IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE	CIVIL CASE NO. 4617/2008

In the matter between:

STANDARD BANK SWAZILAND LTD:	PLAINTIFF

VERSUS

JOHNNY FIFTY FIVE (PTY) LTD	1ST DEFENDANT
MAD HUMAN	2ND DEFENDANT
RAMKOLOWAN BHUTANA	3RD DEFENDANT
SATCH MAURICE KHUMALO	

CORAM:	ANNANDALE J
FOR THE PLAINTIFF	MR. M. MOTSA OF ROBINSON BERTRAM ATTORNEYS.
FOR THE DEFENDANT	MR. S. KUBHEKA OF SM KUBHEKA & ASSOCIATES

JUDGMENT

16th June 2009

[1] The Plaintiff is a commercial bank operating in the Kingdom of Swaziland. It agreed to extend credit facilities to the first Defendant Company, which is locally registered to conduct business, *inter alia* in the field of solar energy systems. The further two Defendants are directors of the Company and are suited as sureties and co-principal debtors.

[2] The Defendant Company requested credit facilities with the Plaintiff, hereinafter referred to as "the Bank", in order to operate its business and to obtain working capital. The Bank agreed to this but on condition that its exposure is covered by personal surety ship of the Second and Third Defendants, as well as the registration of a mortgage bond over fixed property. The

Company then obtained a loan account as well as overdraft facilities in respect of its current account with the Bank.

[3] It is common cause that the Company ran into financial difficulties and became unable to honour its repayment obligations. The Bank issued a simple summons against the Company and the two sureties, claiming E 1,066,018-93 plus interest and costs as well as an order to execute the mortgaged property. This first claim is in respect of a medium term loan. The second claim relates to an overdraft account and amounts to E568, 632-96 plus interest and costs.

[4] The Defendants filed a notice of their intention to defend the matter which in turn resulted in a declaration wherein the Bank comprehensively detailed its two claims. Two days later, it filed an application for summary judgment, supported by an affidavit of its credit evaluation manager. It contains the usual averments relating to verification of the cause of action, the facts and the claimed amount as well as his belief that there is "no defence" to the claim and that the notice of intention to defend has been filed solely

for purposes of delaying the action. The Defendants then filed an affidavit in which summary judgment is resisted, to which a reply was made.

[5] The two claims need only a brief outline since there is no serious dispute with it, save a contentious issue which pertains to the provision of security in the form of a mortgage bond. The Bank claims that a loan agreement was concluded with the (now defunct) Company in November 2006, wherein it agreed to advance one million Emalangeni to finance working capital. Monthly repayments would be deducted from the current account of the Company. The agreement is stated to include provisions for interest linked to the prime rate and adjustable charges/commission as well as that the capital sum plus interest is payable on demand. Attorney and client costs were also agreed upon, should it become necessary to seek a costs order. Over and above unlimited suretyships of the 2nd and allegedly the 3rd Defendant as well, the registration of a first continuing covering mortgage bond over certain fixed property was also agreed to.

[6] The first claim of E1, 066,018-93 is stated to be based on the fact that after receiving the loan amount, the Company breached the agreement in that it failed to repay the loan as agreed and that at the end of November 2008 it was in arrears to that extent. The Bank filed all relevant supporting documents in respect of this claim as annexures to its declaration.

[7] The second claim of E568, 632-96 has its source in an overdraft facility on the current account of the Company. The Bank says that it granted a conditional variable facility in November 2006 to the Company. The initial limit was E300, 000, which could be varied at the Bank's discretion and that all sums overdrawn would be repayable on demand. Interest was to be at three different levels, dependant upon the status of the account. Prime plus 6% would escalate to 7.5% when the agreed limit is exceeded and up to prime plus 10% when there is a failure to repay the full overdrawn balance. Over and above provision for customary ancillary provisions such as a certificate of balance, bank charges, commissions etcetera, the Bank claims that

repayment of all due sums in respect of this facility was to be secured by the registration of a first continuing covering mortgage bond over certain fixed property and unlimited deeds of suretyship by the Second and Third Defendants, the same position as with the first claim.

[8] I pause here to point out that there is an anomaly in the Plaintiff's declaration. In both claims, it states that the loan facilities were *inter alia* subject to unlimited deeds of suretyship by both the Second and Third Defendants. Indeed, both signed the loan agreement as directors of the First Defendant and both also signed personal deeds of unlimited suretyships at diverse times to cover debts of the Company, as is stated by the Bank. However, the written agreement between the Bank and the Company, under the heading "Security required" (clause 5.2.1) only required the Second Defendant to provide unlimited suretyship. It does not also state the same to apply to the Third Defendant. This anomaly is not determinative of the matter and has not been raised an issue by any Defendant.

[9] The Bank goes on to state that following the conclusion of the overdraft agreement, it accepted that the conditions precedent to the agreement had been duly met and tacitly agreed to extend the then prevailing overdraft limit. Specifically, paragraph 6.4 of the agreement which itemizes the conditions precedent reads that:

> *"The Bank will make the facilities available to the borrower subject to the fulfilment of the following conditions precedent to the satisfaction of the Bank:*
>
> *6.4 The Security, duly executed, in a form acceptable to the Bank, and legally binding;..."*

The timing of the furnished mortgage bond as security for both loans is crucial to the matter at hand and I shall soon revert to it. In paragraph 5.2.1.1, under the heading of "Security Required", it is specifically recorded that a *"first continuing covering mortgage bond over Lot 534 Extention 6, Manzini, District of Manzini"* is required as security. This is over and above personal unlimited suretyship by the 2nd Defendant and cession over a house owner's policy.

