LL Case No 137/1992

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

FRANK WERNER DANIEL Appellant

and

BOLAND BANK LIMITED Respondent

CORAM: VAN HEERDEN, VIVIER, EKSTEEN JJA,

NICHOLAS et HOWIE AJJA

HEARD: 16 SEPTEMBER 1993

REASONS HANDED IN: 27 SEPTEMBER 1993

REASONS FOR JUDGMENT

VAN HEERDEN JA:

2 During March

1990 the respondent initiated motion proceedings in the Cape Provincial Division. It sought an order provisionally sequestrating the appellant's estate. In its founding affidavit the respondent inter alia alleged that Dandev (Eiendoms) Beperk ("Dandev") owed it an amount of more than R14 million; that Dandev had been finally wound up in January 1990, and that on 27 November 1987 the appellant and one Norwood had executed a written deed of suretyship whereunder they had bound themselves as sureties and co-principal debtors for payment of the then existing and any future indebtedness of Dandev towards District Bank Ltd. (Subsequently- the assets and liabilities of this bank vested in the respondent by virtue of ministerial approval granted in terms of s 30 of the Banks Act 23 of 1965.)

The application was opposed by the appellant but the court granted a provisional sequestra-

tion order and issued the usual rule nisi. Subsequently the appellant filed a further opposing affidavit. In it he relied upon a defence not raised in his earlier affidavit. His sole defence at this later stage of the proceedings was that he had been released from his obligations under the deed of suretyship because of breaches of contract committed by the respondent as against Dandev with the result that Dandev suffered substantial losses.

The respondent filed a number of replying affidavits and on the extended return day the matter was heard by Lategan J. Either before or on that day the respondent indicated that it would have no objection to the granting of a postponement to enable the appellant to reply to the allegations contained in the replying affidavits. The appellant, however, rejected this offer and his counsel instead asked Lategan J to refer the dispute[s] for the hearing of

oral evidence. Since he was of the view that the balance of probabilities favoured the respondent's denial of breach of contract, Lategan J declined to make the requested order and by confirming the rule nisi granted a final order of sequestration of the appellant's estate.

The appellant lodged an appeal to a full bench of the Cape Provincial Division. Shortly before the matter was to be heard one of the judges caused the attention of the parties' representatives to be drawn to the decision of this court in Fourie v Drakensberg Kooperasie Bpk 1988 (3) SA 466 (A). Up till then the . appellant's representatives (and apparently also those of the respondent) were under the impression that the full bench was the proper forum to deal with an appeal against the final sequestration order. In the event the appellant withdrew the appeal noted to the full bench and filed

a notice of appeal to this court. This was inevitably lodged out of time and the appellant therefore applied for condonation of the late noting of his appeal. Since the record and the appellant's power of attorney were also lodged out of time, and security for the respondent's costs of appeal consequently was not entered into timeously, the appellant made a further application for condonation of those noncompliances with the rules of this court. The respondent opposed the two applications on the sole ground that there were no reasonable prospects of the appeal being upheld.

The only reason I have dealt in some detail with the abortive appeal is to explain why the matter came before us only some three years after the confirmation of the rule nisi.

Counsel for the appellant submitted that on the return day of a rule nisi in insolvency proceed-

ings a court is not entitled to decide a material issue on a balance of probabilities only; at all events not if the party against whom such balance lies asks that the issue be referred for the hearing of oral evidence. This submission cannot be faulted, and it may even be queried whether it is incumbent upon a respondent - against whom the balance of probabilities lies - to apply for a referral for oral evidence: cf R Bakers (Pty) Ltd v Ruto Bakeries (Pty) Ltd 1948 (2) SA 626 (T) 631 with Ngqumba NO v Staatspresident 1988 (4) SA 224 (A) 259-263. It does not follow, however, that Lategan J erred in confirming the rule nisi.

The appellant's second affidavit is vague in the extreme, but the gist of his grounds for denying liability under the deed of suretyship may nevertheless be summarised as follows:

(a) He originally approached District

Bank to provide the necessary finance to enable Dandev to inter alia purchase a spinning plant and "to secure a raw material source" overseas.

(2) In order to procure the materials it was necessary to establish credit facilities.

(3) District Bank undertook to issue letters of credit to enable Dandev to obtain credit for the purchase of the raw materials.

(4) Although the bank knew that the plant had to operate at a minimum of 90% capacity in order to be competitive, it did not comply with requests by Dandev for the issuing of letters of credit. It

either failed to do so or occasioned unwarranted delays. This caused a chain reaction: there was a shortage of raw materials, hence the plant operated way below the required capacity, and this caused Dandev to incur heavy losses instead of operating at a healthy profit.

(5) When the appellant, on behalf of Dandev, complained he was assured that "all ... [Dandev's] requirements in regard to importation facilities would be met."

(6) When Dandev sought to obtain an alternate source of funding for the importation of raw materials, Mr K van der Merwe, an official of the respondent, assured the appellant "that Dandev would be given all the facilities it needed in respect of the importation of raw materials".

(g) Van der Merwe was, however, directly responsible for financially strangling Dandev. He adopted the attitude "that he would only open letters of credit on a hand to mouth basis and, in most cases, for not more than about 60 per cent of what was required".

