REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number178/04
Reportable

In the matter between:

ABSA BANK LIMITED **APPELLANT**

and

JOHANNES JACOBUS IZAK STEPHANUS LOMBARD **RESPONDENT**

CORAM: SCOTT, STREICHER, FARLAM, CLOETE et VAN HEERDEN JJA

HEARD: 11 MARCH 2005

DELIVERED: 30 MARCH 2005

SUMMARY: Debtor and creditor – money lending transaction – whether lender reasonably exercised discretion to vary applicable interest rate.

JUDGMENT

FARLAM JA

[1] This is an appeal against a judgment of De Vos J, sitting in the Pretoria High Court, who dismissed a claim in reconvention brought by the appellant, Absa Bank Limited, against the respondent, Dr JJIS Lombard, for payment of an amount of R51 796-60, with interest and costs.

[2] The respondent had brought a claim against the appellant for R187 130-51, being the amounts he alleged he had overpaid to the respondent in the mistaken belief that they were due under a written loan agreement concluded in January 1988 between the appellant's predecessor in title, the Trust Bank of Africa Limited, and himself. The appellant's response was that the amounts in question had been owed by the respondent and that the respondent still owed money under the loan agreement, which it claimed from him in its claim in reconvention.

[3] The loan agreement which formed the basis of both the claim in convention and the claim in reconvention was, as I have said, concluded between the respondent, as borrower, and the appellant's predecessor, as lender, in January 1988. The respondent borrowed an amount of R259 995-60 to which was added an amount of R4-40, being stamp duty, resulting in a principal debt of R260 000-00. The respondent undertook to repay this sum, together with interest at 15.55 per cent per annum

subject to such increase or decrease in the interest rate as the Bank might in its exclusive discretion from time to time determine, in 120 equal monthly instalments of R4 282-71. (The agreement uses the expression 'finansieringskoste' but I shall speak in this judgment of 'interest'.) According to the agreement the total amount to be paid by the respondent was R513 925-20, being made up of the principal sum, R260 000-00, and the total of the interest charges, calculated at 15.55 per cent per annum.

[4] The loan agreement form used by the respondent and the appellant's predecessor to record their agreement had two alternative clauses dealing with the interest payable. The clause which was the alternative to the clause chosen by the parties and which was deleted on the form provided for an interest charge equal to the prime commercial bank lending rate as charged by the Trust Bank of Africa Limited, plus a certain percentage, per year (the exact figure to be inserted). Among the other clauses in the agreement was one in which the respondent expressly abandoned the benefits of the following exceptions: *non numeratae pecuniae, non causa debiti, errore calculi,* revision of accounts and no value received.

[5] Acting purportedly in terms of the provision in the agreement relating to the applicable interest rate, which I have referred to in

para 4, the appellant's predecessor and the appellant itself from time to time raised the interest rate payable by the respondent. Over the period 15 February 1988 to 15 July 1997 the respondent paid the appellant and its predecessor by stoporder amounts totaling R701 055-71. Believing that the clause in the agreement purporting to confer upon the lender the right in its exclusive discretion to raise or lower the interest rate was invalid, the respondent brought a *condictio indebiti* against the appellant, claiming, as I have said, R187 130-51, being the difference between the total he had paid, *viz* R701 055-71, and the amount payable under the agreement without any increase or decrease in the interest rate as initially stipulated, *viz* R513 925-20.

[6] In its plea the appellant denied that the clause relating to the applicable interest rate was invalid. It pleaded further that it was a tacit, alternatively an implied, term of the agreement that its power to vary the interest rate had to be exercised in a reasonable way with due regard to the rates and usages which would be applicable to similar agreements in the open market from time to time, alternatively with due regard to the fixed and acknowledged commercial practice of banking institutions in respect of similar agreements. It pleaded further that it and its predecessor had raised the interest rate applicable to the agreement in a

reasonable way as set out earlier in its plea. It also denied that the respondent had paid any amount which was not owed.

[7] In its claim in reconvention the appellant repeated the allegation in its plea that it and its predecessor had validly varied the applicable interest rate from time to time and alleged that the respondent still owed it an amount of R51 796-60 in terms of the agreement as validly varied by it and its predecessor.

[8] In his plea to the claim in reconvention the respondent averred that the appellant and its predecessor had not exercised the discretion conferred upon them in a reasonable way. This was because, although the rate had been *increased* from time to time by the same percentage as increases in the prime lending rate, it had only on one occasion *decreased* the rate when the prime lending rate fell.

[9] The pleadings in this case were closed before this court delivered its judgment in *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v Absa Bank Ltd* and *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA), in which it was held that clauses similar to the interest rate provision in the agreement presently under consideration were valid, but that the discretion thereby conferred had to be exercised *arbitrio boni viri,* ie reasonably. In consequence of this decision it became clear that the respondent's

claim in convention, based as it was on the alleged invalidity of the interest rate provision, could not succeed. It was accordingly not surprising that the respondent withdrew his claim in convention and tendered the wasted costs occasioned thereby at the rule 37 conference held between the parties before the trial began.

