



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

REPORTABLE

CASE No: 1587/2006

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA t/a The Land Bank**

Plaintiff

and

**S A EELS (PTY) LTD
(Registration No: 2002/01225/07)**

First Defendant

JOHN ANDREW MATHEWS

Second Defendant

**UNAGI INTERNATIONAL Pic
(Registration No: 4668108)**

Third Defendant

EEL AFRICA INTERNATIONAL INVESTMENTS (PTY) LTD

Fourth Defendant

JUDGMENT DELIVERED : 3 DECEMBER 2008

MOOSA, J:

Introduction

[1]The plaintiff instituted an action against the defendants in terms of which it claimed against them payment of certain monies arising from certain financial advances made by it in terms of the Land and Agricultural Development Bank Act, 15 of 2002 (“the Act”) in the form of loan agreements, instalment sale agreements and covering bonds as well as from suretyship agreements securing such advances. Prior to instituting such

action, plaintiff brought an Application against first defendant, in the form of a rule nisi for the attachment of assets as contemplated in section 33(4) of the Act. The rule nisi was granted and the order was subsequently made final. The present action was instituted against first defendant in pursuance of such final order and against the other defendants in the ordinary course.

Special Pleas

[2]The defendants raised certain Special Pleas. In terms of such pleas, they pleaded firstly, that this court does not have jurisdiction in respect of the third defendant in the absence of confirming or founding jurisdiction ("First Special Plea"); secondly, that the court does not have jurisdiction to declare the immovable properties, referred to in the Plaintiff's Particulars of Claim, executable inasmuch as those properties are situate in the Eastern Cape ("Second Special Plea") and thirdly, that the relief sought in prayers (d) and (e) of the Plaintiff's Particulars of Claim are not competent on the basis that the plaintiff has failed to address a written demand to the first defendant in terms of section 33(3)(b)(i) of the Act ("Third Special Plea"). I will deal with each of these special defences *ad seriatim*.

First Special Plea: Absence of Jurisdiction in respect of Third Defendant

[3]It is common cause that the third defendant is a foreign company registered according to the laws of the United Kingdom of Great Britain and that it is duly registered in London. Its indebtedness to the plaintiff arises from a written Deed of Suretyship (annexure "M") in terms of which it bound itself as surety and co-principal debtor to the plaintiff for the obligation of first defendant. Plaintiff submitted that this court has the necessary jurisdiction to entertain the claim against third defendant on the grounds that the Deed of Suretyship was signed on behalf of plaintiff at Pretoria,

Gauteng on 9 February 2005 and, in terms of clause 15 of the said Suretyship, third respondent agreed and submitted to the jurisdiction of the Magistrate's Court and the High Court of South Africa. This is disputed by third defendant who pleaded that this court does not have jurisdiction in the absence of a court order confirming and founding jurisdiction. I am, therefore, required to determine that issue.

[4]The determination of that issue turns around the interpretation of clause 15 of the Deed of Suretyship. A convenient point of departure would be to interpret the meaning and import of clause 15 of the Deed of Suretyship which makes express provision for jurisdiction. It reads as follows:

“15. JURISDICTION

- i) **15.1** *For the purpose of all or any proceedings herein, the Surety hereby consents to the jurisdiction of the of the Magistrate's Court having jurisdiction under Section 28 of the Magistrate's Court Act (Act no. 32 of 1944, as amended), notwithstanding that such proceedings are otherwise beyond its jurisdiction. This clause shall be deemed to constitute the required consent conferring jurisdiction upon the said Court, pursuant to Section 45 of the Magistrate's Act.*
- ii) **15.2** *It shall nevertheless be in the sole discretion of Land Bank to proceed against the Surety in such Magistrate's Court or any other court (including the High Court) having jurisdiction.”*

[5]It is common cause that third defendant is a *peregrinus* insofar as this court is concerned. Plaintiff is an *incola* of this court in that it has a branch office within the jurisdiction of this court although its head office is situated in Pretoria. First, second and fourth defendants are either resident and/or carry on business within the jurisdiction of

this court and are accordingly *incolae* of this court. Third defendant has, in terms of clause 15 relating to jurisdiction, consented and submitted to the jurisdiction of the Magistrate's Court or any other court (including the High Court) having jurisdiction.

