THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 302/2002

In the matter between

ROBIN PATRICK THORPE **1ST APPELLANT**

ROBIN PATRICK THORPE N.O. **2ND APPELLANT**

and

BOE BANK LIMITED **1ST RESPONDENT**

G L ABRAHAMS, ADDITIONAL MAGISTRATE **2ND RESPONDENT**

Coram: **ZULMAN, BRAND, NUGENT, HEHER JJA and SOUTHWOOD AJA**

Heard: **11 SEPTEMBER 2003**

Delivered: **19 SEPTEMBER 2003**

Summary: **Bank – Banks Act 94 of 1990 – meaning of s 54(1) – agreement to transfer assets and liabilities – enforceability.**

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JUDGMENT

HEHER JA

HEHER JA:

[1] The first respondent is a bank as defined in s 1(1) of the Banks Act 94 of 1990. It successfully sued the appellant in his personal capacity and as sole trustee of the Wentworth Trust in the magistrate's court at Durban for payment of R2 504 982,00. The appellant appealed to the Natal Provincial Division of the High Court which altered the order but dismissed the appeal. It granted the appellant leave to appeal to this Court.

[2] The only issue argued before us (as had been the case in the Court below) was the *locus standi* of the first respondent to claim payment of money lent to the Trust by NBS Bank Limited pursuant to an 'NBS Action Bond Agreement' concluded in February, 1995. (The appellant was a surety for the obligations of the Trust.)

[3] The first respondent alleged in its particulars of claim that it had taken transfer of all the assets and liabilities of NBS Bank Limited in term of the provisions of s 54 of the Banks Act. Whether it did so effectively is the question in the appeal.

[4] The appellant pleaded an absence of knowledge of the alleged transfer and put the first respondent to the proof. That required the first respondent to establish compliance with all the factual and legal steps necessary to vest in it the rights formerly held by NBS Bank Limited.

[5] Section 54(1) of the Banks Act provides as follows-

'No compromise, amalgamation or arrangement referred to in Chapter XII of the Companies Act and

which involves a bank as one of the principal parties to the relevant transaction, and no arrangement for the transfer of all or any part of the assets and liabilities of a bank to another person, shall have legal force unless the consent of the Minister, conveyed in writing through the Registrar, to the transaction in question has been obtained beforehand.'

[6] The first respondent called its company secretary, Mr Acutt, to testify. He told the Court that approval for the transfer of the assets and liabilities of NBS Bank Ltd to Boland Bank PKS Ltd had been duly granted at general meetings of both banks held on 19 September 1997. He produced an agreement for the transfer of the assets and liabilities, signed on behalf of the respective banks at Paarl on 29 September 1997 and at Durban on 30 September 1997. It contained only four executory clauses of which '6. (Change of Name)' can be ignored for present purposes:

'3. TRANSFER

3.1 Subject to the fulfilment of the conditions precedent contained in clause 5 below:

NBS hereby agrees to transfer to BOLAND its entire assets and liabilities in terms of Section 54 of the Banks Act, Act No 94 of 1990, effective from 1 October 1997 ("the Effective Date"), hereinafter referred to as "the transfer"

3.2 BOLAND hereby agrees to and accepts the transfer from NBS of its entire assets and liabilities.

4. CONSIDERATION

The consideration in respect of the transfer of the assets and liabilities will be as follows:

4.1 A loan account will be created in the books of account of NBS, reflecting BOLAND's loan obligation in respect of the consideration;

4.2 The amount of the loan account will be the net asset value of NBS, as at the Effective Date.

4.3 BOLAND accepts the obligations in terms of the aforementioned loan account and the transfer.

5. CONDITIONS PRECEDENT

This agreement is subject to the fulfilment of the following conditions precedent:

5.1 The consent of the Minister of Finance, conveyed in writing through the Registrar of Banks is obtained, in terms of Sections 54(1) and 54(8A) of the Banks Act, Act No 94 of 1990.

5.2 The transfer of the assets and liabilities in terms of this agreement are approved, ratified and adopted in general meetings of BOLAND and NBS.'

