THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 608/2012
Reportable

In the matter between:

PAUL CASEY **FIRST APPELLANT**

KIMBERLEY ROLLER MILLS (PTY) LTD **SECOND APPELLANT**

and

FIRSTRAND BANK LTD **RESPONDENT**

Neutral citation: *Casey v Firstrand Bank* (608/2012) [2013] ZASCA 131 (26 September 2013)

Coram: Navsa ADP, Tshiqi, Petse and Willis JJA and Swain AJA

Heard: 12 September 2013

Delivered: 26 September 2013

Summary*:* **Irrevocable letter of credit – alleged prescription of claim – contended that declaration that underlying debt prescribed extends challenges to enforceability of letter of credit – absence of fraud – draw-down claim presented by beneficiary to issuing bank in accordance with its terms – bank obliged to honour claim – high court dismissing claim for a declarator that draw-down claim prescribed and for repayment of proceeds – appeal dismissed.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Spilg J sitting as court of first instance):

1 The appeal is dismissed save to the extent reflected in the orders that follow. The order of the court below is set aside and replaced with the following order:
'(a) It is declared that interest in excess of the amount of R980 008, claimed by the respondent on the capital sum of R980 008 advanced by the respondent to the second applicant, contravenes the *in duplum* rule.
(b) The respondent is ordered to make payment to first applicant of the sum of R1 284 187,49.
(c) The respondent is ordered to pay the applicants' costs, save that the applicants are ordered to pay one half of the respondent's costs incurred in the rule 35 application.'
2 The respondent is ordered to pay the appellants' costs in the appeal up to and including 27 March 2013.
3 The appellants are ordered to pay the respondent's costs in the appeal incurred after 27 March 2013.

JUDGMENT

Swain AJA (Navsa ADP, Tshiqi and Petse JJA concurring):

[1] The first appellant, Mr Paul Casey (Casey) and the second appellant, Kimberley Roller Mills (Pty) Ltd (Kimberley) unsuccessfully applied to the South Gauteng High Court (Spilg J) for an order declaring that a debt owed by Kimberley to the respondent, Firstrand Bank Ltd (Firstrand) which was secured

by a standby letter of credit, issued by Casey's bankers, the Bank of America, had prescribed.

[2] In addition, because the Bank of America had honoured the letter of credit when called upon to do so by Firstrand, Casey and Kimberley sought a mandamus directing Firstrand to restore to Casey's account at the Bank of America, the draw-down on the letter of credit in the amount of US$420 000, as well as costs incidental to the draw-down. Casey and Kimberley appeal against the refusal of the relief sought with the leave of the court below. They were unsuccessful in that endeavour.

[3] The facts which are common cause are as follows:

a Casey was a customer of the Bank of America and arranged for the irrevocable standby letter of credit to be issued to Firstrand as security for banking facilities sought by Kimberley from Firstrand. It appears that Casey was motivated by his friendship with one Rauff, a director of Kimberley from whom Firstrand also sought additional security in the form of a suretyship.

b The irrevocable standby letter of credit was payable by the Bank of America upon the demand of Firstrand stating that:

'Kimberley Roller Mills (Pty) Ltd has not met his/its obligation to First National Bank of Southern Africa Ltd in respect of the facilities granted by First National Bank of Southern Africa Ltd. Therefore USD (Insert amount) is now due and payable under Nationsbank, NA irrevocable standby letter of credit no 972458.'

Nationsbank subsequently became the Bank of America.

c The letter of credit was expressly made subject to the 1993 revision of the Uniform Customs and Practice for documentary credits of the International Chamber of Commerce (UCP). This body of rules was formulated by the International Chamber of Commerce to regulate the practice of irrevocable letters of credit. These rules provide in article 9a that:

'An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with.'

Article 3 of the UCP under the heading ‘Credits v Contracts’ provides as follows:

‘a: Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationship with the issuing Bank or the Beneficiary.’

d As a consequence, in June 1998 Kimberley concluded a one year term contract with Firstrand in terms of which finance facilities were granted to Kimberley up to a maximum of R850 000 and the letter of credit was issued in the sum of US$200 000. Between 1998 and 2000 the term of the 1998 agreement was extended for further one year periods until 5 March 2001.

e In March 2005 a further one year term finance facility agreement was concluded. In 2006 this was extended for another year to 31 March 2007. It seems however that no funds were requested by, or advanced to Kimberley under the 2005 agreement.

f The total capital amount advanced to Kimberley was the sum of R980 008, but with the addition of interest grew to the sum of R5 414 910.37.

g To cover the indebtedness of Kimberley the letter of credit was increased from time to time to the sum of US$420 000 and the date of the letter of credit was extended annually to 31 March 2011.

