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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2024-090625

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 18/10/24

SIGNATURE:

In the matter between:

JAN HENDRIK GERHARDUS SAUNDERSON

Applicant

and

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

First Respondent

ABSA BANK LIMITED

Second Respondent

**THE MINISTER OF THE DEPARTMENT
OF WATER AND SANITATION**

Third Respondent

BOEGOEBERG WATER USER ASSOCIATION

Fourth Respondent

JUDGMENT

*The judgment and order are accordingly published and distributed electronically. The date for hand-down is deemed to be **18 October 2024***

TEFFO, J:

Introduction

[1] This is an urgent application to compel the first respondent to issue settlement figures to cancel the covering mortgage bond held by the first respondent over the immovable properties of the applicant and that such settlement figures should exclude any and all reference(s) to legal costs.

[2] The application is opposed by the first respondent.

[3] Condonation was granted for the late filing of the answering and the replying affidavits.

The parties

[4] The applicant is Mr Jan Hendrik Gerhardus Saunderson ("*Mr Saunderson*"). The first respondent is the Land and Agricultural Development Bank of South Africa ("*Land Bank*"). The second respondent is Absa Bank Limited ("*Absa Bank*"). The third respondent is the Minister of the Department of Water and Sanitation ("*the Minister*") and the fourth respondent is Boegoeberg Water User Association ("*Boegoeberg*").

[5] No relief is sought against the second to the fourth respondents. These respondents were only cited for any possible interest they may have in the application. The application was served on all these respondents and none of them has filed a notice of intention to oppose the application.

Background

[6] The applicant is the registered owner of various properties namely, erven 1[...], 1[...], 1[...], 4[...], 4[...] and 1[...], all situated at the Karos Settlement, in David Kruiper Municipality, Division Kenhardt, Northern Cape Province (*“the properties”*). He concluded a revolving credit agreement with Unigro Financial Services (Pty) Ltd (*“Unigro”*) on 12 March 2019 and a term loan agreement on 15 May 2017. As security for both agreements, the first respondent registered bond(s) over the immovable properties of the applicant. The second respondent also holds bond(s) over erf 1[...].

[7] On 29 October 2023, the applicant sold the properties to YUD Agri (Pty) Ltd (*“YUD”*) for a purchase consideration of R7 350 000,00 (seven million three hundred and fifty thousand rand) (*“transaction 1”*). This purchase consideration was to be utilised to settle the indebtedness of the applicant to the second, third and fourth respondents.

[8] The applicant alleges that he has made arrangements with the second to the fourth respondents and undertaken by means of acknowledgement of debts to pay their debts as soon as the YUD transaction goes through.

[9] He contends that the YUD transaction (transaction 1) is ready for lodgement. He requested settlement figures from the first respondent in order for the guarantees to be issued. The first respondent provided his attorneys with settlement figures which include legal fees. The legal fees included in the settlement figures relate to proceedings between the first respondent and an entity called JHG Boerdery (Pty) Ltd (*“JHG Boerdery”*), a company of which he was a director.

[10] The applicant claims that there is no legal basis upon which the first respondent is entitled to insist on adding legal fees against the settlement figures on accounts held in his personal name. He asserts that the conduct of the first respondent has resulted in a situation where the YUD transaction (transaction 1) is now at risk which, in turn, could cause all the payment plans he has made to the second, third and fourth respondents being put in danger.

[11] He requests the court's urgent intervention to compel the first respondent to provide him and his attorneys with the correct settlement figures.

Urgency

[12] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of Uniform Rule 6(12). The Rule provides as follows:

“Rule 6(12) (a) In urgent applications the Court or judge may dispense with forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

(c) ...”

[13] The applicant who approaches the court on urgency basis must apply for an order condoning the non-compliance with the rules. He or she must set forth explicitly the circumstances which render the matter urgent. First and where necessary, require that the matter be heard outside of the court's usual urgent procedures. The applicant must show an absence of substantial redress if not heard as a matter of urgency.

