IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 2006-06-01

Case No: A1339/04

In the matter between:

ANTOINETTE JOOSTE Appellant

and

ABSA BANK LTD t/a TRUST BANK Respondent

JUDGMENT

SOUTHWOOD J

[1] On 30 July 1993 ABSA Bank Ltd, the respondent, instituted action against Antoinette Jooste, the appellant, in the Tzaneen magistrates' court for payment of R26 561,66 being the balance of monies lent and advanced to the appellant. In her plea delivered on 20 November 1995 the appellant denied that she was indebted to the respondent in the amount claimed and alleged that if she was liable in any amount, she was excused from payment by virtue of the respondent's indebtedness to her in the sum of R48 747,55 (later amended to R50 968,40) together with interest, as alleged in her counterclaim. In the appellant's

counterclaim the appellant alleged that on 8 April 1993 (later amended to 8 September 1993) she took cession of the claim of Emerald Creek Spur CC ('the close corporation') against the respondent in the sum of R44 711,95. This claim arose from the over-recovery of interest by Volkskas Bank Ltd ('Volkskas') on the overdraft facility of Emerald Creek Spur CC. The appellant alleged that in terms of an oral agreement entered into between Volkskas and the close corporation in March 1988 it was expressly agreed that Volkskas would charge interest at the prime bank lending rate plus 1 % and that during the period April 1988 to March 1993 Volkskas charged interest at a rate higher than the agreed rate. Later it was alleged that Emerald Creek Spur CC did not have knowledge of the facts from which the indebtedness arose until 24 May 1993 when it received a report that Volkskas had over-charged interest, alternatively, that Volkskas had wilfully prevented it from becoming aware of its existence until the receipt of the report. (It is common cause that the agreement was entered into with Volkskas and that the respondent took over the assets and liabilities of Volkskas and is liable for its obligations. Depending on the context there will be reference to the respondent or Volkskas.)

[2] In its special plea to the appellant's counterclaim the respondent alleged that the appellant's claim had become prescribed because the claim arose more than three years before the counterclaim was instituted. In its plea on the merits –

(1) the respondent alleged that the cession was invalid because it was unlawful and *contra bonos mores;*

(2) the respondent denied the overdraft agreement alleged and in particular that it was a term of the overdraft agreement that Volkskas would charge interest at its prime lending rate plus 1 %;

(3) the respondent alleged that Emerald Creek Spur CC expressly, alternatively tacitly, alternatively impliedly, accepted the interest rates reflected in the bank statements and correspondence sent to it.

[3] The appellant did not reply to the respondent's plea of prescription.

[4] At the commencement of the trial on 27 September 2001 the parties agreed that (1) the respondent's claim was admitted subject to the appellant's counterclaim; (2) if the counterclaim failed the respondent would be entitled to judgment on its claim; and (3) there was an overdraft agreement between Volkskas and Emerald Creek Spur CC.

[5] The appellant testified and tendered the evidence of her husband, Christoffel Marius Jooste ('Jooste') and a chartered accountant, Rodney Cecil Moore, who calculated the over-recovery of interest by

Volkskas for the period April 1988 to March 1993. After the appellant closed her case the respondent successfully applied for absolution from the instance. The appellant appeals to this court against the grant of absolution.

[6] In ***Gordon Lloyd Page & Associates v Rivera and Another*** **2001 (1) SA 88 (SCA)** at 92E-93A Harms JA set out the correct approach to such an application:

> ‘[2] The test for absolution to be applied by a trial court at the end of the plaintiff’s case was formulated in ***Claude Neon Lights (SA) Ltd v Daniel*** **1976 (4) SA 403 (A)** at 409G-H in these terms:
>
> > “… (W)hen absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (***Gascoyne v Paul and Hunter*** **1917 TPD 170** at 173; ***Ruto Flour Mills (Pty) Ltd v Adelson*** **(2) 1958 (4) SA 307 (T)**)”

This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (***Marine & Trade Insurance Co Ltd v Van der Schyff*** **1972 (1) SA 26 (A)** at 37G-38A; **Schmidt *Bewysreg* 4th ed at 91-2**). As far as inferences from the evidence are concerned, the inference relied upon by the

plaintiff must be a reasonable one, not the only reasonable one (**Schmidt** at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (***Gascoyne*** *(loc cit)* – a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (***Ruto Flour Mills***). Such a formulation tends to cloud the issue. The court ought not be concerned with what someone else may think; it should rather be concerned with its own judgment and not that of another "reasonable person or court". Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice'.

