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

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

Case No.: 5870/2018

In the matter between:

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

Applicant

and

JACO JONKER

(ID NO: [...])

ESPERANZA JONKER

(ID NO: [...])

1st Respondent

2nd Respondent

AND

Case No.: 109/2019

In the matter between:

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

Applicant

and

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	1st	Respondent
THE MINISTER OF AGRICULTURE, Respondent		2 nd
FORESTRY AND FISHERIES		
THE MINISTER OF PUBLIC WORKS		3 rd
Respondent		
THE MINISTER OF FINANCE		4 th
Respondent		
JACO JONKER		5 th
Respondent		
(in his capacity as sole member of the Jaco Jonker Boerdery CC)		
(Registration No. 2001/048317/23)		
JACO JONKER BOERDERY CC		6 th Respondent
(Registration No. 2001/048317/23 in deregistration)		

JUDGMENT: MOENG, AJ

HEARD ON: 30 MAY 2019

DELIVERED ON: 20 JUNE 2019

[1] I deem it prudent for practical considerations to deal with both applications in this judgment as the issues and defences raised in both applications are in essence the same.

[2] In the application under case number 5870/2018 (“the main application”) the applicant claims payment in the amount of R10 143 592.84 from the first and second respondents as principal debtors and an order declaring their immovable property, known as Portion 1 of the Farm Middenspruit Zuid 2377, District Kroonstad, Free State

Province measuring 476, 1693 hectares, held under Deed of Title T12794/2010, specially executable in favour of the applicant.

- [3] In case 109/2019(“the revival application”) the applicant applies, in Part A of its notice of motion, for an order declaring the dissolution of the sixth respondent (“the close corporation”) void and for an order restoring the close corporation’s name to the Register of Companies. It prays in Part B thereof, for judgment to be entered against the close corporation following its reinstatement, in its capacity as surety and co-principal debtor, for payment in the amount of R 10 143 592.84 and for an order in terms of which its immovable property, known as Goedverwachting 2335 Kroonstad District, Free State Province measuring 256, 9596 hectares, held under Deed of Title T11314/2005, is declared specially executable in favour of the applicant.

- [4] The applicant in both applications is the Land and Agricultural Development Bank of South Africa, a statutory body established in terms of the Land and Agricultural Development Bank Act, 15 of 2002 and a registered credit provider in terms of the National Credit Act 32 of 2005(“the NCA”). The applicant instituted these proceedings as cessionary in terms of a written sale agreement pertaining to the sale, cession and delegation of Suidwes Landbou (Pty) Ltd’s (“Suidwes”) right, title and interest in and to its existing and future debtors’ book.

- [5] The first respondent in the main application is a major male farmer and businessman, married in community of property to the second respondent, with chosen *domicilium citandi et executandi* at Farm

Goedverwachting Kroonstad District, Free State Province. The second respondent is cited by virtue of her marriage in community of property to the first respondent.

- [6] The first to fourth respondents in the revival application are: the Companies and Intellectual Property Commission; the Minister of Agriculture, Forestry, and Fisheries; the Minister of Public Works; and the Minister of Finance. The applicant does not seek any relief against the second to fourth respondents and they were merely cited insofar as they may hold a vested interest in the restoration of the close corporation's name to the Register of Companies. The first to fourth respondents did likewise not participate in these proceedings. The fifth respondent is Jaco Jonker (the first respondent in the main application) in his capacity as sole member of the sixth respondent, the Jaco Jonker Boerdery CC with registration number 2001/048317/23 [- in deregistration].
- [7] It is not in dispute that on or about December 2013 and January 2014, the first respondent applied for and was granted a long term loan in the amount of R7 500 000.00 by the applicant's predecessor, Suidwes, repayable over a period of 15 years and subject to the terms and conditions as set out in the agreement. It is likewise common cause that the loan was granted subject to the condition that a first ranking mortgage bond be registered in favour of Suidwes for an amount of R10 000 000.00 and that the close corporation bind itself as surety and co-principal debtor with the first respondent.

