THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 477/2002

In the matter between:

MICHAEL DE VILLIERS, N.O. First Appellant

BRIAN BASIL NEL, N.O. Second Appellant

and

BOE BANK LIMITED Respondent

Coram: *Howie P, Streicher, Navsa, Heher JJA* and *Van Heerden AJA*

Date of hearing: 29 August 2003

Date of delivery: 26 September 2003

Summary: **Claim based on three loan agreements — lack of formal resolution by company — whether in prevailing circumstances agreements authorised — whether provision that waiver of suspensive conditions be *in writing only* enforceable.**

JUDGMENT

NAVSA JA:

[1] During December 2000 the respondent company, BOE Bank Limited ('the bank'), instituted action in the South Eastern Cape Local Division of the High Court against the appellants in their capacity as joint liquidators of Intramed (Pty) Ltd (in liquidation). The claim which is the subject of this appeal is for payment of a total amount of R101 458 341-07 plus interest. The claim is based on three separate but similar written loan agreements ('the loan agreements'), concluded on 17 June 1999 (less than six months before the winding-up), in terms of which amounts of R40 million, R20 million and R40 million respectively would be lent and advanced to Intramed (Pty) Ltd ('Intramed') against a number of securities namely, a notarial bond over Intramed's moveable assets, a continuing covering mortgage bond over fixed property, a cession of book debts and deeds of suretyship. The amounts outstanding on the loan agreements became due and payable on the winding-up of the borrower.

[2] On 3 June 2002, Ludorf J, who heard the matter, held in favour of the bank. The full extent of the order made by him is as follows:

'A. The Defendants are ordered to pay to Plaintiff:

(i) The sum of R 20 489 275-47 plus interest thereon at 17.25% per annum from 29 November 1999 to 12 September 2000;

(ii) The sum of R 40 926 423-88 plus interest thereon at 17.2% per annum from 29 November 1999 to 12 September 2000.

(iii) The sum of R 40 042 641-72 plus interest at 17.2% per annum from 29 November 1999 to 12 September 2000.

B. I declare that the claims by the Plaintiff are secured by the securities which are annexures "G", "I" and "J" to the Plaintiff's particulars of claim.

C. The Defendants are ordered to pay the costs of suit including the costs of two Counsel on the scale as between attorney and client.'

[3] Ludorf J subsequently granted the appellants leave to appeal to this Court. The three questions posed in the appeal are as follows:

(i) whether the loan agreements, the cession of book debts and the registration of the notarial and mortgage bonds on which the learned judge in the Court below based his order were duly authorised by Intramed;

(ii) whether the total of R100 million advanced in terms of the loan agreements was received by Intramed; and

(iii) whether the non-fulfilment of a suspensive condition in each of the loan agreements caused them to lapse.

[4] I will for the sake of convenience refer to the appellants as the liquidators.

[5] The liquidators contend that Alan Stanley Hiscock ('Hiscock'), who signed the loan agreements on behalf of Intramed, could not bind it as he purported to because he was not a director of Intramed and was not authorised by Intramed by way of a formal resolution or in any other acceptable manner. They contend further, that since the R100 million advanced in terms of the loan agreements was paid to Macmed Health Care Limited ('Macmed') without Intramed's authorisation, the latter had not received the money and was under no obligation to repay the loans in question. They submit that the Court below erred in concluding that they were liable to pay the amounts in question.

[6] The background against which this appeal is to be decided is set out hereafter.

[7] Macmed was a company listed on the Johannesburg Securities Exchange, operating almost entirely through subsidiary companies and joint ventures in the health care industry. The loan agreements were negotiated and concluded against the background of a decision by Macmed to acquire from Aspen Healthcare Holdings Limited ('Aspen') parts of the business of South African Druggists Limited (SAD) conducted under the style of 'Intramed' and 'Serevac', as well

as the shares and loan accounts held by SAD in Fine Chemicals (Pty) Limited, for a total of R500 million ('the acquisition').

[8] On 2 March 1999, whilst Aspen was in the process of purchasing the businesses from SAD, a document embodying heads of agreement was signed on behalf of Aspen and Macmed, the terms of which ultimately regulated the acquisition.

[9] The purchase price of R500 million was to be raised by way of a rights offer of R200 million, plus R200 million from Macmed's own cash resources and bank facilities of R100 million.

[10] To raise the last mentioned R100 million Macmed entered into negotiations with the bank, which agreed to advance the money to Macmed or its nominated subsidiary. The nominated subsidiary was ultimately Intramed.

[11] Intramed was formerly known as Zenith Medical and Surgical Supplies (Pty) Ltd ('Zenith'), but Macmed caused its name to be changed so that it could be used as a vehicle for the acquisition and operation of the established business known as 'Intramed'. Zenith was a shelf company and was intended to be a receptacle for the Intramed business to be acquired from SAD. Intramed was thus

brought into being by Macmed for the specific purpose of housing the business to be acquired.

[12] In accordance with Macmed's *modus operandi* of conducting its business, mainly through subsidiaries which it controlled, the shares in Intramed were transferred to Macmed Investments (Pty) Limited (Macmed Investments), which was wholly owned by Macmed. Thus, Macmed became Intramed's ultimate holding company.

[13] On 17 June 1999 Mr Gregory James Heron ('Heron'), the bank's general manager (structured finance), authorised by the bank, signed each of the loan agreements on its behalf. On the same date, Hiscock signed these agreements 'for' Intramed and Macmed.

