Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: 9644/2004

In the matter between:

ABSA BANK LIMITED **Plaintiff**

and

JACOBUS LODEWICUS ERASMUS **Defendant**

JUDGMENT DELIVERED : 14 JUNE 2006

MOOSA, J:

Introduction

1. The plaintiff instituted action against the defendant for: (a) payment of the sum of R696 133,48; (b) interest at the rate of 15,5 per cent from date of service of summons to date of final payment: (c) an order that the mortgaged property be declared executable; and (d) costs of the action on an attorney and client scale. The defendant opposed the action and counterclaimed the sum of R6 634 000 as damages. The defendant is not legally represented and conducted

his own defence.

Pleadings

2. The plaintiff's case is based on money lent and advanced on an overdraft facility that is secured by a covering bond over the defendant's farm. The defendant pleaded that plaintiff fraudulently firstly, converted a loan on a first mortgage bond at an interest rate of not less than 17 per cent, to a loan on an overdraft facility to enable it to impose a higher interest rate; secondly, included a costs clause of R52 000 without his knowledge and consent; and thirdly, effected withdrawals, payments and unauthorized debits without his knowledge and consent. During the course of the trial, defendant introduced a further defence of prescription. He alleged that plaintiff's claim became prescribed by efflux ion of time.

3. The defendant's counterclaim is based on pain and suffering, ill-health, emotional stress, financial ruin, domestic problems, loss of his multi-million project and black-listing of his name, which all resulted from the fraudulent conduct of plaintiff. The plaintiff denied these allegations and, more particularly, denied that its conduct was directly or indirectly the cause of defendant's problems. The plaintiff furthermore disputed that defendant suffered any damages and pleaded that if defendant succeeds in establishing such damages, plaintiff denies that there is a causal connection between the breach of contract alleged by him and such damages and/or that plaintiff is responsible or liable for the payment thereof. The defendant's counterclaim constitutes both

the elements of a contractual liability and that of a delictual liability.

The Onus

4. It is not disputed by the parties that the onus is on the plaintiff to prove the nature and the terms of the contract and the amounts claimed; while the onus is on the defendant to prove breach on the grounds of fraud, the causal connection and damages. The onus to prove the special defence of prescription is also on the defendant. At the Rule 37 Conference, the parties agreed that the plaintiff would start with the presentation of its case but it reserved the right of rebuttal[1].

Facts which are common cause

5. It is common cause that, early in December 1997, defendant applied to plaintiff for a loan of R260 000 to purchase a farm. This application was approved on 30 December 1997. The plaintiff confirmed in writing that an amount of R260 000 was made available to defendant to purchase the farm known as Weltevreden and situate in the district of Laingsburg. The loan was subject to the normal conditions of the bank, amongst others, that a covering bond in an amount of R260 000 shall be registered over the property in favour of plaintiff[2].

6. It is common cause that on 12 January 1998 defendant applied for the opening of a current cheque account and completed an application form in respect

1 See Pillay v Krishna & Another 1945 AD 946 at 951-954 for an authoritative discussion on onus and South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 548A-C.
2 See annexure “F” to Defendant’s Plea and Counterclaim

thereof[3]. It is also common cause that, on 30 January 1998, defendant executed a power of attorney to register a covering bond and simultaneously initialled a draft covering bond which formed an annexure thereto[4]. These documents were executed and initialled at the offices of and in the presence of the conveyancer, SJ Terblanche.

7. The objective evidence is that the covering bond was registered on 12 June 1998[5].

The proceeds of the covering bond were made available to the defendant on 15 and 17 June 1998 in the form of overdraft facilities to pay the purchase price of the farm. It is not disputed that the proceeds were in fact used to effect payment of such purchase price. The evidence is not on all four squares with the allegations in paragraphs 7 and 8 of plaintiff's particulars of claim. However, not much turns on the difference as plaintiff has accepted the objective evidence to which I have already alluded.

