IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

NOT REPORTABLE

Case no: 252/2006

In the matter between

BOE BANK LTD t/a BOE CORPORATE **APPELLANT**

and

THE GRANGE TIMBER FARMING CO (PTY) LTD **1ST RESPONDENT**
THORPE INSURANCE BROKERS (PTY) LTD **2ND RESPONDENT**
N.J.T. PROPERTIES (PTY) LTD **3RD RESPONDENT**
THE GRANGE PROPERTY OWNING CO (PTY) LTD **4TH RESPONDENT**
ROBIN PATRICK THORPE **5TH RESPONDENT**

Coram: **STREICHER, HEHER and JAFTA JJA**

Heard: **16 FEBRUARY 2007**

Delivered: **5 MARCH 2007**

Summary: Contract – interpretation – loan agreement conferring power of review *in media res* on creditor – time for repayment.

Neutral citation: This judgment may be referred to as *BOE Bank v The Grange Timber Farming Co (Pty) Ltd* [2007] SCA 4 (RSA).

JUDGMENT

HEHER JA:

[1] This appeal concerns the interpretation of the repayment terms of a written agreement of loan.

[2] The appellant, a commercial bank (hereinafter 'the bank') sued five defendants in the Durban magistrate's court for payment of R6 201 739,74. It relied on the agreement concluded with the first defendant supported by undertakings of suretyship provided by the other defendants. The proceedings against the second defendant were adjourned *sine die* in view of its alleged insolvency. It took no part in the subsequent trial or appeals. The original first, third, fourth and fifth defendants are the respondents in this appeal and will hereinafter be referred to as 'the defendants'. The defendants put the bank to the proof of its claim. Evidence was led by the parties relating to the substance and quantification of the claim and the circumstances surrounding the conclusion of the loan agreement. The magistrate dismissed the claim with costs. An appeal to the Natal Provincial Division suffered the same fate. That court granted leave to appeal against the whole of its judgment.

[3] The bank has undergone various commercial transformations which are no longer in issue. As NBS Bank Ltd it entered into the agreement under consideration on 19 June 1991. The agreement was an instrument in a tax avoidance scheme devised by attorneys and accountants and used, in the present case, primarily in the interest of the fifth defendant, Mr Thorpe, an insurance broker. He controlled the first, second, third and fourth defendants. Pursuant to the scheme the fourth defendant acquired a farm near Underberg which it leased to the first defendant. The latter planted trees on the farm. The whole enterprise was financed by the loan from the

[4] The commencement date of the agreement was 1 March 1991. The bank agreed to lend the first defendant money from time to time to enable it to conduct 'The Farming Operation'. This was defined in the agreement as 'the establishment upon the Property of pine and/or eucalyptus plantations, the general upkeep of such plantations and the eventual cutting and disposal thereof'.

[5] Clause 6 of the agreement provided as follows:

'6.1 The Borrower shall repay its entire indebtedness including interest and other charges to NBS Bank on the Repayment Date.

6.2 All payments in terms hereof shall be made to NBS Bank at its *domicilium citandi et executandi*.

6.3 NBS Bank shall be entitled to require that the Borrower repay its entire indebtedness including interest and other charges as at the Review Date by giving written notice to that effect at any time prior to 1st September, 1998 in which event NBS Bank's obligations to fund the Farming Operation for that period after the Review Date shall cease.

6.4 The Borrower shall be entitled, without notice, to repay its entire indebtedness to NBS hereunder, or any portion thereof, at any time during the currency of this Agreement.'

The agreement defined 'The Review Date' in clause 1.8 thereof as 29 February 1999 and 'The Repayment Date', in terms of clause 1.9, is 28 February 2007.

[6] The evidence disclosed that, at the time of concluding the agreement, the bank and Thorpe contemplated that the defined operation would be the sole business of the first defendant, that its sole source of income would be the sale of felled timber and that the probable time at which the proceeds would become available would be early in 2007. The inference is irresistible that that is why the parties agreed in clause 6.1 that repayment of the entire indebtedness of the first defendant to the bank was to take place on 28 February 2007.

[7] The bank duly advanced moneys from time to time and the first defendant

proceeded to plant and cultivate the trees. By late 1998 the capital amounts advanced by the bank were in the region of R3,5 million and the accrued (and capitalized) interest had assumed similar proportions.

[8] The bank took advantage of the review provision (clause 6.3) of the agreement. During August 1998 it sent a notice to the first defendant which contained the following demand:

'We refer you specifically to clause 6.3 of the said agreement in terms of which the Bank shall be entitled to call upon you to pay the entire indebtedness, including interest and other charges as at the review date, provided written notice is given to you prior to 1st September 1998. In terms of clause 1.8 of the said agreement, the review date is the 29th February 1999.

