



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 2085/2018

In the matter between:

FIRST RAND BANK LIMITED
(Registration number: 1929/001225/06)

Applicant

and

KARIS BOERDERY
(Registration number: 2015/143248/07)

1st Respondent

SAREL JACOBUS VAN DER WALT N O

2nd Respondent

JACOBUS VAN DER WALT N O

3rd Respondent

CORNELIUS MARIUS COETZEE N O
(in their capacities as the joint trustees of the
Saamwerk Trust IT 11521/96)

4rd Respondent

CLOETE MURRAY N O

5th Respondent

ELRICH RUWAYNE SMITH N O
(in their capacity as the provisional trustees of
Sarel Van Der Walt)

6th Respondent

CORAM:

DAFFUE, J

HEARD ON: 31 JANUARY 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 14 FEBRUARY 2019

- [1] The applicant is FirstRand Bank Ltd, a commercial bank and registered credit provider. Adv MA Badenhorst SC appeared for applicant before me as was the case in the sequestration application of applicant against SRE Trust. The parties agreed that both applications be heard simultaneously and by the same presiding officer.
- [2] First respondent is Karis Boerdery (Pty) Ltd (“Karis”), a company with registered address situated at the farm, Helpmekaar, district Hoopstad.
- [3] The second, third and fourth respondents are the three trustees of the Saamwerk Trust (“the Trust”), c/o the farm Helpmekaar, district Hoopstad. Second respondent, Mr SJ van der Walt, also known as Sarel, will be referred to by that name to distinguish him from the other Van der Walts featuring in this application. He was at all relevant times the *de facto* farmer and the person in charge of the Van der Walt empire consisting of himself in personal capacity, Karis, Saamwerk Trust and the SRE Trust. He was at all relevant times the sole shareholder of Karis and also the person who negotiated with applicant to obtain credit for himself,

Karis and the SRE Trust. Fourth respondent, Mr CM Coetzee, (“Coetzee”) deposed to affidavits herein and his role in the proceedings will be addressed when convenient. Me Riëtte van der Walt was initially cited as third respondent, but she was substituted by Mr Jacobus van der Walt under circumstances explained *infra*. First to fourth respondents were represented by Adv DB du Preez SC.

- [4] The fifth and sixth respondents are the provisional trustees in the insolvent estate of 2nd respondent. They do not oppose the application.
- [5] Applicant claims judgment against Karis and the Trust jointly and severally, the Trust’s liability however limited to R60m, for payment of R84 741 317.39 plus interest calculated at the rate of 10.25% *per annum*, calculated daily and compounded monthly in arrears from 23 March 2018 until date of payment, together with costs on an attorney and own client scale.
- [6] The principal claim is based on a written credit facility agreement (“the credit facility agreement”) entered into on 13 April 2017 between applicant and Karis in terms whereof working capital in the amount of R80m was made available to Karis. See annexure CAV6. This credit facility provided for an increased amount of working capital. On 16 November 2015 a similar agreement was entered into with a credit limit of R75m. See annexure CAV7.
- [7] The claim against the Trust is based on a Deed of Suretyship entered into on 18 October 2015, annexure CAV10.

- [8] The grant of the credit facility was subject to numerous collateral security agreements being provided, including to mention a few only, the aforesaid Deed of Surety, registration of covering mortgage bonds over several immovable properties of Sarel, cessions by Sarel and Karis of all rights in and to their crops from time to time dated 20 November 2015 and a Deed of Negative Pledge of Assets dated 25 August 2014.
- [9] The main point of attack levelled at applicant's claim is the manner in which the credit facility agreement is structured and whether Karis can be held liable for breach of contract when Sarel in his personal capacity obtained external credit in excess of R1m without applicant's knowledge and consent. The terms of the agreement and clause 4, especially clauses 4.7 and 4.8, are under attack. Mr Du Preez submitted that clause 4.7 is ambiguous, obscure and void for vagueness. Ultimately Karis denies that it breached the agreement and therefore, the credit facility could not be called up. According to Karis it, represented by Sarel, was the only party to the agreement with applicant and a breach cannot be committed by an individual who is not a party thereto. Furthermore, Mr Du Preez submitted that applicant faces the insurmountable hurdle that the agreement between Sarel and Cargill RSA (Pty) Ltd ("Cargill") is unenforceable. In order to consider the arguments it is deemed apposite to refer to some authorities.

