In the High Court of South Africa

KwaZulu-Natal Division, Pietermaritzburg

Case No: 5541/2014

In the matter between:

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| Firstrand Bank Limited | Applicant |
| And | |
| Macroton CC | First Respondent |
| Jacobus Johannes Andreas van Wyk | Second Respondent |
| Martha van Wyk | Third Respondent |

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Judgment

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Lopes J

[1] The applicant, Firstrand Bank Limited ('the bank') seeks judgment against the second and third respondents for payments of the sum of R864 493,84 and R627 398,09 together with interest on those amounts and costs.

[2] The following facts are common cause between the parties :

(a) on the 7th February 2013 the bank concluded three agreements with the first respondent. They were :

(i) a Short-term Direct Working Capital Facility in the sum of R900 000, repayable on demand, with the terms and conditions contained in a Facility Letter. I shall refer to this facility as 'the overdraft facility';

(ii) a Long-term Direct Term Loan of R890 000 repayable over a twelve month term, which was regulated by a Loan Agreement as read with the Facility Letter;

(iii) an Asset Finance Wesbank Facility in the sum of R4.6M, subject to Wesbank documents and agreements. This agreement forms no part of this application.

(b) on the 23rd January 2003 the second and third respondents concluded suretyship agreements with the bank in terms of which the second and third respondents bound themselves as sureties for, and co-principal debtors with, the first respondent for the due payment by the first respondent of all monies which the bank would from time to time be owed by the first respondent.

(c) The first respondent defaulted on the Long-Term Direct Term loan and overdrew on the overdraft facility, and on the 18th December 2013 the bank cancelled the Long-term Direct Term Loan and terminated the overdraft facility.

(d) On the 11th November 2015 the first respondent was placed into provisional liquidation.

[3] Despite a number of denials and defences set up to defeat the main application, Mr *Roelofse,* who appeared for the second and third respondents, conceded at the hearing of this application that on the agreements as they are set out, the bank was entitled to obtain judgment against the first respondent on the 18th December of 2013 when the notices cancelling the Long-term Direct Term Loan and calling up the overdraft facility were sent out by the bank.

[4] Mr *Roelofse* submitted that the bank's application fell to be determined on the basis of the counter-claim which was brought by the first, second and third respondents. The relief sought in the counter-claim was for an order :

(a) declaring the Facility Letter to be invalid and unenforceable;

(b) declaring Clauses 2.4.a, 2.4.b, 4.2.1 and 4.2.7 of Annexure 'A' - the General Terms and Conditions of the Facility Agreement, invalid and unenforceable;

(c) alternatively, in the event that the clauses referred to above are valid, the second and third respondents seek an order declaring that the facility and loan agreements contained an implied term that the bank had a duty to act reasonably in enforcing the terms set out above, and that the bank was in breach of that implied term;

(d) that the common law be extended to include that reasonable notice to the respondents, where a bank intends to take a decision in terms of those clauses, is a requirement prior to the enforcement of them by the bank;

(e) declaring that the notices directed by the bank to the first, second and third applicants on the 18th December 2013 constitute a repudiation of both the agreements concluded on the 7th February 2013;

(f) an order directing the bank to reinstate the facilities under both the short and long-term loans;

(g) directing the bank to pay the costs of the counter-application on an attorney and client scale.

[5] The principal submission of Mr *Roelofse* was that the bank determined its own prestation by claiming the right in the contracts to call up the overdraft facilities on demand.

[6] With regard to the clauses which the second and third respondents wish to impugn :

(a) Clause 12 of the Facility Letter gives the bank the right to review the overdraft facilities after five months, including the right to reduce the facility or terminate it.

(b) Clause 2.4.a of the General Terms and Conditions applicable to the facility provide that the facility advanced is repayable on demand.

(c) Clause 2.4.b provides that where a facility is granted for a fixed term (as was the Long-term Direct Term loan), the bank may, in certain circumstances,

extend the term of the loan. The clause also provides for the appropriation of payments received.

(d) Clause 2.4.1 provides that the bank is entitled, consequent upon a breach to claim repayment of all amounts outstanding under the facility.

(e) Clause 2.4.7 provides that the bank is entitled, consequent upon a breach to refuse to permit any further drawings or utilisation in terms of the facility..

