Case no 340/93 IN

THIS SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NIGEL COLIN TATTERSALL First Appellant

WILLIAM ALLAN DE BEER Second Appellant

and

NEDCOR BANK LIMITED Respondent

CORAM: JOUBERT, NESTADT, EKSTEEN, VAN DEN HEEVER JJA et OLIVIER AJA

Date heard: 23 February 1995

Date delivered: 28 March 1995

J U D G M E N T

NESTADT. JA:

This is an appeal against the grant in the opposed motion

court of the Transvaal Provincial Division of an application by this respondent ("the bank") for judgment against the two appellants and a certain Pierre Cahn, jointly and severally, in the sum of R2 505 231.90 (together with certain ancillary relief). It is brought with the leave of the judge a quo (Roux J).

The bank's claim is founded on a written agreement entered into on 30 May 1991 and in terms whereof it (through its Sandton branch) undertook to grant a so-called building loan of R2.5 m to Khyber Investments. This was a partnership consisting of the appellants and Cahn. The purpose of the loan was to enable the partnership to develop certain immovable property which it had in February 1991 acquired from a company called Mary Brae Holdings (Pty) Ltd ("MBH"). Such development involved the sale of houses

which were to be built on the property. Repayment of the loan was to be secured by a first mortgage bond over the property and was to be in monthly instalments of a specified amount (initially the sum of R42 875.00 but later increased to R49 477.00 consequent upon a change in the rate of interest payable by the partnership).

The bond having been passed, the loan was in due course advanced to the partnership. This took place in the manner provided for in the agreement, namely, by the bank (i) releasing MBH from an indebtedness of its (in the sum of Rl 802 170.92) to the bank and then debiting the partnership bond account with this amount and (ii) between 28 June 1991 and 30 July 1991 making six ("progress") payments to the partnership in the total sum of R632 859.52. (No point was made of the apparent discrepancy of

R70 201.46 between the total of these two amounts and the sum claimed.) The partnership, however, failed to make payment of any of the monthly instalments. Relying on a term of the loan that in the event of the partnership breaching its obligations in this manner, the full amount of the loan would forthwith become payable, this bank launched its application on 25 September 1992. By this time the partnership had been dissolved. Hence the claim against the appellants and Cahn themselves. Cahn is not appealing. He never opposed the application in the first place.

Both in the court below and before us, the appellants relied on three grounds of opposition. They were (i) that the application was not authorised; (ii) that it was premature in that when it was brought the monthly instalments referred to were not yet

due and the partnership was therefore not then in breach of its obligations; and (iii) that pending the outcome of an application (in circumstances to be explained) by MBH for an order that the partnership retransfer the property to it and that the bond in favour of the bank be cancelled, repayment of the loan is excused. I proceed to deal with them seriatim. A. Lack of authority.

The bank's founding affidavit was deposed to by a Mr Paul Spencer, the manager of its Sandton branch. In paragraph 2 Spencer alleges that he is "duly authorised" to bring the application "as will more fully appear from annexure PS1 hereto". It may be accepted that this document does not support the allegations made. Whether for this reason or otherwise, the appellants in their

answering affidavit simply "deny these allegations". Spencer's replying affidavit says no more on the issue (save that it states that he is authorised "to make this affidavit on behalf of the applicant as will more fully appear from annexure PS1"). Thereafter, however, the matter is reverted to in a supplementary affidavit which was served on the appellants a few days before the application was argued and which supplementary affidavit Roux J allowed to be filed. In it Spencer explains that PS1 was annexed to the founding affidavit in error. He proceeds to annex what he says was the intended document. It consists firstly of an internal letter dated 13 August 1991 purporting to be signed by the bank's secretary. This letter confirms that the bank's board of directors had on 26 June 1991 passed a resolution in effect empowering its divisional director to

determine which officials should have the authority to sue on behalf of the bank. Secondly, there is at copy of a notification apparently signed on 18 October 1991 by a Mr Hugh Maclachlan who is described as the bank's divisional director. In it he declares which officials have such authority. In doing so, he states that he is acting in accordance with the authority granted to him by the board on 26 June 1991.