We hereby notify you that the Bank requires the entire indebtedness including interest and other charges to be paid by the 29th February 1999. The entire indebtedness, including interest and other charges, at the review date, shall be the sum of R6 201 739,74, calculated as follows:-

CAPITAL	R3 100 869,87
INTEREST	R3 100 869,87
TOTAL	R6 201 739,74'

[9] In calculating the interest the bank capped it at the level of the capital (which it would otherwise have exceeded) in order to comply with the *in duplum* rule[1].

[10] There was no dispute that the bank was entitled to invoke its review power even though the first defendant had not breached the agreement. By the time that the appeal was argued before us the first defendant had also conceded that the bank had properly and timeously communicated its election to it. The ambit of disagreement was limited to the meaning and legal consequences of clause 6.3.

[11] The defendant's contention, which had found favour in both lower courts, was that the exercise of the election brought the bank's obligation to advance further moneys to an end but did not terminate the agreement as a whole; according to the

1 As to which see *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) and *Standard*

plain wording the obligation to repay the whole indebtedness on the date fixed by

clause 6.1 remained, no other repayment date being stated or implied in clause 6.3. The plaintiff's action to recover its debt was therefore premature.

[12] The bank's stand, by contrast, was that the exercise of the election terminated the whole agreement and the full indebtedness at the review date became immediately due and payable.

[13] The principles of interpretation appropriate to the resolution of the dispute are those summarised by Joubert JA in *Coopers & Lybrand v Bryant*[2]:

'The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ *supra*;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454G-H; *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A) at 305C-E; *Swart's* case *supra* at 200E-201A and 202C; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) at 180I-J;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions. *Delmas Milling* case at 455A-C, *Van Rensburg's* case at 303A-C, *Swart's* case at 201B, *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 624G, *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (A) at 10C-D.'

[14] The present contract serves a commercial purpose and should be construed pragmatically: altruism in the repayment of loan finance is not a characteristic which may reasonably be expected from a financial institution.

[15] It is clear, as I have indicated, that the parties expected that if the contract ran its full term the repayment date and the cutting of the timber would sufficiently coincide to enable the first defendant to use either the proceeds or the imminent prospect to repay the loan. Clause 6.1 covered that eventuality.

[16] Clause 6.3 catered for an entirely different scenario. After less than eight years of a sixteen year contract the bank was entitled to reconsider, without let or hindrance or the necessity to justify itself, its participation in the farming operation. Circumstances which might influence it to decide to send the notice for which the clause provides are obvious: deteriorating market conditions (then and as foreseen), loss of confidence in the farmer, a substantial opportunity to invest elsewhere for which capital was needed or simply a perceived desire for liquidity. In any of these circumstances a long delay in the opportunity to recover the investment in the farming operation might well be very disadvantageous to the bank.

[17] The parties also contemplated other circumstances where the contract would come to a premature end and the first defendant would nevertheless be able or obliged to find the resources to repay its obligations immediately. Clause 6.4 provides one example and clause 11 (the breach clause) another. Both provide specifically for repayment of the entire indebtedness before the defined repayment date. Clause 6.3 likewise deals with an interim 'termination' of the first defendant's obligations, in this case at the instance of the bank. After eight years of growth the standing timber might well have been expected to provide a substantial basis upon which to repay the debt. There is no need to speculate, however. There is simply no sufficient reason to treat the proceeds of the crop at the repayment date as the one and only source of income available to the farmer throughout the duration of the contract and to interpret the contract as if the proceeds of the mature felled timber were a critical determinant

in relation to obligations arising from early termination, as the Court *a quo* seems to have done.

[18] In the light of the considerations to which I have referred in paragraph 16 one may fairly conclude that the bank was hardly likely to have agreed to the suspension of repayment for eight years after it had in effect brought to an end its business relationship with the first defendant. The latter, on the other hand, while it would no doubt have welcomed such a suspension, could hardly have contemplated the possibility of consensus in that regard. (Perhaps that explains why this particular defence was only introduced by amendment shortly before the trial.) It seems to me that the purpose of clause 6.3 in the context of the overall context of the agreement is against the defendant's interpretation. For the reasons which follow, the plain wording of that clause decisively favours the bank's interpretation.

