THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 117/07
Reportable

In the matter between :

D BISNATH NO	FIRST APPELLANT
G BISNATH NO	SECOND APPELLANT
D BISNATH	THIRD APPELLANT
G BISNATH	FOURTH APPELLANT

and

ABSA BANK LIMITED	RESPONDENT

Case number: 674/07

And in the matter between :

ABSA BANK LIMITED	APPELLANT

And

D BISNATH	FIRST RESPONDENT
G BISNATH	SECOND RESPONDENT

CORAM : SCOTT, CLOETE, PONNAN, MAYA JJA *et* SNYDERS AJA

HEARD : 13 MARCH 2008

DELIVERED : 27 MARCH 2008

Summary: Mortgage and pledge: The obligations owed by a pledgee to the pledgor at common law in regard to fruits of the property pledged, are owed by a mortgagee of immovable property to the mortgagor only where the mortgagee is in possession of the mortgaged property.

Neutral citation: This judgment may be referred to as *Bisnath v Absa Bank Ltd* (117/07 and 674/07) [2008] ZASCA 23 (27 March 2008).

CLOETE JA/

CLOETE JA:

INTRODUCTION

[1] These two appeals involve the inter-relationship over more than a decade between Absa Bank Ltd and its predecessors in title on the one hand, and Mr and Mrs Bisnath and the Gita Family Trust ('the Trust'), of which the Bisnaths are the trustees, on the other. It is unfortunately necessary that the facts be set out in some detail. It is not necessary to differentiate between Absa and its predecessors so I shall refer to them as 'the Bank', and where convenient in the first appeal, I shall refer to the Trust and the Bisnaths as 'the appellants'. Although the Trust was represented by the Bisnaths in their capacity as trustees I shall refer to the Trust as if it was the litigating party.

FACTUAL BACKGROUND

[2] There has been protracted litigation involving a property owned by the Trust, and equally protracted litigation in respect of nine properties owned by the Bisnaths. Orders were granted in the Durban High Court by Niles-Dunèr J, Jappie J, Swain J, Hugo J, Msimang J and Radebe AJ.

[3] I shall begin with the litigation involving the property owned by the Trust. As will become apparent, there is even a dispute revolving around the correct description of that property. To avoid begging the question, I shall refer to it as 'the trust property'. The trust property was registered in the name of the Trust in 1994. A mortgage bond was registered in favour of the Bank at that time and a further bond two years later. In addition to the bonds the Bisnaths executed suretyships in favour of the Bank further securing the indebtedness of the Trust to the Bank.

[4] The Trust fell into arrears with its payments under the bonds. The Bank issued summons under case number 8912/98 against the Trust as the principal debtor and the Bisnaths as sureties to recover the amount owing by the Trust. On 8 December 1998 the Bank obtained default judgment against the Trust and the

Bisnaths, jointly and severally, and an order was given declaring the property executable.

[5] After the Bisnaths failed in their attempts to sell the trust property it was sold in execution on 4 October 2000, and bought in by the Bank. It was thereafter in February 2002 sold to Mr and Mrs Durga (who were informed of the proceedings in the court *a quo* but decided not to participate in them) and the Trust's account with the Bank was credited with the net proceeds of the sale, being R165 980,20.

[6] Whilst the events set out in the previous few paragraphs of this judgment were taking place, there was litigation between the Bank and the Bisnaths in respect of the properties owned by the Bisnaths and over which the Bank held mortgage bonds. There were originally nine properties. The Bisnaths fell into arrears and the bank sued for payment under case 8857/98. The arrears were brought up to date and the Bank did not proceed with litigation until the Bisnaths again fell into arrears. The Bank then sued for payment under case 957/2000. The action was defended by the Bisnaths, but settled on 22 November 2000. In terms of the written agreement of settlement the Bisnaths admitted their liability to the Bank, as claimed, and undertook to pay all outstanding arrears and thereafter, the monthly instalments due under the bonds. The settlement agreement contained a provision relating to consents to judgment by each of the Bisnaths which I shall quote at the appropriate place later in this judgment.

