



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 297/2003
REPORTABLE

In the appeal between:

**LAND AND AGRICULTURAL BANK
OF SOUTH AFRICA**

Appellant

and

**J H JANSE VAN RENSBURG NO
M A DLAVANE NO**

Respondents

Before: Harms JA, Zulman JA, Cameron JA, Conradie JA
and Southwood AJA
Appeal: Monday 17 May 2004
Judgment: Friday 28 May 2004

Land Bank Act 13 of 1944 (repealed) – Bank’s power under s 34 – Does not include power to make advances secured by mortgage bond – Such advances empowered only by s 25 – Bank not entitled to rely on s 34 in levying execution against fixed property secured by mortgage bond

JUDGMENT

CAMERON JA:

[1] This is an appeal, with the leave of that court, against an order granted in the Pretoria High Court (de Villiers J)¹ setting aside a sale in execution conducted at the behest of the appellant, the Land and Agricultural Bank of South Africa ('the bank'). The order was sought by the liquidators of a farming company ('the company') which had taken substantial loans from the bank against security of first and second mortgage bonds passed over its immovable properties. When the loans covered by these bonds were not repaid, the bank obtained judgment for their repayment, together with an order declaring the properties specially executable. A warrant of execution was accordingly issued, the sheriff of the court attached the properties, and the sale was advertised. The company was however placed in liquidation three days before the sale. The liquidators (respondents on appeal) tried to stop the sale. But the bank went ahead, buying the properties itself. Hence the proceedings culminating in this appeal. In it, only the loan

¹ *Janse van Rensburg en 'n ander NNO v Land- en Landboubank van Suid-Afrika* 2003 (5) SA 228 (T), which sets out the facts in full.

covered by the second mortgage bond is at issue, though we were told that a number of other cases depend on its outcome.

[2] The bank claims it is entitled to the proceeds of the properties regardless of (and outside) the liquidation. The liquidators claim that the properties fall into the company's liquidation. What they dispute is that the bank was entitled to sell the properties and appropriate the proceeds to the satisfaction of its claims in disregard entirely of the supervening liquidation.²

[3] Which contention is right depends on whether the Land Bank in enforcing its security was entitled to invoke s 34 of the Land Bank Act 13 of 1944 ('the 1944 Act'). That was the statute in force when the loans were made and when the sale in execution took place. The Land Bank's board granted the two loans covered by the first mortgage bond under s 25 of the Act.³ But it purported to make the loan covered by the second mortgage bond ('the loan') in terms of s 34,⁴ and the company's

² It bears mention that the bank's attitude, if vindicated, would deprive the liquidators of the major proportion of their fees. These depend on the size and value of the insolvent estate; without the farms that is likely to be negligible.

³ Section 25 provides in part: 'Save as is otherwise provided in this Act, no advance shall be made – (a) except – (i) on first mortgage of land within the Republic' The further sub-provisions are not material. Section 25(2) provides that 'The board may deviate from the provisions of subsection (1) by determining alternative security or other conditions on which advances under this Act may be made.'

⁴ Section 34(1)(a) provides: 'Notwithstanding the provisions of section 25 the bank may, on the conditions that the board may determine make an advance to a farmer to enable him or her to defray any costs which, in the opinion of the bank, are connected with the production, cultivation, gathering, processing or marketing of any crops by him or her or pay any debts incurred by him or her to defray such costs including costs or debt relating to the purchase of livestock or farming machinery or other implements or equipment and the instalment of such

acceptance also referred to s 34. That provision gave the Land Bank far-reaching powers of execution against defaulting debtors (s 34(3)-(7)), statutorily insulated against their insolvency.⁵ Section 55, which related to advances under s 25, gave the bank comparable powers in respect of loans secured by mortgage bonds. Both provisions included a power to levy execution 'without recourse to a court of law' (s 34(3)(b) and (c); s 55(2)(b)).

[4] After the bank advanced the loans, the Constitutional Court declared s 34(3)(b)-(7), (9) and (10) and s 55(2)(b)-(d) unconstitutional as violating the rule of law in that they infringed the right of access to court.⁶ The declaration that s 55(2)(b)-(d) was invalid took effect immediately. But the court granted a two-year conditional suspension of the invalidity of s 34(3)(b)-(7), (9) and (10), and gave Parliament the intervening time to remedy the statute's constitutional defects.⁷ Parliament

machinery or equipment and property.'

⁵ Section 90 of the Insolvency Act 24 of 1936 exempts the Land Bank from the provisions of the Insolvency Act 'in relation to any property belonging to an insolvent estate'; while s 339 of the Companies Act 61 of 1973 provides that in the winding up of a company unable to pay its debts [the situation obtaining here] 'the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act': see the judgment of de Villiers J 2003 (5) SA 228 (T) 236-237.

