IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED. ✓
DATE 10/4/14 SIGNATURE

CASE NO: 33482/2010
42140/2010
42146/2010
45190/2010
45192/2010

IN THE MATTER BETWEEN

DATE: 10/4/2014

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA	APPELLANT (Defendant in the court *a quo*)
AND	
RYTON ESTATES (PTY) LTD	1ST RESPONDENT
TWIGGY TIMBERS (PTY) LTD	2ND RESPONDENT
BORK ESTATES (PTY) LTD	3RD RESPONDENT
JAN FREDERIK NELL BRITS	4TH RESPONDENT
GERHARDUS LE ROUX	5TH RESPONDENT
UITGEZOCHT INVESTMENTS CC	6TH RESPONDENT
GIDEON WILHELMUS BÜHRMANN	7TH RESPONDENT (1st to 7th Plaintiffs in the court *a quo*)

JUDGMENT

PRINSLOO, J

[1] On 9 March 2012 I delivered a judgment awarding certain amounts, with costs orders, in favour of the respondents (then as plaintiffs before me) against the appellant, then the defendant.

[2] The detailed judgment or so-called "test case", is the one under case no 33482/10 featuring the first three respondents as plaintiffs. In the remaining judgments, featuring the other respondents as plaintiffs, I made certain awards following the approach adopted in the "test case".

[3] On 30 May 2012 I granted leave to the appellant to appeal to the Supreme Court of Appeal ("the SCA") on a single issue namely whether or not the appellant, which had lent and advanced monies to the respondent farmers over many years in a number of different transactions, had been entitled to charge interest on unpaid interest which was due and payable by the respondents.

The relevant portion of the order which I made on 30 May 2012 reads as follows:

> "Dat verlof aan die applikant toegestaan word om na die Hoogste Hof van Appèl te appelleer teen die beslissing dat die applikant nie geregtig was om rente op agterstallige rente te hef nie."

[4] The appeal, reported as *Land & Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd & others* 2013 6 SA 319 (SCA) was upheld. At 326C the learned Judge of Appeal said the following:

> "This judgment therefore lays down that in the absence of agreement to the contrary, *mora* interest at the prescribed rate is payable on unpaid interest which is due and payable."

[5] The result of the appeal dictated that the awards I made during the trial on the strength of calculations by experts on both sides had to be adjusted, firstly to accommodate the *mora* interest on unpaid interest component, and, secondly, to cater for those instances where the interest charged by the appellant ("the Land Bank rates") exceeded the *mora* rate prescribed in terms of the Prescribed Rate of Interest Act, no 55 of 1975.

Efforts by the parties to recalculate acceptable amounts were unsuccessful, and they could not reach agreement. The SCA then decided to refer the matter back to me.

[6] The learned Judge of Appeal puts it as follows at 326E-G:

> "It follows that the appeal must succeed. However, although the Land Bank rates applied in the appellant's aforesaid recalculations were mostly lower than the prescribed rate, they did during some periods exceed the prescribed rate. The appellant accepts that it is only entitled to *mora*

interest calculated at the lower of the applicable Land Bank rate and the prescribed rate from time to time. At the hearing of the appeal this court requested the appellant to recalculate all the loans in accordance with this approach, on the understanding that the parties could reach agreement in this regard. The parties were however unable to reach such agreement. In the result the matter should be referred back to the court *a quo* for determination of the amounts, if any, payable by the appellant in accordance with this judgment. Since it accepts liability in principle for repayment in all the matters, save for Uitgezocht and Bührmann, the appellant did not appeal against the orders of the court *a quo* in respect of interest on judgment debts and costs. In consequence these orders must stand." (Emphasis added.)

[7] In my view, the phrase, "in accordance with this approach," clearly has to do with the finding that the appellant is only entitled to *mora* interest calculated at the lower of the applicable Land Bank rate and the prescribed rate from time to time.

Similarly, the phrase "in accordance with this judgment" has to do with the main principle laid down, namely that, in the absence of agreement to the contrary, *mora* interest at the prescribed rate is payable on unpaid interest which is due and payable. Nothing more.

Identifying the dispute between the parties

[8] Because the parties could not agree on the appropriate recalculated awards to be made, the "rehearing" came before me on an opposed basis a few days ago, on 31 March 2014. As they did during the trial, Mr Beckerling SC, assisted by Mr Sawyer, appeared for the appellant and Mr Arnoldi SC for the respondents.

