IN THE HIGH COURT OF SOUTH AFRICA

REPORTABLE

EASTERN CAPE DIVISION – GRAHAMSTOWN

Case No: 1050/2011

In the matter between:

SIDNEY BONNEN BIRCH

Applicant

married out of community of property to

VERONA BIRCH

and

FIRSTRAND BANK

Respondent

Case No: 1415/2012

In the matter between:

NEIL LAWRENCE DUGMORE PIKE N.O.

First Applicant

KEVIN JEAN VAN HUYSSTEEN N.O.

Second Applicant

EDWARD SIDNEY BIRCH N.O.

Third Applicant

HELEN BIRCH N.O.

Fourth Applicant

(in their capacities as Trustees for the time being of

THE TED AND HELEN BIRCH – SIDNEY TRUST,

Registration Number TM 462)

and

FIRSTRAND BANK

Respondent

Case No: 3774/2015

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

NEIL LAWRENCE DUGMORE PIKE N.O.

First Respondent

KEVIN JEAN VAN HUYSSTEEN N.O.

Second Respondent

EDWARD SIDNEY BIRCH N.O.

Third Respondent

HELEN BIRCH N.O.

Fourth Respondent

(in their capacities as Trustees for the time being of

THE TED AND HELEN BIRCH – SIDNEY TRUST,

Registration Number TM 462)

JUDGMENT

REVELAS J:

[1] There are five applications in this matter. The first two applications are for rescission of a court order dated 13 December 2012. Mr Sidney Bonnen Birch *("Birch")* and his wife, Verona Birch brought the first application for rescission (under case number 5010/2011). The second application for rescission of the same order, is brought by the Ted and Helen Birch Trust *("the trust")* (under case number 1415/2012). FirstRand Bank *("the bank")* is the respondent in both applications for rescission. The bank as applicant in the third application, (case number 3774/2015) seeks an order in terms of Uniform Court Rule 46(1)(a)(ii), to the effect that certain immovable property owned by the trust (a farm called Van Aardtskraal), be declared executable.

[2] In the fourth application, the bank seeks an order to set aside a "*Notice to Produce Documents*", served by Birch, as an irregular step in motion court proceedings in terms of Uniform Court Rule 30(1). Birch in turn, has brought an application to have the bank's application in terms of Rule 30(1) aforesaid, set aside, also in terms of Rule 30(1). That is the fifth application. These fourth and

fifth applications are both also brought under case number 1050/2011.

[3] The order of 13 December 2012, sought to be rescinded by different applicants, was granted pursuant to an application brought by the bank for the sequestration of the estate of Birch (case number 1050/11), as well as an action instituted by the bank against the trust (case number 1415/2012). I will refer to the four defendants as "*the trustees*" herein.

[4] Birch does not dispute that the order was made by agreement between himself and the bank in terms of a draft order handed to Sandi J on 13 December 2012. Birch also complied with the order by commencing with the payments in terms of the order. However, he ceased making payments to the bank when at the end of 2014, according to him, it occurred to him that the loan agreement between himself and the bank may have been sold into securitisation. In that case, he believed, the bank would not have the necessary *locus standi* to sue him and that would be his defence. Had he known about this at the relevant time, Birch stated, he would never have consented to the order in question.

[5] The applicants (the trustees) in the second rescission application seek rescission of the relevant order on two grounds. Firstly they contend that if the bank lacked *locus standi* to recover payments from Birch, it was also not entitled to recover payment from the trust by virtue of being surety for Birch's debts to the bank. Secondly, the trustees allege that they had no knowledge of the settlement agreement between Birch and the bank, which resulted in the order of 13 December 2012. Consequently, they argued, the trustees could not have agreed to the order which they now seek to rescind.