[14] Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his or her case in that regard. The fact that the applicant wants the matter to be resolved urgently, does not render the matter urgent. The correct and

crucial test is whether, if the matter was to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, however, despite the anxiety of an applicant, he can be afforded substantial redress in an application in due course, the application does not qualify to be enrolled and heard as an urgent application¹.

[15] The absence of substantial redress that is required by the rules is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. The applicant may still obtain redress in an application in due course but it may not be substantial².

[16] The applicant contends that on 26 January 2024, the first respondent required guarantees to be issued in the amount of R2 479 302,31 ("*settlement 1 amount*"). This amount included legal fees under contract number 6006315 in the amount of R96 579,57 ("*legal fees 1*") and in the amount of R137 752,00 under contract number 6006339 ("*legal fees 2*") which the first respondent unilaterally added to the account.

[17] He avers that on 30 January 2024 his attorneys wrote to the first respondent and advised it that JHG Boerdery settled all outstanding amounts towards it under the business rescue proceedings. His attorneys also pointed out that no cost order was granted by any court against him or JHG Boerdery (by virtue of him signing as surety for JHG Boerdery).

[18] In a letter dated 19 March 2024 the first respondent advised his attorneys that its attorneys were requested to provide any outstanding legal costs incurred so that the legal costs can be paid in full as part of the guarantee requirements. The applicant claims that as per the new statement that was attached to the letter (H6), the legal fees 2 amount of (R137 752,00) were written off by the first respondent and as at 19 March 2024, JHG Boerdery owed the first respondent R0,00.

¹ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at [7] and [9]

² *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* at [7]

[19] In response to annexure H6, the applicant's attorneys addressed a letter to the first respondent dated 20 March 2024 in which they reiterated his request to the first respondent to provide an explanation for legal fees 1 in the amount of R96 579,57 charged by the first respondent on the revolving credit account and a court order or taxed bill of costs granted against him in his personal capacity which entitled the first respondent to claim legal fees from him. His attorneys also required the first respondent to urgently provide them with the amended settlement figures to enable them to process the guarantees in favour of the first respondent.

[20] On 26 March 2024 the first respondent responded and advised that paragraph 23 of the loan agreement which the applicant signed and accepted, provides that Unigro can at any time cede and transfer its rights and obligations pertaining to the term loan and/or the revolving credit agreements to it. The letter further stated that the amount of R1 126 826,00 is the (*in duplum*) amount on the revolving credit account and that the legal fees (legal fees 1) are additional to the *in duplum* amount.

[21] There was further correspondence between the parties and on 4 April 2024 the applicant's attorneys received correspondence from the first respondent's attorney, Mr Strydom. In the email, Mr Strydom referred to the liquidation and business rescue applications of JHG Boerdery and his engagement with Mr Fischer ("*the Business Rescue Practitioner*"). The letter stated that JHG Boerdery made an offer for payment of the capital, interest and costs of the first respondent. However, the offer was subsequently withdrawn. Mr Strydom further indicated that he had instructed his cost consultants to prepare detailed accounts and that the accounts will be presented to the first respondent and the applicant's attorneys. Mr Strydom advised the first respondent that as the previous undertakings were withdrawn and the business rescue plan was not being honoured, the first respondent must include the legal costs in the settlement amount (cancellation figures).

[22] The applicant alleges that since 4 April 2024 to the date of filing the application, his attorneys have not received any accounts for legal costs from the first respondent's attorneys.

[23] In a letter from the applicant's attorneys dated 17 May 2024 to the first respondent's attorneys, the applicant's attorneys recorded their disagreement and the incorrect interpretation regarding the first respondent's right to claim legal costs from him in his personal capacity. They also requested the first respondent to urgently provide them with the latest revised settlement figures calculated up and until 31 July 2024.

[24] From 28 May to 10 June 2024 the applicant's attorneys repeatedly requested revised clearance figures from the first respondent and on 10 June 2024, the first respondent provided the revised settlement figures in the amount of R2 404 794,54. There were no statements attached to these figures and/or any calculation as to how the settlement amount 2 was made up or calculated.

[25] The applicant claims that although he did not agree with the figures (in particular settlement amount 2), in order not to further delay the YUD transaction, he instructed his attorneys to proceed to issue the guarantee in favour of the first respondent.

