



Republic of South Africa

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE No: 924/2004

In the matter of

NEDCOR BANK LTD

Applicant

and

LISINFO 61 TRADING (PTY) LTD

Respondent

JUDGMENT DELIVERED ON : 18 OCTOBER 2004

MOOSA, J:

INTRODUCTION

1. Applicant issued summons against respondent for payment of R1 816 432,19, being the balance due and owing in respect of monies lent and advanced pursuant to a covering mortgage bond ("the bond"). A copy of the bond was attached to the summons. In addition to the capital, applicant claimed interest at the rate of 12% per annum from 1 October 2003 to date of payment, for an order declaring the mortgaged property executable and costs on an attorney-client scale. The action was opposed by respondent. Applicant applied for summary judgment. In its application, applicant filed an affidavit by its manager verifying the cause of action in the summons. It appears that applicant based its application for summary judgment on a liquid document, alternatively on a liquidated amount in money. Respondent filed an opposing affidavit raising a number of possible defences.

2. After counsel for the parties made their submissions, the court, at the hearing of the summary judgment application, requested them to submit additional Heads of Argument on the following issues:
 - 2.1. What constitutes a liquid document for the purpose of summary judgment and whether the bond in the instant case qualifies as a liquid document.
 - 2.2. Whether a court is empowered to declare immovable property executable in an application for summary judgment.

3. The court is grateful to counsel for submitting additional Heads in support of their respective stand on the above issues. The court will deal with the first issue of whether the bond constitutes a liquid document for the purpose of summary judgment. It will be followed, if necessary, by the second issue of whether the claim qualifies as a liquidated claim in moneys for the purpose of summary judgment. Lastly, it will deal with, if that is necessary, with the issue of whether the court is competent to declare the immovable property executable in an application for summary judgment.

LIQUID DOCUMENT

4. Rule 32 of the Uniform Rules of Court (“the Rules”) provides that where the defendant has delivered a notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only

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(a) on a liquid document;

(b) for a liquidated amount of money;

(c) for delivery of specified movable property;

(d) for ejectment

together with any claim for interest and costs.

5. Rule 32 further provides that where an applicant relies on a liquid document for the purpose of summary judgment, he or she should attach such document to his or her application. In the present instant, the bond was not so attached. However, the applicant verified the cause of action in the summons to which was attached the bond. The attachment of the bond to the application would therefore have been superfluous and a duplication. Although this was not raised as an issue in the proceedings, insofar as it may be necessary in terms of the rules, the court condones such omission. The court is satisfied that the respondent has not been prejudiced by such omission.

6. It is a trite principle of our law that the term "*liquid document*" for purposes of summary judgment proceedings (Rule 32) has the same meaning as a "*liquid document*" for purposes of provisional sentence proceedings (Rule 8) (**Van Wyngaardt, N.O. v Knox** 1977 (2) SA 636 (T). In **Rich & Others v Lagerwey** 1974 (4) SA 748 (AD) at 754H, the court said that if a document in question, upon a proper construction thereof, evidences by its term and without resort to

evidence extrinsic thereto, an unconditional acknowledgement of indebtedness in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted.

7. In **Union Share Agency and Investment Ltd v Spain** 1928 AD 74 at 79, **Solomon, CJ**, said:

“It is of the essence of the doctrine of provisional sentence that the acknowledgment of debt or the undertaking to pay should be clear and certain on the face of the document itself and that no extrinsic evidence should be required to establish the indebtedness.”

In that case the court drew a distinction between the indebtedness being subject to the happening of an event and the payment or performance being subject to an event. On the facts of that case, the court held that there was no unequivocal acknowledgment of indebtedness or unconditional undertaking to pay. This destroyed the liquidity of the document. The case law has drawn a distinction between the indebtedness itself and the payment of that indebtedness. The indebtedness should be unconditional. It cannot be supplemented by extrinsic evidence. The payment, however, could be conditional on the fulfilment of a simple condition and if put in issue could be proved by extrinsic evidence.

(**Pepler v Hirschberg** 1920 CPD 438; **Union Share Agency and Investment Ltd v Spain**, (*supra*) at 78.)

