IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

In the matters between

Case no 291/98

(1) **NBS Boland Bank** Appellant

and

One Berg River Drive and Others Respondents

Case no 428/98

(2) **SB Deeb and Another** Appellants

and

ABSA Bank Ltd Respondents

Case no 85/99

(3) **AL Friedman** Appellant

and

Standard Bank of South Africa Ltd Respondents

Court: Mahomed CJ, Van Heerden DCJ, Olivier JA , Melunsky and Mpati AJJA

Heard: 16 August 1999

Delivered: 10 September 1999

Summary: A mortgagee's power to increase the rate of interest

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JUDGMENT

VAN HEERDEN DCJ:

[1] There is one cardinal question which falls to be answered in all three appeals before us. It is whether a clause in a mortgage bond conferring upon the mortgagee the right to unilaterally increase the original rate of interest payable by the mortgagor is valid. If so, appeal (1) must succeed and appeal (2) be dismissed, whilst a further point will have to be considered in appeal (3). [For convenience I have in the heading numbered the appeals (1), (2) and (3).]

[2] Appeal (1) is against a decision of Southwood J in the Witwatersrand Local Division (reported in 1998 (3) SA 765 (W). He held that the clause in question conferred upon the mortgagee an unfettered power to vary the interest rate. He concluded that the clause was invalid because a term of a contract leaving it to the will of one of the parties to determine the extent of his or the other party's presentation is void for vagueness. For these reasons he

made an order declaring that the clause was invalid and unenforceable.

[3] The appellant in appeal (2) appeals against a decision of Thirion J in the Natal Provincial Division (reported in 1999 (2) SA 656(N)). He held that it was an implied term of the clause under discussion that the mortgagee

> "...would be entitled to raise the rate of interest agreed upon in clause 3 of the mortgage bond whenever and to the extent that it would, in the usual and ordinary course of its business as a financial institution, and as a result of a general increase in interest rates in the market, raise the interest rate charged by it on new mortgage loans of the same nature and category as the one to which the loan in question belongs - provided always that such increased rate of interest would not exceed the maximum permissible under the Usury Act " (at 665B-D).

[4] Since in his view it was not possible to decide whether the increased mortgage rates in that case conformed with his basic finding, the matter was postponed *sine die* so as to allow the parties an opportunity to adduce evidence.

[5] In the court below in appeal (3) Gihwala AJ held in the Cape Provincial Division that the mortgagee's power was not unfettered sine he could increase

the interest rate only in accordance with prevailing banking practices. He furthermore rejected separate defences raised by the present appellant in appeal (3) and granted summary judgment against her (The decision has been reported in 1999(2) SA 456 (C).)

[6] The matter is not *res nova* . In Boland Bank v Steele 1994 (1) SA 259 (T) 276 Van Dijkhorst J held in the Transvaal Provincial Division that the clause must be construed as conferring upon the mortgagee a power to be exercised in a reasonable way, and that it was therefore valid. A different approach was adopted by Stegman J in the Witwatersrand Local Division. In NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK 1998 (3) SA 729 (W) 736 he found that in a moneylending contract the rate of interest payable by the lender is one of the essentials of the contract which must be rendered certain by the parties' agreement. If not the contract is void for vagueness. In the result he concluded that the clause was null and void.

[7] For present purposes there does not appear to be any difference between the clause under consideration and a clause in an overdraft agreement conferring upon a banker the right to increase the rate of interest payable on the amount of the overdraft. In Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd 1988 (4) SA 73 (N) 74 Milne JP had to consider the validity or otherwise of such an overdraft agreement. He found that it was valid either because an obligation to pay interest is not one of the *essentialia* of a contract of loan or because the bank's power had to be exercised *arbitrio boni viri*. A similar conclusion was reached by Wunsh J in Investec Bank (Pty) Ltd v GVN Properties CC 1999 (3) SA 490 (W) 499 F-H. His view was that interest rate variations have to conform with the rate charged to a borrower in the same category to whom loans of the same type are made, and that the clause did not confer upon the bank an unqualified right to act capriciously or unreasonably. For these reasons he concluded that the above mentioned judgments of Stegman J and Southwood J were clearly wrong.

[8] (For another analogous case which tends to support a contention that the clause in question is enforceable, see Diners Club SA (Pty) Ltd v Thorburn 1990 (2) SA 870 (C)).

