THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 287/06

In the matter between:

CITIBANK NA **Appellant**

and

THANDROYEN FRUIT WHOLESALERS CC	**1st Respondent**
R & N FRESH PRODUCE CC	**2nd Respondent**
ISIVANDE (PTY) LTD	**3rd Respondent**
RONNIE THANDROYEN	**4th Respondent**
LOGARANI THANDROYEN	**5th Respondent**

Coram : **SCOTT, NUGENT, HEHER, MAYA JJA *et* HANCKE AJA**

Date of Hearing : **10 MAY 2007**

Date of delivery : **28 May 2007**

Summary: Confession to judgment in terms of Rule 31(1) must be founded on cause of action contained in summons or notice of motion – severability of provision in agreement relating to procedure for obtaining judgment in event of a breach – provision permitting creditor to sell property of debtor and keep any amount in excess of agreed amount by which debt is to be deducted or bear the loss of any shortfall, not contrary to public policy.

Neutral Citation: This judgment may be referred to as *Citibank NA v Thandroyen Fruit Wholesalers CC* [2007] SCA 61 RSA.

SCOTT JA/…

SCOTT JA:

[1] On 7th February 2005 the appellant, to which I shall refer as the Bank, sought and was granted judgment by Nicholson J in the High Court, Durban, against the first, second, fourth and fifth respondents in terms of a confession to judgment as contemplated in Rule 31(1). The respondents (including the third respondent) subsequently applied for the rescission of the judgment together with certain ancillary relief. The Bank opposed the rescission and filed a counter-application in terms of which (as amended) it sought, first, that the judgment be varied by the substitution of a lesser amount and, second, in the event of the judgment being rescinded, that a fresh judgment be granted in the same (lesser) amount. The matter came before Balton J who granted the application for rescission of judgment and dismissed the counter-application, with costs. The Bank appeals with the leave of the court *a quo*.

[2] Before dealing with the issues raised in this court, it is necessary to sketch the events forming the background to the dispute. The facts are largely common cause.

[3] Some time prior to 4 December 2003 the first, second and third respondents applied in the High Court, Durban, for an order interdicting the Bank from instituting liquidation proceedings against them. The matter was settled and on 4 December 2003 a written agreement of settlement was entered into between the Bank and all five respondents. The fourth respondent is Mr Ronnie Thandroyen who is a member of the first and second respondents.

The latter are close corporations which carry on, or formerly carried on, business in the fresh produce trade. The fifth respondent is Ms Logarani Thandroyen who is a director of the third respondent which is a private company.

[4] The terms of the agreement which are material for present purposes were the following:

(a) The first, second, fourth and fifth respondents (but not the third respondent) acknowledged that they were jointly and severally liable to the Bank in the sum of R2 175 000.

(b) The Bank was authorised to sell certain immovable property belonging to the fourth and fifth respondents. Pending transfer of the property into the purchaser's name, and as from 31 January 2004, the Bank was to pay the necessary rates and taxes and other levies imposed on the property. The Bank was also to pay all the costs of marketing the property.

(c) Upon registration of transfer of the property into the name of the purchaser, or upon the expiry of 38 months from the signing of the agreement, whichever was the sooner, the debt was to be reduced by the sum of R1 100 000.

(d) Any amount realised from the sale in excess of the sum of R1 100 000 would be for the benefit of the Bank and any shortfall would be borne by the Bank.

(e) The capital of the debt was repayable by way of instalments of:

(i) R20 000 on 31 December 2003;

(ii) R20 000 on 31 January 2004;

(iii) R150 000 on or before 29 February 2004;

(iv) R25 000 per month thereafter.

All payments were to be paid into a specified account of the Bank.

(f) The first, second, fourth and fifth respondents were all to sign a 'consent' to judgment (in terms of Rule 31(1)) in respect of their joint and several liability to the Bank for the capital amount. The Bank would be entitled to take judgment in terms of the consent in the event of their remaining in default 'after receiving five court days' written notice to cure the breach'.

