THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 170/2014

In the matter between:

LODHI 5 PROPERTIES INVESTMENTS CC	**FIRST APPELLANT**
LODHI 4 PROPERTIES INVESTMENTS (PTY) LTD	**SECOND APPELLANT**
MUHAMMED ISLAM LODHI	**THIRD APPELLANT**

and

FIRSTRAND BANK LIMITED	**RESPONDENT**

Neutral citation:	*Lodhi 5 Properties Investments v Firstrand Bank Limited* (170/14)[2015] ZASCA 72 (22 May 2015)
Coram:	Maya, Majiedt, Pillay, Mbha JJA and Schoeman AJA
Heard:	**4 MARCH 2015**
Delivered:	**22 May 2015**
Summary:	Loan agreement – respondent bank entitled to restitution in light of lapse of loan and agency agreements in terms of which loan lent and advanced to first appellant before debt extinguished – mora interest payable in respect of loan agreement governed by Shari'ah (Islamic) law which prohibits the charging of interest for a loan – order granting appellants' final winding up justified.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Molefe J sitting as court of first instance):

1 Save to the extent below, the appeal is dismissed with costs, including the costs of two counsel.

2 Paragraphs 38 (i) and (ii) of the order of the court below are set aside and replaced with the following:

'Muhammad Islam Lodhi shall pay to the applicant R2 642 006.98 together with interest thereon at the rate of 15,5 per cent per annum as from 15 June 2012 to date of payment.'

JUDGMENT

Maya JA (Majiedt, Pillay, Mbha JJA and Schoeman AJA concurring):

[1] This is an appeal against orders granted against the appellants by the Gauteng Division of the High Court, Pretoria (Molefe J) in three separate applications brought by the respondent, FirstRand Bank Limited (the bank). In terms of these orders, the first and second appellants, Lodhi 5 Properties Investments CC (Lodhi 5) and Lodhi 4 Properties Investments (Pty) Limited (Lodhi 4) were placed under final winding up. The third appellant (Mr Lodhi) was ordered to pay the bank a sum of R10 328 574, 25 together with interest at the rate of 15,5 per cent per

annum from 18 April 2011 until date of payment. The appeal seeks a dismissal of the applications with costs and serves before this court with the leave of the court below.

[2] Lodhi 5 is a close corporation registered in accordance with the laws of the Republic of South Africa. Its sole asset is immovable property, Erf 24 Kramerville Township, Johannesburg. It is one of a group of entities, the Lodhi Group, which include Lodhi 4, through which Mr Lodhi, the sole member of Lodhi 5, conducts business involving rare and fine art, sporting goods, auctioneering and textile industries.

[3] The bank offers its Islamic customers certain specialised services and products compliant with Shari'ah (Islamic) law which cater for Islam's prohibition on the charging of interest. These include an Islamic Finance Residential Property Offering which includes an agency agreement that allows the bank to act as an agent when purchasing property on behalf of its customers in return for a fixed agency fee. In June 2008 the bank lent and advanced to Lodhi 5, without interest, a sum of R9,6 million repayable in 120 monthly instalments of R88 000, in terms of this dispensation. The loan was for the purchase of Erf 24, Kramerville Township and a neighbouring property, Erf 29 (the property). On 7 May 2008 Lodhi 4 and Mr Lodhi had executed a suretyship bond in the bank's favour securing the indebtedness of Lodhi 5. And on 19 June 2008 Lodhi 5 and Lodhi 4 respectively registered a covering mortgage bond and a suretyship bond in the bank's favour.

[4] Lodhi 5 made regular payments to the bank in discharge of the loan until May 2009 and from July to September 2009. During the ensuing lull, in November 2009, the Registrar of the Companies and Intellectual

Property Registration Office (CIPRO) placed Lodhi 5 in deregistration, which was made final in July 2010, for failing to submit its annual return. However, the deregistration was subsequently reversed[1] at the instance of the bank which sought to safeguard its interests as Lodhi 5's creditor. In May 2010 Lodhi 5 made a large payment towards the discharge of the loan in the sum of R5 million from an insurance pay-out, which will be discussed later in the judgment. No further payments were made thereafter.