See also ***De Klerk v ABSA Bank Ltd and Others*** **2003 (4) SA 315 (SCA)** para 10.

[7] When deciding whether absolution should be granted the court will usually accept that the evidence is true – see ***Atlantic Continental Assurance Co of SA v Vermaak*** **1973 (2) SA 525 (E)** at 527B-D. However, where the evidence is patently unacceptable, such as when the plaintiff's witnesses have palpably broken down so it is clear that what they have stated is not true, the court will grant absolution from the instance – see ***Siko v Zonza*** **1908 TS 1013;** ***Erasmus v Boss***

1930 CPD 204; ***Atlantic Continental Assurance Co of SA v Vermaak supra*** at 527C-D; **Erasmus *Superior Court Practice* B1-292-B1-293.** Clearly in such a case the grant of absolution from the instance is in the interests of justice.

[8] The court *a quo* granted absolution from the instance on the following grounds –

(1) The major part of the appellant's claim had prescribed (the major part of the claim had arisen and was due by 20 November 1992 which was three years before the appellant instituted her counterclaim);

(2) In respect of the rest of the plaintiff's claim, i.e. interest over-recovered for the period 20 November 1992 to 26 March 1993, Emerald Creek Spur CC acquiesced in the interest being charged;

(3) The evidence that Emerald Creek Spur CC ceded its claim for repayment of the over-recovered interest to the appellant is untrue and the appellant was not entitled to rely on the alleged cession.

The presiding magistrate referred to contradictions in the evidence of the appellant and her husband, particularly with regard to the issue of

whether the overdraft agreement contained a term that interest would be charged at the prime lending rate plus 1 %, but did not consider that it was necessary to make a finding in this regard. The presiding magistrate did not find pertinently that the appellant's evidence was untrue. Similarly, although the presiding magistrate referred to unsatisfactory features in Moore's evidence regarding the over-recovered interest he did not find it necessary to make a finding regarding the quantum of the appellant's claim. The presiding magistrate did not find that Moore's evidence was not true.

[9] On appeal the issue to be decided is whether the court *a quo* correctly found that the major part of the claim was prescribed and whether Emerald Creek Spur CC acquiesced in the interest charged after November 1991 until it settled the indebtedness in full in March 1993, and whether the court *a quo* correctly found that the evidence regarding the cession of the claim from the close corporation to the appellant was clearly untrue. The respondent is not entitled to defend the order of absolution on other grounds not relied on by the court *a quo* in granting absolution. In his heads of argument the respondent's counsel attempted to do so but did not refer to any principle or authority in support of this approach. It is clearly not permissible as it would, in effect, provide a second opportunity for the respondent to present argument in support of its application for absolution.

[10] The first two grounds, prescription and acquiescence, are legal conclusions based on the appellant's evidence. Any evidence tendered by the respondent would not add to the factual basis of these findings. The third ground depends upon the correctness of the court's finding that the evidence of the cession is clearly untrue.

[11] The relevant evidence of the appellant and her husband may be summarised, very briefly, as follows: In 1987 Jooste, the appellant and J.H. Viljoen registered Emerald Creek Spur CC with the object of conducting business as a Spur steakhouse. When the close corporation was registered it opened a bank account with Barclays Bank. In April 1988 the manager of Volkskas, Johan Theron, invited Jooste to open an account for the close corporation with Volkskas. Theron and Jooste orally agreed that Volkskas would grant the close corporation an overdraft facility of R145 000 and it was an express term of the agreement that Volkskas would charge interest on the overdraft at Volkskas' prime lending rate plus 1 %. Neither Theron nor Jooste confirmed this agreement in writing. Nor did they discuss what interest rate would apply if Emerald Creek Spur CC exceeded the overdraft limit. The close corporation utilised this overdraft facility for the next almost 5 years until the account was closed in March 1993 when the close corporation paid the outstanding balance of the overdraft in full. From time to time the close corporation exceeded the limit of the overdraft, usually with the consent of Volkskas. Each month

Volkskas sent the close corporation a written statement of account which reflected all debits and credits on the account and the balance owing at the beginning and end of each month. Until November 1991 the statements of account did not refer to an interest rate. However from 1 November 1991 (statement number 280) the statements reflected that from 8 October 1991 the rate was 29 %. All deposits on the account are reflected as credits.