- [8] The first respondent and the close corporation duly provided Suidwes with security in the form of covering mortgage bonds over Portion 1 of the Farm Middenspruit Zuid 2377, District Kroonstad, Free State Province measuring 476, 1693 hectares, held under Deed of Title T12794/2010 for an amount of R 6 500 000.00 and over the close corporation's immovable property known as Goedverwachting 2335 Kroonstad District, Free State Province measuring 256, 9596 hectares, held under Deed of Title T11314/2005 for R3 500 000.00.
- [9] On 26 August 2013, the applicant and Suidwes entered into a written sale agreement pertaining to the sale, cession and delegation of Suidwes's right, title and interest in and to its existing and future debtors' book. The applicant and Suidwes, in addition, entered into a service level agreement in terms of which Suidwes was appointed to manage, service and administer the sale book debts sold to the applicant in terms of the sale agreement.
- [10] Applicant alleges that on or about October 2014, the first respondent applied for the restructuring of the long term loan agreement. As a result same was restructured for an amount of R8 013 403.00 repayable over 14 years. This was subject to the condition that no further extensions would be granted, that the arrear portion of the long term loan agreement be transferred to a medium term loan repayable on or before 10 January 2015 and that a general notarial bond be registered over the respondents' movable property. I should pause to mention that the respondents contended that this latter agreement did not amount to a restructuring of the long term loan

agreement but was a novation of such agreement. I will deal with this aspect later.

- [11] It is also not in dispute that on or about July 2017, the first respondent approached Suidwes with a request for an extension of his payment obligations in terms of the long term loan agreement. A duly completed written request for extension of payment and acknowledgment of debt was subsequently submitted to Suidwes by the first respondent. The applicant contends that this amounted to an unequivocal acknowledgment of the first respondent's indebtedness to Suidwes. The said request was not granted and the first respondent subsequently failed to make payment on or before 31 August 2017 as he was contractually required to do.
- [12] The respondents in turn admit that the first respondent approached Suidwes with the request for extension of payment but contends that he did not verify the contents of the written request and they dispute the amount contained therein. The first respondent admits to having failed to make payment but denies that he was legally obliged to do so.
- [13] Applicant alleges that on or about 7 May 2018 and on 16 and 17 October 2018, notices in terms of section 129 of the NCA were dispatched and served on the respondents informing them of their default and the arrear amount. The respondents, despite such demand, failed to make payment. As a result a certificate of balance, reflecting the amount claimed, was issued on 31 October 2018.

- [14] The respondents likewise denied that the purported section 129 notices represented demands as contemplated by the section and denied that the notices were sent to the second respondent. In addition they deny having any knowledge of the calculation of the outstanding balances or arrears as reflected in the purported notices and certificate of balance. Save for the denials raised above, the respondents in turn counterclaimed and raised a number of defences which I will deal with later.
- [15] No serious challenge was directed at the applicant's prayers that the immovable properties belonging to the first and second respondent as well as the close corporation be declared specially executable in favour of the applicant.
- [16] It is not in dispute, in relation to the revival application, that the close corporation was deregistered subsequent to the granting of the loan and the respondents' alleged failure to honour their obligations. It is trite that whilst so dissolved, the applicant is not entitled to enforce any of its remedies against the close corporation. The applicant logically had no option but to seek an order declaring the dissolution of the close corporation void in terms of section 83(4) of the Companies Act 71 of 2008 in order for it to be restored to the Register of Companies.
- [17] On 24 January 2019 the following rule *nisi* was issued in respect of the relief sought in Part A of the revival application:
1. A rule *nisi* is issued, returnable on **14 March 2019** calling upon all interested persons to show cause why an order should not be made in the following terms:

