IN THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE.

CASE NO: 7042/2020

REPORTABLE: YES/NO
OF INTEREST TO THE JUDGES: YES/NO
REVISED.
2/12/2022

In the mater between:

FEDBOND NOMINEES (PTY) LTD **Applicant**

And

IMPORT EXPORT 2020(PTY) LTD **First Respondent**
(Reg No 2010/016816/07)
FRED VAN HEERDEN **Second Respondent**
(ID NO: [....])

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for handing down shall be deemed to be the 02nd of December 2022.

LITHOLE AJ:

INTRODUCTION

1. The Fedbond Nominees Pty Ltd (“the applicant”) claims a money judgment from Import Export 2020(Pty) (“the first respondent”) and Fred Van Heerden (“the second respondent”) based on a loan agreement and consequent participation mortgage bond passed in the applicants’ favour by the first respondent. The participation bond provides security for the collective investments schemes as regulated by the Collective Investment Schemes Act 45 of 2002.

2. The applicant further seeks an order declaring the immovable properties hypothecated in terms of the two mortgages specifically executable for the payment of the sum claimed.

3. The respondents oppose this application on the ground that the certificate which is relied upon by the applicant as prima facie proof is not sufficient proof. The respondents further opposes this application the ground that the applicant failed to discharge the onus to establish the amount of the indebtedness of the respondents. They seek dismissal of the application on those grounds.

4. The applicant’s relationship with the first respondent was formed by way of two loan agreements concluded on the 13 November 2015 and 17 December 2015 for the amounts of R20 000 000 (twenty million rands) and R1 500 000 (one million five hundred thousand rands) respectively.

5. The applicant’s relationship with the second respondent is based on a deed of surety that the second respondent gave in favour of the applicant for the first respondent.

FACTUAL BACKGROUND.

6. The applicant approved two loan agreements in favour of the first respondent for the amounts of R20 million rand and the second loan for R 1.5 million rand. The terms of both the first and second loan agreements were agreed to by the parties in terms of the contracts.

7. Both loans were issued subject to the first respondent having to provide real security in the form of participation mortgage bonds.

8. The first participation bond contains an acknowledgement by the first respondent that it was indebted to the applicant for the principal amount of R20 million rand and an additional R10 million rand. Portion 147 of the farm Roodekuil was especially bound in the participation mortgage bond constituting security for the capital and additional amount.

9. An additional collateral security mortgage bond was registered by the first respondent in favour of the applicant on the 11th of December 2015. In terms of this bond, a property “Verloren” is bound as additional security for the principal and additional amount loaned to the first respondent.

10. The first respondent registered the second participation mortgage bond on the 18 February 2016 in favour of the applicant. In terms of this bond the first respondent acknowledged indebtedness of the principal amount of R1.5 million rand and an additional R 750 000, 00.

11. The first respondent thus had complied with rider to the loan agreements by registering the two participation bonds, in terms of which both the “Roodekuil” and “Verloren” properties were specially bound as security in favour of the applicant.

12. Among the terms agreed upon between the parties was that the first respondent would make payment on each loan to be paid monthly in advance on the first day of each month for the duration of the bond, the interest there on would be calculated in accordance with clause 5.1 of each bond agreement.

13. It was further agreed that on the 5th anniversary of the date of the registration of each bond the outstanding capital and any other outstanding amount due would be paid by the first respondent to the applicant.

14. The applicant argued that the first respondent fell into arrears with payment of the interest due. It is further contended by the applicant that as of July 2020 the first

respondent was in arrears for R 6 291 764. 46 in relation to the first loan and R 340 239. 00 in relation to the second loan.

15. As a result of such default, the applicant contends that the full indebtedness in terms of both bonds became immediately due and payable. The applicant annexed a certificate of indebtedness in terms of which the combined sum for both loans owing by the first respondent to the applicant was R 27 017 493. 66 together with interest there on calculated at a rate of 11.28%.

16. The applicant's claim for payment is premised on the following provisions of the participation mortgage bonds:

16.1. Clause 11.24- in the event of the first respondents default the applicant is entitled to claim and recover the capital amount and all interest thereon, together with all other amounts which might then be due to the applicant in terms of the bond, notwithstanding that the capital amount or the balance thereof and or the interest thereon may not yet have become due and payable.

