

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED.

CASE NO: 2973/2020

Signature

Date.....

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT**APPLICANT****BANK OF SOUTH AFRICA**

AND

WILLEM ADRIAAN ALBERTUS ENGELBRECHT N.O FIRST RESPONDENT**ANSIE ENGELBRECHT N.O****SECOND RESPONDENT**

**[In their capacities as trustees of the Anlem Trust]
 [IT 12327/97]**

REASONS FOR JUDGMENT

MAKGOBA JP

[1] On the 24 June 2020 and upon hearing Counsel for the parties I granted the following order and indicated that my reasons for the order would follow in due course:

- 1.1. The Applicant is authorised to harvest and take possession of the cotton crop cultivated on the farm owned by the Anlem Trust, being the farm Tussenkomst, Thabazimbi, Limpopo Province, which is encumbered in favour of the Applicant by way of special covering bond number B204/2018.
- 1.2. The Respondents and those employed or contracted by them, are interdicted from interfering in whatever manner with the Applicant's rights to harvest and procure the proceeds of the cotton harvest.
- 1.3. The Applicant is authorised to sell the cotton harvest in its sole discretion and to apply the proceeds generated by such sale(s), after payment of the costs associated with harvesting and removing the crop, against the debts owed to the Applicant by the Anlem Trust.
- 1.4. The Applicant is hereby authorised to approach this Court on the same papers, duly supplemented, should the Respondents, or any of their employees or representatives, interfere in any way with the execution of this order or, more specifically, with the harvesting and removal of the cotton harvest.
- 1.5. The costs of this application shall be paid by the Anlem Trust on a scale as between attorney and client.

- [2] What follows are my reasons for the order.
- [3] The Applicant, in its capacity as cessionary of certain rights contractually assigned to its predecessor, Unigro Financial Services ("Unigro"), applied for an order authorizing it to harvest and sell cotton crop established by the Respondents ("the Anlem Trust") on the farm Tussenkomst, Thabazimbi.
- [4] The Respondents opposed the application and raised the following as their defences:
- 4.1. Applicant's *locus standi*;
 - 4.2. Denial of the indebtedness;
 - 4.3. Reckless credit;
 - 4.4. *Lis alibi pendens*;
 - 4.5. Urgency.
- [5] This application initially served before the Urgent Court on 9 June 2020 (MG Phatudi J) when it was struck from the roll with costs on account of lack of urgency. When the matter came before me on 24 June 2020 the issue of urgency had become moot and the matter was dealt with as on the ordinary opposed motion roll. I shall accordingly not deal with the issue of urgency herein.

Applicant's Locus Standi

- [6] The Anlem Trust (Respondents) disputes the Applicant's *locus standi* on the ground that it contracted with Unigro, and not with the Applicant when credit was advanced to it.

The issue of *locus standi* will accordingly be dealt with together with the question whether the Anlem Trust is indebted to the Applicant, that is, paragraphs 4.1 and 4.2 above are to be dealt together. In its papers the Applicant states that the Anlem Trust is indebted to it in the sum of R 41 627 028.42 as at the 28th February 2019 and this amount has increased to R 48 390 262.41 as at the 6th May 2020.

- [7] In support of its *locus standi* the Applicant's witness testified, in the founding affidavit, that the Applicant concluded a host of agreements in terms of which it acquired all existing and future credit agreements concluded by inter alia Unigro, and took cession of Unigro's rights in and to such agreements.

In answer to this evidence the Anlem Trust presented no countervailing evidence, but rather availed itself of a bare denial of the Applicant's *locus standi*.

It is trite that a bald or bare denial will not constitute a defence in the circumstances such as the present where the party who purports to raise the dispute has in its affidavit not seriously and unambiguously addressed the fact

said to be disputed – **Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 271 (SCA) at 375 para [13]**

See also **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162I – 1163A**

- [8] The Respondents (Anlem Trust) is a complete outsider to the business dealings between the Applicant and Unigro. Bluntly placing the Applicant's *locus standi* in dispute does not create a dispute of fact. I accordingly come to a conclusion that there is no dispute concerning the Applicant's *locus standi* as the Anlem Trust has failed to present any countervailing evidence to dispute Unigro's cession of its claims against the Anlem Trust to the Applicant.

