

SOUTH AFRICA / JUDGMENT

Boland Bank Ltd. v Pienaar and Another (356/86) [1988] ZASCA 50; [1988] 2 All SA 467 (A) (19 May 1988)

[1988] ZASCA 50

COURT

Supreme Court of Appeal

BEFORE

Jansen, Smalberger, Nestadt, Vivier, Viljoen

CASE / FILE NUMBER

356/86

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BOLAND BANK LIMITED APPELLANT

and

J S PIENAAR

FIRST RESPONDENT

J F VAN HEERDEN

SECOND RESPONDENT

JUDGMENT BY: H H NESTADT

CASE NO. 356/86

/ccc

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISIONIn the matter betweenBOLAND BANK LIMITED APPELLANTandJ S
PIENAAR FIRST RESPONDENTJ F VAN HEERDEN SECOND RESPONDENT

CORAM: JANSEN, SMALBERGER, NESTADT, VIVIER JJA et VILJOEN AJA

DATE HEARD: 2 MAY 1988

DATE DELIVERED: 19 MAY 1988

JUDGMENT NESTADT JA:

Appellant loaned money to second

respondent/

2.

respondent. It was a term of their agreement that it be repaid in monthly instalments. In order to secure his obligation to do so, second respondent, in terms of

a first mortgage bond, hypothecated certain immovable property of his to appellant.

Nevertheless, he failed timeously to pay a particular instalment. This entitled appellant to claim immediate payment of the full amount of capital and interest owing in terms of the bond. It contained a clause to this effect. The material part of it provides:

"23. Ingeval enige betaling ten opsigte van Kapitaal of Finansieringskoste of die Bykomende bedrag nie stiptelik op die vervaldatum betaal word nie ... sal die hele kapitaalbedrag en bykomende bedrag dan verskuldig tesame met al

die/

3.

die finansieringskoste daarop on-middelklik betaalbaar wees sonder kennisgewing ..." Whilst appellant was considering putting the clause into operation, but before it actually did so, first respondent, wishing to avoid the bond being called up, tendered payment of the arrears.

Appellant refused to accept such payment. It did not wish to jeopardise its right of foreclosure. These, in outline, were the essential circumstances which led first respondent to apply, as a matter of urgency, to the Orange Free State Provincial Division for an order, in effect, compelling appellant to accept payment of what had been tendered. Appellant was cited as first respondent and the mortgagor as

second/ 4. second respondent. The matter came before LICHTENBERG J, who issued a rule nisi in these terms. It was directed that it operate with immediate effect. On the extended return day, and despite appellant's opposition, an order was made, by the same learned Judge, in substance confirming the rule and awarding costs against appellant on the attorney and client scale. This appeal is against such orders. It is before us with the leave of the court a quo. Second respondent does not oppose it. First respondent initially did. Heads of argument were filed on his behalf. At the hearing of the appeal, however, there was no appearance by or for him. Shortly before, his attorneys gave notice that they had

withdrawn/

5. withdrawn and that he would not be represented. The judgment of the court below (confirming the rule) is reported (see *Pienaar vs Boland Bank and Another* 1986(4) S A 102(0)). It explains what first respondent's interest was in seeking to purge second respondent's default in making payment as he was obliged to under the bond. This was that a partnership allegedly existed between them and that the mortgaged property was a partnership asset (at 109 H). It specifies what the indebtedness of second respondent to appellant was, when the bond was registered and the monthly payments due thereunder (104 F -H) as also when

second respondent fell into arrear and in

what/6. what amount (109 I - J). Most important, details of the various tenders made by first respondent to appellant to pay the arrear instalment in question are set out (110 D - F). The exact terms of the order granted against appellant are also given (117 C read with 107 I - 109 A). It is, therefore, un-necessary to deal further in this judgment with these matters. The ratio of the court a quo's decision must, however, be briefly canvassed. It was that: (i) first respondent, even though a stranger to the transaction, was entitled to (tender to) pay second respondent's indebtedness to appellant (110 F - 111 D); (ii) clause 23 of the bond did not result in automatic

foreclosure;/

7foreclosure; appellant had to elect to do so (114 I - 115 B); (iii) when first respondent tendered payment, appellant, though intending to do so, had not yet elected to call up the bond (115 C); (iv) accordingly, such tenders were valid and should have been accepted by appellant; its failure to do so was unlawful; and first respondent was entitled to the relief claimed (115 D); (v) attorney and client costs were awarded because of appellant's dilatory, vexatious, obstructive and contemptuous conduct (116 H - 117 C). I am not sure that finding (iii) is justified. It may be that appellant's refusal of all the tenders per se constituted an election by it

to/...