In a detailed replying affidavit Van der Merwe dealt fully with the relationship between

Dandev and District Bank and later the respondent. (In the papers in the court a quo and counsel's heads of argument no distinction was drawn between District Bank and the respondent, and for convenience I shall hereinafter refer collectively to that Bank and the appellant as "the bank".) It appears from his affidavit that through the years Dandev made various, and ever increasing, applications for facilities, including the provision of funds for the issuing of letters of credit. These applications, or most of them, were approved of by the bank's directors. In each case the directors placed a limit on the facilities available to Dandev. Van der Merwe specifically denied, however, that it had ever been agreed that the bank would provide unlimited facilities for the purchase of raw materials by Dandev.

The respondent also filed affidavits made

one Kotze and one Dobbelsteijn, respectively the erstwhile financial and general manager of Dandev. They alleged that one of the main reasons for Dandev's collapse was the appellant's unauthorised manipulation of its funds. Dobbelsteijn also referred to occasions on which the provision of letters of credit was discussed between the appellant and himself, on the one hand, and officials of the bank, on the other, and he denied that on those occasions the conclusion of an agreement providing for unlimited facilities came under discussion.

Relying mainly on the decision in Minister of Community Development v 5 A Mutual Fire And General Insurance Co Ltd 1978 (1) SA 1020 (W), counsel for the appellant submitted that if in breach of agreement the respondent failed to issue letters of credit, and if Dandev resultantly suffered loss, the appellant as surety would have been automatically

and fully discharged from his obligations. It does not appear to me that that decision supports such a broad proposition. I shall assume, however, both that the decision cannot be faulted and that counsel's submission is well-founded.

On the other hand counsel for the respondent in his heads of argument - he was not called upon to address us - argued that because of a provision in the deed of suretyship the appellant was precluded from raising this defence. The paragraph reads:

> "I/we herewith declare that the degree,
>
> cause and duration of the debtor's obligations will always be in the discretion of the Bank ..."

Counsel contended that because of this provision the appellant could not rely on a breach of an agreement relating to the facilities which the bank would provide to the main debtor, i e Dandev.

There may well be substance in this argument but in the light of what follows I find it unnecessary to deal with it.

The corner-stone of the appellant's disclaimer of liability appears to be that right at the outset the bank agreed to provide letters of credit for an unlimited amount, and for an unlimited period, to enable Dandev to procure raw materials overseas; in other words, to make unlimited facilities available to Dandev for that purpose. However, the notion that the bank would have entered into such an agreement is so highly improbable that it must be rejected. I say so because it is inconceivable that the bank would have agreed to provide facilities on an ongoing basis no matter how much Dandev owed it, no matter whether any repayments were made by that company, and irrespective of Dandev's financial position. Any agreement relating to the provision of

facilities must therefore have been subject to some conditions and qualifications. The appellant mentions none, and it is therefore impossible to determine whether the conduct of the bank on which he relies constituted a breach of such an agreement as might have been concluded between Dandev and the bank.

With one exception the respondent does not give any particulars of failures of the bank to issue letters of credit in terms of the alleged agreement or agreements. He does not say when the applications were made, how that was done, when the letters should have been issued, what were the amounts involved, etc. He also does not furnish any documentary proof of the breaches upon which he relies. True, he states that he does not have access to Dandev's documents because they are in the possession of the liquidator, but it is noteworthy that he refrains

from saying that the liquidator was unwilling to permit him or his attorneys to make copies of such documents.

I turn to the exception mentioned above. The appellant says, albeit rather vaguely, that as far back as 1985 when the bank was requested to provide forward cover, it refused to do so, resulting in Dandev sustaining a loss of some R600 000. This must have occurred shortly after the conclusion of the alleged agreement, but the respondent fails to say that he, who at all times represented Dandev, complained about this refusal as constituting a breach of contract. Nor does he explain why Dandev thereafter continued to deal with the bank. And it is not without significance that some two years later he was quite willing to sign the deed of suretyship.

In the light of what has been said above I have no doubt that the grounds upon which the

appellant disclaimed liability under the deed of suretyship are so implausible that they must be rejected on his papers as they stand.

There is, however, a further reason why the appeal must fail. It is this. Even if one concedes the possibility that the bank foolishly might have agreed to make unlimited facilities available to Dandev, such a decision would have had to be taken at a very high level. The appellant does mention the name of one De Kock with whom, on behalf of Dandev, he initially negotiated, and goes on to say that he also "dealt" with certain other named officials of the bank but does not mention whether any one of them held a managerial position. Be that as it may, his second affidavit omits a vital allegation in that he does not aver that whosoever concluded the alleged "unlimited" agreement on behalf of the bank had the necessary authority to do so. (According to Van der

Merwe all decisions relating to financial assistance to Dandev were taken by the bank's board of directors.)

In the result the court a quo was fully justified - albeit for the wrong reason - in refusing the application for oral evidence to be heard, and in confirming the rule nisi. There were, indeed, no prospects of the appeal being allowed.

For these reasons the following" order was made at the hearing of the appeal:

> "The applications for condonation of the late filing of the notice of appeal, the record, the- power of attorney and the provision of security for the respondent's costs of appeal are refused, and the appellant is ordered to pay the costs occasioned by those applications as well as the costs of the appeal."

H J O VAN HEERDEN JA

VIVIER JA

EKSTEEN JA

CONCUR

NICHOLAS AJA

HOWIE AJA