- 1.1 Declaring the dissolution of Jaco Jonker Boerdery CC, registration number 2001/048317/23 void in terms of section 83(4) of the Companies Act 71 of 2008;
 - 1.2 Directing the first respondent to restore Jaco Jonker Boerdery CC's name to the Registrar of Companies;
 - 1.3 The assets of Jaco Jonker Boerdery CC are declared to be no longer *bona vacantia* and are re-vested in the close corporation;
 - 1.4 The liabilities of Jaco Jonker Boerdery CC, immediately prior to its dissolution are declared to re-vest in the corporation;
2. This rule is to be served on:
- 2.1 The Companies and Intellectual Property Commission;-
 - 2.2 The Minister of Agriculture, Forestry and Fisheries;-
 - 2.3 The Minister of Public Works;-
 - 2.4 The Minister of the Department of Finance;-
 - 2.5 The South Africa Revenue Services;
 - 2.6 Any interested person who has been identified as such
3. The rule is to be published once in:
- 3.1 The Government Gazette in English and Afrikaans;
 - 3.2 An English daily newspaper, circulating in the Kroonstad area;
 - 3.3 An Afrikaans daily newspapers, circulating in the Kroonstad area;
4. Costs are reserved for adjudication during the hearing of Part B of the relief sought.
5. Leave is granted to the applicant to approach the Honourable Court on the same papers, duly amplified, for the relief set out in Part B hereof.

[18] Proper service and publication of the abovementioned order took place and none of the respondents in the revival application opposed its confirmation. I do not deem it necessary to deal with the procedural aspects and principles applicable to such revival

applications as these were succinctly dealt with by Daffue J in **Land and Agricultural Development Bank of SA v Jandrea Boerdery CC and Others** (3127/2018) [2018] ZAFSHC 188 (8 November 2018) at para 15 to 19. Nothing therefore precludes the confirmation of the rule *nisi*. I am satisfied that a proper case has been made out for the restoration of the close corporation's name to the Register of Companies and the rule *nisi* is therefore confirmed.

- [19] Following confirmation of the rule *nisi*, the only question which remains is whether judgment should be granted against the first and second respondents in their capacity as principal debtors and against the close corporation in its capacity as surety and co-principal debtor together with the fifth respondent.

- [20] It is trite that in the event of conflict on the papers, a court should accept the version set up by the respondents unless their allegations do not raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party that purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. See **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) at 375D to G.

- [21] The respondents elected to couch all the defenses raised in both applications in the form of a counter application. Any reference to such defenses in this judgment will therefore also relate to the

counter application. I will now separately deal with the defenses and issues raised in the counter application.

1. ASSIGNMENT AND NOVATION

[22] The respondents allege that, based on the sale and cession agreement, Suidwes was precluded from concluding the agreement dated October 2014. Mr. Du Plessis, representing the respondents, argued that the first loan agreement entered into between Suidwes and the first respondent in December 2013/ January 2014 was assigned to the applicant by Suidwes in terms of the sale and service level agreement. He contends that the first agreement was purportedly substituted by a second agreement concluded by Suidwes and the first respondent in October/ November 2014, after Suidwes had ceded all its rights to the applicant in terms of the sale and service level agreement. This, he argues, was impermissible in law as the cedent had been divested of all the rights arising from the first agreement. He further argued that the second agreement was meant to constitute a contract of novation and not a restructuring as contended by the applicant. The second agreement, upon which the applicant based its action, so the argument went, is non-existent in law and as a result the applicant does not have *locus standi*.

[23] I am inclined to agree with Mr. Terblanche SC, counsel for the applicant, that there is no merit in this argument. The “second agreement”, as referred to by the respondents, is in my view not a novation agreement but clearly a restructuring of the long term loan

agreement. It is clear from the papers that having defaulted and fallen into arrears with the instalment which was due in September 2014, the first respondent approached Suidwes with the latter application for the restructuring of his debt.

- [24] It was for the respondents to allege and prove the purported novation. Except for an unsubstantiated allegation in the ancillary affidavit that the second agreement amounted to a novation, no factual basis was provided for this allegation. The respondents failed to allege and prove that the supposed novation agreement extinguished their existing obligation towards the applicant and simultaneously replaced it with a new obligation.
- [25] Against their failure to allege and prove a novation agreement, the November 2014 agreement clearly had the ingredients of a restructuring agreement. The conditions for granting the altered credit agreement were, according to point 2 of the pre-agreement statement, that “geen verdere uitstel of verhogings nie” (my emphasis) would be allowed and point 3 “indien ons nie betaling ontvang 30/01/2015 nie, gaan ons voort met regsaksie”. This in my view clearly signalled the intention of the parties having been to alter and not to extinguish the long term agreement entered into in January 2014. Clause 25.4.2 of the long term loan agreement also sanctioned such latter agreement and provides that “indien enige bepaling, koers, bedrag of betaling by wyse van skriftelike ooreenkoms wat deur beide partye onderteken word, gewysig word, word dit nie beskou as ‘n novasie nie ...”

