REPUBLIC OF SOUTH AFRICA

# *IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

REPORTABLE
Case number: 73/03

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA LTD** Appellant

and

**SUZETTE KOEKEMOER** 1st Respondent
**PETRUS JACOBUS KOEKEMOER** 2nd Respondent
**HENDRIK JACOBUS KOEKEMOER** 3rd Respondent
**SUZETTE KOEKEMOER** 4th Respondent
**PETRUS JACOBUS KOEKEMOER** 5th Respondent
**DEIRDRé KOEKEMOER** 6th Respondent

CORAM: **MPATI DP, MARAIS, MTHIYANE, CLOETE JJA and JONES AJA**

HEARD: **14 MAY 2004**

DELIVERED: **27 MAY 2004**

**Summary**: Trusts – Trust Deed empowering trustees to enter into loan agreements and to encumber trust property in the process – lending bank under no obligation to protect beneficiaries in circumstances of case

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# *JUDGMENT*

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**MPATI DP:**

[1] The first, second and third respondents are the trustees of the Supedre Trust (the Trust), which was set up by the second respondent. The third respondent is the son of the second respondent and husband of the first respondent. During September 1992 the appellant bank (the bank) advanced a home loan of R600 000 to the Trust. This loan was secured by a first mortgage bond over the Trust's fixed property, described as Portion 5 of the farm Northdene 589, Registration Division I.Q., Transvaal (the property). In August 1996 the bank advanced a second home loan of R700 000 to the Trust. As security for the loan a continuing covering bond was registered over the property. It is common cause that the money in each case was on-lent by the Trust to the third respondent, who applied most of it in his own business ventures.

[2] In July 1997 the bank instituted action against the first, second and third respondents in their capacity as trustees of the Trust, for repayment of the loans together with interest. An order declaring the property executable was also sought. The first and second respondents in this appeal were added, at

their request, as fourth and fifth respondents respectively, together with the sixth respondent, in their capacity as beneficiaries of the Trust.

[3] The respondents denied liability and pleaded that the trustees had entered into the loan agreements and bonded the property in the bona fide, but mistaken, belief that they could on-lend the money advanced to the Trust to the third respondent (who was not a beneficiary of the Trust), an act prohibited by the Trust Deed. It was accordingly pleaded that the loan agreements were *ultra vires* the Trust Deed and therefore unenforceable.

[4] The court *a quo* (Du Toit AJ) upheld the respondents' defence and dismissed the bank's claim with costs. Leave to appeal was subsequently refused. This appeal is with leave of this court.

[5] In terms of the Trust Deed the trustees are empowered, in the performance of their obligations *qua* trustees, to conserve or increase the value of the Trust, to borrow money under any conditions and against any security and, in doing so, to encumber any assets of the Trust. However, the trustees are not entitled to use or dispose of ('beskik oor') any capital or income of the Trust to their own advantage or for the benefit of their estates ('vir hulle eie voordeel of vir die voordeel van hulle boedels') unless they are

also beneficiaries of the Trust, in which event the consent of all the other trustees must be obtained.

[6] The only witness to testify before the court *a quo* was Johan van Rooyen Botha, a registered chartered accountant. His testimony related to the question whether the moneys derived from the loans and passed on to the third respondent by the Trust constituted capital or income. As will emerge below, the characterization of the money as either capital or income or indeed as falling within any other category is irrelevant in this case.

[7] The court *a quo* was asked to decide the matter on a statement of agreed facts, which read:

'1 . . .

2 . . .

3 . . .

4 The proceeds of the first bond were disbursed by plaintiff as follows:

4.1 On 11 September 1992 plaintiff credited the home loan account of Supedre (account number 212317326) with the amount of R500 000,00.

4.2 On the same date and on the instructions of the third defendant, who was representing Supedre, plaintiff transferred the said amount from the home loan account of Supedre to the current account of the third defendant (account number 021767971).

4.3 On 25 September 1992 plaintiff credited the home loan account of Supedre (account number 212317326) with the amount of R100 000,00.

