THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 246/2003
REPORTABLE

In the appeal between:

ABSA BANK LTD Appellant

and

VERA HELENA SWANEPOEL NO Respondent

Before: Mpati DP, Cameron JA, Brand JA, Nugent JA and Heher JA
Appeal: Friday 21 May 2004
Judgment: Monday 31 May 2004

Contract – Interpretation – Provisions in written agreement not all necessarily having operational effect – Clause in bond agreement recording that borrower has chosen to accept life cover – Not intended to make bond-holder life insurer – Clause not imposing contractual obligation

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JUDGMENT

CAMERON JA:

[1] On 20 September 1999 Mr Shaun Swanepoel, then 26 years old, applied for a loan to be secured by a mortgage bond from ABSA Bank Ltd. The loan agreement he signed included this statement:

> 'I hereby declare that the advantages of life insurance that in terms of this loan covers the amount owed, have been fully explained to me, and that I have chosen to accept/~~not to accept~~ this cover.'[1]

The words 'not to accept' were deleted at signature. Less than three months later Shaun ('the deceased') died in a motor collision. His bereaved mother, the executrix of his estate, sold the property covered by the bond. But before agreeing to cancel the bond, the appellant bank ('the bank') insisted on repayment of the outstanding bond amount. Mrs Swanepoel, the respondent, resisted the claim. She asserted that the quoted statement reflected a contractual obligation that required the bank to pay her son's estate an amount equivalent to what he owed it when he died – in effect cancelling out the debt. She applied to the Pretoria High Court for a declaration to this effect. The bank counter-applied for an order declaring it entitled to payment of the outstanding balance.

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[1] My translation throughout. The original Afrikaans:
"Ek verklaar hiermee dat die voordele van lewensversekering wat ingevolge hierdie lening die verskuldigde bedrag dek, ten volle aan my verduidelik is, en dat ek gekies het om hierdie dekking te aanvaar/nie te aanvaar nie."

[2] In the court below, Basson J upheld Mrs Swanepoel's claim. He did not consider that the provision obliged the bank to provide the deceased with a gratuitous indemnity on his death. The question he posed was whether the provision could be described as an insurance contract. He concluded that it could: the provision meant that the bank extended life insurance to the borrower in the amount owing at his death. It was 'virtually unthinkable', however, that the bank was required to provide this cover without any charge. The proper inference was that the parties had tacitly agreed 'that some or other quid pro quo (in the form of a premium) would be payable under the provision'. The loan documents contained no such agreement, nor did they record any premium amount. So the judge granted an order affording the parties an opportunity 'to determine by agreement what a reasonable premium would embrace', and, failing that, to approach the court to determine its amount. Basson J refused the bank leave to appeal against this order, but leave was later granted by this Court.

[3] The bank contends that the disputed provision has no enforceable contractual content. It merely recorded that the deceased had elected to take out life insurance himself. The bank is not in the business of providing insurance, it says, and

the provision signified no more than that a broker would later approach the deceased to see to separate life cover for his debt. That was never done. The deceased's estate cannot now, it argues, force it to act as the insurer of his life.

[4] The learned judge rejected these contentions. He approached the matter by inquiring what contractual meaning was to be imputed to the contentious provision. In following this approach he applied the rules relating to the interpretation of contractual terms, including that a term in a commercial contract will not readily be rendered meaningless, and that in case of ambiguity a provision may be interpreted against the drafter (*contra proferentem*).

[5] But this approach anticipates the question whether the provision had any contractual force at all. It assumes that the provision had an enforceable content, when the prior question is whether it was an operational part of the parties' agreement at all.

[6] At its simplest, a contract is an enforceable promise to do or not do something. But when parties record an agreement in writing, they often add provisions that do not embody such promises. A contract may have a preamble. It may contain 'recordals' and 'recitals'. It may document prior events, or

record the parties' future intentions. It may contain clarificatory or explanatory statements. The parties may place on record matters that bear on the interpretation of what they have undertaken. It is therefore wrong to approach a written contract as though every provision is intended to create contractual obligations.