It is clear that ex facie these last two documents Spencer was authorised to bring the application. As a branch manager he falls within the class of officials identified in the notification as having authority to bring legal proceedings on behalf of the bank. PS1 does not, as was suggested, detract from this; it is not in conflict with the clear terms of the divisional director's delegation.

It was, however, submitted on behalf of the appellants that regard cannot be had to the annexures. This was because, in the absence of affidavits proving the resolution of 26 June 1991 and the divisional director's signature to the notification dated 18 October 1991 and seeing that Spencer did not allege that he was present when the resolution was passed and the notification signed, these documents had no probative value; they constituted inadmissible, hearsay evidence. Moreover, so it was said, Spencer's supplementary affidavit should not have been admitted at what was a late stage in the proceedings; and, in any event, the appellant should have been afforded an opportunity of answering it.

On the last point it appears from the judgment a quo not that the appellants sought a postponement, but that there was "a

tentative suggestion" that the matter be referred to evidence or at least that Spencer should be heard on the issue. For the reasons given by Roux J, I do not think that he exercised his discretion in any way improperly, either in allowing the supplementary affidavit or in refusing to accede to this request for viva voce evidence.

Nevertheless it may be that, in the absence of proper proof of the resolution and the divisional director's determination and notwithstanding the appellants' failure before Roux J to object to the admissibility of the documents on this ground, they are not evidence. I shall assume, in favour of the appellants, this to be the case. I thus leave out of consideration the possible application of sec 3 of the Law of Evidence Amendment Act, 45 of 1988 and sec 34(2) of the Civil Proceedings Evidence Act, 25 of 1965. Even so, I am of

the opinion that Spencer's authority was established. A copy of the resolution of a company authorising the bringing of an application need not always be annexed. Nor does sec 242(4) of the Companies Act, 61 of 1973 (to the effect that a minute of a meeting of directors which purports to be signed by the chairman of that meeting is evidence of the proceedings at that meeting) provide the exclusive method of proving a company's resolution (Poolquip Industries (Pty) Ltd vs Griffin and Another 1978(4) SA 353(W)). There may be sufficient aliunde evidence of authority (Mall (Cape) (Pty) Ltd vs Merino Ko-operasie Bpk 1957(2) SA 347(C) at 352 A). In casu I think there is. What Spencer alleges in the founding affidavit is (i) that he is duly authorised and (ii) that such authority appears from PS1. The appellants' denial is an ambiguous one; it is not clear

whether they dispute (i) or (ii) or both. Moreover, the denial is a bare one. Not only is there no explanation as to how they are able to gainsay Spencer's assertion that he is authorised, but no evidence is tendered in support of what is now argued, viz that Spencer was not authorised. It would seem that the denial was what may be called a tactical one. The tactic must fail. This is a case in which the approach adopted in Mall's case (at 352 B), namely that when the challenge to authority is a weak one, a minimum of evidence will suffice, applies. Weight must be given to the use by Spencer of the word "duly" (authorised). It is an indication that the authority conferred on him was properly conferred (Mall's case at 352 I)). The papers show that Spencer had dealt with the grant of the loan and subsequently that he requested repayment. It being common

cause that the partnership failed to comply, the probabilities are that the bank (regarding the amount as due) would wish to take steps to recover what is, after all, a large sum. And if this be so, Spencer would surely be the person who would act on behalf of the bank. Besides, there is independent confirmation that the bank authorised the proceedings. In an affidavit deposed to by the bank's Johannesburg attorney and filed in reply to a supplementary affidavit of the appellants, the attorney, after stating that his firm acts for the bank "in this above matter", goes on to say that "my instructions were given to me by the head office (of the bank)".