[7] After the settlement three of the Bisnaths' properties were sold and the proceeds used to discharge the amounts outstanding in respect of the bonds over those properties. The balance was used to discharge the arrears on bonds registered over other properties owned by the Bisnaths.

[8] In September 2000 the Bank attached the remaining six properties owned by the Bisnaths under case 8912/98 (ie the case brought against the Trust and the Bisnaths as sureties, referred to in para 4 above). On 2 December 2002 the Trust

and the Bisnaths obtained from Niles-Dunèr J, as a matter of urgency under case number 8912/98, a rule *nisi* which inter alia in paragraph 1(a) called upon the Bank to show cause why the attachment of the Bisnaths' six properties should not be set aside. The Bank opposed the other relief sought in this application and filed a counter-application for an order declaring these properties specially executable.

[9] The return date of the rule *nisi* was extended and came before Jappie J almost a year later on 10 November 2003. The learned judge confirmed paragraph 1(a) of the rule and referred certain issues for the hearing of oral evidence. Those issues included the following:

(i) whether Bisnath instructed the Bank, represented by Mr Payne, to allocate a payment of R65 933,25 to the account of the Trust (for the purposes of what follows, I shall round this amount up to R66 000);

(ii) whether the Bank agreed to pass a credit of R280 000 in favour of the Trust; and

(iii) whether the sale in execution of the trust property in October 2000 should be set aside.

[10] The matter came before Swain J on 14 March 2004. On 6 April 2004 the learned judge found that the Trust had not proved its entitlement to a credit of R280 000. On 5 September 2006 he determined the issues relating to the payment of the R66 000 and the setting aside of the sale of the trust property in favour of the Bank. He also found in favour of the Bank on a further issue, which was raised after the Trust was given leave to re-open its case, namely, that the Trust was not entitled to be credited with rentals which the Bank had allegedly failed to collect in respect of the trust property, after judgment had been taken by the Bank and before the property was sold in execution. These latter three findings, made under case 8912/98, form the subject matter of the first appeal where the appellants are the Bisnaths and the Trust. I shall discuss the issues in more detail when I come to deal with the merits of this appeal, which is with the leave of Swain J.

[11] Whilst the litigation was proceeding before Swain J, the Bank, according to it, gave the Bisnaths notice on 24 April 2006 that it intended to apply for judgment by consent in terms of the settlement agreement under case number 957/2000 to which I have referred in para 6 above. (Argument was advanced on behalf of the Bisnaths as to whether notice was properly given to them and I shall return to this aspect.) Hugo J considered the Bank's application in chambers and on 30 May 2006 he granted judgment by consent against the Bisnaths. In terms of that judgment, the Bisnaths were jointly ordered to pay amounts alleged to be outstanding in respect of each of their six remaining properties and those properties were declared specially executable. Pursuant to the order the six Bisnath properties were attached by the sheriff. I pause to emphasise (for reasons which will become apparent) that there is no attack on the validity of this attachment (as opposed to the order which granted the Bank the right to do so).

[12] In terms of a notice of motion dated 15 March 2007 the Bisnaths brought urgent motion proceedings before Msimang J, who issued a rule *nisi* against the Bank. I shall quote the rule later in this judgment.

[13] On the extended return day, 1 August 2007, Radebe AJ confirmed the rule (with the exception of the paragraph that related to costs) and subsequently refused the Bank leave to appeal. The second appeal, with the leave of this court, is against the order of Radebe AJ.

ISSUES

[14] The issues are therefore the following:

In the first appeal, where the Trust and the Bisnaths are the appellants:

(i) whether the Trust was entitled to a credit of R66 000;

(ii) whether the trust property was declared specially executable; and

(iii) whether the Trust is entitled to a credit in respect of rentals not collected by the Bank;

and in the second appeal, where the Bank is the appellant:

(i) whether notice of intention to apply for judgment by consent was properly given to the Bisnaths; and

(ii) whether the confirmation of the rule *nisi* by Radebe AJ should be set aside.