[10] At the same conference it was agreed by the parties that, on 15 January 1988 when the loan agreement was concluded, the prime lending rate was 12.5 per cent per annum and that it rose steadily from that date until 11 October 1989 when it reached 21 per cent. During substantially the same period the interest rate payable under the agreement steadily increased until the rate charged the respondent on 1 November 1989 was 24.05 per cent. On the day the agreement was concluded the rate payable by the respondent was 3.05 per cent above prime, which was also the difference between the rate charged the respondent and the prime rate on 1 November 1989. The parties also agreed on the correctness of a schedule setting forth the prime rate, the rate charged the respondent and the difference between the two during the period from the conclusion of the agreement and the last payment by the respondent on 15 July 1997. This schedule is as follows:

DATE	PRIME RATE	RATE CHARGED	MARGIN ABOVE PRIME
15/01/88	12,5	15,55	3,05
24/01/88	13	15,55	2,55
10/03/88	14	15,55	1,55
01/04/88	14	16,55	2,55
05/05/88	15	16,55	1,55
16/05/88	15	18,05	3,05
29/07/88	16	18,05	2,05
08/09/88	16	19,05	3,05
03/11/88	18	19,05	1,05
14/11/88	18	21,05	3,05
28/02/89	19	22,05	3,05
08/05/89	20	22,05	2,05
22/05/89	20	23,05	3,05
11/10/89	21	23,05	2,05
01/11/89	21	24,05	3,05
02/04/91	20	24,05	4,05
01/10/91	20,25	24,30	4,05
28/03/92	19,25	24,30	5,05
06/07/92	18,25	24,30	6,05
12/11/92	18,25	23,30	5,05
23/11/92	17,25	23,30	6,05
22/03/93	16,25	23,30	7,05
01/11/93	15,25	23,30	8,05
28/09/94	16,25	23,30	7,05
22/02/95	17,50	23,30	5,80
03/07/95	18,50	23,30	4,80

[11] The respondent stated at the rule 37 conference that his objections related to the interest charged during the period 15 January 1988 to 3 July 1995 and that he did not know what interest rates were charged by the appellant after 3 July 1995. In the minutes of the conference it is recorded that the parties differed as to who bore the onus in respect of the appellant's claim

in reconvention.

[12] The respondent testified at the trial that, in order to secure the loan of R260 000 he received from the Trust Bank of Africa Ltd in January 1988, he passed a bond in favour of the bank over certain immovable property, which was worth about R600 000. In addition the bank had, as further security, an assurance policy of about R260 000 and cession of the debtors of a liquor store he had sold. He said that the value of the land over which the bond was passed in favour of the bank rose during the period. He also stated that as far as he knew there was nothing which made him what he called a high risk for the bank.

[13] In my view the evidence given by the respondent which I have summarized, read with the contents of the schedule (the correctness of which was agreed by the parties) constituted a *prima facie* case that the appellant and its predecessor had acted unreasonably in failing to reduce the applicable rate when the prime rate fell. (It was common cause at the trial that if the margin of 3.05 per cent above prime had been maintained throughout the respondent would have already discharged his indebtedness to the appellant in January 1998.)

[14] The appellant led no evidence to rebut this *prima facie* case. The only witness who testified on its behalf, Mr NJJ Janeke, the

manager of its national administrative division, was unable to provide any reasons as to why the applicable rate had not been adjusted downwards, to keep it at about 3.05 per cent above prime, as the prime rate fell, regard being had to the fact that the risk of non-recovery from the respondent remained constant or even decreased over the period.

[15] In his argument the appellant's counsel referred to the evidence of Mr Janeke that all the payments made by the respondent were always appropriated first to the payment of interest and thereafter to the payment of capital and that he had calculated that all interest up to and including 14 July 1997, that is to say also interest in respect of the period concerning which the respondent complained, had been paid by him. The amount of R51 796-20 claimed in reconvention accordingly, so he submitted, related to the capital owing, in an amount of R45 171-90, and interest for the period 15 July 1997 up to and including 26 January 1998, in an amount of R6 624-20.

[16] He contended that two issues arose for decision:

(a) the appellant and its predecessor properly exercise its discretion when it did not lower the interest rate when the prime rate fell, although they did raise it when the prime rate rose? and

(b) did the appellant have to prove that it and its predecessor exercised their discretion reasonably or was it for the respondent to show that the discretion was not reasonably exercised?

