

SOUTH AFRICA / JUDGMENT

Investec Bank (Mauritius) Ltd v Mohan (6713/2010) [2012] ZAWCHC 62 (20 March 2012) [2012] ZAWCHC 62

COURT

Western Cape High Court, Cape Town

BEFORE

Gangen

CASE / FILE NUMBER

6713/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 6713/2010

In the matter between:

INVESTEC BANK (MAURITIUS) LIMITEDApplicant

and

LEO GERARD MOHANRespondent

JUDGMENT DELIVERED 20 MARCH 2012

GANGEN, A.J.:

- [1] This is an application by the Applicant for an order that the Respondent pay the applicant two claims of €696 906.72 and R2135 504.07, that certain properties be declared executable, R57 000 paid to the auditor on behalf of Respondent and costs.
- [2] The Applicant brought this application as it alleged that the Respondent was in default of two court orders dated 29 April 2010 ("the April order") and 19 October 2010 ("the October order").

- [3] The April order was made pursuant to a settlement agreement by the parties in an application by the Respondent to interdict the Applicant and the Sheriff from executing against the Respondent's property pursuant to a Court order of 12 March 2009 under case no 17215/2009, to rescind the order of 12 March 2009 and calling for debatement of the bond accounts by an auditor.
- [4] In terms of the April 2010 order, the order of 12 March 2009 was rescinded and an auditor was to be appointed for the determination of the amounts due by Respondent to Applicant. The cost of the auditors was to be shared equally and the Respondent was to pay interest on a monthly basis, commencing on the last day of the month following the auditor's determination. Half of the capital amount was to be paid 12 months after the auditor's report and the balance was to be paid within a further 6 months.
- [5] The April order stated furthermore that-
- "15 In the event that the Applicant defaults on any payment to the First Respondent including monthly interest as determined by the Auditor, alternatively the full amount owed by the Applicant to the First Respondent, then the First Respondent is entitled to apply to this Court on these papers duly supplemented for judgment of such amount."
- [6] Respondent was not happy with the auditor's costs being uncapped and there was a dispute as to whether interest was payable by the Respondent pending the auditor's report.
- [7] The matter came before court again on 19 October 2010 when by agreement it was ordered that the Respondent contributes half of the costs of the auditor which was not to exceed R100 000,00 and, in the event that it did, Applicant would be responsible for the amount in excess thereof. It was further ordered that the prayers regarding payment be amplified to include provision for payment of interest monthly with effect from October 2010 as claimed by Applicant pending the finalisation of the auditor's report.
- [8] The Applicant approaches the Court under the same case number as the two court orders on the strength of paragraph 15 of the April order (*supra*).
- [9] The matter is to a large extent to be determined by an interpretation of the April order and the question of the applicability of the National Credit Act.
- [10] The Respondent submits that the Applicant has not complied with s129(1) of the National Credit Act and is therefore not entitled to any relief. The Applicant however contends that the National Credit Act is not applicable as it is dealing with default of the court order.
- [11] In interpreting paragraph 15 of the court order, there are two issues raised. The first one refers to the Respondent's submission

that reference to the "papers duly supplemented" is to be read in that the Applicant ought to have in his supplemented papers dealt with compliance in terms of section 129(1) of the National Credit Act. In this regard, the Respondent contends that by making the settlement an order of court, it did not waive its rights in regard to the National Credit Act.

[12] I am of the view that the Applicant was entitled to bring the application without notice in terms of s129 of the National Credit Act because the matter is being brought before Court to address Respondent's default of the terms of the court order. The Court order is not a credit agreement and s129 of the National Credit Act specifically makes reference to default of the credit agreement. I do not believe that it can be read in 'papers duly supplemented' that the Applicant was to comply with s129 of the National Credit Act.

[13] The second issue relates to what happens in the event of default by the Respondent. Applicant submits that in the event of default on any payment the Applicant would be entitled to apply for judgment of the full amount owing.

