



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 420/2010

In the matter between:

**FRANS JACOBUS KRUGER
h/a KRUGER ATTORNEYS**

Appellant

and

PROPERTY LAWYER SERVICES (EDMS) BPK

Respondent

Neutral citation: *Kruger v Property Lawyer (420/2010) [2011] ZASCA
80 (27 May 2011)*

Coram: Mpati P, Brand, Lewis, Malan and Tshiqi JJA

Heard: 4 May 2011

Delivered: 27 May 2011

Summary: Bridging finance – undertaking by transferring attorney to pay against registration of transfer – construction of undertaking – undertaking to pay from proceeds of sale.

ORDER

On appeal from the North Gauteng High Court, Pretoria (Murphy J sitting as court of first instance):

- (a) The appeal is upheld with costs including the costs of two counsel;
- (b) The order of the court below is set aside and replaced by the following:

‘The application against the first respondent is dismissed with costs.’

JUDGMENT

MALAN JA (Brand, Lewis, Maya and Tshiqi concurring)

[1] The appellant appeals against the whole of the judgment and order of Murphy J in the North Gauteng High Court, Pretoria in terms of which the appellant was directed to pay to the respondent an amount of R271 244,90 together with interest and costs. This appeal is with leave of the court below.

[2] The appellant, a firm of practising attorneys, furnished a written letter of undertaking to the respondent, a provider of bridging finance to sellers of immovable property and their agents, mainly attorneys. The bridging loan was to be made pending transfer of certain properties in which the appellant was engaged, albeit not as the conveyancer, as attorney on behalf of the sellers. The undertaking of the appellant is addressed to the respondent and commences with a reference to the properties to be transferred and who the transferors and transferee were. The material part reads as follows:

‘Ons onderneem hiermee onherroeplik om die bedrag van R500 000,00 (Vyfhonderd Duisend Rand) tesame met 20% (tuintig persent) en 10% (“raising fee”) in die volgende rekening in te betaal op datum van registrasie van die bogemelde eiendomme in die Aktekantoor te Pretoria:

Proplaw Bridging

Absa, Brooklyn

Branch: 632 005

Account Number: 4071652511

tensy ons van regsweë verhoed word of aangestel word as agente namens die Suid Afrikaanse Inkomste Diens ooreenkomstig Art 99 van die Wet op Inkomstebelasting No. 58/1962 soos gewysig.'

[3] The seller of six of the properties referred to in the undertaking, Bell Investments (Pty) Ltd (the company), was liquidated and its liquidators claimed the proceeds arising from the sales. The seller of the seventh property was Mr I M Bell. All the properties were sold to the same purchaser, Philadelphia Game Ranch (Pty) Ltd.

[4] The respondent, when considering an application for finance, requires certain documentation including a request for bridging finance and mandate to pay signed by the client, an identity document, a copy of the sales agreement and also a letter of undertaking from the conveyancer or attorney that the amount of the bridging finance will be repaid by the conveyancer against registration of transfer of the sale property. The 'Bridging Request and Mandate to Pay' in this case, signed by Mr Bell for himself and also on behalf of the Bell Ontwikkelings Trust (the client), refers to the properties involved and the particulars of their transfer. It was submitted to the respondent by the appellant (referred to as the 'law firm') on behalf of the client. The borrowers were Mr Bell and the Trust and the seller of six of the properties was the company and Mr Bell the seller of the seventh. Apparently both the company and the Trust were controlled by Mr Bell. The bridging request contains a request by the client for payment of an amount of R500 000 (the amount of the loan) and continues:

'And whereas [the respondent] requires that the client in return cedes in their [favour] his right, title and interest to the proceeds in the above transaction in the amount of (requested amount plus 20 % as well as a raising fee of 10 %)

R100 000,00 (Een Honderd Duisend Rand) plus die "raising fee" van 10% R50 000.00 (Vyftig Duisend Rand)

Now therefore the [appellant] is hereby irrevocably instructed to issue a Bank Guarantee / Letter of Undertaking, in the last mentioned amount in favour of [the respondent] payable on registration of the above transaction. Should the transaction for whatever reason be cancelled or not registered within

six (6) months from signature then the amount will immediately become due and payable to [the respondent].’

[5] At the end of the bridging request there is a ‘Confirmation by Registering Attorney’ in the following terms signed by the appellant (or the law firm):

‘I, the undersigned Marthinus Jacobus Pretorius on behalf of the law firm hereby confirm that:

1. We have been instructed to attend to the registration of the above matter.
2. That all conditions precedent, or otherwise, to the said transaction as well as linked transactions (if applicable) have been met, all registration documents have been signed, costs have been paid or provision for the payment thereof have been made and that no reason exists why registration triggering the payment of the guarantee/undertaking should not take place on the said expected date.
3. Approval hereof relies materially upon the above request and confirmation.’

[6] The appellant furnished both the letter of undertaking and the bridging request to the respondent. Registration of transfer of the properties did not take place within the six month period envisaged in the bridging request but only thereafter. After liquidation of the company the liquidators elected to abide by the sales and the properties were duly transferred. An amount was available from the proceeds of the sale of the seventh property (by Mr Bell) which was paid to the respondent leaving the balance claimed.

