IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Not Reportable
CASE NO. 218/2023

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA — **Applicant**

And

KINROS ESTATES (PTY) LTD
(Registration number: 2018/261040/07) — **First respondent**

PIETER JOHANNES GERHARDUS MOOLMAN
(Identity number: 8[…]) — **Second respondent**

JUDGMENT

LAING J

[1] This is an application for, *inter alia*, judgment against the respondents for money previously advanced. The applicants have already obtained an order for the attachment and sale of farming land to recover the amount in question.[1]

The applicant's case

[2] In its founding affidavit, deposed to by a legal advisor, Ms Sinenhlanhla Mtshali, the applicant avers that it entered into a loan agreement with the first respondent on or about 9 October 2018 at Makhanda. The loan agreement fell within the ambit of section 26 of the Land and Agricultural Development Bank Act 15 of 2002 because the funds made available to the first respondent were to be used for the purchase of immovable properties. The terms thereof stipulated, *inter alia*, that the applicant would lend an amount, alternatively make credit facilities available, in the sum of R 16,625,524 for the purchase of the land in question. The loan amount and interest thereon were repayable over 25 years in annual instalments of which the first was the sum of R 2,286,465. The loan agreement provided for notice in the event of default and indicated, furthermore, that the entire outstanding balance would become due and payable if an instalment was not paid timeously. A certificate issued by the applicant's authorised representative would constitute *prima facie* proof of any amount owed. The applicant, so it alleges, performed accordingly.

[3] As security for the first respondent's indebtedness, the applicant caused a covering mortgage bond to be registered over three of the first respondent's immovable properties, situated in the Albany district. The bond was registered for a further sum of R 3,325,105 in relation to the costs of preserving and realising the properties, as well as any insurance premiums paid or payable by the first respondent as mortgagor. It constituted a continuing covering security for any amount owed to the applicant. Furthermore, the second respondent bound himself as surety and co-principal debtor in

[1] The applicant obtained an order on 12 September 2023 to attach and sell the land. This was unknown to counsel on the date upon which the present matter was argued but emerged later upon the court's request for supplementary heads of argument.

favour of the applicant. The sum claimable from the second respondent was limited to R 16,625,524 excluding attorney-and-client legal costs.

[4] The applicant alleges that the first respondent breached the loan agreement by failing to pay the instalments due. Consequently, the entire outstanding balance became due and payable; this amounted to the sum of R 24,475,284 on 31 August 2022. Interest accrued thereon at 11.88% per annum, calculated daily and capitalised monthly. The applicant gave notice to both the first and second respondents on 9 November 2022, demanding payment, but to no avail.

[5] The remainder of the application pertained to the remedy available under section 33(4) of the Land and Agricultural Development Bank Act 15 of 2002. The provisions in question permit the applicant to apply to court for an order that authorises the attachment and sale of property to liquidate the amount owing in relation to what was previously advanced, together with interest and costs.[2] As mentioned, the applicant has already obtained an order to that effect. The alternative relief sought by the applicant, in addition to the monetary judgment, was that the immovable properties be declared specially executable. The applicant does not pursue this further. It focuses, instead, on the recovery of the outstanding balance owed by the first respondent, who has allegedly failed to make payment as required.

The respondents' case

[6] In their answering affidavit, the respondents deny that Ms Mtshali was authorized to launch the application or to depose to an affidavit in support thereof. They contend that the applicant's delegation of powers, upon which Ms Mtshali relied, did not list a legal advisor for insolvency and recoveries as a signatory. There was also a need for approval from Legal Services, which was absent.

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[2] The provisions stipulate the circumstances that must exist before the applicant can apply to court; they include a situation where the payment of any amount due, in relation to an advance previously made, is in arrears.

[7] The respondents admit that a loan agreement was concluded with the applicant but assert that it is unlawful and unenforceable. This is because the applicant's representative, Mr Zilindile Makapela, was not properly authorized. The applicant's chief financial officer ('CFO') and a Class A official, as described in the applicant's delegation of powers, ought to have concluded the loan agreement; alternatively, the correct signatories, as prescribed elsewhere in the delegation of powers, should have signed. The respondents go on to deny that the nature and purpose of the loan agreement fell within the ambit of section 26, read with section 3, of Act 15 of 2002; they assert that the lending of money or provision of credit facilities for the purchase of immovable properties is not a listed objective of the applicant. They also contend that not all the conditions imposed by the loan agreement were met and that the certificate of balance is incorrect.