4.4 On the same date and on the instructions of the third defendant, who was representing Supedre, plaintiff transferred the said amount from the home loan account of Supedre to the current account of the third defendant (account number 021767971).

4.5 The said payments extinguished the third defendant's overdraft of R321 745,07 with plaintiff.

4.6 The third defendant dealt with the balance of those funds as follows:

4.6.1 On 11 September 1992, the third defendant transferred R185 000,00 to the current banking account of Supedre (account number 021811539).

4.6.2 On 25 September 1992, the third defendant paid R100 000,00 to Roodhuis (Pty) Ltd, a company in which the third defendant had a 50% interest, by way of cheque number 33 drawn on his current account.

5. The proceeds of the second bond were disbursed by plaintiff as follows:

5.1 On 13 August 1996, plaintiff appropriated an amount of R6 516,70 towards the payment of bond costs;

5.2 On the same date:

5.2.1 plaintiff credited the home loan account of Supedre (account number 212317326) with the amount of R693 483,30;

5.2.2 on the instructions of the third defendant, who was representing

Supedre, plaintiff transferred the said amount to the current account of Supedre (account number 021811539);

5.2.3 the third defendant drew a cheque on that account for the said amount in favour of Modderfontein Steenmakery CC ("Modderfontein"), a close corporation of which the third defendant was the sole member and which required the said amount to enable it to conduct its business operations. The cheque was deposited into the banking account of Modderfontein, which received the proceeds thereof.

6 The plaintiff disbursed the said sums knowing that the disbursements would be used for the purposes for which they were in fact used.

7 At all times during which the aforegoing transactions were effected, the plaintiff was in possession of the Trust Deed of Supedre. . . .

8 All repayments in terms of the two bonds were made to plaintiff by Modderfontein.

9 When Modderfontein was placed under a winding-up order, repayments under the bonds ceased.

10 Supedre proved a claim in the winding up of Modderfontein . . . . Pursuant to that claim, Supedre received a dividend of approximately R87 000,00.

11 . . . '

[8] It was argued on behalf of the respondents that on these facts it is clear that the actual intention of the parties was to advance the money to the third respondent. If by this argument counsel meant that the bank intended to advance the loans to the third respondent then I disagree. The argument

loses sight of the fact, as is clear from the agreed facts, that the third respondent had an existing overdraft facility with the bank and that it would thus have been the easiest thing for the bank simply to increase such facility, albeit that security would probably have been required. It seems clear that the bank had no intention whatsoever to advance money to the third respondent. It may well be that by granting the loans to the Trust the bank facilitated a loan by the Trust to the third respondent, a matter that I shall come to presently. Clearly the party with which the bank concluded the loan agreements was the Trust and the Trust alone, as represented by the trustees. The fact that the repayments were made by Modderfontein Steenmakery CC does not change the position. That was merely an arrangement between the Trust and the third respondent outside of the loan agreements. The covering bonds reflect the Trust as the mortgagor who 'shall pay all amounts owing to the bank . . . in consecutive monthly instalments . . .'.

[9] What I have just said also uncovers the flaw in the reasoning of the trial court in dismissing the bank's action. Du Toit AJ found that the third respondent, not being a beneficiary of the Trust, 'to the advantage and prejudice of the Trust, encumbered trust property and used the proceeds thereof to his own advantage and the advantage of Roodhuis (Pty) Ltd and

Modderfontein'. As I have shown above, the parties to the loan agreements are the bank and the Trust. Plainly the third respondent would not have been able to bind the Trust without the consent of the other two trustees and there is indeed nothing in the agreed facts to indicate that he did not have their consent. On the contrary, and as has been mentioned in para 3 above, respondents pleaded that the trustees had entered into the loan agreements with the bank. The third respondent's instructions to the bank to transfer funds from the Trust's home loan account to his current account and to the Trust's current account were given by him in his capacity as a duly authorised trustee representing the Trust and could not be resisted by the bank. Once the bank had granted the loans and credited the Trust's home loan account, it was not entitled to control the application of the funds by the Trust.