[5] On 18 April 2011 the bank sent a statutory demand to Lodhi 5 in terms of s 69 of the Close Corporations Act 69 of 1984 (the Close Corporations Act)[2] and a letter of demand to Mr Lodhi. On 25 May 2011 it sent a statutory demand to Lodhi 4 in terms of s 345 of the Companies Act 61 of 1973 (the Companies Act).[3] The statutory demands stated that if payment of the sums claimed was not made within 21 days of receipt

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[1] In terms of section 26(6) and (7) of the Close Corporations Act which provide:
'(6) The Registrar may on application by any interested person, if he or she is satisfied that a corporation was at the time of its deregistration carrying on business or was in operation, or that it is otherwise just that the registration of the corporation be restored, restore the said registration.
(7) The Registrar shall give notice of the restoration of the registration of a corporation in the *Gazette*, and as from the date of such notice–
(*a*) the corporation shall be deemed to have continued in existence as from the date of deregistration as if it had not been deregistered.'

[2] The section provides for circumstances under which a corporation may be deemed unable to pay its debts for purposes of its winding up. The relevant part reads:
'**Circumstances under which corporation deemed unable to pay debts**
(1) For the purposes of section 68 (*c*) a corporation shall be deemed to be unable to pay its debts, if –
(*a*) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.'

[3] The section provides for circumstances under which a company is deemed unable to pay its debts for purposes of its winding up and reads in relevant part:
'**When company deemed unable to pay its debts**
(1) A company or body corporate shall be deemed to be unable to pay its debts if –
(*a*) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due –
(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
(ii) …
and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.'

thereof, Lodhi 5 and Lodhi 4 would be deemed unable to pay their debts. The appellants did not respond to the letters of demands.

[6] On 5 July 2011 the bank launched the court proceedings in which it mainly sought to have Lodhi 5 and Lodhi 4 placed under final winding up and Mr Lodhi ordered to pay the outstanding amount on the loan. The bank relied on the written, interest free loan agreement (the loan agreement) in terms of which it alleged to have lent and advanced to Lodhi 5 a sum of R9,6 million. The bank further relied upon a written 'Agency and Administration Services Agreement' (the agency agreement). In terms of the agency agreement, the bank, acting as Lodhi 5's exclusive agent, would purchase the property on its behalf. An administration fee for those services was payable by Lodhi 5 to the bank in a sum of R7 600 560 (plus VAT) payable in 120 equal monthly instalments. The bank alleged that Lodhi 5 had fallen into arrears in terms of both agreements and that sums of R3 609 331,52 and R6 773 242,73 remained owing as capital in terms of the loan agreement and the balance of administration fees in terms of the agency agreement, respectively.

[7] The appellants did not dispute the loan agreement which they admitted Mr Lodhi had signed. They also admitted that a capital sum of R2 682 627 remained owing under the agreement. But they contended that this debt was not yet due and payable because the bank had not accelerated the repayment of instalments in terms of the loan agreement and that the payment of R5 million amounted to prepayment of 62 instalments and years' worth of instalments in advance. Furthermore, a suspensive condition to which the loan agreement was subject was never fulfilled to bring the agreements into effect. Regarding the agency agreement, they denied that it came into effect on the ground that it was

never signed. They argued further that even if the agency agreement had been signed it was, nevertheless, not implemented according to its terms because the bank did not perform any of the obligations it undertook as their agent in terms thereof. Thus, it was contended that the bank earned no agency fee which amounted to interest in breach of Shari'ah law in any event.

[8] In response, the bank averred in a supplementary affidavit (one of several allowed by the high court) filed late into the proceedings, that the agency agreement, which it alleged it could not locate, had been signed by an official who was no longer in its employ and was unavailable to comment. The bank accepted that if the court below found that the agency agreement never came into force and effect by reason of non-signature, in light of the absence of proof that it was signed, then the loan agreement would be similarly affected by reason of clause 4. The latter provision required that the agency agreement be signed and become unconditional. But the bank contended that even if the loan and agency agreements were invalid it was still entitled to the restitution of the outstanding balance of R7 007 297,51 (a claim which the appellants unsuccessfully argued had prescribed in the high court and which they wisely did not raise on appeal). This amount comprised the initial capital loan of R9,6 million less all payments made by Lodhi 5 under both agreements, together with interest at 15,5 per cent from June 2008, the date of the initial advance of the loan.