⁶ Bill of Rights s 1: The Republic of South Africa is one, sovereign, democratic state founded on values that include (c) 'Supremacy of the constitution and the rule of law'; s 34: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

⁷ *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and others, Sheard v Land and Agricultural Bank of South Africa and another* 2000 (3) SA 626

timeously passed a successor statute.⁸ Its terms do not affect the issue before us.

[5] De Villiers J held that the bank could not invoke s 34. He found that s 34 did not empower it to advance the loan covered by the second mortgage bond, and therefore that the provisions of s 34 did not protect the bank when it proceeded with the sale in execution in defiance of the supervening liquidation. He found however that the loans were valid under s 25: the mortgage bonds securing it were therefore not void. He held further that even if s 34 did apply, the bank had failed to fulfil the requisites applicable under the order suspending the invalidity of the procedures.

[6] In my view both the structure of the statute as a whole and the provisions of s 34 itself vindicate that conclusion. The reasons for this view in summary are: the statute required the bank, in general, to advance loans only on the strength of security such as a mortgage bond. Exceptionally, it permitted the bank to advance loans without such security. Section 34, the vehicle for the exceptional class of loans, catered only for cases where the bank could not obtain or had not obtained such security.

(CC) para 17.

⁸ Land and Agricultural Development Bank Act 15 of 2002, repealing the 1944 Act.

To make up for its absence, the provision gave the bank a special right to execute against first the unsecured movable goods and then the immovable property of the defaulting debtor. That special protection cannot properly be claimed when the bank holds a mortgage bond, as it did here.

- [7] The premise on which the 1944 Act permitted the bank to make advances was set out in s 25. This laid down a general rule that security over fixed property is a prerequisite for any advance by the bank. Section 25(1) namely provided that ‘save as is otherwise provided in this Act, no advance shall be made’ *except* on a first mortgage bond (or comparable security). The provision then enumerates the types of real security it contemplates. The proviso to s 25(1) stated that ‘any land may be accepted as additional security for an advance, whether or not on first mortgage’. Section 25(2) was added in 1998.⁹ It gave the bank greater flexibility by empowering it to ‘deviate from the provisions of subsection (1) by determining alternative security or other conditions on which advances under this Act are made’. The greater flexibility this provision introduced did not detract from the general scheme of the statute, which still contemplated that, where real security was

available and was exacted, the sole authorising provision was s 25. Departures from its norm remained a statutorily avowed 'deviation'.

[8] Section 34 created the statutory basis for loans made without the security of a mortgage bond. It provided that the bank may make loans to farmers, for limited purposes, without exacting real security. Section 34 provided that '[n]otwithstanding the provisions of section 25 the bank may, on the conditions that the board may determine make an advance to a farmer' for certain specified purposes. These were connected with the production, cultivation, gathering, processing or marketing of crops, including costs relating to the purchase of livestock or farming machinery or other implements or equipment.

[9] Section 34 was thus intended to give the bank greater flexibility to make advances to needy farmers in the conditions specified, 'notwithstanding the provisions of section 25'. Its purpose was not to replicate or substitute the powers created by s 25, but to extend them to cases where no real security could be obtained. The provision for this reason conferred a preference on the bank, which could attach and execute on movable and immovable property over which it did not hold any other form of

⁹ Act 21 of 1998, s 16(b).

security. Section 55 entitled the bank to execute extra-curially against secured fixed property. Section 34 gave it in addition a form of 'statutory security' in respect of first movable and then immovable property in respect of which no security was given.

[10] When s 25(2) was inserted in 1998, s 34(1) was also amended.¹⁰ Previously, s 34(1) permitted an advance only 'on completion of a promissory note by a farmer'. The amendment substituted for this the simple power to advance a s 34 loan 'on the conditions that the board may determine'. This change was coordinate with that made to s 25. Both gave the bank more flexibility in regard to the conditions under which it could extend loans: those where real security was available under s 25; and those without such security under s 34.

[11] The bank contended that the amendment enabled it to make advances under s 34 even where it had real security. In the present case, counsel contended, this enabled the board to advance the loan on the strength of the second mortgage bond that was registered over the company's farm properties. He conceded that his argument entailed that s 34, thus amended, would also authorise the bank to make s 34 advances where it had a first mortgage bond as security.

[12] But this would entail, if correct, that the 1998 amendments radically changed the scheme and structure of the entire statute and the purpose of its central provisions. In particular, it would imply that the bank was able to advance all loans, those covered by real security as well as those not, in terms of s 34. Given the special advantages s 34's procedures accorded the bank – which entitled it to a prior preferent claim on the debtor's movable property in addition to any fixed property – there would on this construction be scant reason for the bank ever to use s 25, which would in effect be rendered redundant.

[13] That conclusion is untenable. The amendments were plainly more modest in scope and purpose. They merely made more flexible the conditions under which the bank was empowered to make loans under respectively s 25 and s 34, without obliterating the distinctive purposes of each provision.