[14] In accordance with the facility letter dated 24 May 1999 sent by BOE to Macmed confirming approval of the R100 million loan to Macmed 'and for its nominated subsidiary', the loan agreements identified Intramed as the borrower.

[15] Each of the loan agreements contain similar terms concerning repayments, interest and default by the borrower. They each make provision for security to be furnished in one or more of the forms referred to earlier.

[16] The first covering notarial bond hypothecating movable assets which was in terms of one of the loan agreements to be executed by Intramed in favour of the bank, was registered on 16 August 1999; the first continuing covering mortgage bond over specific fixed property (the Intramed factory) which was in terms of another of the loan agreements to be executed by Intramed in favour of the bank was registered on 16 August 1999; and the cession of book debts required in terms of the third loan agreement, was signed by Hiscock, purporting to act on behalf of Intramed, on 17 June 1999. On this last mentioned date, Hiscock also signed a deed of suretyship in terms of which Macmed bound itself as surety in favour of the bank for all the debts owed by Intramed to the bank, as was required in terms of each of the three loan agreements.

[17] It is common cause that:

(i) on 18 June 1999, pursuant to the loan agreements and acting on the instructions of Hiscock, the bank paid R100 million into an account held at Standard Bank, called SCMB Macmed Rights Offer, Customer no. 68802, Account no. 278037;

(ii) three instalments as provided for in the loan agreements totalling R5 962 153-74 were paid by Intramed to the bank during July, August and September of 1999;

(iii) after September 1999 Intramed discontinued making payments and was placed in provisional winding-up on 29 November 1999, which order was confirmed on 16 February 2000;

(iv) on 31 March 2000 the liquidators sold the Intramed business for R153 million;

(v) on 12 September 2000 the liquidators paid the bank an amount of R100 million subject to the outcome of the action instituted in the Court below.

[18] The Court below in coming to the conclusion that the loan agreements and the underlying securities were duly authorised had regard to the fact that, at the time of the conclusion of the loan agreements, Hiscock was the principal figure behind the Macmed group's business success and growth. The acquisition was his brainchild. Ludorf J had regard to the importance of the acquisition to the group in general and to Macmed in particular, and concluded from

the evidence that the directors of Macmed and its members were well aware of and in favour of the acquisition.

[19] The learned judge also had regard to a resolution by Macmed ratifying the acquisition (ordinary resolution number 1) and a second resolution (ordinary resolution number 2) passed by its members on 18 June 1999 at a general meeting of shareholders in the following terms:

> 'It was agreed that *any director* of the Company be and *is* hereby *authorised to* sign all such documents and *do all such other acts as may be necessary* to implement Ordinary Resolution Number One.'

(emphasis added)

[20] Ludorf J took into account that at some stage prior to the passing of the resolutions it was common knowledge that the majority of the members of Macmed were in favour of passing the resolutions so that the actual passing thereof was a foregone conclusion. He reasoned that the directors were authorised to act not only on behalf of Macmed but also on behalf of Intramed because the latter was a wholly owned subsidiary of Macmed through Macmed Investments. He considered that the terms of the second resolution, particularly the last emphasised part in the preceding paragraph, warranted the

conclusion that a delegation by a director or directors of Macmed to Hiscock was authorised.

[21] Although the said resolution was passed the day after the loan agreements were signed, Ludorf J reasoned that the resolution was no more than the formal embodiment of the pre-existing unanimous assent on the part of members of Macmed to do something *intra vires* the company.

[22] In considering the correctness of the conclusions reached by the Court below it is necessary to have regard to:

(a) the role played by Hiscock within the Macmed group and its subsidiaries;

(b) material events leading up to the conclusion of the loan agreements, including events in which Hiscock and the directors and shareholders of Macmed and of Intramed played a role;

(c) events subsequent to the conclusion of the loan agreements, including those in which the actors described in (b) played a role.

[23] The evidence shows that there were three leading figures in the Macmed group of companies: Donald Ian McArthur (‘McArthur’), the

managing director and chairman of the board of directors of Macmed, Robin Frank Maguire ('Maguire'), an executive director of Macmed Consumables, the division in which Intramed was housed, and Hiscock, the Macmed company secretary and its *de facto* financial director. Maguire and McArthur were the only directors of Macmed Investments which, as stated earlier, held all the shares in Intramed.

[24] Hiscock was an unrehabilitated insolvent and thus statutorily barred from taking up any directorships within the group. His official designation was that of Macmed's company secretary. Within the Macmed group Hiscock was regarded as the ultimate financial authority and his authority over subsidiaries was unquestioned.

[25] McArthur himself considered that Hiscock was the powerhouse of the group and largely responsible for its then growing success.

[26] Over a number of years during which he exercised overall financial authority within the group Hiscock negotiated, concluded and executed numerous contracts on behalf of Macmed and its subsidiaries. It appears that there was never in this regard a challenge to his authority by any of the directors of either Macmed or of its subsidiaries or by any shareholders of Macmed.

[27] I turn to deal with the involvement of shareholders and directors of Macmed and Intramed in events surrounding the conclusion of the loan agreements.

[28] On 4 March 1999 there was a report by Hiscock to the Macmed board on developments in the acquisition. It appears from the minutes of the relevant meeting that Aspen had agreed to a due diligence enquiry and that the acquisition was being pursued.

[29] On 30 April 1999 a circular to Macmed shareholders was issued concerning the rights offer that was an integral part of the financing of the acquisition.