(g) The Bank was to seek judgment only for the balance owing as at the date of lodging the consent, notwithstanding the amount specified in the consent.

(h) In order for the Bank to obtain judgment by consent against the fourth and fifth respondents, they consented to being joined in the interdict proceedings.

[5] In pursuance of the agreement, the first, second, fourth and fifth respondents signed the consent to judgment in the sum of

R2 175 000 plus interest calculated from the date of payment and costs of suit. The consent also made provision for the fourth and fifth respondents to be joined in the interdict proceedings. Some 10 months after the conclusion of the agreement, the property was sold and the capital debt was reduced by R1 100 000 as provided for in the agreement. In the event, the property realised R1 400 000 and the excess of R300 000 accrued to the Bank.

[6] The Bank received no payments. On 6 December 2004 it caused written notice to be given to the first, second, fourth and

fifth respondents informing them that they were in arrears with their repayments and giving them five court days within which to remedy their breach, failing which judgment would be taken in terms of the consent. The respondents' attorneys responded by insisting that the instalments had been paid by electronic transfer and forwarded to the Bank certain computer print-outs to substantiate their contention. They also called on the Bank to check its records. The Bank advised that it had done so and called on the respondents to provide confirmation from their Bank that the transfers had not been returned. This was not forthcoming. After two months and the exchange of much correspondence the Bank finally lost patience and on 7 February 2005 took judgment in terms of the consent. It subsequently transpired that the transfers had indeed been returned and this, it was said, had not been noticed by the third respondent which, although not liable, had been the party effecting the transfers. The reason for the returns was said to be an incorrect clearing code on the part of the third respondent's bankers. Although initially in dispute, it was common cause in this court that the respondents' failure to pay amounted to a breach of the settlement agreement. For the sake of completeness, it should be mentioned that the Bank sought and obtained judgment in the full amount of R2 175 000 notwithstanding the sale of the property. The warrant of attachment issued in pursuance of the judgment was, however, for an amount which took into account the deduction of R1 100 000.

[7] On 17 February 2005 the respondents launched an application as a matter of urgency for the rescission of the judgment granted on 7 February 2005 and for a stay of the warrant

of execution pending the finalisation of the application for the rescission. The Bank agreed to the stay but resisted the rescission of judgment. As previously indicated, the Bank filed a counter-application in which, as subsequently amended, it sought (a) a variation of the amount for which judgment had been granted and (b), in the event of the rescission being granted, a fresh judgment based on the acknowledgment of debt contained in the settlement agreement. The amount for which judgment was sought was the sum of R1 049 960 which took into account the deduction of R1 100 000 for the property as well as two subsequent payments.

[8] The court *a quo*, as I have said, granted the rescission and dismissed the counter-application. Although the Bank sought and obtained leave to appeal against both orders, counsel for the Bank in their heads of argument filed in December 2006 conceded that the rescission had been correctly granted. The concession was well made. Rule 31(1) provides that a defendant may confess in whole or in part 'the claim contained in the summons'. In terms of s 1 of the Supreme Court Act 59 of 1959 'civil summons' is defined as including, *inter alia*, a notice of motion. But in motion proceedings the confession, in order to comply with Rule 31(1), must be to the claim contained in the notice of motion. If the claim is founded not on the relief claimed in the summons or notice of motion but on a settlement agreement, Rule 31(1) cannot be applied. The position is different if the settlement provides that its breach entitles the plaintiff or applicant to take judgment in terms of the original cause of action contained in the summons or notice of motion. See *Barbour v Herf* 1986 (2) SA 414 (N). But in the present case, the judgment sought was founded on the cause of

action contained in the settlement agreement, *viz* the acknowledgment of debt, not the cause of action contained in the interdict proceedings.

[9] I turn to the counter-application. In rejecting it, Balton J said the following:

'The [Bank] seeks judgment against the first, second, fourth and fifth applicants for an amount of R1 049 960. This in effect entails an amendment and or variation to the judgment granted by Nicholson J. The judgment cannot be rectified since the jurisdictional basis for the existence of the judgment in terms of Rule 31(1) does not exist. The judgment therefore falls to be set aside and cannot be amended. The [Bank] would be entitled to institute the necessary proceedings to recover any amount due to it against the applicants concerned.'