8. **Boshoff, J**, in **Inter-Union Finance Ltd v Franskraalstrand Bpk** 1965 (4) SA 180 (W) at 181F-G says:

“The principle upon which provisional sentence is granted are well-settled and clear. The difficulty lies in their application to particular documents which involves a construction of such documents. Provisional sentence may only be granted on a liquid document which is a document wherein a debtor acknowledges over his signature, or that of his duly authorised agent, or is in law regarded as having acknowledged without his signature actually having been affixed thereto, his indebtedness in a fixed and determinate sum of money. The amount of the debt must be ascertained and the document must be sufficient in itself and not require extrinsic evidence to prove that the debt is due.”

9. The above criteria will be applied to the terms of the bond to determine whether it qualifies as a liquid document. The allegations in the summons *prima facie* disclose that applicant’s claims are founded on a liquid document. According to

Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd

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the allegations, the capital amount of the claim is due and owing in respect of monies lent and advanced pursuant to the bond, the interest thereon has been fixed in pursuance of powers conferred upon the applicant by the bond, the property to be declared executable is secured by the bond and the attorney and client cost is provided for in the bond. It is clear that applicant's claims are based on a liquid document, namely the bond. The question which begs an answer is, is the bond a liquid document?

10. According to the terms of the bond, respondent acknowledged liability to the applicant in the sum of R1 500 000,00 (the capital) arising from a consideration set out in the recital. The consideration in the recital covers such indebtedness which arises from moneys lent and advanced, drafts or bills of exchange or by reason of any suretyship, guarantee or indemnity and any payment made pursuant to the bond, including future debts generally from whatsoever cause arising, up to, but not exceeding the sum of R1 500 000,00 together with finance charges thereon and an additional sum of R300 000,00 to cover costs and disbursements. It is clear from the terms of the bond that the *causa* is so widely worded that it could cover both liquidated and unliquidated amounts in money. It further caps the indebtedness to a maximum amount which corresponds with the amount of the acknowledgment of indebtedness.

11. In terms of Section 51(1) of the Deeds Registries Act, No 47 of 1937, covering bonds can be utilised to secure a fluctuating state of indebtedness between the mortgagor and mortgagee, either as a result of several legal transactions or as a result of a special business relationship between the parties. The bond in question constitutes a continuing covering security for all and any sum or sums of money which may now or in the future be owing from any cause and remains in existence until cancelled notwithstanding any fluctuation in, or temporary extinction of the indebtedness. It has been held by our courts that on a proper construction of the terms of the bond, the general acknowledgment of indebtedness in a fixed sum of money as evidenced in the bond is a conveyancing form introduced for conveyancing purposes and does not necessarily render the document liquid. (See: **Cape Town City Council v Maydell** 1935 CPD 56; **Inglestone v Perreira**, 1939 WLD 55 at 63; **Harrowsmith v Ceres Flats (Pty) Ltd** 1979 (2) SA 722 (T) at 734A-B; **Barclays Bank Ltd v Pretorius** 1979 (3) SA 637 (N) at 642F-G.)
12. A further term of the bond is that a certificate of indebtedness shall upon the mere production thereof be *prima facie* proof of the amount owing and such certificate shall constitute a valid liquid document in any competent court. The

particular term connotes that the bond is not a liquid document and confers on the certificate the attributes of liquidity. To give such a certificate the attributes of liquidity is highly questionable. It does not conform to the accepted legal definition of a liquid document. The certificate is not “*an unconditional acknowledgment of indebtedness by the debtor, in an ascertained amount of money, the payment of which is due the creditor*” (**Rich & Others v Langerwey** (*supra*) at 754H). It is settled law that extrinsic evidence cannot make a liquid document illiquid or an illiquid document liquid. A document cannot become liquid *ex post facto*. A written document is inherently liquid or illiquid depending upon its terms. (See **Harrowsmith v Ceres Flats (Pty) Ltd** (*supra*) at 746A; **Barclay Western Bank Ltd v Pretorius** (*supra*) at 645A-B; **Barclays National Bank Ltd v Serfontein** 1981 (3) SA 244 (W) at 249G.)

