IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)

REPORTABLE
Case No. 2455/04

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA t/a THE LAND BANK **Applicant**

And

THE MASTER OF THE HIGH COURT **First Respondent**
DAVID JOSEPHUS STRAUSS N.O. **Second Respondent**
SAREL ALBERTUS COETAEE N.O. **Third Respondent**
THE 33 CONCURRENT CREDITORS IN THE INSOLVENT ESTATE OF THOROLD ROY DOUBELL **Fourth and Further Respondent**

JUDGMENT: 25 JANUARY 2005

DAVIS J:

Introduction.

1. The applicant seeks relief in order to claim the whole free residue of the insolvent estate of Thorold Roy Doubell ('the insolvent estate'). The relief is sought in the form of an order for the attachment of the free residue of the insolvent estate in terms of section 34(4)(c) of the Land and Agricultural Development Bank Act 15 of 2002 ('the 2002 Act').

In addition applicant seeks an order declaring that **:**

‘1.2.1 Applicant will be entitled as a preferent creditor in the insolvent estate, to the free residue to the monies so attached in order to liquidate its full claim as at the date of payment against the insolvent estate:

1.2.2. (Rectification of) the second and final liquidation and distribution account in the said insolvent estate to reflect Applicant’s full claim as at the date of payment as preferent (and not concurrent), and to adjust the second and final liquidation and distribution account accordingly; and

1.2.3 no concurrent creditor and no creditor whose claim is secured in terms of a special or general mortgage bond, other than a mortgage bond as contemplated in section 1 of the Security by Means of Moveable Property Act No. 57 of 1993, shall share in the free residue of the insolvent estate before repayment of the outstanding amounts, interest and costs owing by the insolvent estate to Applicant.’

Factual Background.

The estate of Thorold Doubell was provisionally sequestrated on 26 July 2000 and finally sequestrated on 31 August 2000. Second and third respondents were appointed joint trustees by first respondent. The insolvent owed applicant an amount of R2 430 477,65 at the date of sequestration. Applicant received an amount of R662 847,51 as value and repayment after sequestration, which comprised an amount of R547 201,14, being value received by the applicant when applicant purchased the immovable property and deducted the purchase price from the outstanding loan and an amount of R115 464,37 which had been received as a payment from the insolvent estate on 23 September 2002.

These amounts were reflected in the first and second liquidation and distribution accounts. Applicant received a copy of the second and final liquidation and distribution account on 11 November 2003 in terms of which the free residue available in the insolvent estate was allocated to concurrent creditors. The second and final liquidation and distribution account was filed with the Master and to date has not been confirmed.

Second and third respondents have opposed the application on five separate grounds, being:

1. Applicants' authority to institute proceedings;
2. The inapplicability of section 33(3)(b) and (4) of the 2002 Act to advances made in terms of the Land Bank Act 13 of 1944 ('the previous Act').
3. The inapplicability of sections 33(3)(b)(and (4) to sequestrations before 10th June 2002
4. There had not been compliance with section 33(4)(a) of the 2002 Act
5. In terms of a discretion provided to the Court in terms of section 33(4)(a) of the 2002 Act, the order should not be granted.

Authority to institute proceedings.

The application was launched on behalf of applicant by one Jacobus Johannes Cloete. In paragraph 2 of the founding affidavit Cloete states 'I am employed by the applicant as a manager of its insolvent task team'. He then alleges that he is 'duly authorized to depose to this affidavit and to launch the present application on behalf of the Applicant.' In support of this allegation, Cloete annexed a document entitled

'A Memorandum to the General Manager Risk and Credit' in which the following passage appears:

'The fact that debtor is insolvent and the Land Bank Accounts are in arrear, the Management Insolvency Task Team recommends as follows:

- That repayment of the advance be demanded in terms of Section 33(3).
- That if the advance is not paid within 7 days, the Branch Manager or his/her assignee be authorized to pursue in terms f Section 33(4) of the Land and Agricultural Development Bank Act, 15 of 2002.
- That the Branch Manager or his/her assignee or an appointed attorney/advocate be authorized to make an application in terms of section 33(4) by drafting an affidavit; and sign it on behalf of the Bank.
- That the Branch Manager or his/her assignee or an appointed attorney/advocate be authorized to provide security when requested by the court in terms of subsection 4.
- That the Branch Manager or his/her assignee or an appointed attorney be allowed to return to the court to obtain authorization to attach and sell the debtor's property and rights without recourse to ordinary court processes.
- That all legal costs be for the account of the debtor.'

