

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO: **AR409/12**

In the matter between:

FEDSURE PARTICIPATION MORTGAGE

BOND MANAGERS (PTY) LIMITED

FIRST APPELLANT

FEDBOND NOMINEES (PTY) LIMITED

SECOND APPELLANT

and

SANDLUNDLU (PTY) LIMITED

RESPONDENT

JUDGMENT

Delivered on: 18 October 2013

KRUGER J

[1] The Appellants (collectively referred to as "Fedbond"), having obtained leave from the Supreme Court of Appeal, appeal against the judgment of van Heerden AJ granted on the 20th September 2011. The order appealed against is one directing the Appellants, jointly and

severally, the one paying the other to be absolved, to pay to the Respondent:

- (a) The sum of R2 584682,58;
- (b) Interest on the amount of R3023832,41 calculated at the rate of 15,5% per annum from 23rd July 2007 to 8th February 2010;
- (c) Interest on the amount of R2 584682,58 calculated at the rate of 15,5% per annum from 9th February 2010 to date of payment;
- (d) Costs of suit.

BACKGROUND

[2] Pursuant to a written loan agreement, Fedbond loaned to the Respondent ("Sandlundlu") the sum of R5 600 000,00. The loan was secured by the registration of a first mortgage bond over the property previously described as Lot 1094 Port Edward, then owned by Sandlundlu. This mortgage bond was registered, in favour of Fedbond, on the 22nd January 1998. Sandlundlu was unable to meet its obligations in terms of the said mortgage bond and, as a result, Fedbond obtained judgment against it for payment of the sum of R7 855439,77 together with interest at the rate of 16,99% per annum calculated from 1st December 1999 to date of payment. The aforesaid immovable property was also declared executable.

[3] An agreement was subsequently reached whereby the aforesaid property was sub-divided on the 7th February 2002. The one portion of the sub-division incorporated the land on which an existing hotel stood. This was described as Portion 1 of Lot 1094 Port Edward (the "hotel

property"). The other portion of the sub-division consisted of land upon which Sandlundlu was in the process of constructing a number of chalets as part of a sectional title development. This sub-division, known as the Remainder of Lot 1094 Port Edward, was registered in the name of Secprop (Pty) Limited ("Secprop").

[4] Sandlundlu remained the owner of the hotel property. The Secprop property was released from the existing mortgage bond and a new mortgage bond of R5 000000,00 was registered, in favour of Fedbond, over this property. It is common cause that simultaneously, the existing mortgage bond over the hotel property would be reduced by R5 000000,00. Sandlundlu then became liable for payment of the balance of this mortgage bond.

[5] Sandlundlu leased the hotel property to a company known as "Biz Afrika" for a period of ten years. Simultaneously, it had entered into an agreement to sell the property to a company called "Slipknot Investments". Both Biz Afrika and Slipknot Investments were controlled by Messrs Kotter and Michaelides. Given Slipknot's refusal or procrastination in procuring transfer of the property and as a result of protracted litigation relating to the rental payable by Biz Afrika, the mortgage bond payments fell into arrears. Fedbond foreclosed on the mortgage bond and obtained judgment, on the 5th August 2002, against Sundlundlu, in the sum of R8 865285,88 together with interest at the rate of 14.99% calculated from 1st June 2002 to date of payment. The immovable property was also declared executable. It is common cause that the amount of R8 865285,88 included the sum of R5 000000,00 in respect of which Secprop had assumed liability.

[6] The property however was not sold in execution as Biz Afrika, Slipknot and the trustees of the Ark Trust (Kotter and Michaelides) sought a rescission of the judgment. These proceedings were protracted and costly. It is common cause that during the course of these legal proceedings, Fedbond, from time to time, debited the legal fees incurred against Sandlundlu's mortgage bond account. At the conclusion of these proceedings, these legal costs amounted to the sum of R686 934,90. Thereafter Sandlundlu requested a settlement figure in order to discharge and cancel the bond. A dispute arose and Sandlundlu ultimately paid what Fedbond demanded "under protest", in order to secure cancellation of the bond.