Allegations of fraud

8. Defendant in his plea and counterclaim makes serious allegations of fraud against the plaintiff. Before dealing with the specific grounds of fraud, I think that it is only prudent to make certain general observations relating thereto. The allegations of fraud are regarded by our courts in a very serious light. They are not easily made as they are difficult to prove[6]. There is a duty on the person

3 See annexure "B" to Plaintiff's Particulars of Claim.
4 See exhibit "G"
5 See Covering Bond B35805/1998 which is annexure "C" to Plaintiff's Particulars of Claim
6 See: Nedperm Bank Ltd v Verbri Projects cc 1993 (3) SA 214 (W) at 220B

who makes such allegations to prove them. In the present case, besides the *ipse dixit* of defendant, there is no other evidence to substantiate the allegations of fraud. Moreover, the objective evidence does not support such allegations. The uncontroverted evidence is that plaintiff confirmed the approval of the loan in writing, subject to the normal terms and conditions, amongst others, the registration of a first covering bond. Defendant alleged that it was a term of the agreement that the interest would not exceed 17 per cent per annum. It was also agreed that there would be a structured monthly repayment plan. These allegations are not supported by the terms of the bond.

9. Pursuant to the approval of the loan, defendant executed a power of attorney to register a bond and initialled a draft bond document. The bond was registered in the deeds office. The proceeds thereof, in the form of overdraft facilities on the cheque account of defendant, were paid to cover the purchase price of the property over which the bond was registered. The defendant admitted that these payments were used to cover the purchase price[7]. The bank statement of defendant reflected these payments[8]. The bond provides that interest shall be calculated at the rate or rates agreed upon between the parties in writing from time to time and in the absence of such agreement it shall be determined in accordance with the rate or rates which the bank levies against the particular transaction. There is no stipulation in the bond that the interest rate shall not exceed 17 per cent per annum. The bond also covers an additional amount of

77 See: Defendant's reply to question 9 of the Rule 37 Minute
8 See amounts of R84 700,93 on 15 July 1998 and R175 299,07 on 17 June 1998 reflected on Absa's bank statement marked "X10"

R52 000 in respect costs. The defendant also denied that he ever agreed to such a term.

10. In accordance with the doctrine of *"caveat subscriptor"* there is a presumption that a person who signed a document is aware of the content, irrespective of whether he has read the document or not. This presumption can be rebutted in certain exceptional circumstances[9]. Defendant in his pleadings states that he did not have the opportunity to read the bond document before signing it. He saw the document for the first time when he received the summons in this matter. It was an annexure to the particulars of claim. His assertion that he saw the document for the first time is not borne out by the objective facts. He in fact initialled the bond document when he executed the power of attorney to register the bond. He has not rebutted the presumption of constructive knowledge. The court is satisfied that when he executed the power of attorney, he was aware that a bond was to be registered and had constructive knowledge of its content.

11. The first issue of fraud that the court will evaluate is the allegation that plaintiff fraudulently converted a loan on a bond to an overdraft facility. The crux of defendant's objection, the way I understand it, is that the proceeds had to be paid by the plaintiff directly to the transferring attorneys and not by converting a bond into an overdraft facility on his cheque account. The defendant alleges that such conduct was fraudulent, which entitled plaintiff to charge a higher rate

9 See George v Fairmead 1958 (2) SA 465 (A) at 470C-D where the Court approved a passage of Innis CJ from Burger v South African Railways 1903T 571 at 578, which succinctly set out the principles; Afrox Healthcare Ltd v Strydom 2002 (6) SA 21 (SCA) at 41 and Stiff v Q Data Distribution (Pty) Ltd 2003 (2) SA 336 (SCA)

of interest than the agreed rate of not more than 17 per cent per annum. In support of this contention, he relied on three documentary exhibits. The first one was the application form for the opening of the banking account, which states “No overdraft facilities”[10]. The second one was a letter from the Landbank which confirms that defendant had applied for a loan and such application was withdrawn[11]. The third one was a computer print out of defendant headed “Portfolio Enquiry – Consolidated”, with hand written notes. The printout was mysteriously posted to him by an unknown person[12].