16.2. Clause 5.4.1- the applicant is entitled to levy interest on any overdue amounts at the maximum rate allowed by statute.

16.3. Clause 12.1, 12.2, 12.3- the applicant is entitled to issue a written certificate of indebtedness in which affirmed the amount of the first respondent's indebtedness to it at any time, the rate of interest thereon, the date from which such interest was payable and the date upon which such indebtedness became due and payable.

16.4. Clause 12.3.4- the contents of the certificate of indebtedness are binding on the first respondent and constitute prima facie proof of those contents.

16.5. Clause 8.1.4- the applicant is entitled to claim costs on the attorney and client scale in any proceedings for the recovery of the first respondent's indebtedness to it.

17. The applicant has annexed a certificate of indebtedness as well as the mortgage bonds as supporting documents for the relief sought.

18. The applicant caused a letter of demand to be sent to the first respondent on the 21 July 2020. The first respondent replied to such demand on the 31 July 2020.

ANALYSIS

19. The trite principle of law in motion proceedings is that affidavits constitute both evidence and pleadings. It was stated by Harams JA, in the *National Director of Public Prosecutions vs Zuma, 2009 (2) SA (SCA)*, at paragraph 26, that:

> *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if then respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*

20. It is against this legal principle that this application should be adjudicated. There are common cause facts and those facts that the respondents cannot dispute are set out briefly below.

21. The facts underpinning this application are fully set out in the founding affidavit that has been deposed to by the applicant's deponent.

22. From the assessment of the facts before this court and the argument presented, what is clear and undisputed is that two loans were taken by the first respondent, first respondent fell into arrears and is thus indebted to the applicant.

23. The respondents have not disputed indebtedness to the applicant at all but have raised defenses which relate to the interest rates charged as well as the VAT charged to the late payment interest fees.

24. The respondent has not disputed that the full capital amount of both the first and second loans are now due and payable, nor has it been disputed that the first respondent over the duration of the bonds has paid only a portion of the agreed contractual interest and the associated fees and charges, and that no portion of the capital loans have been repaid. The respondent has thus fallen into arrears in respect of both loans.

25. The first respondent's failure to adhere to the terms of the loan agreements entitles the applicant to enforce its right to claim accelerated payment of the full amounts due and owing. The respondents do not dispute that the applicant is entitled to orders declaring the mortgaged properties to be specifically executable for payment of the sums due and lastly that despite demand neither of the respondents have cured the first respondent default.

26. The respondents raised in its answering affidavit an issue with the certificate of indebtedness, claiming that the applicant had applied the wrong interest rate and had incorrectly added VAT to late payment interest.

27. The applicant conceded in reply that it had indeed erroneously charged VAT on late payment interest and charged the interest at a rate not agreed to by the parties.

28. The applicant thus went and redo the calculation to determine the true amount owing and the respondents now deem it fit to file a further affidavit. An opposed application for leave to file a further affidavit must first be determined by the court.

THE FURTHER AFFIDAVIT

29. In the answering affidavit of the respondents, an attack was launched at the evidence in proof of indebtedness of the respondents to the applicant that being the certificate of indebtedness. The respondents raised objections to the said certificate, those being that:

29.1. The parties had agreed to interest being charges at a rate 12.20% as opposed to the 12.53% used by the applicant.

29.2. The third objection was that the applicant was not entitled to charge late payment fees VAT inclusive as it had done.

30. The applicant did however concede that it had erroneously charged VAT to the late payment interest fee and the interest charged in accordance with the initial certificate is not at the agreed amount, and thus elected to recalculate the amount it claims is outstanding and annex a new certificate of indebtedness. In its recalculation of the outstanding amount, the applicant is levying in respect of all defaults a penalty interest rate of 2% and has been calculated VAT excluded.

31. The applicant annexed a new certificate of indebtedness, in terms of which the respondents are owing more than the amount claimed, however the applicant has further indicated that it is willing to forgo the excess so as not to prejudice the respondents.

32. The respondents contend that by virtue of the recalculation of the outstanding amounts, and annexing of a new certificate it amounts to a new version on the following grounds:

32.1. The recalculation saw the finance charges increase from R13 339 224, 56 to R13 555 849, 33 in relation to the first account and from R876 830, 85 to R888 254, 67 in relation to the second account.