[6] The relevant terms of the order sought to be rescinded reads as follows:

"**IT IS ORDERED:** (BY AGREEMENT BETWEEN THE PARTIES)

1. THAT the Respondent in case number 1050/2011 and the Defendants in their official representative capacities in case number 1415/2012 shall jointly and severally pay the Applicant.

a. the amount of R2 500 000.00 together with interest at prime (currently 8.5%) per annum calculated daily and compounded monthly in arrears from 7th December 2012 to date of payment, both days inclusive by way of:

b. an instalment of R100 000.00 on or before 31st January 2013;

c. an instalment of R243 113.54 on or before 28th February 2013;

d. seven equal instalments of R343 113.54 payable at three monthly intervals commencing on or before 7th June 2013 and thereafter on or before 7th September 2013; 7th December 2013; 7th March 2014; 7th June 2014; 7th September 2014 and 7th December 2014.

2. THAT should Respondent and the Defendants fail to make payment of any instalment envisaged in paragraph 1 hereof, and fails to do so within seven days after receipt of written notice calling upon him to do so, the full outstanding balance will immediately become due and payable.

3. THAT the Respondent and Defendants shall make payment of Applicant's party and party bill of costs, to be taxed or agreed.

4. THAT it is recorded that the obligations set out in paragraphs 1, 2 and 3

above are in full and final settlement of any and all obligations of the above Respondent to the Applicant in respect of account no: 4000016834294 and 62088888585 and Defendants (in their official representative capacities) to the Applicant in respect of its suretyship.

5. THAT it is ordered that Respondent retains the right(s), subject to prescription, to institute legal proceedings against Applicant pursuant to the alleged damages occasioned by the fire at Van Aardtskraal Farm, Middleton, Eastern Cape in September 2010."

Background

[7] The facts which gave rise to the aforesaid order are the following: On 01 December 2009, the bank afforded Birch two short term facilities comprising of a working capital facility, available in the form of an overdraft and other facilities, and a pre-settlement facility of R1,000,000.00 and R150,000.00 respectively. In the same facility letter, a long term direct loan for the amount of R1,360,000.00 was also afforded to Birch, and in terms of the facility letter, a written loan agreement was concluded between the bank and Birch on 02 December 2009 in respect of the long term direct loan.

[8] Birch breached the terms of the facility letter and the loan agreement by failing to make full and timeous payments in terms of the loan and by committing an act of insolvency, being that he notified the bank on 02 August 2010, that he was unable make repayment. Birch's debt review was terminated by the bank and the bank launched the application for his estate to be sequestrated. Birch contested the sequestration application.

[9] The factual background to the action instituted under case number 1415/2012

against the trust is the following: The trust owns certain immovable property (referred to earlier) which is a farm, Van Aardtskraal, in the Middleton area, Somerset East. On 17 August 2005 a bond was registered over Van Aardtskraal by the trust, in favour of the bank, as a continuing security and covering bond for every sum in which the trust may then or thereafter become indebted to the bank. The bank subsequently instituted an action against the trust for repayment of Birch's unfulfilled obligations in terms of the loan agreement, by virtue of the trust having bound itself as surety and co-principal debtor *in solidum* with Birch for the repayment of his loans. As a result of the trust's liability to the bank pursuant to the suretyship, the bank issued summons against the trust for payment in the amount of R1,360,000.00.

[10] When the sequestration application and the action became settled, Birch made payments to the bank in terms of the order of 13 December 2012, as from January 2013 until November 2014. Thereafter he ceased making monthly payments. In total, of the R2,5 million that Birch was ordered to pay the bank in the order sought to be rescinded, he paid only R943,113.54.

The applications in terms of Rule 30 (1) and the first rescission application

[11] It is convenient to deal with the first, fourth and fifth applications first, since they concern the entitlement of Birch to demand discovery of the documents[1] listed in his notice "*To Produce Documents*" and whether Birch can successfully rely on securitisation as a valid defence. These questions are all closely intertwined.

[12] There was no formal application for a postponement, but in the event of Birch

being successful in his application to have the bank's Rule 30(1) application set aside, the matter would have to be postponed. That would enable Ms Carruthers, who presently acts for both Birch and the trust, to scrutinize the documents demanded in the notice.