[26] He alleges that on 21 July 2024 his attorneys forwarded a draft guarantee for approval and issue to the first respondent's attorneys in settlement amount 2. His attorneys also informed all the affected parties in the YUD transaction by email on 22 July 2024 that they had received all the guarantees in respect of the YUD transaction. Furthermore, that all the required documents will be forwarded to the correspondent attorneys in Kimberley for simultaneous lodgement in the Deeds Office by all the affected parties, once they were in a position to do so.

[27] On 22 July 2024 the attorneys of the second respondent were provided with a guarantee. On the same day and 24 July 2024 the applicant's attorneys requested the first respondent to provide them with the contact details of their correspondent attorneys in Kimberley. However, they did not receive any response. On 25 July 2024 the applicant's attorneys issued the guarantee for the payment of settlement amount 2 in accordance with the guarantee requirements issued by the first respondent on 10 June 2024.

[28] On 26 July 2024 the second respondent's attorneys confirmed receipt of the guarantee and also advised that they would attend to transactions 1 and 2 simultaneously as the properties are held under the same title deed and bond. The applicant asserts that on 26 and 29 July 2024 his attorneys requested the first respondent to urgently provide them with the contact details of their correspondent attorneys in Kimberley who would attend to the cancellation of their existing bonds. They still did not receive any response and on 29 July 2024, his attorneys received an email from the first respondent stating that the guarantee requirements issued on 10 June 2024 were not correct as there are legal fees outstanding and that as soon as the first respondent received the legal fees from its attorney, it will provide the new guarantee requirements.

[29] The applicant further alleges that on 31 July 2024 his attorneys wrote to the first respondent explaining that he was not indebted to it in respect of the legal costs claimed from him and further requesting it to provide his attorneys with the guarantee requirements for the revised settlement amount 3 which amount should exclude all legal fees, together with the contact details of their corresponding attorneys in Kimberley to attend to the bond cancellation on or before close of business on Friday, 2 August 2024, failing which he will approach this court on an urgent basis to seek a declaratory order against the first respondent.

[30] He did not receive any response from the first respondent and on 5 August 2024, his attorneys wrote to the first respondent again and attempted to find a solution to the dispute relating to the legal costs to allow the transactions to proceed to registration. His attorneys requested the first respondent to provide them with the revised settlement amount 3 which should provide for legal fees separately before the close of business on Monday, 5 August 2024. The proposal requested that the amount for settlement should be accompanied by a document indicating how the amounts were calculated and that he will pay the amount for legal fees into the trust account of his attorney until such time that the dispute was resolved.

[31] Later in the day on 5 August 2024 his attorneys received correspondence from the first respondent in which the first respondent reiterated its stance regarding the legal costs incurred in the liquidation application against JHG Boerdery and the

summonses that were issued against the sureties. The first respondent also indicated that it was still awaiting information and outstanding invoices from its attorneys which will be presented to a committee for their consideration.

[32] The applicant contends that the first respondent has not provided him with any court order that entitles it to claim legal costs against him.

[33] It was submitted that the applicant stands to lose his entire livelihood as there are other affected parties (the second to the fourth respondents) who, in the absence of finalising the transaction by obtaining final cancellation figures, will enforce their respective claims against him and this will result in catastrophic losses for the applicant.

[34] He claims that he has explored every possible avenue before approaching the court and that he has no other satisfactory alternative remedy in law but to approach the court on an urgent basis.

[35] Relying on the decision in *Luna Meubel Vervaardigers*³, Mr J G Cilliers for the first respondent argued that it is trite that in urgent applications the degree of relaxation of the Rules and of ordinary practice should not be greater than the degree of urgency that the circumstances of the case demand. Further submissions made were that the applicant fails to make out a proper case in its founding affidavit for the extremely urgent basis on which he elected to bring the application; the alleged grounds for urgency relied upon by the applicant and the nature of the relief sought do not justify the degree of relaxation of the Rules of Court sought by the applicant; there is no reason why the first respondent could and should not have been afforded a reasonable period for the filing of its answering affidavit; the first respondent is severely prejudiced by the degree of relaxation of the Rules sought by the applicant.