[9] The court below found that both agreements were valid and enforceable as they had been signed and were compliant with Shari'ah law. The court accordingly granted judgment against Mr Lodhi in the full amount and interest initially claimed. The court below also granted the

liquidation applications against Lodhi 4 and Lodhi 5. This was on the basis that these entities had no valid defence and were clearly unable to pay their debts, which were due and payable.

[10] On appeal the issues crystallised to whether (a) Lodhi 4 and Lodhi 5 were correctly placed under winding up, (b) the appeal should succeed partially by the reduction of the amount in the order granted against Mr Lodhi to the capital amount of R2 642 006,98 admitted as outstanding, and (c) Mr Lodhi is liable to pay interest on such amount and if so, from which date.

[11] The appellants challenged all the conclusions of the court below. They argued that the bank's main claims were wrongly granted on an unfounded premise that the agreements came into effect. This was not proved, they argued, because the agency agreement was not signed and the bank itself had ultimately conceded that the issue had to be decided on the appellants' version. It was further contended that the appellants' resistance to the claims was justified as the bank subsequently abandoned them and claimed restitution. In terms of the loan agreement, this position conflicted with the bank's allegation that the suspensive conditions had been fulfilled (which the bank failed to prove in any event). Thus the amounts claimed in the letters of demand were not due and payable at the time. And the bank could claim restitution of the capital outstanding from Lodhi 5 only and not against the sureties. It was further argued that the award of interest had no basis in law even if the outstanding debt was due and payable. This was so because the parties' intention to conclude an interest free loan agreement governed by Shari'ah law excluded the

application of the Prescribed Rate of Interest Act 55 of 1975 (the Act)[4] upon which the bank relied. It was then contended that the bank's success in its main claim meant that its alternative claim for restitution had failed and could not be pursued on appeal in the absence of a cross-appeal as the bank sought to do.

The winding-up proceedings

[12] As indicated above, the liquidation applications were based on the deeming provisions in s 69 of the Close Corporations Act and s 345 of the Companies Act – that Lodhi 5 and Lodhi 4 should be deemed unable to pay their debts by neglecting to pay, secure or compound their debts demanded by the bank and should therefore be wound up in terms of s 344(*f*) of the Companies Act.[5] In its supplementary affidavit the bank also alleged that the financial statements of Lodhi 5 and Lodhi 4 showed that their liabilities exceeded their assets. They were also unable to pay their debts and were therefore commercially insolvent.

[13] The bank's locus standi as Lodhi 5's creditor was not in dispute. The appellants only denied neglecting to pay the debt. They contended that it was not yet due and payable when the bank demanded payment in view of the loan and agency agreements' lapse, the advance payment of R5 million and the bank's failure to accelerate payment of the instalments in terms of the loan agreement. In their supplementary replying affidavits they contended that Lodhi 5's financial situation had since stabilised.

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[4] Section 1(1) of the Prescribed Rate of Interest Act 55 of 1975 provides that '[i]f a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on grounds of special circumstances relating to that debt, orders otherwise.'

[5] Section 344(*f*) of the Companies Act provides: 'A company may be wound up by the Court if –
. . . the company is unable to pay its debts as described in section 345'.

[14] The contention that the bank did not invoke the acceleration clause under the loan agreement may be dealt with shortly. Clause 18.2 of the loan agreement gave the bank the right in the event of a breach of its terms, by written notice, to 'declare all or any part of the Capital Outstandings to be immediately due and payable whereupon the Capital Outstandings shall become immediately due and payable; and/or enforce any or all of its rights under the Security Documents'[6]. The bank expressly invoked these provisions in its letter of demand of 18 April 2011 which stated that '[i]n light of the aforesaid breach, [the bank] has instructed us to declare all the Capital Outstandings of the Loan Agreement … to be immediately due and payable'.