h Kimberley did not discharge any of this indebtedness over the years and enjoyed the benefit of the loan, it seems without any demand for payment by Firstrand. Problems understandably arose when Kimberley contended that the debt had prescribed. Kimberley nevertheless made without prejudice offers to Firstrand, ostensibly because Kimberley had enjoyed a banking relationship with Firstrand extending for over a century. This might explain the accommodating approach adopted by Firstrand to Kimberley’s indebtedness over the years. During these negotiations Firstrand threatened to draw-down on the letter of credit.

i On 28 October 2010 Firstrand carried out its threat and lodged a claim for a draw-down on the letter of credit for its full face value of US$420 000 stating that:

'Kimberley Roller Mills (Pty) Ltd has not met his/its obligations to Firstrand Bank Ltd, in respect of the facilities granted by Firstrand Bank Ltd. Therefore US$420 000 is now due and payable under Bank of America irrevocable standby letter of credit number 972458.'

Bank of America paid to Firstrand the sum of US$420 000 and Casey's US bank account was debited with the sum of US$420 000, together with banking charges in the sum of US$1050.

[4] Casey and Kimberley contended that Firstrand was not entitled to claim payment in terms of the letter of credit on the basis that:

a Firstrand's claim for payment of the amount loaned and advanced to Kimberley had prescribed;

b The amount of interest claimed by Firstrand on the capital advanced to Kimberley was in excess of that permitted in terms of the *in duplum* rule and

c Firstrand's certification to the Bank of America in terms of the letter of credit that Kimberley had not met its obligations to Firstrand and that the sum of US$420 000 was due and payable, was fraudulent. This was because Firstrand was aware that the entire claim had prescribed and that interest had been charged in excess of that permitted in terms of the *in duplum* rule.

[5] In *Loomcraft Fabrics CC v Nedbank Ltd & another* 1996 (1) SA 812 (A) at 815G-J this court described the nature of irrevocable letters of credit in the following terms:

'The system of irrevocable documentary credits is widely used for international trade both in this country and abroad. Its essential feature is the establishment of a contractual obligation on the part of a bank to pay the beneficiary under the credit (the seller) which is wholly independent of the underlying contract of sale between the buyer and the seller and which assures the seller of payment of the purchase price before he parts with the goods forming the subject-matter of the sale. The unique value of a

documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or, for that matter, even the existence of the underlying contract, by issuing or confirming the credit, the bank undertakes to pay the beneficiary provided only that the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof of fraud on the part of the beneficiary.'

[6] *Loomcraft* stressed the autonomous nature of the obligation owed by the bank to the beneficiary under a letter of credit (at 816B-C). An interdict restraining a bank from paying in terms of a credit would not be granted at the instance of the bank's customer save in the most exceptional cases (at 816D). This included the case where it was established that the beneficiary under the letter of credit 'was a party to fraud in relation to the documents presented to the bank for payment' (at 817E-F). It was emphasised that fraud on the part of the beneficiary would have to be clearly established and although the onus would be discharged by proof on a balance of probabilities, as in any case where fraud was alleged, it would not lightly be inferred (at 817G-H).

[7] The court below recognised the autonomy of the irrevocable letter of credit and dismissed the application. However, regarding the claim that the interest exceeded the *in duplum* rule, it held that '[c]onsidering that the original debt was reconstituted by voluntary agreement as a new capital advance, it does not appear that there is any scope for applying the rule'. In this the court below erred which it recognised in granting leave to appeal. Where interest is capitalised and interest is charged on interest, capitalised interest does not lose its character as interest and does not become part of the capital amount for the purposes of the *in duplum* rule. See *Standard Bank of South Africa Limited v Oneanate Investments (Pty) Ltd (in liquidation)* [1998] 1 All SA 413 (SCA).

[8] Recognising this, it was conceded in Firstrand's heads of argument dated 26 March 2013 (but apparently received by Casey and Kimberley's attorneys on 27 March 2013) that Firstrand ought not to have claimed more than the US$ equivalent of R980 008 plus interest thereon in an equivalent amount, regardless of the advice it received to the contrary at the time. Firstrand accordingly conceded on appeal, an order in terms of prayer 1.3 of the notice of motion in which a declarator was sought that the interest claimed by the respondent on the advances contravened the *in duplum* rule. It was also conceded in argument that a further order should be granted directing Firstrand to make payment of the amount in question. The claim of Firstrand was accordingly restricted to an amount of R1 960 016 including interest and not the sum of R5 414 910.37.