THE FIRST APPEAL

Credit of R66 000

[15] The appellants' case as testified to by Bisnath was that on 15 October 1998 the latter had agreed with Payne of the Bank that the proceeds of the sale of a property, the R66 000 in question, would be credited to the bond account of the Trust. Payne on the other hand said that the instruction given by Bisnath at the meeting was to credit the proceeds of the sale to the arrears in the bond accounts of the Bisnath properties. Payne went on to say that had Bisnath attempted to give him an instruction to credit the Trust's bond account, he would not have accepted it as that would have resulted in the Trust's account being R40 000 in credit, and the other bond accounts remaining in debit. This, he said, would not have made sense and would also have been contrary to the Bank's policy to update as many accounts as possible because there were a lot of foreclosures at the time. Payne even went so far as to say that Bisnath was lying about the instruction given at the meeting. Yet Payne was never cross-examined on his version.

[16] The evidence of Bisnath was patently unacceptable, for a number of reasons. I shall mention only two. He said that he had not discussed the arrears on the Bisnath properties with Payne because no legal action had been instituted in respect of the arrears on those properties. A return by the sheriff reflecting personal service on him of the summons relating to the Bisnath properties, was put to him. That return recorded that the summons had been served on the same date, 14 October 1998 ─ a day before the meeting with Payne ─ as the summons relating to the trust property. Bisnath said, variously, that he did not recollect receiving the summons relating to the Bisnath properties; he remembered only service of the summons relating to the trust property; he only received one summons; and he received no summons in respect of the Bisnath properties. Eventually, after several

adjournments and a change of counsel, he was led to say (after the appellants' case had been reopened) that he had received two summonses ─ one relating to the trust property and one relating to the Bisnath properties.

[17] Pearce said in his affidavit that 'during the meeting [between himself and Bisnath on 15 October 1998] Mr Bisnath and I dealt with these two cases separately'. Pearce then went on to relate what Bisnath had said in respect of the bonds over the Bisnath properties, and what he had said in respect of the trust property. In answer to these allegations, Bisnath said in an affidavit: 'It is correct that the two cases were dealt with separately.' Bisnath could not reconcile his oral evidence that the Bisnath properties had not been discussed at all, with what he had said in his affidavit.

[18] Swain J recorded in his judgment that senior counsel representing the appellants had found himself unable to present argument in favour of their case on this issue. The learned judge nevertheless analysed the evidence and weighed up the probabilities in some detail, and concluded that it was 'quite clear that Mr Bisnath has lied to the court'. I do not propose being detained by the arguments advanced in the heads of argument against this finding. They were not advanced with any enthusiasm during oral argument. All of them are devoid of substance and none merits detailed consideration.

Trust property declared executable

[19] As I have already said, the Bank obtained default judgment against the Trust (as the principal debtor under the bond) and the Bisnaths as sureties for the debts of the Trust, on 8 December 1998 under case number 8912/98. Paragraph 3 of the relief granted was:

'An order declaring the property described as:
Lot 2643 Reservoir Hills (Extension No. 1)
situate in the City of Durban
administrative District of Natal
Province of Kwazulu-Natal

in extent 697 Square Metres

specially executable.' (I have deliberately retained the paragraphing of the order for emphasis.)

The property is in fact situated in extension 7. The appellants accordingly contended (I quote from an affidavit deposed to by Bisnath):

'[T]he property, extension no. 7, was never declared specially executable and the writ in terms of which the sale took place . . . was not issued in accordance with the default judgment . . . as that declares the property described as Lot 2643 Reservoir Hills, extension no. 1, specially executable. It is respectfully submitted that the sale in execution of the property, extension no. 7, to the [Bank] was accordingly irregular and is liable to be set aside at the instance of [the trust and the Bisnaths].'

