REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
Case number: **165/07**

In the matter between:

KAMINTHA GOUNDER Appellant

and

TOP SPEC INVESTMENTS (PTY) LTD Respondent

CORAM: **MPATI DP, NUGENT, VAN HEERDEN, CACHALIA JJA and MHLANTLA AJA**

HEARD: **3 MARCH 2008**

DELIVERED: **8 MAY 2008**

Summary: Husband and Wife – marriage in community of property – whether loan agreement entered into by one spouse without written consent of the other falls within ambit of s 15(2)*(b)* of Matrimonial Property Act 88 of 1984 where it incorporates agreement to register mortgage bond over the parties' fixed property as security for the loan.

Neutral citation: **Gounder v Top Spec Investments (Pty) Ltd (165/07) [2008]**

ZASCA 52 (8 May 2008)

JUDGMENT

MPATI DP:

[1] This appeal concerns the power of a party in a marriage in community of property, to bind the joint estate without the consent of the other party to the marriage. The respondent claimed, by way of application proceedings, payment of the sum of R1 140 000,00, plus costs, from the appellant (as second respondent) and her husband, Mr Anand Gounder (as first respondent), to whom she is married in community of property, The sum claimed is made up of a loan of R1 000 000[1] together with a raising fee of R140 000. Also claimed was payment of a penalty raising fee calculated at 10 % per month on the loan amount from 4 July 2006 to date of payment.

[2] The Natal Provincial Division (Nicholson J) granted the order sought. This appeal is with its leave. I shall, for convenience, refer to the appellant and her husband jointly as 'the borrowers'.

[3] The material facts are largely undisputed. It is alleged in the founding affidavit, deposed to by Harry Sidney Spain (Spain), a director of the respondent company, that on 3 April 2006, at Verulam, the respondent entered into a 'written agreement' of loan (the written document) with the borrowers.[2] The written document was signed by Mr Anand Gounder (Mr Gounder) and, ostensibly, also by the appellant. Due to an oversight, Spain omitted to sign the written document on behalf of the respondent. He alleges, however, that he 'authorised the conclusion and implementation' of the agreement.

---

1 Although the written document reflects the sum to be advanced as R1 400 000,00, the actual amount lent and advanced was R1 000 000.

2 The written document reflects the names of Anand Gounder and Kamintha Gounder (the appellant) as the other parties to the loan agreement.

[4] Pursuant to the agreement the respondent paid, by means of electronic transfer, R999 940[3] into the account of Attorney Veni Moodley, who received the money on behalf of the borrowers. Attorney Moodley, in turn, disbursed the moneys as per instructions given to her by Mr Gounder. The loan was repayable by no later than 3 July 2006.

[5] In terms of clause 5.1 of the written document the borrowers undertook to pay a raising fee of R140 000 within ninety days 'regardless of the date of repayment' of the loan. That period, it is alleged, expired at the end of June 2006. Clause 5.2 provides that the maximum term of the loan 'shall not exceed 90 days', but should this period be exceeded a penalty raising fee of 10 % 'will be applied per month'. The borrowers failed to repay the loan and raising fee by due date, hence the institution of the claim by the respondent.

[6] Annexed to the founding affidavit, in addition to the written document, is a Power of Attorney to register a mortgage bond, signed by Mr Gounder and, ostensibly, by the appellant in favour of Attorney Moodley. The Power of Attorney refers to 'the attached draft Mortgage Bond' (also annexed to the founding affidavit), which was to be registered over the borrowers' fixed property as security for the loan. The appellant describes the property in her answering affidavit as 'my home at 10 Paradise Drive, Orient Heights, Pietermaritzburg'. The amount intended to be secured by the draft covering bond attached to the founding affidavit was R2 500 000 and an additional sum of R625 000.

[7] In clause 4.1 of the written document reference is made to 'registration of transfer of the Property' and to 'a certificate of balance due by the Borrower in terms of this Agreement'. Spain explains that the wrong standard form was used when the agreement was concluded and that no property was in fact to be sold and transferred. The correct form, he says, would have provided for a mortgage bond 'to be registered

3 The respondent deducted R60 from the loan amount for bank charges for a speedy transfer.

over the [borrowers'] immovable property as security for the loan'. Spain submits, however, that nothing turns on the fact of the use of the wrong form for the loan agreement as it is not relevant to the loan, but only to the security for the loan.