32.2. The recalculation saw an increase of late payment interest from R459 195, 63 to R 814 078, 14 in respect of the first account and from R18 807, 58 to R 51 719, 95 in respect of the second account, notwithstanding the fact that the VAT has been removed.

33. The respondent alleges that the replying affidavit introduces “new issues”, those being that:

33.1. The founding affidavit did not contain any indication as to how the claimed amount of R 27 017 493 was calculated and what fees were debited from time to time.

33.2. The recalculation schedule purports to represent the difference between the debt and credits in the applicant’s statements and recalculated amounts.

33.3. The total amount in the calculation schedule differs from the claimed amount in the notice of motion.

33.4. No explanation was offered for the increase from R 27 017 493, 6 to R27 304 837, 37 in the recalculation schedule.

33.5. The recalculation schedule increased the finance charges under circumstance where the applicant conceded to incorrectly charging higher interest at 12.53% instead of 12.20%.

33.6. The reworking increased the late payment interest under circumstances where it is common cause that the statements did not contain any item with such description.

34. The court has considered each of the grounds as listed by the respondent individually to properly ascertain if any prejudice shall be suffered by the respondents if even one of them is found to be valid.

35. When I consider the ground that no calculation was in the founding affidavit as opposed to the reply, it is neither her nor there. The parties had agreed in terms of the mortgage bonds that the applicant is entitled to issue a written certificate of indebtedness which certificate is binding on the respondent and constitutes prima facie proof of the contents.

36. There is no requirement in terms of the agreements for the applicant to have to show the manner of calculation, but only to produce the said certificate. If the respondent disputes the evidential value of the said certificate, it is upon the respondent to state in reply why there should be no value attached to it.

37. The respondent disputed the VAT added to the late payment interest as well the 12.53% rate at which the finance charges were calculated. Thereby requiring the applicant to remove the VAT and apply the rate at the agreed rate. The applicant seems to have done one better and charged even less in terms of interest. Therefore, does the respondent suffer any prejudice on this ground? I think not.

38. The respondents raise a ground to file a further affidavit based on what it perceives the recalculation schedule purport. And further that the amounts in the schedule differ from that which is claimed in the notice of motion with no explanation for same.

39. The applicant has explained that the increase in late payment interest of 2% charged from 2019 as well as inaccuracies in the calculation of interest in certain of the earlier months which had been rectified are responsible for the increase in amounts owed.

40. Notwithstanding that on proper calculation the respondents are indebted for more than that which is claimed, the applicant chose not to amend its pleadings but to forgo the excess.

41. The respondent is thus not prejudiced by the difference in amount owed to the amount claimed. If the respondent were claiming that it in fact owed less than what has always been claimed by the applicant, it had the opportunity to prove that in their answering affidavit but chose not to.

42. The respondent does not even at this stage propose to prove that the applicant is incorrect but to only question the explanation already given. That which the respondent wanted corrected in terms of the certificate of indebtedness has been corrected, it just seems that the respondent is disappointed that the applicant went through its accounts with a fine-tooth comb and found that it had under billed the respondent even on the lesser interest rate.

43. This then goes to the issue of the increased finance charges after the interest rate was lowered. It should be noted that the interest rate was lowered even further than the agreed amount to 11.28%.

44. The deduction that the court can make here is that the respondent hoped that the claimed amount would reduce by the exclusion of VAT and calculation of interest at a lesser rate. When such a scenario does not play out as planned and hoped for, the respondent offers more questions which the applicant is not in terms of their agreement bound to give explanation to.

45. The general rule is clear, only three sets of affidavits should be filed in any application, however as the respondent correctly stated, the court has the discretion to allow for further affidavits to be filed where necessary. The court is not bound to only permit the three affidavits as some flexibility should also be permitted.

46. I am at pains trying to find what is exceptionally new from the reply of the applicant other than the fact that the interest charged is even less than that which was agreed by the parties.

47. I thus find no reason to allow the respondent to file a further affidavit.

EVIDENTIAL VALUE OF THE CERIFICATE OF INDEBTEDNESS

48. The claim of the applicant is proved by a certificate of indebtedness which the applicant has annexed to its heads after having recalculated that which it claims is truly owed to it.

