

SOUTH AFRICA / JUDGMENT

Silvermoon Investments 278 CC v Slip Knot Investments 777 (Pty) Ltd (2142/2012) [2012] ZAECGHC 58 (23 July 2012) [2012] ZAECGHC 58

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering

CASE / FILE NUMBER

2142/2012

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13

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

Case no: 2142/2012

Date heard: 17 July 2012

Date delivered: 23 July 2012

In the matter between

SILVERMOON INVESTMENTS 278 CC

(REGISTRATION NO: 2006/156270/23)Applicant

AND

SLIP KNOT INVESTMENTS 777 (PROPRIETARY)

LIMITED (REGISTRATION NO: 2001/010265/07)Respondent

REASONS FOR JUDGMENT

PICKERING J:

On 17 July 2012 this matter was argued before me as an urgent application. In view of the exigency of the situation I granted an

order on 19 July 2012 and intimated that my reasons for judgment would follow in due course. These are my reasons.

The order granted was as follows:

“1. Respondent is ordered within 3 days of the date of this order to take all steps necessary and to sign all documents necessary to cancel the first covering mortgage bond B1793/2008 in favour of the Respondent and to take all steps and to sign all documentation to effect such cancellation, against the provision by or on behalf of the Applicant of an irrevocable bank guarantee for payment to the Respondent of the sum of R2,540,757,05.

2. In the event of Respondent failing to comply with paragraph 1 above within such period as set out therein, the deputy sheriff for East London be and is hereby authorized to take all steps and to sign all documentation necessary to effect the cancellation of the first covering mortgage bond B1793/2008 in favour of the Respondent.
3. Respondent is ordered to pay the costs of this application including such wasted costs as were occasioned by the application standing over on 10 July 2012 to 11 July 2012 and such wasted costs as were occasioned by the postponement of the application on 11 July 2012, and including also the costs of two counsel.”

Applicant, Silvermoon Investments 278 CC, is a duly registered close corporation carrying on business in East London. Applicant is the registered owner of various erven in East London which it is developing under the name of Royal Park as a residential township

development with the aim of developing independent freehold housing units for onward sale at a profit to individual home buyers.

According to applicant it is in an advanced state of preparation with regard to this development. Respondent, Slip Knot Investments 777 (Pty) Ltd, is a company also carrying on business at East London. Its business ventures include the provision of bridging finance, loans and the development and onward sale of, inter alia, residential township erven of the same nature as those being developed and sold by applicant at Royal Park.

During December 2007 applicant and respondent entered into a written bridging finance loan agreement (MBW2) in terms whereof respondent

loaned and advanced to applicant bridging finance in the total sum of R2 059 000,00. It was a term of this agreement that as security for applicant's obligations thereunder there would be registered in favour of respondent a first covering mortgage bond to the value of R2 059 000,00. This security was in due course effected in consequence whereof respondent currently holds a first covering mortgage bond B1793/2008 over the applicant's aforementioned immovable property.

In terms of the loan agreement applicant undertook to pay interest on the capital sum at the rate of 1,25% per week, compounded monthly. Applicant does not contend that such rate of interest is extortionate. (Compare in this regard Slip Knot Investments 777 (Pty) Ltd v Project Law Prop (Pty) Ltd, unreported South Gauteng High Court case no 36018/2009.)

There was some dispute on the papers as to whether the rate of interest had in fact been increased to 2,5% per week as from October

2008 as was contended by respondent but, at the hearing of the matter, Mr. Ford S.C., who with Mr. Boswell appeared for respondent,

conceded that as such alleged increase had not been recorded in writing and signed by both parties as stipulated in the loan agreement the alleged increase had not in fact been effected.

The loan agreement provided that applicant would pay the full outstanding capital sum on or before the payment date which was calculated as being a period of 2 months from the commencement date of the loan agreement. The commencement date itself was stipulated to mean the date on which the respondent advanced the loan to applicant.

During March 2008 the parties agreed, in terms of an addendum to the loan agreement, that the “payment date shall mean a period of 2 months calculated from the date on which the loan is actually paid out by the lender or the 1st June 2008, whichever is the earlier.”

It is common cause that after expiry of the payment date applicant was in default of repayment of the loan amount. According to

applicant respondent did not demand payment of the outstanding balance and applicant from time to time made payment against the

outstanding balance. This, however, is disputed by respondent which alleges that applicant requested, and respondent allowed, an

extension of the payment date.