[6]Adv **Fisher**, on behalf of the defendants, submitted that clause 15 of the Deed of Suretyship does not envisage a consent to jurisdiction but rather an agreement that the Magistrate's Court would have jurisdiction where the High Court already has automatic jurisdiction over a party agreeing to such jurisdiction. There is no jurisdictional fact in clause 15 which indicates that the Magistrate's Court would only have jurisdiction if the High Court has automatic jurisdiction. On the proper reading and construction of the clause, the indication is to the contrary. Implicit in the clause is the fact firstly, that *peregrine* third defendant has effectively submitted its person to the jurisdiction of the South African courts which have the necessary jurisdiction rather than the courts of Great Britain in connection with any legal proceedings emanating from the said suretyship and secondly, such jurisdiction is conferred on the High Court with the Magistrate's Court having concurrent jurisdiction. The more pertinent question that requires to be answered is: Which division of the High Courts of South Africa has the necessary jurisdiction?

[7]In terms of the consent and submission, the Magistrate's Court and the High Court have concurrent jurisdiction. The plaintiff has been entrusted with the discretion to make an election whether to institute the proceedings either in the Magistrate's Court or the High Court having the necessary jurisdiction. In this instance, plaintiff has elected to institute proceedings in the High Court of the Cape of Good Hope Provincial Division. The principal debtor, namely first defendant carries on business in the jurisdiction of this court and gave as its *domicilium et executandi* address within the jurisdiction of this

court. Second defendant, who is the principal shareholder and director of first and second defendants, is resident and gave his *domicilium et excecutandi* address within the jurisdiction of this court. Fourth defendant likewise carries on business and gave its *domicilium et executandi* address within the jurisdiction of this court. Third defendant bound itself as surety and co-principal debtor to plaintiff for the obligation of first defendant. In my view the election made by plaintiff, by virtue of the consent and submission of third defendant, in order to institute action against it out of this court, accords with the doctrine of effectiveness.

[8]Heher JA in **Hay Management Consultants v P3 Management Consultants** 2005 (2) SA 522 quoted with approval from **Forsyth Private International Law** 4th ed at 215-16:

“...It is submitted that effectiveness in this slightly attenuated sense should suffice to justify the exercise of jurisdiction on the grounds of submission. ...The South African Courts should as a matter of policy encourage submission. As economic development in Southern and Central Africa proceeds, there is no reason other than archaic restrictions on the exercise of jurisdiction, why the local courts should not develop an international role akin to that of the Commercial Court in London. ...Thus peregrines should not find that, if they have submitted to the jurisdiction of the South African courts, their property is still at risk of being seized to found or confirm jurisdiction.”

[9]Scott JA in **Naylor v Jansen; Jansen v Naylor** 2006 (3) SA 546 (SCA) at 559D-E said that an attachment to found or confirm jurisdiction and a submission to the jurisdiction both have the effect of founding or confirming jurisdiction. It was held that an

attachment serves only to provide an *incola* with property or security in South Africa against which the judgment can be executed. A submission, on the other hand, entitles an *incola* to enforce the judgment in the country of the *peregrinus*.

[10]**Harmse JA** in **Tsung v Industrial Development Corporation of SA Ltd** 2006 (4) SA 177 (SCA) at 181E-F re-affirmed the principle: *“If a peregrine defendant has submitted – whether unilaterally or by agreement – to the jurisdiction of the court of the incola, an attachment or arrest to found or confirm jurisdiction is not only unnecessary, it is not permitted”*.

[11]I agree with the submission of Adv **Jacobs** that clause 15 of the Deed of Suretyship constitutes a submission by consent on the part of third defendant and the need to obtain an order to found or confirm jurisdiction is, therefore, obviated. Third defendant’s Special Plea that this court has no jurisdiction in respect of third defendant in the absence of an order confirming or founding jurisdiction is accordingly dismissed with costs.

Second Special Plea: Absence of Jurisdiction to Declare Property Executable

[12]I now turn to discuss the Second Special plea, namely, that this court does not have the jurisdiction to declare the immovable properties referred to in the plaintiff’s Particulars of Claim executable as the properties are situate in the Eastern Cape. Our courts have given conflicting decisions on this issue. The legal writers also expressed divergent views on the issue. It was submitted on behalf of defendants that it is not competent for this court to grant the necessary relief as it is not the forum rei sitae of such property notwithstanding the provision of section 26 (1) of the Supreme Court Act, 59 of 1959. Section 26 provides for service and execution of civil process issued from

one division of the Supreme Court to be effected within the jurisdiction of any other division. In support of his submission, Adv **Fisher** referred to **Weibren's Trust & Others v Holmes & Another** 1960 (3) SA 461 (D). In that case **Henning AJ**, after analysing various authorities concluded:

*"In my opinion the section does not confer, either expressly or by necessary implication, jurisdiction on one Division to declare executable immovable situated in another Division. This interpretation leaves it open to the plaintiffs to approach the Court in whose area of jurisdiction the properties are to make the order now asked for by invoking the provisions of sec 26 and making a formal application to the Court concerned (see **Ex parte Hill**, 1924 O.P.D. 116)."*

[13]On this particular issue, plaintiff nailed its colours to the mast of the decision in the case of **Ivorl Properties (Pty) Ltd v Sheriff, Cape Town** 2005 (6) SA 96 (C). **Van Reenen J**, after extensively and in-depth examining the various conflicting authorities and the views of our legal writers, concluded that the decision in **Weinbren's Trust & Others v Holmes & Another** (*supra*) is no longer good law. He went on further to say that, in his view, the judgment of **Hall J in Colonial Mutual Life Assurance Society Ltd v Tilsum Investments (Pty) Ltd** 1952 (4) SA 134 (C) is not plainly wrong and he is accordingly bound thereto. I agree with the *ratio decidendi* of **Van Reenen J** in **Ivorl Properties** (*supra*) and find myself likewise bound to the decision of **Hall J in Colonia Mutual** (*supra*).

[14]I accordingly find that this court is competent to declare the property in question executable and defendants' Special Plea that this court has no jurisdiction to declare

the immovable properties in question executable, inasmuch as those properties are situate in the Eastern Cape, is dismissed with costs.

Third Special Plea: Absence of Written Demand

[15]Defendants plead that the failure of plaintiff to address a letter of demand as contemplated in section 33(3)(b)(i) of the Act bars plaintiff from instituting this action. Plaintiff firstly, denies that such a letter of demand was not sent and secondly, in any case, denies that such a letter of demand is a prerequisite to the institution of an action.

[16]The Act grants the Land Bank extraordinary remedies in the event of the debtor defaulting with payment to it. The Land Bank is empowered, after having made a written demand, to apply to court, as a matter of urgency, to attach and sell assets of the debtor. In granting such an order the court may impose conditions with regard to the institution of action and the giving of necessary guarantees. In this matter plaintiff brought an application for the attachment of the assets of first defendant pending the institution of an action. The court issued a rule nisi authorising the attachment of the assets of first defendant and imposed a condition that, in the event of first defendant's liability being disputed, plaintiff institute action for the recovery of monies owing to it. The present action against first defendant is in pursuance of such court order.

[17]Section 33(3)(b)(i) of the Act provides that before the plaintiff can bring an application for the attachment and sale of defendants' assets, seven days must have elapsed after a written demand had been made for the repayment of advances made to the debtor. It is common cause that when plaintiff brought the application for the attachment of the assets of first defendant, a letter marked "annexure HJ20" was submitted in support of such application. The letter, after addressing various issues,

concludes as follows:

“In view of the fact that the undertaking to pay the R10million by 30 June 2005 has not been fulfilled, together with the fact that interest payments and instalments under the various loans are in arrears, Land Bank will have no other option than to take appropriate legal action in order to protect its interest.”

[18]Defendants’ case, as I understand it, is that, before plaintiff could have instituted the action, it was a requirement that a letter of demand should have preceded it. In my view such prerequisite is misconceived for three reasons. Firstly, section 33(3)(b)(i) contemplates a letter of demand as a prerequisite only in the case of an application for attachment and sale of assets and not for the institution of the action. Secondly, section 33(4)(b) provides that a court may impose conditions for the institution of an action. In confirming the rule nisi against first defendant, the final order provided that plaintiff shall institute the action against first defendant for recovery of monies allegedly owed to first defendant. The court did not impose a condition that the institution of the action should be preceded by a letter of demand. Thirdly, that annexure HJ20 did in fact precede not only the institution of the action, but also the application. A further letter of demand would have been superfluous. The letter of demand as contemplated in section 33(3)(b)(i) only applies to first defendant and not to the other defendants.

[19]I conclude, therefore, that there is no merit in the Third Special Plea that a further letter of demand had to be sent before plaintiff instituted the present action. I accordingly dismiss the Third Special Plea with costs.

[20]In summary, the three Special Pleas are dismissed with costs.

For Plaintiff : ***Adv D J Jacobs***
Attorney(s) : ***Cliffe Dekker***

For Defendants : ***Adv W Fisher***
Attorney(s) : ***Meyer & Associates***