[13] Ms Carruthers stated that the purpose of such scrutiny of the documents would allow her to establish whether or not the loan agreement between Birch was sold or ceded into securitisation to an unidentified, undisclosed third principal. The bank has denied that this occurred. Ms Carruthers argued that if the original loan agreement was not forthcoming, the inescapable inference to be drawn therefrom, was that the agreement had indeed been sold into securitisation, despite the bank's protests to the contrary.

[14] Should the original loan agreement however, be produced by the bank, Ms Carruthers said that she wished to compare the original loan agreement with copies thereof, and with the transparencies of such copies. The purpose thereof would be, according to Ms Carruthers, to find discrepancies in the signatures of the debtor and words on these documents. Such unusual features would, according to Ms Carruthers, indicate the securitisation of the bank's loan to Birch.

[15] As stated before, the bank denies that the loan agreement in question was ever sold or ceded by it into securitisation and submits that Birch's "*Notice to Produce Documents"* is an abuse of the process of this court, and an irregular step, at least in as much as Rule 35(1) does not apply to applications.

[16] Birch's entitlement to the documents in question depends entirely on the viability of his so-called securitisation defence. There would be no point in

postponing the matter to provide an opportunity for Ms Carruthers to scrutinize the documents if there are no prospects that the proposed defence, if it is a defence, will succeed. At this point there is no indication that the loan agreement was securitized. It is highly significant that thus far, no third party, entity or principal has come forward to claim payment as a creditor from Birch. There is also no indication that Birch's debt to the bank has been extinguished.

The Entitlement to Documents

[17] An order compelling a party in motion court proceedings to make discovery is a rare and unusual procedure in application proceedings. In *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another*[2], it was held that such an order would be made "*only in exceptional circumstances"* and such circumstances were held to specifically exclude those in which the application for discovery amounts to no more than a "*fishing expedition"*[3].

[18] A litigant who seeks discovery in motion proceedings, is obliged by Uniform Court Rule 35(13), to bring a formal application, setting out the special circumstances justifying such an order. Birch has simply failed to do so. Ms Carruthers, while she was arguing (without heads of argument despite the fact that I reminded her at the previous hearing that it was a requirement in terms of the rules applicable to the Eastern Cape), said that she would bring such an application if required to do so. She ought to have brought such an application much sooner than the third hearing of the matter.

[19] In *Cullinan Holdings Ltd v Mamelodi Stadsraad*[4] Van Dijkhorst J said of Rule 35

(14), although not quite applicable to the present matter, but nonetheless apt in the circumstances:

> "Myns insiens skep Reël 35(14) nie 'n metode waardeur 'n gedingsparty deur gebruikmaking van generiese omskrywings 'n net kan knoop waarmee vir halfbekende dokumente gevis kan word nie. Dit is 'n remedie wat vir besondere omstandighede geskep is. Dit vereis die oproep van 'n spesifieke dokument waarvan die applikant kennis dra en wat hy presies kan omskryf."

[20] Birch has not, and in my view, would not be able to establish the existence of the kind of special circumstances which would justify an order compelling the production of the documents in question. If one has regard to the nature of some of the items listed in Birch's notice, such as the "*complete set of all transactions... relating to the bank and its securitization participants"* and the banks "*securitization portfolio and ledger"* [5] it seems that the notice is aimed at a fishing expedition of a magnitude that could delay the finalization of this case considerably which is, in my view, what the notice to compel discovery is aimed at.

[21] Ms Carruthers has acted in several matters where securitisation, was raised by defendants or respondents contesting claims instituted against them by banks and other creditors, as a defence. As far as I am aware, this type of defence has never been successfully raised in our courts. At best, it has in some cases delayed the enforcement of the loan agreements in question considerably. As will be shown below, scrutiny of the original loan agreement and other documents, to forage for possible signs that the loan agreement in question may have been sold into securitisation, would be a futile exercise.

[22] In matters where the features of loan agreements were challenged, the presiding judges were tasked with determining the additional question whether or

not securitisation may have occurred. Ms Carruthers appeared in all three decisions of the Eastern Cape referred to herein. Apparently undeterred by the poor track record of this type of defence, Ms Carruthers has persistently raised it in several matters (not only those mentioned herein) and has created a veritable "*cottage industry*[6]" around defending debtors in the manner evidenced in the matters referred to herein. The benefit derived from relying on this type of defence can only be that the outcome of any legal action taken against the debtor, is delayed.