[17] The appellant's counsel submitted that the first issue should have been decided in favour of the appellant because the interest the respondent was complaining about did not form part of the amount claimed in the claim in reconvention. He sought support for this submission in the judgment of this Court in *ABSA Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) in which the bank had sued for payment of the debit balance on an overdrawn bank account. The defendant had disputed the bank's claim and instituted a claim in reconvention on the ground that the bank had in the past levied too much interest. The claim in reconvention was for a debate of account to which it was held the respondent was not entitled. His true remedy would have been a *condictio indebiti,* which had prescribed. The defendant had had no objection to interest debits levied on his account after 28 March 1992, his objection being aimed at interest debits before that date. From the evidence it appeared that he had paid all the interest in respect of the period concerning which he complained, ie the period before 28 March 1992. The judgment of the Court was delivered by Brand

JA who said (para 13 at 707 C-G):

'Ek kan my nie met die Hof *a quo* se uitgangspunt waarvolgens die appellant die juistheid van elke rentedebiet voor 28 Mei 1992 moes bewys, vereenselwig nie. Die juiste vertrekpunt is myns insiens dat die respondent se oortrokke rekening op 'n stadium na 28 Maart 1992 'n nulbalans getoon het. Aangesien die respondent geen beswaar het teen enige bedrag wat na 28 Maart 1992 teen sy rekening gedebiteer is nie, staan die bedrag wat die appellant eis in wese onbetwis. Die respondent se enigste verweer is dat die appellant voor 28 Maart 1992 bedrae teen sy rekening gedebiteer het waarop hy nie geregtig was nie. Die "skuld" wat hierdie debiete verteenwoordig het, is egter intussen deur betaling uitgewis. Dit verskyn nie meer op die respondent se rekening nie, die appellant maak nie meer op betaling daarvan aanspraak nie en hy hoef dit derhalwe ook nie te bewys nie … Waarop dit neerkom, is derhalwe dat die respondent, op sy weergawe, voor 28 Maart 1992 onverskuldigde betalings aan die appellant gemaak het omdat hy verkeerdelik geglo het dat hy daarvoor aanspreeklik is. Op hierdie weergawe was die respondent se remedie om sy onverskuldigde betalings met die *condictio indebiti* terug te eis. Die feit dat die verskillende transaksies tussen die partye op 'n lopende rekening plaasgevind het kan aan hierdie onderliggende basiese beginsels geen verskil maak nie.'

[18] The appellant's counsel sought to apply the principles laid down in the *Janse van Rensburg* case to the facts of this case, even though this case did not concern a current account where there were ongoing debits and credits, with the account at some

stage having a nil balance, but rather with a loan agreement where money was advanced at the time of the initial transaction and not thereafter, the subsequent debits being in respect of interest only. Counsel argued that this case should not be decided on the basis of an unreasonable exercise of discretion as regards the period up to and including 14 July 1997 because all interest up to and including that date had been paid and that it was clear that the respondent was not complaining about the interest levied during the period from 15 July 1997 up to and including 25 January 1998. He contended further that the evidence regarding the respondent's risk profile was thus irrelevant.

[19] In respect of the second issue he submitted that the respondent bore the *onus* of establishing an unreasonable exercise of the discretion to determine the interest rate. He relied in this regard on the fact that the respondent had specifically waived the legal exceptions of *non causa debiti* and *errore calculi.* He submitted on the strength of *Cohen v Louis Blumberg (Pty) Ltd* 1949 (2) SA 849 (W) that the effect of such a waiver is to put the onus of proving the defence on the debtor. (In what follows I shall assume, without deciding, that this submission was correct.)

[20] In my view the argument advanced on behalf of the appellant in respect of the first issue cannot be accepted. I think that the

learned judge in the Court below correctly held that the *Janse van Rensburg* case was distinguishable in that this case did not relate to a current account with deposits and withdrawals and a nil balance at some stage. In my opinion it is not correct to attempt to draw a line through 14 July 1997 and to say that because all interest had been paid up to and including that date the case could not be decided on the basis of an unreasonable exercise of a discretion before that date. If the appellant or its predecessor had unreasonably exercised their discretion before that date, by charging interest at a rate more than 3.05 per cent above prime where the risk had not changed, as the respondent alleges, then some of the money purportedly allocated to the payment of interest should and would have gone to the payment of capital. This is because it is common cause between the parties that payments made by the respondent have to be allocated in accordance with the legal rules relating thereto and where a payment made exceeded the interest payable at that stage the balance thereof had perforce to be allocated to capital. It will be recalled in this regard that it is common cause that if the interest rate had never `gone above 3.05 per cent above prime the whole amount owing under the loan agreement would have been paid off by January 1998. It *is* accordingly necessary to consider whether the appellant

and its predecessor exercised the discretion conferred by the interest rate provision in the agreement in a reasonable way. As I have stated earlier a consideration of this question leads to the conclusion based on the fact that the *prima facie* case referred to was not rebutted that the discretion in question was not exercised reasonably.

[21] The following order is made:

The appeal is dismissed with costs.

……..
IG FARLAM
JUDGDE OF APPEAL

CONCUR
SCOTT JA
STREICHER JA
CLOETE JA
VAN HEERDEN JA