- [26] Such a restructuring was similarly within the scope of section 95 of the NCA which provides that: “The provision of credit as a result of a change to an existing credit agreement, or a deferral or waiver of an amount under an existing credit agreement, is not to be treated as creating a new credit agreement for the purposes of this Act if the change, deferral or waiver is made in accordance with this Act or the agreement.”
- [27] It is disquieting that the respondents, in their answering affidavit dated 5 December 2018, admitted that the long term loan agreement was restructured in October 2014 and did not take issue with the purported novation. It was only in the “ancillary affidavit” dated 31 January 2019 that they changed ground and raised this issue. They indicate that the reason for this belated defence is that their attorney of record only came across this defence in the course of his preparation in another case where applicant was also involved and where similar merits were involved. It came to light during the deliberations that the matter respondents referred to is **Land and Agricultural Development Bank of SA v Jandrea Boerdery CC and Others** *supra*. It is common cause that a similar defence was dismissed and a resultant application for leave to appeal was refused. A petition to the SCA was likewise unsuccessful.
- [28] The respondents’ argument that the applicant’s predecessor was, based on the sale and cession agreement, precluded from concluding the restructured agreement with the first respondent is likewise unsustainable. Clause 6.5 of the Service Level Agreement provides that: “Notwithstanding anything to the contrary contained in this Agreement, Suidwes Agri shall not be entitled to:-

6.5.1 cancel, vary or alter the terms and conditions of any of the Loan Documents or the documents pertaining to the Related Security without the prior written consent of the Land Bank except to the extent necessary pursuant to:

6.5.1.1 ...

6.5.1.2 debt collection procedures, including the granting of temporary extensions for payment and/or rescheduling of payments by a Debtor, provided that such rescheduling does not amend the procedures referred to in the Approved Credit Policies”

[28] I am satisfied that based on the last mentioned clause, Suidwes was not precluded from restructuring or rescheduling the first respondent’s debt. Clause 6.5.1.2 in my view sanctioned the restructured agreement entered into between the first respondent and Suidwes. This defence therefore falls to be rejected.

2. **NATIONAL CREDIT ACT**

- **Section 110 and 111 of the NCA**

[29] The respondents allege that the applicant failed to provide them with statements of the arrears and balance owing as envisaged by section 110 of the NCA. In the same breath they contend that they have disputed the entries in the accounts that were submitted to them and the applicant is consequently prohibited by section 111 of the NCA from continuing with enforcement proceedings. Mr. Du Plessis argued

that the applicant ignored the provisions of section 110 and likewise ignored the disputes communicated in respect of certain entries.

- [30] The papers reflect that on 26 October 2018, pursuant to receiving the section 129 notices, the respondents' legal representative directed a letter to the applicant's attorney of record in which he requested a statement as contemplated in section 110, from the date of conclusion of the long term loan agreement to the date of the letter. The respondents' legal representative similarly, in the same letter, disputed "debit entries" that were contained in the section 129 notice, purportedly in terms of section 111. This dispute was, to say the least, premature as no statements had been provided at that stage. The respondents were in addition not at liberty to dispute the arrears and outstanding balance as contained in the section 129 notice since they were not entries as envisaged by section 111. This in my view clearly reflected their lack of bona fides in raising each and every conceivable defence in the NCA.
- [31] In a letter dated 16 November 2018, a number of statements were provided to the respondents. Dissatisfied with the statements, the respondents' legal representative addressed a second letter to the applicant to provide a "proper account" in terms of section 110. No response was forthcoming from the applicant and the main application was issued on 21 November 2018. The battle lines were therefore clearly drawn and as will appear below, the respondents did not take any steps as envisaged by the NCA to resolve this purported failure to provide statements.