I make a finding that there exists a valid cession of rights between the Applicant and Unigro. As the cessionary, the Applicant has a valid claim against the Anlem Trust and thus the necessary *locus standi* to institute the present proceedings has been established.

- [9] Cession, in order to be effective, does not require the prior knowledge, consent, concurrence or co-operation of a debtor (in *casu* the Anlem Trust). Cession is complete when the cedent (Unigro) and the cessionary (Applicant) reach finality on the act of cession – **National Sorghum Breweries Ltd v Corpcapital Bank Ltd 2006 (6) SA 208 (SCA) AT 2019**

and

LTA Engineering Co Ltd v CCAT Investments (Pty) Ltd 1974 (1) SA 747 (A) at 762

Reckless Credit

- [10] The Anlem Trust contends that the agreement of loan between it and Unigro is invalid on account of it being a reckless credit and as such the rights that would purportedly have been ceded to the Applicant cannot be enforced.

The defence raised by the Anlem Trust is that the credit agreement(s) entered into between Unigro and the Anlem Trust constitute reckless credit as defined in sections 79 and 80 of the National Credit Act 34 of 2005 ("NCA"). It is contended that in as much as Unigro would not have been in a position to enforce the agreement, or if the agreements are held to be unlawful, the same would apply to the Applicant even if it was a lawful cession.

- [11] It should be noted that the Anlem Trust raises this defence several years after having received and used the credit advanced by Unigro. Anlem Trust never raised this defence against Unigro before the cession of Unigro's rights to the Applicant. It is only now when Applicant enforces its rights that the Anlem Trust comes up with the defence that the supply of credit was reckless and that it is as a result over-indebted.

In my view, the credibility of the Anlem Trust is questionable in this regard.

- [12] The onus is on the Anlem Trust to prove that at the time of the conclusion of the credit agreement, the credit provider, having conducted the required assessment, entered into the credit agreement with the consumer despite the fact that on the preponderance of information available, the amount approved when entering into the credit agreement would make the consumer over-indebted.

In *casu* the Anlem Trust has not pleaded and proved over-indebtedness and has only sought to rely on sections 79 and 80 of the NCA. In the answering affidavit the Anlem Trust has not succinctly set out the basis or facts upon which it relies on to show that it was over-indebted and that the credit was reckless.

- [13] In **Standard Bank of South Africa Ltd v Panayiotts 2009 (3) SA 363 (W)** at para [8] it was held that:

"[55] A party (the consumer) who raises a defence of over-indebtedness must plead and prove the defence, which includes proving that he is over-indebted as envisaged in section 79 of the NCA".

- [14] The Court in **Panayiotts** (supra) made the following instructive remarks and findings in paragraphs [52] [56] and [79]:

"[52] It is so that the NCA is for the benefit of every consumer who can prove

that he is over-indebted as contemplated in Section 79 of the NCA. More importantly, however, is whether the consumer wanting to take advantage of the NCA provisions has made proper disclosure to enable a court to exercise its discretion properly.

[56] In casu the defendant's allegations regarding his over-indebtedness are inherently and seriously unconvincing. I say this for the following reasons: The defendant has set out insufficient facts to show that he is over-indebted as envisaged in section 79. In addition such facts are so vague and bald that they do not amount to a bona fide defence.

[79] Considerations of fairness require that the circumstances of both the defendant and the plaintiff be given equal considerations. Where it is clear that the credit provider is likely to be greatly prejudiced if the protection measures provided by the provisions of the NCA are implemented courts should be reluctant to assist the defendant."

[15] It is not sufficient for a consumer to simply allege to be over-indebted in order to scape liability from a claim by his creditor, but such a consumer (like the Anlem Trust in *casu*) must present factual evidence to illustrate its over-indebtedness.

I make a finding that the Anlem Trust has failed to discharge the onus in this regard. The defence of reckless credit and over-indebtedness are devoid of merit.