The Bank then honoured cheques of the Company, drawn on its current account, without funds being available to meet the amounts, based on the agreement until then. The Company did not lodge any complaint about the accuracy of detailed banking statements, the interest rates levied against it or the costs and charges debited by the bank. At the 30th November 2008, the accrued balance of the overdrawn account stood at E 568 632-96.

The Bank thereafter demanded payment of the stated overdraft balance of the current account and at the three differentiated levels of interest which is stated to remain unpaid despite demand, hence the second claim.

The Plaintiff goes on to declare that the Second Defendant caused the abovementioned surety mortgage bond over certain fixed property to be registered in March 2008. Therein, he bound himself as surety and co-principal debtor together with the Company in the sum of E 1 500 000 plus an additional E375 000. Apart from bonding over the property, he also undertook to pay the secured sum and interest on demand.

Over and above the surety mortgage bond passed by the Second Defendant in favour of the Bank as security for the Company, he and the Third Defendant also bound themselves as sureties for debts of the Company, in unlimited amounts. In all instances a certificate signed by any manger or branch administrator of the Bank would suffice as proof of amounts due and payable by the Company as well as applicable interest rates. Also, the legal exceptions which could otherwise be taken were renounced and provision was made for costs at the scale of attorney and own client plus collection commission.

[14] Finally, the Plaintiff's declaration reiterates that the claimed amounts remain unpaid by the Defendants despite demand, hence its claims as stated in the summons. The claims are against all three Defendants, jointly and severally the one to pay the other absolved. The claimed amounts are as set out above, with applicable different rates of interest, and attorney/own client costs plus collection commission. It includes a prayer, relating to the first claim, that the mortgage property be declared executable.

[15] The 2nd Defendant deposed to an affidavit in which he resists summary judgment. He is supported by the 3rd Defendant in all respects. However, he does not aver to also be acting on behalf of the First Defendant Company as well. Nor did he file a resolution by the First Defendant, authorising himself in respect of defending the action or to resist the application for summary judgment. He does not even go as far as even attempting to allege that he also acts on behalf of the Company to oppose the matter. He does not even make an averment that he is employed by the Company or that he is an office bearer or a director, nor does the 3rd Defendant do so. All he does is to state that indeed he was a surety for the Company and that he also pledged his own property as security.

Due to this *lacuna,* it could well be held that factually, there is no resistance by the Company to the summary judgment application in which it features as the 1st Defendant. There is also no evidence that the Company has been placed under liquidation, which might have required the liquidator to step into the shoes of the directors in defending the matter.

However, the outcome of the application for summary judgment is not based on an absence of resistance to it by the Company and it . remains an issue which was not argued before this Court. This point was not taken and I can only assume that both sides are in agreement that contrary to the technical default by the 1st Defendant, the intention remains that all three Defendants oppose the matter *in solidum* and that what befalls the one shall apply to the others as well, in that either summary judgment is to be granted against all three Defendants, or be refused.

In his affidavit to resist the application, the 2nd Defendant states his denial that he entered an appearance to defend purely for purposes of delay. He also denies having no *bona fide* defence to the claim, though the Plaintiff stated that the Defendants have "no defence" at all.

Mr. Ramkolovan then aspires to set out "his" defence to the claim, which culminates in an averred counterclaim. He is in agreement with the claimed factual basis set out by the Plaintiff as to how the Bank and the Company came to their agreement. He confirms that he had a mortgage bond registered over his fixed property in favour of the Bank. He also confirms that he

and the 3rd Defendant bound themselves as sureties and co-principal debtors of the Company. He however denies breach of any agreement between the Bank and themselves, instead blaming the conduct of the Bank which rendered it impossible for them to honour their obligations under the agreement.

Notably, the 2 Defendant supported by the 3 and by implication the Company as well, does not take any issue with the essence of the action and the application against them. The amounts and rates of interest are not disputed. Liability of the two sureties is not in issue either, as is the claimed scale of costs and the prayer for execution of immovable property. Demand for payment of the outstanding claimed amounts and non performance of obligations to the Bank is not challenged either. In fact, over and above the aforestated position of non-existent opposition by the 1st Defendant, the remaining Defendants seem to acquiesce to all stated facts as outlined by the Applicant in the summary judgment application, save for the stating of the reasons why they regard themselves as victims of the Bank and to blame the Bank of untoward behaviour against themselves which resulted in the loss of their business which in turn is held out as a counterclaim.

The Plaintiff is sought to be tarred and feathered in the following manner: It is categorically stated that the debtors found it impossible to honour their obligations because the Bank failed to honour their cheques.

This ambiguous statement encapsulates the case for the Defendants. On the one hand, they seek to lay the blame of their inability to service the loans with the Bank which provided it with lines of credit, both as medium term finance and overdraft facilities, acknowledging it to be so, but at the same time, wanting the extender if credit to be held liable for their own misfortunes. As shown below, the debtors blow hot and cold, abrogating and derogating at the same time, by stating that they have a counterclaim against the Bank which is to serve the purpose of staving off the claim against them. In doing so, the Applicant points out that in earlier litigation, a quite different scenario of facts were held out by the Respondents to seek the warding off of a claim against them brought by the creditor in favour of which the contentious cheques in this matter were drawn. I revert to this below.

The 2nd Defendant states in the resisting affidavit that the Bank was *"not able to proceed with the loan transaction due to its inability to register a bond"* over

the specified property because the previous secured creditor *"Nedbank refused to release a bond Nedbank held over the said property at the time."* He goes on to say that in January 2008 Nedbank released the bond over the property which was then handed over to the Plaintiff in February 2008.