Respondent alleges further that it furnished to applicant schedules reflecting the balance outstanding, which schedules were based upon the increased interest rate of 2,5%. The calculation thereof was never challenged by applicant until April 2011 when Mr. Jan du Plessis, on behalf of applicant, wrote to Mr. Jean du Plessis, on behalf of respondent, referring to the in duplum rule and stating that his understanding was that “interest cannot exceed 100% of capital” and that “my costs of money were capped” (sic).

For its part applicant avers further that at least since December 2011 it wished to effect payment of the “true outstanding balance owing to respondent” and to that end sought to obtain from respondent and its attorneys a proper calculation of such balance “regard being had to the applicable rates of interest reflected in the loan agreement and the application of the in duplum rule” in order, inter alia, so that respondent’s first covering mortgage bond could be cancelled and so that applicant could “explore and finalise a loan agreement” for the sale of its erven and

the development effected thereon to a purchaser of the entire development.

Applicant states that its attorney, Mr. Webb, accordingly engaged with respondent's then attorney, Mr. Schoeman, in order to reach agreement as to the final outstanding balance. Applicant also employed the services of a chartered accountant, Mr. Murphy, to calculate the outstanding balance as at 20 March 2012, taking into account in doing so the in duplum rule.

Mr. Murphy calculated the outstanding balance as being R2 540 757,05 (MBW4).

On 24 February 2012, however, respondent's attorney, Mr. Schoeman, wrote to Mr. Webb advising him that the view of respondent

was that the balance owing as at 18 January 2012 was in fact R94 059 374,48 to which interest was to be added at 2,5% per week, compounded monthly, from 19 January 2012 to date of payment. Applicant contends in the light thereof that respondent clearly has no bona fide intention of determining applicant's true outstanding indebtedness and that it is extending the dispute relating to such

indebtedness in order, inter alia, to bankrupt and effectively render unviable the Royal Park development with which it is allegedly in competition and to "maintain the impediment of the first covering mortgage bond" over applicant's erven on "false, anti-competitive, unlawful, contrived and non-commercial pretexts."

Applicant avers that in order to bring the matter to a head Mr. Webb, on behalf of applicant, forwarded to Mr. Schoeman on 4 June 2012 a copy of a bank guarantee for the outstanding amount as calculated by Mr. Murphy, which guarantee was tendered against cancellation of the mortgage bond in favour of the respondent over the aforementioned erven. The guarantee forwarded to Mr. Schoeman in annexed to applicant's papers as Annexure MBW6.

Eventually, on 25 June 2012, applicant received an e-mail communication from Mr. Schoeman stating that Mr. Jean du Plessis "has a different interpretation of the in duplum rule and has decided to enforce his claim in full." It was in consequence of this e-mail that applicant launched the present proceedings.

In his initial answering affidavit filed on behalf of respondent Mr. Jean du Plessis denied the correctness of Mr. Murphy's

calculations. He stated that because of the alleged urgency and the truncated time period afforded to respondent to file answering

affidavits respondent had been unable to obtain advice from its legal representatives and could therefore not respond in greater detail to these calculations as well as to applicant's allegation that the in duplum rule was of application. Respondent averred that applicant's last payment to it had been made in August 2010 and that respondent had been extremely tolerant and had granted applicant numerous indulgences in respect of repayment of the outstanding balance.

In a supplementary answering affidavit dated 13 July 2012 Mr. du Plessis reiterated respondent's denial of the correctness of Mr. Murphy's calculations and averred that applicant, being mindful of the application of the in duplum rule, and in the knowledge that the application thereof would defeat the clear intention of the parties to the contrary, obtained extensions of time from respondent for repayment of the loan with the deliberate intention of not being obliged to pay further interest once the unpaid interest had equalled the unpaid capital. In the light of this respondent accordingly refused to agree to the cancellation of the mortgage bond.

Much was made both in the papers and during argument of the alleged motives of the respective parties. During the course of this exchange applicant relied upon certain correspondence addressed to its attorney, Mr. Webb, by respondent's attorney, Mr. Schoeman, which correspondence, so it was contended by respondent, was of a privileged nature and inadmissible. Respondent sought to strike out, not only this correspondence, but also a number of other averments made in applicant's papers. In the view that I take of the matter, however, it is not necessary to deal specifically with the striking out application or to resolve the issue of the motives of the respective parties.