[30] Before the loan agreements were signed Hiscock was hard at work to ensure that Macmed and Intramed complied with their obligations in terms of the heads of agreement signed in March 1999. He negotiated and secured the loan facility with the bank. He visited the Intramed factory to ensure that the assets were properly catalogued and valued. As described earlier, the necessary steps were taken to locate Intramed within a stand-alone wholly-owned subsidiary company. Hiscock also recruited Intramed's financial director, Albertus Petrus Marais ('Marais') from its predecessor.

[31] All the activity and the underlying transactions generated excitement within Macmed. The group was abuzz with anticipation that the acquisition would be the most important transaction of its existence.

[32] Legislation required that the managing director of a pharmaceutical company, such as Intramed, be a registered pharamacist. To that end Macmed appointed John Kok managing director of Intramed on 19 May 1999, with effect from 11 June 1999. The letter of appointment was written by McArthur in his capacity as Chief Executive Officer of Macmed and records that Kok's appointment is at the instance of Macmed's board of directors.

[33] On 26 May 1999 McArthur, Maguire, Kok and Marais were appointed directors of Intramed. This appointment is somewhat strange as the relevant resolution suggests that they appointed themselves. However, it has not been suggested that they were disqualified from acting as directors of Intramed or that that they lacked authority to act on its behalf. On the contrary, the liquidators adopt the position that these directors of Intramed ought to have been formally consulted before the loan agreements were signed and that a specific formal resolution by them authorising the loans in question

was required. They submit that this was required because Intramed was a distinct legal *persona* which had to act in its own name and in terms of its articles of association.

[34] On 26 May 1999 Hiscock reported to the Macmed Board that the acquisition was almost finalised and would add meaningfully to the group's stature and earnings potential.

[35] On 3 June 1999 a circular was distributed to Macmed shareholders incorporating a notice of a general meeting formally to approve the acquisition.

[36] On 14 June 1999 the directors of Macmed passed a resolution authorising Hiscock to sign the deed of suretyship (by Macmed) in favour of the bank (as required by the loan agreements) which he then duly did on the same day.

[37] Extracts of minutes of an Intramed directors' meeting on 14 June 1999 reflect resolutions authorising:

(a) the borrowing of R60 million against the security of a mortgage bond over immovable property and a cession of book debts;

(b) the borrowing of R40 million against the security of a special notarial covering bond over moveable property;

(c) Hiscock to sign the necessary documents in respect of the acts referred to in (a) and (b).

Maguire signed the extracts of the minutes. There is a dispute about the second signatory to the minutes, which, for reasons that will become apparent, it is not necessary to resolve.

[38] On 14 June 1999 Hiscock signed a power of attorney on behalf of Intramed authorising the registration of the mortgage bond in favour of the bank.

[39] On 17 June 1999, the day on which the loan agreements were signed, Hiscock signed a cession of book debts to the bank on behalf of Intramed as required by one of the loan agreements. On the same day, Marais and Gayronisa Rahim, an accountant employed by Intramed as a financial manager, signed debit order instructions on the Intramed bank account for repayment of each of the three loans.

[40] On 18 June 1999 Macmed shareholders adopted the two resolutions referred to in paragraph [19]. On the same day Hiscock instructed the bank to pay the R100 million into the rights offer account referred to earlier in this judgment. The bank complied.

[41] On 18 July 1999 Intramed paid instalments to the bank on each of the three loans totalling R1 972 604-24.

[42] On 20 July 1999 Hiscock signed a power of attorney on behalf of Intramed for the registration of the special notarial bond in favour of the bank.

[43] On 16 August 1999 the mortgage bond over immovable property was registered in favour of the bank. On the same day the notarial bond by Intramed was registered in favour of the bank.

[44] On 18 August 1999 Intramed paid instalments to the bank on each of the three loans totalling R1 995 985-76.

[45] On 18 September 1999 Intramed paid instalments to the bank on each of the three loans totalling R1 993 563-74.

[46] It is clear from Marais' testimony that he was employed in management at SAD at the time that the acquisition was being negotiated. He became aware of the implications of the acquisition towards the end of March 1999. He understood how Macmed would structure the acquisition and knew how Intramed would function within the Macmed group. He was actively involved in setting up Intramed and in starting up its operations. Testifying about his interaction with Kok about the acquisition and its implementation he

said the following:

'Mr Kok and myself had daily discussions, and I would inform him, as a colleague I would inform him of what was happening, and on some issues obviously he did not have maybe the technical financial experience, but nevertheless he was informed, and we would discuss issues around the company and the formation, and also what administration was happening at that stage, that he was kept up to date.'

[47] At the beginning of June 1999 Marais became aware of the fact that Intramed's assets were being used as security to obtain a loan from the bank. He was also aware of the revaluation of the immovable property on which the Intramed factory was situated. According to Marais he discovered later in June 1999 that Intramed was borrowing the R100 million from the bank. Although he was the financial director of Intramed, Marais unquestioningly took instructions from Hiscock but he was somewhat disappointed by the fact that Intramed, the company he had just joined, was borrowing a substantial amount of money. He informed Kok about the loan. Kok apparently registered some protest but Maguire explained that it was necessary. It is clear that Kok and Marais decided to abide the decisions to conclude the loan agreements, albeit perhaps grudgingly.

[48] Marais conceded that a formal resolution authorising or ratifying the loan agreements was never passed by Intramed's four directors. As far as he was concerned, Hiscock, as the financial head of Macmed, had the authority to sign the loan agreements. As was the case with the other subsidiaries of Macmed, Intramed was an operational arm within the group and operated under instructions from corporate headquarters. In June 1999 Intramed required an overdraft facility at the bank and could only acquire one with Hiscock's approval.