[8] Mr Gounder did not depose to an answering affidavit. Instead, he gave notice, in terms of Rule 6(5)(d)(iii)[4] of the Uniform Rules, that he intended to apply for the dismissal of the application at the hearing of the matter on the grounds that *ex facie* the founding affidavit, material disputes of fact existed and that therefore application proceedings were inappropriate. He was, however, not present, nor was he represented, at the hearing of the matter before Nicholson J.

[9] The appellant denies that she appended her signature to the written document and Power of Attorney to pass a mortgage bond over her home to secure the loan. She raises, like Mr Gounder, but as a point *in limine*, the issue of the respondent having proceeded by way of motion when he should have proceeded by way of an action. She states that the matter required extensive, in-depth and thorough investigation, which would require a substantial period of time, if she was 'to be allowed the right to properly ventilate the matter' and defend herself. The appellant contends that when commencing the motion proceedings the respondent knew that she denied that she signed the documents concerned and thus should have foreseen that 'critical triable disputes would arise'.

[10] Much as it is preferable that claims like the present one should be instituted by way of an action, a claimant is not barred from instituting a claim by way of notice of motion. The latter proceeding is pursued at a claimant's own peril should a factual dispute arise which turns out to be incapable of being resolved on the papers; the risk being a dismissal of the application should the court, in the exercise of its discretion,

---

4 The subrule provides:
'Any person opposing the grant of an order sought in the notice of motion shall –
. . .
(iii) if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.'

decide not to refer the matter for trial, nor direct that oral evidence be placed before it.[5] In the present matter, however, it seems to me that the only possible dispute of fact was the question whether or not the appellant signed the written document and the Power of Attorney to register a mortgage bond. These being motion proceedings, it must be accepted that the appellant did not sign the documents and the matter must be decided on that basis.[6]

[11] The respondent was well aware of this position. Spain says the following in the founding affidavit:

'. . . I understand that the Second Respondent [appellant] denies that she signed the agreement and contends that someone else had done so. Whatever the position may be in this regard I am advised and respectfully submit that in terms of section 15 of the Matrimonial Property Act, No 88 of 1984 [Mr Gounder] had the power to enter into the loan agreement and to bind the joint estate without the consent of the [appellant].'

It seems plain, therefore, that the respondent was well aware of the risk attendant upon his proceeding by way of motion and narrowed down the issues to a reliance on s 15 of the Matrimonial Property Act (the Act), the relevant provisions of which provide as follows:

'15 **Powers of spouses.** –

(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse –

(a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;

(b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;

. . .

---

5 *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) (SA) 398 (A) at 430G-431A.

6 *Plascon-Evans Paints (Ltd) v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 623 (A) at 634G-635C; *Ngqumba en 'n ander v Staatspresident en andere, Damons NO en andere v Staatspresident en andere, Jooste v Staatspresident en andere* 1988 (4) SA 224 (A) at 259C-263D.

(5) The consent required for the performance of the acts contemplated in paragraphs *(a)*, *(b)*, . . . of subsection (2) shall be given separately in respect of each act and shall be attested by two competent witnesses.

. . .

(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and –

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;

. . . .'

The respondent accordingly relies on the provisions of s 15(1) and (9)(a) of the Act. With regard to the latter subsection, the respondent alleges that it did not and could not reasonably have known that the agreement 'was being entered into' without the appellant's consent.

[12] Merely to complete the history of the matter, I may mention that on 3 April 2006 Mr Gounder called at the offices of Attorney Veni Moodley to sign the written document and Power of Attorney. Jelisha Mathura, a secretary in the employ of Attorney Veni Moodley, says the following in a confirmatory affidavit attached to the founding affidavit:

'. . . The First Respondent [Mr Gounder] was alone and he signed the said documents in my presence. On requesting the signature of his wife, the Second Respondent [the appellant], he informed me that she was waiting in the car outside as she had hurt her foot or was unwell and could not climb the stairs to our offices. He offered to take the documents to the car for her to sign and thereafter to bring the documents back to us.