[14] With regard to the provisions for payment in terms of the two orders read together, Respondent was to pay-

13.1. Interest on the amount which the auditor determines is owed by the Respondent to the Applicant, monthly commencing on the last day of the month which follows the month in which the Auditor completes its Analysis

13.2. 50 (fifty) percent of the amount which the Auditor may determine the Respondent owes to the Applicant not later than twelve

months from the date of the report of Auditor's Analysis

13.3. the balance of the full amount, which the Auditor may determine that the Respondent owes to the Applicant, not later than eighteen months from the date of the report of Auditor's Analysis

13.4. interest only on the amounts claimed by the Applicant monthly in arrears with effect from October 2010 pending finalisation of the auditor's analysis report.

[15] The auditor's report was finalised on 7 September 2011 and therefore the payments in terms of paragraphs 13.2 and 13.3 are not as yet due and payable. The amount payable in terms of paragraph 13.2 becomes due in September 2012 and the amount in terms of paragraph 13.3 will become due, in March 2013.

[16] There is no specific acceleration clause in the court order that entitles the Applicant to judgment on the full amount in the event that the respondent is in default of payment in respect of any one of the four prayers. Applicant relies on paragraph 15 of the April order to support the submission that Applicant is entitled to judgment on the full amount owing.

[17] The Applicant submits that the reference to 'such amount' in paragraph 15 of the April order refers to the 'full amount' as this is the only place in the sentence where reference to the word 'amount' is made.

[18] I do not agree. From an ordinary reading of paragraph 15 of the April order, it appears that the reference to 'such amount' is a reference to 'the amount by which the Respondent is in default.' I am of the view that the order does not make provision for the full amount to be due and payable in the event of default and that Applicant is only entitled to judgment in respect of the amounts in default.

[19] This then raises the issue as to whether the Respondent was in default when the Application was brought in November 2011 and, if so, the extent of the default. It is Respondent's submission that the total of the amounts paid by him to Applicant from October 2010 to October 2011 exceeded the amount of interest due.

[20] Applicant denies that this is so as one of the properties secured was sold by the Respondent and the proceeds, paid to the

Applicant in March 2010, was allocated to both capital and interest. Applicant submits that it was entitled to do so as its security was reduced by the sale of the property.

[21] Respondent denies this on the basis that the object of the Court order was effectively a restructuring of the Respondent's obligations and which regulated the process for debatement and assessment of the amount due by Respondent. Respondent accordingly submits that in circumstances where the full amount is not due, the Applicant is obliged to credit all payments to interest.

[22] This then raises the issue as to whether the payment of proceeds of the sale of the property which was paid is to be allocated to capital as per applicant's submission.

[23] In this regard, the payment allocated to capital was an amount of €89817 which the Respondent paid to Applicant on 24 March

2011. This amount represents the proceeds of the sale of one of the properties which property was, on transfer of the property to the purchaser and on cancellation of the bond, released as security. The amount was subsequently split and allocated to capital and to interest being €58942.42 to capital and €30874.58 to interest.

[24] Applicant has submitted that the settlement which was made an order was a restructuring of the respondent's obligations and

regulating the process for debatement and assessment of the amount due by Respondent.

[25] The question is then whether the restructuring of the Respondent's obligation was intended to have the effect of reducing

the Applicant's security.

[26] Relevant here is the provision in paragraph 16 of the court order that the period of 18 months would be extended if

"(R)egistration of the transfer has not taken place, then the eighteen month period shall be extended to the date of registration of transfer of such properties, on condition that the deeds have already been lodged with the Registrar of Deeds at the date of expiration of the eighteen month period."