[32] Credit providers are obliged by the provisions of section 110 to furnish consumers on request, without charge, a statement of all or any of:

- a) the current balance of the consumer's account;-
- b) any amounts credited or debited during a period specified in the request;-
- c) any amounts currently overdue and when each such amount became due and;-
- d) any amount currently payable and the date it became due.

If a statement is not offered or delivered within the time required, the Tribunal may in terms of section 114, on application by the consumer order the credit provider to provide the statement or it may determine the amounts in relation to which the statement was sought.

[33] Statements were admittedly provided by the applicant but these were not to the satisfaction of the respondents. The respondents' submission that the applicant failed to provide such statements is therefore factually incorrect. Subsequent to the statements that were provided on 16 November 2018, further statements were attached to the application reflecting the capital amount, the current balance and the accrued interests. In addition to these statements, the section 129 notices similarly clearly reflected the arrear amount, when such amount became due and the total amount due and payable as at 31

August 2018. This in my view placed the respondents in a position to determine what is envisaged by section 110.

- [34] As I see it, the Act does not provide any remedy to a consumer who is dissatisfied with the form and content of statements that are provided by a credit provider. Section 114 is only at the disposal of a consumer who was not timeously provided with a statement. Even if one accepts that no statements were provided, such failure does not provide any defense against the applicant's claim for payment. The consumer may under such circumstances at best attempt to resolve the dispute with the credit provider in terms of section 129(1)(a) or may alternatively approach the Tribunal in terms of section 114 or section 134 for appropriate relief. A decision to approach the Tribunal would however not affect or suspend enforcement proceedings.
- [35] One cannot lose sight of the fact that the respondents do not dispute their indebtedness to the applicant. The first respondent had, as a matter of fact, approached Suidwes with a written request for extension of payment and had acknowledged his indebtedness to the applicant. He similarly acknowledged his indebtedness in accordance with the monthly statement dated 8 May 2017 and acknowledged the arrear installment as well as the outstanding amount.
- [36] It would have been prudent for the respondents, under such circumstances, to calculate the relevant overdue amounts themselves to enable payment to be made in accordance with section 129(3). The respondents' reliance on applicant's failure to provide them with

statements is in my view nothing but an attempt to delay the inevitable and this defense is bound to fail.

[37] A further issue was raised with regard to the debit or credit entries in the credit agreement. The respondents sought to dispute the totality of the entries contained in the supplied statements. This dispute was clearly contrary to the provisions of section 111(1) which affords a consumer the right to dispute all or part of any particular credit or debit entered under a credit agreement. The respondents were not at liberty to lodge a blanket dispute over the totality of the entries. They had to be specific in their dispute and should have specified the particular entries which are disputed and the grounds for such dispute.

[38] This defence is equally still-born on the ground that, for enforcement proceedings to be suspended, the creditor should not have commenced with measures to recover the debt. Put conversely, section 111(2)(b) is only available to a consumer against whom enforcement proceedings have not yet begun. Needless to say, the proceedings to recover the monies owed to the applicant were commenced on 16 and 17 October 2018 when the section 129 notices were served on the respondents and the purported section 111 notice was only issued thereafter on 26 October 2018. The respondents' reliance on sections 110 and 111 are likewise rejected.

- **Section 129 of the NCA**

- [39] The respondents contend that the applicant failed to convey to them the correct purported overdue amounts in the section 129 notice and failed to address such notice to the second respondent. They contend that the arrear amount as reflected in the section 129 notice dated 7 May 2018 is reflected as R2 727 008.00 and a few months later in a resultant notice dated 16 October 2018, the arrear amount is reflected as R4 584 578.36. This they allege, when viewed in conjunction with the figures reflected in the certificate of balance, is “fictitious and abjectly (sic) false”.
- [40] It is trite that it will not suffice for a credit provider merely to state that the consumer is in default. The particulars of the default and the exact amount of the arrears should be reflected in the section 129(1)(a) notice. The exact amount of arrears is of importance as it would inform the consumer’s election as to whether or not he would be able to bring the arrears up to date as suggested in the notice.
- [41] It is noteworthy that despite placing these figures in doubt, the respondents do not indicate what the correct figures are in their view. Their approach clearly raises fictitious issues which are not factually substantiated. This fictitious concern is clarified by the detailed statement of account attached to the founding affidavit and marked as “RMN22”. All that the respondents say about this detailed statement is that they put each and every entry therein in dispute. The respondents clearly failed to unambiguously address the facts said to be disputed.