[7] The same witness also testified about various changes of name which took place in terms of s 56(5)(b) of the Act:

Boland Bank PKS Ltd to NBS Boland Bank Ltd on 12 February 1998;

NBS Boland Bank Ltd to BOE Bank Ltd, the respondent, on 30 September 1998.

[8] Mr Acutt identified a letter dated 13 October 1997 from the Registrar of Banks to the Chief Executive Officer of NBS Boland Bank Limited which stated:

'AMALGAMATION OF BUSINESS INTERESTS AND TRANSFER OF ASSETS AND LIABILITIES OF NBS BANK LIMITED ("NBS") TO BOLAND BANK PKS LIMITED ("BBL") IN TERMS OF THE PROVISIONS OF SECTION 54 OF THE BANKS ACT, 1990

Your letter dated 25 August 1997 and various telephonic discussions refer.

In terms of the provisions of section 54(1) of the Banks Act, 1990 (Act No. 94 of 1990 – "the Act"), permission is hereby granted for the transfer of all assets and liabilities of NBS to BBL.

Kindly note that the Minister of Finance, in terms of the provisions of section 54(1) of the Act, has granted permission for NBS to transfer all its assets and liabilities to BBL.

Furthermore, please note that, in terms of the provisions of section 54(6)(b) of the Act, the registration of NBS is deemed to be cancelled and will subsequently be withdrawn, as effected by the registration, by this Office, of the notices referred to in section 54(5) of the Act. In this regard please find enclosed,

registered copies of the said relevant notices. It would subsequently (sic) be appreciated if you could furnish this Office with the certificate of registration as a bank of NBS, for purposes of cancellation.

Finally, please be advised that the Minister of Finance, on the recommendation of the Registrar of Banks and after consultation with the Commissioner for Inland Revenue, in terms of the provisions of section 54(8A) of the Act, has given his consent to waive the relevant tax liabilities flowing from the above-mentioned transfer.'

The letter was received by the addressee on the date thereof.

[9] The appellant called no witnesses to testify on his behalf.

[10] Counsel for the appellant submitted that the clear meaning of s 54(1) is that the legal enforceability of any transaction referred to in the section is dependent upon the consent of the Minister being obtained prior to the conclusion of the transaction in question. In the context of this case, 'transaction', he said, was to be equated with 'arrangement for the transfer'. Since every word in a statute must be given a meaning to avoid surplusage, *Attorney-General, Transvaal v Additional Magistrate, Johannesburg* 1924 AD 421 at 436, the word 'beforehand' should be accorded its full weight, ie meaning therefore that Ministerial consent had to be obtained prior to entering into the arrangement. He emphasised that the section speaks of an arrangement having no legal force unless (and not 'until') the consent of the Minister has been obtained. Consent cannot, consistent with such an interpretation, he submitted, be effective if given after the arrangement has been entered into. Since the

agreement for the transfer of assets and liabilities had been signed on 30 September 1997 providing for an effective date of 1 October 1997 and the Minister's consent had been obtained, at the earliest, on 13 October 1997, it followed that the agreement could never have come into force. As the respondent obtained no title to the claim of NBS Bank against the appellant, the defence of absence of *locus standi* should have succeeded.

[11] This superficially attractive argument does not survive the test of the facts or the law.

The suspended agreement

[12] The whole contract between NBS Bank Ltd and Boland Bank PKS Ltd was expressly made subject to due compliance with the provisions of s 54 (1). Neither the transfer of the assets nor the action necessary to give effect to the consideration clause were to have any effect unless the Minister's consent was duly obtained. In *Tuckers Land and Development Corporation Ltd v Strydom* 1984 (1) SA 1 (A) this Court reaffirmed the law applied since the decision in *Corondimas and Another v Badat* 1946 AD 548 that when a contract of purchase and sale is entered into subject to a suspensive condition no contract of sale is then and there established and the binding contractual relationship which does arise is not a contravention of a statute prohibiting the conclusion of a contract of purchase and sale and only matures into such a contract on fulfilment of the condition. Those principles apply equally to the contract under consideration in this appeal. Because the obligations relating to the

transfer of assets were not enforceable by the parties until due statutory compliance had taken place the contract was not in conflict with the statute. The suspensive condition was fulfilled on 13 October 1999 and NBS Bank Ltd could and did thereafter lawfully transfer its assets and liabilities, including its claims against the Trust and the appellant, to its successor-in-title.