[9] A recurring theme in those cases in which it was held that the clause in question is invalid, is that a contract which empowers one of the parties to fix a prestation is void for vagueness. With one exception that was undoubtedly the view of Roman Dutch Law writers in regard to the determination of the price in a sale and the rental in a lease. However, in Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd 1993 (1) SA 179 (A)185-6 two observations were made thereanent. The first was that the reason given by our writers for their views, viz that the price or rental is uncertain, is difficult to reconcile with their recognition that it may validly be left to the determination of a third party. In such a case the price or rental is after all as "uncertain" as when such a prestation is to be determined by

one of the parties. I may add that if A sells to B any one of his hundred horses the *merx* remains uncertain until it is determined by either the seller or the buyer, as the case may be. Yet it is undoubtedly a valid contract.

[10] The second was that the views of Voet and others did not accord with modern legal systems. Something more should be said about those systems as well as English and Scottish law to which no or little reference was made in Benlou.

[11] In May and Butcher Ltd v R [1929] All ER Rep 679 (HL) 684 D, Viscount Dunedin said that "it is a perfectly good contract to say that the price is to be settled by the buyer". This *dictum* was followed in Lombard Tricity Finance Ltd v Paton [1989] 1 All ER 918 (CA) 923 g, a case very much in point. A consumer credit agreement provided that the lender could increase the rate of interest in his absolute discretion. The Court of Appeal found that this stipulation was valid.

[12] Scottish institutional writers also hold that a term in a contract of sale

empowering either party to determine the price is unobjectionable. Of particular significance is the following passage in Brown, Treatise on the Law of Sale p 150:

> "204. Another question upon which some doubt has existed, is, whether the price may lawfully be left to be fixed by one of the parties to the sale. Pothier holds that it cannot, (C*ontr. De Vente,* No *23.;)* and it seems to be the common opinion, that such was the rule of the Roman law, *Vinn. ad Inst.* 3.24. p. 612. § 3.: *Voet. ad Pand.* 18.1.§ 23.: *Huber,* tom.l. p. 320. § 6.: *Ersk.* 3.3.4. One commentator, (*Noodt*, ad lib. 18. Tit. 1 **T**. tom. 2. p. 388) however, maintains that such a reference was lawful and competent by the Roman law; not, indeed, to the effect of enabling the party to whom the price was referred, *to fix it absolutely, and without its being possible to have it corrected in case of obvious iniquity,* but to the effect of enabling him to fix a price *secundum arbitrium boni viri,* leaving it open to the judge to interfere for the correction of his estimate, if it were unjust.
>
> The latter rule, together also with the qualification annexed to it, seems to be adopted in our law, *(Ersk.* 3.3.4.: *Stair,* 131.) and in one case was expressly admitted".

See also Stair, Institutions, pp 188-9; Erskine, *Institute,* pp 725-6, May and Butcher Ltd, *supra*, at 684 E, and Steven v Robertson (1760) M 3158.

[13] In German Law the position is governed by para 315 of the BGB. It

provides that if a prestation is to be determined by one of the parties it is, in case of doubt, to be accepted that an equitable discretion must be exercised. If an inequitable determination is made, it can be assailed by the other party: Palandt, Bürgerliches Gezetzbuch, 42nd ed, pp 355-7; Larenz, Lehrbuch des Schuldrechts, 12th ed, vol 1 pp 67-70. An identical position obtains in Swiss law: Von Tuhr, Allgemeiner Teil des Schweizerischen Obligationenrechts 3rd ed, vol 1, p 191.

[14] The test in Dutch Law is somewhat different. If the parties left it to one of them or a third party to determine a prestation, the agreement is perfectly valid but a determination can be assailed if it is inequitable or unreasonable. See Asser-Hartkamp, Verbintenissenrecht, 10th ed, part 1, p 18, and part 2, p.314. In such a case the determination is voidable at the instance of the other party.

[15] In the United States section 2-305 (2) of the Uniform Commercial Code provides that a price to be fixed by the seller or by the buyer “means a price

for him to fix in good faith".

[16] It will thus be seen that the views of our writers that a sale or lease containing a power to fix the price or rental is not only illogical but also sadly out of step with modern legal systems. It is problematical whether we should still follow those rules, and I shall revert to this question. For present purposes it is, however, unnecessary to decide the point. This is so because the above views were not articulated in respect of a contractual power to fix a prestation other than a price or rental, and there is ample reason not to extend the common law rule to other types of contractual discretions, and therefor not e.g. to a discretionary power provided for in a contract of loan.