Contextualised, it requires to be recalled that the agreement between the Bank and the Defendants was dated the 20th November 2006 and signed as acceptance the following day. It contains a suspensive clause, referred to above, which states that, the Bank requires a first covering surety mortgage bond over the stated property, in addition to an unlimited suretyship by the 2nd Respondent, as conditions precedent to the making available of credit facilities by the Bank. By the Defendant's own admission, this was done as late as February 2008, significantly later. If the Bank meanwhile decided to honour cheques drawn against the current account of the Company, it was out of goodwill more than a contractual obligation. In the interim, pending filing of security, transactions exceeded the then prevailing overdraft facilities, which could have been extended by the Bank over and above the agreed credit limits, at the discretion of the Bank.

Seemingly, this is what happened in fact and in practice. The Company initially serviced its obligations in respect of the loan account, through deductions from its already overdrawn current account. In addition, it drafted cheques which further increased its indebtedness to the Bank, but which payments were made good by the Bank, presumably because it acted in the belief that sooner rather than later, the Company and its benefactor would also honour their obligations. Security was to be in the form of a surety mortgage bond over fixed property, supplemented by a personal bond of surety by the 2nd Defendant. Later on, the 3rd Defendant also provided a surety bond, albeit outside the agreement presently under consideration.

However, acceptedly due to the unwillingness of a previous bondholder to let go of its secured security, registration of the bond was delayed for a considerable period of line. It resulted in the Bank releasing unsecured credit to the Company before it had the satisfaction of a secured loan, as agreed with its client.

[27] In the event, it resulted in the client (the defendant Company backed by its sponsors) extending its agreed overdraft facility by more than E200 000, but without the preceeding condition of a mortgage bond yet having been complied with.

[28] In turn, the Bank continued to provide semi-unsecured credit, extending beyond the initially agreed limit of E 300 000. It eventually expanded beyond E 500 000, still without the agreed preceeding condition of being given a surety mortgage bond before the two agreed facilities would become operative and effective. In reality, the Bank could well have refused to release any credit as either a loan or an overdraft facility until such time that the bond was registered in its favour.

[29] The bond was eventually registered on the 11th March 2008, a long time after the loan agreement dated the 20th November 2006 and accepted by the 1st and 2nd Defendants on the following day, which agreement contained the suspensive conditions already mentioned.

Crucial to the resistance against summary judgment is the contention by the Defendants that the Bank is to be blamed for their woes. This is expressed as follows:-

> *"On or about February 2008 the Plaintiff erroneously returned two cheques of E 148 000 with the answer refer to drawer, drawn by the 1st*

Defendant in favour of a South African Company, Masonite (Pty) Ltd, which supplied the 1st Defendant with material".

"It was wrong for the Plaintiff to return the said cheques and to fail to honour them when Nedbank had handed over the security to the Plaintiff and despite the loan facility to the 1st Defendant having been approved at that point by the Plaintiff and the 1st Defendant being within its limits".

Chronologically, this cannot be accepted. The loan agreement, including the overdraft facility, was quite specific as to the fact that it was subject to the filing of security. Security in two forms was required: Personal surety and a surety mortgage bond over property.

The 2nd Defendant accepted personal unlimited suretyship in November 2006, some one and a quarter years before the contentious cheques were returned by the Bank. Meanwhile, a second personal unlimited suretyship was signed by the 3rd Defendant on the 4th March 2008, also before the surety bond was registered in favour of the Plaintiff. The bond itself was eventually registered on the 11th March 2008, well after the contentious cheques were dishonoured.

The inescapable conclusion remains that by their own admission, the Defendants issued the contentious returned cheques before the conditions precedent to the agreement with the Bank were fully met. Sympathy is due to the Defendants who were unable to timeously furnish their bankers with an unencumbered bond. Seemingly, another bank held onto the previous bond for longer that what the surety anticipated. Nevertheless, the agreement on which both parties rely has it as a prerequisite that Standard Bank had to have the surety bond in hand before the agreed loan and overdraft facilities would became due for release. Meanwhile, if the Bank extended credit it was as a measure of goodwill or some other ground, but nevertheless as an unsecured loan, save for personal suretyship. As it turns out, the E 300 000 overdraft facilities already got stretched to almost double the amount initially agreed as a limit, partially due to a number of debits in relation to the loan account of one million Emalangeni which was released on the same day that the bond was registered.

The Second Defendant continues with his attack on the Bank which commenced with an admission that the bond could not be timeously registered. He says that

the surety bond was handed to the Bank in February 2008 and *ex facie* the bond deed itself, it was registered the 11th March 2008, in favour of Standard Bank.

By operation of law, it was only from this date onwards that the Bank can properly be said to have had the security of a mortgage bond over fixed property, as it had been agreed to in November 2006, the date of acceptance of the loan application. Differently stated, the final condition precedent to the availing of credit by the Bank remained dormant until the 11th March 2008, the date when the final condition became effective. Until that date, any indulgences by the Bank could well be termed *ex gratia.* The client did not have a legitimate expectation until then that cheques drawn by itself on the Bank would be honoured in accordance with their agreement to provide a medium term loan facility and allow their current account to be overdrawn, initially to a debit balance of E 300 000 and thereafter, in accordance with their banker's discretion.

[34] It is therefore difficult, to accept the blame shifting by the Defendants when it is said that it was wrong for the Plaintiff to return two cheques in February 2008, instead of honouring thern. The

two cheques of E 148 000, or amounts in the region thereof, depending on where one is to determine this, as mentioned below, were drawn by the Company in favour of a foreign supplier, Masonite (Pty) Ltd. The defendants state that the Bank was obliged to honour them because by then ".. *Nedbank had handed over the security to the Plaintiff and despite the loan facility to the 1st Defendant having been approved at that point by the Plaintiff and the 1st Defendant being within its limit".*

[35] Factually, the loan and overdraft facilities were approved by then but it was subject to security which by that time had not yet become operative. It was only afterwards, on the 11th March 2008, that the surety mortgage bond was registered and became legally binding, as was the agreement. The suspensive condition thus remained in place until the 11th day of March, and not in February 2008, when the cheques were dishonoured by the Bank.

