

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Master of the High Court and Others (30661/2005) [2006] ZAGPHC 163 (4 April 2006)

[2006] ZAGPHC 163**COURT**

High Courts - Gauteng

BEFORE

Pretorius

CASE / FILE NUMBER

30661/2005

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**IN THE HIGH COURT****OF SOUTH AFRICA****(TRANSVAALSE****PROVISIONAL DIVISION)****Case number: 30661/2005****Date:**

4/4/2006

NOT REPORTABLE

In the matter between:FIRSTSTRAND BANK
LIMITED Applicant

and

THE MASTER OF THE HIGH
COURT First

Respondent

THE LAND AND

AGRICULTURAL DEVELOPMENT Second
Respondent

BANK OF SOUTH AFRICA

t/a LANDBANK

CARL HERCULES JACOBUS

BARNARD N.O. Third

Respondent

DEON MARIUS BOTHA

N.O. Fourth

Respondent

DIMAKATSO ARNOLD

MICHAEL MOHASOA Fifth

Respondent

PARBHOO ROYNATH Sixth
Respondent

JUDGMENT

PRETORIUS AJ,

This is an application where the Applicant seeks relief in the following terms:

That the decision of the First Respondent on the 18th of March 2005 upholding the objection of the Second Respondent to the fourth liquidation and distribution account filed by the Third to Sixth Respondents in the insolvent estate of Jacobus Johannes de Kock Roux under Master's reference T165/2002 be reviewed and set aside;

That the fourth and fifth liquidation and distribution account in the insolvent estate of Jacobus Johannes de Kock Roux be confirmed.

The question this court has to deal with is whether the Second Respondent has a preferent statutory right to free residue in terms of section 33 of the Landbank Act, Act 15 of 2002 and whether Second Respondent had a statutory pledge in terms of Section 30 of the Act, as the free residue had allegedly arisen from a mielie crop financed by the Second Respondent.

The Land and Agricultural Bank of South Africa was established by the Land Bank Act of 1912, an Act repealed and replaced by the Land Bank Act of

1944. The latter Act has now been repealed and replaced by the Land and Agricultural Development Bank Act, Act 15 of 2002.

Both counsel for the Applicant and Respondent agreed that the Court First had to decide whether the relevant sections of the Land and Agricultural Development Act no 15 of 2002 are applicable, as the indebtedness arose from monies advanced prior to the 2002 Act coming into operation. Act 15 of 2002 came into operation on 10 June 2002.

The question has been dealt with in several cases, which were referred to by both counsel for the Plaintiff and the Defendant. In the matter Land and Agricultural Development Bank of South Africa t/a Land Bank versus The Master and Others 2005 (4) SA 81 (CPD) Davis J found that the express wording of section 33 of the 2002 Act was clear. The remedies afforded in case of default applied only in respect of advances made under the 2002 Act and did not apply to advances which were not made in terms of the 2002 Act.

Mr Leathern, for the Applicant, argued that this position is correct as the date of commencement of the Act was 10 June 2002, and the monies advanced by the Second Respondent were in terms of section 34 of the 1944 Act and the remainder of the loans were prior to the 2002 Act coming into operation.

The Applicant relies on sub section 30(1) and sub section 30(2) of Act 15 of 2002 which reads:

“while any person owes the bank any money by virtue of an advance in terms of this Act”

Counsel for Applicant further argued that section 33(2) only applies to money due under the 2002 Act and does not include advances made prior to the date of the operation of the Act, which was 10 June 2002.

In *First National Bank of South Africa Limited versus Land and Agricultural Bank of South Africa* [2000] ZACC 9; 2000 (3) SA 626 (CC) the Constitutional Court confirmed an order declaring sections 34(3)(b) to (7), (9) and (10) and section 55(2)(b) to (d) of the 1944 Act unconstitutional in terms of section 34 of the Constitution of South Africa Act 108 of 1996.

Sections 34 and 55 of the Land Bank Act of 1944 provided amongst other matter, for remedies of the Land Bank against defaulting debtors. These sections permitted the Bank to recover debts without recourse to a court of law and without having to follow ordinary legal procedures. These sections also conferred a statutory preference on the Bank, which allowed the Bank in some instances to recover moneys from debtors to which other creditors would ordinarily have had a prior claim.