[9] In my judgment after the trial, I said the following in paragraph 118 thereof:

> "Ander begrippe wat gereeld hulle verskyning maak in die stukke is 'Nominal Annual Compounded Monthly' ('NACM') en 'Nominal Annual Compounded Annually' ('NACA').
>
> Ek het reeds vroeër daarop gewys dat die verweerder in Junie of Julie 1999 begin het om rente maandeliks te kapitaliseer ('NACM') waar dit voorheen jaarliks gekapitaliseer is ('NACA'). Dit is gemene saak dat die maandelikse kapitalisering nadelig inwerk op die boer of lener se posisie, met die gevolg dat die rentekoers (destyds van ongeveer 19%) met twee punte (na ongeveer 17%) verminder is om die nadelige effek van die maandelikse kapitalisering teen te werk."

[10] The experts engaged throughout by the respective parties to do calculations and recalculations as the demand occurred, were Mr Strydom ("Strydom") for the appellant and Mr Whelpton ("Whelpton") for the respondents.

[11] One of the issues before me during the trial, which I decided against the respondents, was whether or not Whelpton was entitled, for purposes of his calculations, to consistently apply the original margin between the prevailing prime rate and the Land Bank rate agreed upon between the appellant and the borrower, even where the Land Bank rate varied from time to time in terms of the contract between the parties. For example, the initial margin agreed upon between the appellant and the first three respondents was 3,05%. This approach, of consistently maintaining the margin, became known, in the trial before me, as "die treinspoor benadering". In my judgment, I held that there was no basis for this approach, and the result was, for obvious reasons, a limiting effect on the amount initially claimed.

[12] In an effort to arrive at a realistic result, I requested a calculation involving the experts applying the actual rates applied by the appellant at the relevant time (and not the rate reduced by the favourable margin less than prime because it is common cause, that, especially during later stages, the appellant's rates at times equalled prime and even exceeded that) and my request to counsel was recorded in the following terms:

> "HOF: Het mnr Whelpton ooit 'n berekening gemaak op die ware koerse wat toegepas is, soos wat mnr Strydom ... (tussenbeide)
>
> MNR BECKERLING: Hy het mnr Strydom se koers bevestig, mnr Strydom se berekenings bevestig.

HOF: Nee ek verstaan dit maar het mnr Whelpton ooit 'n berekening gemaak wat afwyk van die treinspoor?

MNR BECKERLING: Nee, edele, hy het nooit 'n treinspoor ... (tussenbeide)

HOF: En op sy enkelvoudige rente basis met aparte kolomme en so meer soos wat hy getuig het, aan die hand van die ware koerse wat toegepas is, (tussenbeide)

MNR BECKERLING: Nee, edele.

HOF: 'n Berekening gedoen?

MNR BECKERLING: Nee, edele. Mnr Whelpton het net sy berekening is treinspoor, met ander woorde jy begin by daardie die rente marge wat hy by aanvang bepaal en dan soos 'n treinspoor soos *prima facie* op en af gaan bereken hy hom. Dit is die een inset. Sy ander inset is hy sê ek kapitaliseer nooit rente nie. Met ander woorde asof die ou my nou betaal en of hy my nie betaal nie, ek werk net uit op kapitaal.

HOF: Ek verstaan daardie punte en ons gaan nog baie daaroor praat wanneer ons betoog Maandag, maar ek stel belang daarin en ek het dit op kamers ook aan u en mnr Arnoldi genoem dat in geval dit vir my van belang blyk te wees, wanneer ek hierdie uitspraak moet oorweeg in 'n beraming deur mnr Whelpton as hy nog beskikbaar is op sy begrip van enkelvoudige rente maar waar hy die ware koerse wat inderdaad gevra is soos ons sien in aanhangsel A tot die deskundiges se notule, gebruik en ek

het gewonder of mnr Arnoldi dit kan probeer reël as mnr Whelpton nog beskikbaar is.

MNR ARNOLDI: Dit gaan nie 'n probleem wees nie.

MNR BECKERLING: U edele ek kan voorstel miskien mnr Strydom kan dit ook doen. Hulle kan, die twee van hulle kan bymekaar kom.

HOF: Dit sal nog beter wees dan weet ons wat hulle – of hulle op 'n gesamentlike syfer kan uitkom." (Emphasis added.)