[7] It may be difficult to determine whether a written provision is intended to embody a promise to do or not do something, or whether, without itself constituting an undertaking, it merely bears upon what the parties have undertaken. A recent illustration of a dispute about the extent of a contract's operational provisions, about which this Court was divided, is *Man Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products and Busaf*.[2] But the question whether a contractual provision has operational content is fundamental to the ambit of the obligations the parties undertake, and it precedes the application of rules designed to establish the proper interpretation of their undertakings. Only once it is determined that a provision was intended to have contractual effect will the court try to interpret it so as to give it business

[2] Case 38/03, judgment of 26 March 2004.

efficacy.[3] If it was not so intended, those rules of interpretation do not come into play. No 'business meaning' can be conjured out of a clause that was not intended to have contractual effect at all.

[8] That is what happened here. The judge sought to apply the rules of interpretation to the provision without considering its context. With respect to him, that was not the correct approach. Whether a provision forms an operational part of a contract, or is merely informational or historical or evidentiary, depends on what it says within its context in the contract, against the background in which the parties concluded it.

[9] This agreement is headed 'Bond Loan Agreement'. A recital follows with the parties' names and addresses. Clause 1 then records that subject to the terms and conditions in the annexure ('Terms and Conditions'), the bank lends to the borrower the cash amount together with the other sums mentioned in the next clause, which the borrower must repay 'in the manner set out in clause 2 and in accordance with the Terms and Conditions'. Clause 2 sets out the figures, including the principal debt of R304 942.17, repayable at a specified rate of interest in monthly instalments over twenty years.

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[3] As in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W).

[10] Clause 3 states that the loan is subject to certain specified provisions. Summarised, they are:

1. registration of a covering bond in favour of the bank over the property;
2. an application for insurance [for the property] must be provided;
3. the stated interest rate is fixed for 24 months from registration of the bond;
4. the insurance of the property being mortgaged for a specified amount;
5. inspection of the property by the bank places no duty of care upon it and is purely for internal purposes.

[11] The contentious term is in clause 4, which is headed 'Special Conditions'. It is necessary to set out its provisions in full. It reads:

1. The consequence of a new Reserve Bank ruling in respect of new/additional home loans exceeding 80% of valuation is that such loans will be more expensive to fund. The bond rate will therefore be changed accordingly.
2. The attached agreement to vary the terms of a bond loan (ABSA 1291AX) must be signed by the client before registration of the bond.
3. The repayment is a provisional amount and you will be informed of the correct payment on date of registration.
4. "I hereby declare that the advantages of life insurance that in terms of this loan covers the amount owed, have been fully explained to me, and that I have chosen to accept/not to accept this cover."
5. Although a bond is being registered for an amount that exceeds the amount of the loan, this does not imply that further advances will automatically be granted up to that amount.
6. If additional financing is required, a new application for a further advance or Flexi-Reserve facility must be submitted.
7. A Flexi-Reserve facility for the pre-paid portion of the loan has been granted.
8. A signed addendum to the bond loan agreement (ABSA 1289A) must be faxed on day of registration to the administrative centre (record maintenance department).
9. Attorney must obtain a signed debit order authorisation against cheque account.'

[12] The last clause, 5, contains the definitions. The parties' signatures and those of the witnesses follow. It was common cause that the annexure, the bank's 'Terms and Conditions',

was incorporated in the contract, together with the terms contained in the bond subsequently registered over the property, as well as those in a third document, the bank's 'Standard Bond Conditions Applicable to All Bonds Registered in Favour of ABSA Bank Ltd'. Together these documents (each of which cross-refers to the other) provide the context against which it must be determined whether the disputed provision contained any undertaking by the bank.

[13] Two things immediately impress about the setting. First, despite the misleading heading ('Special Conditions') none of the other provisions of clause 4 contain contractually enforceable undertakings or conditions. Clause 4.1 records information about a Reserve Bank ruling. Clause 4.2 refers to a separate part of the parties' agreement, apparently intended to be a condition precedent to the registration of the bond (it was not included in the court papers). Clause 4.3 is informational. Clause 4.5 makes clear, in informative terms, what already emerges from the other provisions – that the bank is not obliged to make further advances. Clause 4.6 informs the borrower of application procedures. Clause 4.7 records a past event – the grant of a flexible loan facility in respect of the portion of the bond already paid. Clause 4.8 records an

administrative requirement – it does not purport to set a condition precedent to contractual efficacy. Clause 4.9 says nothing about the contracting parties' obligations. It is a practical administrative reminder directed to the attorney.