What does emerge clearly from the papers, whatever the parties' motives may or may not have been, is that applicant, relying upon the in duplum rule, avers that the amount owing to respondent in full is the sum of R2 540 757,05 which sum, together with the cancellation charges, it tenders to pay to respondent *pari passu* with the cancellation of the first covering mortgage bond by way of an irrevocable bank guarantee, whereas respondent, contending that the in duplum rule is not of application, avers that the outstanding amount of applicant's indebtedness to it is in fact approximately R94 million, that in the circumstances the whole of the debt would not be extinguished by payment of the amount of R2 540 757,05 and that accordingly the bond itself would likewise not be extinguished.

Before dealing with the substantive issues raised in the papers it is necessary to consider a number of points in limine which were raised by respondent.

The first such point in limine relates to the alleged urgency of the matter.

Urgency

As set out above applicant avers that at least since December 2011 it wished to effect payment of the full outstanding balance owing to respondent and that it accordingly engaged in negotiations with attorney Schoeman who was acting on behalf of respondent at the time. Mr. Webb, on behalf of applicant, addressed an e-mail to attorney Schoeman on 4 June 2012 forwarding a copy of a bank guarantee for the outstanding amount as calculated by Mr. Murphy against cancellation of the mortgage bond in favour of respondent over applicant's property. Applicant avers further that on 12 June 2012 its sole member entered into an agreement with certain purchasers, Bain and Joubert, for the sale of its total interest in applicant for a purchase consideration of R5 400 000,00 of which R2 540 757,00 was payable on cancellation of respondent's mortgage bond over applicant's property by the provision by the purchasers of a bank guarantee in favour of respondent. It was a term of that agreement that, unless the mortgage bond was cancelled by 31

July 2012, the guarantee would be withdrawn and the whole agreement would be null and void ab initio. It was thereafter, on 25 June 2012, that applicant received the e-mail from attorney Schoeman to the effect that respondent had a different interpretation of the in duplum rule and that it was enforcing its claim in full.

It was in these circumstances that applicant launched the present application as a matter of urgency on 2 July 2012.

It is against this background that the question of urgency must be considered.

Mr. Ford raised various issues relating to the alleged urgency of the application. It is not necessary to deal in any detail with these submissions as, in my view, they clearly cannot be sustained.

The first point raised by Mr. Ford related to an alleged non-compliance with the provisions of Court Notice 1 of 2012 which provides that every application to be heard on an urgent basis by this Court must be filed with the duty Judge, who, once satisfied that the matter is one of urgency, will give directions as to the time and place that the matter should be heard, if the matter is to be heard at any time other than the normal motion court hours. Mr. Ford submitted that no written directions appeared to have been

issued by this Court as to the time and place and when and where the matter should be heard.

It is common cause, however, that the certificate of urgency relating to this matter was placed before the then duty Judge, Sangoni JP, who gave his verbal approval to the application being heard as one of urgency and who, as appears from the affidavit of applicant's

attorney of record, Mr. Nunn, directed his secretary to inform Mr. Nunn accordingly. Sangoni JP directed further that the matter would be heard on 10 July 2012. In these circumstances I fail to see in what respect there has been non-compliance with the Court Notice.

I should add that any such directions, wither verbal or written, as to the hearing of an application as a matter of urgency are obviously not determinative of the issue, being based as they are solely on the certificate of urgency without reference to the papers. It obviously remains open to a respondent to raise an alleged lack of urgency when the matter is eventually heard.

Mr. Ford further assailed the certificate of urgency itself. Whilst it is so that there are certain discrepancies between the facts

alleged in the certificate of urgency and the facts contained in applicant's founding papers, none of these discrepancies are of such a nature as, in my view, to have misled Sangoni JP with regard to the urgency of the matter. Mr. Ford submitted that the averment contained in paragraph 6 of the certificate of urgency to the effect that the time period required for the cancellation of the bond by the King William's Town Deed's Office was 10 days from the date on which the necessary documentation was lodged is not contained in the founding affidavit. As explained by Mr. Nunn in his affidavit he made reference to this cancellation period because he believed that the

information would assist the duty Judge who was considering the application. In any event, paragraph 5 of the certificate of urgency specifically refers to the term of the agreement between applicant's sole member and Bain and Joubert to the effect that unless the mortgage bond was cancelled by 31 July 2012 the guarantee would be withdrawn with all the consequential prejudice to applicant.