[7] Two issues were raised on appeal: first, the proper construction of the letter of undertaking, particularly whether it constitutes an undertaking independent of the underlying transaction, that is the bridging loan to Mr Bell and the Trust; and, secondly, if the letter of undertaking is not an independent undertaking, whether it is enforceable since the bridging finance loan does not comply with the provisions of the National Credit Act 34 of 2005 (NCA). In this regard, the appellant submitted that the letter of undertaking, in any event, constitutes a ‘credit guarantee’ as defined in the NCA. In the court below Murphy J found in favour of the respondent on all these issues. Relying on *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* 2010 (2) SA 86 (SCA) he found that the letter of undertaking gave rise to an independent obligation and was not of an accessory nature, nor was it unenforceable due to non-compliance with the provisions of the NCA. He gave judgment in favour

of the respondent. For the reasons that will appear from this judgment it is not necessary to consider the applicability of the NCA.

[8] The letter of undertaking was issued pursuant to the bridging loan made by the respondent to Mr Bell and the Trust. It must be construed in that context, the factual matrix in which the parties operated,¹ so as to give it a commercially sensible meaning.² It is clear from the wording of the undertaking that the appellant undertook to pay the amounts stipulated against registration of transfer of the properties. It is also clear that the appellant did this on the instructions of the client: it uses the word 'onherroeplik' implying that the mandate to the appellant could not be revoked by its principal, the client. The fact that the appellant acted as the agent of the borrowers in giving the undertaking does not mean, of course, that it could not have incurred a personal liability in terms of the letter of undertaking.³ The word used is 'onderneem' leaving no doubt that a personal obligation was envisaged. The real question, however, is not whether the appellant undertook to pay but what the content of this undertaking was.

[9] The purpose of the undertaking was that the appellant, as the attorney involved in the transfer of the properties, would make payment to the respondent of the money lent and other charges from the proceeds received from the sale of the seven properties by the company and Mr Bell.⁴ This is clear from the terms of the bridging request. It recites that all the conditions precedent to the sales have been fulfilled and that registration was expected to take place not later than the end of August 2008. It records that the client, that is Mr Bell and the Trust, requested payment of the amount borrowed and that the respondent requested the client 'in return' to cede 'his right, title and interest to the proceeds in the above transaction in the amount of "(requested amount plus 20% as well as a raising fee of 10%)" to the respondent. As security for the bridging loan the client therefore ceded part of its

¹ See *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39; *Swart & 'n ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C-D.

² *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* (457/2008) ZASCA 154 [2009] [27 November 2009]; 2010 (2) SA 498 (SCA); [2010] 2 All SA 195 (SCA) para 13; *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd & another* 2008 (6) SA 654 (SCA) para 7.

³ Cf *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) at 137I-138B.

⁴ *Venter & others v Credit Guarantee Insurance Corporation of Africa Ltd & another* 1996 (3) SA 966 (A) at 973D-E.

right to the sale proceeds to the respondent.⁵ Because payment was expected by no later than the end of August 2008 the appellant was instructed to issue the letter of undertaking. The appellant's confirmation at the end of the bridging request in so many words confirms that, because all the conditions for registration and payment of the costs have been met, 'no reason exists why registration triggering the payment of the guarantee/undertaking should not take place on the said expected date'. It is only by virtue of his control over the proceeds of the sales that effect to the entire transaction could have been given.

[10] The undertaking is not to pay 'regardless' but to effect payment from the receipt of the proceeds of the sales. Nor was it envisaged that the proceeds would vest in the appellant: by virtue of the 'cession' the proceeds in the agreed amount had to be paid to the respondent. It would have been absurd for the appellant to have given an unconditional, independent undertaking in these circumstances. The letter of undertaking itself contains a reference to the bridging finance provided to Mr Bell and the Trust, recites the properties to be transferred and links payment of the undertaking to registration of transfer. Seen in this context, the undertaking amounts to no more than an undertaking to make payment from the proceeds of the sales.⁶ It is common cause that the sales of the company's properties left a deficit. The proceeds of the sale of the seventh property by Mr Bell left a net balance which was paid to the respondent. It follows that the respondent is not entitled to any further payment from the appellant.

⁵ The fact that a partial, and hence an invalid, cession was involved is not relevant for the purposes of this matter: apparently, all the parties regarded it as valid.

⁶ See also *The Minister of Transport and Public Works: Provincial Government of the Western Cape and The Head of the Department of Transport and Public Works: Provincial Government of the Western Cape v Zanbuild Construction (Pty) Ltd and Absa Bank Limited* (68/2010) [2011 ZASCA 10 (11 March 2011) paras 14 ff on the importance of interpreting the terms of the particular undertaking or guarantee under consideration.

[11] The following order is made:

- (a) The appeal is upheld with costs including the costs of two counsel;
- (b) The order of the court below is set aside and replaced by the following:

‘The application against the first respondent is dismissed with costs.’

F R MALAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:

A Subel SC
J Pretorius

Instructed by:

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