On all the evidence I am satisfied that the bank discharged the onus of showing that the application was properly authorised. To hold otherwise would be carrying formality too far.

In my view, therefore, Roux J correctly overruled the objection in

limine to Spencer's authority.

13. Was the application premature?

This issue involves a decision as to when payment by the partnership of the monthly instalments, to which I earlier referred, was to begin and in particular whether, when the application was launched, they were due.

I have thus far not referred to the terms of the loan which are relevant in this regard. I must now do so. The agreement is embodied in a number of documents. There is firstly the letter of grant (dated 13 May 1991) addressed to the partnership. It is a standard, proforma document which provides for certain information to be inserted in individual cases. The letter advises the

partnership that its application for a loan has been granted "against security of a mortgage bond". There follows in a series of numbered clauses what are termed "details of the loan". These include the amount thereof, the identity of the property to be mortgaged, the rate of interest (this by reference to an annexure) and the amount of the monthly instalments, namely R42 875, The next clause is 1.7. It reads: "Commencement of monthly instalments 15/01/1993". (The date has obviously been typed in whereas the preceding wording is part of the form.) At the foot of the first page of the letter there is a reference to "further conditions". These are attached to the letter. One of them is clause 03. It provides as follows:

> "The commencement date of monthly instalments is the 15th day of the month following the period allowed for completion

of the buildings or the date of occupation or the date of final payment, whichever is the earliest (see clause 1.7)."

There are no other provisions as to when the loan was repayable.

"The bank's case was that the final progress payment having been made at the end of July 1991, the partnership was obliged, in terms of clause 03, to commence monthly repayments of the loan on 15 August 1991 being the 15th day of the month "following...the date of final payment". It was not in dispute that on this basis the partnership was in default and that (subject to the third issue referred to) the bank was entitled to claim repayment of the loan. The appellants, on the other hand, relying on clause 1.7, contended that payment of the monthly instalments only had to commence on 15 January 1993. Accordingly, so it was said, the bank had no cause of action when the application was launched on

25 September 1992.

The issue thus is: was payment of the monthly instalments to commence as provided for in clause 1.7 (ie on 15 January 1993) or did clause 03 govern (so that payments were due on 15 August 1991)? Whether on a strictly linguistic interpretation of the contract or whether on a contextual approach (including a reference to permissible background evidence), there can be only one answer, namely 15 August 1991 (being the earlier date relied on by the bank and, in substance, the one found to be applicable by Roux J). Prima facie and in the absence of any explanatory evidence, it is a little puzzling why the commencement date is dealt with in two clauses and why it takes the form it does. Judging from the evidence to which I shortly refer, it would seem that it was initially

contemplated that the full amount of the loan would only be advanced shortly before 15 January 1993. The fact that in clause 1.10 the "building completion date" is given as 16 December 1992, lends some support to this. So, too, does clause 01 that "provision has been made for 24 progress draws." Whatever the reason, however, we must take the contract as it is. Possibly it should be interpreted to give clause 03 greater weight or even precedence over clause 1.7. It is, however, unnecessary to decide this. I shall accept that the two clauses must be read together. As I have indicated, they in effect refer to each other. Adopting this approach, can it be said that any ambiguity or conflict is produced? I do not think so. What results is simply a number of alternative dates for the commencement of the monthly instalments, ie the 15th of the month

after completion, occupation, final payment or 15 January 1993, whichever is the earliest. The appellants' argument requires that clause 03 have no effect. This is untenable. It also means that though having advanced the loan by the end of July 1991, repayments would only begin some 18 months later. It is improbable that the parties intended such a consequence.

The appellants relied on an alternative defence. It was founded on the allegation (contained in their answering affidavits) that during their negotiations with the bank for the loan, it was orally agreed (with Spencer) that payment of the monthly instalments would begin on 15 January 1993. There was, so it was said, uncertainty as to when development of the property would be completed and thus when the loan would be finally advanced; this event would determine when repayments would commence; the date agreed on

was designed to clarify this; in the result clause 03 "does not correctly set out the prior oral agreement...and the common continuing intention"; indeed, clause 03 had been deleted on the copy of the agreement given to the appellants.