The 2nd Defendant further relates the woes which thereafter befell the Company. One cannot but have sympathy with the course of events which unfolded and

culminated in a once healthy company, capable of raising large amounts of credit from a commercial bank, to go from bad to worse and onto its knees. It lost its customers and its main supplier, Masonite, not only cut off supplies but successfully took it to court. It got evicted from its premises and creditors attached its assets. It now faces yet another huge claim.

It is this unfortunate course of events which it now wants to place on the broad shoulders of the Plaintiff in the form of a counterclaim. It is adamant to the extent that it accuses the Plaintiff, by seeking summary judgment, of insincerely and malice, wanting the Court's disapproval by dismissing the application with punitive costs.

The counterclaim is further embellished by averring that the Bank breached its contract by referring the cheques in favour of Masonite to the drawer. The Bank is said to have acknowledged wrongfulness through correspondence, which is dealt with below. Finally, it is said that the dishonouring of their two cheques caused their downfall and that it gives rise to a counterclaim. However, not even an estimation is proffered as to the *quantum* of the unliquidated counterclaim.

It is on these allegations that the Defendants rely to firstly, constitute a triable defence to the Plaintiff's claim, as well as a justiciable counterclaim which jointly are to result in a dismissal of the application for summary judgment and have the matter referred to trial.

In order to decide this issue, as to whether the matter should be referred for trial or be settled by way of summary judgment at this stage, regard has to given to the facts and the law. The judicial discretion to so decide cannot depend upon sympathy with a litigant or be arbitrarily or capriciously made. The guiding legal principles are crystallized in precedents, such as *Nedperm Bank Ltd Verbri Projects CC 1993 (3) SA 214 (W)* at 220 where Zulman J, as he then was, had this to say:

> *"What is essential is that there should be hard facts as it were, upon which the Court can exercise the discretion which it is given in terms of the Rule relating to summary judgment. Rule 32 (3) (b) makes it plain that the affidavit seeking to resist summary judgment successfully must satisfy the Court, by evidence, of the fact that the Defendant has a 'bona fide defence' to the*

action and furthermore, 'such affidavit or evidence shall disclose fully the nature and grounds of defence and the material facts relied upon therefore'. The emphasis therefore is plainly on 'material facts'".

At page 224, the learned Judge continued to say:

".. but a discretion exercised in appropriate cases where there is some factual basis, or belief, set out in the affidavit resisting summary judgment which would enable a Court to say that something may emerge at a trial, and there was a reasonable probability of it so emerging, that the Defendant would indeed be able to establish the defences which it put up in affidavit and which at the particular time it might have difficulty in precisely formulating or in precisely quantifying because of lack of detailed information".

[40] It is mandatory for the defendant in a summary judgment application to clearly show that it has a *bona fide* and triable defence which ought to be dealt with by way of trial, should the application

be opposed. He must fully disclose the nature and grounds of and the material facts relied upon as defence. It need not be formulated with the precision of a plea but it must be a defence in law and the facts set out in the affidavit must be sufficient to support the defence.

[41] In the present matter, the defendants say that it is not their fault that the cheques in favour of Masonite amounting to some E 148 000 were referred to the drawer but that it is the fault of the Bank. They rely on breach of contract, based on handing over security to the Plaintiff and the agreement they had. The same is held out to be the

basis for their counterclaim, with the dishonouring of their cheques leading to termination of supplies by Masonite and eventually resulting in the downfall of the company.

As indicated above, the defence of contractual breach is predicated upon the agreement between Plaintiff and 1st Defendant. While it is accepted that such agreement does in fact exist, it is also true that the agreement specifically includes a suspensive condition, which is quoted in paragraph 9 of this judgment. II: is necessary

to first determine whether in fact it indeed contains a condition precedent as a suspensive condition and if so, whether it serves the purpose as contended by the Bank.

Primarily, a distinction needs to be drawn between modal clauses and conditions. In the *Law of Contract in South Africa* by Sir JW Wessels, 2nd edition by AA Roberts 1951, at paragraph 1450 it is stated that:

> *"Though it is often difficult to distinguish a condition from a modal clause, yet there is a clear juridical difference. If by the clause inserted in the contract the parties intend to suspend the performance of the contract, we have to do with a condition. If, on the other hand, the party conferring the benefit intends the contract to be operative at once, but requires the other party benefited to give something, or to do or not to do something in consideration of the benefit bestowed, then we are dealing with a modus or modal clause".*

Clearly, the present clause is not a *modus,* but it still requires to be read in context and in own right to see if it indeed is a condition precedent, a suspensive clause. The minefield of terminology, associated with "conditions", "terms" and "clauses" in this context can best be avoided by highlighting the focus on what is actually contained in paragraph 6.4 of the agreement.

> *"In the sense of a true suspensive or resolutive condition, however, the word (condition) has a much more limited meaning,* viz *of a qualification which renders the operation and consequences of the whole contract dependant upon an uncertain event .... In the case of true conditions the parties by specific agreement introduce contingency as to the existence or otherwise of the contract, whereas provisions which are not true conditions bind the parties as to their fulfilments and on breach give rise to ordinary contractual remedies of a compensatory nature... specific performance, damages, cancellation or certain combinations of these"* (Per De Villiers AJ in R v Katz 1959 (3) SA 408 (C) at417F).

