

SOUTH AFRICA / JUDGMENT

Dolberg Asset Finance Ltd v Dolberg South Africa (Pty) Ltd (2020/25831) [2021] ZAGPPHC 610 (20 September 2021) [2021] ZAGPPHC 610

COURT

North Gauteng High Court, Pretoria

BEFORE

van der Westhuizen

CASE / FILE NUMBER

2020/25831

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO.: 2020/25831

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

20/09/2021

In

the matter between:

DÖLBERG
ASSET FINANCE
LTD Applicant
(Registration: no:
C09024861)
and
DÖLBERG
SOUTH AFRICA (PTY)
LTD Respondent
(Registration no:
2011/141214/07)

JUDGMENT

van der Westhuizen, J

[1] The applicant seeks to enforce an intercompany guarantee that was granted by the respondent in favour of the applicant. The applicant and the respondent are sister companies within the Dölberg Group, i.e. the Dölberg Group Holdings Ltd, registered in the Isle of Man. The applicant is a company registered in Mauritius and the respondent is registered in South Africa.

[2] The respondent has raised a point in limine, namely that the deponent to the founding affidavit does not have the requisite locus standi to represent the applicant in these proceedings. The deponent to the founding affidavit describes himself as:

“The Deed Administrator of the applicant.”

[3] The deponent further alleges that he is duly authorised to bring the application on behalf of the applicant. Apart from that vague allegation, nothing further was alleged, or any document supporting the allegation was attached. On behalf of the applicant it was submitted that:

- (a) The deponent is a chartered accountant;
- (b) He is the Deed Administrator of the applicant in Mauritius, in terms of which the deponent administers the affairs of the applicant in Mauritius following on a voluntary compromise (the Deed) with the applicant's creditors;
- (c) In terms of the wording of the said Deed it is clear that it is a contractual compromise with the creditors;
- (d) There are no insolvency proceedings in Mauritius that involves the applicant; and
- (e) There is no procedural bar under Mauritian law to bring the present proceedings in South Africa.

[4] On behalf of the respondent it was submitted that:

- (a) No allegation was made in the founding affidavit that there has been compliance with the statutory requirements of the Mauritian

Insolvency Act, 2009, including compliance with the provisions of section 287(1) thereof;

- (b) That Act requires the lodging of a notice of appointment with the Registrar of Companies in Mauritius, and the required publishing of a notice in the particular Mauritian Gazette. None of those two requirements was complied with, nor were documents attached to the founding affidavit, or, for that matter, to the replying affidavit in these proceedings, to support the applicant's aforementioned allegations.[1]

- [5] In view of the approach I intend following in this judgment, a determination of that point in limine is not required. In any event, it will not be definitive of the rights and obligations of the parties in respect of the said guarantee. Without deciding the issue, I shall, for the purposes of this judgment, assume that the deponent on behalf of the applicant has the required authority.
- [6] It is common cause that payment of the guarantee in question is dependent upon the fulfilment of a suspensive condition. The suspensive condition reads as follows:
- “9. Payment under this guarantee shall be conditional upon the approval of an Authorised Dealer on the South African Reserve Bank (“SARB”) and/or the SARB (as the case may be), which approval the Guarantor shall do everything in its power to obtain, when required.”*
- [7] The applicant contended that the respondent has failed in its obligation to obtain the approval of the SARB and has consequently dismally failed in its obligation to do everything in its power to obtain the said approval. It is further contended by the applicant that, in view of the respondent’s failure to do everything in its power to obtain the approval, it should be found that there has been a fictional fulfilment of the suspensive condition, and hence that the respondent should make good on its undertaking in respect of the guarantee.
- [8] The main contention of the applicant is that the respondent was required to in fact obtain SARB approval, anything less would result in the respondent not doing everything in its power to obtain approval. That contention flies in the face of all legal principles.
- [9] From a purposive and contextual reading of the guarantee as a whole, the clear intention of the grant of the guarantee was to secure a shareholder’s loan made to the applicant by its parent company, Dölberg Group Holdings.
- [10] It was common cause between the parties that the object of the guarantee was to provide for the flow, or export, of monies from South Africa to Mauritius. Such object can only be achieved when and if approval for the flow, or export, of such monies is obtained from the appropriate authority within South Africa. The parties were agreed that the flow, or export, of monies across the borders of any country to another country requires the necessary approval of the appropriate authority of that country. In this instance, the appropriate authority, within South Africa, to grant such approval, is the SARB. That much is acknowledged in the quoted passage of the relevant clause of the guarantee.
- [11] It is gleaned from the papers filed in these proceedings, that the respondent instructed FirstRand Bank Ltd to make application to the SARB for approval to make payment in terms of the guarantee to the applicant in Mauritius.
- [12] On that instruction, FirstRand Bank Ltd, through its Group Treasury’s Manager: Currency and Exchange Department, one Graham Prior, filed the required request for approval for the cross-border flow of monies in terms of the guarantee by the SARB.