I am satisfied therefore that the certificate of urgency contains no material misrepresentation or inaccuracy.

As to the actual urgency of the matter I am also satisfied that once it had become clear to applicant that respondent was not prepared to accept its guarantee on the basis that the outstanding balance owing to it was in fact R94 million that applicant thereafter acted with the utmost expedition in launching the application. I am of the view that in the circumstances of this matter applicant cannot be faulted for not having launched its application at an earlier date. In the circumstances there is, in my view, no merit in the submission that the application falls to be dismissed for lack of urgency.

Authority to institute proceedings

The deponent to applicant's founding affidavit, Mr. Webb, alleged that he was authorised to institute the proceedings on behalf of applicant. As pointed out by Mr. Ford he alleged that the Dolphin Family Trust is the sole member of the applicant and yet he relied upon a General Power of Attorney given to him by Jan du Plessis in his personal capacity and a resolution allegedly "passed by the members of Silvermoon Investments 278 CC." That resolution is signed by Jan du Plessis. In his affidavit Jan du Plessis alleges that he is the sole member of applicant.

Furthermore, the agreement entered into on 12 July 2012 for the sale of the sole member's interests in applicant reflects the Dolphin Family Trust as the sole member and Jan du Plessis is not a party thereto. Mr. Ford submitted that these allegations are in conflict and irreconcilable and do not reflect any resolution by the members of the Dolphin Family Trust authorising the institution of the proceedings by Mr. Webb.

In this regard Mr. Smuts S.C., who with Mr. Dugmore appeared for the applicant, referred to the affidavit filed in reply by Jan du Plessis and Marida du Plessis in which the deponents state with reference to the resolution authorising Mr. Webb to launch these proceedings that they are the two trustees for the time being of the Dolphin Family Trust. They state that they held a meeting of trustees in Mauritius on 25 June 2012 in consequence of which the resolution (MBW1) was prepared and signed by Jan du Plessis. They state further that at the meeting of trustees it was resolved that an urgent application be brought on behalf of applicant for the relief contemplated in this application and that Mr. Webb was authorised to depose to the founding affidavit. They state further that to the extent that the resolution "does not record that this resolution was a resolution of the trustees of the Dolphin Family Trust, which Trust is the sole member of the applicant, we regret such failure and wish hereby to state the correct factual position."

Respondent seeks also to strike out this replying affidavit.

In addressing this issue Mr. Smuts, with reference to *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 at 207H-I raised the question as to whether it was at all conceivable that an application of this magnitude could have been launched on behalf of applicant without the authority of the Trust in question, in circumstances where Mr. Webb has stated under oath that he was authorised to depose to the founding affidavit; where the resolution authorising him to do so was signed by Jan du Plessis, a trustee of the Trust in question and where both trustees of the Trust in question have under oath clarified the position.

I agree with Mr. Smuts that that question can be answered only in the negative.

Mr. Smuts submitted further that in any event, in the circumstances of this case, respondent should have invoked the provisions of Rule 7(1) of the Uniform Rules of Court. See in this regard the *Unlawful Occupiers* case at 206G – 207H. I agree. Had respondent done so a great deal of time that was expended during argument in addressing this issue would have been obviated. Mr. Ford's submissions in this regard can therefore not be sustained.

I turn then to consider what is in effect the main substantive defence raised by the respondent to this application, namely the application of the in duplum rule.

In this regard Mr. Ford submitted, with copious reference to authority that the in duplum rule had now become a true anachronism the original role of which, namely the protection of small-scale individual borrowers, had been taken over by the National Credit Act 34 of 2005. He submitted, inter alia, that the rule clearly offended against the right to freedom of contract and that, in view of the general development of the in duplum rule and the changes in society in general, the historical reasons behind the adoption of the rule no longer applied and the purpose of its limitation had in effect fallen away. He stated that the rule had been designed to protect ordinary, powerless and often ignorant credit seekers against greedy credit providers. In the modern context, and in particular in the present context where one commercial entity borrowed money from another, both in pursuit of profit, the original purpose of the rule was no longer being served. He submitted, with reference to the Constitution, that the common law should be developed by refusing to allow debtors such as the applicant to hide behind the provisions of the rule in order to avoid their contractual obligations. He submitted, if I understood him correctly, that if I was prima facie of the view that there was merit in his submissions then respondent should be entitled to hold onto its security in the form of the mortgage bond against the reasonable possibility that a Court would in due course declare the rule to be in conflict with the Constitution or otherwise redundant.