[23] In *Jeanette Thompson v Investec Bank*[7], the applicant brought an application for rescission in similar circumstances as the present case. In that matter, the bank similarly denied that the loan agreement between the applicant and the respondent was securitized. The original loan agreement was scrutinized and small discrepancies between those in the original and copies of the loan agreement were detected by Ms Carruthers who acted for the applicant. These were for example that when transparencies copies of the copies were placed on top of the original loan agreement, the words were differently placed with variations of 1mm – 5mm. The debtor's signature on the original differed from the one reflected on the copy, but the debtor conceded that both were his signatures. Ms Carruthers argued that the only inference to be drawn from the discrepancies was that the loan agreements were sold into securitisation. Eksteen J, in rejecting securitisation as a *bona fide* defence, emphasized that it was not in dispute that the debtor concluded the loan agreement with the bank, and had placed his signature thereon. In the light thereof, close scrutiny of the documents and finding discrepancies between them, was held not to take the matter any further.

[24] In *Standard Bank of South Africa Ltd v Michael Anthony Border* [8] similar arguments about the absence of the original of the relevant loan agreement were also raised.

Unsubstantiated fraud allegations were levelled against the bank. The loan agreement and the defendant's signature on them were not in dispute and Roberson J held that[9] no possible purpose could have been served by the plaintiff in forging the copies of the loan agreement. Roberson J also rejected the allegations of forgery and the inferences sought to be drawn from the absence of the original documents. The defendant's securitisation defence was held by her to be "*no more than speculation*" ***[10]*** for lack of proof.

[25] In interlocutory proceedings in the matter of *Standard Bank of South Africa Ltd v Davenport NO and Others*[11], concerned with the amendment of a plea, Plasket J described the notion of the bank manufacturing copies of the original as "*outlandish".* When the proceedings in *Davenport* were finalised before Beshe J, she too dismissed the securitisation defence when it was raised by Mr Davenport.

[26] The aforementioned approach adopted by different judges demonstrate clearly that the kind of scrutiny of documents which Ms Carruthers has in mind, can be of no assistance to a debtor where there is no actual proof - only a suspicion - that securitisation has taken place.

[27] In the aforesaid cases, securitisation as a defence raised by defaulting debtors in terms of a loan agreement, was dismissed for a lack of proof that it had occurred. Some judges in the Western Cape also examined the actual merits of securitisation as a defence, irrespective of proof, and found it wanting.

[28] In *Nedbank Limited v Paul Lawrence Coxie Killian NO and Others*[12], the defendant in an application for summary judgment, raised the defence that the plaintiff bank was not acting as a principal, but on behalf of undisclosed principals

or lenders through the process of securitisation. Accordingly, the defendants submitted, the bank was no more than an intermediary, and thus lacked the necessary *locus standi* to sue the defendants. Griesel J, as in almost all the other cases dealing with this topic, emphasized the lack of evidence to support the defendants' suggestion that the plaintiff bank had in any way ceded any of its rights arising from the financial statements in question in that case. More importantly, he held as follows regarding the merits of the defence[13]:

> "In any event, should the defendants pay the amount presently claimed by the plaintiff, and should the 'true' holder of those rights at some stage in the future emerge and claim payment of the same debt from the defendants, they would have a solid defence that the debt has been extinguished."

[29] In his judgment Griesel J also relied on the judgment of *ABSA Bank Ltd v Richard James Hill*[14] where Louw J, for similar considerations, rejected this type of defence.

[30] Savage J (when she was Savage AJ), considered the same defence raised in *Nedbank Limited v Dirk Arno Coetzee*[15]. Relying on the two judgments of Griesel J and Louw J referred to above, and citing the same paragraph from Griesel J's judgment as has been done in the present judgment[16], rejected the defendants' securitisation defence and granted summary judgment against them.