The First Respondent then left and returned soon thereafter with the documents purportedly signed by the Second Respondent. I asked him if she had signed the documents and he confirmed that she had.'

[13] The appellant contends that 'the intended or purported transaction' was one contemplated by either s 15(2)*(a)* or 15(2)*(b)* of the Act, which Mr Gounder could not enter into without her written consent 'attested to by two competent witnesses in accordance with s 15(5)'.[7] For the contention that the transaction was one contemplated by either s 15(2)*(a)* or *(b)* of the Act, the appellant relies on what she says is the respondent's own version, viz that the loan agreement it intended to enter into with her and Mr Gounder 'incorporated an agreement to mortgage my home'.

[14] It will by now have become obvious that the registration of the mortgage bond over the appellant's 'home' did not proceed. It is therefore not necessary to consider the provisions of s 15(2)*(a)* in detail. This section prohibits, *inter alia*, the alienation or mortgaging of immovable property forming part of the joint estate without the consent of the other party to the marriage in community of property. The issue, it seems to me, is whether the loan agreement is one contemplated by s 15(2)*(b)* of the Act.

[15] Counsel for the appellant contended that it is. He submitted that the clear distinction drawn by the Legislature between the actual mortgaging or burdening of immovable property in s 15(2)*(a)* and 'any contract for' such activity fortifies his contention. Counsel argued further that the wording of s 15(2)*(b)* is wide and inclusive in and of itself, and that as a remedial provision should be interpreted as widely as the wording permits. Reliance on this last submission was sought in the minority judgment of Streicher AJA in *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander*.[8]

[16] It is true that in the founding affidavit Spain avers that the written document

---

7 See subsection (5) above, para 11.
8 1997 (4) SA 66 (SCA) at 81J-82C.

evidencing the loan agreement was the incorrect form and that the correct form would have provided for a mortgage bond to be registered over the borrowers' immovable property as security for the loan. But the respondent does not rely on such a 'correct form' for its claim, nor does it seek rectification, or to prove terms of the loan agreement outside of the written document. The form it relies on, i.e. the written document, makes no reference whatsoever to a mortgage bond to be registered over the immovable property of the borrowers.

[17] But more importantly, a court is not entitled to import words into a statute that do not appear in it if the meaning intended by the words actually used is clear and unambiguous.[9] The function of a court is to interpret and apply the law. The language of the statute 'must neither be extended beyond its natural sense and proper limits in order to supply omissions or defects, nor strained to meet the justice of an individual case'.[10] The provisions of s 15(2)*(b)* are quite clear. Though not absolute because of the provisions of subsec (9), they prohibit the entering into a contract for the alienation, mortgaging, etc. of a real right in immovable property forming part of a joint estate without the requisite consent of the other spouse. Closer to home, it prohibits Mr Gounder from doing what he purported to do, viz: to enter into an agreement to pass and register a mortgage bond over the fixed property without the appellant's written consent. The subsection does not prohibit one spouse from entering into a loan agreement without the consent of the other. That is permissible in terms of s 15(1).

[18] The fact that the 'correct form', referred to by Spain, would have provided for a mortgage bond to be registered over the borrowers' immovable property as security for the loan does not mean that only one agreement was intended. There were two separate agreements, one a loan agreement and the other an agreement to secure the loan with a mortgage bond. And the validity of the loan agreement did not depend on

9 L C Steyn *Die Uitleg van Wette* 5ed (1981) p 14-16.
10 Compare *Union Government v Thompson* 1919 AD 404 at 425; *R v Tebetha* 1959 (2) SA 337 (A) at 346.

the validity or otherwise of the agreement to register the mortgage bond. Put simply, a declaration of invalidity in respect of the agreement relating to the registration of a mortgage bond will not, for that reason, result in the loan agreement becoming invalid. It is separate from, and independent of, the agreement to register a mortgage bond, although it is the *causa* for the latter agreement.