[20] In answer to these allegations, the Bank delivered an affidavit by Mr Marais, who had been employed in the office of the Surveyor-General, Kwazulu-Natal, and had thirteen years' experience in (in his own words) 'the various technical aspects of the approval of diagrams prepared by land surveyors for certification for use in the Deeds Office'. According to Marais, there is only one erf 2643 in the township of Reservoir Hills; the phrase 'extension 7' merely indicates that the developer developed the township in phases and that erf 2643 was registered when the seventh phase was reached; and in terms of regulation 28[1] made under the Deeds Registries Act,[2] the particulars to be quoted in any deed in which land in a township is described do not require reference to the extension number. This evidence was confirmed by Mr Williams-Wynn, the Surveyor-General: Pietermaritzburg. It was not challenged by Bisnath or anyone else either on affidavit or in oral evidence.

[21] As Swain J correctly held, the need for a property to be described accurately in an order declaring it executable is obviously to ensure that the correct property is attached and sold. There was only one erf 2643 in the township and it was precisely

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[1] The regulation provides (to the extent relevant):
'28(1) In any deed wherein land is described, the following particulars shall be quoted:
(a) The name of the registration division, administrative district and province in which such land is situated, or, in the case of land situated in a township, the registration division concerned, administrative district, the name of such township and the province: and
(b) the registered number (if any) of such land.'

[2] 47 of 1934.

identified in the order. That erf was attached and sold. Reference to the extension was unnecessary for the proper description of the erf, it created no ambiguity and it was entirely irrelevant. Counsel representing the appellants found himself unable to argue the contrary but he did not abandon the point, obviously acting on instructions. I shall return to this briefly when I deal with the costs of appeal.

Collection of rentals

[22] The appellants' case is this. The Bank, according to them, was in possession of the trust property after it was attached. The building on the property had been converted into a student residence and was fully let for the academic year commencing February 1999. Had the bank collected the rentals, the amount of the debt for which the default judgment was granted on 8 December 1998 under case number 8912/98 would have been extinguished and accordingly, the property was wrongly declared executable.

[23] I shall deal first with the law, and then the facts. There are two Transvaal cases which deal with the obligations of a pledgee in respect of the fruits of property pledged. In *Freeman Cohen's Consolidated Ltd v General Mining and Finance Corporation Ltd*[3] Innes CJ (Wessels and Bristowe JJ concurring) said:

'The pledgee is bound not only to take care of the pledged property, but to render an account of any fruits or profits derived from it. The rule is thus expressed in the *Code* (4, 24, 1): *Ex pignori percepti fructus imputantur in debitum, et si sufficiunt ad totum debitum, tollitur actio et reditur pignus*. The profits received from the pledged thing are to go in account against the debt. If they are sufficient to wipe out the whole of the debt the action is at an end, and the pledge must be returned. In commenting on that rule Grotius (*Introduction*, 3, 8, 5) says: "With respect to the fruits or profits of the property pledged, the pledgee must give them up or carry them to account in reduction of the debt;" and Pothier, in his treatise on *Namptissements* (sec. 35, p. 680), is to the same effect.'

In *Judes v SA Breweries Ltd*[4] Ward J said:

'Under the Roman-Dutch law the pledgee has to take care of the property pledged and he must account for the fruits (*Grotius* 3.8.4; *Voet*, XIII. 7.4). . . . According to the [C]ode IV. 24.3 the creditor is bound to account for the fruits gathered and those which should have been gathered. *Donellus "De*

[3] 1907 TS 224 at 226.
[4] 1922 WLD 1 at 8.

Pignoribus et Hypothecis," IX. 1. (Vol. VI., page 998) says: "*Quin etiam judicio pignoratitio percipere eos cogitur ex fide bona, ne res apud eum otiosa et sine fructu maneat, et debitori vacet*." . . . . I take the law to be that the *onus* is on the plaintiff [the successor in title to the rights of the debtor] to show that there has been loss incurred.'