[31] In *ABSA Bank Limited v Terblanche and Another*[17], the defendant who raised a securitisation defence in a summary judgment application, unsuccessfully attempted to persuade Davis J, that the defence was *bona fide* and good in law. During the course of the argument, the defendants referred to the case of a certain Mr Michael Tellinger, who had raised a similar defence against Standard Bank. That matter had proceeded to the Constitutional Court, and the

parties told the learned judge that they were still awaiting judgment at that point. Davis J made enquiries about the aforesaid matter and had established that the order made by the Constitutional Court in that case (under Case Number CCT 28/12) was that Tellinger's application for leave to appeal was "*dismissed as there were no prospects of success".*

[32] In *Terblanche*, Davis J also relied on and cited from the judgment of Griesel J [18] and rejected the securitisation defence raised by the defendants. With regard to the argument in favour of securitisation as a defence, which deprives a claimant or creditor from its *locus standi* to sue, the debtor Davis J stated[19]:

> "It is well known that securitisation is a highly sophisticated commercial transaction resting on complex agreements, the preparation of which requires specialist legal and financial knowledge. It is highly unlikely, in my view, that such a transaction would be structured in a manner which permanently divests the mortgage bank of its right to institute legal proceedings against a defaulting mortgagor."

[33] The defence of possible or actual securitisation of the debt in question, as illustrated by the approach adopted by the courts in the judgments referred to above, has no prospects of success. No purpose will be served by postponing the application to provide Ms Carruthers with an opportunity to scrutinize documents, some of which may not exist, to search for a defence that has never been upheld in court. It follows that Birch's notice to compel discovery in these proceedings falls to be set aside as an irregular step. Birch has also not made out any case for the setting aside of the bank's application in terms of Rule 30(1) as an irregular step itself, and the fifth application accordingly, falls to be dismissed. I

will now turn to the rescission application brought by Birch.

The First Rescission Application

[34] Applications for rescission should be brought and heard expeditiously, that is trite. In *First National Bank of Southern Africa Ltd v Van Rensburg NO and Others: In re First National Bank of Southern Africa v Jurgens and Others* [20], Eloff JP made the following remarks about when courts are faced with applications for rescission of courts orders:

> "The need to proceed rapidly to correct an order mistakenly granted was mentioned by Trollip JA in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306 H:
>
> 'Thus, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, after or supplement it in one or more of the following cases…'
>
> That was admittedly said in relation to the common-law power of correcting an order of Court, but the reasoning applies equally well to applications under Rule 42(1).
>
> It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject."

[35] Why the application was not brought much sooner after Birch had his conversation with Mr Ashe Davenport (who enlightened him about securitisation) at the end of 2014, when he became aware of the possibility of a securitisation defence, remains unexplained. The explanation for the delay hardly matters in

view of the weak prospects of succeeding with the defence argued for by Birch.

[36] In *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd* Gubbay CJ set out what is required in a successful rescission application, where the judgment in question was given by consent[21]:

> "The adoption of those principles to an application to rescind a judgment given by consent enjoins the Court to have regard to:
>
> (a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;
>
> (b) the *bona fides* of the application for rescission;
>
> (c) The *bona fides* of the defence on the merit of the case which *prima facie* carries some prospect of success; a balance of probability need not be established."

[37] The reasonableness of the explanation of the circumstances in which the judgment was consented to by Birch (because he did not know about securitisation at the time) is closely connected to the question of whether his proposed defence *prima facie* carries some prospect of success. The observations of Griesel J and Davis J outlined above, illustrate that even if securitisation has taken place, it does not follow that the debtor has a defence against the creditor who sold the debt incurred in terms of the loan agreement concluded between them. Securitisation appears not to be a defence at all. It is clearly of no assistance to a debtor in cases such as the present, where the conclusion of a loan agreement between the bank and Birch is not in dispute. Accordingly, the first rescission application must fail.