[45] Albeit so that Corondimas v Badat 1946 AD 548 was decided in relation to contracts of sale, it

crystallized our law in the understanding of what a true suspensive condition is, namely that in principle, a contract that is subject to such a condition cannot be regarded as a contract (of sale) until the fulfilment of the condition. This principle was applied in many subsequent decisions and confirmed on appeal. (See Soja (Pty) Ltd v Tuckers Land and Development Corpn (Pty) Ltd 1981 (3) SA 314 (A) at 312 F-H and Tuckers Land and Development Corpn (Pty) Ltd v Strydom 1984 (1) SA 1 (A)).

[46] In De Freitas v Tuckers Land and Development Corporation (Pty) Ltd

980 (3) SA 699 (WLD), Gordon J pronounced upon suspensive conditions in contract clauses, albeit in respect to sale of land. Referring at 702 G with approval, to Corondirnas v Badat 1946 AD 548 (per Feetham AJA), he quoted:

"Where an agreement of purchase and sale of land is entered into subject to a suspensive condition, no contract of sale is there and then established, but there is nevertheless created ' a very real and definite contractual relationship'

which, on fulfilment of the condition, develops into the relationship of seller and purchaser".

In similar vein, he referred at 703 A to *Palm Fifteen v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 887 C-D per Miller JA):

> *"...three observations need to be made. The first is that, despite the suspensive condition and the circumstance that because of it* (the suspensive condition) *no contract of sale there and then came into being, there was" nevertheless created 'a very real and definite contractual relationship' between the parties which,* on fulfilment of the condition (developed) into the relationship of seller and purchaser". *The second is that, <u>once</u> the suspensive condition had been fulfilled neither party to the agreement had the right to resile, from what had been agreed. And the third is that the right acquired by the purchaser under the agreement, when the condition had been fulfilled, was not the right to ownership of the property, but to claim transfer thereof - and a corresponding*

obligation to give transfer rested upon the seller. For all these propositions, authority is to be found in Corondinas v Badat (supra) per Watermeyer C J at 550 and 551 and per Feetham AJA at 558 - 559, 560 and 661".

Applied *mutatis mutandis* to the present matter, should clause 6.4 be such a condition precedent or a suspensive condition in the agreement between the Bank and the Company, it would then follow that although the agreement was concluded in November 2006, the obligation resting upon the Bank to honour cheques of the Company remained in limbo, or was suspended, until such time when the obligation vested with the Company, i.e. to furnish security as required, had been met and complied with. Until such time, the Company could not require the Bank to perform its part of the bargain, namely to honour its cheques on an overdrawn current account. Likewise, it could not count on the Bank to release funds from the E 1 million loan account either.

[48] A condition precedent suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future

uncertain event. Presently, it is the furnishing of a First continuing mortgage bond over Lot 534, Extension 6, Manzini District of Manzini (clause 5.2.1.1 read with clause 6.4). As a condition precedent, *"the Bank will make the facilities available to the borrower subject to the fulfilment of the following conditions precedent to the satisfaction of the Bank" " the security, duly executed, in a form acceptable to the Bank and legally binding".*

[49] The view I take of the plain and unambiguous language used in the agreement is that indeed the agreement between the parties, or the contract between them as embodied in annexure "A" to the declaration filed by the Plaintiff as applicant for summary judgment, is indeed a suspensive condition. The obligations of the Bank under this agreement kept the contract in a state of suspended animation until such time as when the Company fulfilled it by providing the agreed security and in particular, a first continuing covering mortgage bond over the specified property, duly executed and legally binding.

[50] Security goes to the heart of credit facilities sought from a Bank. It forms the root and is of the essence. This much is evidenced in the clauses referred to above. It is a condition precedent to performance by the Bank, the grantor of a million Emalangeni loan facility and provider of overdraft facilities of at least E300 000. There is no obligation on the bank to release funds on credit until the borrowing Company furnishes the required security. Fulfilment of the conditions precedent could well and rather have been referred to as an essential term of the contract, upon which the operation thereof squarely rests.

In Odendaalsrust Municipality v New Nigel Estate Gold Mining Co. Ltd 1948 (2) SA 656 (0) Van den Heever J (as he then was) said at 666-667 that:

> *"The contract (in the modern sense, now that all contracts are consensual) is binding immediately upon its conclusion; what may be suspended by a condition is the resultant obligation or its exigible content* (Inst. 3.15.6)."

Central to the resistance against summary judgment is the contention by the Defendants that indeed they furnished the Bank with an unencumbered mortgage

bond over the property. Furthermore, that this had belatedly been done due to another bank refusing to release it sooner, but that at the time the contentious cheques were returned, the Plaintiff already had possession of the documentation. Factually, this contention is not correct. The mortgage bond was registered well after the two cheques were drawn, presented for payment and dishonoured by the Bank. What this also loses sight of is that the issue at hand, from the perspective of the Plaintiff at least, is not that it focuses on two returned cheques but that it sues for payment of all of the overdraft balance and all of the balance of the loan. It is the Defendants who raise the matter of the returned cheques as a defence and basis for a counterclaim. They want the matter to go to trial, based on alleged breach of contract. But is it a triable defence?

In Hanomag SA (Pty) Ltd v Otto 1940 CPD 437 at 443, de Villiers J had this to say about the ascertainment of the true intention of contracting parties:

> *"Hence, the much discussed question whether a condition ought to be performed in forma specifica_or per aequipullens is robbed of much of its difficulty. The Court*

> *must gather from the surrounding circumstances what the parties contemplated. It must take into consideration everything which can give a clue to the intention of the parties. It must seek to find out what the parties would have wished it their minds had been specifically directed to the question whether the condition was to be fulfilled in forma specifica or by an equivalent act".* (Here, he referred to Wessels' Contract Vol. 1, sec. 1335).