- [27] It is clear from this that the Applicant was aware when the order was made that the properties were going to be sold. However, from the wording above and from the manner in which the proceeds of the sale of the unit of €89817 was paid, (that is, in the normal manner, by paying on registration of transfer and cancellation of the bond the outstanding amount in respect of that unit) it seems to me that it was never intended that the Applicant would give up its security in terms of the mortgage bonds despite the restructuring of the payments.
- [28] This Court notes that the restructuring agreement arose from Respondent's default in terms of the original loan agreements in respect of which the mortgage bonds were registered and his call for debatement of the amounts due.
- [29] I am accordingly satisfied that the split of the payment is correct and that the Respondent cannot rely on the full payment of €89817 as meeting his obligation in terms of 13.1 and 13.4 of the Court order.
- [30] It is common cause that the Respondent did not comply strictly with the court order in that he did not make monthly payments as required. The question is then whether the Respondent was in arrears when the application was brought.
- [31] It appears that whilst the Respondent was required to make payments monthly from October 2010 to date of the auditors report, he made three payments to Applicant at random dates, and besides the payment of €89817 on 24 March 2011 pursuant to the sale of one unit, the first payment was made in June 2011.
- [32] The Respondent's counsel in argument also raised the issue that the statements of the interest and payments handed in at Court were not correct as the figures were not aligned to those in the auditor's report. However, I do note that the amounts in the statement handed in at Court are less than those set out in the auditor's report and so the Respondent is not in anyway prejudiced by any discrepancy.
- [33] It appears that Respondent made payments totalling €11 124.86 and R49 000.00 to Applicant in relation to his obligation to pay interest, in terms of paragraph 13.4 of the court order, that is, pending finalisation of the auditors report. If the payment of €30874.58 is allocated towards interest then this increases the payments in euros to €41999.44.
- [34] The amount due to the Applicant for this period was at least €33503.03 and R504290.50. Thus as at date of the auditor's

report the Respondent was ahead of his payments in euros (€8496.41) but arrears in terms of his payments in rands (R455290.53), clearly putting him in an overall arrears position.

[35] It is also clear that Respondent had not in his communications with Applicant in relation to the March payment indicated that the payment should be allocated to interest as per his interpretation.

[36] Paragraph 13.1 of the Court order required Respondent to pay interest on the amount which the auditor determines as being owed by the Respondent to the Applicant, monthly commencing on the last day of the month which follows the month in which the Auditor completes its Analysis.

[37] Interest was therefore due monthly from end of October 2011. For the purposes of this application it is relevant whether the

Respondent was in arrears as at 9 November 2011.

[38] From the statements submitted to Court, it appears that for September and October 2011, the interest payments were €6087.52

and R49751.49. Respondent made no further payments until 23 November 2011.

[39] Respondent was thus ahead of his payments in euros (€2408.89) but arrears in terms of his payments in rands (R505042.02), clearly putting him in an arrears position as at 9 November 2011 when the application was brought For clarity I detail the calculation

hereunder-

Due as at 1 September 2011 -€8496.41 R455290.53

Due for Septembers October 2011 €6087.52 R 49751.49

-€2408.89 R505042.02

[40] Respondent, in any event, since the application was brought, has only made two further payments in euros (€ 3260.22 and €2874.63) and two payments in rands (R27844.89 and R25515.13) with interest having accrued till 28 February amounting to €11728.50 and R99693.45. Thus as at 28 February 2012, Respondent was in arrears to the extent of €3184.76 and R551375.45 in respect of paragraphs 13.1 and 13.4 of the court orders.

[41] The last claim arises from Respondent's non-payment of his share of the auditor's costs which the Applicant claimed as R50 000 plus VAT but which was conceded in argument to be limited to the R50000. On 6 December 2011 Respondent's attorney advised Applicant that the amount would be paid shortly but it was not paid. Applicant paid the amount to the auditor and is entitled to an order for payment of R50000.

[42] Whilst Applicant, based on its application for all the bonded properties to be declared executable, I am unable to make such an order in circumstances where judgment is not granted for the full amount outstanding.

[43] I am unaware of the values of the properties but having regard to the value the unit sold and to the extent that Respondent is in arrears with his payments in respect of his obligations in terms of the April and October orders, I am inclined to declare one property specially executable.

ORDER

- 1) Judgment for the arrear amounts in respect of interest being €3184.76 and R551375.45 is granted.
- 2) An order declaring the following property to be executable - Section No 11 as shown on Sectional Plan No SS 614/05 in the scheme known 3© Harbouredge, in respect of the land and building or buildings situate at Cape Town, in the City of Cape Town, an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan and an exclusive use area described as Parking Nay no PB89
- 3) Judgment for R50000.00 in respect of the auditor's costs, paid by Applicant, is granted
- 4) Respondent is to pay the costs of the application.

GANGEN, A.J

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