IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **10399/2023P**

In the matter between:

ITHALA DEVELOPMENT FINANCE CORPORATION LTD	**APPLICANT**
and	
LOYISA CONSULTING AND PROJECTS CC	**FIRST RESPONDENT**
LUYOLO LENNOX MAKAULA	**SECOND RESPONDENT**
LIZIWE PEPETA	**THIRD RESPONDENT**
DONALD LUTHANDO LOYISO PEPETA	**FOURTH RESPONDENT**

Coram: Mossop J
Heard: 21 January 2025
Delivered: 21 January 2025

ORDER

The following order is granted:

1. It is declared that the large business loan agreement concluded between the applicant and the first respondent has been cancelled.

2. The respondents are directed to pay the applicant the amount of R10 100 011.46 jointly and severally, the one paying the others to be absolved.

3. The respondents shall pay interest on the aforesaid amount of R10 100 011.46 at the applicant's lending rate minus two percent or the maximum

rate permitted in terms of the National Credit Act 34 of 2005, whichever is the lower rate, calculated daily and compounded monthly in arrears.

4. The immovable property owned by the first respondent with the formal description of:

Remainder of the farm Rooi Poort No. 1[...], registration division ES, Province of KwaZulu-Natal, in extent 810,6653 hectares and held by deed of transfer T19453/1992,

is declared to be specially executable.

5. The applicant is authorised to perfect the general notarial bond bearing number BN 0[...] granted to it by the first respondent in respect of all its movable assets listed in annexure 'A' to the aforesaid general notarial bond, subject to a maximum value of R2 855 020.

6. The respondents are directed to pay the costs of the application jointly and severally, the one paying the others to be absolved.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] In this application, the applicant seeks an order confirming cancellation of a written large business loan agreement concluded between itself and the first respondent (the loan agreement), a money judgment against the respondents, jointly and severally, for the payment of the amount of R10 100 011.46, an order declaring specially executable certain immovable property, an order perfecting a general notarial bond held by it in respect of movable property owned by the first respondent, and costs.

[3] The applicant seeks this relief because on 30 November 2011 it concluded the loan agreement with the first respondent in terms of which it lent it the sum of R11 453 034 (the loan amount). It was, thus, a large business loan agreement. As security for the loan amount, the first respondent agreed to pass a covering

mortgage bond over certain immovable property that it owns, which has the formal description of the remainder of the farm Rooi Poort No. 1[...], registration division ES, Province of KwaZulu-Natal, in extent 810,6653 hectares and held by deed of transfer T19453/1992. The mortgage bond was to be in the amount of R11 600 000. The first respondent also agreed to encumber its moveable assets and passed a general notarial bond over certain of those assets to a maximum value of R2 855 020. As further security for the loan amount, the second, third and fourth respondents agreed to stand as sureties for the obligations of the first respondent to the applicant. Interest was to be charged on the loan amount at the applicant's lending rate minus two percent or the maximum rate permitted in terms of the National Credit Act 34 of 2005, whichever was the lower rate, calculated daily and compounded monthly in arrears.

[4] It is not in dispute that the applicant duly advanced the loan amount to the first respondent and the latter registered the covering mortgage bond over its immovable property and the general notarial bond over its movable assets.

[5] On 23 April 2015, the loan agreement was varied (the variation agreement). In terms thereof, the then existing arrears of the first respondent were to be capitalised to form part of the debt and the instalment payable by the first respondent was increased from the amount of R95 441 per month to the amount of R107 165.60 per month. The term of the loan agreement remained unaffected by these changes, as did all its other terms.

[6] The applicant alleges that the first respondent thereafter breached its repayment obligations to it, fell into arrears with its payments and did not make good the arrears when called upon in writing to do so. When the first respondent failed to do so, the applicant cancelled the loan agreement on 30 June 2023. That, simply put, is the applicant's case.

[7] To this, the respondents have delivered an answering affidavit in which they generally and vaguely dispute the applicant's claim and explain that the money that the first respondent loaned from the applicant was to assist it in developing a milk

processing plant. Because of certain changes in the business landscape that occurred shortly after the loan agreement was concluded, the first respondent sought from the applicant, and was granted, a grace period in respect of the loan agreement of one year. Whether the grace period was a year or a shorter period is in dispute, but nothing really turns on this. The fact of the granting of the grace period is evidenced in the variation agreement previously mentioned.

[8] Unfortunately, the first respondent's business was subject to further unexpected blows and hardships after the variation agreement had been agreed to and, ultimately, it found itself again in financial straits. It, however, asserts that it has devised, and is implementing, a turnaround plan (the turnaround strategy) which it, perhaps not unexpectedly, is certain will lift it from its current predicament and guide it to ultimate success. But for this to happen, it requires the applicant to buy into the turnaround strategy and to permit it time to implement it. As shall be explained shortly, the applicant has declined to support the turnaround strategy. As a consequence, the respondents state in their answering affidavit that the applicant is being 'disingenuous and inconsiderate' in declining to view the turnaround strategy with the same enthusiasm with which they view it.

