

BOLAND BANK LIMITED

APPELLANT

~~and~~
and

J S PIENAAR

FIRST RESPONDENT

J F VAN HEERDEN

SECOND RESPONDENT

JUDGMENT BY:

H H NESTADT

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

BOLAND BANK LIMITED

APPELLANT

and

J S PIENAAR

FIRST RESPONDENT

J F VAN HEERDEN

SECOND RESPONDENT

CORAM: JANSSEN, SMALBERGER, NESTADT, VIVIER JJA
et VILJOEN AJA

DATE HEARD: 2 MAY 1988

DATE DELIVERED: 19 MAY 1988

J U D G M E N T

NESTADT JA:

Appellant loaned money to second

respondent/

respondent. It was a term of their agreement that it

be repaid in monthly instalments. In order to secure

his obligation to do so, second respondent, in terms of

a first mortgage bond, hypothecated certain immovable

property of his to appellant. Nevertheless, he failed

timeously to pay a particular instalment. This en-

titled appellant to claim immediate payment of the full

amount of capital and interest owing in terms of the

bond. It contained a clause to this effect. The

material part of it provides:

"23. Ingeval enige betaling ten opsigte van
Kapitaal of Finansieringskoste of die
Bykomende bedrag nie stiptelik op die
vervaldatum betaal word nie ... sal
die hele kapitaalbedrag en bykomende
bedrag dan verskuldig tesame met al

die/

die finansieringskoste daarop on-
middellik betaalbaar wees sonder
kennisgewing ..."

Whilst appellant was considering putting the clause into operation, but before it actually did so, first respondent, wishing to avoid the bond being called up, tendered payment of the arrears. Appellant refused to accept such payment. It did not wish to jeopardise its right of foreclosure.

These, in outline, were the essential circumstances which led first respondent to apply, as a matter of urgency, to the Orange Free State Provincial Division for an order, in effect, compelling appellant to accept payment of what had been tendered. Appellant was cited as first respondent and the mortgagor as

second/

second respondent. The matter came before LICHTENBERG

J, who issued a rule nisi in these terms. It was

directed that it operate with immediate effect. On

the extended return day, and despite appellant's opposi-

tion, an order was made, by the same learned Judge, in

substance confirming the rule and awarding costs

against appellant on the attorney and client scale.

This appeal is against such orders. It is before

us with the leave of the court a quo. Second re-

spondent does not oppose it. First respondent

initially did. Heads of argument were filed on his

behalf. At the hearing of the appeal, however,

there was no appearance by or for him. Shortly be-

fore, his attorneys gave notice that they had

withdrawn/

withdrawn and that he would not be represented.

The judgment of the court below (confirming the rule) is reported (see Pienaar vs Boland Bank and Another 1986(4) S A 102(O)). It explains what first respondent's interest was in seeking to purge second respondent's default in making payment as he was obliged to under the bond. This was that a partnership allegedly existed between them and that the mortgaged property was a partnership asset (at 109 H). It specifies what the indebtedness of second respondent to appellant was, when the bond was registered and the monthly payments due thereunder (104 F - H) as also when second respondent fell into arrear and in

what/

what amount (109 I - J). Most important, details of

the various tenders made by first respondent to

appellant to pay the arrear instalment in question

are set out (110 D - F). The exact terms of the

order granted against appellant are also given (117 C

read with 107 I - 109 A). It is, therefore, un-

necessary to deal further in this judgment with these

matters.

The ratio of the court a quo's decision

must, however, be briefly canvassed. It was that:

(i) first respondent, even though a stranger to the

transaction, was entitled to (tender to) pay second

respondent's indebtedness to appellant (110 F - 111 D);

(ii) clause 23 of the bond did not result in automatic

foreclosure;/.....

foreclosure; appellant had to elect to do so (114 I -

115 B); (iii) when first respondent tendered payment,

appellant, though intending to do so, had not yet elected

to call up the bond (115 C); (iv) accordingly, such

tenders were valid and should have been accepted by

appellant; its failure to do so was unlawful; and

first respondent was entitled to the relief claimed

(115 D); (v) attorney and client costs were awarded

because of appellant's dilatory, vexatious, obstructive

and contemptuous conduct (116 H - 117 C).

I am not sure that finding (iii) is

justified. It may be that appellant's refusal of

all the tenders per se constituted an election by it

to/

to call up the bond. Moreover, second respondent

(as appears from 109 C) told a representative of

appellant in October 1984, at a time before the instal-

ment in question was due, that it would not be paid

and asked that the bond be called up. He was told

that appellant would do so. It may be that this

amounted to a notification, in advance, of an election

by appellant to foreclose and that the need to repeat

this when second respondent actually fell into arrear

was dispensed with. And it must, of course, be

remembered that it was second respondent as mortgagor,

rather than first respondent, to whom appellant's

election had to be communicated. However, before us,

Mr Burger, for appellant, was content to argue the

matter/

matter on the basis that finding (iii) (as also (i) and (ii))

was correct. His attack was directed at (iv) (and,

consequently, (v)). It was submitted that on second

respondent's failure to pay the instalment on due date,

appellant acquired the right to call up the bond; it

could not, pending a decision whether to do so, be de-

prived of such right by any tenders of payment; it

was, accordingly, not obliged to accept them; and first

respondent's application should, in the premises, have

been refused.