8to call up the bond. Moreover, second respondent (as appears from 109 C) told a representative of appellant in October 1984, at a time before the instalment in question was due, that it would not be paid and asked that the bond be called up. He was told that appellant would do so. It may be that this amounted to a notification, in advance, of an election by appellant to foreclose and that the need to repeat this when second respondent actually fell into arrear was dispensed with. And it must, of course, be remembered that it was second respondent as mortgagor, rather than first respondent, to whom appellant's election had to be communicated. However, before us, Mr Burger, for appellant, was content to argue the

matter/ 9. matter on the basis that finding (iii) (as also (i) and (ii)) was correct. His attack was directed at (iv) (and, consequentially, (v)). It was submitted that on second respondent's failure to pay the instalment on due date, appellant acquired the right to call up the bond; it could not, pending a decision whether to do so, be de-prived of such right by any tenders of payment; it was, accordingly, not obliged to accept them; and first respondent's application should, in the premises, have been refused. The principle underlying the argument is a well-established one. It has been applied to the case of a creditor seeking to cancel a contract

of/

10. of sale on the basis of a *lex commissoria*. His accrued right to do so is not defeated by a belated tender of payment of the arrears before he exercises his election to cancel. This was decided in *Schuurman vs Davey* 1908 T S 664. An instalment of the purchase price of fixed property was due on 2 April of a particular year. It was not then paid. Only on 17 April was it tendered. The seller, however, refused to accept it. Relying on a *lex commissoria* in the deed

of sale, he then notified the purchaser that the agreement was cancelled. INNES CJ, rejected the purchaser's contention that the tender deprived the seller of his right to cancel. Having found (at 671) that though such right accrued on the day of the buyer's default, cancellation could

only/ 11only take effect on notification to the buyer ofthe seller's election to cancel, the learned judgestated (at 671 - 2):

"Then the second point is whether the fact that the buyer, before the noti-fication of cancellation, tendered pay-ment, affected the seller's right to notify his decision to cancel at once. Upon this point I entirely agree with the contention of Mr Roos in the course of his able argument. If the right to cancel existed on the 17th April, the seller could not be deprived of it merely because the buyer tendered to pay on that day. Nothing but waiver, undue lapse of time, or some default on the part of the seller in a matter which was a condition precedent to his obtaining payment under the contract, could deprive him of his right. Tender of the price after the due date could not cure the buyer's default, and, therefore, could not affect the seller's position."

SOLOMON/

12.

SOLOMON and WESSELS JJ concurred.

Schuurman vs Davey has been followed

over the years (see, on the point under consideration,

Pienaar vs Fortuin 1977(4) S A 428 (T) at 432 in fin -

433 C; Mahabeer vs Sharma NO and Another 1982(2) S A

157 (D) at 164 A - C; Mahabeer vs Sharma NO and Another

1982(4) S A 242 (N) at 249 D - E and, especially, Moodleyvs Reddy 1985(1) S A 76 (D)). In Moodley's case, asubmission that Schuurman vs Davey was wrongly decidedwas rejected (at 82 G). During the course of his

judgment, THIRION J said:

"(I)t would seem to me that the notion that a defaulting purchaser had a right to purge his default by tendering his performance late, and by such

tender/

13.

tender to deprive the seller of the benefit of a lex commissoria express- ly stipulated for in his favour, mili-tates against the whole concept of the lex commissoria. It would mean that, after fulfilment of the condition on which the lex commissoria was dependent, there would be two concurrent and com-peting rights; the right of the de-faulting purchaser still to tender

performance and the right of the seller at his option to cancel the contract and it would then depend upon who was first in point of time to exercise his right. Such a situation would be contrary to the object with which a *lex commissoria* would be stipulated for (at 81 D - F). ... Whatever the position may be in a case of a sale without a *lex commissoria*, once a *lex commissoria* is stipulated for in the seller's favour the position becomes altered and on fulfilment of the condition which brings the *lex commissoria* into operation there accrues to the seller a right to cancel which cannot be defeated by an offer of performance by the/

14.

the purchaser and the offer of performance by the purchaser then becomes subordinated to the choice of the seller to cancel." (at 82 F - G).

THIRION J's views are supported by old authority. Some are referred to by him. Another is Voet's Commentary on the Pandects 22.1.31 where the following is stated:

"Default cannot always be purged. -Still it should be noticed that freedom to purge a default has not been bestowed on a defaulter in every case. If right from the commission of default a kind of new obligation has arisen in favour of him against whom default has been made, there is no room for purgation, since a right which has once accrued to anyone cannot be taken from him except by his own act. Instances from *Lex commissoria*: -On those lines if a thing has been sold/

15.

sold and delivered to anyone under a commissory term, and he has deferred payment beyond the day fixed in advance, he effects nothing by afterwards making a tender. He could not deprive the seller of the power which accrued from the first moment of default to reclaim the thing purchased by action in rem or in personam. "

(Gane's translation, vol III, p 721). In principle this is surely correct. Normally, a creditor is obliged to accept a tender of performance by the debtor. His failure to do so would constitute a breach of contract and give rise to *mora creditoris*. But as De Wet and Yeats *Kontraktereg en Handelsreg*, 4th ed,

167 point out, this does not apply where "die skuldeiser weens die mora van die skuldenaar h terugtrekingsreg het waarvan hy gebruik wil maak". Were this

otherwise/

16. otherwise, what is a bad tender, because it is out of time, would be elevated to the status of a good one which the creditor would have to accept. And having done that, he would be precluded from invoking the *lex commissoria*. This amounts to an imposed variation of the contract; instead of having to perform by a particular date, the purchaser is able to pay at any time prior to the seller communicating his election to cancel. I agree, therefore, with both

the reasoning and conclusion of THIRION J and, in particular, that Schuurman vs Davey is good law. And, insofar as Middelburgse Stadsraad vs Trans-Natal Steenkoolkorporasie Bpk 1985 (2) S A 524(T) at 529 A is at variance with it (as to whether it is,

see/.... .