Presently, I find no room for an interpretation along the lines suggested by the Respondents. More than a year after the agreement, the Bank is eventually given the papers with which it could proceed to have a surety mortgage bond registered. Only once perfected can it be said that it had duly executed security, in a form acceptable to the Bank, which is legally binding. This is what the parties agreed to and which is embodied in their written agreement, in plain unambiguous language.

In *Framer v Maitland* 1954 (3) SA 840 (A), van den Hever JA held at 850 that:

> *"Where the language is plain, I think, the golden canon of interpretation has been crisply stated by Greenberg JA in Worman v Hughes and others 1948 (3) SA 495 at p 505 (A): 'It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what language used in the contract means, i.e. what their intention was as expressed in the contract. From the nature of the function of a suspensive condition it seems to me that this rule should in that case, if anything, be more strictly adhered to than in regard to other terms of a contract. ' "*

It is my considered view that presently, based on the clear and unambiguous words of the contract, the agreed facilities would only be released or honoured by the Bank once the required security had been properly furnished. Unlimited personal deeds of surety were timeously provided but not also a surety mortgage bond. Until that date, the 11th March 2008, the Bank had no obligation to honour cheques of the Company which was in excess of its limits. The Company's defence is that indeed there was such an obligation

and it relies upon that contention for its defence to summary judgment as well as its proposed counterclaim. This is untenable.

Returning to the Defendant's own version, it is stated that the Bank lent and advanced E1 000 000 as working capital in November 2006. In the same breath, it says that an overdraft facility of E 300 000 was afforded to it. What it does not also say is that performance by the

> Bank was subject to a suspensive condition. Further, it accused the Plaintiff of being wrong in failing to honour its two cheques of E 148 000 in February 2008.

[57] What it fails to appreciate is that both the medium term loan and overdraft facility were subject to it being made available only after that time, once the suspensive conditions had been complied with. This was on the 11th March 2008, the date of registration of the bond, an event that made it legally bending. It was from this date onwards that the Company could have issued its cheques, such as to Masonite, and with a legitimate expectation that its bankers would honour it, provided thai it remained within the originally

agreed overdraft limit, or as it could be extended from time to time, in accordance with their agreement. But, not before then, as the Defendants would have wanted it to be.

[58] Until such time that the suspensive conditions of their contract with the Bank had been fulfilled, which event eventually occurred on the 11th March 2008, the operation of the contract of November 2006 remained suspended. In *ABSA Bank Ltd v Sweet and others* 1993 (1) SA 318 (C) at 322 C-F, Tebbutt J (as he then was) said:

"It is trite law that, in a contract which is made subject to a suspensive condition, the rights of the parties created by the contract remain in abeyance pending the fulfilment of the condition ... There is, however, a binding agreement between the parties, which neither can renounce pending fulfilment of the condition".

He then referred, with approval, to the dictum of Van den Heever J (as he then was) in *Odendaalsrust Municipality v New Nigel Estate Gold Mining Companies* quoted above.

It is because the Defendant Company, and likewise the other defendants as well, could not have demanded performance by the Bank until they have fulfilled their side of the bargain by ensuring that the Bank has legally binding security, *in casu* a registered surety mortgage bond, that the suspensive condition remained in place and thereby suspended the obligation of the Bank to honour their cheques. Accordingly, the Defendants cannot rely upon dishonouring of their cheques as a defence, preceding fulfilment of the suspensive condition, as a defence or consequential counterclaim to the claim by the Bank, less so in an application for summary judgment. It does not constitute a triable *bona fide* defence. There was not a breach of contract by the Bank.

[60] Furthermore, the claims by the Bank are in respect of two accounts. In each instance, the claimed amount is the full outstanding balance of indebtedness to itself, in accordance with the conditions under which founds were advanced, subject to repayment upon demand. The two contentious cheques upon which tire Defendants rely as defence represent but a small fraction of the total indebtedness.

[61] Insofar as the purported counterclaim is concerned, over and above what is already stated above, other factors also militate against it. Neither the amount nor extent of the counterclaim is stated. It is not only that unliquidated damages are sought to be based upon alleged breach of contract, but in order to succeed in resisting summary judgment, at minimum it must exceed the amount of the claim itself, unless supplemented by payment or a tender for the balance, which is not the case. In the useful work of *Van Niekerk and others,* Summary judgment - a Practical Guide, 2004 at pages 9-35/36, this much is stated:

"It is generally required that, for an unliquidated counterclaim to constitute a bona fide defence, the quantum of the counterclaim should exceed (or be at least of similar magnitude, but not less) than the quantum of the Plaintiff's claim. The implication hereof is that the Defendant ought to quantify his counterclaim in order to demonstrate that the quantum thereof is at least as much as, or in any event, not smaller than the Plaintiff's claim. Only then is the counterclaim a bona fide

> *defence to the Plaintiff's claim. Should the Defendant have a liquidated counterclaim with a quantum less than the Plaintiff's claim, or if the quantum of the defendant's unliquidated counterclaim is less than that of the Plaintiff's claim, the Defendant should, in order to advance a bona fide defence, pay in the balance".*

The salient principle of this has *inter alia* been followed by Masuku J in Busaf (Pty) Ltd v Vusi E. Khumalo t/a Zimeleni Transport, (unreported Civil Case No. 2839/08) at paragraph 27 and by Diemont J in Groenewald v Plattebosch Farms (Pty) Ltd 1976 (1) SA 548 (CPD) at 550 FG:

> *"I find myself in respectful agreement with Corbett J (as he then was) per Stassen v Stoffberg* 1973 (3) SA 725 *(C) at 729, [a judgment in Afrikaans] that where a defendant in Summary judgment proceedings relies on an unliquidated counterclaim but fail to indicate the amount of such counterclaim, and where it appears that the counterclaim is likely to be substantially less than the main claim, such counterclaim does not constitute a bona fide defence to the action".*

The vagueness of the proposed counterclaim is further exacerbated by the total absence of even an estimated extent thereof, let alone whether it is in excess of the claim against it. As *Corbett J,* as he then was, held in *Stassen v Stoffberg (supra) at 729,* even a substantial counterclaim for an unspecified sum did not *per se* show that a Defendant had a *bona fide* defence to the liquid claim under the contract.