The principle underlying the argument

is a well-established one. It has been applied to

the case of a creditor seeking to cancel a contract

of/

of sale on the basis of a lex commissoria. His

accrued right to do so is not defeated by a belated

tender of payment of the arrears before he exercises

his election to cancel. This was decided in Schuurman

vs Davey 1908 T S 664. An instalment of the purchase

price of fixed property was due on 2 April of a particular

year. It was not then paid. Only on 17 April was it

tendered. The seller, however, refused to accept it.

Relying on a lex commissoria in the deed of sale, he then

notified the purchaser that the agreement was cancelled.

INNES, CJ, rejected the purchaser's contention that the

tender deprived the seller of his right to cancel.

Having found (at 671) that though such right accrued

on the day of the buyer's default, cancellation could

only/

only take effect on notification to the buyer of
the seller's election to cancel, the learned judge
stated (at 671 - 2):

"Then the second point is whether the fact that the buyer, before the notification of cancellation, tendered payment, affected the seller's right to notify his decision to cancel at once. Upon this point I entirely agree with the contention of Mr Roos in the course of his able argument. If the right to cancel existed on the 17th April, the seller could not be deprived of it merely because the buyer tendered to pay on that day. Nothing but waiver, undue lapse of time, or some default on the part of the seller in a matter which was a condition precedent to his obtaining payment under the contract, could deprive him of his right. Tender of the price after the due date could not cure the buyer's default, and, therefore, could not affect the seller's position."

SOLOMON and WESSELS JJ. concurred.

Schuurman vs Davey has been followed

over the years (see, on the point under consideration,

Pienaar vs Fortuin 1977(4) S A 428 (T) at 432 in fin -

433 C; Mahabeer vs Sharma NO and Another 1982(2) S A

157 (D) at 164 A - C; Mahabeer vs Sharma NO and Another

1982(4) S A 242 (N) at 249 D - E and, especially, Moodley

vs Reddy 1985(1) S A 76 (D)). In Moodley's case, a

submission that Schuurman vs Davey was wrongly decided

was rejected (at 82 G). During the course of his

judgment, THIRION J said:

"(I)t would seem to me that the notion
that a defaulting purchaser had a
right to purge his default by tendering
his performance late, and by such

tender/

tender to deprive the seller of the benefit of a lex commissoria expressly stipulated for in his favour, militates against the whole concept of the lex commissoria. It would mean that, after fulfilment of the condition on which the lex commissoria was dependent, there would be two concurrent and competing rights; the right of the defaulting purchaser still to tender performance and the right of the seller at his option to cancel the contract and it would then depend upon who was first in point of time to exercise his right. Such a situation would be contrary to the object with which a lex commissoria would be stipulated for. (at 81 D - F). ... Whatever the position may be in a case of a sale without a lex commissoria, once a lex commissoria is stipulated for in the seller's favour the position becomes altered and on fulfilment of the condition which brings the lex commissoria into operation there accrues to the seller a right to cancel which cannot be defeated by an offer of performance by

the/

the purchaser and the offer of performance by the purchaser then becomes subordinated to the choice of the seller to cancel." (at 82 F - G).

THIRION J's views are supported by old authority. Some are referred to by him. Another is Voet's Commentary on the Pandects 22.1.31 where the following is stated:

"Default cannot always be purged. -

Still it should be noticed that freedom to purge a default has not been bestowed on a defaulter in every case. If right from the commission of default a kind of new obligation has arisen in favour of him against whom default has been made, there is no room for purgation, since a right which has once accrued to anyone cannot be taken from him except by his own act.

Instances from Lex commissoria: -

On those lines if a thing has been

sold/

sold and delivered to anyone under a commissory term, and he has deferred payment beyond the day fixed in advance, he effects nothing by afterwards making a tender. He could not deprive the seller of the power which accrued from the first moment of default to reclaim the thing purchased by action in rem or in personam."

(Gane's translation, vol III, p 72P). In principle

this is surely correct. Normally, a creditor is obliged to accept a tender of performance by the debtor.

His failure to do so would constitute a breach of

contract and give rise to mora creditoris. But as

De Wet and Yeats Kontraktereg en Handelsreg, 4th ed,

167 point out, this does not apply where "die skuldeiser

weens die mora van die skuldenaar 'n terugtrekingsreg

het waarvan hy gebruik wil maak". Were this

otherwise/

otherwise, what is a bad tender, because it is out of

time, would be elevated to the status of a good one

which the creditor would have to accept. And having

done that, he would be precluded from invoking the

lex commissoria. This amounts to an imposed variation

of the contract; instead of having to perform by a

particular date, the purchaser is able to pay at any time

prior to the seller communicating his election to cancel.