[49] It is true that at one stage under cross-examination Marais stated that Macmed had borrowed R100 million against the Intramed assets. However, Marais later testified that he provided for the R100 million loan in Intramed's budget, made calculations and concluded that Intramed could repay the loan. In August 1999 he received the three loan agreements and reflected the R100 million as a loan by Intramed from the bank in Intramed's accounting records. Up until that time the total paid for the Intramed business was reflected in Intramed's books of account as an amount of R425 million, owing to Macmed. From August 1999 onwards that amount was reduced to

R325 million, with the remaining R100 million recorded as being owed to the bank by Intramed.

[50] I will now have regard to the relevant section of Intramed's articles of association before considering, against the factual matrix set out in the preceding paragraphs, whether the conclusion of the Court below in respect of the primary issue were correct.

[51] Article 57 of Intramed's articles of association provides:

'Unless otherwise determined by the company in general meeting, or by a meeting of the directors (at which all directors are present), the quorum necessary for the transaction of the business of the directors shall be a majority of the directors for the time being in office. A resolution of directors shall be passed by a majority of the votes of the directors present at the meeting at which it is proposed.'

[52] Of course, principles of good governance of companies dictate that resolutions should be properly taken at general meetings or meetings of directors after due and proper deliberation. This does not mean, however, that in instances where this course is not strictly followed the directors cannot otherwise bind a company.

[53] It has never been suggested that the loan agreements or the underlying securities were not *intra vires* Intramed. It is abundantly clear that the directors of Intramed, both before and after the

conclusion of the loan agreements, knew about them. McArthur, the Chief Executive Officer of Macmed which was aggressively pursuing the acquisition, was also a member of the board of Intramed and of Macmed Investments. His assent to the loan agreements and the underlying securities can hardly be questioned. As shown earlier the Macmed board was kept apprised of developments in the acquisition and its execution. Maguire, a Macmed director and a director of Macmed Investments, signed the relevant extracts of the minutes of Intramed recording the resolutions flowing from the acquisition. Maguire was also a member of the Intramed board and was actively involved in the acquisition. His approval of the loan agreements can also not be questioned. On Marais' uncontested evidence he and Kok both knew about the loans and decided to abide by them.

[54] In these circumstances the lack of a formal resolution by the directors of Intramed, either authorising the conclusion of the loan agreements or ratifying it, is not fatal to the bank's claim. See *Alpha Bank Bpk en Andere v Registrateur van Banke en Andere* 1996 (1) SA 330 (A) 348G-I where the following appears:

'Ook is daar geen meriete in die punt dat daar nie 'n skriftelike resolusie was van Alpha Bank se direksie dat Van der Walt die relevante toestemming

mag teken nie. . . . Die direksie van ‘n maatskappy kan deur eenparige toestemming afstand doen van die formele vereistes wat resolusies betref (*Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) op 693E-694F). Insoverre een direkteur nie vooraf sy toestemming gegee het nie omdat hy oorsee was, is dit duidelik dat hy na sy terugkeer in die direksie-besluit berus het (sien *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 te 217-18; *Dickson v Acrow Engineers (Pty) Ltd* 1954 (2) SA 63 (W) te 65B, 69D-E). Vir twee-en-‘n-half jaar na die in-kuratele-stelling het geen lid van die direksie daarteen beswaar gemaak nie. Die waarskynlikhede is oorweldigend dat die direksiebesluit geratifiseer en tans onaanvegbaar is.’

[55] In *Randcoal Services Ltd and Others v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (SCA) at 840G-H the following appears:

‘I am therefore of the view that all the respondent’s directors had at least impliedly resolved to authorise the conclusion of the substitution agreement as amplified by Heyns’ letter. I am not unmindful of the fact that this resolution was not adopted at a properly convened board meeting. But the doctrine of unanimous assent does not require that all the directors should meet together. . .’

[56] In the present case the acquisition was at the instance of Macmed. Intramed was brought into life to serve Macmed’s purpose. All the subsidiaries in the group were subjected to control from

headquarters. The directors of Intramed accepted this method of operation and acquiesced in the decisions made by Macmed in respect of the acquisition. From a logistical point of view one can understand why the acquisition and the loan agreements were negotiated before Intramed came into existence.

[57] Not only did all the directors of Intramed acquiesce in the transactions in question, but the directors of their immediate holding company, Macmed Investments (Maguire and McArthur) consented to and were actively involved in finalising the acquisition. This included the conclusion of the loan agreements. The shareholders of Macmed, Intramed's ultimate holding company, passed formal resolutions authorising the acquisition including all such acts as were necessary to ensure that it was finalised. To sum up, shareholders and directors of Intramed all authorised the loan agreements and the underlying securities.

[58] Even though Ludorf J's reasoning is not entirely consonant with what is contained in the preceding paragraphs, his conclusion that the loan agreements and the underlying securities were authorised is in my view correct.

[59] At this point it is necessary to deal with the second issue in this appeal, namely, whether the R100 million was received by Intramed. There is no merit in the submission that, because the R100 million was required by Macmed as part of the financing of the acquisition and because it received the R100 million in its 'rights offer' account, *it* was the borrower and should be liable for the repayment. A borrower is entitled to nominate the person to whom money it has borrowed should be paid. This does not mean that the borrower ceases to be the borrower. Against the facts spelt out earlier in this judgment it is clear that Intramed borrowed the money from the bank, nominated the Macmed rights offer account as the payee, paid three instalments and in all the circumstances can rightly be considered to have received the R100 million.

