IN THE COURT OF APPEAL FOR THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CASE NO. CACLB-070-09
HIGH COURT CASE NO. MAHLB-000256-09

In the matter between:

EUROPEAN INVESTMENT BANK **APPELLANT**

And

DIAMONEX LIMITED **RESPONDENT**

Advocate S.C. Vivian, with him Attorney K. Alidi for the Appellant
Advocate D.P. De Villiers, with him Mr. Attorney M. McKee for the Respondent

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J U D G M E N T

CORAM: **McNally AJP**
Ramodibedi JA
Howie JA

McNALLY AJP:

1. There are really three parties involved in this appeal. The European Investment Bank (the Bank) lent a considerable amount of money to Diamonex (Botswana) Limited (DBL) a wholly owned subsidiary of the respondent, an Australian company which I shall call Diamonex. DBL was seeking to develop a diamond mine in Botswana but it ran into financial difficulties. The Bank sought to recoup its investment by claiming

the amount from Diamonex, relying on a Deed of Pledge (the pledge) signed by the latter in favour of the Bank.

2. It was, and is, the contention of Diamonex that it is not liable to the Bank under the Pledge, for DBL's debt. The answer to this dispute will resolve the only point in issue. The High Court found in favour of Diamonex, hence the appeal.

3. Extensive submissions have been made to us about the general law of pledge, and about the general law concerning the interpretation of documents. I think it is preferable to begin by examining the pledge document itself. I will not reproduce the whole document, but will cite relevant passages as I come to deal with them.

4. It appears from clause 1 that Diamonex acknowledges that it was or might become liable to the Bank pursuant to the "Facility Agreement" between the Bank and DBL. Indeed that Facility Agreement provides in Clause 8 of its preamble-

> "The financial obligations of the borrower (DBL) hereunder are to be secured by
>
> i) …
>
> ii) A guarantee and indemnity (the guarantee) from Diamonex Limited (the guarantor)"

5. These references to a guarantee are significant. They are the first of many indications that it was the intention of both (indeed all) of the parties that Diamonex

would guarantee the indebtedness of DBL to the Bank. Such a guarantee would complete the triangle of responsibility.But that guarantee was never signed. Whether this was due to negligence on the part of the Bank or to unconscionable behaviour on the part of Diamonex, or to a combination of both, has never been made clear. The bank now claims that it relies on the pledge, and that the guarantee was unnecessary. Diamonex insists that no liability on its part for the indebtedness of DBL arises from the pledge standing alone. I shall return later to this question of the guarantee.

6. Clause 2 of the pledge begins with words which seem to make it clear that the debts secured are the debts of Diamonex. It reads

> "In security for the due payment of all debts and monetary liabilities of the Pledgor …"

7. However it continues, and this is perhaps the high point of the Bank's argument-

> "…and without further limiting the generality of the aforegoing, whether such debt, monetary liabilities or obligations:
>
> a) …
>
> b) …
>
> c) be incurred by the Pledgor individually or jointly with others <u>or by any firm in which the Pledgor has or holds or may hereafter have or hold any interest</u>". (my emphasis)

8. The first question is whether the word "firm" includes "company".The learned trial judge was prepared to accept that it might do, in a proper case. I would agree. My difficulty, on the facts of this case, is that DBL is referred to on numerous occasions in this Pledge as "the Company". Had it been the intention to include DBL under this sub-section one would have expected it to read:-

"or by the company or by any firm…"

9. As it stands, and if the word "firm" is to be taken to include "company", the extent of the pledge would be ridiculously wide. As pointed out by the learned judge, it would mean that the pledgor accepted responsibility for the indebtedness to the Bank of any listed company in which the Pledgor held a few shares. I am satisfied therefore that the word "firm" here must be given its ordinary and more restricted meaning of "partnership". Mr. Vivian has produced before us the decision in R. v. GROUNDLANDS 1915 OPD 100. All the judges in that case agreed that in the particular circumstances of Ordinance 10 of 1903 the normal meaning of "firm" (a partnership) had to be extended to include "company". There is no such compulsion in the present case.

10. This view is fortified when one looks at the very next sub-section, which is clearly intended to refer to the indebtedness of DBL. Sub- section 2(d) refers to –

> "….security for the share payment of the debts and monetary liabilities of the Pledgor… whether such debt, monetary liabilities or obligations:
>
> a)…
> b)…
> c)…

d) arises (sic) through any acts of suretyship, guarantee, warranty, indemnity or other undertaking signed by the Pledgor solely or jointly with others or otherwise."

11. I say this sub-clause is clearly intended to refer to the indebtedness of DBL because throughout the history of the relationship between these three parties it is evident that a guarantee was to be signed by Diamonex to cover the indebtedness of DBL to the Bank. I turn now to deal with that history.

12. The original Finance Contract between the Bank and DBL was signed on 17 and 24 October 2007. this was later referred to as "The Facility Agreement". In that agreement, it was provided, in Clause 8 of the Preamble, as already noted in paragraph 4 above, that a guarantee was to be provided by Diamonex.