Mr Breitenbach, who appeared together with Mr Myburgh on behalf of respondents, submitted that this document did not show that the power to launch the application had been delegated to Cloete by the board of directors of applicant as constituted in terms of

section 8 of the 2002 Act and/or the chief executive officer of the bank appointed in terms of section 17(1) of the 2002 Act.

In support of these submissions Mr Breitenbach referred to the judgment of a full bench of this Division in **Bester N.O. v The Land Agricultural Bank of South Africa** (unreported judgment CPD dated 23 September 2004). This case concerned authority to institute proceedings on behalf of the Land Bank in terms of 34(3)(b) of the previous Land Bank Act. The court concluded that the Land Bank had not shown that its Board had decided to institute the proceedings. Further, there was no evidence that the Board had delegated the authority to the Managing Director of the Land Bank (Mr Fandeso) to take the decision to institute proceedings.

On behalf of a unanimous court, **Ngwenya J** said 'There is no evidence upon which we can infer that Fandeso had the delegated powers to exercise the discretion which is vested in the Land Bank board of directors in terms of s 34(2). In the absence thereof one cannot on these facts say that the board of the respondent had authorized the launching of these proceedings and that Fandeso had been clothed with the necessary authority in terms of section 4 ter of the Land Bank Act. Differently put, the respondent has failed to prove that it has the necessary authority to launch these proceedings.' Accordingly the court held that the Land Bank 'had failed to prove that it has the necessary authority to launch these proceedings'.

At the hearing Mr Bergenthuin, who appeared on behalf of applicant, handed in to the court a special power of attorney in which one George Odera Oricho, the acting chief

executive officer of applicant had deposed to a special power of attorney confirming that Jacobus Frederick De Beer, and David Johannes Malan, attorneys acting on behalf of applicant were duly authorized to bring the application against first, second, third and fourth respondent. Mr Breitenbach raised two important questions regarding the validity of the special power of attorney, being that it did not appear to deal with the issue of retrospectivity and whether actions taken prior to the execution of the special power of attorney as at 12 November 2004 had been ratified. Furthermore and pursuant to the **Bester** decision, the document did not indicate the authority upon which the acting chief executive officer of applicant (as opposed to the Board) sought to authorize this litigation.

Mr Bergenthuin submitted that no challenge had been brought by respondents pursuant to Rule 7 of the Uniform Rules of the High Court, either to the authority of Cloete, De Beer or Malan to act on behalf of applicant as far as this litigation is concerned. Section 18 of the 2002 Act empowers the chief executive officer to be responsible for (i) the management of the day to day affairs of the Bank, subject to directions of the Board and (ii) control over the staff of the Bank. Section 18(2) empowers the chief executive officer to delegate any power or assign any duty to an employee of the Bank including a power delegated to him or her or a duty assigned to him or her by the board in terms of section 16 unless the Board in its written delegation or assignment to the chief executive officer expressly prohibits such further delegation or assignment.

Mr Bergenthuin also referred to the decision of Supreme Court of Appeal in **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA). The importance of the following passage from the judgment of Streicher JA is self explanatory:

"In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorized to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorized to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorized and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorized. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided." (at para 19).

The distinguishing feature in this case is that the affidavit by attorney Malan merely confirms his authority with regard to service upon creditors and can thus hardly be equivalent to the affidavit of Mr Kurz in the **Ganes** case, supra.

A further objection raised by Mr Beritenbach was that litigation of this nature does not constitute the management of 'the day to day affairs of the Bank'. Therefore the Board or the chief executive officer should, by a properly authorized resolution in terms of section 16(1) of the 2002 Act, provide the authority to institute such litigation.

There is clear merit in Mr Breitenbach's arguments regarding lack of authority but I will assume in favour of applicant that the proper authority has now duly been presented to this Court by way of a special power of attorney. Accordingly I shall assume, without deciding, that the litigation was properly brought before this court.

The applicability of sections 33(3)(b)(4) of the 2002 Act to the present dispute.

This defense of the respondents needs to be considered within the context of the decision of the Constitutional Court in the **First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa** 2000(3) SA 626 (CC). In its judgment the Constitutional Court held that the provisions of section 34(3)(b) – (7), (9) and (10) together with section 55(2)(b) – (d) of the Land Bank Act 13 of 1944 which allowed applicant to attach and sell movable and immovable property in execution on its own authority without judicial supervision were unconstitutional. These provisions permitted

applicant to bypass the courts and allow it to take the law into its own hands and serve as a judge in its own cause. Hence, the effect of these provisions was to violate the right of access to courts provided for in section 34 of the Constitution of the Republic of South Africa Act 108 of 1996. The Court declared these sections to be unconstitutional and ordered that their invalidity be suspended for a period of two years provided that, as on the date of the order, no attachment and sale in execution in terms of section 34(3)(b) of the Land Bank Act 13 of 1944 not yet completed shall take place without recourse to a court of law.