The Second Application for Rescission (Case Number 1415/12)

[38] As mentioned before, the trust relies on two grounds in this application for rescission of the order made on 12 December 2013. Firstly, the trust relies on the securitisation defence raised by Birch. The argument is that if the bank has no *locus standi* to claim from Birch, it follows that the bank does not have *locus standi* to sue the trust as surety for Birch's debts. The second ground for rescission is that the attorney who negotiated the compromise that resulted in the order in question, had no mandate from the trustees to do so. Mr Edward Sidney Birch, who is the third applicant and one of the trustees, deposed to the founding affidavit in support of the rescission application. He contends that he was unaware of the agreement and thus did not become a party to thereto.

[39] Mr K J Van Huyssteen, an admitted attorney and trustee of the trust, and thus the second applicant herein, acted for Birch at all relevant times, as well as for the trust when the bank instituted action (under case number 1415/12) against it.

[40] On 12 December 2012, the day before the sequestration application was to be argued, Mr Van Huyssteen, using his firm's letterhead, wrote to Mr Adriaan Human of De Klerk Van Gend Attorneys, who act for the bank regarding the compromise.

[41] In paragraphs 2, 3 and 4 of the aforesaid letter the second applicant wrote:

> "2. We refer to our subsequent telephone conversation and confirm that it is agreed that the above two matters shall be settled on the terms set out in the draft order attached to your email referred to above.
>
> 3. Messrs Whitesides, who are on record in the matter regarding the trust,

will provide a letter of confirmation separately to enable the order to be taken by consent in both of the above matters.

4. On this basis your client will not be proceeding with the application for our client's sequestration." (Emphasis added)

[42] On the following day, Whiteside's (the trust's correspondent attorneys in Grahamstown) wrote to the bank's correspondent attorneys and confirmed that:

"an order in terms of the draft attached hereto may be taken with the consent of our clients in the above matter". (Emphasis added)

[43] As the legal representative of all the applicants herein, it is hardly likely that the second applicant would not have advised his co-trustees of the settlement agreement he was negotiating under their name. He has filed no affidavit to corroborate the third applicant's version, despite the obvious need to do so. In addition, it is noteworthy that Birch insisted that he acted on behalf of the trustees at the previous hearing of the present application, on the basis that he was intimately acquainted with the affairs of the trust. The third applicant is his father.

[44] On the facts and correspondence outlined above, a very clear impression was created to the outside world that Mr Van Huyssteen, as the trust's attorney and as a trustee of the trust, acted on behalf of and with a mandate from the trust. In *MEC for Economic Affairs, Environment and Tourism v Kruisenga***[22]** Van Zyl J discussed several authorities which adopted the approach that the appointment of a person to a certain position of authority is a factor that is not to be underestimated. An attorney or counsel, retained in an action which had

commenced, has implied and ostensible authority, as between himself and the opposing litigant, to compromise a claim without actual proof of his or her authority[23]. In my view, it is unlikely that the trustees had absolutely no knowledge of the litigation between Birch and the bank, and no knowledge of the settlement agreement. In the absence of a notice to the second applicant, that a limit was placed on his authority in the action, the trustees must reasonably have expected that the person who dealt with their matter as agent, would believe that they had the authority to compromise the claims[24]. The trust is accordingly estopped from raising the point that they never gave their consent to the order.

[45] Under the discussion about securitisation above, I have concluded that there are no prospects of success in Birch's securitisation argument, which is the cornerstone of his application for rescission. Accordingly this application must fail.

The Third Application (Case Number 3774/2015)

[46] This is the bank's application for an order to have the trust's farm declared executable.

[47] According to the third respondent in this application (Mr Edward Sidney Birch) he was advised by the Sheriff or his Deputy that the latter's instructions to execute against the trust were withdrawn. There was no explanation by the bank for the fact that the Sheriff or his Deputy had not executed against the movables, except the bald statement that it did not know why the Sheriff did not execute. There is no report from the Sheriff that there are insufficient movable assets to satisfy the judgment debt.

[48] The bank simply relies on the mortgage bond wherein the immovable

property was specifically hypothecated for the debts incurred by the trust, which includes the debt it owes by virtue of the trust's standing surety for Birch, who is in arrears with paying his debt in terms of the court order.