As I understood the appellants' argument it was that in the circumstances outlined and despite the absence of any allegation as to mistake, they were entitled to a rectification of the agreement so as to delete clause 03. I am not sure that a case for rectification is sufficiently made out. But even if it is, I remain entirely unpersuaded that Roux J was wrong in rejecting the appellants' version (that the true agreement was that payment of the monthly instalments would start only on 15 January 1993). In my opinion this was one of those exceptional matters on motion where the Court

could be satisfied that the respondents (now the appellants) had not raised a genuine or bona fide dispute of fact (cf Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634 I -635 C). I do not propose to canvass the factors relevant to this conclusion in any detail. Perhaps the position can be summarised in the following way. The bank in its affidavits denied the oral agreement relied on by the appellants. It adequately explained how certain lines came to be drawn across clause 03. This was inadvertently done. The appellants, far from later alleging that the monthly instalments were not due before 15 January 1993, accepted that they were. This is evidenced by their subsequent conduct. The papers reveal that on two occasions in January and February 1992 the bank wrote letters to the partnership in effect alleging that the

instalments were due and in the one case requesting payment by the partnership. It was to be expected that if instalments were not due this would have been stated. It was not. There was simply no reaction. In the circumstances and in the absence of any satisfactory explanation, the appellants' silence constituted an admission by conduct (McWilliams vs First Consolidated Holdings (Pty) Ltd 1982(2) SA 1(A) at 10 D-F). That is not an end of the matter. As appears from the judgment a quo there are a number of other instances of the appellants having, by clear implication, acknowledged that the instalments were due before 15 January 1993. I refer to two of them. On 5 February 1992 the first appellant in a letter to Cahn stated:

> "I would like to advise you that R49 477 is payable to the SA Perm on 14 February. Please advise as to how you can assist

in providing finance for this as well as other creditors of the partnership."

On 8 April 1992 the second appellant in a letter to the bank (for the attention of Spencer) acknowledged that "a lack of ability to service the bond may cause the (bank) to foreclose on the bond". He was clearly not referring to what might happen in January 1993. Here, too, the attempt, proffered in the appellants' supplementary answering affidavits, to justify the statement cited is wholly unconvincing.

The cumulative effect of what has been stated, so it seems to me, is quite destructive of the appellants' version that it was orally agreed that repayment of the loan would only commence on 15 January 1993. This being so and on a proper construction of the written terms referred to, the monthly instalments were due as from 15 August 1991. The application was therefore not premature.

C. The MBH defence.

It will be recalled that the loan was to enable the partnership to develop certain immovable property and that such property had been acquired by the partnership from MBH. The defence now under consideration arises from MBH having, as indicated earlier, brought an application for an order that the property be retransferred to it and that the bond, passed by the partnership in favour of the bank in order to secure the loan, be cancelled. The application was brought in the Witwatersrand Local Division against the partnership and the bank. MBH's cause of action was that transfer had been secured through a fraud by the partnership. Whilst the bank did not oppose the application, the partnership did. It denied it had been fraudulent. Nevertheless, the application was

granted. This was on 7 August 1992. A point taken by MBH in limine that the partnership had not authorised the opposition to the application was upheld. However, the order was subsequently set aside on appeal. The proceedings were referred to trial, presumably on the merits. The matter is still pending.