[13] The factual basis of FirstRand Bank Ltd's exchange control application is contained in the said application and the following is of importance:

- (a) The details of the party that submitted the application for approval is clearly recorded, i.e. the FirstRand Bank Ltd;
- (b) The application further records the details of the requesting party, as well as the details of the party that would benefit, namely the details of the respondent (as applicant) and the Mauritian companies, including Dölberg Asset Finance Ltd, Mauritius, the present applicant;
- (c) The amount to be transferred cross-border, i.e. MUR 54 311 776.00;
- (d) The purpose of the transfer, namely "Financial Operations Division – Guarantees: Issuance of a corporate guarantee";
- (e) A background of the business of the respondent is set out which indicates that the respondent has a large international footprint, as well as an international client-base;
- (f) Under the rubric "Details of the guarantee", it is recorded that the respondent bound itself as surety and co-principal debtor in respect of an amount which is owed by Dölberg Group Holdings Limited as debtor to the applicant (the Mauritian company) in terms of a guarantee for payment of the amount stipulated in the guarantee. It is further recorded that the guarantee is subject to the obtaining of the required approval, as it would result in the cross-border flow of funds.
- (g) It is further recorded under the said rubric that there may not be a clearly quantifiable direct benefit to South Africa, albeit some indirect benefit to South Africa, which is then explained further under the rubric "Indirect benefit to South Africa.
- (h) The recorded indirect benefit related to the success of the Dölberg Group of companies, which are regarded as sister companies, all separate and independent companies. Although separate and independent, the success of the local company, is interrelated with

the success of the other companies, and vice versa.

- (i) A copy of the guarantee was attached to the application to the SARB.

[14] A brief and curt response to the application for approval was received from the SARB. The following was stated:

"I thank you for the information furnished and advise that, since there may not be direct financial or monetary benefit to South Africa and that there is no direct interest of shareholding between the parties concerned, we are unable to favourably consider the applicant's request."

[15] Due to the SARB's refusal to grant approval for the cross-border flow of monies, the applicant launched these proceedings.

- [16] This application is premised upon a number of allegations directed at proving that the respondent did not comply with its obligation to do everything in its power to obtain approval of the cross-border flow of monies in order to comply with the provisions of the guarantee.
- [17] In that regard, the following issues were raised:
- (a) On a conspectus of the SARB application for approval, in the context of the respondent's conduct, it is revealed that the respondent fell markedly short of its obligation to do everything in its power to obtain SARB approval;
 - (b) The respondent's conduct invites an inference that the respondent intended to frustrate the fulfilment of the suspensive condition;
 - (c) The timing of the application for exchange control approval was telling in that the application was made in October 2018 and, had the approval been granted at that time, the authorisation would have lapsed by the time that payment was due in December 2019;
- [18] The alleged conduct on the part of the respondent complained of was said to be:
- (a) The respondent's alleged tardiness in providing the applicant timeously with a copy of the SARB application;
 - (b) The belated advising of the denial of approval of the SARB application;
 - (c) The half-hearted and unpersuasive content of the application for approval of cross-border transfer of monies;
 - (d) Alleged material deficiencies in the SARB application, such as: approbation and reprobation in describing the relationship between the two companies (unrelated foreign company and sister company); the absence of details of the position of guarantor of the respondent in the group structure of the Dölberg Group; and the benefit of the finance agreement to the Dölberg Group.
- [19] It is contended on behalf of the applicant that from the fore stated criticisms, an inference is to be drawn that the respondent has shrugged off its duty in terms of clause 9 of the guarantee.
- [20] The respondent submitted that there is no merit in the aforementioned criticisms. In that regard the following is stated:
- (a) The applicant did not directly criticise FirstRand Bank Ltd in the manner in which it presented the application;
 - (b) No attack was directed at FirstRand Bank Ltd that it had intentionally, or negligently, dressed up the application with an intent that it must fail;

- (c) FirstRand Bank Ltd is one of the largest banks in South Africa that made the application on behalf of the respondent and such was made by the FirstRand Group Treasury's manager: Currency and Exchange Department, one Graham Prior;
- (d) The supposition that "more" could have been said is without merit. The applicant does not suggest any additional or crucial information to have been disclosed, whether in respect of the "relationship" between the applicant and the respondent, or in respect of the alleged financial benefit intended by the guarantee;
- (e) No indication or allegation was forthcoming from the applicant that any of the facts contained in the SARB application were false;
- (f) The SARB exercises a discretion whether or not to grant approval for cross-border transfer of monies, and in that regard, a value

judgment

is made on whether the Republic of South Africa will receive equal value for the amount to be transferred cross-border for good, in which case sufficient value will remain in the financial system of the Republic of South Africa.