[49] The insufficient facts regarding the movable assets of the trust, precludes me from granting the relief sought by the bank. In the circumstances of this case, the application is premature. There is no reason why there should not be at least an attempt to execute against the trust's moveable assets first, before executing against its immovable property. In the circumstances I decline to grant the declaratory order.

[50] In the circumstances, the following orders are made:

1. Applications under Uniform Court Rule 30 (1) - Case Number 1050/2011:

    (a) The application by the first and second applicants (the Birchs') to have the respondent's application in terms of Uniform Court Rule 30 (1), set aside is dismissed with costs.

    (b) The respondent's application in terms of Rule 30 (1) succeeds and the applicants' "*Notice to Produce Documents*" is hereby set aside as an irregular step in terms of Uniform Court Rule 30(1)

    (c) The applicants are ordered to pay the costs of the respondent's application in terms of Uniform Court Rule 30(1) as referred to in (b) above;

2. The Rescission Applications Under Case Numbers 1050/2011 and 1415/2012

    (a) Both applications for rescission of the order of Sandi J, dated 13 December 2012, are hereby dismissed with costs.

(b) The applicants in both applications are jointly and severally liable to pay the respondent's costs.

3. Case Number 3774/2015

(a) The bank's application to have the trust's immovable property, the farm, Van Aardtskraal, declared executable, is removed from the roll.

(b) The applicant (bank) is to pay the applicant's (the trust's) costs occasioned by the trust's opposition to the application.

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E REVELAS

Judge of the High Court

Appearances:

In Case No. 1050/2011:

For the applicant: Ms B Carruthers instructed by Carruthers Attonreys, Port Elizabeth.

For the respondent: Adv R B Engela instructed by Nettelton Attorneys, Grahamstown.

Date heard: 12 May 2016

Date delivered: 03 June 2016

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[1] 1. The complete original signed Loan Agreement concluded between the parties, all ancillary contracts and cessions related to the agreement, inclusive of any endorsements thereon and all copies thereof;

2. The bank's securitization ledger with all certified copies thereof and "all relevant time periods"

3. Detailed statements "connected to the amount in question together with books of accounting" and all certified copies thereof

4. A complete set of all transaction documents, pooling and servicing agreements, relating to the bank and its securitization participants, as well as the bank's securitization trusts.

5. The bank's securitization portfolio

6. The bank's securitization ledger which it (presumably) keeps in terms of the National Credit Act, 34 of 2005

[2] 1979 (2) SA 457 (W) at 47 D; *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) at 149; *Firstrand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd* 2013 (5) SA 238 (GSJ) at 242F-H; *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at 276D-277E.

[3] *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE) at 196-7.

[4] 1992 (1) 645 (T).

[5] See footnote 1.

[6] The phrase is borrowed from Gorven J in *Ex Parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP) at paragraph [9], page 53.

[7] Unreported ECLDP Case No. 864/2012 delivered on 01 July 2014.

[8] Unreported ECDG Case No. 2105/2014 delivered on 11 February 2015 per Roberson J.

[9] In paragraph [13].

[10] Paragraph [29].

[11] Unreported ECDG Case No. 847/2010 delivered on 25 April 2014

[12] Unreported WC Case No. 8148/12 (delivered on 08 November 2012) per Griesel J.

[13] At paragraph 8.

[14] Unreported WC Case No. 2588/12 (delivered on 22 August 2012).

[15] Unreported WC Case No. 6032/12 (delivered on 12 November 2012).

[16] At paragraph [9].

[17] Case No. 17330/2012 delivered on 30 November 2012 in the Western Cape High Court (per Davis J).

[18] Paragraph [8] of the judgment in *Nedbank Ltd v Paul Lawrence Coxie Killian*

matter.

[19] Paragraph [17].

[20] 1994 (1) SA 677 at 681 D-F.

[21] 2000 (1) SA 126 (ZS) at 132 G-I.

[22] 2008 (6) SA 264 (CkHC) at paragraphs [68] and [69].

[23] *Waugh and Others v H B Clifford & Sons Ltd and Others* [1982] 1 All ER 1095 (CA) cited in *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) at 65 E.

[24] *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) at 412 C – E.