[36] In the heads of argument filed on behalf of the first respondent, it was submitted that the applicant's failure to afford the first respondent a reasonable

³ *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another* 1977 (4) SA 135 (WLD) at 136D

period for filing its answering affidavit infringes on the first respondent's right to be heard, and should not be allowed. Furthermore, that the applicant has been aware of the dispute since January 2024. If any urgency exists (which is denied), it was self-created by the applicant's failure to bring the application earlier. He delayed in bringing the application from January 2024 until 13 August 2024.

[37] The Court in *Luna Meubel Vervaardigers*⁴ had this to say:

“Practitioners should carefully analyse the facts of each case to determine, for the purpose of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must commensurate therewith. Mere lip service to the requirements of Rule 6(12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm ...”

[38] The essence of the first respondent's contentions is that the period afforded to it for filing its papers is not reasonable. It is contended that the first respondent was served with an application that comprises 160 pages by email on 13 August 2024 and only afforded less than 2 (two) court days to consider it, consult with its legal representatives and then file its notice of intention to oppose. The first respondent further complains that the applicant's founding affidavit contains detailed allegations referring to a number of annexures which it needed to deal with comprehensively in an answering affidavit. It was only afforded 3 (three) court days from the date of service of the application to file its answering affidavit. It is alleged that the first respondent was unable to prepare an answering affidavit dealing fully and comprehensively with the averments in the founding affidavit in the time afforded.

[39] It is correct that the application was served on the first respondent on 13 August 2024 by email and that the first respondent was only afforded until 15 August 2024 to file a notice of intention to oppose the application. The founding affidavit

⁴ At 137E-F

consists of 38 pages and numerous documents have been annexed to the founding affidavit. Without condoning and encouraging what most practitioners do in not affording their opponents reasonable time frames to file their opposing papers, I do not agree that in the matter *in casu* this was the case. It is apparent from the papers that the parties in this matter have been in constant communication shortly after the applicant sold the properties. Most of the documents attached to the application relate to the communication between the parties regarding the issue at hand. There is nothing new in the documents and they relate to the allegations made in the founding affidavit. From 13 August 2024 the first respondent was aware of the application. It was able to consult its attorneys who are not new to the matter and then filed its notice of intention to oppose the application before the close of business of 15 August 2024.

[40] The first respondent had from 13 August 2024 to start preparing its answering affidavit. It was expected to file its answering affidavit on or before 19 August 2024. It did not comply with the time frames given by the applicant. Although the answering affidavit was signed on 23 August 2024, it was only filed on 26 August 2024. The first respondent sought condonation for the late filing of its answering affidavit. The application was not opposed and I condoned the late filing of the answering affidavit as well as the replying affidavit.

[41] The first respondent requested the court to postpone the application if it was willing to entertain it to afford it a reasonable opportunity to file a more comprehensive answering affidavit. I did not deem it necessary to postpone the application as I found the information in the answering affidavit more than sufficient to enable me to deal with the application.

[42] Mr Celliers on behalf of the first respondent submitted that the dispute regarding the legal costs already existed shortly after October 2023 and finally resurfaced in June 2024 when the first respondent clearly indicated that it would not provide the applicant with the settlement figures without the legal costs. Mr Jacobs for the applicant conceded that the applicant was aware of the dispute from January 2024. However, on 10 June 2024 the situation changed when the first respondent provided the applicant with settlement figures which did not include legal costs. It

was only on 29 July 2024 that the applicant received the news from the first respondent that the figures provided on 10 June 2024 were not correct and that they needed to add legal costs. The applicant's attorneys requested an undertaking from the first respondent before 5 August 2024, the undertaking was not provided and on 13 August 2024 the application was launched.

[43] Mr Celliers further submitted that the applicant has an alternative remedy in that the parties discussed how the matter can be resolved. He referred me to paragraphs 11.26 of the founding affidavit and 36 of the answering affidavit to support his argument.