[12] Emerald Creek Spur CC did not conduct the overdraft facility in accordance with its agreement with Volkskas and on 12 December 1991 Volkskas addressed a letter of demand to the close corporation to call up the overdraft. In the letter Volkskas stated that the close corporation was indebted to it in the sum of R66 448,99 together with interest thereon calculated at 29 % per annum from 28 November 1991 to date of payment. Jooste, who received the letter of demand, knew that he had agreed with Theron that Volkskas would charge interest at its prime lending rate plus 1 %, but did not communicate with Volkskas to object to the interest rate of 29 %. Nor did he do so before he received the letter of demand. The close corporation must have made some arrangement with Volkskas because Emerald Creek Spur CC continued to operate on the account. In about June 1992, after the members of the close corporation discussed ways of reducing the cost of running the business, Jooste investigated bank charges and concluded that Volkskas was charging 35 % on the overdraft facility.

He went to the bank and queried the interest rate with an accountant. He told her that the agreed rate was the prime lending rate plus 1 %. She did not investigate the correctness of this statement. She simply said it depended on the method of calculation. Jooste took no further steps then or thereafter (until about May 1993) to ascertain whether Volkskas was charging 35 % interest or even 29 % as stated in the statements of account and letter of demand.

[13] In the meantime the close corporation's business was struggling and by October 1992 it ceased to carry on business and the members decided to sell the franchise. The close corporation sold the franchise in about March 1993 and used the purchase price of R325 000 to pay all the close corporation's debts. These included Volkskas' claim of about R43 000 which the close corporation's attorney paid in full without querying the interest rate. The final payment obviously included interest charged at 29 % from 28 November 1991 to March 1993.

[14] At about that time Jooste became aware of media reports that banks had been over-charging their clients interest and he received a visit from a representative of Interest Computing Experts (Pty) Ltd ('ICE') who asked whether the close corporation wished to have the interest on its account recalculated. Jooste was interested and furnished ICE with the close corporation's bank statements and certain other

information. On 24 May 1993 ICE reported to Jooste that Volkskas had over-charged interest in the sum of R31 456,11 and that the close corporation had a claim against Volkskas for that amount and interest which totalled R44 711,95.

[15] When Emerald Creek Spur CC's business was struggling the appellant decided to assist by borrowing a sum of money and lending it to the close corporation. On 8 November 1991 she entered into a loan agreement with Trust Bank in terms of which she borrowed R40 000 and undertook to repay the loan with finance charges over a period of 35 months. The agreement provided that she if she failed to pay any instalment timeously the full outstanding balance would become due and payable. The appellant used the loan to assist the close corporation to pay its debts but by July 1993 she was in arrears with her repayments. It will be remembered that the respondent (which had taken over the assets and liabilities of Trust Bank) instituted action in the Tzaneen magistrates' court for payment of R26 561,66, the balance outstanding on the loan agreement. The appellant defended the action and the respondent applied for summary judgment which the appellant opposed. The defence raised in the appellant's opposing affidavit was a counterclaim of R44 711,95. The appellant alleged that the respondent owed Emerald Creek Spur CC the sum of R44 711,95 in respect of interest over-charged and that Emerald Creek Spur CC had ceded its claim to her.

Prescription

[16] The appellant's counterclaim is for repayment of the interest debited against the account of Emerald Creek Spur CC by Volkskas which exceeded the interest agreed. Once the close corporation paid that interest its remedy was the *condictio indebiti* – see ***ABSA Bank Beperk v Janse van Rensburg* 2002 (3) SA 701 (SCA)** para 13.