- [21] In my view, where the SARB has a discretion whether or not to grant approval for the cross-border flow of monies, the applicant's contention that the respondent was obliged to in fact obtain approval, at all costs, has no merit. A value judgment in respect of the value of the monies to be transferred and the reciprocal return value to be received within the Republic ousts any obligation cast on the respondent to in fact obtain approval. The undeniable quid pro quo requirement renders any such obligation upon the respondent nugatory.
- [22] The requirement of a reciprocal return value is the very essence of the inclusion of clause 9 in the guarantee. The parties to the guarantee were acutely alive to that fact. In fact the parties were acutely aware that the grant of the approval by the SARB fell wholly within the discretion of the SARB and its policies.
- [23] The applicant did not deny that it and the respondent were separate companies and independent of each other. It acknowledged the fact that no direct shareholding in each of them were shared. The applicant further did not deny that no reciprocal return value to the Republic would follow from the cross-border flow of revenue. The applicant furthermore did not deny that the intended purpose of the guarantee was to make good a loan by the applicant to Dölberg Group Holdings.
- [24] Furthermore, whatever "further" or "better" explanation of the benefit to the Dölberg Group in terms of the finance agreement should have been provided in the application, is of no concern. In my view, any such "further" or "better" explanation would only highlight the fact that no reciprocal value would befall the Republic by the cross-border flow of monies.

- [25] In that regard, the stressed contention on the part of the applicant that the real benefit would only befall the Dölberg Group, puts paid to any value to be retained or received within the Republic, due to the cross-border flow of revenue.
- [26] It follows, that the absence of any indication by the applicant that any benefit of value would accrue to the Republic in granting the approval, negates any inference to be drawn against the respondent's approach.
- [27] In my view, there is no merit in the applicant's contention that the doctrine of fictional fulfilment applies. The very purpose of that principle is to hold a party to its obligations to achieve the result of the suspensive condition. Where, as in this matter, the intended result is dependent upon the exercise of a discretion that befalls a third party, the intended result can only be achieved, where the relevant and requisite facts are placed before the said third party upon which it is to exercise its discretion. However, where that discretion is fettered, as in this instance, namely where a policy of value judgment is to be measured, the doctrine of fictional fulfilment can find no application.[2] To apply that doctrine in the present instance would entail holding that approval was obtained from the SARB, when in fact approval was refused, and ordering the respondent to transfer the guarantee amount to the applicant in Mauritius. The granting of such an order would transgress upon the doctrine of separation of powers.[3]
- [28] There is no merit in the applicant's contention that an inference be drawn against the respondent that it purposively did not provide "further and better" information in the application for approval. The respondent itself did not submit the request, it utilised the services of an appropriate and suitable entity to act on its behalf, as it was obliged to do as per the SARB directives and policy. Furthermore, the applicant has not suggested what "further or better" or additional information should have been provided. As recorded earlier, the fettered discretion of the SARB to grant approval is dependent upon policy considerations. On the common cause facts in this matter, the policy considerations clearly lean to the
- fact that those policy considerations were not met and consequently resulted in the non-granting of the request for approval.
- [29] As alternative relief, the applicant seeks that the respondent be ordered to pay the guarantee amount into the applicant's attorneys trust account in South Africa for the benefit of the applicant. The seeking of such relief is bad in law.
- [30] It is common cause that the applicant conducts no business in the Republic. It holds no financial accounts within the Republic. The applicant adds no revenue value in and to the Republic. The guarantee amount is further required in Mauritius, not in South Africa.

- [31] Furthermore, it is common cause that the suspensive condition of the guarantee was not met. That resulted that the contract, i.e. the guarantee, was rendered unenforceable.[4] Consequently, no residual obligation rested upon the respondent to make good its undertaking. The parties were acutely aware of that fact when the guarantee was negotiated as evidenced by clause 9 of the guarantee.
- [32] In addition, the SARB has already exercised its statutory discretion against the granting of approval as no revenue benefit would befall the Republic, and due to the absence of any direct interest or direct shareholding between the parties.
- [33] Where the SARB has already exercised its discretion, any non-compliance with that notice or directive, as in the present instance, should the alternative relief be granted, would result in the contravention of Regulation 22 of the Exchange Control Regulations, 1961, as promulgated. That section rules such non-compliance an offence. The respondent would consequently commit an offence if it paid the guarantee amount into the trust account of its South African attorneys in compliance with the obligations imputed upon the respondent by the said guarantee.
- [34] Furthermore, the granting of such alternative relief would circumvent the purpose of the suspensive condition of the guarantee to obtain SARB approval.
- [35] It follows that the application cannot succeed.

I grant the following order:

1. The application is dismissed with costs.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

Date of Hearing: 17

August 2021

On behalf of Applicant: S A Nakhjavani

Instructed by: Kapditwala

Inc t/a Dentons

On behalf of Respondent: C Acker

Instructed by: Pagel

Schulenberg Inc

Date of Judgment: 20

September 2021

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- [1] Moosa and Cassim N.N.O v Community Development Board 1990(3) SA 175 (A) at 180H-181C
- [2] Akin to the situation in Gowan v Bower 1924 AD 550 at 572-573
- [3] National Director of Public Prosecutions v Zuma 2009(2) SA 277 (SCA)
- [4] Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd 2013(2) SA 133 (SCA) [10]
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