[7] Mr *Roelofse* relied upon the dicta in *NBS Boland Bank v One Berg River Drive and Others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* [1999] 4 All SA 183 (A) at paragraph 30 where van Heerden DCJ stated :

'One further point should be made. It is conceivable, albeit unlikely, that a stipulation may be so worded that an absolute discretion to fix a prestation is conferred on one of the parties. Here again it is unnecessary to express a view as to whether such a stipulation will be invalid, as being in conflict with public policy, or whether the fixing of the prestation may only be assailed when it is done in bad faith.'

[8] Mr *Roelofse* also relied upon *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at paragraph 23. He submitted it was not just a question of the right to terminate, but of the bona fides and reasonableness of the Bank. The circumstances of the termination are relevant because on the 9th December 2013, and shortly prior to calling up the loan, the first respondent's representatives had addressed the Bank setting out, inter alia, the difficulties they were having in obtaining payment from others.

[9] Mr *Roelofse* drew attention to the unequal bargaining power which existed between institutions such as banks and ordinary businesses. He submitted that reasonable notice should be given where a facility was being called up by a bank, and that this should be a requirement of the common law which should be extended accordingly. He conceded that reasonable notice will depend on the circumstances of each matter and referred to *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at paragraph 48. This paragraph dealt with the fact that the common law, like all other laws, needed to be viewed through the prism of the objective normative value system set by the Constitution. Where the common law is found to fall short, it should be re-shaped in order to conform with the Constitution.

[10] Mr *Roelofse* submitted that the bank could have made it clearer to the first respondent that it was unhappy with the conduct of its account. He submitted that public policy considerations of fairness dictate that it was unfair to behave as the bank had done, by giving no prior notice of its intention to call up the facilities prior to the letters delivered by the bank on the 18th December 2013. He referred to some of the correspondence which had been exchanged between the parties during December 2013 and submitted that where one party has an absolute discretion, as the bank in this case did in the facility letters, reasonable notice of the intention to terminate them is an implied term.

[11] Mr *Roelofse* referred me to *De Lange v ABSA Makelaars (Edms) Bpk* [2010] 3 All SA 403 (SCA) where the court was required to consider whether it was a tacit term of an employment contract that the employee would be afforded a hearing prior to the employer seeking to recover damages from him. The court set out the test for the existence of a tacit term which was one which could only be imported into a contract where a court is satisfied that the parties would necessarily have agreed upon that term if it had been suggested to them at the time of contracting. In doing so a court will have regard to the express terms of the contract and the surrounding circumstances under which the contract was concluded. Mr *Roelofse* emphasised the principle that a party must be heard when a decision is to be made, and submitted that this should be seen as a tacit term of the agreement.

[12] Mr *Roelofse* also referred me to *Barkhuizen v Napier* 2007 (5) SA 323 (CC). This case concerned a time bar in an insurance policy and the Constitutional Court held that the proper approach to a constitutional challenge to a contractual term was to determine whether the term was contrary to public policy as evidenced by constitutional values, and in particular as set out in the Bill of Rights. Public policy was to be determined on considerations of reasonableness and fairness and the court held that time limitation clauses in contract were permissible, and the right to seek judicial redress from them could be limited where the clause was sanctioned by a law of general application and the limitation reasonable and justifiable. The court recognised that the doctrine of *pacta sunt servanda* could influence the court to decline to enforce a time limitation clause, if its implementation would result in unfairness or be unreasonable because it was contrary to public policy.

[13] Mr *van Rooyen*, who appeared for the bank, submitted that as the first respondent was in provisional liquidation, the debt was repayable by the second and third respondents, and there was in the circumstances no need to consider the reasonableness of the demand made by the bank or whether it had determined its own prestation.

[14] Mr *van Rooyen* also drew a distinction between the overdraft facility and the Long-term Direct Term loan, pointing out that the long-term loan had fixed repayment periods which had been breached by the first respondent.

[15] Mr *van Rooyen* referred to *Bredenkamp* and pointed out that in that case the bank had cancelled a contract on the grounds that the client had posed a risk to the bank's reputation. The court held that the fairness of exercising contractual rights did not arise when no public policy considerations or constitutional values were involved. In those circumstances the cancellation was not unfair, and the clause enforceable.