[60] I now turn to deal with the question whether the agreement lapsed because of the non-fulfilment of a suspensive condition. Each of the loan agreements contains the following suspensive conditions:

'2.1 This agreement is subject to the fulfilment of the following suspensive conditions to the satisfaction of BOE by no later than 17 June 1999.

2.1.1 final unconditional duly completed agreements satisfactory to BOE, being duly signed by all parties thereto recording the purchase and sale of the business from Aspen Healthcare Holdings Limited to the borrower.

2.1.2 BOE being placed in possession of, and approving, the final audited annual financial statements of Macmed for the year ended 31 March 1999;

2.1.3 the loan agreements to finance the acquisition by the borrower of the immovable and movable assets of the business are signed by all parties and become unconditional;

2.1.4 the guarantee issued by BOE to Standard Corporate and Merchant Bank on behalf of Macmed in the amount of R30 000 000,00 (thirty million Rand) being cancelled and returned to BOE without having been presented for payment;

2.1.5 the provision of the security required in terms of 7.'

The suspensive condition in question is contained in clause 2.1.1. It is common cause that no final agreement as contemplated therein was submitted to the bank for scrutiny and that the condition was not waived in writing by the bank. Aspen and Macmed were ultimately content to have the acquisition regulated by the heads of agreement referred to earlier. The conditions contained in clauses 2.1.2 to 2.1.5 were fulfilled after a number of written extensions by the bank.

[61] Clause 2.2 of each of the loan agreements provides:

'The suspensive conditions referred to in 2.1 are stipulated for the benefit of BOE which shall be entitled, in writing only, to waive any or all such conditions or to extend the date by which any or all of them must be fulfilled. If any of the above conditions are not waived or fulfilled by the date set out in 2.1 or such later

date as agreed by BOE, then this loan agreement shall lapse and be of no further force or effect.'

[62] Clause 9.7 of the one loan agreement and clause 11.7 of the other two provide:

'No contract varying, adding to, deleting from or cancelling this agreement, and no waiver of any right under this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.'

[63] The submission in the alternative on behalf of the liquidators is that, in terms of clause 2.2, the loan agreements had lapsed with the result that restitution should occur.

[64] It was contended on behalf of the bank that, since clause 2.2 was stipulated for its benefit, the requirement that waiver could only be effected in writing could also be waived by it. It was submitted further that it is clear from the evidence that the bank in fact waived the condition in question.

[65] The Court below held that the requirement that waiver be in writing was a condition solely for the benefit of the bank which it could waive. The Court found that on the evidence an oral waiver by the bank had been proved and that the loan agreements were of full force and effect despite the non-fulfilment of the condition.

[66] The material facts against which the dispute concerning the interpretation and application of clauses 2.1.1, 2.2, 9.7 and 11.7 is to be decided are set out in paragraphs [67] to [72] hereafter.

[67] In respect of two loan agreements, the bank, on 17 June 1999, in writing, extended until 18 June 1999 the period within which condition 2.1.1 had to be met. In respect of the remaining loan agreement the bank extended the period until 25 June 1999. On 18 June 1999 the period in respect of the first two loan agreements was further extended by the bank in writing to 25 June 1999.

[68] On 18 June 1999, the day on which the R100 million was paid into the Macmed's rights offer account, an internal bank e-mail written by Heron recorded the following:

'. . . Paul Leaf-Wright and Clive Whittaker have agreed to payout the Macmed loans today.

Condition 2.1.1 still however needs to be met in the next week. Notwithstanding this payout can still take place.'

[69] On 19 July 1999 an internal bank memo from Clive Whittaker, the bank's regional manager for Gauteng, to Roland Cooper ('Cooper'), a corporate branch manager in Johannesburg — copied to Ingrid De Villiers, a bank employee involved in its medical services

department — recorded the following:

'Dear Roland

I refer to the outstanding condition relating to the Intramed acquisition and after discussions with Alan Hiscock and Alan Rubin of Bernadt Vukic Potash & Getz, I am totally satisfied that we can request Advances to amend the conditions of the agreement by removing the clause: "Final, unconditional duly completed agreements satisfactory to BOE, being duly signed by all parties thereto recording the purchase of the sale of the business of Aspen Healthcare Holdings Limited to the borrower".

My reason for this is that:

1. I have been satisfactorily convinced by Alan Rubin that the "Heads of Agreement" between Macmed and Aspen is a binding document (in this regard refer to clause 2 of the Heads of Agreement).
2. Macmed has taken possession of the businesses.
3. The attached document, signed by Werksmans and Investec Bank, confirms that the condition precedents of the agreement have been fulfilled and specifically indicates that ownership and risk in the business had lawfully passed to Macmed.

In view of the above, we should urgently request Advances to amend the conditions of approval to replace the clause referred to in paragraph 1 above, with the requirement that we obtain the attached document from Werksmans and Investec Bank Limited.'

[70] On 22 July 1999 (after the apparent expiry of the previous extension period on 25 June 1999), the bank in writing once more purported to extend the period for the fulfilment of clause 2.1.1 in respect of the loan agreements, this time to 20 August 1999.

[71] On 23 July 1999 Ingrid De Villiers responded by e-mail to Clive Whittaker's memorandum as follows:

'Dear Clive

Thank you for your memo dated the 19th July 1999 with regard to our meeting on the 14th July 1999 re: the Clause 2.1.1 issue.