[13] Having found that the "treinspoor" approach was wrong, I came to the conclusion, and I am still of the same view, that the correct approach would be to recalculate on the basis of the true rates applied by the appellant. I assumed that Whelpton would work on his simple interest basis and Strydom on some form of compound interest basis.

[14] The result produced by the experts was the "oornag berekening" to be found in volume 3, p306 of the record. What is of relevance for present purposes, is column 2 (Strydom's calculation involving "partial compounding") and column 3 (Whelpton's calculation, applying the true Land Bank rates but on a simple interest basis).

[15] The figures which I adopted, after much agonising and questioning about the thorny issue of compound interest versus simple interest, for purposes of my judgments in all the cases, were those in column 3, less payments which had

already been made by the appellant following the concession about various irregularities described in the judgment.

[16] It is common cause that the results contained in columns 2 and 3 are products of correct calculations by the two experts, barring, of course, their different assumptions on which they worked.

[17] 0f significance, in my view, is the fact that the true rates applied by the appellant (Land Bank), and as foreshadowed in the "oornag berekening" are those reflected in annexure "A" to be found in the record volume 3 p308-309. This is common cause between the parties.

What is even more significant, in my view, for present purposes, is that it is common cause that these rates are NACM rates and not NACA rates.

Moreover, what is also common cause is that Whelpton, correctly in my view, performed his calculations, resulting in the figures contained in column 3, on the basis of these NACM rates but Strydom, for some reason, which remains unexplained, conducted his calculations, for purposes of column 2, on the basis of NACA rates.

This development took everybody, including the appellant's own counsel, by surprise because all concerned were under the impression that the only difference

between the results in column 2 and those in column 3 arises from the fact that Strydom made provision for interest on arrear interest and Whelpton did not.

The fact that the appellant's counsel did not know that Strydom had adopted the NACA rates is illustrated in the following exchanges between the appellant's counsel and Strydom while the latter was giving evidence (record volume 6 p683):

> "Edele die som wat laasnag vir u gedoen is, is op hierdie manier gedoen. Die Whelpton(?) manier.
>
> Ja dit is in terme van my versoek gister? --- Ja edele.
>
> MNR BECKERLING: En die enigste verskil tussen hierdie som en dit is op bl 62(D1) en 62(a) in die ry 3, in ry 2 is die feit dat mnr Whelpton nie rente bereken het op enige agterstallige en uitstaande rente nie. Dit is die enigste verskil tussen u som en die een wat sy edele aangevra het? --- Ja edele.
>
> HOF: Dit is nou die derde kolom op 62(a)?
>
> MNR BECKERLING: Dit is die derde ry, is die een wat u edele aangevra het en die tweede rytjie is mnr Strydom se som. Die enigste verskil tussen 2 en 3 is dat 3 nie enige rente op uitstaande agterstallige rente in ag neem nie. Dit is die enigste verskil ..."

It is common cause that Strydom's decision to employ the NACA rates led to a bigger discrepancy (lower rewards for the respondents) between Strydom's figures and Whelpton's figures. I will revert to this state of confusion at a later stage.

[18] After the SCA had decided the only issue before it, and the only issue in respect of which leave to appeal was sought and granted, and the only issue mentioned in the notice of appeal, namely "that in the absence of agreement to the contrary, *mora* interest at the prescribed rate is payable on unpaid interest which is due and payable" (the reported judgment at 326C), the learned Judges of Appeal requested the parties to recalculate all the loans "in accordance with this approach" which, as I have explained, caters for the fact that the Land Bank rates applied at times exceeded the prescribed interest rate, and, "in accordance with this judgment", which, as I explained, only has a bearing on the finding of the SCA on the only issue before it, *supra*.

[19] Both parties instructed their experts, Whelpton and Strydom, to recalculate, to provide for *mora* interest on overdue interest and also to take into account instances where the Land Bank rate exceeded the prescribed rate.

[20] Whelpton, again applying the NACM rates as he should have, delivered a bundle of calculations to be found at pp82 to 118 of the trial bundle compiled for purposes of the "rehearing".

Understandably, the awards which I had made were significantly reduced because of the finding of the SCA about *mora* interest on unpaid interest. For example, the award of R3 265 054,91 to the first three respondents now has to be reduced to an amount of R2 237 853,49.