[8] By reason of the unlawfulness of the loan agreement, say the respondents, the applicant was not entitled to have a covering mortgage bond registered over the property. It was also not entitled to rely on the bond to secure the additional amount of R 3,325,105 because this had never been agreed. The suretyship is invalid, too, they say, for want of compliance with the General Law Amendment Act 50 of 1956; the principal debtor was not properly identified. In any event, they argue that the suretyship is unenforceable because it is derived from the unlawful loan agreement.

[9] The first respondent concedes that it failed to make payment in accordance with the terms of the loan agreement.

In reply

[10] The applicant, in reply, notes that it was common cause that: a loan agreement was concluded, there was a suretyship agreement in place, money was lent and advanced in terms of the loan agreement, the first respondent failed to make payment of the instalments due, and it remains in arrears. These facts on their own, asserts the applicant, entitle it to the relief that it seeks.

[11] Dealing with Ms Mtshali's alleged lack of authority and personal knowledge of the matter, the applicant points out that the respondents ought to have invoked rule 7. They failed to do so. Regarding the loan agreement, the applicant refers to the principle of *pacta sunt servanda* and points out that the respondents have benefitted from the money advanced and have only challenged the lawfulness of the loan agreement some five years later.

Issues for determination

[12] The issues, such as remain to be determined, can be summarised as follows: (a) Ms Mtshali's authorisation to launch the application and represent the applicant; (b) the validity of the various agreements and the implications thereof for the applicant's case; and (c) the correctness of the certificate of balance. They serve as a useful framework for the analysis below.

Authorisation

[13] It was previously a well-established principle that when a juristic entity commenced motion proceedings, evidence was required to indicate that it had indeed resolved to do so. In *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*,[3] a full court held that the best evidence would be an affidavit from an official, annexing a copy of a resolution; each case had to be considered on its merits, however, and a court must decide whether enough had been placed before it to conclude that it was indeed the applicant that was litigating and not some unauthorised person on its behalf.[4]

[14] The legal position appears, however, to have changed. In *Eskom v Soweto City Council*,[5] Flemming DJP observed that the introduction of rule 7(1) in the Uniform Rules of Court did away with the need to attach 'the many pages of resolutions, delegations

[3] 1957 (2) SA 347 (C).
[4] At 352A-B.
[5] 1992 (2) SA 703 (W).

and substitutions' to prove authority.[6] If an attorney was authorised to bring an application, then the application was necessarily that of the applicant.[7] The case was cited with approval in *Ganes and another v Telecom Namibia Ltd*,[8] where the Supreme Court of Appeal, per Streicher JA, held that it was unnecessary for a deponent to be authorised to depose to a founding affidavit. It was the institution and prosecution of proceedings that required authorisation. If a respondent wished to challenge the authority of the attorneys who had instituted the proceedings, then rule 7(1) of the Uniform Rules of Court provided a procedure by which to do so.[9] This was confirmed shortly afterwards in *Unlawful Occupiers, School Site v City of Johannesburg*,[10] where Brand JA reiterated that rule 7(1) was the appropriate remedy for a respondent who disputed the authority of any person allegedly acting for the purported applicant.[11] More recently in *ANC Umvoti Council Caucus and others v Umvoti Municipality*,[12] a full court, per Gorven J, considered the above decisions and found as follows:

> 'With respect, the reasoning in these cases also appears to me to accord with sound legal principle. The deponent to an affidavit is merely a witness, as was pointed out by Streicher JA in *Ganes*'s case. It is the attorney of a litigant who, by signing a notice of motion and issuing application papers, signifies that that attorney has been authorised to initiate the application on behalf of the named litigant. Whether or not the litigation has been properly authorised by the artificial person named as the litigant should not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained by means of rule 7(1), since this is a procedure which safeguards the interests of both parties.'[13]

[15] The learned judge continued further:

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[6] Rule 7(1) provides that a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may be disputed, in which event such person may no longer act unless he or she has satisfied the court that he or she is authorized to do so.
[7] *Eskom*, at 705E-H.
[8] 2004 (3) SA 615 (SCA).
[9] At paragraph [19].
[10] 2005 (4) SA 199 (SCA).
[11] At paragraphs [14] to [16].
[12] 2010 (3) SA 31 (KZP).
[13] At paragraph [27].