[17] There is an additional reason for holding that the clause under discussion is valid. Even if , contrary to my above view, there should be an analogous extension of the common law rule, that rule concerned one of the *essentialia* of a sale or lease, and I am not aware of an extension of that rule to other terms of such contracts, and *a fortiori* not to terms of other types of contracts. And although in the Western world the erstwhile Catholic

prohibition of the charging of interest, so fiercely defended by the Jesuits, no longer obtains, a term relating to the payment of interest is not an essentialé, as opposed to a material term, of a contract of loan. There can after all be a perfectly good contract of loan even if it makes no provision for the payment of interest. I am not unmindful of the fact that according to Lubbe, Kontraktuele diskresies, potestatiewe voorwaardes en die bepaalheidsvereiste, 1989 TSAR 159,173, no distinction should be drawn, for present purposes, between an essentialé and another term of a contract, but he gives no reasons for his opinion. And see Davids, Unilaterally imposed terms in Contract, 1965 SALJ 108,110.

[18] It has already appeared that in NBS Bank Ltd Stegmann J typified a term in a loan relating to the payment of interest as an essential term of the contract. It is not clear to me whether Stegmann J intended to say that such a term is an essentialé, as distinguished from a material term, of a loan. If he did, he was clearly wrong.

[19] Is there any decision of this court which stands in the way of my above

approitach? In Murray and Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A), 514 Hoexter JA said:

> "It is no doubt a general principle of the law of obligations that, when it depends entirely on the will of a party to an alleged contract to determine the extent of the prestation of either party, the purported contract is void for vagueness. Obvious examples of the application of the principles are afforded by the law of sale. If, for example, it is left to one of the parties to fix the price the contract is bad."

Not only was no authority cited in support of this broad statement but it was clearly an *obiter dictum*.

[20] In Patel v Adam 1977 (2) SA 653 (A) 666 this court considered an agreement of sale in terms of which it was left to the purchaser to determine what amount he wished to pay each month as an instalment of the purchase price. It was held that the sale was void for uncertainty. It should be observed, however, that the sale also did not provide for a period during which the full purchase price had to be paid. Hence, this was a clear case of a *condicio si voluero* (to which further reference is made below). In any event, the power of the purchaser related to the fixing of components of a purchase price.

[21] At first blush a more formidable obstacle is created by a passage in the

judgment of Van den Heever JA in Theron NO v Joynt 1951(1) SA 498 (A) 506.

It reads:

> "Waar een van twee mense, wat voorgee kontrakterende partye te wees, hom die reg voorbehou om na willekeur enige beding in die sogenaamde ooreenkoms eensydig te wysig, kom sy resposisie in alle opsigte ooreen met dié van iemand wat oënskynlik 'n verpligting aangaan op voorwaarde dat hy na willekeur daardie verpligting kan nakom of ontduik. Sulke handelinge beskou ons reg as geen regshandelinge nie of handelinge sonder regsgevolge (D. 45.1.17; 45.1.46.3; 45.1.108.1)."

[22] It is not clear to me what was meant by the use of the word "willekeurig". But even if the learned judge intended to refer to a discretionary power two observations should be made. The first is that the quoted passage was also an *obiter dictum* since nothing turned on it. The second is that the *dictum* is, with respect, not borne out by the Digest texts upon which Van den Heever JA relied. They read as follows (Mommsen, Krueger and Watson, The Digest of Justinianus, vol iv pp 652, 657 and 667):

D45.1.17

"A stipulation is not valid when a condition is entrusted to the judgment of the party making the promise"

D 45.1.46.3

"However, the stipulation 'do you promise to give, if you wish', is clearly invalid".

D 45.1.108.1

"No promise can be valid if it lies wholly within the choice of the promissor".

[23] It is clear, I think that all three texts relate to the validity of a *condicio si voluero,* i.e. a condition that the promissor is bound to perform only should he wish to do so. At most they concern a contract or stipulation where the promissor may determine his own prestation, and do not deal with the situation where the other party has the right to determine or alter the promissor's obligation.

[24] In sum I am of the view that, save, perhaps, where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable. Second, and has been said above, there is an additional reason for holding that the clause under discussion is valid. Of course, in some cases providing for discretional determinations there may be no enforceable contract until the determination is made. But when made an unconditional contract comes into being.