It would seem from this passage that the learned judge misunderstood what the Bank was claiming. The notice of motion makes it clear that the variation to the judgment was sought only in the event of the rescission not being granted. The claim for a fresh judgment based on the acknowledgment of debt in the settlement agreement was conditional on the rescission being granted. It was not dependant on the rectification of the judgment granted by Nicholson J.

[10] In this court counsel for the respondents did not attempt to rely on the reasoning of the court *a quo* but instead sought to justify the dismissal of the counter-claim on two further grounds. The first related to the question of severability. He pointed out that the conditional relief claimed was premised on the finding that the

settlement agreement was invalid at least to the extent that it entitled the Bank to seek judgment on the basis of the consent signed by the respondents. He submitted that the Bank was accordingly obliged to make out a case in its counter-application that the unenforceable provisions of the agreement were severable from the remaining provisions and that the Bank had failed to do so. He submitted further that the invalid provisions were in any event not severable, particularly as the right to place the respondents *in mora* was conjoined with the invalid right to obtain judgment on the strength of the consent.

[11] In *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 16B Smalberger JA, quoting with approval Botha J in *Vogel NO v Volkersz* 1977 (1) SA 537 (T) at 548F, formulated the inquiry into the question of severability as follows:

‘The “fundamental and governing principle” with regard to severability is “to have regard to the probable intention of the parties as it appears in, or can be inferred from, the terms of the contract as a whole”.’

It is true that there is no express reference to the question of severability in the counter-application. But what the Bank was claiming was judgment by way of a procedure other than in terms of Rule 31(1). It was therefore implicit in the relief sought that the Bank was relying on the severability of the provisions relating to judgment by consent. Moreover, the settlement agreement, from which the probable intention of the parties must be inferred, was before the court, as were the circumstances in which the agreement came to be concluded. In my view, there is accordingly

no merit in the contention that the Bank was obliged to allege more in its papers before being entitled to argue the severability issue.

[12] As to the severability of the so-called invalid provisions, it must be borne in mind that these provisions concern no more than the procedure which the Bank was entitled to adopt when seeking judgment in the event of a breach. Had it been legally possible for the Bank to obtain judgment by consent it would not have been precluded, had it so wished, from instituting action by way of a simple summons and obtaining judgment by default in terms of Rule 31(5). The only consequence would have been to render it liable for the additional costs incurred. In this regard, Beyers JA in *Montesse Township and Investment Corporation (Pty) Ltd v Gouws NO* 1965 (4) SA 373 (A) at 380 *in fine* said the following:

'I am not aware of any general proposition that a plaintiff who has two or more remedies at his disposal must elect at a given point of time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others. Such a situation might well arise where the choice lies between two inconsistent remedies and the plaintiff commits himself unequivocally to one or other of them.'

(See also *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 626 I-J.) Counsel for the respondents argued, however, that the provision was of fundamental importance to the Bank as it enabled the Bank to take judgment without the prospect of lengthy litigation. I
pause to observe that given the acknowledgment of debt contained in

the agreement it is difficult to suppose what would have given rise to such litigation. Counsel made no suggestion as to the defence that could have been raised nor, I might add, did the respondents seek to rely on it. But, be that as it may, I am unpersuaded that there is merit in counsel's contention. It strikes me as highly improbable that the Bank when confronted with the offer of a written acknowledgment of debt would have declined to accept it unless it could obtain judgment by consent in the event of a breach. It follows that in my view the provisions in question are severable from the remainder of the agreement and the first ground advanced in support of the court *a quo's* decision must therefore fail.

