount that is due and payable), which shall constitute prima facie proof of the contents and correctness thereof for the purpose of any proceedings against the respondent in any court.

14. Following the conclusion of the loan agreement and on 5 July 2017, a notarial covering bond ('the bond')[13] was registered in favour of the Trust in terms of which the respondent inter alia, declared that it is 'truly and lawfully indebted and held and firmly bound' to the Trust for the maximum amount of R4,488,021.00, being 'the capital sum of the loan arising from money advanced in terms of the loan agreement,' and the respondent further declared itself to bind specifically to an in favour of the Trust, 'The Roff R70 maize milling plant, and adjacent silos situated at Gerhardus street, Henville, Germiston, Johannesburg 1429' as security for the due payment of the secured debt and any interest payable thereon.

15. In terms of clause 1.1 of the bond:[14]

'The secured debt shall be repayable by the Mortgagor [respondent] to the Mortgagee [Trust] in accordance with the terms of the loan agreement. In the event of default by the Mortgagor, the secured debt shall...be repayable ...against written demand.' (emphasis added)

16. In terms of clause 4 of the bond, 'an event of default shall occur if the respondent 'breaches any of the terms, conditions or stipulations of this Notarial Bond,[15] or 'makes or attempts to make ...any ...compromise with any ...of its creditors.' [16]

17. In terms of clause 5 of the bond, 'upon the happening of an event of default', the Trust 'shall be entitled...at such time as it may think fit' to 'declare the full amount of the Mortgagor's indebtedness to the mortgagee from whatsoever cause arising to be due and payable forthwith and to claim and recover the same from the Mortgagor forthwith on demand'.[17]

18. In terms of clause 9 of the bond:

'This bond shall cover debts generally, including existing and future indebtedness, and the security afforded to the Mortgagee by this bond shall be continuing;'

19. In terms of clause 11 of the bond:

'This Notarial Bond shall remain in full force and effect as a continuing covering security in pursuance of the foregoing provisions thereof for the due discharge of all obligations of the Mortgagor to the Mortgagee, performance whereof is secured by the Notarial Bond, until this Notarial Bond shall have been cancelled with the consent of the Mortgagee in the deeds registry.'

20. Apart from having made certain initial repayments (totalling in aggregate an amount of R566 706.92), the respondent failed to pay the monthly instalments under the loan agreement and as such, the full outstanding indebtedness became due, owing and payable to the Trust.[18]

21. On 7 July 2017 the trust demanded payment from the respondent of the amount of R4 367 970.00, being the entire loan amount plus accrued interest thereon, by 28 July 2017.

22. The Trust provided a certificate of balance in the founding affidavit,[19] which reflects that the respondent is indebted to the Trust in the sum of R4 378 021.00.

Evaluation of the grounds of opposition relied on at the hearing

Application is premature

23. The respondent alleges that the parties entered into settlement negotiations in an attempt to resolve this matter. The respondent required the Trust to cease all litigation whilst settlement negotiations were taking place. On 5 September 2017, the Trust's attorneys sent a letter by way of email to the respondent's attorneys in which the respondent was notified that 'our client has agreed to suspend all legal action pending the outcome of the settlement negotiations between the parties, which will be deemed to have failed in the event that either of our offices notifies the other that the settlement negotiations have failed.' Two dates, namely, 7th or 8th September 2017 were proposed therein for the parties to meet in order to explore a settlement of the matter. The email further

specifically records that: 'Please note that the above dates are the final proposed dates for a meeting, in the event that you and/or your clients are unavailable to meet on those dates then our client will retract any undertakings to suspend legal action and shall proceed accordingly.'[20] (own emphasis)

24. The respondent alleges that the Trust served the application on 13 October 2017 without first having notified the respondent that settlement negotiations had failed, as per its undertaking in the said letter. The respondent contends that the application is therefore premature and falls to be dismissed with costs on this ground alone.
25. As is common cause on the papers, the parties only met on 6 October 2017 to pursue settlement negotiations. The Trust submits that the respondent had, in clear and unambiguous terms, been forewarned in the letter of 5 September 2017 that any undertakings to suspend litigation would be retracted if the parties did not meet on the final proposed dates, being either the 7th or the 8th September 2018. The submission appears to me to be sound. This meant that by the 9th September 2017, all prior undertakings to suspend legal proceedings, stood retracted. The Trust also submits that the fact that the application was launched a few days after the meeting on 6 October 2017, is perforce indicative of the fact that settlement negotiations had failed, and the applicant was therefore entitled to proceed with the application. I agree. The point raised by the respondent in this regard must accordingly fail.