Interesting as these submissions may be, it is not necessary to deal with them. Even were such submissions eventually to be upheld in another forum Mr. Smuts, in my view, is correct in his submission that it is inconceivable that any court, in abolishing the rule, would order that it be struck down retrospectively. To do so would be to create utter chaos in the commercial world. The fact remains that the rule is presently of application and that I am obliged to give effect to it. Respondent's contrary contention is untenable.

Mr. Ford then submitted further that respondent was being, in effect, forced to substitute the security held by it for another form of security unacceptable to it. This, however, is clearly not so. All that applicant seeks to do is to extinguish the debt owing to respondent under the loan agreement with the consequence that the mortgage bond, which is ancillary to the loan agreement, itself be extinguished. As submitted by Mr. Smuts, it is trite that if the amount due is tendered by a debtor and refused by the creditor, or if it is the creditor's fault that payment is not made, then the former is entitled to claim restoration of the secured property (*Ford Agencies v Hechler* 1928 TPD 638 at 641-642), the duty to cancel the bond and the duty to pay the amount due being reciprocal and consequently to take place *pari passu*. See too: *Forfif (Pty) Ltd v Macbain* 1984 (3) SA 611 (W) at 615H – 616I; *Oertel N.O. v Brink* 1972 (3) SA 669 (W).

Mr. Ford submitted however that there was a dispute of fact as to the exact amount of the outstanding balance. He referred in this regard to the calculations of attorney Schoeman applying the *in duplum* rule which reflect a balance owing of R2 7325 841,00 (SAA9).

I am satisfied, however, that, as was submitted by Mr. Smuts, no genuine dispute of fact exists in this regard. The affidavit filed on behalf of the applicant by the chartered accountant, Mr. Murphy, sets out clearly the principles relating to the *in duplum* rule which were applied by him in his calculations. Respondent has not seen fit to dispute the correctness of these principles and has, in effect, contented itself with a bare denial of the correctness thereof without in any way attempting to enlighten the court as to where Mr. Murphy's calculations went wrong. No affidavit by Mr. Schoeman has been filed and no reason has been put forward to suggest that what appear to be draft calculations by an attorney, whose expertise in matters of this nature is unknown, should be preferred to the calculations of a chartered accountant. I am satisfied therefore that there is no merit in Mr. Ford's submission.

Mr. Ford then submitted that the guarantee annexed to Mr. Webb's affidavit as annexure MWB6 was clearly not irrevocable and that as such respondent was fully entitled to reject it. I agree with this submission. The guarantee by Absa Bank confusing as it is, specifically provides that it may be withdrawn by the bank at any time prior to the cancellations of the bond. It is noteworthy,

however, that the guarantee was not initially rejected by respondent on this basis but on the basis that the amount tendered would not settle applicant's indebtedness to respondent because the *in duplum* rule did not apply. Be that as it may I am satisfied that applicant is not bound by the guarantee (MWB6) and that it may, having established a clear right to the relief sought, furnish to respondent an irrevocable guarantee in an acceptable form. By so doing it is not making out a case in reply as was submitted by Mr. Ford.

I am indeed satisfied that applicant has established a clear right to the relief sought by it. It has tendered to furnish respondent with an irrevocable bank guarantee for the full amount of its indebtedness to respondent which respondent refuses without any legal

justification to accept. Applicant has no other adequate alternative remedy nor does respondent suggest it does other than to contend that applicant should pay the “correct amount due by it” of R94 million.

In these circumstances applicant is entitled to an order in terms of the amended Notice of Motion.

Mr. Ford did not suggest that costs should not follow the result or that the costs of two counsel should be disallowed.

It was for these reasons that I made the order which was handed down on 19 July 2012.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. Smuts S.C. together with Adv. Dugmore

Instructed by: Whistlesides Attorneys, Mr. Nunn

Appearing on behalf of Respondent: Adv. Ford S.C. together with Adv. Boswell

Instructed by: Wheeldon Rushmere & Cole, Mr. Laing

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