[9] Counsel were requested to agree upon an appropriate method for calculating the amount to be paid to Casey. We were advised that the parties are in agreement that the amount in US$ which Firstrand was not entitled to receive as at the date of payment, being 2 November 2010 was US$138 291.37. The parties, however, disagree upon the date when this amount should be repaid. Casey and Kimberley contend that this amount should have been repaid on the date when the tender was received namely 27 March 2013. On that date the exchange rate was 9,2861 rands to the US$, with the result that Firstrand should be ordered to pay the sum of R1 284 187.49 to Casey. Firstrand, however, contends that the rand equivalent of US$ should be calculated as at the date of judgment alternatively payment, at the exchange rate prevailing on that date. Firstrand having conceded on 27 March 2013 that it was not entitled to this amount should have made payment on that date. It is accordingly equitable that the exchange rate should be determined on that date, which has the added advantage of certainty.

[10] On the merits it was submitted on behalf of Casey and Kimberley that the court below erred in adjudicating the application as if it was a 'classic' irrevocable letter of credit. By this was meant the situation where a customer of the bank issuing the letter of credit to a beneficiary, seeks to thwart a claim by

the beneficiary for a draw-down on the letter because of a dispute about the performance of a contract secured by the letter of credit. It was conceded that where the customer had sought to restrain a bank from honouring a draw-down claim, the courts stressed the autonomy of a letter of credit and declined to intervene, *save* where the beneficiary was party to a fraud in relation to the documents presented to the bank. An interdict had not been sought by Casey and Kimberley because the letter of credit had been honoured. As counsel put it 'the horse had bolted'. In the court below the initial speculative approach adopted was to allege that the debt had prescribed to the knowledge of Firstrand, and that in claiming a draw-down on the letter of credit, Firstrand had acted fraudulently. In addition, it was argued that where the customer acts against the beneficiary to attack the validity of the draw-down, on the basis that the debt secured by the letter of credit had prescribed and with it the entitlement to claim a draw-down based on that debt, the principle of autonomy did not find application. Put differently, it was contended that the effect of a declarator that the debt had prescribed, was to extend the ambit of legitimate challenges to a letter of credit beyond the narrow confines of the fraud exception.

[11] Accordingly, so the argument went, the relief sought by Casey as the customer of Bank of America was directed against Firstrand as the beneficiary under the letter of credit. The purpose was not to interfere with the obligation on the Bank of America to honour Firstrand's draw-down claim, but to obtain a declarator that Kimberley's debt had prescribed and with it Firstrand's entitlement to claim a draw-down on the letter of credit.

[12] The inherent flaw in this argument is that it seeks to equate the legal standing of a letter of credit with a suretyship. As pointed out in *Loomcraft* and in articles 3 and 9(a) of the UCP, a letter of credit is wholly independent of the underlying contract between the customer of the bank and the beneficiary. It establishes a contractual obligation on the part of the issuing bank to pay the beneficiary in accordance with its terms. An irrevocable letter of credit is not accessory to the underlying contract and is distinguishable in law from a

suretyship which is accessory to the principal obligation. See *Absa Bank Bpk v De Villiers* 2001 (1) SA 481 (HHA).

[13] The letter of credit was never furnished as surety by Casey for the due compliance by Kimberley of its obligations to Firstrand. Although the letter of credit was expressly furnished as security for the due performance of these obligations, this did not change its legal nature. The letter of credit was furnished as security in addition to the suretyship of Rauff as required by Firstrand.

[14] The distinction sought to be drawn on behalf of Casey and Kimberley is without merit. The issue of the irrevocable letter of credit by the Bank of America in favour of Firstrand, established a contractual obligation on the Bank of America to pay Firstrand as beneficiary, provided that the conditions specified in the credit were met. Reciprocal obligations in these terms were created by the letter of credit between the Bank of America and Firstrand. An order declaring that Firstrand had no right to draw-down on the letter of credit, must inevitably have as a consequence that the Bank of America was not obliged to honour this draw-down claim. Such an order would infringe upon the autonomy of the irrevocable letter of credit. The argument was advanced simply to circumvent the autonomy of the letter of credit.

[15] It was also fallaciously submitted on behalf of Casey and Kimberley that the claim did not challenge the validity of the letter of credit because it had been honoured. It was directed solely at Firstrand's receipt of the money, to which Firstrand was not entitled. This was a distinction without merit. It was conceded that this was an enrichment claim which had never been advanced on the papers.