As this still seems to be an issue I would like to point out the following.

1. The content of Clause 2.1.1 in the Loan Agreements was not a condition of Approval and therefore we are all satisfied that all the conditions of the approval of the above facility have been met.
2. The Facility letter was drawn up by Regional Office and signed by yourself and Roland Cooper. Clause 2.1.1 came about because of one of the Conditions Precedent that was added in by Regional Office i.e. The Facility letter.
3. Daryn Brown has only acted on our instruction to draw up the Loan Agreements, where Clause 2.1.1 was brought in.

This is not a credit issue but a Regional Office one and according to the Memo I have received from yourself it is clear that you are satisfied that clause 2.1.1 has

now been met. However, Roland needs to sign this off as well to enable us to record this in our files.

I feel that we should now stop sending reminders to Alan Hiscock to meet the suspensive conditions as I feel this issue has now been finalised.'

[72] Cooper testified that Whittaker told him that he had telephoned Hiscock during August 1999 and informed him that the bank was now satisfied that 'the agreements and the transaction were completed'. It is this evidence on which the Court below relied in coming to its conclusion that an oral waiver was sufficient.

[73] The opening sentence in each of the three loan agreements introducing the suspensive conditions states that they have to be fulfilled 'to the satisfaction' of the bank, presupposing, in respect of clause 2.1.1, that the bank would consider whether the agreement is to its satisfaction. It is common cause that no such agreement was submitted to the bank.

[74] The bank in extending in writing on three occasions the period within which the condition in question had to be fulfilled recognised that the conditions could only be waived in writing as stipulated in clause 2.2. Whittaker's memorandum dated 19 July 1999 set out in paragraph [69] is not a written waiver. In that memo, Whittaker clearly contemplates written amendments to the loan agreements which

would exclude clause 2.1.1. It was in any event never communicated to the other parties to the loan agreements and it was written after the *most recent* extension period (until 25 June 1999) had apparently already expired. Ingrid De Villiers' memo, in response, confused as it is, nevertheless recognises that Cooper has to 'sign off' in respect of clause 2.1.1. After the third written extension there was no further written communication by the bank to Intramed concerning compliance with clause 2.1.1. It should be reiterated that the third written extension was given after the second one had apparently already expired causing the agreements to lapse in terms of clause 2.2 (see Christie *The Law of Contract* 4th ed 2001 at 167).

[75] Clause 2.2 records that the conditions in 2.1 are suspensive conditions stipulated for the bank's benefit. The bank has rights flowing from the suspensive conditions and has the right to waive compliance with any of the conditions. Clause 2.2, however, stipulates that the entitlement to waive can be exercised *in writing only*. It should be borne in mind that the bank was the *stipulans*.

[76] The validity and binding nature of an entrenchment clause in a written contract, providing that amendments to an agreement have to comply with specified formalities, were reaffirmed by this Court in

Brisley v Drotsky 2002 (4) SA 1 SCA. Dealing with the motivations for such clauses this Court said the following at 11 C-F:

'Partye doen dit deur vooraf ooreen te kom dat 'n kontrak alleen dan tot stand kom wanneer aan sekere formaliteite voldoen is. *Die oogmerk is om geskille te beperk of uit te skakel*. Natuurlik staan die partye vry om die formaliteite te ignoreer en te handel asof 'n bepaalde Wet nie bestaan nie. *Ontstaan 'n dispuut, is enigeen geregtig — en die Hof verplig — om die strikte reg toe te pas*. En hoekom moet dit anders wees in vrye kontraksverband? Daar is ook 'n algemeen heersende mite dat hierdie tipe bepaling slegs ten bate van die ekonomies magtige bestaan en dat dit tot ongelykheid in kontraksverband aanleiding gee. Dit is waarskynlik waarom daar 'n beroep op die grondwetlike gelykheidsbeginsel gemaak word. Hierdie bepaling dien ter beskerming van beide partye . . .'

A few lines further down (at 11F-G) the following appears:

'Die *Shifren*-beginsel is "trite" en die vraag ontstaan waarom dit, na bykans 40 jaar omvergewerp moet word? *Mens kan jou beswaarlik die handelsgevolge, regsonsekerheid en bewysprobleme wat gaan ontstaan indink*. . .'

(emphasis added)

The same reasoning applies with equal force to the clauses in the loan agreements that stipulate in clear and emphatic terms that the entitlement to waive can only be exercised *in writing*. This is

particularly so against the provisions of clauses 9.7 and 11.7 of the respective loan agreements as set out in paragraph [62].

[77] Whilst it is recorded in clause 2.2 that the suspensive conditions are for the benefit of the bank it can hardly be contended that Macmed and Intramed had no interest in the certainty of a written waiver. The bank could, if it chose, after the conclusion of the loan agreements and the payment of the R100 million, claim the return of the money based on the non-fulfilment of condition 2.1.1, particularly since it had repeatedly (as the evidence shows) called on the other parties to the loan agreements to fulfil that condition.

[78] It may appear odd that agreements which were ostensibly executed should now be held to have lapsed. The proper approach, however, is to consider the terms of the agreement and to hold the parties to such obligations and formalities as agreed to. In the present case all that was required from the bank was a one-sentence letter in terms of which it waived compliance with the requirements of clause 2.1.1 in order for the waiver to be effective. It is precisely to avoid the kind of disputes and uncertainties referred to in the highlighted parts of the *dicta* of the *Brisley* judgment referred to in paragraph [77] above that the validity and binding nature of clauses 2.2 and 9.7 and

11.7 of the loan agreements should be observed and enforced. The dispute in the present case arose because waiver was not exercised as set out in the loan agreements.