[13] The second ground advanced by counsel for the respondents to justify the dismissal of the counterclaim was that the provisions in the settlement agreement authorising the Bank to sell the property owned by the fourth and fifth respondents and to reduce the debt by R1 100 000, regardless of what the property realised, had the effect of rendering the settlement agreement unenforceable. In elaboration, he submitted that although the provisions did not strictly speaking constitute a *pactum commissorium* or permit a *parate executie* their similarity to both was enough to categorise them as contrary to public policy. A *pactum commissorium*, shortly stated, is an agreement in terms of which property pledged or mortgaged may be kept by the creditor in the event of a future default by the debtor, regardless of the amount of the debt or the value of the property. Such an agreement is prohibited by law and is void. See *Graf v Buechel* 2003 (4) SA 378 (SCA) paras 9-13. An agreement permitting

parate executie (immediate execution) without recourse to the court, or, after default, to the debtor in the case of immovable property, is similarly void : *Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 (1) SA 613 (T), *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) para 7. In my view, none of the features of a *pactum commissorium or parate executie* which render them void are to be found in the provisions of the settlement agreement which counsel contends are contrary to public policy. The parties agreed at the time of entering into the settlement agreement that the Bank would sell the property and the debt would be reduced by a specified amount or, failing a sale within a specified period, the debt would in any event be reduced by that amount. Although the agreement was not one of sale of the property by the respondents to the Bank, its effect was similar. Once the parties had agreed upon the amount by which the existing debt was to be reduced it was up to the Bank to find a buyer. The Bank was responsible for the costs of marketing the property and for all rates, taxes and other levies imposed on the property pending its sale. Had the property not realised the agreed amount, the Bank would have borne the loss. In the event, it succeeded in selling the property for more than the agreed amount. The result would have been no different had the respondents sold the property to the Bank and the Bank, in turn, had resold it.

[14] The respondents' real complaint is that the Bank made a profit of R300 000. But, as pointed out by Innes CJ in *Eastwood v Shepstone* 1902 TS 294 at 302, when determining whether a contract is contrary to public policy or not:

'What we have to look to is the tendency of the proposed transaction, not its actually proved result.'

(See also *Sasfin (Pty) Ltd v Beukes, supra,* at 8J-9A.) In the present case the Bank could just as well have lost on the agreement had it been unable to sell the property for as much as R1 100 000. In that event the respondents would hardly have complained. In the *Sasfin* case Smalberger JA at 9B emphasized that no court should shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. By the same token, he warned, however, that the power to declare contracts contrary to public policy should be 'exercised sparingly and only in the clearest of cases'. The present is manifestly not such a case.

[15] It follows that the appeal against the dismissal of the counter-application must succeed. This brings me to the question of costs. As previously indicated, counsel for the Bank conceded in their heads of argument that the rescission of the judgment given in terms of Rule 31(1) was correctly granted. Nonetheless, by succeeding in its counter-application the Bank achieved substantial success and is entitled to its costs of appeal, including the costs of the application for leave to appeal. As far as the costs in the court below are concerned, the order as to costs of the main application will remain undisturbed, but the appellant is entitled to the costs of the counter-application.

[16] The following order is made:

(a)(i) The appeal against the order of the court *a quo* in respect of the main application is dismissed.

(ii) The appeal against the order of the court *a quo* in respect of the counter-application is upheld.

(iii) The respondents are ordered to pay the appellant's costs of appeal jointly and severally (including the costs of the application for leave to appeal), such costs to include the costs of two counsel.

(b) The order of the court *a quo* in respect of the counter-application is set aside and the following order is substituted:

(i) Thandroyen Fruit Wholesalers CC, R & N Fresh Produce CC, Logarani and Ronnie Thandroyen are directed jointly and severally to pay Citibank NA the sum of

R1 049 960.

(ii) Thandroyen Fruit Wholesalers CC, R & N Fresh Produce CC, Logarani and Ronnie Thandroyen are directed jointly and severally to pay Citibank NA interest on the sum of R1 049 960 at the rate of 15,5% per annum calculated from the date of judgment (26 August 2005) to the date of payment in full.

(iii) The applicants in the main application are directed to pay the costs of the respondent's counter-application.

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D G SCOTT
JUDGE OF APPEAL

AGREE:

NUGENT JA
HEHER JA
MAYA JA
HANCKE AJA