12. Mr Gouws, the branch manager of plaintiff at the time, testified that he was not permitted to finance the purchase of farms through the granting of bonds. The modus operandi was to do so through the granting of overdraft facilities on security

of a covering bond. This evidence was not disputed or rebutted by defendant. He testified further that, save for the modus operandi referred to, at the time he opened defendant’s banking account, there was no agreement with regard to overdraft facility on such account. This was endorsed on the application form. However, prior to the registration of the bond, defendant’s account went into debit and plaintiff, by tacit agreement, granted him an overdraft facility of R10 000 to cover such overdraft. The inherent probabilities are consistent with such version and the court accepts Mr Gouws explanation.

10 See under the column marked “Remarks” in annexure “B” of Plaintiff’s Particulars of Claim
11 This letter is dated 8 December 1997 and forms part of Defendant’s Bundle of Documents at p 332
12 See exhibit “B”

13. The defendant testified that he was persuaded by plaintiff to withdraw his application for a loan from Landbank and apply to plaintiff for such loan. Defendant contended that he was offered 17 per cent interest by Landbank and it would have been foolhardy for him to have gone to plaintiff for a loan if its interest rate was higher than that of plaintiff. The letter from Landbank does not disclose its rate of interest but there is no reason to doubt defendant's contention in respect thereof. Mr Gouws denied that plaintiff approached defendant to seek finance from it or offered him a lower interest rate than the going rate. There is therefore conflicting evidence with regard to the question of who approached who for the loan. I do not think that the court is required to resolve that dispute for the purpose of present purposes.

14. With regard to the computer print-out headed "Portfolio Enquiry - Consolidated", Mr Pogieter testified that there was nothing sinister about it. He said that it appears to be a working document obtained by someone from the records of Absa. He confirmed that it was consistent with the other bank statements of the defendant. I accept that the print-out was a working document. Although there are unexplained handwritten notes thereon, the document per se does not appear to be suspect. Both Mr Gouws and Mr Potgieter denied that plaintiff acted fraudulently as alleged by defendant.

15. The second issue of fraud pleaded by defendant is that plaintiff included a costs clause of R52 000 in the bond without his knowledge and consent. It is common practice to include a cost clause in a bond[13]. The object is to secure

13 See: Para 477 (Usual Clauses in Bond) of Lawsa, First Re-issue, Volume 17 at page 394/5.

certain costs which may be expended by the mortgagee in respect of the mortgaged property. The court found earlier that when the defendant executed the power of attorney and initialled the draft bond document, he had constructive knowledge of the content of the bond which included the cost clause of R52 000. His contention that the costs clause was included without his knowledge and consent can accordingly not be upheld.

16. I now turn to the further allegations of fraudulent conduct on the part of plaintiff. Defendant in his plea alleges that plaintiff fraudulently and without his consent and knowledge made withdrawals and payments from, and unauthorized debits to his cheque account. These entries are satisfactorily explained by plaintiff's witnesses. It is common cause that the two withdrawals, complained of by defendant, were to effect payment of the purchase price of the farm property. There were also certain overpayments in respect of insurance premiums. Mr Potgieter, who testified for plaintiff, explained that they were due to a computer error. Instead of presenting one debit order for R1 763, seventeen debit orders for the same amount were erroneously presented on the same day. This resulted in the account going into overdraft. The computer error was rectified and the incorrect entries were reversed the following day, which resulted in the account going into credit again[14].