[16] Mr *van Rooyen* submitted that no public policy issues were relevant in this application, and if they were, the first, second and third respondents could have previously brought applications to deal with that alleged unfairness. Mr *van Rooyen* also referred to *Erasmus and Others v Senwes Ltd and Others* 2006 (3) SA 529 (T) for the proposition that a stipulation conferring on a contractual party the right to

determine its own prestation was not of itself objectionable, provided that it was subject to an objective standard, and thus fettered. Where the discretionary power was completely unfettered, the exercise of its discretion had to be made *arbitrio boni viri*, which obliged the party exercising the discretion to act reasonably. Once an obligation to act reasonably was established, the discretion was one which was fettered.

[17] In my view it certainly seems reasonable to suggest that the bank should not have called up the overdraft facility and long-term loan without an adequate reason. The problem for the respondents in this application, however, is that the bank cancelled the facilities because it became clear that the first respondent had breached its obligations and that the first respondent was in some financial difficulty. This is amply demonstrated by the correspondence, from which it appears that various options were suggested, and that the first respondent was not conducting its financial affairs in a manner with which the bank was comfortable.

[18] In the circumstances of this matter the bank acted reasonably in calling up the loan facilities, and did so inevitably to limit its own losses, in circumstances where it was becoming apparent that the first respondent would be unable to meet its financial obligations. The bank did, on a number of occasions, make it clear to the first respondent that it was unhappy, not only with regard to the first respondent's conduct of the facilities extended to it, but also its failing financial situation. There can be no suggestion, in this matter, that the bank's termination of the credit facilities afforded to the first respondent was unreasonable.

[19] In my view it was entirely reasonable of the bank to have refused to advance more monies to the first respondent after the notice which it sent to the respondent on the 18th December 2013.

[20] None of the clauses which are sought to be impugned may be viewed as commercially unusual or unfair, and it has not been suggested that any of them are in breach of any constitutional provision. Nor do I believe that it can be suggested that any of them have been unfairly implemented against the first, second and third respondents.

[21] What seems unclear from the respondents' affidavits is what they expected to occur when the first respondent had breached the Long-term Direct Term loan and had exceeded the overdraft limit on the overdraft facility. It was surely not unreasonable for the bank to cease providing finance after the first respondent's breaches. Should the first respondent have been entitled to carry on drawing against the overdraft bank account in excess of the overdraft facility? Clearly not. Was the bank expected to give a month's notice during November, and to be able to anticipate what the first respondent's expenditure would be, and when it would begin to overdraw the overdraft facility? Again, I think not! Notice was given by the bank on the 18th December 2013 to the first respondent that it was required to pay back the overdraft facility by the 7th day of January 2014. This notice was reasonable in the circumstances, and the bank did not require payment forthwith.

[22] The effect of the overdraft facility which was afforded to the first respondent by the bank, was that the bank allowed the first respondent to draw monies from the bank at will, but subject to the pre-arranged conditions, one of which was that if the first respondent exceeded the overdraft facility, then the bank could terminate the arrangement. This is exactly what happened, and in my view there was no manifest unfairness in the agreement, and it could not be said to be contrary to public policy that the bank could call up the overdraft once the limit had been exceeded, and because it correctly viewed the first respondent to be in financial difficulties with the probability that it would be unable to repay its debts to the bank.

[23] In setting out my views in this matter I do not wish to be understood to be suggesting that the clauses sought to be impugned could never be regarded as unreasonable. Each case depends on its merits. Given the warnings and requests made by the bank in its communications with the first respondent, it is surprising, in my view, that the second and third respondents have resisted the relief sought on the grounds which they have done. Their approach warrants a punitive order for costs.

[24] In all the circumstances I am satisfied that the defence and counter-claim have no merit. I make the following order :

(a) Judgment is granted in favour of the applicant against the second and third respondents, jointly and severally, the one paying the other to be absolved in

the terms set out in paragraphs 1 and 2 of the Notice of Motion dated the 15th April 2014;

(b) The second and third respondents' counter-claim is dismissed with costs, such costs to be calculated on the scale as between attorney and client.

Date of hearing : 7th December 2015

Date of judgment : 5th January 2015

For the Applicant : Mr R van Rooyen (instructed by Edward Nathan Sonnenberg)

For the Second and Third Respondents : Mr J H Roelofse (instructed by Van Wyk and Associates).