49. In terms of the agreement entered by the parties, a certificate of indebtedness shall serve as prima facie proof of the outstanding amount. There is no requirement upon the applicant to show manner of calculation of the outstanding amount. Simply put, the mere production of the certificate serves as prima facie proof of the debt.

50. The onus lies on the respondent to cast doubt on the evidential value of the certificate. The respondent has pointed out in the answering affidavit that there are some errors in the calculation of the indebtedness done by the applicant

51. As alluded *supra* the applicant conceded in reply that it had made such errors. The applicant then sat down and recalculated that which is owed minus the addition VAT and excess interest rate. Although the applicant has stated that on the recalculation amount has increased but the applicant is willing to forgo that which is more than that which is claimed.

52. The question now is, has the respondent managed to disturb the prima facie evidential value of the certificate so much so that it is no longer sufficient proof of the indebtedness of the respondent.

53. Does the initial calculation at the incorrect interest rate and the inappropriately added VAT render the certificate undependable to the court. Not losing sight of the fact that the errors have been corrected.

54. The respondents do not dispute that the certificate of indebtedness produced and attached to the founding affidavit as annexure “N” complies with the requirements of the two participations. The respondents have not introduced any factual evidence in rebuttal of the prima facie status of the certificate of indebtedness.

55. In *Nedbank Ltd V Schoeman No obo Maluti Trust 2016 JDR 1146(GJ)*, the court said:

> *"The respondent makes each of these claims and raises each of the factual dispute by asserting that the certificate of balance contains a mistake and is therefore not sufficiently reliable as proof of any indebtedness. Yet they rely on the same certificate as a prima facie indication that any debt owing to the bank was ceded to the third party. …. Confronted by this challenge the bank explained the in the replying affidavit that reference to the green house in the certificate was inconsequential mistake and out of caution, the bank produced and attached another 'fresh certificate', confirming and updating the first."*

56. There is undoubtedly a conflict between the two certificates presented to the court. The question however is that, is the conflict so severe that it is sufficient to destroy or detract from the evidential value.

57. If that which was complained of in the initial certificate has been removed and the interest rate upon which the respondent is charged is even less than that which is agreed, the proper calculation on such beneficial terms amounting to more than what was hoped for does not conceivably amount to a disturbance of the value on the document.

58. The allegation that interest is charged at 11.28% as opposed to 12.20% is a prejudice that is suffered and accepted by the applicant. If the prejudice were suffered by the respondent, the court would have a different view on the issue.

59. The certificate in its original form and in the corrected form comply with the prerequisite for a certificate of indebtedness in terms of the contractual agreement between the parties, all allegation that ought to be made are made. Save for the administrative or clerical error, which was then remedied by the second certificate, no other mistake was noted.

60. This court agrees with Bester AJ As he held in the FirstRand Bank LTD018 JDR 2038 that:

> *"It is not a new case in reply to relinquish a portion of the interest claimed. The introduction of the certificate in reply is therefore not an attempt to introduce new material that ought to have been in the founding affidavit, rather it simply constitutes prima facie evidence of what the amount of the debits are if the lower interest rate is applied. The applicant is entitled to forsake the additional interest and then claim the lesser amount in the circumstances the application to strike out must fall."*

61. The applicant herein has similarly not gone and introduced new material but have simply done the calculation as it ought to have been done from the start. Evidently the applicant forgoes the excess and maintains a claim for that prayed for in prayer 1.

CALCULATION OF THE OUTSTANDING AMOUNT

62. As alluded supra, the applicant had erroneously calculated the amount owed by applying the incorrect interest rate and applying VAT where it ought not. Responsibly, the applicant accepted that it made an error and corrected it.

63. The respondent now pleads that the applicant has again applied the incorrect interest rate at 11.28% as opposed to 12.20%. The applicant has applied an interest rate at 1.08% less than what the respondent argues it ought to charge at and the respondent wants to rely on this advantage to it to rubbish the certificate of indebtedness and pray for a dismissal of the whole claim.

64. The applicant has rightly pointed out that the respondent has not once tendered any payment of whatever reduced amount they contend they in fact owe. They submit that the whole claim should be dismissed.

