IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 48731/10
DATE: 2011-08-17

In the matter between

INVESTEC BANK LIMITED Applicant

And

McCREEDY, MARK WILLIAM Respondent

J U D G M E N T

WILLIS, J:

[1] The applicant seeks payment by the respondent of an amount of R28,5 million, together with interest at a rate of 15,5 percent per annum from 24 August 2009 to date of payment and costs of suit on an attorney and client scale. The scale of costs arises from the agreement concluded between the parties.

[2] It is common cause that the liability, if any, of the respondent is dependant upon a suretyship agreement which he signed for the debts

of a principal debtor known as Greenglades Properties (Pty) Limited.

[3] It is also common cause that my erstwhile brother, Blieden J placed Greenglades Properties (Pty) Limited, the principal debtor, in liquidation on 29 October 2010. The respondent has relied on a moratorium agreed between the applicant and the principal debtor. After some debate, counsel for the respondent agreed that the moratorium would not survive the liquidation of the principal debtor. In other words, if the principal debtor was correctly placed in liquidation, the respondent would indeed be liable in terms of the written agreement of suretyship, subject, of course, to the rectification point which I shall address later.

[4] It is common cause that the liquidation order of Blieden J is subject to an application for leave to appeal. It is also trite that Blieden J's judgment regarding the liquidation will enjoy, in this court, the status merely of an opinion, upon which it would be quite wrong for me to express a view one way or the other. What I do do, and what I must do, and I am required to by law to do, is to take into account the fact that there is in fact a liquidation order. Therefore, seems to me (and ultimately it seemed that everyone was in agreement on this issue) is that the order that the surety pay the amount must be linked to the outcome of the application for leave to appeal. I shall make such an order.

[5] The only remaining issue is the question of rectification which the

respondent relies upon. The respondent relies upon the following words that were inserted in handwriting in an written agreement between the parties:-

> It is agreed that the suretyship at this point will be reviewed to reflect the 60:40 profit participation between the client and our deal.

[6] It is quite clear (I fully agree with counsel for the respondent on this point) that a review was envisaged pending the outcome of uncertain future events that may have transpired. The respondent alleges that those events have occurred.

[7] The final clause in this agreement upon which the respondent relies, however, provides as follows:-

> All the above terms and conditions are subject to Investec board approval and will only be binding on Investec once incorporated in a signed loan agreement.

[8] The agreement signed after Investec approval, also provides for a review, but not in the same terms and, in any event, provides that any variation must be agreed to between the parties in writing. There is no agreement in writing as to the review or the quantum of the review. I fully agree with Ms *Fischer*, counsel for the applicant, that a review is not ‘rectification’. Review simply means that the position will be looked at again and in the light of all the circumstances. The parties might agree upon a new formula. There are certainly no ‘rectifications’

involved. The 'rectification point' cannot succeed.

[9] Accordingly, the following is the order of the court:-

1. Judgment is granted in favour of the applicant in terms of prayers 1 and 2 of the Notice of Motion dated 1 December 2010;
2. Execution of this order is stayed pending the outcome of the application for leave to appeal in the judgment of Blieden J, given in the matter of Investec Bank Limited and Greenglades Properties (Pty) Limited (Case number JG/32080), on 29 October 2010.
3. The costs of this application are to be costs on a scale as between attorney and client, but are to be costs in the application for leave to appeal against the aforesaid judgment of Blieden J.

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Counsel for the applicant, Advocate D C *Fischer* SC

Counsel for the respondent Advocate C W *Jordaan* SC (with him, Advocate T M Greeff).

Attorneys for the applicant: Blakes Mapanga Incorporated.

Attorneys for the respondent: Smit Jones and Pratt.