[15] There is similarly no merit in the appellants' contentions concerning the R5 million insurance pay-out. Clause 17.2.2 of the loan agreement specifically provided for the manner in which such funds (arising from insurance that it took out as cover against damage to or destruction of the property) were to be utilised. If any event which gave rise to a claim under the insurance occurred, the bank would, at its sole discretion, be entitled to apply the insurance proceeds against the 'capital outstandings'. And to the extent that any balance of the 'capital outstandings' remained thereafter, such balance would remain a debt due by Lodhi 5 to the bank. Even on Lodhi 5's case, after its loan account was credited with the payment of the R5 million, a substantial balance nevertheless remained outstanding on the capital debt. Needless to say, on the above provisions such payment certainly did not absolve Lodhi 5 from discharging its obligations in the terms specified in the loan

[6] The loan agreement defines 'capital outstandings' as the aggregate of all amounts of principal and all and any other amounts due and payable to the bank under the loan agreement and 'security documents' as the mortgage bond and any further agreements entered into at any time by or on behalf of Lodhi 5 or any other person as security for its obligations to the bank under the loan agreement.

agreement. The bank was wholly entitled to insist on the continued payment of instalments, and upon the full debt becoming due and payable, to insist on payment in full.

[16] As for the statutory notices to which the appellants did not respond, the background leading to their issue was not disputed. Pursuant to a meeting between the parties' representatives, including Mr Lodhi, on 10 February 2010, the bank recorded that the arrears on Lodhi 5's debt stood at R725 074,40 which it was unable to pay arising from cash flow problems. Mr Lodhi subsequently confirmed the correctness of these statements in writing and made certain proposals to the bank regarding payment of the arrears. The debt was not settled and a year later, on 21 February 2011, the bank sent Lodhi 5 a letter of demand which was followed by the statutory notice of 18 April 2011 to which there was no response as already mentioned. This gave rise to the deemed inability to pay.

[17] In addition to this, the financial statements of both Lodhi 5 and Lodhi 4 and their failure to make any payment barring the R5 million since 2009, despite their insistence that they were able to pay their debts, subsequently showed their actual inability to pay their debts. According to their financial statements, as at 28 February 2010 Lodhi 5 owed the bank R2 682 675 and Lodhi 4, which carried a further liability on the basis of its suretyship, was trading at a loss. The situation had not changed by July 2012. Quite clearly, the two entities are commercially insolvent and the court below correctly ordered their final winding-up.

The suretyships' liability

[18] For the assertion that the restitution claim lies only against Lodhi 5, Lodhi 4 and Mr Lodhi relied on clause 4.4 of the loan agreement on which the claim for restitution is based. The clause reads:

'In the event that the Suspensive Conditions are not fulfilled on or before 31 May 2008, or such other date as may be agreed in writing between the Parties on or before that date, then this Agreement, save for the provisions of this clause and of clauses 1, 2, 20, 22, 23, 24, 25, 26, 27 and 28 which shall remain of full force and effect, shall never become of any force or effect, and no Party shall have any claim against any other Party for anything done hereunder or arising herefrom, save as a result of a breach of any of the provisions of this clause 4 by any party, and the parties shall be restored to the status quo ante.'

[19] It was argued on the appellants' behalf that it was clear from the wording of the clause that if the suspensive conditions were not fulfilled after the advance of the loan, the claim would be limited to one of restitution between the bank and Lodhi 5 only. The words 'no Party shall have any claim against any other Party' in the clause referred to parties such as the sureties, so it was contended. And a claim would not lie against the sureties here because to claim restitution, the bank would first have to tender release of all securities in terms of the loan agreement, which it had not done.