17. see 1985 Annual Survey 116), it must be taken to be wrong. (The judgment has in fact, for reasons not relevant to the issue under discussion, been reversed; see Middelburgse Stadsraad vs Trans-Natal Steenkoolkorporasie Bpk 1987(2) S A 244 (T).) But does the principle in question apply in casu? In my view it does. I can see no difference in principle (in relation to the point under consideration) between a *lex commissoria* in a contract of sale and a foreclosure clause in a bond. Both usually (and in the present matter do): (i) involve periodic payments by the debtor; (ii) which if not made timeously, afford the creditor an election of remedies; (iii) which election, however, must be made within a reasonable

time/

18.

time and (iv) may be waived (by e.g. an acceptance of late payment); (v) but, having been made, binds him and (vi) results in the termination of the sale or bond (as the case may be). In particular, as in the case of a *lex commissoria*, the fulfilment of the condition giving rise to the foreclosure clause being able to be put into operation, results in the mortgagee obtaining a right which would be negated were he bound to accept late performance by the mortgagor. The Schuurman vs Davey rule is probably of more general application. Thus the view is expressed at 82 D of Moodley's case that a lessor would not be precluded from terminating the lease simply because of a tender of overdue rental prior to actual cancellation. And the first paragraph of

Voet,/ 19. Voet, op cit, clearly does not confine the inability of a defaulter to purge his default to the case where the creditor has the advantage of a *lex commissoria*. I do not, however, propose to express a firm view in this regard. It suffices to say that I am satisfied that a mortgagee is entitled, in circumstances such as the present, to rely on a foreclosure clause, notwithstanding that he only elected to employ it subsequent to the mortgagor having tendered to cure his failure timeously to pay an instalment due in terms of the bond. It is unnecessary to attempt to determine when, on the papers, foreclosure of the bond by appellant actually took place. (It should be noted

in/20. in this regard that the reference to "18 July 1984" and "2 December 1985" at 114 G of the judgment a quo should respectively be to "18 July 1985" and "2 December 1984".) First respondent has never suggested that when the tenders of payment were made, there had been an undue delay by appellant in electing to call up the bond. In the result, therefore, applying the principle under discussion, LICHTENBERG J should have held that appellant was not bound to accept any of the tenders made by first respondent. It remains to mention certain miscellaneous matters on the merits. They are the following:

(i) In his counsel's heads of argument (to which I earlier referred) it is not contended on behalf

21. of first respondent that an acceptance by appellant of the tender of payment would have precluded a foreclosure of the bond. The point taken is simply that the order granted was justified because it obliged appellant merely to accept payment on account of the full amount owing under the bond. This is untenable. Payment was never tendered on that basis. The whole purpose of the application was to avoid foreclosure and the sale of the property in execution; the

dispute was whether appellant was entitled so to act; and the tenor of the judgment a quo. fully reflects this to have been so.

(ii)/.....

22.

(ii) An alternative argument presented to the court a quo on behalf of first respondent, and referred to by the learned judge at 115 E - F (though not decided by him) was that there has been a "conspiracy" between appellant and second respondent that payments under the bond cease and that appellant thus be enabled to foreclose it. There is no question of a conspiracy - at least not an unlawful one. Even if non payment by second respondent did take place pursuant to an agreement with appellant, they, as the contracting parties, were perfectly entitled so to agree. (iii) Another point raised on behalf of first

23. respondent in the court below, but which also was not finally decided, was that it had not been proved that appellant's representative had authority to elect to call up the bond (see at 115 G - 116 B). I do not think that this view is, on the facts, justified. In any event, an application of the correct legal principles should have resulted in it being found that appellant need not have elected to have called up the bond prior to the tenders of payment (or the launching of the application) at all.

To sum up then, I am of the opinion that

the/

24.

the application for an order that appellant accept payment of the amount tendered by first respondent was ill-founded and should have been dismissed. This being so the order for costs against appellant also cannot stand. Appellant is obviously entitled to the costs of appeal. I think these should include the costs of two counsel.

The following order is made:

(1) The appeal succeeds and is allowed with costs. These are to be paid by first respondent and are to include those of two counsel.

(2) The order of the court a quo is set/

25. set aside and the following substituted: "The rule nisi is discharged with costs".

NESTADT, JA

JANSEN, JA)

SMALBERGER, JA)) CONCUR VIVIER, JA)

VILJOEN, AJA)

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Prepared on 13 October 2026 · Esheria