[7] Sandlundlu then instituted an action to recover the amounts it alleged it had overpaid. Judgment was accordingly granted in its favour as set out in paragraph 1 *supra*.

[8] In the judgment, Van Heerden AJ dealt with five issues, viz:

- (a) The Secprop issue – this related to the assumption of R5 000000,00 by Secprop and the failure by Fedbond to reduce Sandlundlu's indebtedness in respect of the hotel property. The Court *a quo* ultimately found that the sum of R585 819,87 had been overpaid by Sandlundlu as a result of Fedbond's failure to credit the account and the resultant interest which had then accrued. The Appellants have accepted the Court *a quo*'s findings and do not appeal against this issue.
- (b) The second issue relates to the costs incurred in the rescission application. The Court *a quo* held that Fedbond was entitled to recover these costs from Sandlundlu. However, it held further

that Fedbond was only entitled to debit Sandlundlu's mortgage bond account after a demand for payment was made and payment not being effected. It is against this finding that the Appellants have appealed.

- (c) The third issue is termed the "FS Trust Issue". This related to the rate of interest Sandlundlu was entitled to receive on monies which it paid to Fedbond and which, by agreement, was not reflected as a credit on the mortgage bond statements. The Court *a quo* determined this issue in favour of the Respondents. The Appellants appeal against this finding as well.
- (d) The Fourth issue relates to the interest charged by Fedbond after it had obtained judgment against Sandlundlu on the 5th August 2002. The Court *a quo* held that the interest was simple interest and that Fedbond did not have the right to vary the rate of interest or to compound or capitalise same. The Appellants appeal against this finding as well.
- (e) The final issue concerned the costs of the application proceedings before and reserved by Nicholson J. The Court *a quo* held that these costs be borne by Sandlundlu. Sandlundlu has accepted this finding and there is no cross-appeal.

[9] I turn now to consider the issues on appeal.

(a) **COSTS**

[10] As stated earlier in this judgment, the appeal on this issue is limited to whether Fedbond ought to have demanded payment of the legal costs from Sandlundlu prior to debiting the mortgage bond account.

[11] In its plea, Fedbond averred that “the Defendants (Fedbond) were entitled to so debit these legal costs to the Sandlundlu No. 2 account in terms of Clause 8.1 of the Port Edward Bond.” In answer to a question posed in terms of Rule 37(4), whether demand was made to pay these costs, Fedbond responded that “no demand was made. The Defendant acted in terms of the provisions of Clause 8 of the mortgage bond”.

[12] The relevant provisions of Clause 8 are:

“8. Legal Work and Expenses

8.1 Mortgagor shall pay, on demand, to the mortgagee all the costs of and incidental to –

.....

8.1.6 In general all costs (including costs between attorney and client) which might arise out of or in connection with the mortgagors indebtedness to the mortgagee hereunder, this bond and/or the mortgaged property.

8.2 Should the mortgagor fail to pay any of the costs referred to in 8.1, the mortgagee shall be entitled to pay such costs and recover such costs so paid from the mortgagor together with interest as provided in 5.”

[13] It is patently clear from the afore-quoted provisions that a demand is a pre-requisite before a mortgage bond account may be debited with legal costs. This is particularly spelt out in Clause 8.2 which confers upon the mortgagee the right to debit a mortgage bond account with these costs. Therefore, until such time as the mortgagee informs the mortgagor that such costs have been incurred and are due and payable and the mortgagor has been given an opportunity to pay such costs, the mortgagee is not entitled to claim same from the mortgagor by means of a debit entry against the mortgage bond account. Mr Pammenter SC, on behalf of the Appellants has, during argument, conceded that no formal

demand for payment of the legal costs was made prior to same being debited against the mortgage bond account. He has however submitted that Mr Reardon, Sandlundlu's representative, understood from the bond statements that Fedbond required Sandlundlu to pay the legal costs. He accordingly realised that a demand for payment of same was being made. Mr Pammenter's submission, as I understand it, arises from Mr Reardon's response during cross-examination. Mr Reardon testified that when he saw that Sandlundulu's bond was being debited with legal costs, he telephoned Fedbond and was informed that the costs were in respect of the Kotter and Michaelides litigation and that in terms of the mortgage bond he had to pay same.