[14] These clauses are informational. They are not operational. It would be surprising indeed if in this context a provision were suddenly injected imposing a contractual obligation on the bank to indemnify the deceased in the amount owed on the bond on the date of his death.

[15] Second, sub-clause 4, alone of the provisions of clause 4, is in quotation marks. This is telling. It supports the conclusion that the sub-clause records a declaration by one of the parties. The declaration, made by the borrower, records a prior fact: that, assisted by an explanation, he *has already chosen to accept* (or, not to accept) life insurance cover. This again is not compatible with the imposition of a contractual burden. The contextual indicators strongly suggest that the sub-clause does no more than record the fact of the declarant's prior choice, and that it does not create, impose or record an obligation.

[16] Apart from context, there is the provision's content. This points even more conclusively away from contractual obligation. If the provision creates a contract of 'life insurance',

what conditions apply? It does not say. And in what state of health must the insured be? Again, the clause is silent. Can it mean, as counsel for Mrs Swanepoel suggested, that on signature a borrower at death's door is without more insured for the full amount of the loan?

[17] Counsel for Mrs Swanepoel urged us to find that the words 'life insurance that in terms of this loan covers the amount owed' signified that the contract of loan itself, at its conclusion, created the insurance obligation resting on the bank. That might have been possible had there been other provisions in the loan agreement that are compatible with or suggestive of such an obligation; but there are none. The ambiguity on which counsel relied is created by the fact that the words 'in terms of this loan' appear before, and not after, the words 'the amount owed'. But this ambiguity cannot serve to create an obligation in the face of overwhelming indications to the contrary.

[18] Central in this regard is the aspect that rightly troubled the learned judge: the premium. If the clause is to be given operational meaning, it must surely exact from the lender a quid pro quo for the sizeable benefit it confers. But what amount? Calculated with reference to what insurable interest

or value? Would it remain static during the twenty years of the bond? Or decrease as the debt reduced? And how often would it be paid? Yearly, as premiums on property insurance sometimes are? Or monthly, together with the bond repayments?

[19] The judge appreciated the difficulty of conjuring up from the provision a contractually enforceable undertaking to pay a premium. Hence the order he issued, which seeks to shift the difficulties back to the disputing parties by inviting them to reach agreement on a 'reasonable premium'.

[20] Counsel for Mrs Swanepoel was trapped in a dilemma. He disavowed support for the expedient the judge's order adopted (though he did not, and in the absence of a cross-appeal could not, abandon it). Counsel's reluctance is fully warranted. If the bank were an insurer, which had previously insured the borrower, a 'reasonable' premium might have been capable of calculation. In the alien territory of bond lending, this goal simply cannot be attained.

[21] But this drove counsel to the even more extravagant contention that under the clause the bank undertook the obligation to discharge, without counter-prestation, the outstanding bond debts of all clients upon their death. This, it

will be remembered, the judge dismissed as 'virtually unthinkable'. That judgment is correct. For a lender in this context to confer gratuitously a benefit of such significance, so incidentally, is indeed not thinkable in a world of commercial exaction and counter-exaction.

[22] In any event, if the bank wished to confer this benefit, why would it need to ask the borrower to accept or reject it? It could simply broadcast its renunciation of any claim upon the estates of its deceased clients without involving them in the bother of signifying their acceptance at all. Counsel was driven to suggest that it could have been intended that an additional fee equivalent to the premium that would have been payable on such life insurance should be included in the amount of the loan, but no provision in any of the documents constituting the parties' agreement offers support for this construction.

[23] The whole matter does not withstand scrutiny, and it is clear that the bank's contentions must prevail. The disputed provision contains no undertaking. Nor, for that reason, could the deceased reasonably have understood that the provision did contain such an undertaking (assuming he in fact did so at all, of which there was of course no evidence in view of his death). The case in my view fails at the first level of contractual

meaning, which is whether the clause properly construed in its context is capable of imposing any obligation at all.

[24] The appeal succeeds with costs. The order of the court below is set aside. In its place there is substituted:

1. The application is dismissed with costs.
2. The counter-application succeeds with costs.
3. An order is granted in terms of prayer 1 of the counter-application.

E CAMERON
JUDGE OF APPEAL

CONCUR:
MPATI DP
BRAND JA
NUGENT JA
HEHER JA