[44] At paragraph 11.26 of the founding affidavit the applicant alleges that his attorneys made a proposal to the first respondent to provide them with the revised settlement figures which should include legal costs separately to enable him to pay the amount for legal costs into the trust account of his attorney, so that the amount can be kept in his attorney's trust account until such time that the dispute is resolved. More or less the same tender was made by the first respondent's attorney, Mr Strydom save to say that the difference between the two proposals was that the proposal on behalf of the first respondent requires the applicant to pay the amount for legal costs into the trust account of an independent attorney.

[45] Mr Celliers submitted that all the applicant can do is to pay the amount for the legal costs as proposed by the first respondent and/or provide for a guarantee including costs which costs he can later claim from the first respondent. Mr Jacobs disagreed that the applicant has an alternative remedy. He submitted that the applicant would not settle on the first respondent's terms. As I understood Mr Jacobs' argument, the applicant did not agree to pay the amount for legal costs into the trust account of an independent attorney as per the first respondent's tender because his stance has always been that he was not liable to pay any of the first respondent's legal costs.

[46] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*⁵, the Court held that the delay in instituting proceedings is not on its own, a ground for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the court to believe. On the other hand, a delay may have been caused by the fact that the applicant was attempting to settle the matter or collect more facts with regard thereto.

[47] It is clear from the papers that from January 2024 since this dispute about legal costs started, there were ongoing discussions between the parties until on 10 June 2024 when the first respondent issued settlement figures without the legal costs and the applicant continued with the process of ensuring that bond cancellations are done and the registration of the transfer of the properties continue. This process was halted after the applicant's attorneys received correspondence from the first respondent that the figures were not correct and that the amount for legal costs should be added. Immediately thereafter, the applicant further attempted to resolve the matter with the first respondent. This did not work and the application was launched.

[48] In my view there was no delay in bringing the application. The delay that could have been there have been caused by the fact that the applicant was attempting to settle the matter. I am persuaded from the facts of this matter that the applicant cannot be afforded substantial redress at a hearing in due course. I conclude that the application qualifies to be enrolled and heard on an urgent basis.

The interdict and applicable legal principles

[49] The relief sought by the applicant is in the form of a final interdict.

⁵ *Supra* [8]

[50] The requirements for the granting of a final interdict are trite. The applicant is required to establish: a clear right; injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy⁶.

[51] A clear right is established when an applicant on a balance of probabilities, proves facts which in terms of substantive law, establish the right relied on.⁷ It is incumbent upon the applicant to prove a clear right in order to obtain a final interdict against the respondent. In order to obtain a final interdict, the applicant must prove all the requisites of a final interdict. If one of the requisites is not established, then an interdict cannot be granted.

[52] In his book Willes' *Mortgage and Pledge in South Africa*⁸, the learned author, Scott says the following:

"The right of the mortgagee or pledgee is to retain his hold over the secured property until his debt is paid and, if the mortgagor or pledgor is in default, to have his property sold and obtain payment of his debt out of the proceeds of the sale."

[53] In *Absa Bank Ltd v Lombard Insurance Company Ltd, Firstrand Bank Ltd v Lombard Insurance Company Ltd*⁹, the Court had this to say:

"... Generally the discharge of a debt requires an agreement between the parties to that effect ... It requires the parties to be in agreement as to the debt, whether that of the payer or that of a third party, to be paid."

[54] In *Nulliah v Harper*¹⁰, the Court held that where immovable property is mortgaged, payment of the mortgaged debt obliges the mortgagee *pari passu* to cancel the bond or cause it to be cancelled in the Deeds Registry.

⁶ *Dyalo v Mnquma Local Municipality and Another* (8490/2016) [2016] ZAECHMC 36 (9 September 2016)

⁷ LAWSA Vol.II, 2nd Ed.397

⁸ Scott and Scott: *Willes' Mortgage and Pledge in South Africa* 3^{ed} 1987 p 5

⁹ [2012] ZASCA 139; 2012 (6) SA 569 (SCA) (*Lombard*) at para 18

¹⁰ 1930 AD 141 at 151-2 and 155

[55] In *Tskanae and Another v Firstrand Bank Ltd and Others*¹¹ it was held that the mortgage bond restricts the borrower's ownership rights until the debt is repaid. Therefore, it is evident that the mortgage bond is crucial to secure the loan advanced.