[14] I do not agree with this submission. The fact that Mr Reardon and thereby Sandlundlu was informed of the legal costs after he queried same and after the costs had already been debited to the mortgage bond account seemed to have escaped Mr Pammenter. This course of action was clearly in conflict with the provisions of Clause 8 of the mortgage bond.

[15] I accordingly agree with the finding of the Court *a quo* that although the costs were owing by Sandlundlu to Fedbond, in the absence of a proper demand, these costs never became due and payable. The appeal in respect of this issue must therefore fail.

(b) **THE FS TRUST ISSUE**

[16] One of the consequences of the protracted rescission proceedings was that no payments were being made or effected to service the mortgage bond. Fedbond, via its Managing Director, Mr Field, was concerned as the indebtedness was increasing due to monthly interest

payments that were due. They were also concerned as Fedbond was obliged to pay their investors from the monthly interest payments and in the absence of such payments, had to fund the payments to their investors themselves. This placed a financial burden on Fedbond. Finally, Fedbond was concerned as it was not receiving its share, calculated at 3.5% of the monthly interest payments.

[17] As a result, and in December 2002, a meeting was held with Mr Field and Mr Reardon. Mr Field expressed his concerns as outlined above and Mr Reardon assured him that payments would be effected. It was also agreed that Sandlundlu (Mr Reardon) would effect payment of R50 000,00 per month. These payments commenced in January 2003.

[18] Given the concerns which Mr Reardon expressed regarding the possible outcomes of the rescission application, the parties (Mr Field and Mr Reardon) agreed that the monthly payments of R50 000,00 would not be reflected on Sandlundlu's mortgage bond statements.

[19] Sandlundlu honoured its undertakings in terms of this agreement with Fedbond and it is common cause that eleven payments of R50 000,00 were made. However, instead of crediting the monthly payments against the mortgage bond, Fedbond deposited these monthly payments into an account referred to as the "FS Trust". It is common cause that the interest earned on money deposited into the FS Trust was approximately 6% per annum. As a consequence Sandlundlu's mortgage bond indebtedness continued to increase (at approximately 16% per annum) despite the monthly payments of R50 000,00 which it was effecting. On the 7th January 2004 Fedbond credited Sandlundlu's mortgage bond account in the sum of R579 945,92 in respect of the

eleven payments and interest that it received. Sundlundlu accordingly claimed the difference between the two interest rates and the effect it had on the mortgage bond account.

[20] Mr Field testified that it was agreed that the money would be placed in a trust account whereas Mr Reardon denied that such an agreement existed. The Court *a quo* held that a legally enforceable agreement did not come into existence because the parties were never *ad idem* on the interest rate that the monthly payments would earn. This view has been supported by Mr Pammenter in his submissions on appeal. I however do not agree. To conclude that the parties were not *ad idem* as regards the rate of interest would, in my opinion, mean that the parties agreed that either the money would be invested elsewhere or that the payments would not be credited to the bond account. None of these circumstances existed. I have drawn the distinction between the payments not being credited to the mortgage bond account (as contended for by Mr Pammenter) as opposed to the payments not being reflected on the bank statements. In this regard the evidence clearly points to and favours the latter.

[21] The commencement point is, as outlined earlier in this judgment, the concerns of Fedbond as a result of the non-payment of the monthly interest by Sandlundlu. Despite these concerns and the fact that Fedbond was now receiving interest payments in the sum of R50 000,00 Mr Field was quite prepared to continue funding the monthly payments to his investors, thereby perpetuating the financial burden on Fedbond. This decision does not make business sense as is the contention by Mr Field that Mr Reardon was willing and agreed to receive interest on his monthly payments at the rate of approximately 6% per annum whereas he was paying interest on a mortgage bond at approximately 16% per annum.