[19] Clause 6.3 is constructed in two distinct halves: the first confers on the bank an election to claim repayment while the second sets out the consequence of the election. The notice which the bank must give need only set out the election and say nothing about the consequence (as the bank's notice quoted above did). A notice in such a form (and which contains details of the entire indebtedness at the review date) can, in my view, only amount to a demand to pay the specified amount at that date. Moreover, it would make no sense to notify the debtor that the entire indebtedness, including interest and other charges at the review date is to be paid on the defined repayment date eight years hence. If the agreement continues in existence the capital amount must, in any event, be repaid on that date in consequence of clause 6.1. But the rest of the notice would not merely be superfluous but also misleading, since the obligation under clause 6.1 is to pay not only the interest at the review date but also all the (substantial) interest which accrues after that date as provided for in clause 5 of the agreement and the annual administration fee of R250 provided for in clause 15.2.

[20] If clause 6.3 had been intended to have the effect for which the defendants contend one cannot but conclude that it would have been constructed very differently. The emphasis would have been on the cessation of the bank's obligation to advance moneys for the farming operation after the review date and, if a mention of repayment had been deemed necessary or desirable, that would surely have been done by reference to clause 6.1.

[21] A second aspect of the language used by the parties is this. The bank's obligation to 'fund' the farming operation was discharged at two levels. One involved the advance of moneys, the other allowed the first defendant to use the moneys for whatever period the agreement allowed. Where, therefore, clause 6.3 refers to the cessation of the funding obligation, it embraces, in the absence of any indication to the contrary, both aspects of the obligation. If the defendant's interpretation is applied, the effect of the election would be to bring the bank's obligation to make future advances to an end but leave the funding obligation intact in relation to moneys already in the hands of the first defendant at the review date, a consequence in conflict with the language chosen by the parties.

[22] A final, unambiguous, indicator of the parties' intention is to be found in clause 4.5 which reads as follows:

> 'The Borrower's Loan Account shall not exceed:-
>
> 4.5.1 the sum of FIVE MILLION FIVE HUNDRED THOUSAND RAND (R5 500 000,00) for the period terminating on the Review Date; and
>
> 4.5.2 the sum of TWENTY ONE MILLION FIVE HUNDRED THOUSAND RAND (R21 500 000,00) during the period commencing on the Review Date and terminating on the Repayment Date *if this Agreement has not been terminated by NBS Bank in terms of clause 6.3 herein*.
>
> (My emphasis.)

Counsel for the defendants in the appeal was driven to submit that the words 'this agreement' refer only to the agreement to advance money. That submission finds no

home in logic or language. The italicized words would be superfluous if the loan agreement did not terminate on the review date. Moreover the expression 'this Agreement' unequivocally refers to the agreement of loan as a whole[3] and there is no reason to imply any qualification.

[23] Having regard to the clear indications in the words used by the parties in clause 4.5.2 and the structure, purpose and language adopted in clause 6, I have no doubt that the bank's interpretation of its rights and obligations must prevail. The giving of notice in terms of clause 6.3 had the effect of rendering the entire existing indebtedness on the review date immediately due and payable. The action was accordingly not premature.

[24] At the trial the defendants attacked the bank's calculation of their alleged indebtedness. Before us counsel for the bank conceded that adjustments needed to be made to the amounts claimed to cater for debits not proved in evidence, interest incorrectly added and a payment of R1,4 million made by a surety after the service of summons in the magistrate's court. Both counsel agreed that the correct amount for the purposes of any order by this Court in favour of the bank is R4 371 065,40 (comprised in equal parts of capital and capitalized interest as at the date of issue of summons) plus interest *a tempore morae* at the rate of 15,5% per annum from date of issue of summons to date of payment. Counsel so agreed in the light of the fact that the *in duplum* rule is suspended *pendente lite* from the date of service of the initiating process until judgment. Once judgment has been granted, interest may run until it reaches double the capital amount outstanding in terms of the judgment[4].

[25] The agreement also contains an acknowledgment by the first defendant that, in

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3 It is used in this broad sense in many other clauses of the agreement eg 5.4, 5.6, 7.1, 8.1, 10,14.1, 15.1, 17, 18, 19 and 20. There is no instance of restricted meaning.

the event of the bank instructing its attorneys to recover any overdue amount, the borrower will pay such legal costs as the bank may incur on an attorney and own client basis.

[26] In the result the appeal succeeds. The following order is made:

1. The order of the Natal Provincial Division dismissing the appeal with costs is set aside and replaced with the following order:

   '(a) The appeal succeeds with costs, such costs to be taxed as between attorney and own client.

   (b) The respondents are ordered jointly and severally to pay to the appellant:

      (i) the sum of R4 371 065,40;

      (ii) interest *a tempore morae* thereon at 15,5% per annum from date of service of the summons until date of payment;

   (iii) costs of suit as between attorney and own client.'

2. The first, third, fourth and fifth defendants jointly and severally are to pay the costs of the appeal, such costs to be taxed as between attorney and own client.

J A HEHER
JUDGE OF APPEAL

STREICHER JA)Concur
JAFTA JA)