- [10] In an oft-quoted judgment Wallis JA summarised the current state of our law regarding the interpretation of documents, including contracts, as follows in *Natal Joint Municipal and Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

Thus, the matter must be approached holistically and context and language must be considered together with neither predominating over the other. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at paras [10]-[12].

- [11] In *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] 2 All SA 295 (SCA) Lewis JA stated the following in a unanimous judgment at para [11]:

“It is settled law that the contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract It is also clear that the position must be given a commercially sensible meaning ...”

- [12] In *Novartis v Maphil* [2015] ZASCA 111, 3 September 2015, the same learned judge of appeal stated the following at para [28]:

“[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012..... A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.”
(emphasis added)

- [13] I repeat what Lewis, JA said in *Novartis supra*. In order to establish what the parties intended, all the facts – the context – must be examined in order to determine what the parties intended. In the words of Wallis, JA in *Endumeni supra*, a “sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

- [14] I accept that clause 4.7 under the heading “monitoring conditions” of the credit facility agreement, annexure CAV6, is vague and ambiguous as Mr Du Preez submitted. However, if the context and relevant circumstances are considered, I am satisfied that the clause must be interpreted on the basis that Karis undertook to ensure that the Van der Walt empire consisting of Karis, Sarel,

and the two trusts (Saamwerk and SRE) shall not obtain financial assistance from third parties without applicant's prior written consent. So interpreted, the clause provides a commercially sound and sensible meaning. The context is clear. Sarel owned valuable immovable properties in his own name, but he elected to conduct his farming operations by also making use of several vehicles such as Karis and the two trusts. Karis was apparently the main vehicle used. It needed working capital and applicant was willing to assist, but knew that Karis could not offer sufficient security. Collateral cover was required from Sarel and the Trust to secure its position. Applicant was certainly aware of the risk if Sarel and his other entities, the trusts, decide to apply for finance from third parties once the credit limit agreed upon was reached. It had to safe-guard its position as commercial banker. The various clauses in the credit facility agreement must be considered in this context.

[15] It might be argued that applicant should have ensured that Sarel and the two trusts become parties to the agreement with Karis. That might have been ideal, but it does not mean that the entities within the Van der Walt empire, Sarel and Karis included, can escape liability when Sarel secretly obtained finance of close to R60m from an entity such as Cargill and simultaneously allowed the passing of a notarial bond to the obvious detriment of applicant.

[16] In motion proceedings the affidavits constitute both the pleadings

and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom. See *Minister of Land Affairs and Agricultural v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D*. It is trite that the applicant in application proceedings must make out his or her case in the founding affidavit. That affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand or fall by his or her founding affidavit. See *Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H – 636D*.

- [17] It is necessary to consider the requirements enunciated in *Plascon-Evans* in adjudicating the disputes, but in that regard the following dicta by Heher, JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)* are applicable. I quote from paragraph [13]:

“[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a

broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.” (emphasis added.)

- [18] The essence of Mr Du Preez’s argument in respect of the credit facility agreement is that the claim is not due and payable. I do not agree for the reasons set out in this paragraph as well as the next paragraphs. A banker-client relationship is contractual in nature and therefore, a decision to terminate the agreement is governed by the rules of contract. A bank does not have to give reasons for terminating the relationship. In *Bredenkamp and others v Standard Bank of South Africa* 2010 (4) SA 468 (SCA) the court held at paragraph [57] “....it is difficult to see how someone can insist on opening a bank account with a particular bank and, if there is an account, to insist that relationship should endure against the will, bona-fide formed, of the bank.” See also: *Annex Distribution v Bank of Baroda* 2018 (1) SA 562 (GP) paragraphs [21] – [22].
- [19] The credit facility agreement is contained in a letter by applicant dated 13 April 2017, annexure CAV6, which must be read with the terms and conditions thereto as set forth in annexure A. It is

true that applicant advanced a reason for terminating this agreement in its letter of demand dated 11 September 2017, that reason being the alleged breach when Sarel obtained finance from Cargill over the previous two production seasons in an amount far in excess of R1m without applicant's knowledge and consent. The question to be answered is whether Sarel's actions could be relied upon by applicant in order to terminate the credit facility agreement with Karis.