[22] The probabilities favour the Court *a quo's* findings that the arrangement between the parties was that the monthly payments of R50 000,00 would not be reflected on the mortgage bond statements. I agree with the Court *a quo's* findings that this arrangement was purely administrative in nature and did not affect the contractual relationship between the parties. Mr Field conceded, during cross-examination, that the monthly payments of R50 000,00 were made under Sandlundlu's contractual obligation to pay interest under the mortgage bond. He also conceded that in the absence of any such payments, Sandlundlu's indebtedness would increase (as it did prior to the commencement of the monthly payments of R50 000,00) as the interest would accumulate in arrears. It is therefore remarkable that notwithstanding payment, he still allowed the interest arrears to accumulate.

[23] Mr Reardon's version that he was honouring Sandlundlu's obligations and expected and believed that the said monthly payments were discharging Sandlundlu's interest obligations in terms of the mortgage bond is accordingly more probable.

[24] I accordingly agree with the Court *a quo's* finding that the payments are to be treated as payments in reduction of the mortgage bond. The appeal in respect of this issue must therefore fail.

(c) **THE INTEREST ISSUE**

[25] On the 5th August 2002 the following order was granted, in the Durban and Coast Local Division of the High Court, in favour of Fedbond:

- "1(a) That judgment is granted in favour of the Second Applicant against the Respondent (Sandlundlu) in the sum of R8 865385,88 plus interest at the rate of 14.99% per annum calculated from the 1st June 2002 to date of payment.
- (b) That the First Respondents (sic) immovable property, Portion 1 of Erf 1094 Port Edward, Registration Division ET, Province of KwaZulu-Natal, is declared executable.
2. That the Respondent is to pay the costs of the application on the scale as between attorney and client.
3. Further and/or alternative relief."

[26] It is common cause that Fedbond compounded interest from that day and it also varied the interest rates in accordance with the provisions of the mortgage bond. It claimed to do so by virtue of the provisions of Clause 5 of the mortgage bond. In seeking to justify this, Mr Pammenter submitted that the aforesaid judgment did not novate the mortgage bond in so far as it related to the question of interest. In support of this submission he relied on the judgment of Farlam JA in **MV Tirupati; MV Ivory Tirupati and Another v BadanUrusanLogistik (aka Bulog) 2003(3) SA104 (SCA)**. At paragraph 28, Farlam JA held that a judgment "does not terminate the antecedent obligations or those things that were accessory to it, such as pledges, sureties and interest." At paragraph 30 he held that:

"Although an original cause of action may continue to exist in a reinforced and strengthened form, a judgment ... may also give rise to a new and independent cause of action enforceable between the same parties in another court".

In **Trust Bank of Africa Limited v Dhooma 1970(3) SA304 (N)**, Fannin J held, at 310 A-C:

"It does seem to me to be a somewhat artificial view of the position to regard a judgment as, in all circumstances, having the effect of a novation. In some cases of course, it does have precisely that effect, where, for example, a Plaintiff obtains a judgment for cancellation of a contract and for damages. Thus, in this case, had the judgment been one declaring the contract between the parties to have been at an end, with an order that the Defendant return the vehicle to the Plaintiff and pay the Defendant a sum of money, it could quite realistically be said that the judgment wholly replaced and thus novated the contractual rights and liabilities of the parties inter-se. But in a case like the present, where the only purpose of the judgment is to enable the Plaintiff to enforce certain rights, by means of execution if need be, without in any way affecting other rights arising out of the contract, it seems more realistic to regard the judgment not as novating the former, but as strengthening or reinforcing them. The right of action will have been replaced by a right to execute, but the enforceable right remains the same."