Amount claimed not due and payable as yet

26. The respondent contends that the amount claimed is not yet due and payable by virtue of the provisions of a written 'sale of shares agreement' as read together with the provisions of a written 'shareholders agreement,' which agreements were entered into between the Trust, the respondent and one David William Brown on 6 December 2016.[21] In paragraph 26 of the answering affidavit,[22] the respondent alleges that the funds loaned by the Trust to the

respondent 'are to be construed as shareholder loans' in the light of: (i) the provisions of clauses 1.1.5 and 4.3 of the sale of shares agreement[23] and (ii) a representation allegedly made by Bowden (on behalf of the Trust), namely, that the Trust's financing of the Roff R70 maize Mill Plant and related equipment would be by way of a 'loan account'. Therefore, so the argument developed, clause 5 of the shareholders agreement would apply to the repayment of the loan. In terms of clause 5.4.1, as read with clauses 5.2 and 5.3 of the shareholders agreement, repayment of plant finance would only have to be made 'as and when the respondent has funds available for this purpose, having regard to the respondent's other liabilities, commitments and working capital requirements'.[24]

27. The Trust denies that the amounts loaned and advanced to the respondent constitute shareholders' loans[25] and disputes the alleged representation by Bowden. Even if the financing of the Roff were to be construed as a shareholder's

loan, the provisions relied on in the shareholders agreement would not assist the respondent in the light of what has been set out in paragraphs 30 to 32 below.

28. Both the loan agreement and the bond provide for the production of a certificate of indebtedness evidencing the amount outstanding to the Trust.[26] Although the amount of the indebtedness appears to be in dispute on the papers (the respondent inter alia, having disputed the contents of the certificate of balance),[27] the certificate of balance has not as such been gainsayed in the answering affidavit by means of evidence. There was an evidential burden on the respondent to rebut the effect of the certificates of balance. To this end, the respondent was obliged to adduce evidence[28] to demonstrate the incorrectness of the certificate/s. The mere averment, without any substantiation, that the amount as certified is incorrect, was insufficient for this purpose.[29]

Claim for payment in the notice of motion

29. The Trust relies on a breach by the respondent in failing to pay the monthly instalments.[30] In terms of the provisions of the bond, the full outstanding balance owing by the respondent to the Trust fell due and payable upon demand.
30. When the respondent defaulted in its monthly payments under the loan agreement, the Trust's attorneys addressed letter to the respondent on 7 July 2017, wherein payment of the entire loan amount, plus interest was demanded from the respondent by no later than 28 July 2017.[31]
31. On 2 June 2017, the respondent (as debtor) concluded an acknowledgment of debt agreement with a company by the name of 'Agri Milling a division of Philafrica Foods Proprietary Limited' (as creditor) and thereby entered into a compromise with one of its creditors,[32] which meant that a default event, as envisaged in the bond, thereupon occurred, which carried the consequence that the full outstanding

balance owing by the respondent to the Trust fell due and payable upon demand. The letter of demand referred to earlier was effective

in placing the respondent in mora for purposes of the relief sought in paragraph 2 of the notice of motion.

32. On the respondent's own declaration as recorded in the bond, it is indebted to the Trust in an amount of R4,488,021.00,[33] which indebtedness has been secured under the bond up to a maximum amount of R4,488,021.00 including interest thereon.[34] It accordingly follows that the respondent has failed to establish that the amount claimed is not yet due and payable by it to the Trust.
33. For all the reasons given, I am satisfied that the Trust has established its entitlement to the relief sought in the notice of motion.
34. The general rule is that costs follow the result. I see no reason to depart therefrom.

I accordingly make the following order:

1. Judgment is granted against SA Rice Mills (Proprietary) Limited in favour of the Casey Property Trust for :
 - (a) Payment of the sum of R4,378,021.00;
 - (b) Interest a tempore mora on the aforesaid amount at the rate of 12% as from 7 July 2017 to date of final payment;
2. It is declared that:
 - (i) the applicants (Casey Property Trust) are entitled to take possession of and to remove the Roff R70 maize milling plant and adjacent silos situate at the premises of the respondent, being Unit B1, 10 Gerhardus Street, Henville, Germiston, so as to perfect the Notarial Bond registered in favour of Casey Property trust;
 - (ii) should the respondent fail to pay the sum of the judgment granted in favour of the applicants in terms of paragraph 1 supra, with costs, within 7 (seven) days from date of granting of the order, the applicants shall be entitled to sell and dispose of the aforesaid Roff R70 maize milling plant and adjacent silos situate at the premises in such manner and upon such terms as the applicants may decide and to convey valid title to purchaser(s) or transferee(s) thereof; alternatively to levy execution against such assets in terms of the Superior Courts Act 10 of 2013 and the Uniform Rules of Court and to apply all such proceeds towards the settlement of the judgment in paragraph 1 of this order and costs.
3. The respondent is directed to pay the costs of this application.

MAIER-FRAWLEY AJ

Date of hearing: 22 May 2018

Judgment

delivered: 14 June 2018

APPEARANCES:

Counsel for Applicant: Adv. DL Williams

Attorneys for Applicant: Malherbe Rigg & Ranwell Inc.