The Constitutional Court realised that the result of this decision would leave the Bank without recourse for unsecured loans. Therefore it was ruled that the invalidity of these sections would be suspended for two years, that is until 9 June 2002. A new act was drafted, that is in line with both the Constitution and certain recommendations by the Law Reform Commission, which came into operation on 10 June 2002.

Section 90 of the insolvency Act, Act 24 of 1936 provides that the provisions of the Insolvency Act will not affect the provisions of any other law that confer powers and impose duties upon the Land Bank or the Land and Agricultural Bank, in relation to any property belonging to an insolvent estate.

Section 34(1) of the 1944 Act allowed the Land Bank to make unsecured advances to farmers to enable them to defray certain specified expenses related to farming.

Section 34(2) of the 1944 Act set out circumstances where the Board of the Bank could take action against the borrower, which included a debtor who became insolvent. Section 34 of the 1944 Act further provided that seven days after a demand for repayment of the unsecured advance had been made by means of a registered letter to the debtor, the Bank could, without recourse to the court require a sheriff, or any other person designated by the Bank, to attach and sell by public auction so much of the movable property of the debtor as was necessary to liquidate the amount owed.

Section 34 further provided that, if above had taken place and an amount was still owed, the Bank could, after notice to mortgagees and the Registrar of Deeds, and without recourse to a court, attach any of the debtor's immovable property and cause it to be sold at public auction.

In First National Bank of South Africa Ltd versus Land and Agricultural Bank of South Africa and Others the Constitutional Court suspended the invalidity for two years and found that:

“the invalidity of the impugned provisions should not affect attachments and sales already completed. However, all current attachments, not yet perfected by a sale effected in terms of s 34(3)(b) as it now reads, ie without recourse to a court of law should be invalidated and all future attachments require that the Land Bank proceed only by court order”

On p 633 H – 634 B (supra)

It is clear from this judgment that the Constitutional Court regarded all advances made under the 1944 Act, to be dealt with in a way that accorded with the Constitution and therefore attachments could only be made by approaching a court of law. Under these circumstances the Land Bank could obtain a preferent right with regard to the property of a debtor, if a court order authorizing the Land Bank to attach property of the debtor had been obtained and the property had been attached. The suspension of the invalidity of section 34 lapsed on 9 June 2002 and on 10 June 2002 the present Act came into operation.

The dispute in this application concerns the free residue of R 500,000-00 in the insolvent estate of Johannes De Kock Roux. A notarial bond was registered in favour of the Applicant as security in terms of Act 57 of 1993, which covers an amount of R 2,000,000-00.

The Second Respondent, the Land Bank, objected to the fourth liquidation and distribution account. The Master of the High Court, the First Respondent, upheld the objection of Second Respondent that the amount of R 500,000-00 in the free residue should not be awarded to the Applicant as a preferential creditor.

The First Respondent gave the reasons for his decision on 18 March 2005 as follows:

“1. The objection fall within the scope of Section 33(10) of the

Land and Agricultural Bank Act 15 of 2002 in that Mr JJ de Kock Roux became insolvent.

In terms of the letter dated the 15th of January 1999 between the Land and Agricultural Bank and the insolvent the bank approved a Short Term Production Loan for a

period of 5 years for the financing of a grain crop for the 1998/1999 season whereafter it was re-established in 1999 and never

repaid. The loan was for an amount of R 2,000,000-00.

The loan was secured by way of a Special Notarial Bond over 12 Ford 8340 tractors.

In terms of section 30 of the above mentioned act while any person owes the Bank any money by virtue of an advance in terms of this Act-

all agricultural produce and all products manufactured by that person from any agricultural produce with money so advanced to him or her; and

any agricultural produce purchased by that person with money so advanced to him or her, which is in the possession of or in transit to that person or an agent of that person, is deemed to have been pledged to the Bank as effectually as if it had been expressly pledged and delivered to the Bank, and any disposal thereof by or on behalf of that person, without the consent in writing of the Bank, is void.

In terms of Section 34(2) of the said act any other creditor who holds a statutory preferential right over property of the debtor of any other law ranks after the Bank's preferential rights in terms of this Act."

The First Respondent dealt with the objection in terms of Act 15 of 2002, although the money was advanced in January 1999.