[27] This judgment was cited with approval in **Swadiff (Pty) Ltd v Dyke, NO 1978(1) SA928 (AD)**. At 944 F Trengrove AJA (as he then was) held:

"I respectfully agree with the views expressed by Fannin J, in **Trust Bank of Africa Limited v Dhooma** ... in the passage quoted above. In a case like the present, where the only purpose of taking judgment was to enable the judgment creditor to enforce his right to payment of the debt under the mortgage bond by means of execution, if need be, it seems realistic and in accordance with the views of the Roman Dutch writers to regard the judgment not as novating the obligation under the bond, but rather as strengthening or re-enforcing it. The right of action, as Fannin J puts it, is replaced by the right to execute, but the enforceable right remains the same."

[28] In both the Trust Bank and Swadiff cases, the relief sought was for specific performance of obligations in terms of a contract. Hence the exception referred to by Fannin J did not apply. It is however noted that *in casu* Fedbond expressly cancelled the loan agreement. This is precisely what was referred to in the Trust Bank and Swadiff cases. Accordingly

the judgment of 5th August 2002 novated Fedbond's contractual rights. As a result, Fedbond had no right to vary the rate of interest nor did it have the right to capitalize any interest in the absence of a Court order permitting same.

[29] Although not referred to in his heads of argument, Mr Pammenter submitted that the mortgage bond was not cancelled or terminated. As I understand his submission, it was only the underlying loan agreement that was cancelled. Cancellation of the mortgage bond was only effected in the Deeds Registry Office once payment in full had been received by or secured in favour of Fedbond. As Fedbond were claiming their rights under the mortgage bond and as these rights had not been cancelled, the right to vary the interest rate and to compound interest was not novated.

[30] This submission is without merit. The loan agreement is the foundation of the contractual obligations of the parties. The mortgage bond records and acknowledges the existence of and primacy of the loan agreement – **Grobler v Scholtz 1953(3) SA175 (2) at 179 C-D; Lief, NO v Dettmann 1964(2) SA253 (AD) at 259; Thienhaus NO v Metje and Ziegler Limited and Another 1965(3) SA25 (AD).** Accordingly Fedbond's rights are found in the loan agreement which was cancelled or terminated by Fedbond.

[31] The order of court provided for the payment of interest at the rate of 14.99% per annum with effect from 1st June 2002. As the order is silent on whether this interest is compound or simple, it is a longstanding practice that unless compound interest has been claimed and granted, the interest is simple interest. Mr Pammenter appeared to have conceded this during argument.

[32] I agree with the findings of the Court *a quo* and the appeal on this ground must also fail.

(e) **QUANTUM**

[33] Although the parties gave the Court *a quo* the assurance that the calculations performed by the accountants were arithmetically sound (and this assurance was relied upon by the Court *a quo*) Mr Pammenter submitted that there was a patent error in Mr Clamp's (Sandlundlu's accountant) calculations. I have, subsequent to the hearing of the appeal, received a recalculated schedule from the Appellant. The parties have agreed that the judgment of the Court *a quo* be amended as hereinafter set out.

CONCLUSION

[34] In conclusion the following order is made:

1. The appeal is dismissed with costs.
2. The order of the court *a quo* is amended to read as follows:

The First and Second Defendant, jointly and severally, the one paying the other to be absolved, are ordered to pay to the First Plaintiff:

- (a) The sum of R1 702 465,61;
- (b) Interest on the amount of R2 141 615,44 calculated at the rate of 15.5% per annum from 23rd July 2007 to 8 February 2010;

- (c) Interest on the amount of R1 702 465,61 calculated at the rate of 15.5% per annum from 9th February 2010 to date of payment'
- (d) Costs of suit.

NDLOVU J

I agree

MADONDO J

CAV ON: 5 August 2013

DELIVERED ON: 18 October 2013

COUNSEL FOR THE APPELLANT: Pammenter SC

INSTRUCTED BY: Gideon Pretorius Inc.

COUNSEL FOR THE RESPONDENT: Smithers SC

INSTRUCTED BY: de Villiers, Evans & Petit