[16] In **SA Taxi Securitisation (Pty) Ltd v Mbatha 2011 (1) SA 310 (GSJ)** at paras [26] and [32] it was said that:

“[26] Since the enactment of the NCA, there seems to be a tendency in these courts for defendants to make bland allegations that they are "over-indebted" or that there has been "reckless credit". These allegations, like any other allegations made in a defendant's affidavit opposing summary judgment, should not be "inherently and seriously unconvincing", should contain a reasonable amount of verificatory detail, and should not be "needlessly bald, vague or sketchy". A bald allegation that there was "reckless credit" or there is "over-indebtedness" will not suffice

[32] The purpose of the NCA is to provide a more efficient and equitable credit system by balancing the rights of credit providers and consumers. The intention of the Legislature was not to shift the balance of power so much that all power in the credit relationship would amass into the hands of the consumer.”

Lis Alibi Pendens

[17] The Anlem Trust contends that the Applicant issued motion proceeding under case number 2924/2019 in which the Applicant prayed for an order that it be authorized to take possession of all movable assets of the Anlem Trust in

order to perfect a notarial bond and to hold the movable assets in its possession as if it has a lien over it until such times all amounts secured by the notarial bond have been paid. The applicants further sought an order that it be authorized to, in accordance with the provisions of the notarial bond, sell the crops, livestock and movable assets attached in terms of the order.

[18] It is clear from the Anlem Trust papers that the pending litigation under case number 2924/2019 does not contemplate any right afforded to the Applicant to harvest the cotton crop. It only speaks of selling the crops. The present proceedings are aimed at interdicting the Anlem Trust from harvesting the cotton crop and authorizing the Applicant to harvest, take possession and sell the cotton crop. It is common cause between the parties that the cotton crop would be ready for harvesting within few weeks. According to the Anlem Trust the harvesting would be due by the 29 June 2020. In my view the remedy available to the Applicants to protect its right is by the Court order as prayed for and granted in the present proceedings on the 24 June 2020. The pending proceedings under case number 2924/2019 would not serve the purpose.

[19] A party wishing to raise a *lis pendens* bears the onus of alleging and proving:

- (a.) Pending Litigation;
- (b.) Between the same parties or their privies;

- (c.) Based on the same cause of action; and
- (d.) In respect of the same subject matter as defined in the pleadings.

Once a party has established all the above, a presumption arises that the second proceedings are *prima facie* vexatious. The party who instituted the second proceedings then needs to satisfy the Court that the balance of convenience and equity require the case to proceed. In my view, to uphold the *lis pendens* defence in the present case would effectively result in a situation where all the Applicant's rights to and concerning the cotton crop become moot. It would therefore be just and equitable to dispose of the current application.

[20] In **Keyter NO v Van Der Meulen and Another NNO 2014 (5) SA 215 (ECG)**

Plasket J (as he then was) said the following:

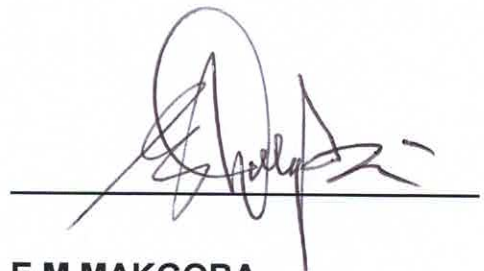
"[11] *The Court is vested with a discretion as to whether to stay proceedings or to hear the matter despite the earlier pending proceedings. In Loader v Dursot Bros (Pty) Ltd Roper J dealt with this aspect when he said:*

"It is clear on the authorities that a plea of lis pendens does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or the other

of the proceedings, because it is prima facie vexatious to bring two actions in respect of the same subject-matter. The Court has discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a lis alibi pendens is proved to exist."

Conclusion

[21] I come to the conclusion that the Anlem Trust has not established any of the defences it raised in this matter. In my view the defences raised are in the form off technical and obstructive objections raised with the view of frustrating the Applicants rights. The Applicant is entitled to the orders sought in the notice of motion and it is against this backdrop that I granted the order on the 24 June 2020.

A handwritten signature in black ink, appearing to read 'E M Makgoba', is written over a horizontal line.

E M MAKGOBA

**JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

Heard on : 24 June 2020

Order Pronounced on : 24 June 2020

Reasons Furnished on : 30 June 2020

For the Applicants : Adv. J Vorster

**Instructed by : Strydom Bredenkamp Attorneys
c/o De Bruin Attorneys**

For the Respondents : Adv. J H Mollentze

**Instructed by : Olivier & Malan Attorneys
c/o Kampherbeek & Pogrand Attorneys**