But, if it is of any consolation to the Defendants, as *Visser AJ stated in Citibank NA, South African Branch v Paul No and Another 2002 (4) SA 180 (T) at 197-para 38,* that when holding that the Defendants cannot ward off summary judgment:

> *"After all, if the Defendants do have claims against the Plaintiff, they are not going to disappear if summary judgment is entered for the plaintiff. The Defendants will be free to file any claims which they may have against the plamtiff in due course, if so advised".*

In closing, before it becomes clear that the Defendants cannot ward off summary judgment, two further issues need to be dealt with in order to determine whether or not clutching at them might not salvage the matter. In

doing so, it still requires to be recalled that when the loan and overdraft facilities were agreed to, it was also agreed that repayment would be upon demand by the Bank. The Bank has demanded full repayment of all outstanding debts owed to it by the Defendant Company and the two sureties, further that the main contention in resistance to judgment is that the Bank is blamed for the misfortunes of the Company in that it returned two cheques drawn by the Company in favour of one of its creditors.

I shall soon revert to what was said in contiguous proceedings between the 1st Defendant and Masonite but fact remains that the two returned cheques amount to only a relatively small portion of the totality of the claim and as stated above, the proffered counterclaim is not sustainable as a defence to the claims herein.

The first remaining issue is focused upon an e-mail letter to Masonite. Because of the reliance which the Defendants place upon it, I quote it in full. There is no issue with its authenticity and genuineness but insofar as *estoppel* is concerned, the Plaintiff vigorously contests both the authority of its author to have done so on its behalf, or acting within the course and scope of his duties arising from his employment with the

Bank, as well as the conclusions which the Defendants seek to draw from it.

On the 13 May 2008, one Ntsetselelo Shongwe employed by the Plaintiff, sent an e-mail to the 2nd Defendant, to which he attached his e-mail sent to Masonite, as requested of him. He also said that:

> *"Madhu,* [Madhuman Ramkolovan, 2nd Defendant] *despite the outcome of the request for the re-instatement of the credit limit, we will need to sit down and discuss the E500.000 increases (sic) on the facility".*

The main e-mail from Ntsetselelo Shongwe of the Bank was addressed to two addressees at Masonite.co.za and headed as "Johnny 55 (Pty) Ltd unpaids *{sic)* Standard Bank Account". It reads:-

> *"Afternoon Shirley,*
> *I am Shongwe Ntsetselelo, Business Banking Manager based at Matsapha Branch and Relationship Manager for Johnny 55 (Pty) Ltd.*
> *On the 1Cfh January 2008, we received an application for facilities, amounting to E1, 500,000.00 from the directors of Johnny 55 (Pty) Ltd.*

This application was subsequently sanctioned and structured as follows:

E1, 000,000 Medium
Term Loan E500, 000
Overdraft

On the 21st February 2008 the client issued two cheques with numbers 1187and 1186 both forE159, 576.70 (One Hundred and Fifty Nine Thousand Emalangeni, Five Hundred and Seventy Six Emalangeni and Seventy Cents Only), these were unfortunately returned with answer refer to drawer despite the facilities having been approved at that point and the client being within his limit.

This was due to a misunderstanding between our credit department and their supporting department regarding paperwork that had been sent a couple of days before, and that internal misunderstanding led to paper being returned.

As a result of this, the client has informed us that this has unfortunately led to the cancellation of their credit limit with yourselves that they had been utilizing in the past.

As the Relationship Manager, I wish to apologise to both my client Johnny 55 (Pty) Ltd and Masonite (Africa) Ltd on behalf of Standard Bank that our actions have resulted in the breakdown of the relationship between yourselves and my client.

/ also wish to point out that it had not been our intention to dishonour any item and Johnny 55 (Pty) Ltd remains a valued client of ours.

We would greatly appreciate it if their facilities enjoyed with Masonite were re-instated as they were caused by our in -efficiency which has since been corrected. Kind Regards

Ntsetselelo Shongwe (Mr.)"

Immediately apparent from this e-rnail is that in his capacity as Relationship Manager of the Bank, he apologises for the breakdown of the relationship between the 1st Defendant Company and Masonite (Africa) Ltd, further that it was not the "intention" to dishonour the cheques. He blames if on an "internal misunderstanding despite the facilities having been approved at that point and the client being within its limit".

The latter phrase regularly appears in the affidavit resisting summary judgment but as shown above, the preceding conditions to the loan agreement and overdraft facility had not yet been met by the 21st February 2008 and therefore cannot be branded as technically correct. Indeed the facilities had been approved by that time, but it was subject to conditions that had not yet been met at that time. The Defendant Company could thus not yet have drawn two cheques of E159,576.70 (or E148,000 each as referred to elsewhere) against its overdrawn current account and

expect, as if of right, that its bankers would honour payment under the terms and conditions of its facilities. In the affidavit resisting summary judgment, Mr. Ramkolovan states in paragraph 3.7.3 (page 68 of the record) that each of the two cheques were for amounts of E148,000, not the amount as mentioned in the email.