These proceedings were launched after the termination of the order of suspension of invalidity by the Constitutional Court. The proceedings were launched on 18 March 2004. It is common cause that, if the 1944 Act had applied to this application, applicant would only be in the position of a concurrent creditor without any preferred claim. The question therefore arises as to whether section 33(3)(b) and (4) of the 2002 Act was applicable to the present dispute. Pursuant to section 33(3)(b), applicant made a demand for the repayment of the advance to the address of the debtor, a period of at least seven days had expired after this written demand, and applicant had then applied to a court of law. The order sought was to authorize applicant to attach and sell by public auction or public tender so much of the property and rights of the debtors as may be necessary to liquidate the amount owing in respect of the advance made by applicant together with interest and costs in respect thereof.

This precise question came before **Wright J** in **Land and Agricultural Development Bank of South Africa t/a The Land Bank v Venter** [2004] 2 ALL SA 314(0). **Venter's** case was based on similar facts to the present dispute. **Wright J** found that the 2002 Act did so apply to a case with facts such as those presented in this dispute. The learned judge held thus: 'The 2002 Act specifically provides that should the applicant's debtor be sequestrated or liquidated, the fact that the property of the debtor vests in his/her trustee/liquidator, does not limit the Bank rights in terms of sub-section 33(4). According to this sub-section read with section 19 of the Insolvency Act, it is clear that the creditors rights arising from a **concursus creditorum,** were at all periods limited and subject to the applicants rights in terms of the 1944 Act during the interim period or in terms of the new Act…..It (the new Act) imposes no new duty or disability and, therefore, has no retrospect in effect. The respondents should not rely on any other rights obtained after the **concursus creditorum** which may have been encroached upon by applicant (at para 19)'.

Section 90 of the Insolvency Act 24 of 1936 provides thus: 'The provisions of this Act shall not affect the provisions of any other law which confer powers and impose duties upon the Land and Agricultural Bank of South Africa or the Land and Agricultural Bank of South West Africa in relation to any property belonging to an insolvent estate'.

In effect **Wright J** found that creditors in an insolvent estate such as those in the present dispute did not acquire vested rights, for their rights were subject to the application of section 90 of the Insolvency Act; that is the rights which the creditors possessed were

always subject to applicant's rights as protected in terms of section 90 of Insolvency Act. Section 90 of Insolvency Act had not been declared to be unconstitutional. Accordingly, creditors' rights were always subject to a right which might be possessed by applicant, whether in terms of the 1944, or, in this case, in terms of the 2002 Act.

In my view, this conclusion meets the objections raised by respondents. Mr Breitenbach had contended that should a remedy in section 33(4)(a) in the 2002 Act be available to applicants in this and similar insolvent estates, the section would have retrospective effect. The rights of creditors of an insolvent estate could be significantly impaired, being subject to applicant's rights in terms of section 33 by virtue of section 90 of the Insolvency Act read together with section 52(7) of the 2002 Act or because section 33(4)(a) attached a new disability in regard to an event which had already passed.

This submission is however unable to overcome the express wording of section 90 of the Insolvency Act which provided expressly for a statutory qualification to any vested rights which might have been obtained by the creditors pursuant to a **concursus creditorum**. Once account is taken of s 90 of the Insolvency Act and its express qualification which allows applicant's statutory rights to trump those of ordinary creditors, s 33(4)(a) has no retrospective effect on the rights of creditors in that these rights were always limited by section 90 of the Insolvency Act.

There is a further difficulty with regard to the application of section 33(3)and (4) of the 2002 Act to the facts of the present dispute which was not canvassed in **Venter's** case.

Mr Bergenthuin conceded that the transitional provision in the 2002 Act, being section 52(5) of the Act was indicative that the legislature had made provision solely for court proceedings involving the Bank. Court proceedings instituted immediately before the commencement of the Act had to be disposed of as if the 2002 Act had not been enacted. Only the sequestration proceedings had been instituted immediately before the commencement of the Act. By contrast the present proceedings had been implemented after the commencement of the 2002 Act. Thus, it could not be said that the 1944 Act had any application to the present dispute.