[25] All this does not mean that an exercise of such a contractual discretions is necessarily unassailable. It may be voidable at the instance of the other party. It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri* (cf Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) 707 A-B; Moe Bros v White 1925 AD 71,77; Holmes v Goodall and Williams Ltd 1936 CPD 35,40;

Belville-Inry (Edms) Bpk v Continental China (Pty) Ltd 1976 (3) SA 583 (C) 591 G-H, and Remini v Basson 1993 (3) SA 204 (N) 210 I-J). In his commentary on the Digest Windscheid, Lehrburch des Pandektenrechts, 7th ed, vol 2 p 407, maintains that such a rule existed in Roman Law. He relies inter alia on D 50.17.22 which certainly appears to provide analogous support for his view. It reads (the same translation):

> "One must in general approve of the principle that wherever in actions of good faith the condition of someone is placed in the power of his master or of his procurator, then this power is to be regarded as equivalent to the power of the decision of a good man".

[26] Reference may also be made to D.17.2.77 where it is said that where one party has to do work to the satisfaction of the other party, the latter must exercise his discretion *arbitrium bono vire.*

[27] The discretionary powers vested in the mortgagees by the relevant deeds must therefore be subject to this inherent limitation. The attack made on behalf of the mortgagors concerned effectively assumes that there is no

such limitation. It is an erroneous assumption.

[28] So far I have confined myself to our common law and comparable legal systems. An analogous conclusion may well be reached if one applies the modern concept of the role of public policy, *bona fides* and contractual equity to the question in issue (see e.g. Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO 1997 (4) SA 302 (SCA) 318-31, per Olivier JA.)

[29] The question whether in cases such as these appeals a determination does not comply with the above requirement if it is merely unjust, or whether it must be manifestly unjust, need not be answered (cf Voet 18.1.23 and Gane's note (h) in vol 3, p 278, in regard to the determination of a price by a third party). The reason is that none of the mortgagors attempted to assail the fixing of increased interest rates. They relied solely on the contention that the clause was invalid. At the risk of repetition I should again say that the clause is perfectly valid, but that an exercise of the power conferred upon the mortgagor may be objectionable.

[30] One further point should be made. It is conceivable, albeit unlikely, that a stipulation may be so worded that an absolute discretion to fix a prestation is conferred on one of the parties. Here again it is unnecessary to express a view as to whether such a stipulation will be invalid, as being in conflict with public policy, or whether the fixing of the prestation may only be assailed when it is done in bad faith.

[31] In conclusion I should mention that the provisions of the Usury Act 73 of 1968 have no bearing on the outcome of the three appeals.

[32] I revert to a stipulation which confers on one of the parties the power to fix the purchase price or rental, as the case may be. In the light of what has already been said there does not appear to be any logical rationale for drawing a distinction, in the context under consideration, between such a stipulation and other similar stipulations conferring on a party to a contract a discretion to determine a prestation. The exercise of the power to determine the price or rental would after all be open to attack on the same grounds as in the case of

utilization of other types of discretionary stipulations. However, the common law rule governing sales and leases was not in issue in this court, and the question whether the rule should be jettisoned was not argued before us. Hence, it is unnecessary, and indeed undesirable, to decide that question.

[33] I now turn to an additional point raised by the appellant in appeal (3). In her affidavit resisting the application for summary judgment she alleged that the present respondent had previously obtained judgment by default against her; that this had occurred in conflict with an arrangement between the parties that pending settlement negotiations it would not be necessary for her to enter an appearance to defend, and that she resultantly suffered damages under various headings. She went on to say that she would claim the damages either by way of a counterclaim in the respondent's action against her or by instituting a separate action.

[34] For various reasons her affidavit does not disclose a genuine defence. I mention only two . The first is that a claim for damages can only be a

”defence” if the court is asked to stay judgment on the plaintiffs claim until the defendant has established a counter claim. As has appeared, this is not what the appellant did *in casu* . Indeed, she indicated that she might prefer her claim in a separate action.

[35] Second, the appellant in essence did no more than make the bald allegations that her credit-worthiness and rights of personality had been infringed because judgment by default had been given against her. She studiously refrained from giving factual details to support her allegations, and certainly did not comply with the requirements of Rule 32(3) (b) of the Uniform Rules that an affidavit resisting a claim for summary judgment disclose fully the material facts relied upon by a defendant.

[36] The following orders are made:

(1) Appeal (1) is allowed with costs, including the costs of two counsel, and the following is substituted for the order of the court a quo:

"(a) It is declared that clause 14 of mortgage bonds 36200/95 and 68231/95 is valid.

(b) The defendants are ordered jointly and severally to pay the plaintiff's costs, including the costs of two counsel".

(2) Appeals (2) and (3) are dismissed with costs, including the costs of two counsel.

HJO VAN HEERDEN
DEPUTY CHIEF JUSTICE

Concur:

Mahomed CJ
Olivier JA
Melunsky AJA
Mpati AJA