[56] In *Panamo Properties v Land and Agricultural Development Bank*¹² (*Panamo*), the Court had this to say:

"It is clear that the bond was initially passed to secure the performance of Panamo under the loan. Its terms make it accessory to the loan. Once the loan is set aside as invalid, unless the bond is accessory to a different obligation than the loan, it must suffer the same fate as does the loan and be subject to cancellation. However, even though the loan is void, this does not in itself mean that there is no obligation secured by the bond ...

In the first place, the bond is a covering bond. A covering bond may provide security for more than one specific debt. The bond may therefore afford security for more than obligations arising under the loan. It is not necessarily extinguished merely because the loan is void. It complies with the formalities required by section 51 of the Deeds Registries Act for those covering future indebtedness. The nature of the bond thus does not exclude the possibility that an enrichment claim may be recovered."

Discussion

Have the requirements of a final interdict been met?

[57] The applicant alleges that he has a clear right to the fulfilment by the first respondent of its obligation to provide him with the requisite settlement figures at his election to sell the properties. Upon request the first respondent was obliged to, within a reasonable time, provide the correct settlement figures. He also has the right

¹¹ (A250/2021) [2023] ZAGPPHC 596 (18 July 2023) at para 25

¹² (20051/2014) [2015] ZASCA 70 (22 May 2015) at para 29 and 31

not to be held liable for the costs that the first respondent is not entitled to and which he is not liable for.

[58] The applicant referred me to a statement issued by the first respondent's attorneys, annexure R2, which he submitted it indicates that the purported legal fees relate to other legal entities and not to him personally. He disagrees with the contention by the first respondent that it is entitled to levy the purported legal fees against his properties when issuing the cancellation figures. He further disputes that by virtue of the fact that he had signed surety for the other separate legal entities, he is liable for the legal costs of the first respondent against the other entities.

[59] It was argued on behalf of the applicant that the first respondent is not in possession of any court order directing any of the entities, or the applicant to pay its legal costs. Further, that the legal costs associated with the various legal matters are still to be argued and no costs order has been granted in favour of the first respondent.

[60] It was submitted that no bill of costs has been drafted nor presented to the taxing master for taxation. Furthermore, the applicant contends that should such cost order(s) be granted in the future, they will first be required to be taxed whereafter it will be the responsibility of the legal entities against whom the order was granted and taxed, to pay such costs order(s).

[61] A concern was raised regarding the discrepancies in the initial cancellation figures of the first respondent that included amounts of R96 579,57 and R137 752,00 with a total of R234 331,57 in legal fees and the amount of the security of R521 913,43 that the first respondent demands.

[62] On the other hand, the first respondent claims that the applicant has failed to demonstrate a clear right for the relief sought. It asserts that it has a right to refuse to consent to cancellation of the covering bond at this stage in terms of the terms and conditions of the covering bond registered against the properties relating to this application, in favour of Unigro. All the right, title and interest in the said covering bond were subsequently ceded to the first respondent on 22 November 2017.

[63] The first respondent referred me to the covering bond, annexure “R1” attached to the answering affidavit which copy of the bond (number B1290/2017) it is alleged has been registered over one of the bonded properties in favour of Unigro. The first respondent contends that under the bond, the applicant provided the bonded properties to Unigro as security for all his current and future liabilities under the revolving credit agreement and the term loan agreement referred to in the founding affidavit. I was also referred to clause 27 of both the revolving credit agreement and term loan agreement, in terms of which the applicant is liable for any legal costs incurred by Unigro to recover any amount due or to enforce any of Unigro’s rights under the revolving credit agreement and/or the term loan agreement on a scale as between attorney and own client.