'…I am therefore of the view that the position has changed since Watermeyer J set out the approach in the *Merino Ko-operasie Bpk* case. The position now is that, absent a specific challenge by way of rule 7(1), "the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant" is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used.'[14]

[16] The findings of the full court in *Umvoti* seem to be an accurate reflection of how the legal position has changed. Evidence is not required to demonstrate that a juristic entity has properly resolved to launch an application or that it has provided its legal practitioners with the necessary instructions or approval to institute motion proceedings. A respondent who wishes to challenge such authorisation must use the procedure contained in rule 7(1).

[17] In the present matter, the application was instituted by Wheeldon, Rushmere & Cole Inc at the instruction of Leahy Attorneys Inc, acting for the applicant. This was, on its own, sufficient to demonstrate that the attorneys involved were authorised to institute motion proceedings. By implication, the application was that of the applicant. If the respondents had intended to challenge such authority, then they ought to have invoked rule 7(1); this was never done. The applicant is not required to prove, on affidavit, the existence of such authorisation. Similarly, whether Ms Mtshali was properly authorised to depose to the founding affidavit is neither here nor there. The decision of the Supreme Court of Appeal in *Ganes* makes it clear that the deponent does not have to be authorised to do so; she is merely a witness in the motion proceedings. Consequently, there is no basis for the respondents' contention that Ms Mtshali lacked the necessary authority to launch the application and to depose to the founding affidavit.

[14] At paragraph [28]. Footnotes omitted.

Validity of the various agreements involved

[18] A finding on the validity of the loan agreement might have implications for the validity of the mortgage bond and suretyship. These will be discussed under the respective sub-headings below.

The loan agreement

[19] It appears to be common cause that Mr Makapela was the only official of the applicant to have signed the loan agreement. The applicant's delegation of powers clearly required at least two signatories, either the CFO and a Class A signatory for a 'loan and/or facility agreement within the borrowing limits agreement with any counterparty'[15] or two other signatories, as stipulated elsewhere. A Class C signatory, Mr Reynier Kapp, who signed underneath Mr Makapela's signature, clearly did so as a witness and nothing more.

[20] The applicant contends that if the loan agreement was indeed unauthorised, then Mr Makapela's conclusion of the document was subsequently ratified when the applicant elected to pay the loan amount and make the credit facility available to the first respondent. This cannot be so. In terms of section 18 of Act 15 of 2002, the Chief Executive Officer ('CEO') is responsible for the day-to-day affairs of the applicant and may delegate any power or assign any duty to an employee of the applicant. The delegation of powers, attached to the applicant's papers, gives effect to the empowering provision. Listed amongst the underlying principles thereof is the following:

> 'd) One of the exercising of powers must be in the field of responsibility and no person can exercise a power that is not a function of his/her responsibility.'[16]

[15] Sic.
[16] Sic.

[21] It is apparent that Mr Makapela purported to bind the applicant to the loan agreement without the necessary authorisation. There is no evidence that the CEO as the delegating authority, alternatively the applicant's board of directors, subsequently ratified such conduct. The applicant referred to *Africast (Pty) Limited v Pangbourne Properties Limited*,[17] where the respondent's group company secretary and a director signed a property sale agreement, later ratified by the board of directors. Theron JA found that the signatories had the requisite authority. The facts are different to those in the present matter and the decision is of no assistance to the applicant. The loan agreement, here, was unauthorised and must be deemed void and unenforceable.

The mortgage bond

[22] The applicant asserts that, notwithstanding any finding that the loan agreement is unenforceable, it remains entitled to the monetary judgment by reason of a cause of action based on unjust enrichment. It argues that it is also entitled to enforce the underlying mortgage bond or suretyship. To that effect, it refers to *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa*,[18] where the Supreme Court of Appeal dealt with an agreement for the loan of funds to purchase and develop certain agricultural properties, secured by a mortgage bond. Lewis JA held that the agreement fell outside the objects of Act 15 of 2002, as listed in section 3 thereof, making it invalid and unenforceable.[19] He held further that:

> 'The Bank may well have an enrichment claim against Panamo for the money that it advanced pursuant to the invalid contract. Thus, while the Bank contended for invalidity, it nonetheless argued that the mortgage bond registered in its favour is valid and constitutes real security for a possible enrichment claim.'[20]

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[17] 2014 JDR 0616 (SCA).
[18] 2016 (1) SA 202 (SCA).
[19] The court relied, too, on sections 66 and 68 of the Public Finance Management Act 1 of 1999 to the effect that any public institution that concludes a transaction not authorized by legislation will not be bound thereby. At paragraph [22].
[20] At paragraph [23].