[17] In terms of section 11(d) of the Prescription Act 68 of 1969 the period of prescription applicable to the claim is three years. Section 12(1) of the Prescription Act provides that subject to subsections (2) and (3) prescription shall commence to run as soon as the debt is due. Section 12(2) provides that if the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt. Section 12(3) provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care. Appellant's counsel contends that the debt was not due before the close corporation paid the balance of the overdraft in full, which occurred in March 1993, within the three year prescription period, and that in any event, the close corporation was not aware of facts from which the claim arose until it received the report

form ICE on 24 May 1993, also within the prescription period. The respondent's counsel contends that each part of the claim arose on payment of the interest charged and that this occurred when there was a payment into the account which covered the interest. He argues that as each amount of interest was raised so it was paid when payments were made to the credit of the account. This occurred throughout the existence of the overdraft. The respondent's counsel contends further that as early as December 1991 the close corporation knew that interest was being charged at a rate in excess of the agreed rate and accordingly that there was an over-recovery of interest. The respondent's counsel relies on the statements which appeared on the respondent's (Volkskas') bank statements from November 1991: 'from 8 October 1991 the rate is 29 %' and the letter of demand dated December 1991 calling up the overdraft with interest thereon calculated at 29 % per annum.

[18] Before a debt is due it must be immediately claimable by the creditor or, put differently, there must be a debt in respect of which the debtor is under an obligation to perform immediately – see ***The Master v IL Back & Co Ltd and Others*** **1983 (1) SA 986 (A)** at 1004F-H; ***Deloitte Haskins & sells v Bowthorpe Hellerman Deutsch*** **1991 (1) SA 525 (A)** at 523H. Accordingly, prescription cannot begin to run against a creditor before his cause of action is fully accrued: i.e. until he is able to pursue his claim – see ***Deloitte Haskins & Sells v Bowthorpe***

Hellerman Deutsch supra at 532I. Clearly before the close corporation paid and Volkskas received the over-payment of interest the debt was not due. In ***Standard Bank of South Africa v Oneanate Investments (in liquidation)*** **1998 (1) SA 811 (SCA)** at 832I-833C the Court confirmed the rule stated by **Wessels *The Law of Contract in South Africa*** 2 ed Vol 2 para 2308 –

> 'Where a debt produces interest, the money paid must be applied in the first instance to the payment of the interest and then to the capital (C 8.42 (43), 1; ***Bank of Africa v Craven NO*** **(1888) 5 HCG 112**). Even if the payment is made on account of principal and interest, it will by law be appropriated first to the interest and then to the capital (D 46.3.5.3). If no mention is made of the principal, but only of the interest, the surplus after paying the interest will nevertheless be appropriated to the capital (D 46.3.102), provided the capital is then due.'

Accordingly each claim for payment of interest over-charged arose when payment was made to the account of the close corporation which covered the interest raised.

[19] Before a debt is due in terms of section 12(3) it is not necessary that a creditor should be fully informed about all aspects of his contemplated litigation before prescription can begin to run. It is sufficient if he has the minimum facts at his disposal – see ***Nedcor Bank Beperk v Regering van die Republiek van Suid-Afrika*** **2001 (1) SA 987 (SCA)** para 10-13; ***Drennan Maud & Partners v Pennington Town Board*** **1998 (3) SA 200 (SCA)** at 212-213; ***Van Staden v Fourie*** **1989 (3) SA 200 (A)** at 216B-F. In December 1991 Jooste, on behalf of the close

corporation, received respondent's statement of account and letter of demand reflecting that interest was charged at 29 % and he knew that the close corporation's agreement stipulated interest at prime lending rate plus 1 %. He therefore knew that Volkskas was charging more interest than it was entitled to and that the close corporation had a right to claim repayment of interest charged in excess of the agreement – see unreported judgment of Jones J in ***Dietrich Friedrich Osterloh v ABSA Bank Ltd*** East London Circuit Court Division case number 1898/96 delivered 29 January 2002 at page 7. He already knew this when he instructed ICE to recalculate the interest charged on the account. The purpose of the ICE calculation was obviously to calculate the quantum of the claim and not to establish whether there was a claim.

[20] Prescription therefore began to run in December 1991 which is more than three years before the appellant instituted her counterclaim. The court *a quo* therefore correctly found that the major part of the claim had prescribed.