- [20] I shall now mention some of the clauses which were discussed during argument in order to adjudicate applicant's claim that it was entitled to terminate the credit facility agreement. Firstly, in paragraph 1 the following is stated pertaining to the term of the agreement: "Repayment on demand and subject to annual review." Clause 2.4 of annexure A (the applicable general terms and conditions) stipulates that "(I)n terms of normal banking practice, any facility availed of is repayable: 2.4.1 on demand by the Bank to this effect,..."
- [21] Secondly, the right of the applicant under the heading "monitoring conditions" includes the right (a) to have Sarel's immovable properties revalued every four years (clause 4.4), (b) to insist that the assets of Sarel and the two trusts (Saamwerk and SRE) as indicated in their balance sheets be preserved (clause 4.5); (c) to insist that Karis provide applicant with the signed final financial statements of Sarel and both trusts annually (clause 4.6); (d) to insist that neither Karis, nor Sarel and the two trusts incur any further external debt in excess of R1m without applicant's prior written consent (clause 4.7) and (e) that neither Karis, nor Sarel

and the two trusts sign surety in favour of any third party (clause 4.8).

- [22] Thirdly, clause 7 records Karis' acknowledgement that the credit facility was provided based on the financial position and circumstances of Karis as well as the sureties, which we know are Sarel and the trusts.
- [23] Clause 4 of annexure A deals with breach of the agreement and applicant's rights in that regard. The parties expressly agreed that a breach shall occur even when the debt of a guarantor or surety become due and payable by reason of default or if the debt is not paid when due (clause 4.11), or when a warranty or representation by the guarantor or surety was taken into consideration and materially relied upon when the credit facility was offered which was found to be untrue or incorrect in any material aspect (clause 4.12). It must be recorded that annexures CAV6 and CAV7 contain similar terms and conditions. CAV7, the 2015 agreement with the overdraft facility of R75m, was entered into between applicant and Karis on 18 November 2015.
- [24] Sarel entered into two credit agreements with Cargill, firstly for the 2016 season and secondly for the 2017 season. The agreements were entered into during September 2015 and September 2016. The September 2016 agreement was entered into after the conclusion of CAV7, but prior to CAV6. Applicant was unaware of this until 6 September 2017. Although respondents attack the

validity of these agreements and the second one in particular, it is without substance. Sarel not only obtained finance from Cargill without applicant's consent, but he allowed the registration of a notarial bond over his movables in favour of Cargill. That bond was registered on 15 September 2016. See annexure CAV22. In terms of the agreement with Cargill, the maize harvested became Cargill's property. Sarel admitted in writing on 23 August 2017 that the Cargill agreement was valid and enforceable, that he owed an amount in excess of R26m at that stage and he also undertook not to carry on delivering maize to third parties. The documents mentioned in this paragraph are attached to the replying affidavit. In my view this is acceptable and not contrary to the authorities quoted insofar as respondents' version that the Cargill agreement is unenforceable necessitated a reply. Consequently, Sarel (and Karis in effect) is also in breach of the undertakings provided to applicant in that he acted contrary to the Cession of Crop Agreements between him and Karis on the one hand and applicant on the other. I refer to annexures CAV14 and CAV15. He also breached the Deed of Negative Pledge of Assets in favour of applicant, annexure CAV16.

- [25] Sarel, in his capacity as sole director of Karis at the time, signed and authorised in that capacity the involvement of Karis in entering into the credit facility agreement. The breaches of the credit facility agreement were committed by Karis as principal debtor and Sarel as guarantor and surety. Applicant was entitled to terminate the credit facility agreement as it did and to claim the amount due to it.