At that time, the overdraft agreement was not yet fulfilled or with the status of a binding contract, since the conditions precedent had not yet been met at that time. Therefore, it was not factually correct for Shongwe to inform Masonite that the cheques were dishonoured due to a mere internal misunderstanding. The letter of Shongwe could well be termed as being *ultra vires.* It is not now the time to pronounce on any potential liability of Shongwe, but his letter does not suffice to refuse summary judgment on strength of his e-mailed letter. The Bank had no obligation to honour the two contentious cheques in favour of Masonite. Also, it still does not dispose of the obligation by Johnny 55 (Pty) Ltd to repay all outstanding debts against it upon demand by the Bank. Should these two cheques have been cleared by the Bank, honoured as per its wishes, the present claim based on the overdraft facilities would merely have increased the claim to the same extent. The second claim would thus have been

for and amount of E887, 786.36 instead of E568, 632.96, as well as some additional interest. This calculation is based on the amount of the cheques as stated in the e-mail, and not as E148, 000 each as stated by Mr. Ramkolovan.

The Second aspect of estoppel by representation was argued by Mr. Kubheka to be of significance over and above the aforestated issue. The Defendants want the Bank to be tarred and feathered due to the e-mail of Shongwe to Masonite, with the result that summary judgment ought to be refused and with the matter being referred for trial *inter alia* on this basis. It begs the question as to not only whether this issue is triable but if proven at a trial, if it would constitute a valid defence against the claim itself.

[74] Mr. Motsa has advanced cogent and persuasive argument to the contrary. On this point, he relies upon *dictae* in *Mkize v Martins 1914 AD 382 at 390 and Minister of Law and Order v Ngcobo* 1992 (4) SA 822. In the latter judgment, Kumleben JA, with all other four members of the AD concurring, referred with approval to the former case as a statement of principle at 826 H-I that:

> *"(A) master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely per his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during; his employment",* (emphasis added).

[75] In casu, Shongwe wrote the e-mail while being an employee of the Plaintiff, but he was neither authorised nor mandated to do so in the course and scope of his duties by any account. Seemingly, although not proven by evidence, he acted on a frolic of his own in trying to accommodate a client of the Bank. He erred in doing so, portraying a factual position quite incorrectly, to favour his client. Otherwise put, while the servant was engaged in the affairs of his master, he seemingly uninformedly and incorrectly performed the work entrusted to him by his master, the Bank. He made a misrepresentation to Masonite about the internal affairs of his Bank, as well as the

creditworthiness of the Bank's client, Johnny 55 (Pty) Ltd.

[76] In doing so, it is my considered view that it does not deprive the Bank of its claim against the Defendants, nor does it afford the Defendants a triable defence, which if proven at trial, would warrant a refusal of judgment against it. Summary judgment should therefore not be refused on the basis of vicarious liability or estoppel, over and above the other aspects already stated above.

[77] Furthermore, the defence of estoppel has not been pleaded as such but raised in argument by Mr. Kubheka. Nevertheless, even if it was so pleaded, it does not alter the outcome of the application.

[78] Finally, even though credibility of witnesses on affidavit is not the yardstick by which summary judgment applications are measured, the Bank pointed at a not insignificant deviation by Mr. Ramkolovan in the present matter and one preceding this case.

[79] In a matter against the same Defendants but with Masonite (Africa) Ltd as Plaintiff, brought under case number 1449/08 (Annexure JI page 171 of the record), Mr. Ramkolovan sought rescission of the judgment therein on a different basis. He did not then blame Standard Bank for dishonouring cheques of Johnny 55 as the root of the problem. Instead, he blamed Masonite with regard to delivery problems and not unpaid cheques. In that claim, two amounts of E143, 993-02 each were claimed, neither being E148, 000 nor E159, 576-70.

[80] However, despite the apparent anomaly, no adverse inference can be drawn from it to impugn the credibility of Mr. Ramkolovan in the present application, as sought by the Bank.

[81] The bottom line of the application for summary judgment remains that the 1st Defendant agreed to the terms embodied an Annexure "A". The Defendants are unable to convince this court that they have a triable defence which must be ventilated at a trial and which could absolve it against the two claims. The purported counterclaim does not pass muster either.

The 2nd and 3rd Defendants stand to be liable for debts of the 1st Defendant, if it cannot satisfy judgment against it, to the extent of their liabilities as sureties. This includes executing the bonded property of the 2nd Defendant.

In the event, it is ordered that judgment be entered in favour of the Plaintiff against all three Defendants, jointly and severally, one to pay the other absolved, as follows:-

> Claim 1: Payment of the sum of E1,066,018-93, being in respect of monies lent and advanced as a medium term loan, plus interest at the rate of prime plus 3% a *tempore morae* to date of final payment, and costs of suit on the agreed scale of attorney and own client, including collection commission. It is further ordered that the property described as Lot 534, Manzini Extention number 6 Township, situate in the District of Manzini, measuring some 1000 square metres and held by the Mortgagor under Deed of Transfer No. 14/1986 dated the 29th January 1986, under surety Mortgage Bond number 226 of 2008 in favour of Standard Bank Swaziland Limited, be declared executable.

Claim 2: Payment of the sum of E568,632-96, being in respected monies lent and advanced as an overdraft, facility, plus interest at the rate of prime plus 6% a *tempore morae* to date of final payment, and cost of suit on the agreed scale of attorney and own client, including collection commission.

JACOBUS P. ANNAN DALE_
JUDGE OF THE HIGH COURT