Acquiescence

[21] Volkskas sent Emerald Creek Spur CC monthly statements of account during the period November 1991 to March 1993 in which it is stated that interest is being charged at 29 % per annum. The respondent also sent the close corporation (and Jooste personally) a letter of demand claiming payment of the outstanding balance on the overdraft and

interest thereon calculated at 29 % per annum. Eventually the close corporation's attorney paid the balance outstanding in March 1993. This was done without protest against the interest rate or even a query as to whether it was correct. Despite the fact that Jooste contends that this was not the interest rate agreed he did not formally object to the interest rate and demand that it be charged at the rate agreed. He clearly knew that interest was charged to the account each month and that it was added to the current capital amount. This appears from the monthly statements of account.

[22] The following remarks in ***Senekal v Trust Bank of Africa Ltd*** **1978 (3) SA 375 (A)** at 384F-H are apposite –

> 'The evidence of Burger does not establish that there was any express agreement between respondent and Luna that interest on overdraft would be due and payable monthly and, indeed, it is probably only rarely that, in ordinary commercial banking practice, such an agreement is expressly concluded between a banker and his customer. Ordinarily, the customer is probably aware of the bank's practice of periodically debiting, as money due and payable, interest to an overdrawn account and, if the customer may have been aware of that practice at the time of his seeking and obtaining overdraft facility, he must needs have become aware of it when periodical statements of account were rendered to him by the bank showing that interest had been periodically charged and added to his current capital account. It appears to me that a customer who receives such periodical statements without protest or objection acquiesces in the system and thereby tacitly agrees to be bound thereby'.

When the customer knows in addition that an interest rate is reflected on each statement of account and continues to operate the account without protest or objection he acquiesces in the interest rate reflected.

As pointed out in ***Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA)** at 49H-50C his intention will be adjudged by outward manifestations and this will be judged from the perspective of the other party concerned. See also ***Osterloh v ABSA Bank Ltd supra*** at 14-15. A reasonable man in the position of the respondent would regard the close corporation's conduct as an acceptance of the interest rate reflected on the statements of account.

[23] The court *a quo* therefore correctly found that in respect of the period in respect of which the appellant's claim had not prescribed the close corporation acquiesced in the interest charged. The court *a quo* therefore correctly granted absolution from the instance.

[24] This conclusion makes it unnecessary to consider the question of cession. Nevertheless I shall briefly record my views. The court below found that the appellant was not entitled to rely on the cession but did not pertinently hold that the cession was unlawful or *contra bonos mores* or that it did not believe that there was a cession. In the absence of a pertinent finding that the cession was unlawful or *contra bonos mores* it is not open for this court to consider this. If the court intended to say that it could not believe that a cession had taken place it was clearly wrong. There is a written cession signed on 8 September 1993. For purposes of absolution from the instance that must be accepted as correct.

Costs

[25] On 3 October 2005 the appeal was postponed because volume 2 of the record, which contained the vital evidence of Jooste, was not before the court. At that time there was no explanation for this and the court postponed the appeal and reserved the wasted costs. The parties' attorneys have filed affidavits to explain what happened. The respondent's attorney clearly cannot explain why the volume was missing. The appellant's attorney confirms that he ensured that all the documents, including volume 2, were timeously filed. His communications with the Registrar reassured him. The judges who were to hear the appeal took their records during the recess immediately before the hearing and it was not possible for the attorney to check the record three days before the hearing. In the circumstances it cannot be found that any party was at fault. The fairest order is that the wasted costs should be costs in the cause.

Order

[26] The following order is made:

(1) The wasted costs of 3 October 2005 are to be costs in the cause;

(2) The appeal is dismissed with costs.

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B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

I agree

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F.J. JOOSTE

ACTING JUDGE OF THE HIGH COURT

CASE NO: A1339/04

HEARD ON: 22 May 2006

FOR THE APPELLANT: ADV. N. NAIDOO

INSTRUCTED BY: Mr C.K. Petty of Stegmanns Inc

FOR THE RESPONDENT: ADV. J.S. STONE

INSTRUCTED BY: Mr Nel of Tim du Toit Inc

DATE OF JUDGMENT: 1 June 2006