[19] It follows that the loan agreement is not one contemplated in s 15(2)*(b)* of the Act. Its validity did not depend upon the consent of the appellant, written or otherwise s (15(1)). This conclusion renders it unnecessary for me to consider the other submissions relating to the provisions of s 15(9)*(a)* of the Act, which both counsel so eloquently advanced.

[20] In the alternative, the appellant averred that the transaction was a credit agreement as contemplated by s 15(2)*(f)*[11] of the Act, with the same consequences, i.e. the requirement of her written consent, attested to by two competent witnesses in accordance with s 15(5), was not complied with. That line of attack was correctly abandoned in this Court.

[21] One last aspect in this matter requires attention. In her answering affidavit the appellant raises the question of the penalty stipulation in the written document. She says:

'In any event the alleged penalty fee is unduly onerous, excessive and unreasonable. I contend that the penalty constitutes a penalty stipulated in terms of section 3 of the Conventional Penalties Act No 15 of

11 Up until 31 May 2006 section 15(2)*(f)* prohibited the entering by a spouse, as a credit receiver, without the written consent of the other spouse, into a credit agreement as defined in the Credit Agreements Act, 1980 and to which the provisions of that Act apply in terms of s 2 thereof. Section 15(2)*(f)* was substituted by s 172(2) of the National Credit Act 34 of 2005 with effect from 1 June 2006. Whether or not the transaction might well fall within the ambit of s 15(2)*(f)* as substituted is not in issue; the amendment was not retrospective and is thus not applicable in the present case.

1962, is completely out of proportion to the prejudice suffered, and submit that the penalty ought in any event to be reduced to an amount being just and equitable, even if applicable.'

In this Court, counsel for the appellant advanced no argument in support of the averments or contentions made in the appellant's answering affidavit on this issue.

[22] Section 3 of the Conventional Penalties Act provides:

'**3. Reduction of excessive penalty.** - If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'

[23] It will be recalled that the written document provides for the application of a penalty raising fee of 10 % per month. The court *a quo* granted an order in terms of which the appellant and Mr Gounder are to pay to the respondent, jointly and severally, R100 000,00 per month from 4 July 2006 to date of payment of the amount claimed (being R1 140 000,00). This means that as at the date of hearing of this appeal (3 March 2008) the penalty alone would have totalled more than double the amount of the loan. That seems to me *prima facie* out of proportion to whatever prejudice the respondent may have suffered as a result of the borrowers' breach (failing to repay the loan on due date).

[24] In *Smit v Bester*[12] this Court held that it could *mero motu* reduce the penalty amount when it *prima facie* appears from the pleadings that the penalty amount is out of

12 1977 (4) SA 937 (A).

proportion to the prejudice suffered by the creditor.[13] It was also held in that case that where a court is concerned with a penalty under s 3 of the Conventional Penalties Act, the onus is on the debtor to show that the penalty is disproportionate to the prejudice suffered by the creditor and that it should thus be reduced, and to what extent. When the debtor *prima facie* proves that the penalty should be reduced then there is an onus on the creditor to rebut, so as to refute the *prima facie* case of the debtor.[14]

[25] In the present matter counsel for the respondent conceded that the stipulation in the loan agreement constitutes a penalty as contemplated in the Conventional Penalties Act. The respondent merely denied in the replying affidavit that the penalty is out of proportion to the prejudice it suffered. That, in my view, is insufficient to persuade me not to reduce the penalty amount. Counsel for the respondent submitted that should the penalty be struck out the ordinary rate of *mora* interest should apply. I intend to make such an order.

[26] The following order is made:

1. The appeal succeeds only to the extent that paragraph (b) of the order of the court below is set aside and substituted with the following:

   '(b) Payment by the respondents, jointly and severally, to the applicant, of interest on the capital sum, calculated at the rate of 15.5 % per annum from 4 July 2006 to date of payment.'

2. The appellant is to pay the costs of the appeal.

---

13 At 942H.

14 At 942D-F. See too *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 906B-F.

L MPATI DP

CONCUR:

NUGENT JA

VAN HEERDEN JA

CACHALIA JA

MHLANTLA AJA