C/o Jordaan & Wolberg

Ref: Mrs Rizotto

Counsel for Respondent : Adv. Da Costa

Attorneys for Respondent: Kern & Partners

Ref: C Holing

- [1] Para 26 at pp. 76-78 of the papers.
- [2] A copy of the loan agreement appears at pp.22-34 of the papers.
- [3] This is the amount specified in clause 1.1.4 of the loan agreement.
- [4] Clause 3.1 read with clause 1.1.12 and clause 4.1 read with clause 2.1.2 of the loan agreement.
- [5] Clause 1.1.3 read with clause 1.1.18 of the loan agreement.
- [6] Clauses 4.1 & 4.2 read with clause 1.1.19 of the loan agreement.
- [7] 6 December 2018, being the signature date of the agreement.
- [8] Clause 1.1.17 of the loan agreement.
- [9] Clause 11.1.1 of the loan agreement.
- [10] Clause 11.1.7 of the loan agreement.
- [11] Read with clause 1.1.13 of the loan agreement.
- [12] At p. 31 of the papers.
- [13] A copy of the bond appears at pp.36-48 of the papers.
- [14] At p. 39 of the papers.
- [15] Clause 4.1 at p. 41 of the papers. In terms of clause 1.1 of the bond (at p.39 of the papers),
- [16] Clause 4.2.

[17] Clause 5.1.

[18] Para 15 at p. 18 read with annexure “FA3” at p. 49 of the papers. FA3 comprises a reconciliation of amounts paid by the respondent to the applicant.

[19] Annexure ‘FA4’ at p. 58 of the papers.

[20] See: annexure “AA2” at p. 81 of the papers.

[21] A copy of the sale of shares agreement appears at pp.86 to 97 of the papers. A copy of the shareholders agreement appears at pp.99 to 115 of the papers. Mr. Brown [as seller] had sold 40% of his shareholding in the respondent to the Trust in terms the Sale of Shares agreement. The shareholders agreement records the provisions governing the relationship inter se between the shareholders and the respondent – see para 26.1.2 at p.77 of the papers. It is not in dispute that the aforesaid agreements were concluded contemporaneously with the loan agreement.

[22] At p.76 of the papers.

[23] In terms of clause 4.3 of the sale of shares agreement, payment of the purchase consideration was dependent on the Trust ensuring that ‘the plant finance is executed and made available for the company [respondent] in accordance with this clause, and in order to

extinguish the Purchaser’s [Trust] payment obligations to the Seller [Brown] in respect of the Sale Shares.’ ‘Plant finance’ is defined in clause 1.1.5 of the sale of shares agreement as ‘the discounted financing of the Roff R70 maize Mill Plant and related equipment on site, which financing shall be in the name of the company [Respondent] and financed by way of a loan account between the Company and the Purchaser [Trust]’.

[23] In terms of clause 4.3 of the sale of shares agreement, payment of the purchase consideration was dependent on the Trust ensuring that ‘the plant finance is executed and made available for the company [respondent] in accordance with this clause, and in order to

extinguish the Purchaser’s [Trust] payment obligations to the Seller [Brown] in respect of the Sale Shares.’

‘Plant finance’ is defined in clause 1.1.5 of the sale of shares agreement as ‘the discounted financing of the Roff R70 maize Mill Plant and related equipment on site, which financing shall be in the name of the company [Respondent] and financed by way of a loan account between the Company and the Purchaser [Trust]’.

[24] See: para 26.4 at p.78 of the papers.

[25] Para 16.6 at p.127 of the papers.

- [26] Clause 8 of the bond provides that ‘A certificate signed by the trustee or manager for the time being of the Mortgagee specifying the amount owing by the Mortgagor to the Mortgagee in respect of the secured debt or any interest thereon shall be prima facie proof of the amount of such indebtedness for all purposes including...judgment under this Notarial Bond. It shall not be necessary to prove the appointment or authority of such trustee or manager.’
- [27] See: para 16 at p. 74 and para 18. 2 at p.19 of the papers.
- [28] It is trite that the affidavits constitute the evidence in motion proceedings.
- [29] See: Bank of Lisbon International Ltd v Venter and Another 1990
- (4) SA 463 (A) at 481H - 482C; Senekal v Trust Bank of Africa Ltd 1978
- (3) SA 375 (A) at 382 in fine - 383.
- [30] See: para 15 at p. 18 of the papers.
- [31] A copy of the letter of demand, dated 7 July 2017, appears at pp. 59-60 of the papers.
- [32] See: para 16.10 at p. 127 of the papers. A copy of the acknowledgment of debt appears at pp. 140-145 of the papers. This was properly
- conceded by the respondent at the hearing of the matter.
- [33] The amount of R4,488,021.00 being the capital sum of the loan arising from monies advanced to the respondent in terms of the loan agreement.
- [34] See: paragraph i) of the bond at p.38 of the papers.

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