[9] The respondents' answering affidavit was drawn prior to the applicant actually expressing its view on the adequacy and sufficiency of the turnaround strategy proposed by the first respondent. The applicant in its replying affidavit explains that the turnaround strategy was only proposed after its application was launched. In good faith, it accordingly proposed to the respondents that it stay its own application while it considered the turnaround strategy. This was assented to by the respondents and the applicant duly considered what the first respondent proposed. After doing so, the applicant rejected the strategy. It was not, in my view, obliged to accept it and I fail to understand why, in acting as it has, the respondents believe that the applicant has conducted itself in a 'disingenuous or inconsiderate fashion.' It appears to me, to the contrary, that it has behaved in a responsible and considerate manner.

[10] As regards any other defences raised by the respondents, there is a faint and distant suggestion of a complaint about the authority of the deponent to the

applicant's founding affidavit, but there has been no formal challenge in terms of Uniform rule 7, as is required if this point is to be pursued.[1] There is also a murmuring that the applicant has not proved the extent of the first respondent's indebtedness to it. That is without substance, for the loan agreement specifically permitted the applicant to prove any indebtedness by way of a certificate of balance. Such a certificate is an annexure to the founding affidavit. A final submission made by the second, third and fourth respondents is that they are not jointly and severally liable with the first respondent. Unfortunately for them, that is incorrect. As sureties for the obligations of the first respondent they bound themselves as co-principal debtors in solidum with the first respondent. They are, thus, jointly and severally liable with the first respondent.

[11] The most significant part of the answering affidavit, in my view, appears in paragraph 27 thereof, where the following is stated:

'The first respondent has failed to make payment due to financial difficulties it was facing which now have been resolved and hopefully with the applicant agreeing to the restructuring of the first respondent (sic) business loan, payment towards settling the debt should be expected in due course.'

In that brief extract, the respondents admit the thrust of the applicant's case: the first respondent did not observe the conditions attached to the loan agreement and fell into arrears with its payment obligations. The fervent optimism in the answering affidavit that the applicant would see the virtue in the turnaround strategy has been dashed by the reality that the applicant did not accept it. Any suggestion by the respondents, and there is such a suggestion, that the first respondent was not in breach of the loan agreement thus perishes on the respondents' own version.

[12] There is, accordingly, no real or substantive defence that has been raised to the applicant's claim. All that the respondents can offer is the promise of expected sunshine that will allegedly follow once the first respondent commences with the turnaround strategy. That, of course, is not an answer to breaches, deficits and failures that have already occurred, nor does it meet the fact that the applicant has already cancelled the loan agreement. It is because of those failures that the

[1] *ANC Umvoti Council Caucus and Others v Umvoti Municipality* [2009] ZAKZPHC 47; 2010 (3) SA 31 (KZP).

applicant seeks the relief set out in its notice of motion. Having heard argument from Mr Miya, who appears for the applicant this morning, there being no appearance of counsel for the respondents, I am satisfied that the relief claimed by the applicant must be granted.

[13] I accordingly grant the following order:

1. It is declared that the large business loan agreement concluded between the applicant and the first respondent has been cancelled.
2. The respondents are directed to pay the applicant the amount of R10 100 011.46 jointly and severally, the one paying the others to be absolved.
3. The respondents shall pay interest on the aforesaid amount of R10 100 011.46 at the applicant's lending rate minus two percent or the maximum rate permitted in terms of the National Credit Act 34 of 2005, whichever is the lower rate, calculated daily and compounded monthly in arrears.
4. The immovable property owned by the first respondent with the formal description of:

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is declared to be specially executable.

5. The applicant is authorised to perfect the general notarial bond bearing number BN 0[...] granted to it by the first respondent in respect of all its movable assets listed in annexure 'A' to the aforesaid general notarial bond, subject to a maximum value of R2 855 020.
6. The respondents are directed to pay the costs of the application jointly and severally, the one paying the others to be absolved.

MOSSOP J

APPEARANCES

Counsel for the appellant:	Mr S E Miya
Instructed by:	Matthew Francis Incorporated Suite 4, First Floor 21 Cascades Crescent Block A Montrose Pietermaritzburg
Counsel for the respondent:	No appearance
Instructed by:	Lungelo Nyuswa Attorneys 39 Thomas Road Musgrave Durban
	Locally represented by:
	M Shabalala Attorneys Office 203, ABC Building 9 Gallwey Lane Pietermaritzburg