65. This position is simply not tenable, a dismissal of the claim would mean that the applicant, whom the respondent acknowledges they are indebted to would have

lost all money to the respondent and the respondents exonerated from having to pay back even a cent of that which is owed.

66. The respondent in its admission to indebtedness just grandstands that the applicant's calculation must be wrong, however does not make any effort to show that which it deems would be the correct calculation. The respondent is thus looking to clutch at any reed to draw it out of the river of debt it finds itself.

67. After looking at the 2% rate at which interest was charged on overdue payments, it is again the applicant who is in fact charging less than what it is entitled to charge and the respondent complaining about same.

68. The provision of 5.4.1 provides for interest to be borne at the maximum rate allowed by law. That maximum rate is higher than 2% per annum, as the statute provides for 3.5% per annum.

69. The respondent suffers no prejudice by the application of a lesser interest rate to the overdue amounts and in any case, even if that 3.5% interest rate is to be applied the applicant is only interested in the amount claimed and nothing more.

APPLICANTS' FAILURE TO REDUCE INTEREST RATE

70. The other issue that the respondent has canvased is the applicant failure or rather exercise of its discretion not to reduce the interest rate in line with the repo rate in April, May, and July of 2020.

71. The respondent themselves have quoted clause 5.1.1 of the mortgage bonds which clearly states that 'the manager on behalf of the applicant shall be entitled in its discretion to increase or decrease the rate of interest payable by the respondent at any time during the currency of this bond when there has been a change in the repo rate by the South African Reserve bank.'

72. I draw emphasis to the underlined words. The applicant had discretion in terms of the mortgage agreed to by the parties. The applicant was never expected to

give reasons or tender explanation because it chose to exercise that discretion. The letter informing the respondent of the decision taken in the exercise of the applicant discretion was more than sufficient.

73. This court thus find that the applicant has discharged the onus upon it and proven that the first respondent is indebted to it for the amount claimed being R 27 017 493, 66 (twenty-seven million and seventeen thousand four hundred and ninety-three rands and sixty-six cents).

74. The applicant having relied on the mortgage bonds and loan agreement, seeks an order declaring immovable property specifically bonded to the mortgages specifically executable.

75. The respondent has not disputed the agreements nor the contents of same, thus admitting that the applicant is entitled to an order, should the court find that it so fitting declaring the two immovable properties immediately executable.

LEGAL COSTS

76. The respondent alleges that the applicant ought not to have included legal fees in its re-calculation as same is not authorized by the agreement. It seems the respondent also missed the part where the applicant directs it to the provision in terms of the mortgage wherein it is entitled to claim costs.

77. In terms of clause 8.1.4 the applicant is entitled to costs on an attorney and client scale. The respondent's contention is thus misguided and unfounded.

THE ORDER

1. The respondents' application for leave to introduce a further affidavit is dismissed with costs, the costs shall include the costs of senior counsel.

2. The Applicant's claim against the Respondents succeeds and the following order is made:

2.1. Directing the first and second respondents, jointly and severally, the one paying the other to be absolved, to pay to the applicant the sum of R 27 017 493,66;

2.2. Interest on the amount of R 27 017 493,66 at the agreed rate of 11.28% per annum;

2.3. Declaring the immovable property, being the remaining extent of portion 147 of the Farm Roodekuil 496, registration division K.R Limpopo Province, to be specially executable for payment of the sums set out in paragraphs 1 and 2 above;

2.4. Declaring the immovable property situated at portions 1 to 27, 30, 58, 109 to 113, 116 to 123, 155, 190 and 196 of the Farm Verloren 787 registration division K.R Limpopo Province to be specially executable for payment of the sums set out in paragraphs 1 and 2 above;

2.5. Costs of suit on the attorney and client scale.

TC LITHOLE
ACTING JUDGE
LIMPOPO DIVISION OF THE HIGH COURT
POLOKWANE

APPEARANCES

On behalf of the Applicant:
with: **Adv A R G MUNDELL SC**
Instructed by: **CARVAHO Inc ATTORNEYS .**

On behalf of the 2nd respondent: Adv H F OOSTHUIZEN SC
Instructed by: FRONEMAN ROUX AND STREICHER ATTORNEYS .

DATE OF HEARING : 17 AUGUST 2022

DATE OF JUDGMENT : 02 December 2022