[20] This argument however ignores the provisions of the deed of suretyship. In terms of clause 1 thereof, Mr Lodhi and Lodhi 4 bound themselves jointly and severally as sureties for and co-principal debtors with Lodhi 5 'for the due and punctual performance by [Lodhi 5] and each of the sureties of all their obligations to the bank … now due, owing and payable or becoming due, owing and payable in the future from any

cause whatsoever'. Clause 3 made provision for the sureties to 'be bound by all admissions or acknowledgements of indebtedness made or given at any time by [Lodhi 5] to the [bank] now or in the future in regard to any obligation or liability for which [the] suretyship is given'. These provisions obviously impose no condition on the bank to first release the suretyship to be able to claim against Lodhi 5 and its sureties. The rights and the obligations of the parties must be determined with reference to the terms of the deed of suretyship.[7] Furthermore, it does not appear that clause 4.4 itself requires the bank to tender release of the securities if the loan agreement lapsed, as seems to have happened here, in the absence of satisfactory proof that the bank signed the agency agreement.

Mr Lodhi's liability

[21] Regarding Mr Lodhi's liability as Lodhi 5's surety, it was conceded on the bank's behalf at the outset that the amount in the order granted by the court below against him should be reduced to the admitted outstanding capital sum. The bank however insisted that he was liable for interest on the reduced sum at the legal rate at the material time, 15,5 per cent, calculated from the date of delivery of the supplementary affidavit in which restitution was claimed. I find nothing wrong with this stance.

[22] The contention that the bank should have cross-appealed against the finding of the court below, that the agreements were valid and binding to sustain its claim for restitution, need only be stated to be rejected. An appeal lies only against a judgment or order of court and not its

[7] *Bock & others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) para 29.

reasoning.[8] Therefore, quite apart from the fact that the bank had no reason to appeal against the order which granted the precise relief it sought, it could not have challenged the finding of the court below on the status of the two agreements even if it so wished. It is not necessary for a plaintiff to cross-appeal where a reduction of the quantum of damages awarded by a trial court is sought by a defendant because such reduction is not a substantive judgment or order but rather a finding or ruling which the court is required to make in its assessment of damages to be awarded.[9] By parity of reasoning, there was no basis for a cross-appeal here too. The judgments of this court in *Giliomee v Cilliers* and *Southern Sun Hotel Corporation (Pty) Ltd v G & W Leases CC* upon which the appellants relied in this regard are clearly distinguished by their own facts.[10]

[23] On the question of interest, it seems to me that the appellants' argument misconceives the nature of the interest sought here – that it was not based on the enforcement of a contractual undertaking but rather on Lodhi 5's default. It is trite that a party which has been deprived of the use of its capital for a period of time has suffered a loss which, in the normal course of events, will be compensated by an award of mora interest.[11] The term mora simply means delay or default; interest a tempore morae constitutes the damages that flow naturally (without the need to place the debtor in mora) from the contract itself by reason of a

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[8] *Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.
[9] *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A); *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A).
[10] *Giliomee v Cilliers* 1958 (3) SA 97 (A); *Southern Sun Hotel Corporation (Pty) Ltd v G & W Leases CC* [1999] 1 All SA 497 (A).
[11] *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) para 16; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 85; *Bellairs v Hodnett& another* 1978 (1) SA 1109 (A) at 1145D-G.

debtor having failed to perform a contractual obligation within the agreed time.[12] Lodhi 5 unlawfully delayed payment of its outstanding debt to the bank. It is therefore liable to compensate the bank for its failure to perform on the due date at the legal rate as prescribed by s 1(2) of the Act.[13] This obligation, which arose on 15 December 2012 when the bank claimed restitution in its supplementary affidavit, has nothing to do with and is not affected by the Shari'ah law's prohibition against payment of interest on a loan debt.

[24] In the result the following order is made:

1 Save to the extent below, the appeal is dismissed with costs, including the costs of two counsel.

2 Paragraph 38 (i) and (ii) of the order of the court below are set aside and replaced with the following:

'Muhammad Islam Lodhi shall pay to the applicant R2 642 006.98 together with interest thereon at the rate of 15,5 per cent per annum as from 15 June 2012 to date of payment.'

MML Maya

Judge of Appeal

[12] *Scoin Trading(Pty) Ltd v Bernstein* 2011 (2) SA 118 (SCA).

[13] *Davehill (Pty) Ltd & others v Community Development Board* 1988 (1) SA 290 (A) at 299B; *Land and Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd & others* [2013] All SA 385 (SCA) paras 19 and 20.

APPEARANCES:

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