[24] I respectfully adopt those passages as correctly setting out the law in regard to pledges. It does not follow, however, that the same obligation in respect of fruits is imposed by law on a mortgagee. Ex hypothesi, a pledgee is in possession of the article pledged; but that is most unusual in the case of a mortgage of immovable property. There is no reason why the law should impose the obligations of a pledgee in regard to fruits on a mortgagee not in possession of the mortgaged property. Professors Lee,[5] C G van der Merwe,[6] Lubbe,[7] and T J and S Scott[8] all limit the obligation of a mortgagee to account for fruits, to that case. The view expressed by C G van der Merwe elsewhere[9] that except in the case where a *pactum antichreseos* is included, the *mortgagor* has to account for fruits of the mortgaged land, is, with respect, wrong and is not borne out by the authority quoted in support of it, which is *Judes v SA Breweries Ltd*. I can only assume that the learned author intended to refer to the mortgagee and that the reference to the mortgagor is a misprint. But then the proposition would require qualification. In *Judes*, the creditor, the South African Breweries Ltd, the defendant in the action, was in possession of the property of the debtor, Joffe, who had transferred the property to the Breweries 'with authority to collect the rents to devote the same to the payment of the capital amount of the loan and interest, with the right to [the Breweries] to sue for rent or in respect of breaches of the lease and to re-enter in respect of the same'.[10] The Breweries were not a mortgagee. Lubbe[11] describes the relationship between the Breweries and Joffe as *a fiducia cum creditore contracta* pursuant to which the Breweries had taken transfer of

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[5] *An Introduction to Roman-Dutch Law* 5th ed p 199 n 5 and Lee and Honoré *The South African Law of Property, Family Relations and Succession* 1st ed para 246.
[6] *Sakereg* 2nd ed p 635.
[7] 17 LAWSA (Re-issue) para 472 p 387.
[8] *Wille's Mortgage and Pledge* 3rd ed 140.
[9] Lee and Honoré *The South African Law of Property, Family Relations and Sucession* 2nd ed para 457 and *Wille's Principles of South African Law* 9th ed p 637.
[10] Page 3.
[11] loc. cit. n16.

the movable property *in securitatem debiti*. Ward J[12] adjudicated the claims of Judes, the successor in title to Joffe's rights who argued that the Breweries should not have reduced the rent and should have collected more rent than it did, on the basis that the Breweries had the same obligation as a pledgee to account for fruits. The important fact, for present purposes, is that the Breweries were in possession of the debtor's property.

[25] So far as the onus is concerned, on basic principles, the onus of proving that the mortgagee was in possession of the mortgaged property and therefore obliged to collect the fruits, should be on the party who asserts this ie the mortgagor.

[26] The Bank relied upon the following clause in the bond as relieving it of any liability should it fail to collect rentals in respect of the trust property. The clause provides:

'The Mortgagor(s) hereby grant(s) a full and sufficient cession, transfer and assignment to the Bank of his/her/its/their right, title and interest in and to all rents and other revenues which may accrue from the mortgaged property as additional security for such sums as may be claimable at any time under this Bond, with the express right in favour of the Bank irrevocably and *in rem suam* to take proceedings against tenants in default for the recovery of the rent, and/or ejectment, to cancel or renew and enter into leases in such manner as the Bank shall think fit, provided, however, that such cession, transfer and assignment shall not be acted upon without the consent of the Mortgagor(s) while the conditions of this Bond have been and are being fully complied with. It is hereby agreed that the Bank shall be entitled to charge a commission of 5% (five per centum) on the gross amount of all rents collected to recover such commission under this Bond.'

I interpret the clause to confer a right on the Bank:

(i) To take proceedings against tenants in default (for the recovery of the rent and/or ejectment); and

(ii) to cancel or renew and enter into leases in such manner as the Bank shall think fit.

I find in the clause no exemption from any obligation.

[12] Page 8, part of which has been quoted above.

[27] I turn to consider the facts. The high water mark of the appellants' case was the following evidence in regard to the building on the trust property, given by Bisnath whilst being led by the appellants' counsel:

'Now, what happened after judgment was taken about control of that building? --- We lost control of the building.

. . .

Were you allowed to go there? --- No. They changed the locks in the building and we were not allowed in.