[79] The suggestion that because the rationale for the suspensive conditions had ceased to exist and the money had been paid over the question of waiver falls away is, in my view, fallacious. It ignores the express provisions of the agreements and leaves scope for the kind of uncertainty and disputes which entrenchment clauses by their very nature are designed to obviate.

[80] The application of clause 2.2 of the loan agreements results in the lapsing of the loan agreements with the consequence that the total amount which the bank is now entitled to recover, as opposed to what it would have been able to obtain in terms of the agreement, is relatively smaller, because the interest that would have accrued in terms of the loan agreement is not recoverable. However, interest *a tempora morae* would be payable from the time of the lapsing of the agreement.

[81] A calculation supplied by the respondents showing the amount which would be due to the bank upon restitution was not challenged. The amount is R113 177 568-51.

[82] The cost order made by the Court below was based on the terms of the loan agreements which provided for attorney client costs against the party in breach. The lapsing of the agreements render the provisions in question inoperative.

[83] It has not been suggested that, in the event that the underlying securities were held to be authorised, the liquidators would not be bound by them.

[84] The degree of success attained by the appellants is insufficient in the overall picture to carry costs of appeal. It was not argued that it should. In light of the foregoing conclusions the following order is made:

1. The appeal is upheld only to the extent reflected in the difference between the amounts set out in the order of the Court below and in paragraph [81] above;

2. The appellants are to pay the respondent's costs of appeal including the costs of two counsel;

3. The order of the Court below is amended as follows:

'A. The Defendants are ordered to pay to the plaintiff the amount of R113 177 568-51.

B. It is declared that the claims by the Plaintiff are secured by the securities which are annexures "G", "I" and "J" to the Plaintiff's particulars of claim.

C. The defendants are ordered to pay the plaintiff's costs of suit including the costs of two counsel.'

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MS NAVSA
Judge of Appeal

CONCUR:

HOWIE P
STREICHER JA
VAN HEERDEN AJA

STREICHER JA:

[1] I have read the judgments by Navsa JA and Heher JA. I agree with the judgment of Navsa JA to which I would like to add the following comments in respect of the finding by Heher JA that the suspensive condition in clause 2.1.1 of the agreements of loan was fulfilled.

The clause reads as follows:

'2.1 This agreement is subject to the fulfilment of the following suspensive conditions to the satisfaction of BOE by not later than 17 June 1999.

2.1.1 Final unconditional duly completed agreements satisfactory to BOE signed by all parties thereto recording the purchase and sale of the business from Aspen . . . to [Intramed].'

('The suspensive condition.')

[2] It is common cause that no such agreement was ever concluded. It follows logically that the suspensive condition could not have been fulfilled.

[3] The respondent alleged in its particulars of claim that the suspensive conditions referred to in clause 2.1 of each of the agreements of loan were fulfilled alternatively waived by it. However, in its reply to a request for particulars for trial it replied that the suspensive condition in clause 2.1.1 of each of the loan agreements was not fulfilled. During his cross-examination of Cooper counsel for the appellants stated that it was common cause that the condition had not been fulfilled. The statement was repeated in the appellants' heads of argument. Counsel for the respondent also stated in their heads of argument that it was common cause that the suspensive condition was not fulfilled in that there were no 'final unconditional duly completed agreements . . . recording the purchase and sale of the business from Aspen . . . to [Intramed].'

[4] In the circumstances it is not open to this court to find that the suspensive conditions had in fact been fulfilled and to fill factual gaps in the evidence by way of inferences drawn as a matter of probability from statements made by counsel for the respondent in his opening address, the evidence of the respondent's witnesses and the 'failure' of the appellants' counsel to follow what may be considered to be an obvious line of attack if the common cause facts are ignored.

[5] In any event, the evidence was not to the effect that the suspensive condition had been fulfilled. Cooper testified that Mr Whittaker told him that he had telephonically advised Mr Hiscock that the respondent 'was now satisfied that the agreements and the transaction were completed'. Cooper understood him to mean that the deal was finalised but did not know whether the suspensive conditions had been fulfilled. It was at this stage

that it was put to him by counsel for the appellants that it was common cause that the condition had not been fulfilled. He did not dispute the statement and counsel for the respondent did not object thereto.

[6] In the light of the fact that there was no agreement between Aspen and Intramed, Whittaker could not have intended to say that he was satisfied that the suspensive conditions had been fulfilled, he could only have meant to say that fulfilment of the condition was no longer necessary as far as the respondent was concerned. That is to say he could only have meant to say that the respondent had waived fulfilment of the suspensive condition.

[7] But, even if Whittaker had in terms told Hiscock that the respondent was satisfied that the suspensive condition had been fulfilled and that the transaction was for that reason complete he would, in the light of the fact that there was no agreement between Aspen and Intramed, in fact have been telling him that the respondent was waiving compliance with the condition.

[8] I, therefore, disagree with the finding of Heher JA that the suspensive condition was fulfilled.

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STREICHER JA

HOWIE P)

NAVSA JA) CONCUR

VAN HEERDEN AJA)

HEHER JA:

[1] I have read the judgment of Navsa JA. I agree with his conclusions on the issues of authorisation and the recipient in law of the money advanced by the respondent.