[13] That conclusion is predicated on an assumption that s 54(1) renders unenforceable an agreement for the transfer of assets and liabilities of a bank unless the Minister's consent is obtained before the conclusion of the agreement. The assumption is, however, based on an incorrect interpretation of that section.

The interpretation of s 54(1)

[14] Compromises, amalgamations and arrangements in Chapter XII of the Companies Act all involve changes in relationships between companies, members or creditors which are inevitably preceded by proposals and agreements which require to be put into effect in various ways such as the transfer of shares, assets and liabilities or rights of action. So also an arrangement for the transfer of assets will usually be initiated by an agreement which requires implementation.

[15] The narrow dispute between the parties is whether the 'transaction' which is referred to in s 54(1) is to be construed as the underlying agreement or the implementation of that agreement. The appellant's case depends upon a finding that the first is the correct construction since it is common cause that the parties to the agreement withheld implementation until the Minister had given his consent.

[16] According to the Shorter OED 3 Ed 2344, 'transact' means:

'2. To carry through, perform (an action, etc); to manage (an affair); now especially to carry on, do (business)',

and 'transaction' means

'2. The action of transacting or fact of being transacted';

'3. That which is or has been transacted; a piece of business.'

It would seem, therefore, that 'transaction' is capable of sustaining either of the meanings which the parties seek to attach to the word. The answer must be sought in the language of the section in the context of the legislative purpose.

[17] There are clear indications in the language used that the legislature had in mind the implementation of an agreement to compromise, amalgamate or arrange and of an arrangement to transfer assets and liabilities. Section 54(1) is directed against the conferring of 'legal force', ie giving legal effect; in s 54(3) the phrases 'a transaction effecting the amalgamation … or effecting the transfer of all or part of the assets and liabilities' recognise that a transaction is an act which brings about consequences and not merely an agreement to do so.

[18] The purpose of requiring the Minister's consent before legal force can attach to a compromise, amalgamation or arrangement or an arrangement to transfer assets and liabilities is discernible from s 54 and other parts of the statute.

[19] Section 54(2) provides –

'The Minister shall not grant his consent referred to in subsection (1) unless -

(a) he is satisfied that the transaction in question will not be detrimental to the public interest;

(b) in the case of an amalgamation referred to in subsection (1), the amalgamation is an amalgamation of banks only; or

(c) in the case of a transfer of assets and liabilities referred to in subsection (1) which entails the transfer by the transferor bank of the whole or any part of its business as a bank, such transfer is effected to another bank or to a person approved by the Registrar for the purpose of the said transfer.'

[20] As counsel for the respondent pointed out, a factor which will undoubtedly weigh heavily with the Minister in reaching his decision is the need to preserve the asset base, reserves and liquidity of a bank for which provision is made in ss 70, 70A and 72 of the Act.

[21] The Minister is, in all these instances, enjoined to consider not merely the existence of an agreement per se but, more important, the consequences of its implementation upon the parties to the agreement and the public. The dangers which the Minister's consent is intended to avoid are thus clearly the effects of any agreement in question and there seems no obvious reason why his consent should be required before mere formal consensus can validly be reached on the terms of a compromise, amalgamation or arrangement under Chapter XII or an arrangement to transfer the assets and liabilities of a bank.

[22] For these reasons I conclude that what s 54(1) means is that unless the Minister consents before any implementation of an agreement of the specified nature takes

place, that agreement will be regarded as without force in law. For the reasons I have given the respondent did not fall foul of this provision.

[23] The appeal is dismissed with costs.

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J A HEHER
JUDGE OF APPEAL

ZULMAN JA)**Concur**
BRAND JA)
NUGENT JA)
SOUTHWOOD AJA)