Section 52(1) of the 2002 Act provides that:

"Anything validly done in terms of the Land Bank Act, 1944 (Act No.13 of 1944), continues to be valid and of full force and effect despite the repeal of that Act by section 53 and any regulations made in terms of that Act remain in force until repealed in terms of section 49 of this Act "

Section 52(5) provides that:

"Any proceedings involving the Bank, whether they be litigation in court or any hearing whatever nature in terms of labour legislation, which had been instituted immediately before the commencement of this Act, must be disposed of as if this Act had not been enacted, and the Bank retains any rights it had in respect thereof immediately before the commencement of this Act. "

In the unreported judgment of Chetty J in *The Land and Agricultural Development Bank of South Africa versus M de Villiers and Others* case number 693/2004 (ECD) it was decided that reference in section 33(2)(a) of Act 15 of 2002 to "any advance in terms of this Act" does not mean that the Bank's action is limited to advances granted after 10 June 2002, as was decided by Davis J in the matter of *Agriculture Bank of South Africa versus The Master and others* (supra). That interpretation ignores the other provisions of the section which refers to "advances it has made" – section 33(1) and having regard to section 2(1) which relates to the entire existence of the Land Bank since 1912.

In the unreported case of *Die Land- en Landbou- Ontwikkelingsbank van Suid-Afrika versus Cloete Murray NO and others*, case number 27258/2003 (TPD) Botha J decided:

"Die rekening is bekragtig en die Meester het sy bevinding oor die beswaar teen die rekening gemaak na die inwerkingtreding van Wet 15 van 2002. Die aansoek moet dus beoordeel word aan die hand van Wet 15 van 2002."

In this instance the Master gave his decision on 18 March 2005, which is almost three years after Act 15 of 2002 had come into operation.

In Land and Agricultural Development Bank of South Africa t/a Land Bank versus Venter NO [2004] All SA 314 O par 24 it was decided by Wright J that the 2002 Act did not infringe any vested rights obtained at the concursus creditorum under similar circumstances and that the 2002 Act applied.

The difference, which section 33 of the 2002 Act authorizes, is that if any of the jurisdictional facts enumerated in section 33(2), whereunder the insolvency of the debtor according to section 33(2)(e)(i), exist, the Land Bank has to demand payment in writing of the advance made to the debtor. If the debtor had not paid within seven days in terms of section 33(3) the Land Bank may apply to a court of law for authorization to attach and sell property of the debtor in terms of section 33(4). This may be done if there is an affidavit supporting the application to a court of law that complies with the aspects as set out in subsection 4(a), or if it is reasonable or just in the circumstances or if compelling considerations exist in terms of sub section 4(c).

I am of the opinion that, having regard to the fact that although there is no dispute of Second Respondent's claims or defence against Second Respondent's claims, that it was necessary to obtain judgment in a court of law to found Second Respondent's claim, as set out in section 33.

Botha J states in Die Land- en Landbou ontwikkelingsbank van Suid Afrika versus Cloete Murray NO en andere:

“Natuurlik is die bank nie verplig om ‘n hofbevel aan te vra nie, maar, as hy dit nie doen nie, verbeur hy die voordeel van die voorkeur wat, volgens artikel 34(1), afhanklik gemaak word van die nakoming van die bepalings van artikel 33.”

and further:

“Dit is so dat die applikant ‘n voorkeur kan verwerf deur ‘n hofbevel aan te vra, maar dit verskaf geen regverdiging daarvoor om hom toe te laat om ‘n kort pad te vat en weg te doen met die vereiste van die verkryging van ‘n hofbevel”

page 11 (supra)

There is an appeal pending against the finding of Davis J in Land and Agricultural Development Bank of South Africa t/a the Land Bank versus The Master and others (supra)

I do not agree, with respect, with the judgment of Davis J as he refers to section 33(2)(a) in isolation, without having regard to section 33(1) of Act 15 of 2002. Section 33(2)(e)(i) provides the Second Respondent with a remedy in the event of a debtor's insolvency. Section 33(2)(a) must be read, bearing in mind all the provisions of the Act as well as the pre-amble to the Act.

I am of the opinion that section 52(1) of the 2002 Act clearly provides for advances made prior to the 2002 Act to be regarded as valid and of full force and effect. Section 33(1) refers to “advances it has made” which should be read with section 2(1).