Yes. And what happened to the movables in the building? --- That was removed from the property by the bank.'

Even if this evidence is accepted at face value, it does not establish when the Trust lost possession of the building. But Bisnath was such a poor witness, who changed his version in fundamental respects and was found with every justification by Swain J to have lied, that I would not be prepared to accept anything he said without corroboration; and there is none on this aspect. In fact, the evidence points the other way. Bisnath said in the founding affidavit deposed to by him that:

'When the property was eventually sold in execution, the [Bank] suddenly took possession thereof and caused or allowed security guards to prevent me from removing the [Trust's] goods.'

In addition, Bisnath gave the following evidence under cross-examination by Mr Wolmarans, counsel representing the Bank:

'Now, from the time that judgment was taken until the final sale notice is it correct that you were in possession of the property? --- In title, yes.

Yes.

Swain J Sorry, what was that, Mr Bisnath? --- In title. It was still registered in my name.

Mr Wolmarans asked you whether you were in possession of the property, whether you held it, occupied it. --- Yes. But, my lordship, I think it might be clear to quote that I personally didn't occupy the property.'

[28] I therefore conclude that the appellants did not establish that the Bank ever took control of the trust property, much less when that occurred. It is accordingly unnecessary to deal with the other and numerous unsatisfactory features of Bisnath's evidence. It only remains for me to add that counsel for the appellants readily admitted the problems which he had on this aspect of the first appeal although, again, no concessions were made.

Costs

[29] The Bank asked that the appellants be ordered to pay the costs of the first appeal on the scale as between attorney and client. I have no hesitation in acceding to the request. The appeal was plainly without merit and the conduct of the appellants in pursuing it, vexatious, particularly in regard to the credit of R66 000, and also frivolous in regard to the description of the trust property in the order declaring it to be specially executable.

THE SECOND APPEAL

[30] I turn to consider the second appeal against the confirmation by Radebe AJ of the rule *nisi* granted by Msimang J. The rule reads as follows:

'THAT a rule *nisi* do issue calling upon the [Bank] to show cause, if any, on or before the 5th April 2007 at 09H30 a.m. or so soon thereafter as the matter may be heard why an order should not be granted in the following terms:

(a) That pending the final determination of this application:
    (i) the writs of attachment and execution against the [six Bisnath properties] are stayed;
    (ii) all proceedings to execute the judgement under [case 957/2000] granted on 30th May 2006 [by Hugo J] are stayed;
(b) That the judgment granted in favour of the plaintiff against the first and second defendants on 30th May 2006 [by Hugo J] be and is hereby set aside;
(c) That it is declared that the amounts which appear in the schedule [to the Bisnaths' founding affidavit] are the amounts owing in respect of the mortgage bonds over the properties listed in the annexed schedule [ie the Bisnath properties];
(d) That the plaintiff is ordered to cause and allow the mortgage bonds registered over all of the properties listed in the annexed schedule to be cancelled against payment of the outstanding amounts owing in respect of the mortgage bonds;
(e) That the plaintiff is ordered to accept guarantees for payment of such outstanding amounts issued in a form and manner which is consistent with usual conveyancing practice;
(f) That the [Bank] is ordered to pay the [Bisnaths'] costs of this application on the scale as between attorney and client.'

Msimang J also ordered that para 2(a) of the rule would operate as an interim order with immediate effect pending the return day.

[31] Paragraph 2(a) of the rule was an interim order and required no confirmation. Radebe AJ however said in the course of her judgment that:

'For the reason that the correct procedure as laid down by law was not followed when the [Bank] sought and obtained the writs of attachment and execution against the [Bisnaths' properties], I do not think such writs ought to stand.'