[14] The statute's provisions have long been so interpreted, and the Constitutional Court decision declaring s 34's operative provisions invalid clearly proceeded from the premise that the provision was available to the bank only 'in the absence of

¹⁰ Act 21 of 1998, s 18.

contractual security'.¹¹ In *Landboubank van Suid-Afrika v Joubert NO*,¹² Friedman J explained that (my translation):

'... the Legislator apparently foresaw the possibility that there would be cases where, notwithstanding the fact a farmer is not in a position to provide security, it is nonetheless desirable that money for certain specified objects, namely those set out in s 34, should be advanced to him by the Land Bank. The Legislator therefore, by way of exception, provided in s 34 that, notwithstanding the provisions of s 25, the bank's board may, on completion by him of a promissory note [now, 'on the conditions that the board may determine'], make an advance to a farmer in order to enable him to combat costs in connection with one or other of the matters mentioned in s 34(1). Even though no security is provided in regard to that advance, the Legislator ensured, through the far-reaching powers accorded to the Land Bank by s 34, that when an advance under s 34(1) of the Land Bank Act is made to a farmer, the Land Bank is not in the same position as an ordinary creditor who has made an advance without security.'

[15] This analysis accurately renders the underlying object of s 34's special execution procedures, which is to cover the case where the bank is not able to exact security over fixed property for its loan. As Friedman J rightly went on to observe, those procedures are designed 'to ensure that the Land Bank, as far as possible, does not lose money which it has advanced

¹¹ *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and others, Sheard v Land and Agricultural Bank of South Africa and another* 2000 (3) SA 626 (CC) para 11.

¹² 1982 (3) SA 643 (C) 647G-648 (top of page):

'Nietemin het die Wetgewer blykbaar die moontlikheid voorsien dat daar gevalle sou wees waar, desondanks die feit dat 'n boer nie in staat is om sekuriteit te verskaf nie, dit nogtans wenslik sou wees dat geld vir sekere bepaalde doeleindes, Naamlik dié in art 34 vermeld, aan hom voorgesket word deur die Landbank. Die Wetgewer het derhalwe, by wyse van uitsondering, in art 34 bepaal dat, ondanks die bepalings van art 25, die bank se raad aan 'n boer, by voltooiing van 'n promesse deur hom, 'n voorskot kan verstrek ten einde hom in staat te stel om die koste te bestry wat in verband staan met die een of ander aangeleentheid in art 34 (1) vermeld. Ofskoon daar nie ten opsigte van sodanige voorskot sekuriteit verskaf word nie, het die Wetgewer deur middel van die verreikende magte wat deur art 34 aan die Landbank verleen word, verseker dat wanneer 'n voorskot ingevolge art 34 (1) van die Landbankwet aan 'n boer verstrek word, die Landbank nie in dieselfde posisie sal wees soos 'n gewone skuldeiser wat 'n voorskot sonder sekuriteit verstrek het nie.'

without security'.¹³ Neither before nor after the amendments did the provisions envisage that the bank would seek to garner the benefits of s 34 where it had the type of security s 25 envisaged.

[16] It is correct that the purpose for which the loan was advanced fell within those sanctioned by s 34. This did not bring it within the section, for that would be to elevate a necessary condition for a s 34 loan to a sufficient condition. Nor does it matter that the bank described the loan as one under s 34, and that the company accepted it as such. The bank had no such power. Once it had fixed-property security, the sole provision under which the bank could advance the loan was s 25. Given the parties' joint intention to give and receive an advance on the basis of the security the company provided, I think that de Villiers J was correct in concluding that the loan must be held to have been extended in the exercise of the bank's s 25 powers.

[17] This conclusion makes it unnecessary to consider the alternative basis on which de Villiers J reached his conclusion, namely that if the advance was validly made under s 34, the

¹³ 1982 (3) SA 643 (C) 648A: 'Om te verseker dat die Landbank, sover moontlik, nie geld wat hy sonder sekuriteit voorskiet, verloor nie'.

purpose and effect of the conditions on which the Constitutional Court suspended its declaration of invalidity required the bank to observe s 34's procedures regarding the advertisement and holding of the sale, which it did not do. It is enough to say that that conclusion, too, is persuasive, and that the bank's argument rests on a unstable paradox in which it invokes s 34 during its suspension yet claims to be able to ignore its procedures.

[18] The sale was invalid and must be set aside. The order of the Court below inadvertently referred to the wrong prayers for relief. The order corrects that.

[19] The appeal is dismissed with costs, which include the costs of two counsel. The order of the court below is amended to read as follows:

(a) It is declared that the sale in execution on 8 March 2002 by the deputy sheriff, Riversdale, under warrant of execution of this court under case number 24456/01, of the properties set out in the founding affidavit is invalid and the applicant liquidators are not bound by it.

(b)The respondent must pay the costs of the application,
including those of two counsel.

**E CAMERON
JUDGE OF APPEAL**

**CONCUR:
HARMS JA
ZULMAN JA
CONRADIE JA
SOUTHWOOD AJA**