[2] As to whether the agreements lapsed I regret that I see the matter somewhat differently. For the reasons which follow, I think that Ludorf J was correct in the order he made.

[3] Of course the respondent could at any time during the validity of the agreements have notified the borrower in writing that it did not require compliance with any specified aspect of any of the suspensive conditions, thereby formally waiving its right to rely on non-fulfilment. However, because of the particular terms of clause 2.1 of each agreement, this was not the only option open to the respondent.

[4] Clause 2.1 laid down a minimum measure for the assessment of whether the suspensive conditions had been fulfilled. That measure was the satisfaction of the respondent. In addition, lest any doubt should remain, clause 2.2

provided that the conditions were stipulated for the benefit of the respondent. Because the unrestricted satisfaction of the respondent was to be decisive it was entitled to regard any degree of performance from 0% to 100% as fulfilment. The only, implied, requirement was that the expression of its satisfaction should be communicated to the borrower before the agreements lapsed in order to render the fulfilment effective.

[5] Such an expression of satisfaction in relation to any of the conditions was a right conferred on the respondent and the communication was its exercise. The agreements did not require that it be exercised in writing.

[6] The evidence established that the respondent did communicate its satisfaction with regard to the fulfilment of clause 2.1.1 while the agreements were still *in esse*. In these circumstances, waiver, ie an abandonment of a right to rely on the non-fulfilment of the condition in question, is irrelevant.

[7] The respondent extended the date by which clause 2.1.1 had to be fulfilled in writing from time to time from 17 June 1999, the last extension expiring on 20 August 1999.

[8] That there were effective extensions of the agreements seems to me an overwhelming inference derived from the way in which the case was presented by the respondent and fought by both sides:

(a) In opening the case for the respondent in the trial Court senior counsel, Mr Wallis, informed the Court that there had been seven letters extending the agreements.

(b) In fact, the bundle of documents placed before that Court (and included in the appeal record) included only three such letters, dated 17 and 18 June and 22 July. The respective letters each dealt with all the conditions which had not at the time of writing been fulfilled. The first extended the date for fulfilment of clause 2.1.1 to 18 June, the second extended that date to 25 June and the last extended it to 22 August.

(c) Mr Wallis, in leading his witness Mr Heron of the respondent and referring to the extension letters, said

> 'Now I do not propose to take you to all of them . . . but there were a number of extension letters?' — 'That is correct.'

Heron confirmed that his colleague Cooper was responsible for attending to the fulfilment of the agreements.

(d) In the evidence in chief of Mr Cooper the witness confirmed that the letter of 22 July was 'the last letter' which he wrote.

He said:

> 'We kept sending the letters [of extension] . . . You will see they were weekly or fourteen day extensions and then I pushed it up to three or four weeks to

cover the period while I was away on leave. I went away at the beginning of August.'

(e) The evidence of Cooper and the correspondence leaves no doubt that the question of fulfilment was a matter constantly at the forefront of the minds of himself and other officials of the respondent. He was very aware of the requirement that the agreements needed to be extended *before* they lapsed by the sending of timeous notices to the borrower. It is very probable that the letters not produced in evidence had the necessary effect. In cross-examination of Cooper senior counsel for the appellants suggested to him that clause 2.1.1 had, notwithstanding the respondent's satisfaction with the alternative performance, not been fulfilled according to its terms. Counsel did *not* suggest that the letter of 22 July had not been preceded by others in a chain of extensions or that that letter would not in any event have been effective in extending the time for fulfilment of clause 2.1.1 because the agreements had already lapsed which, if the facts bore him out, would have been the obvious line of attack.

[9] No agreement was signed between the parties to the sale from Aspen to the borrower. By the end of July internal correspondence of the respondent

leaves no doubt that the responsible officials, Messrs Steensma, Corey, Whittaker, Heron and Cooper, were satisfied that fulfilment of clause 2.1.1 according to its terms was unnecessary as 'the requirements of that clause have been satisfied via other means' (memo from Steensma to Cory dated 26 July 1999). When Cooper returned from leave in the middle of August he was told by his senior Whittaker that the latter had notified Hiscock (who possessed authority to represent the borrower) telephonically that the respondent was satisfied and regarded the agreements and the transaction as completed. The respondent decided for this reason, correctly, in my view, that it was unnecessary to extend the agreements once again. (It was common cause that Whittaker was disabled by a fatal illness from testifying and there is no reason why reference to his conversations and correspondence with Cooper and Hiscock should be excluded from consideration.) The evidence was substantially adduced by appellant's counsel in cross-examination of Cooper, its correctness was not placed in issue and Hiscock was not called to rebut it. It is true that the respondent did not plead such fulfilment but Mr Wallis stated unequivocally in his opening address to the Court *a quo* that he would rely on the satisfaction of Whittaker for the fulfilment of clause 2.1.1. There was not then or thereafter objection from the appellant's side. Although he did not refer to the oral communication of that satisfaction to the borrower that critical gap

was filled by the cross-examination of Cooper. There is no suggestion that the matter was not fully canvassed by the evidence or that anything further could have been said or done to dilute its effect. I conclude, therefore, that the evidence proved that clause 2.1.1 of each agreement was fulfilled to the satisfaction of the respondent although no final or unconditional agreements were produced or signed as provided in the clause.

[10] I would, therefore, dismiss the appeal with costs, including the costs of two counsel, on the scale as between attorney and client.

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J A HEHER
JUDGE OF APPEAL