This statement by the learned judge creates the impression that she intended to set the writs aside. In view of the protracted litigation in this matter and the conduct of the Bisnaths over the last ten years it is desirable to deal directly with the learned judge's view. There was no basis for it, although the mistake was understandable given the convoluted history of the litigation. The learned judge relied on a concession made by the Bank's attorney that the writs issued by the Bank during September 2002 under case number 8912/98 were wrongly issued. Those writs were set aside by Jappie J on 10 November 2003 when he confirmed paragraph 1(a) of the rule *nisi* issued by Niles-Dunèr J on 2 December 2002. The learned judge confused these writs with the writs referred to in para 2(a) of the rule issued by Msimang J which she confirmed. There was never any attack on the validity of these latter writs ─ as opposed to the validity of the judgment of Hugo J on 30 May 2006 on which they were based, and which I shall now consider.

Notice: consent to judgment

[32] Counsel for the Bisnaths submitted in his practice note and heads of argument that his clients had not received any notice of the Bank's intention to apply for judgment in terms of the settlement agreement entered into under case number 957/2000 on 27 November 2000. I have referred to the settlement agreement in para 6 above. It contained the following clauses:

'7. First and Second Defendant [the Bisnaths] agree to sign a Consent to Judgment in this matter which the Plaintiff [the Bank] undertakes not to use provided the First and Second Defendant pay all amounts specified in this settlement agreement.

8. The terms and conditions of this settlement agreement shall be supplementary to the terms and conditions of the mortgage bonds and the mortgage loan agreements upon which the Plaintiff's cause of action against the Defendants is based. Nothing herein contained shall be construed as a novation or waiver of any of the terms and conditions contained in the said mortgage bonds or mortgage loan agreements. In particular, should First and Second Defendant fail to pay any single

amount either in terms hereof or in terms of any mortgage bond, on due date, then the Plaintiff shall be entitled to declare the Defendants' total indebtedness to the Bank to be immediately due owing and payable and to apply to the Registrar of the High Court for judgment in accordance with the Consent to Judgment.

9. It is specifically agreed that should the Defendants default by the failure to pay any ongoing monthly instalment in respect of any particular mortgage bond . . . then prior to making application for judgment, Plaintiff will provide the Defendants with fourteen days notice of their failure to pay any particular instalment and of the Plaintiffs' intention to apply for judgment should the instalment not be paid within fourteen days. Such notice shall be sent to the Defendants by registered post at PO Box 65037, RESERVOIR HILLS, 4091 which address the Defendants appoint as the address at which they will accept any notice in connection with this clause. Any notice sent in terms of this clause will be deemed to have been received by the Defendants within three days after date of posting.'

[33] In his founding affidavit, Bisnath specifically dealt with the consents to judgment and submitted that the Bank was not entitled to lodge them. He gave two reasons for this. Neither involved an assertion that proper notice had not been given. In the answering affidavit, the deponent on behalf of the Bank said:

'Notice was given to both the [Bisnaths] and to their attorney of the decision by the [Bank] to apply for judgment under the Bisnath bonds in accordance with the settlement agreement. See annexures "E1" and "E2".'

Annexure E1 comprises a copy of a telefax sent to a firm of attorneys, Shamin Rampersad & Associates, and a copy of a letter sent to the Bisnaths; and annexure E2 is a copy of that letter. Both were dated 24 April 2006, and the letter was addressed to the Bisnaths at P O Box 65037, Reservoir Hills 4091 (the address stipulated in the settlement agreement). In the replying affidavit Bisnath said, in response to these allegations:

'Save for alleging that the [Bank] was obliged in terms of the provisions of paragraph 9 of the Settlement Agreement to give both [the Bisnaths] notice by registered post, it is apparent from Annexure "E1" that the letter was not despatched by registered mail. Attorney S Rampersad was not the [Bisnaths] Attorneys of record in that matter.'

The replying affidavit studiously refrains from dealing with annexure E2, the letter addressed to the Bisnaths themselves. Had there been a point to take in that regard, I have no doubt that it would have been taken. Every other point, good and bad, has been during the course of this litigation. Counsel for the Bisnaths said that it was his

express instruction that the notice had not been received. But in view of the contents of the affidavits, which I have set out, it was not open to counsel to make the positive submission that his clients did not receive any notice of the Bank's intention to apply for judgment.