I add that, in a few instances in respect of the smaller claims, the replacement awards proposed by Whelpton are slightly higher than those I awarded and the reason for this, so I was informed by counsel, is the fact that in those instances the farmer (the particular respondent/plaintiff) paid the debt in advance so that he must now also get the benefit which arises from that.

[21] I return briefly to the confusion, *supra*, about the basis on which Strydom had performed his calculations. It turned out, as I have mentioned, that Strydom, after all, employed the NACA rates and not the NACM rates as requested.

In its notice of appeal, the appellant proposes certain figures based on Strydom's calculation, already making provision for *mora* interest on overdue interest, and, as pointed out, based on the NACA rate. I was informed that during the hearing before the SCA, counsel for the respondents, answering a query from his opponent, after the recalculation had been ordered, indicated that, in principle, he had no difficulties with the figures proposed by the appellant, still believing that the only difference between the two experts was the *mora* interest factor. It is clear, from the exchanges between the appellant's counsel and Strydom, *supra*,

that the appellant's counsel was also under the impression that that was the situation. Consequently, there was a mutual misunderstanding of the true state of affairs.

From my debate, during the rehearing, with counsel for the appellant, it appears that the appellant is now relying on the alleged "concession" made by counsel for the respondents before the SCA and the appellant appears to adopt the stance that the respondents are bound by the figures proposed by the appellant barring an adjustment in respect of the instances where the Land Bank rates exceeded the prescribed rates.

This attitude is misplaced. It is clear that the respondents' counsel was, quite understandably, under a *bona fide* misapprehension. Moreover, once the experts got together after the parties were ordered to recalculate, and it emerged for the first time that the appellant was insisting that NACA should be the basis for calculation, the respondents sent comprehensive supplementary heads of argument to the SCA explaining their attitude, and illustrating why NACM (applied in terms of the "oornag berekening") ought to be the basis for calculation. In addition, attached to these supplementary heads of argument was a bundle of correspondence exchanged between the parties reflecting details of discussions about these two methods of calculation following the instruction to recalculate.

Included in the bundle of correspondence is a letter from Whelpton to the respondents' attorney dated 27 May 2013, part of which reads as follows:

> "The overnight calculations were done on the basis of simple interest at the actual rates applied by the Land Bank on that account (NACM rate).
>
> The recalculations by Land Bank in terms of my understanding of the instructions of Supreme Court of Appeal at the hearing of the appeal on 20 May 2013 are based on incorrect assumptions.
>
> Land Bank have calculated interest on the NACA rate in contrast with the overnight calculations which were calculated at the NACM rate."

On 3 June 2013, Whelpton also wrote the following letter to the respondents' attorney:

> "I had a discussion with Pieter Strydom today regarding the recalculations.
>
> We are in agreement that the overnight calculation done for the North Gauteng High Court in case no 33482/2010 was in fact done on the NACM rate.
>
> Your instructions were to use the same calculation (NACM rate) and calculate interest on unpaid interest from the instalment date where such interest was due, to date of payment of the unpaid interest, at the rate of

15,5% or the rate applied by the Land Bank on the account, whichever is the lowest.

According to Mr Strydom his instructions are to calculate interest on the NACA rate but with the rate exceptions for interest on arrear interest as indicated above. This is the same calculations attached to their pleas, with only the rate adjustment of the lowest of 15,5% or Land Bank rate on arrear interest amounts.

We agree on the amounts calculated on both sets of instructions. Therefore, if he uses the NACM rate, our calculated amounts correspond."

With all this having been placed before the SCA, before that court made its order, the apparent suggestion on behalf of the appellants, if I understood it correctly, that the SCA explicitly referred the figures submitted by the appellant in its notice of appeal for recalculation (thereby, in effect, preferring the NACA basis to the NACM basis) is misplaced and wrong: the issue of NACA versus NACM never came before the SCA, neither was it mentioned in the judgment and neither could it have been, because it did not form part of the narrow issue appealed against. I have illustrated what is meant, in my view, with the expressions "in accordance with this approach" and "in accordance with this judgment" – the reported judgment at 326F-G.

Paragraph 3 of the order of the SCA simply reads as follows:

> "All the matters are referred back to the High Court for determination of the amounts payable by the appellant in accordance with this judgment and of costs, where applicable."

[22] It is further common cause that:

1. the recalculations by Whelpton and Strydom are correct, on the assumptions they applied; and
2. when Strydom does a recalculation on the assumptions applied by Whelpton (including NACM) he arrives at the same result.