I agree, therefore, with both the reasoning and conclusion

of THIRION J and, in particular, that Schuurman vs Davey

is good law. And, insofar as Middelburgse Stadsraad

vs Trans-Natal Steenkoolkorporasie Bpk 1985 (2) S A 524(T) at

529 A is at variance with it (as to whether it is,

see/

see 1985 Annual Survey 116), it must be taken to be

wrong. (The judgment has in fact, for reasons not rele-

vant to the issue under discussion, been reversed; see

Middelburgse Stadsraad vs Trans-Natal Steenkoolkorporasie

Bpk 1987(2) S A 244 (T).)

But does the principle in question apply

in casu? In my view it does. I can see no difference

in principle (in relation to the point under consideration)

between a lex commissoria in a contract of sale and a

foreclosure clause in a bond. Both usually (and in

the present matter do): (i) involve periodic payments

by the debtor; (ii) which if not made timeously,

afford the creditor an election of remedies; (iii)

which election, however, must be made within a reasonable

time/

time and (iv) may be waived (by e g an acceptance of

late payment); (v) but, having been made, binds him

and (vi) results in the termination of the sale or

bond (as the case may be). In particular, as in the

case of a lex commissoria, the fulfilment of the condi-

tion giving rise to the foreclosure clause being able

to be put into operation, results in the mortgagee

obtaining a right which would be negated were he bound

to accept late performance by the mortgagor. The

Schuurman vs Davey rule is probably of more general appli-

cation. Thus the view is expressed at 82 D of Moodley's

case that a lessor would not be precluded from terminating

the lease simply because of a tender of overdue rental

prior to actual cancellation. And the first paragraph of

Voet, op cit, clearly does not confine the inability

of a defaulter to purge his default to the case where

the creditor has the advantage of a lex commissoria.

I do not, however, propose to express a firm view in

this regard. It suffices to say that I am satisfied

that a mortgagee is entitled, in circumstances such as

the present, to rely on a foreclosure clause, notwith-

standing that he only elected to employ it subsequent

to the mortgagor having tendered to cure his failure

timeously to pay an instalment due in terms of the bond.

It is unnecessary to attempt to determine

when, on the papers, foreclosure of the bond by

appellant actually took place. (It should be noted

in/

in this regard that the reference to "18 July 1984" and

"2 December 1985" at 114 G of the judgment a quo

should respectively be to "18 July 1985" and "2 December

1984".) First respondent has never suggested that

when the tenders of payment were made, there had been

an undue delay by appellant in electing to call up the

bond. In the result, therefore, applying the princi-

ple under discussion, LICHTENBERG J should have held

that appellant was not bound to accept any of the

tenders made by first respondent.

It remains to mention certain miscellaneous matters on the merits. They are the following:

(i) In his counsel's heads of argument (to which I

earlier referred) it is not contended on behalf

of/

of first respondent that an acceptance by
appellant of the tender of payment would have
precluded a foreclosure of the bond. The
point taken is simply that the order granted
was justified because it obliged appellant merely
to accept payment on account of the full amount
owing under the bond. This is untenable. Payment
was never tendered on that basis. The whole pur-
pose of the application was to avoid foreclosure
and the sale of the property in execution; the
dispute was whether appellant was entitled so
to act; and the tenor of the judgment a quo
fully reflects this to have been so.

(ii)/.....

(ii) An alternative argument presented to the court

a quo on behalf of first respondent, and re-

ferred to by the learned judge at 115 E - F

(though not decided by him) was that there

has been a "conspiracy" between appellant and

second respondent that payments under the

bond cease and that appellant thus be enabled

to foreclose it. There is no question of a

conspiracy - at least not an unlawful one.

Even if non payment by second respondent did

take place pursuant to an agreement with

appellant, they, as the contracting parties,

were perfectly entitled so to agree.

(iii) Another point raised on behalf of first

respondent/

respondent in the court below, but which also

was not finally decided, was that it had not

been proved that appellant's representative

had authority to elect to call up the bond

(see at 115 G - 116 B). I do not think

that this view is, on the facts, justified. In

any event, an application of the correct

legal principles should have resulted in it

being found that appellant need not have

elected to have called up the bond prior

to the tenders of payment (or the launching

of the application) at all.

To sum up then, I am of the opinion that

the/

the application for an order that appellant accept

payment of the amount tendered by first respondent

was ill-founded and should have been dismissed.

This being so the order for costs against appellant

also cannot stand. Appellant is obviously entitled

to the costs of appeal. I think these should

include the costs of two counsel.

The following order is made:

(1) The appeal succeeds and is allowed

with costs. These are to be paid

by first respondent and are to in-

clude those of two counsel.

(2) The order of the court a quo is

set/

set aside and the following substituted:

"The rule nisi is discharged with costs".

NESTADT, JA

JANSEN, JA	)	
	)	
SMALBERGER, JA	)	
	)	CONCUR
VIVIER, JA	)	
	)	
VILJOEN, AJA	)	