Mr Bergenthuin then submitted that 33 of the 2002 Act authorised similar remedies to those enjoyed by applicant during the period 9 June 2000 to 9 June 2002 in terms of the 1944 Act and pursuant to the order of the Constitutional Court in the **FNB** decision, supra. If any of the jurisdictional facts enumerated in section 33(2), whereunder the insolvency of the debtor applies and the applicant had, in writing, made demands for the repayment of an advance to the debtor addressed to the debtor's address stated in the application form for the advance, applicant could apply to court for authorization to attach property of the debtor provided that

(a) there was sufficient evidence supported by affidavits of the aspects mentioned in section 33(4)(a) or

(b) it was reasonable and just in the circumstances or if compelling considerations existed in terms of section 33(4)(c).

The critical question is whether s 33(1) and (2) are applicable to the present facts. Section 33(1) of the 2002 Act provides:

(1) Despite anything to the contrary in any other law or any agreement and without prejudice to any other remedies the Bank may have, the Bank may in respect of advances that it has made take any action envisaged in subsection (3) if any of the circumstances envisaged in subsection (2) exist.

(2) The circumstances contemplated in subsection (1) are if –

(a) payment of any sum of money, due in respect of any advance made in terms of this Act, is in arrear whether it is the capital sum or interest thereon;

(b) any such advance has been applied for a purpose other than the purpose for which it was made;

(c) the advance has not within a reasonable time been applied for the purpose for which it was made;

(d) any other condition to which the advance is subject has not been complied with substantially;

(e) (i) the debtor becomes insolvent, commits any act of insolvency in terms of section 8 of the Insolvency Act, 1936 (Act 24 of 1936), or is sequestrated by virtue of an order of court in terms of that Act;

(ii) the debtor is sentenced to imprisonment without the option of a fine;

(iii) judgment is obtained against the debtor for the payment of any sum of money;

(iv) any asset of the debtor is by order of a competent court declared executable or is attached in pursuance of an order of any such court

(f) the debtor is deceased, and his or her estate is about to be dealt with in terms of section 34 of the Administration of Estates Act, 1965 (Act 66 of 1965) or has been sequestrated;

(g) the debtor is a company or close corporation which has been placed under judicial management or is being wound up or is being deregistered, as the case may be; or

(h) the debtor is a private company or close corporation and any director, shareholder or member thereof is sentenced to imprisonment without the option of a fine.

In terms of section 33(3)(b) and (4) a requirement for action by applicant is that there must have been payment of a sum of money by the debtor which was due in respect of any advance made in terms of this Act. Throughout subsection (2) reference is to 'such advance or 'the advance' or 'any other condition to which the advance is subject'.

The express wording is clear: the remedies in case of default as provided for in terms of s 33 are in respect of advances made under the 2002 Act. The loan in the present dispute was not made in terms of the 2002 Act. The proceedings were thus not instituted on or after 10 June 2002 for authority to attach and sell so much of the property and rights of the debtor as may be necessary to liquidate the amount owing in respect of the '**advance'** made by the Bank in terms of the 2002 Act. In this case, the advance was made pursuant to the 1944 Act in that the loan agreements were concluded during 1994 and 1999. All of the agreements were concluded well before the 2002 Act came into effect on 10 June 2002. There appears to be no other interpretation of s 33 than that the reference to

‘advance’ and ‘debtor in terms of an advance’ which phrase is used extensively and consistently in sub-sections (3) and (4) of section 33 is to an advance made in terms of the 2002 Act. Further, there is no provision in the 2002 Act which provides for relief in respect of of sums of money due in respect of advances made in terms of the 1944 Act.

In short, as Mr Bergenthuin correctly submitted the 1944 Act does not apply to the present case. Relief, if any which is available to the applicant must be sought in the 2002 Act. The essence of the relief provided in the 2002 Act is that it provides protection for applicant in the case of default in respect of ‘any advance made in terms of this Act’.

It may well be that this result is incongruent with the intention of the legislature and that the result arrived at by **Wright J** is more in keeping with its broad intention in respect of the 2002 Act was introduced. However, the clear wording ‘advance in terms of this Act’ as it appears in section 33(2)(a) and which plays a central role in the scheme of s 33 can only support a conclusion that advances which were not made in terms of the 2002 Act cannot be recovered in terms of s 33 of the 2002 Act.

For these reasons, the application is dismissed with costs, including the costs of two counsel.

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DAVIS J