[23] I add that, at the commencement of the rehearing before me, the appellant made submissions on the strength of a substantive application (launched a few days earlier) asking for leave to the appellant to re-open its case and to cause Strydom again to give evidence. The declared aim of this exercise was an attempt by Strydom to persuade me to opt for the NACA option as opposed to the NACM option, as I did when delivering the judgment. The application was opposed. The effect, if the new evidence were to be received and adopted, would have been that I would have been called upon to amend my own judgment. This I cannot do, if only because I am *functus officio*. In any event, I stand by my decision that the basis for the calculation ought to be the NACM rates, being the true rates debited by the appellant and which decision, in any event, did not form the subject of the appeal before the SCA.

[24] After an adjournment during the rehearing, I was informed by counsel that the application to re-open the case was being abandoned by the appellant.

The order and costs

[25] In all the circumstances, I am satisfied that the calculations by Whelpton, making due provision for the directives laid down by the SCA, and using the NACM rate, are to be preferred ahead of the Strydom calculations based on NACA.

[26] The costs of the rehearing should follow the result.

[27] The costs of the abortive application to re-open the appellant's case should also follow the result.

[28] During the hearing, counsel suggested that I need not revisit each of the separate judgments which I handed down so that I will only order the replacement figures in respect of each of those cases.

I add that in one instance, the claim of Brits, the third of three awards made to him by me (record p827) in the amount of R46 476,62, falls away altogether because, so I was informed by counsel, Whelpton's recalculations indicated that this claim fell away because of the effect of the judgment of the SCA.

[29] I make the following order:

1. The case of Ryton Estates (Pty) Ltd & two others v Land Bank, case no 33482/2010:

   1.1 the award of R3 265 054,91 is reduced and replaced with the amount of R2 237 853,49;

   1.2 the existing orders in respect of interest, *mora* date and costs, including the costs of two counsel and the qualifying and other fees of the experts Whelpton and Roodt are re-affirmed.

2. The case of Gerhardus le Roux v Land Bank, case no 42140/2010:

   2.1 the award of R9 418,90 is increased and replaced with an amount of R10 298,96;

   2.2 the award of R2 480,41 is replaced with an amount of R2 563,86;

   2.3 the award of R19 996,36 is replaced with an amount of R23 139,74;

   2.4 the award in respect of interest and costs, including the costs of two counsel and the qualifying and other expenses of the experts Roodt and Whelpton are reaffirmed.

3. The case of Jan Frederik Nell Brits v Land Bank, case no 42146/2010:

   3.1 the award of R98 594,92 is reduced and replaced with an award of R58 853,21;

   3.2 the award of R53 705,33 is replaced with the reduced figure of R52 711,85;

   3.3 the award of R46 476,62 falls away;

3.4 the orders in respect of interest and costs, including the costs of two counsel and the qualifying and other expenses of the experts Whelpton and Roodt are reaffirmed.

4. The case of Gideon Wilhelmus Bührmann v Land Bank, case no 45190/2010:

4.1 the award of R17 946,69 is reduced and replaced with the amount of R13 592,49;

4.2 the award relating to costs including the costs of two counsel and the qualifying and other expenses of the expert witnesses Roodt and Whelpton is reaffirmed.

5. The case of Uitgezocht Investments Bk and Gideon Wilhelmus Bührmann v Land Bank, case no 45192/2010:

5.1 the award of R87 071,41 is increased and replaced with the amount of R101 874,67;

5.2 the awards as to interest and costs including the costs of two counsel and the qualifying and other expenses of the experts Roodt and Whelpton are reaffirmed.

6. The appellant is ordered to pay the costs of the rehearing which will include:

6.1 the costs of the application to lead further evidence;

6.2 the costs of senior counsel;

6.3 the costs of the expert Whelpton, who is declared a necessary witness, and which costs will include preparation, consultations,

discussions with the opposing expert, qualifying fees, reservation fees and attendance to court proceedings, including the proceedings at the SCA.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

33482-2010

HEARD ON: 31 MARCH 2014
FOR THE APPELLANT: T W BECKERLING SC ASSISTED BY M J SAWYER
INSTRUCTED BY: EDWARD NATHAN SONNENBERGS INC
FOR THE RESPONDENTS: A F ARNOLDI SC
INSTRUCTED BY: SCHALK BOTHA ATTORNEY