- [42] It is common cause that the first respondent was obliged to repay the long term loan agreement in annual instalments of approximately R1 200 000, 00 payable on or before 31 August of every year. When the first section 129 notice was issued on 7 May 2018, he was R2 727 008.00 in arrears with his repayments. A further instalment which was due at the end of 31 August 2018 remained unpaid and so was the compounded accrued interest. Logic therefore dictates that the arrear amount would have substantially increased when the second section 129 notice was issued in October 2018.
- [43] I am satisfied that the notices comply with the requirements as set out in the section as they brought the default to the consumer's notice and contained proposals regarding referral of the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court, or ombud with jurisdiction. It also indicates that the intent of the proposal is to enable the parties to resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.
- [44] It is not in dispute that it is the first respondent who entered into the long term loan agreement with Suidwes. He is therefore the consumer as defined by the Act and the second respondent was merely cited by virtue of their marriage in community of property. A consumer, for our purpose, is defined in section 1 of the Act as the party to whom credit is granted under a credit facility or the party to whom or at whose direction money is advanced or credit granted under any other credit agreement. The wife to whom such a consumer is married in community of property, is admittedly not

regarded as such. I am in agreement with what was said in **Motor Finance Corporation v Herbert** (case 16098/2011 an unreported judgment in the Western Cape), that courts should not impose notice obligations on credit providers beyond those expressly required in terms of the Act.

- [45] Even if I am wrong in the above conclusion, it is not in dispute that the second respondent was notified by registered letter dated 7 May 2018 of the first respondent's indebtedness to the applicant. It is further common cause that on 16 October 2018, the Sheriff personally served a section 129 notice on the second respondent. The said notice was admittedly addressed to the first respondent as consumer but the details of the second respondent were reflected therein. Her husband reacted to this notice which clearly reflected her details and approached his attorney of record. Nowhere in the answering affidavits did she allege that the notice did not come to her attention. This defence is in my view without merit and as a result is rejected.

- **Reckless Credit**

- [46] The respondents alleged that Suidwes failed to conduct an assessment as required by section 81(2) and knowing that the respondents would not be able to service their liabilities proceeded to avail credit to them. In addition, Mr. Du Plessis submitted that the applicant never averred that it complied with the provisions of Part D of Chapter 4 of the NCA and because of that, its application is fatally

flawed. In his view, the credit agreements constitute reckless credit and are consequently liable to be set aside.

[47] This defence is without merit and the respondents' likewise failed to seriously and unambiguously address the facts said to be disputed. A consumer who alleges the granting of reckless credit should set out such defence in sufficient particularity. The respondents elected to make vague allegations of reckless credit and merely repeated the factors referred to in the relevant section without elaborating as to how the credit provider's violation of each of those factors directly affected them. See **SA Taxi Securitisation (Pty) Ltd v Mbatha** 2011 (1) SA 310 (GSJ) and **Absa Bank Ltd v Malherbe** 2013 ZAFSHC 78 (16 May 2013) para 76 and 78.

[48] Unlike the respondents' unsubstantiated allegations of reckless credit, the applicant detailed the credit assessment its predecessor conducted before credit was advanced to the first respondent. This detailed procedure is captured in the replying affidavit and is supported by detailed credit evaluation documents. The credit evaluation documents reflect that at the time of the application for credit, the respondents had assets amounting to R18 700, 000.00 and liabilities in the amount of R6 900, 000.00. The information provided by the respondents' further indicated that their commercial farming activities would result in a positive cash flow. This information was verified by Suidwes and it compiled its own cash flow analysis based on the information provided by the respondents. This defence is likewise rejected.