[23] By reason of the order that the applicant has already obtained for the attachment and sale of the immovable properties, it has no apparent need to enforce its rights under the mortgage bond. It did, however, register the bond for a further sum of R3,325,105 for the costs of preserving and realising the properties, as well as any insurance premiums paid or payable by the first respondent as mortgagor. Insofar as it seeks to rely on the bond to recover the costs in question,[21] it is necessary to deal with its validity considering the court's finding that the loan agreement was unauthorised.

[24] It is trite that a mortgage bond is always accessory to an obligation. If the obligation is unenforceable then the bond is also unenforceable.[22] The court in *Panamo* stated that there was no reason why a bond could not secure a debt arising from an enrichment claim but whether it did so in the circumstances depended on how the terms of the bond were construed.[23] Gorven AJA concluded as follows:

> 'The bond is not a model of clarity. However, construing it as a whole, I can find no basis for limiting the broad, all-encompassing language contained in the preamble, clause 2.1, clause 8 and clause 15. I disagree with the submission that the bond must suffer the same fate as the loan. In my view, the bond affords security for a claim for moneys due under one of the condictiones.'[24]

[25] It is necessary to consider the terms of the mortgage bond held by the applicant in the present matter. To that effect, the applicant drew attention to the broadly worded preamble, recording the parties' intention for the bond to serve as security for the first respondent's obligations towards the applicant 'vir welke oorsaak ookal'.[25] This was followed by clauses binding the first respondent to repayment of the capital amount of

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[21] The order granted on 12 September 2023 authorises the applicant to attach and sell the properties to liquidate the amount owing for advances made, together with interest and costs in relation thereto. It also authorises the applicant to appoint a private security company to safeguard the properties and orders the respondents to pay the costs thereof. It is silent, however, on the question of liability for the payment of any insurance premiums.
[22] *Albert v Papenfus* 1964 (2) SA 713 (E), referred to in *Panamo*, at paragraph [24]. See, too, the mention of *Kilburn v Estate Kilburn* 1931 AD 501.
[23] *Panamo*, at paragraphs [27] and [30].
[24] At paragraph [46].
[25] Translated as 'for any cause whatsoever' [own translation].

R 16,625,524 and interest thereon, as well as an amount of R 3,325,105 for legal costs, service fees, insurance premiums, tax, stamp duty, and other costs that might rise in accordance therewith. The contents of clause 2.1 are especially pertinent. They provide as follows:

> '2.1 Hierdie verband is 'n voortdurende dekkingssekuriteit vir gelde geleen en voorgeskiet, gelde geleen en voorgeskiet te word, en vir gelde wat Land Bank van tyd tot tyd in die toekoms aan die Verbandgewer mag leen en voorskiet en, in die algemeen, vir enige bestaande of toekomstige skulde wat die Verbandgewer aan Land Bank verskuldig is, of verskuldig mag wees tot en met, maar nie die Kapitale bedrag te bowe te gaan nie.'[26]

[26] The terms in question are, as the applicant points out, exceptionally wide and were clearly designed to give effect to the preamble. The mortgage bond was intended as security for any debt owed by the first respondent to the applicant. Similarly, clause 3 provides that the indebtedness may arise from, *inter alia*, all amounts already owed, or which may become due and owing in terms of any agreement, as well as any credit facilities made available to the first respondent.

[27] The court agrees with the applicant that the terms of the mortgage bond are sufficiently broad to encompass indebtedness other than that arising directly from the loan agreement. This would include an amount owed by the first respondent in relation to an enrichment claim. The bond is certainly enforceable.

The suretyship

[28] Regarding the suretyship, the respondents challenge its validity for want of proper identification of the principal debtor in the underlying agreement. The front page

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[26] Translated as 'this bond is a continuing covering security for monies lent and advanced, monies to be lent and advanced, and for monies that the Land Bank may from time to time, in the future, lend and advance to the mortgagor, and, in general for any existing or future debts that the mortgagor owes or might owe to the Land Bank, up to, but not exceeding, the capital amount' [own translation].

thereof clearly stipulates, however, that the applicant made certain financial facilities available to Kinross Estates Proprietary Limited, registration number 2018/261040/07; there can be no mistake about the identity of the principal debtor, subsequently referred to as 'die hoofskuldenaar'.[27] The respondents also contend that the agreement is unenforceable because it was derived from the unlawful loan agreement. In *Shabangu v Land and Agricultural Development Bank of South Africa*, [28] mentioned by the applicant, Froneman J found that:

> '…an agreement in relation to an undisputed invalid earlier agreement may be possible if it relates to an enrichment claim which results from the invalidity of the earlier debt, but not if it seeks to enforce the earlier indebtedness. If the terms of the accessory suretyship agreement are wide enough to cover the enrichment claim, the sureties may well also be liable.'[29]

[29] From the terms of the agreement in the present matter, the second respondent provided the suretyship in relation to any amount owed by the first respondent, either at the time or in the future.[30] It is clear that the parties intended that the terms of the agreement be interpreted to have as wide a meaning as possible; they are sufficient to include any claim that the applicant may have for enrichment.

Certificate of balance

[30] The remaining issue for determination is the correctness of the certificate of balance. It is relevant only insofar as it might have a bearing on the calculation of the enrichment amount. The respondents originally challenged its accuracy to assert that the applicant failed to demonstrate that it had a claim for a liquidated amount, thereby

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[27] The suretyship agreement indicates that the applicant made the facilities available to the first respondent, 'hierna genoem die hoofskuldenaar', translated as 'hereafter referred to as the principal debtor' [own translation].
[28] 2020 (1) SA 305 (CC).
[29] At paragraph [32].
[30] The applicant referred to the preamble, which states that the second respondent binds himself as surety for the repayment of all or any amounts owed or that may, from time to time, become owing by the first respondent to the applicant. See, too, clause 3 thereof.

preventing the applicant from relying on the remedy envisaged under section 33(4) of Act 15 of 2002. In reply, the applicant attached a transaction list and an updated certificate of balance, contending that these comprised a true reflection of the extent of the first respondent's indebtedness.

[31] This might indeed be of benefit to the applicant where it could base its claim on the terms of a valid loan agreement. The court has, however, already found that the loan agreement is void and unenforceable for want of the necessary authorisation. Inasmuch as the applicant has relied on the corresponding provisions of the loan agreement to capitalise interest at the various rates indicated and to levy the fees indicated, the certificate of balance cannot be used as the basis for any claim for enrichment.

Relief to be granted

[32] It is necessary, at this stage, to decide what relief can be granted to the applicant. At the invitation of the court, the applicant delivered supplementary heads of argument in terms of which counsel submitted that, in the event of the court's finding that the loan agreement was void and unenforceable, the applicant would indeed have an enrichment claim. This would be limited to the capital amount advanced to the first respondent; interest would run from the date of demand or the date of the institution of proceedings. It was suggested, however, that the claim would be akin to one for damages, only capable of determination upon the leading of further evidence.

[33] The court is inclined to agree. The applicant has, in terms of the present application, sought to enforce its rights under a loan agreement, subsequently held to have been unauthorised. An enrichment claim, possibly based on either the *condictio indebiti* or the *condictio sine causa*,[31] appears to be available to the applicant but would

[31] See DP Visser, 'Enrichment', in *LAWSA* (vol 17, 3ed), at paragraphs 214 and 222. The subject is canvassed in greater detail in JC Sonnekus, *Unjustified Enrichment in South African Law* (LexisNexis, Durban, 2008), at 227 and 333 *et seq*.

constitute a separate cause of action altogether. The court cannot find that relief to such effect can be granted on these papers.

[34] Regarding the award of costs, it is trite that the court enjoys a wide discretion, to be exercised judicially upon a consideration of the facts in each case.[32] In the present matter, the issues in relation to the attachment and sale of the immovable properties have become moot; the applicant has already obtained relief in that regard.[33] The respondents have, admittedly, successfully opposed the applicant's reliance on the loan agreement to recover the money previously advanced. Their opposition was based on technical grounds, however, and they conceded that the first respondent had received the funds but had failed to make repayment. The court found, moreover, that the applicant is entitled to enforce both the mortgage bond and the suretyship. In the circumstances, it would seem fair merely to require each party to pay its own costs.

[35] Consequently, the following order is made:

(a) the application in relation to the remaining relief sought by the applicant, in terms of prayers 3, 4, and 5 of the notice of motion, is dismissed; and

(b) there is no order as to costs.

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JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Adv Van Schalwyk

[32] DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 23, 2024), at D5-6 to D5-6B.
[33] See n 1 above.

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Date of delivery of judgment:	06 August 2024.