13. In accordance with that preamble there was a provision in the main part of the agreement, Clause 7.01, which reads -

"The obligations of the Bank hereunder are conditional upon (i) the prior creation and perfection of first ranking security interests over the assets of the BORROWER, including pledges over bank accounts, the licence and equipment as further described in schedule C and (ii) upon the prior execution and delivery to the BANK of the duly executed Guarantee in form and manner satisfactory to THE BANK whereby the guarantor unconditionally guarantees the due performance of THE BORROWER's financial obligations under this Contract, and grants THE BANK an indemnity against all losses charges and expenses to which THE BANK may be subject or which the bank may incur under or in connection with the contract or the guarantor.

(The guarantor is Diamonex).

14. A draft guarantee was provided by the Bank to Diamonex on 5

June 2007. There was no meaningful response by Diamonex.

15. The Pledge was signed by Diamonex on 17 December 2007.

16. Despite its present contention that the Pledge was intended to replace the proposed guarantee, the Bank wrote to DBL on 19 December 2008, a year after the signing of the Pledge, for the attention of both DBL and Diamonex, to say –

> "6. <u>Guarantee and Indemnity Agreement</u>
>
> As mentioned under Art 7.01 of the Finance Contract, we would like to remind you that the Guarantee Agreement still remains to be finalized. For this purpose we have attached to this letter a draft guarantee and Indemnity Agreement to be entered into by Diamonex LTD."

A further reminder was sent on 6 January 2009, accompanied by a gentle threat, which was never carried into effect.

17. I am at a loss therefore to understand how Mr Marciano, speaking for the Bank, could say, in an affidavit dated 2 September 2009, at paragraph 7.3 –

> "However, in disbursing the funds, the pledge was accepted in lieu of the guarantee. There was no intention, at the time when the pledge was signed, for a guarantee to be signed."

All the evidence suggests otherwise.

18. There has been some dispute over whether the Pledge is a "stand alone" document. This is a slightly confusing expression. Strictly speaking it is a "stand alone" document in the sense that it can stand alone to secure the obligation of the Pledgor to the Bank. The Pledgor of course contends that it has no obligations to the Bank. However if

it is to be interpreted to mean that, standing alone, it covers the obligations not only of the Pledgor to the Bank, but also of DBL, then that is a different matter. I have already expressed my disagreement with that interpretation.

19. The bank has sought to rely on the letter of 19 April 2008 from DBL's attorneys to the Bank. That letter however, was not written in response to the question "Can the pledge make the Pledgor liable for a debt owed by DBL to the Bank?" Paragraph 4.3 of the letter reads:

> "The Security Documents constitute legal, valid binding and enforceable obligations of the Company enforceable in accordance with their terms and are effective to create in favour of the European Investment Bank first – ranking security expressed to be created there under."

20. Insofar as that paragraph can be taken to mean that the Pledge, without a guarantee, makes Diamonex liable to the Bank for the debts of DBL, I would have to say that I do not agree. I note that in terms of clause 1.04 of the Facility Agreement, dealing with "Condition of Disbursement" it is stated –

> "A. Disbursement of the first tranche under Article 1.02 is subject to fulfilment of each of the following conditions to the satisfaction of THE BANK falling 15 days preceding the Proposed Disbursement Date.
>
> i) a legal opinion shall have been issued covering inter alia the capacity of THE BORROWER to enter into this contract
> ii) …
> iii) ..
> iv) The Security Documents and the guarantee have been signed to the satisfaction of THE BANK in accordance with Article 7 and the respective legal opinions have been issued."

21. Finally on this aspect I note that the letter of 18 April 2008 is written by the attorneys acting for DBL, not for Diamonex. It speaks of "the obligations of the Company (i.e DBL)"and not the obligations of Diamonex. I do not think it assists the bank in its claim against Diamonex.

22. The last of the possibly relevant sections of the Pledge is section 2.9.The content of the section is more significant for what it does not say than for what it says. It does not say "The Pledgor shall become liable to EIB for the full amount of the obligations of the company (DBL) 'instead, it says that "EIB shall be entitled… to cause the shares to be sold in execution in which event the proceeds will be applied in reduction of any and all of the amounts <u>due by the Pledgor to EIB</u> (my emphasis)" and "make demand upon the company (DBL) for the payment…"

23. Without a guarantee that provision is ineffective.

24. Much has been said about interpreting the pledge "in its factual matrix." In my view the factual matrix includes the fact that the documents were drafted in the expectation that the guarantee would be signed.

25. I would dismiss the appeal with costs and with regret.

N.J. McNALLY
ACTING JUDGE PRESIDENT

I AGREE:

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I AGREE:

C.T. HOWIE
JUSTICE OF APPEAL

DELIVERED IN OPEN COURT THIS 29TH OF JANUARY 2010