[64] Moreover, it was submitted that apart from the indebtedness of the applicant towards the first respondent in terms of the above two agreements, the applicant is also indebted to the first respondent in terms of a suretyship agreement that he signed in favour of Unigro. The applicant accepted liability for the indebtedness of JHG Boerdery. In addition, the applicant further agreed to the registration of a covering bond over the properties relevant to this application and the covering bond was subsequently registered over the said properties of the applicant. The first respondent contends that the cancellation of this covering bond forms the subject matter of the application *in casu*.

[65] It is averred that all these rights were subsequently ceded to the first respondent by Unigro in terms of the agreements with the applicant as well as the covering bond.

[66] It was submitted on behalf of the first respondent that it is a specific term of the covering bond that the bond also covers and provides security to the first respondent relating to any indebtedness that the applicant has or may have with regard to the first respondent in terms of his suretyship. The relevant portion of the covering bond reads as follows:

“EN TEN OPSIGTE VAN die bedrae verskuldig ten opsigte van die oorsake hierin genome aangegaan deur die ander persone, firmas, regspersone of enigiemand anders ten opsigte waarvan die verbandgewer homself as borg, medehoofskuldenaar of andersins ten opsigte van sodanige skuld, teenoor die verbandgewer verbind het of hierna mag verbind.”

[67] The first respondent further contends that in terms of the covering bond it is entitled in its sole discretion to collect and/or recover any amount due and/or covered by the bond which include the recovering of costs. On this basis it was submitted that the legal costs relating to JHG Boerdery (the principal debtor) are covered by the security provided by the covering bond that forms the subject matter of this application.

[68] In an application for a final interdict, the grant or refusal of an interdict is a matter within the discretion of the court hearing the application and depends on the facts peculiar to each individual case and the right the applicant is seeking to enforce or protect.¹³

[69] When the proceedings are on affidavits the applicant must satisfy the court on the admitted or undisputed facts by the same balance of probabilities required in every civil suit, of the facts necessary for his success in the application¹⁴.

[70] In motion proceedings final relief may be granted where the disputes of fact have arisen on affidavits if those facts averred in the applicant's affidavit which have been admitted by the respondent together with the facts averred by the respondent, justify such a final order provided that the denial by the respondent of a fact alleged by the applicant does not raise a real, genuine or *bona fide* dispute of fact. In such a case final relief may be granted if the court is satisfied as to the inherent credibility of the applicant's factual averment¹⁵.

¹³ *Candid Electronics (Pty)Ltd v Merchandise Buying Syndicate(Pty)Ltd* 1992(2) SA 459 (C) at 326

¹⁴ *Mbangi v Dobsonville City Council* 1991 (2) SA 330 (W) at 335; See also *Mankowitz v Koewenthal* 1982 (3) SA 758 (A) at 787F-H

¹⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

[71] It is common cause between the parties that JHG Boerdery obtained a term loan from Unigro in 2017 as well as a revolving credit facility. Unigro as security for the term loan and the revolving credit facility provided to JHG Boerdery, registered bond(s) over JHG Boerdery's properties.

[72] At some stage JHG Boerdery was unable to meet its obligations towards Unigro. Consequently, the first respondent who took cession of the book debts of Unigro, instituted legal proceedings against JHG Boerdery and the sureties of JHG Boerdery who included the applicant. An application for the liquidation of JHG Boerdery was also launched.

[73] The applicant contends that these proceedings including the liquidation application against JHG Boerdery were defended and after all the papers were filed in the liquidation application and before the application could be heard, business rescue proceedings were instituted and the application for business rescue was granted. The liquidation application and the actions instituted against the sureties never proceeded. He claims that in terms of the business rescue plan that was accepted, the properties of JHG Boerdery were sold and from the proceeds of the sale the full amount that JHG Boerdery owed to the first respondent was settled.

[74] He further alleges that JHG Boerdery does not owe the first respondent's attorneys any amount of money in respect of legal costs as the attorneys could not tax their legal account (Strydom) nor claim legal costs. The liquidation application never proceeded and no cost order was awarded in favour of the first respondent against JHG Boerdery.