- [26] Clause 11 of the Deed of Suretyship renders the surety liable in respect of each breach or default in respect of the principal debtor's obligations. See annexure CAV10.
- [27] Applicant relies on a certificate of balance as it was entitled to do in terms of the credit facility agreement. The amount of R84 741 317.39 plus interest certified as due and payable is not in dispute on the basis as set out in *Wightmann supra*. Karis made certain allegations in paragraph 4.12 of the answering affidavit in order to show that applicant relied on different amounts in three separate applications, to wit this application and the sequestration applications against Sarel and SRE Trust. It incorrectly alleges that the certificate relied upon in this application is dated September 2017. That is untrue. The certificate sets out the balance due and payable as on 23 March 2018 together with interest from that date. Mr Verster, who issued the certificate, deposed to the founding affidavit on behalf of applicant and confirms the correctness of this amount under oath. In response to the answering affidavit and annexures thereto he clearly demonstrates the fallacy of the respondent's defence. I need to refer only to paragraph 18.11. The claim against Karis amounted to R80 602 544.45 on 20 September 2017 and not R92m as alleged by respondents. It is rather unfortunate that Mr Du Preez adopted the incorrect allegations and insisted in his argument by referring to alleged discrepancies, whilst the true facts are clear as daylight.

- [28] I referred to *Wightmann supra* and reiterate that if respondents wanted to attack the certificate, confirmed under oath, they should have presented cogent evidence. The certificate attached to the founding affidavit, annexure CAV24, is *prima facie* evidence of the outstanding amount and *in casu* it has been confirmed under oath to be correct. This certificate, confirmed under oath, has not been attacked as such. The respondents and their legal representatives had a duty to engage with the facts they wish to dispute and set out those disputes fully and accurately. This court is entitled to follow a robust approach. I emphasise that the two credit facility agreements *in casu* are not in dispute. It is also not disputed that money was advanced to Karis and that the Trust stood surety for Karis' liability towards applicant, limited to R60m.
- [29] The only outstanding issue to be considered is the wasted costs of 29 November 2018. Coetzee and Sarel must be blamed for the unnecessary postponement and consequent delay. On 20 September 2018 Coetzee deposed to an answering affidavit, confirmed by Sarel. The court and applicant heard for the first time that Me Riëtte van der Walt had resigned as trustee of the trust on 6 March 2018 and that the vacancy had not been filled. These two trustees did nothing to fill the vacancy. The matter was postponed to 29 November 2018 on which date leave was granted to Coetzee and Sarel to intervene in their personal capacities. The court also ordered them to nominate a new trustee for an appointment to be made before 4 January 2019. It transpired later that the Master of the High Court, Pretoria had

already appointed Mr Jacobus van der Walt as the third trustee on 24 October 2018. The trustees failed to do the substitution in terms of rule 15 immediately; it was only done in January 2019. An explanation has been provided by Coetzee, and although extremely flimsy, I do not believe that a punitive costs order should be made against him and Sarel *de bonis propriis*. However, there is no reason why the unsuccessful respondents shall not be ordered to pay such wasted costs, notwithstanding Mr Du Preez's argument that applicant should pay those costs. Applicant and the court were deceived, although perhaps not intentionally.

[30] Consequently the following orders are made:

Judgment is granted against Karis Boerdery (Pty) Ltd and the Saamwerk Trust, first and second respondents respectively, jointly and severally, the one to pay the other to be absolved, the Saamwerk Trust's liability limited to the amount of R60 million, as follows:

- (1) Payment of the amount of R84 741 317.39 together with interest calculated at the rate of prime at 10.25% *per annum*, calculated daily and compounded monthly in arrears from 23 March 2018 until date of payment;
- (2) Costs of the application, including the wasted costs of 29 November 2018 on the scale as between attorney and own client, such costs to include the fees and expenses of senior counsel

J P DAFFUE, J

On behalf of Applicant: Adv MA Badenhorst SC
Instructed by: Symington & De Kok
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On behalf of Respondents: Adv DB Du Preez SC
Instructed by: MJ Lombard Inc
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