17. Plaintiff acknowledged that certain debits in respect of costs were erroneously debited to the account. Mr Potgieter testified that with the recalculation of the

14 See bank statements of Absa marked X3-X6

account he found one debit of R537,13 in respect of legal costs was erroneously included in plaintiff's claim. Plaintiff agreed that its claim should accordingly be reduced by that amount. Mr Potgieter explained that there were two further debits in respect of legal costs, but they did not form part of plaintiff's claim. It is quite clear from the objective facts that, save for the amount of R537,13, the other incorrect amounts were either reversed or not claimed. The court is satisfied that defendant did not suffer any prejudice by the withdrawals, overpayments and unauthorized debits as alleged by defendant.

18. Besides the objective facts, the probabilities also do not support defendant's allegation of fraud. Firstly, defendant raised the question of fraud for the first time in writing after plaintiff instituted legal proceedings for the recovery of the loan. Although defendant testified that he raised the issue with Mr Gouws and other personnel of plaintiff, there is no documentary evidence to record such complaint. Mr Gouws denied that any such complaint was made to him. Secondly, defendant had continued operating the account, despite the fact that he became aware of "the enormous fraud" perpetrated against him by plaintiff. Thirdly, the objective facts are consistent with plaintiff's version and do not favour defendant's version. In the circumstances the court concludes that the defendant has failed to prove any fraudulent conduct on the part of plaintiff as alleged by him.

19. The overwhelming evidence, the objective facts and the probabilities support

the plaintiff's version with regard to the nature and terms of the agreement concluded between them. The court accordingly finds that plaintiff agreed to advance defendant a loan of R260 000 to finance the purchase of the farm property in the form of an overdraft on his cheque account and such loan was to be secured by the registration of a bond. The terms and conditions of such loan are set out in the bond, which includes the manner in which the interest is to be calculated and reflects the additional amount of R52, 000 in respect of costs.

The defence of prescription

20. I now turn to consider the special defence of prescription raised by defendant during the course of the trial. The matter was not pleaded by defendant. As the matter was essentially a legal issue rather than a factual one and as defendant is a layperson who, through poverty, was not able to afford the services of a lawyer, I allowed him to raise the matter for the first time at the trial. Plaintiff was afforded an opportunity to respond thereto. Plaintiff's counsel submitted that there was no merit in the special defence, as the period of prescription was 30 years and not three years as argued by defendant. During the course of my research, I came across section 51 of the Deeds Registries Act, 47 of 1937 which sets out the requirements of bonds intended to secure future debts. I thought that it may have some impact on the issue under consideration. I afforded both parties an opportunity to submit additional written heads on the question of prescription in the light of the provisions of the said section. Both parties provided further input in respect thereof.

21. In terms of the bond, defendant acknowledged liability to and in favour of plaintiff for the sum of R260 000 or any lesser amount which may from time to time be owing (the principal sum) together with interest thereon. The bond serves as a continuing security for the principal sum, interest thereon and the additional amount of R52 000. The bond serves both as an instrument of debt and as security. From the wording of the bond it is clear that an existing debt is being secured. The question whether interest is an existing or future debt has been the subject of discussion in case law[15]. Section 51(1) is silent on the issue.

22. In **Rooth & Wessels v Benjamin Trustee and the Natal Bank Limited** 1905 TS, **Innes, CJ** said (at p630):

> *"…the rule as to preference of interest under mortgage bonds is this: If the bond stipulates for interest, or if it is clear from its provisions that the parties contemplated that interest would be paid, and if the property mortgaged is bonded as security for the interest as well as for the capital, then the interest up to the legal limit enjoys just the same preference as the main debt. But if the bond contains no such stipulation or provisions, then any claim for interest can only be a concurrent one."*

Applying the principles enunciated therein to the present case, both the principal sum and the interest thereon are secured by the bond. The interest thereon up to the legal limit in terms of the *in duplum* rule accordingly enjoys the

15 See: Lipschitz NO v Saambouvereniging 1979 (1) SA 527 (T) at 531C-D; Klagbruns Inc v Adjunk-Balju, Bronkhorstspruit 1979 (2) SA 169 (T) at 171G-H.

same preference and priority as the principal debt.