[16] Whether the claim of Firstrand had prescribed is accordingly irrelevant. At the time of the draw-down claim by Firstrand on 28 October 2010 the validity of the letter of credit was beyond dispute, its date having been extended to 31 March 2011. It may be asked rhetorically why the duration of the letter of credit

was voluntarily extended to this date by Casey, if Kimberley contended that its liability to pay Firstrand had prescribed. To claim a draw-down on the letter of credit Firstrand simply had to state that Kimberley had not met its obligations in respect of the facilities granted to it by Firstrand and that a specified amount was due and payable to Firstrand. Firstrand complied with the letter of credit, obliging the Bank of America to honour its undertaking and make payment. Kimberley concedes that it did not repay any of the capital loaned to it by Firstrand, nor any of the interest which was payable. Whether the claim of Firstrand had prescribed and the interest claim was in excess of the *in duplum* rule, would only be of relevance if Firstrand acted fraudulently. It would have to be established that Firstrand presented the draw-down claim to the Bank of America, knowing that it contained material representations of fact upon which it would rely and which Firstrand knew were untrue. Mere error, misunderstanding or oversight on the part of Firstrand, however unreasonable, would not amount to fraud (*Loomcraft* at 822G-I). Counsel on behalf of Casey and Kimberley when asked eschewed any reliance upon fraud to challenge Firstrand's entitlement to draw-down on the letter of credit.

[17] Not dealt with in oral argument on appeal were the costs of an application brought by Firstrand in the court below to compel discovery of certain documentation by Casey, in terms of rule 35(14). Firstrand was awarded one half of its costs on the basis that only half of the documents requested were required by Firstrand. In the application for leave to appeal Casey and Kimberley alleged that the court had erred in making this order. In the notice of appeal an order was sought dismissing Firstrand's rule 35(14) application with costs. This issue was not referred to in the heads of argument filed on behalf of Casey and Kimberley. I agree with Firstrand's submission in its heads of

argument that the order should stand on the basis that the court below exercised its discretion judicially.[1]

[18] The belated concession made on behalf of Firstrand that it was not entitled to claim and receive payment of the interest which exceeded the *in duplum* rule, means that Casey and Kimberley should have succeeded before the court below, in obtaining a declarator in these terms. This would constitute substantial success entitling them to an award of costs in the court below as well as their costs of appeal up to and including the date of the tender being 27 March 2013. However, the lack of success by Casey and Kimberley in the remaining issues on appeal, should result in an order that they pay Firstrand's costs of appeal incurred after 27 March 2013.

[19] In the result the following order is granted:

1 The appeal is dismissed save to the extent reflected in the orders that follow. The order of the court below is set aside and replaced with the following order:

'(a) It is declared that interest in excess of the amount of R980 008, claimed by the respondent on the capital sum of R980 008 advanced by the respondent to the second applicant, contravenes the *in duplum* rule.

(b) The respondent is ordered to make payment to first applicant of the sum of R1 284 187,49.

(c) The respondent is ordered to pay the applicants' costs, save that the applicants are ordered to pay one half of the respondent's costs incurred in the rule 35 application.'

---

[1] On appeal a court 'will not reverse the decision of the lower Court as to costs unless it is quite clear that some important factor escaped the attention of the lower Court, or unless the discretion exercised has not been a judicial discretion'. See *Molteno Bros v South African Railways* 1936 AD 408 at 417.

2 The respondent is ordered to pay the appellants' costs in the appeal up to and including 27 March 2013.

3 The appellants are ordered to pay the respondent's costs in the appeal incurred after 27 March 2013.

K G B SWAIN
ACTING JUDGE OF APPEAL

Willis JA (dissenting):

[20] I agree with the fine judgment of Swain AJA except insofar as the rate of exchange is concerned. In my opinion, my colleague has correctly decided that the calculation of the award to the appellant must be determined by reference to a foreign currency, United States dollars. It seems to me to be clear from the cases of *Standard Chartered Bank of Canada v Nedperm Bank Ltd*[2] and *Bane & others v D'Ambrosi*[3] that the court must then order that the applicable rate of exchange is that prevailing on the date of payment.

N P WILLIS
JUDGE OF APPEAL

[2] *Standard Chartered Bank of Canada Limited v Nedperm Bank Limited* 1994 (4) SA 747 (A).

[3] *Bane & others v D'Ambrosi* 2010 (2) SA 539 (SCA) para 23.

Navsa ADP (concurring in the main judgment):

[21] I have had the benefit of reading the judgments of my colleagues Willis JA and Swain AJA. I agree with the conclusions reached by Swain AJA and his reasoning. I have no quarrel with the principles stated in the judgment of Willis JA. However, my learned colleague ignores the fact that the parties were agreed that the order should sound in the Rand equivalent of the loss suffered in US-dollars. The parties were not in agreement about the date from which it should be payable. Swain AJA in para 9 has provided sound reasoning for the order proposed by him.

_____

M S NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR APPELLANT:	A J BESTER SC
	VAN ZYL LE ROUX INC
	c/o BDK ATTORNEYS, JOHANNESBURG
	HONEY ATTORNEYS, BLOEMFONTEIN
FOR RESPONDENT:	I MILTZ SC
	EDWARD NATHAN SONNENBERGS
	c/o BOWES & TURNER INC, JOHANNESBURG
	WEBBERS ATTORNEYS, BLOEMFONTEIN