[10] But counsel for the respondents submitted that the transactions, ie the home loan agreements, between the bank and the trustees were not concluded at arm's length, and that because not only the trustees but also the beneficiaries were affected (trust property was to be encumbered) the bank, with the knowledge it had of the purpose for which the loans were intended, should have been more circumspect. Although no general duty rested on it to do so, the bank, in the circumstances of this case, should have enquired as

to whether the trustees were empowered to on-lend the money to the third respondent, so counsel argued. The bank was in a position to do so, said counsel, because it had the Trust Deed in its possession. Its failure to do so, the submission concluded, rendered the agreements unenforceable.

[11] I shall assume, without deciding, in favour of the respondents that if the bank knew that the trustees were specifically prohibited from on-lending the money to the third respondent and that such on-lending was a benefit or advantage to a non-beneficiary, the home loan agreements would have been unenforceable. It is true that the bank was in possession of the Trust Deed of the Trust 'at all times during which the . . . transactions were effected', but nowhere is it stated in the agreed facts that the bank's attention was drawn to the prohibition clause or that any responsible official of the bank was aware of it. When asked whether knowledge of the contents of the prohibition clause should be imputed to the bank counsel disavowed reliance upon constructive knowledge.

[12] Part of the bank's business is to lend money to clients and what would have been of interest to it is whether the trustees had the authority to borrow money and to encumber trust property in the process. If satisfied on that score, the bank was under no obligation to protect the beneficiaries. There

was accordingly no obligation on it to study the Trust Deed any further to ascertain whether the trustees did or did not have the power to on-lend the money to the third respondent. The fact that the Trust Deed was in its possession indeed provided the bank with the means to acquire the knowledge, or, if that was not apparent *ex facie* the Trust Deed alone, to appreciate what questions should be asked to acquire the knowledge, but that in itself does not justify a finding that it had actual or constructive knowledge of the prohibition. In my view, to render the agreements unenforceable at least actual knowledge by the bank of the prohibition would have to be established. A court is not normally concerned with the respective motives which actuate parties in entering into a contract, except in so far as they were made part and parcel of the contract either expressly or by clear implication. *African Realty Trust Limited v Holmes* 1922 AD 389 at 403. The question whether, if actual knowledge was established, the respondents, in their quest to have the loan agreements declared unenforceable, would have to go further and show that the bank also appreciated the implications upon the validity or enforceability of the on-lending, does not arise for consideration here.

[13] It may be mentioned, in conclusion, that in the absence of proof at least of actual knowledge on the part of the bank of the prohibition clause in the

Trust Deed, or the existence of a positive duty in law to investigate whether the on-lending would be *ultra vires* the Trust Deed or constitute a breach of trust prejudicial to the beneficiaries, considerations of public policy do not arise. The appeal should accordingly succeed.

[14] Although the total amount claimed in the particulars of claim is R1 321 431.16 with interest thereon at the agreed rate of 18% per annum from 1 November 1996 to date of payment, counsel for the bank submitted in their heads of argument that the amount payable by the Trust is R2 414 479.22, together with interest at the rate of 13.5% per annum from 1 May 2001 to date of payment. Counsel for the respondents had no objection to the order sought in this court and I can see no reason why it should not be granted. Counsel for the respondents also conceded that in the event of the appeal succeeding, a costs order should be made in terms of the contract, which provides for costs on the scale as between attorney and client.

[15] In the result I make the following order:

(1) The appeal succeeds with costs, such costs to be taxed on the scale as between attorney and client.

(2) The order of the court *a quo* is set aside and for it is substituted the following:

(a) 'The first, second and third respondents, in their capacity as trustees of the Supedre Trust, are ordered to pay to the plaintiff the sum of R2 414 479.22, together with interest thereon at the rate of 13.5% per annum from 1 May 1996 to date of payment;

(b) The immovable property being Portion 5 of the farm Northdene 589, Registration Division I.Q., Transvaal is declared executable;

(c) The first, second and third respondents in their aforesaid capacities are ordered to pay the plaintiff's costs of suit on the scale as between attorney and client.'

L MPATI DP

CONCUR:

MARAIS JA

MTHIYANE JA

CLOETE JA

JONES AJA