Remainder of the rule *nisi*

[34] It was the Bisnaths' case that the Bank was not entitled to lodge the consents to judgment because they had been prevented from discharging the full amount of their liability under the mortgage bonds due to the Bank's own actions. Those actions consisted, according to the Bisnaths, in the Bank's refusal to cancel the bonds against tenders by the Bisnaths to pay the balance of the capital advanced and interest owing in respect of each bond. If this contention is incorrect, paragraphs 2(b) to (e) of the rule *nisi* confirmed by Radebe AJ fall to be set aside.

[35] Each of the bonds registered over the Bisnaths' properties is a covering bond and contains a clause in the following terms:

'This Bond shall be a continuing covering security to the aggregate amount of the Capital, the additional sum and any interest becoming owing to the Bank in terms of Clause 3, for all and any sum or sums which shall now or may in the future be owing to or claimable by the Bank from whatsoever cause arising, for money lent and advanced or which may hereafter be lent and advanced by the Bank, and for future debts generally including any payments made by the Bank under the provisions of this Bond, and generally any indebtedness to the Bank from whatsoever cause arising. The Bank may advance further sums or may readvance to the Mortgagor(s) under security hereof such sums or portions thereof as may have been previously repaid . . .'.

Bisnath said in his replying affidavit in the proceedings which led to the first appeal that this clause, correctly interpreted, refers only to indebtedness arising out of or in connection with the loan which the bond secures and in the alternative, that the clause is vague and unenforceable. Not surprisingly, counsel for the Bisnaths did not attempt to argue either point. Counsel correctly and readily agreed that the plain meaning of the clause was that the bonds were not limited to securing payment of the balance of amounts advanced in respect of each bond plus interest due. They cover, in addition, 'future debts generally' and 'generally any indebtedness to the Bank from whatsoever cause arising'. There is nothing vague about that.

[36] Bisnath also said in his replying affidavit that the clause quoted in the previous paragraph of this judgment was 'contrary to public policy and void'. This contention was also not advanced by counsel representing the Bisnaths. Counsel was quick to point out in oral argument that covering bonds have been recognised in our law for at least one hundred years[13] and specific provision for them is made in the Deeds Registries Act.[14]

[37] In the present matter, the Bank was fully entitled to refuse to cancel the bonds over the Bisnaths' properties against a tender that the amount then outstanding in respect of each bond be paid. The bonds provided security for the Bisnaths' indebtedness to the bank in their capacity as sureties for the amount owing by the Trust, up to the amount of each bond. The amount owing by the Trust was in dispute because of the Bisnaths' contentions in respect of the R66 000 dealt with earlier in this judgment, and their claim for a credit of R280 000 allegedly due to the Trust which Swain J dismissed and against which there has been no appeal.

[38] The Bank asked for the costs of the appeal to be awarded to it on the scale as between attorney and client. Clause 5 of the settlement agreement provides:

'First and Second Defendant agree to pay attorney and client costs incurred by the Plaintiff in the above matter as taxed or agreed on demand.'

It seems to me that this clause may well be limited to costs already incurred prior to the settlement agreement. But I find it unnecessary to decide the point as a punitive award of costs is amply justified. The opposition to the appeal was patently without merit and vexatious.

ORDER

[39] The following order is made:

(1) The first appeal under case number 117/07 is dismissed with costs which are

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[13] *Rooth & Wessels v Benjamin's Trustee and the Natal Bank Ltd* 1905 TS 624 at 629-630.
[14] Sections 50(2), 51(1) and 52.

to be taxed on the scale as between attorney and client and paid by the Trust and each of the Bisnaths jointly and severally.

(2) (a) The second appeal under case number 674/07 is upheld with costs, which are to be taxed on the scale as between attorney and client and paid by the respondents jointly and severally.

(b) The order of the court below is set aside and the following order substituted:

'The rule *nisi* is discharged. The applicants are ordered jointly and severally to pay the respondent's costs.'

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T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Ponnan JA
Maya JA
Snyders AJA