23. In **Tobacco Exporters and Manufacturers v Bradbury Road Properties** 1990 (2) SA 420 (C) at 427I -428A, the court approved the proposition that *"while s 51(1) deprives a bondholder of any preference or priority if his bond fails to comply with s 51(1), it has no effect upon the essential validity of the bond which remains fully effective inter partes"*.

24. In my view therefore, the interest in the present bond does not constitute a future debt within the meaning of s 51(1). In the light of my conclusion it is unnecessary to decide whether or not the bond complies with the provisions of s 51(1).

25. The Prescription Act, 68 of 1969 provides for a 30 year prescription period in respect of any debt secured by a mortgage bond. The said Act is silent on the question of interest. The precursor[16] provided for a 30 year prescription period in

respect of a debt secured under a mortgage bond and a three year prescription period in respect of interest secured under a mortgage bond. In the present case, the bond secures both the principal sum and the interest thereon and accordingly constitute debts within the meaning of s 11(a)(i).

26. I accordingly conclude that the period of prescription in respect of both the

16 See: section 3(2)(c)(v) of the Prescription Act, 18 of 1943

principle sum and interest is 30 years. I am strengthened in this conclusion by the fact that within the capital of the claim is an amount which represents interest which has been capitalised over a period of time. It only make good sense that if different periods of prescription applied in respect of capital and interest then, in

that event, the interest had to be decapitalised from the claim, to determine the

question of prescription in respect of each of the claims.

Defendant's Counterclaim:

27. I now turn to evaluate defendant's counterclaim. Defendant's counterclaim is based on fraud. As I have already found, that defendant has failed to prove fraud on the part of plaintiff, the basis of defendant's counterclaim falls away. It is, therefore, not necessary for the court to consider the two further issues of causation and quantum relating to defendant's counterclaim. The plaintiff also submitted that it was not competent for defendant to counterclaim concurrently on the basis of contractual and delictual liability. In view of the conclusion that I have reached, it is unnecessary to decide that issue. Defendant's counterclaim falls therefore to be dismissed.

The *in duplum* rule

28. A further issue which requires the court's attention, is the relief sought by

plaintiff in prayer (b) of the summons. In the light of the *in duplum* rule, is plaintiff entitled to mora interest as claimed in prayer (b)? According to the judgment of **Standard Bank of SA v Oneanate Investments (in liquidation)** 1998 (1) SA 811 (SCA) at 834G: "(i) The *in duplum* rule is suspended pendente lite, where *lis* is said to begin upon service of the initiating process; and (ii) once judgment has been granted, interest may run until it reaches the double of the capital amount outstanding in terms of the judgment"[17].

29. The summons in this matter was served on 18 November 2004. The amount of the claim is R695 059,33. In terms of the *in duplum* rule the interest ceased to run as at 26 March 2002. In accordance with the principles laid out in the **Standard Bank case** (**supra**), plaintiff is entitled to mora interest at the rate of 15,5 per cent from 18 November 2004 to date of payment. The **in duplum** rule will once more apply in respect of the further interest on the capital amount of the judgment. In terms of the bond, plaintiff is entitled to have the property declared executable as claimed for in prayer (c) and to be awarded costs on an attorney and client scale as claimed for in prayer (e).

The Order

30. In the premises, judgment is granted against defendant as follows:

(a) payment of the sum of R695 059,33 (six hundred and ninety five thousand fifty nine rand and thirty three cents);

17 See also The Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (Pvt) Ltd and Three Similar Cases 1997 (2) SA (ZH) 285 at 300G-I.

(b) interest thereon at the rate of 15,5% (fifteen and a half per cent) per annum from date of service of summons to date of payment;

(c) portion 1 of the farm Weltevreden No 253 in the district of Laingsburg, Province of the Western Cape, measuring 391,2299 hectare, held by deed of transfer No T53648/98, is declared executable; and

(d) costs on an attorney and client scale.

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