The appellants have sought to rely on MBH's claim to the property as an excuse for non-payment of the loan on various bases. In summary they are:

(i) In the event of it being found that the partnership's title to the property was defective, this was due to the negligence of the attorneys who attended to registration of transfer from MBH to the partnership; in so acting, such attorneys were the agent of the bank; accordingly,

the partnership would have a claim for damages against the bank; such damages "are at least an amount equivalent to what is claimed by the bank", (ii) "The acquisition of the property by the partnership and the loan formed one indivisible transaction; in particular the object of the loan was to enable the partnership to develop the property; it was therefore an implied, alternatively a tacit term of the loan that the partnership would acquire an unassailable title to the property; unless it did, the loan was not repayable; alternatively, properly interpreted, this was the effect of the loan. (iii) The payment of the amount of R1.8 m by the bank to MBH could only be regarded as part of the loan

advanced to the partnership if the partnership acquired a valid title to the property; if it did not, the bank was not entitled to have debited this amount to the partnership's bond account; the loan was to this extent therefore not repayable. Against the background of these allegations, the appellants in their affidavits made the submission that "if the registrations of the land and of the mortgage bond be invalid, or there be uncertainty as to the validity of such registrations, there is no basis on which the applicant may make its present claim against...the partnership". Before us Mr Slomowitz. on behalf of the second appellant, amplified this by contending that the issues that have arisen in MBH's pending proceedings are largely the same as those which arise in the present

appeal and that it is highly undesirable that the two matters be separately disposed of; accordingly the appeal should be upheld and the application stayed pending the outcome of MBH's claim.

The appellants'contentions are misconceived. There is no basis (in relation to (i) above) on which it could be found that the attorneys who attended to transfer of the property from MBH to the partnership acted on behalf of the bank. True, they were the same attorneys who did act for the bank in relation to the registration of the mortgage bond passed by the partnership in favour of the bank. But qua transfer, it is abundantly clear from the agreement of sale between MBH and the partnership and from the evidence of the conveyancer himself that the attorneys acted on behalf of MBH. There is, therefore, ex facie the papers before us, no question of the

partnership having a claim for damages against the bank of the kind envisaged.

I turn to (ii) above. The argument cannot be acceded to. The fact that MBH claims that the bond passed by the partnership in favour of the bank be cancelled is irrelevant. It would simply mean that the bank loses its security. But its cause of action against the partnership is on the underlying loan. No doubt the appellants will find themselves in an unfortunate position were MBH's application to succeed. The partnership would then have been deprived of the property (with improvements) but yet be obliged to repay the loan including the sum of approximately R1.8 m which it never actually received. But these consequences cannot avail the appellants when it comes to their relationship with the bank. As already stated, the

loan was to enable the partnership to develop the property. To some extent therefore the transaction between MBH and the partnership was linked to the one between the bank and the partnership. But not indivisibly so. There is no warrant, on the allegations made by the appellants in their affidavits, for implying a term in their agreement with the bank, the effect whereof would be to make repayment of the loan dependent on the outcome of the dispute between MBH and the partnership over the property. It would be a somewhat unusual provision. Normally the lender of money is not concerned with whether the borrower uses it gainfully or not. The contended for implication would moreover conflict with the express terms as to repayment, ie clauses 1.7 and 03. It follows that the construction relied on must also be rejected.

This leaves for consideration the defence referred to in (iii) above. It was an express term of the loan (clause 08) that the

"amount owing under the existing bond……be liquidated from the proceeds of this loan". It was on this basis that it was stated, towards the beginning of this judgment, that the loan to the partnership was advanced in part by MBH being released from its indebtedness to the bank. Such indebtedness was secured by the bond referred to in clause 08. The bond was cancelled. The bank was therefore entitled to regard the R1.8 m as having been advanced to the partnership. And, for the reasons previously stated, this was not dependent on the fate of the transaction between the partnership and MBH.

In the result, Roux J justifiably rejected the MBH defence. It follows that the application was correctly granted.

The appeal is dismissed with costs. Such costs are to include the fees of two counsel.

H H Nestadt Judge
of Appeal

JOUBERT, JA	)
EKSTEEN,JA	) CONCUR
VAN DEN HEEVER, JA	)
OLIVIER,AJA	)