3. INVALID CLAUSES IN THE CREDIT AGREEMENT AND MORTGAGE BOND

- [49] The respondents allege that clauses' 19.1 of the loan agreement and 15 of the mortgage agreement contain unlawful provisions in that they provide that in case of breach, the total outstanding amount will become immediately due and payable without notice and that the applicant may take legal action without notice.
- [50] Section 90 prohibits the inclusion of unlawful provisions in credit agreements. If an agreement contains an unlawful provision a court must, in terms of section 90(4) (a) or (b), sever that unlawful provision from the agreement, or alter the provision to render it lawful if it is reasonable to do so having regard to the agreement as a whole. Alternatively it may declare the entire agreement unlawful.
- [51] Sections 123 and 129 of the NCA deal with the notice periods that credit providers must adhere to before terminating credit agreements and that they have to comply with before commencing enforcement proceedings. A credit provider may therefore not override these provisions and if it does, such provision must be dealt with in terms of section 90.
- [52] It is common cause that despite the purported unlawful provisions in clauses 19.1 and 15, the necessary notice was given to the respondents. Nothing therefore turns on this defence. I will therefore sever these offending provisions from the rest of the contract and

mortgage bond. I am satisfied that such severance will not leave the parties with a contract that is substantially different from the one they intended. See **Guide to the National Credit Act**, Service Issue 10 at para 9.3.4.2.

- [53] The same fate should similarly befall the sixth respondent's argument that the deed of suretyship provided by it contravenes the National Credit Regulations. Such offending provisions are likewise severed from the deed of suretyship.

4. **EXECUTABILITY OF THE IMMOVABLE PROPERTIES**

- [54] There is no reason why the properties should not be declared specially executable. Respondents conceded that the properties do not constitute their primary residences and did not challenge the applicant's entitlement to such orders. This issue was likewise not challenged in the heads nor during deliberations. The properties are utilised for commercial farming purposes and the loan was not obtained to purchase the properties.
- [55] The loan agreement, deed of suretyship and mortgage bond provide for costs on an attorney and client scale in the event of default and in case legal proceedings are initiated. The applicant sought an order of costs on an attorney and client scale including the costs consequent upon the employment of two counsel. I am satisfied that such a cost order is justified under the circumstances.

[56] **ORDER**

The following orders are made:

Case 5870:

1. The counter application is dismissed;-
2. Judgment is granted against the first and second respondent in the amount R10 143 592.84 together with compounded interest at a rate of 12% per annum calculated daily and capitalised monthly from 1 July 2018 to date of final payment;-
3. An order declaring the immovable property, known as Portion 1 of the Farm Middenspruit Zuid 2377, District Kroonstad, Free State Province measuring 476, 1693 hectares, held under Deed of Title T12794/2010, specially executable in favour of the applicant is granted;-
4. The first and second respondents' are ordered to pay the applicant's costs on an attorney and client scale including the costs consequent upon the employment of two counsel.

Case 109/2019

1. The counter application is dismissed;-
2. The rule *nisi* dated 24 January 2019 is confirmed;-
3. Judgment is granted against the sixth respondent in the amount of R10 143 592.84 together with interest at a rate of 12% per annum from 1 July 2018 to date of final payment;

4. An order declaring the immovable property, known as Goedverwachting 2335 Kroonstad District, Free State Province measuring 256, 9596 hectares, held under Deed of Title T11314/2005, specially executable in favour of the applicant is granted;-
5. The sixth respondent is ordered to pay the applicant's costs on an attorney and client scale including the costs consequent upon the employment of two counsel.

L.B.J. MOENG, AJ

On behalf of applicant: Adv. FH Terblanche SC and AJ Wessels
Instructed by:
Mcintyre & Van Der Post
BLOEMFONTEIN

On behalf of the respondents: Mr. HSL Du Plessis
Instructed by:
Blair Attorneys
BLOEMFONTEIN

COUNTER APPLICATION!