[75] Mr Jacobs for the applicant placed reliance on the decision of Constitutional Court in *Nkata v Firstrand Bank Ltd*¹⁶ and argued that the first respondent cannot just unilaterally add costs on the settlement figures and force the applicant to pay them on attorney and client scale. The costs must be sanctioned by a costs order. They must also be taxed. He further submitted that if there is a suretyship agreement, it must make provision for attorney and client costs. Furthermore, that before a party

¹⁶ *Nkata v Firstrand Bank Ltd* 2016 (4) SA 257 (CC)

can be entitled to costs, there must be a finding in that party's favour followed by an order for costs which must be taxed.

[76] The Court in the *Nkata* matter¹⁷ held that legal costs would become due and payable only when they are reasonable, agreed or taxed and on due notice to the consumer. While I concur with the decision in the *Nkata* matter, I do not agree with the argument by Mr Jacobs. It does not follow that if costs are not taxed, it means they were not incurred. He is correct to say until an account has been drawn and agreed between the parties or taxed in case of a dispute, they are due and payable.

[77] The terms of the covering bond registered over the properties of the applicant have been referred to at paragraphs 66 and 67 of the judgment. I fully agree with Mr Celliers that in order to establish whether the applicant is entitled to cancel the covering bond, one will have to look at the agreements which include the covering bond. In terms of the covering bond that the first respondent registered over the properties of the applicant, by virtue of him being a surety of JHG Boerdery in respect of its indebtedness to the first respondent, which form the subject matter of the application in casu, the first respondent is entitled in its sole discretion to collect and recover any amount due and/or covered by the bond which include the recovering of costs.

[78] At paragraph 3.7 of his replying affidavit the applicant states the following:

“The first respondent remains fully entitled to obtain a cost order against JHG Boerdery and, then, in terms of the costs order and subsequent Taxing Master’s allocator claim costs against JHG Boerdery or against myself in my capacity as surety.”

[79] While the applicant denies liability for the legal costs of the first respondent relating to the litigation against JHG Broedery, he concedes that the first respondent can claim such costs against him once it has obtained a costs order against him and a bill has been drawn and then taxed. There can be no doubt that costs were

¹⁷ *Supra*

incurred by the first respondent when it instituted litigation against JHG Boerdery and its sureties. Now the question that becomes pertinent in this application, is what happens pending the finalisation of that process of obtaining a costs order, drawing a bill and ensuring that it is agreed or taxed? The first respondent contends that it is entitled to hold on its security until its debt is paid. The applicant wants the court to compel the first respondent to abandon its security when its debt is not paid. I agree that the first respondent has to retain its hold over secured property until its debt has been paid.

[80] As things stand the parties cannot agree on the issue of the liability for costs. This dispute is a real, genuine and a *bona fide* dispute which cannot be resolved on the papers. Relying on the decision in *Plascon-Evans Paints*¹⁸, a final relief can therefore not be granted under the circumstances.

[81] Put differently, I am not persuaded that the applicant has established facts on a balance of probabilities which in terms of substantive law establishes the right that he relies on¹⁹. He has therefore failed to establish a clear right. In order to obtain a final interdict, the applicant must prove all the requisites of a final interdict. If one of them is not established, then the final interdict cannot be granted. As a result, I do not find it necessary to deal with the other requisites of a final interdict.

[82] Under the circumstances, I cannot order cancellation of the covering bond where there is a dispute between the parties relating to liability for costs.

[83] Consequently, the application is bound to fail.

Costs

[84] Mr Celliers submitted that the application justifies a cost order on scale C which costs should include costs for the employment of two counsel. The decision with regard to costs lies in the discretion of the Court. Having considered the matter,

¹⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd supra*

¹⁹ LAWSA Vol 11, 2nd Ed 397

I am not persuaded that it justifies a costs order on scale C and the employment of two counsel. I conclude that the appropriate costs order should be on scale B.

[85] In the result the following order is made:

85.1 The application is dismissed.

85.2 The applicant is to pay costs on scale B.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the applicant	M Jacobs
Instructed by	C J Willemse & Babinsky Attorneys
For the first respondent	J G Celliers & J S Griesel
Instructed by	Strydom & Bredenkamp Inc
Date of hearing	27 August 2024
Date of judgment	18 October 2024