Section 52(7) of Act 15 of 2002 stipulates:

“Any reference in any legislation to the Land and Agricultural Bank of South Africa or the Land Bank Act, 1944, must be interpreted as a reference to the Bank or to this Act, as the case may be. ”

Section 34 of the 2002 Act confirms Seconds Respondent’s preferential right to the proceeds of property of the debtor after liquidating any amount owing in terms of a bond or other real right. The preferential right can only be obtained in terms of the procedure set out in section 33(3)(b).

In terms of section 102 of the Insolvency Act, No 24 of 1936 rights secured by a general bond, rank after statutory preferential rights over property.

The intention of the legislature could not have been to exclude all advances made prior to the commencement of the 2002 Act. Section 52(7) of the 2002 Act stipulates that any reference in any legislation to the 1944 Act must be interpreted as a reference to the 2002 Act.

The First Respondent’s decision to deal with the matter, in terms of Act 15 of 2002 is correct. The decision to uphold the objection can, however, not be entertained.

The Second Respondent did not comply with the requirements of section 33(3)(b) and therefore cannot obtain preference.

As the court has found Act 15 of 2002 applicable, the further question relates to section 30 of the 2002 Act, and the court has to decide whether the advances made by the Second Respondent were used to produce the crops concerned which gave rise to the funds now applicable.

The date of sequestration was 12 February 2002. The short term production loan was granted for financing a grain crop for the 1998/9 season whereafter it was “re-established” in 1999 and was never repaid.

Nothing was placed before the Master or this court to indicate any reason for the Second Respondent to be entitled to such funds. There is the possibility, although not stated by the Second Respondent, that there would have been a Second occasion of applying money to produce a crop, that is for 1999/2000 crop. Had there been a few failed crops in between then, according to Second Respondent’s argument, Second Respondent would be entitled to claim the proceeds of a later successful crop, although it had not been financed by Second Respondent.

That can never be the intention of the legislature.

It is quite clear from section 33(1)(e)(i) and 33(1)(g) and 33(10) that the sequestration or liquidation of a debtor’s estate does not preclude the granting of a court order as set out in section 33(4).

I am of the opinion that neither a trustee or the Master has the discretion to absolve the Second Respondent of complying with sections 33 and 34 of Act 15 of 2002.

In this instance the Second Respondent requested the Master on 1 July 2004 to inform the Land Bank if the Master on 1 July 2004 was not going to amend the fourth Liquidation and Distribution account, to enable the Second Respondent to apply for a court order in terms of section 33(4)(c) of Act 15 of 2002.

It is so that section 34 confirms Land Bank's preferential right to the proceeds of property of the debtor after liquidation any amount owing in terms of a bond or a real right. The proviso is that the Land Bank has to establish a preferential right by adhering to the requirements as set out in section 33 and has to obtain a court order. If Land Bank fails to obtain a court order the Land Bank is only a concurrent creditor.

At the time of the objection to the Master, by the Second Respondent, on 1 July 2004, the Second Respondent was fully aware that if Act 15 of 2002 applied, that in order to obtain a preferential right Land Bank had to apply for a court order in terms of section

33. The Second Respondent failed to do so, although it knew of the judgment by Botha J on 24 October 2003.

The following order is made:

1. The decision of the First Respondent on 18 March 2005 upholding the objection of the Second Respondent to the fourth liquidation and distribution account filed by the Third to Sixth Respondents in the insolvent estate of Jacobus Johannes de Kock Roux under Master's reference T 165/2002 is set aside;
2. The fourth liquidation and distribution account in the insolvent estate of Jacobus Johannes de Kock Roux is confirmed;
3. The counter application is dismissed;
4. The Second Respondent to pay the costs of the application and counter application.

Acting Judge Pretorius

Case number : 30661/2005

Heard on : 8 March 2006

For the Applicant / Plaintiff : Adv DM Leathern

Instructed by : Wolmarans & Luderitz

For the Respondent / Defendant : Adv B Bergenthuin SC

Instructed by : Gildenhuys Lessing Malatji inc

Date of Judgment :

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPHC/2006/163.html>

CASE PAGE https://chat.esheria.ai/case-law/south-africa/firststrand-bank-limited-v-master-of-the-liquidation_and_distribution_account-agphc-2006-30661-2005--6a3ea51a3b1caa912981148f

Prepared on 14 October 2026 · Esheria