13. The terms of the bond are substantially similar to the terms of the covering bond in the case of **Wollach v Barclays National Bank Ltd** 1983 (2) 543 (A). In that case there was an admission of liability in a fixed sum for R80 000,00 and future liability limited at any time up to, but not exceeding the sum of R80 000,00. Similar provisions are to be found in the bond in the present case. In the majority judgment the court held that despite an unqualified admission of indebtedness in a fixed amount, the covering bond was not a liquid document,

by reason of the clause relating to future indebtedness and liability. The minority judgment of the court sought to distinguish two situations in the covering bond. The one was the admission of liability in the sum of R80 000,00 and the other was the contingent future liability up to a maximum amount of R80 000,00. In coming to this conclusion the minority judgment relied on the wording of the covering bond “*without in any way limiting the generality of the aforesaid from the causes aforementioned*”. There are no similar provisions in the bond in the instant case and there is therefore no room to distinguish the two situations as postulated in the minority judgment. In any case, this court is bound by the majority judgment.

14. The terms of the bond in question are also distinguishable from the terms of the covering bond in the case of **Inglestone v Perreira** (*supra*), which was subsequently confirmed on appeal to the full bench. Adv **Caiger** who appeared for the applicant criticized the majority decision of **Wollach v Barclays Bank Ltd** (*supra*) in that it glosses over the judgment of **Inglestone v Perreira**, (*supra*). In my view the criticism is not justified. The majority judgment assumed that the decision in **Inglestone** was still good law and went on to distinguish the facts in the two cases. Adv **Caiger** argued that the terms of the bond in the present instant fall squarely within the ambit of the **Inglestone** case. I disagree.

In the **Inglestone** case the terms of the bond reflected not only an acknowledgment of indebtedness, but also an unconditional undertaking to pay certain instalments by specified dates. This quality rendered the covering bond a liquid document in terms of the legal authorities. In the bond in question no such attribute exists which could render it a liquid document.

15. In my view the liability arising from the bond in the present instance is not an unequivocal acknowledgment of indebtedness or an unconditional undertaking to pay, which are the hallmarks of a liquid document. It is conditional upon the considerations set in the recital to which I have referred to earlier. It is further reinforced by the term of the bond which states that:

“The bond is a continuing covering security for all and any sum or sums of money which may now or in the future be owing to or claimable by the Bank from any cause aforementioned and any other cause of whatsoever nature, and remains of full force and effect until cancelled in the deeds registry notwithstanding any fluctuation in, or temporary extinction of, the Mortgagor’s indebtedness to the Bank from time to time.”

16. I am driven to the conclusion that the scope, nature and extent of the debt at the time of the execution of the bond cannot be determined *ex facie* the bond. This destroys the liquidity of the document. I am strengthened in this conclusion firstly, by the fact that the amount claimed exceeded the maximum amounts permitted in terms of the bond. Secondly, by the fact that the parties never intended the bond to be a liquid document. The bond provides for a certificate of indebtedness to serve as a liquid document, I have already held earlier that a document cannot become liquid *post ex-facto* and a certificate of indebtedness cannot acquire the attributes of a liquid document. In any case no certificate of indebtedness was attached to the summons or the application for summary judgment. In my view, on a proper construction of the terms of the bond, it cannot be said that it is a liquid document for the purpose of summary judgment.

LIQUIDATED AMOUNT IN MONEY

17. The next issue which needs to be debated is whether the claim of applicant can resort under Rule 32 (b) as a liquidated amount in money. The concept has been described as an amount which has been agreed upon or which is capable of speedy and prompt ascertainment. (See **Lester Investment (Pty) Ltd v**

Narshi 1951 (2) SA 464 (C) at 469F-G.) The court has already found that the fixed amount of indebtedness as reflected in the bond is not a liquidated amount by virtue of the considerations set out in the recital. *Ex facie* the bond it cannot be said that the amount was owing at the time of the execution of the bond or that the amount can speedily and promptly be ascertained. The bond merely stipulated the maximum liability which respondent could incur from time to time. The bond served merely as a continuing covering security for money which is owing or shall be owing in the future from any cause. In any event, no certificate of indebtedness as provided for by the bond was produced as *prima facie* proof of the amount owing.

18. In a full bench judgment **Margo, J**, in **Van Wyngaardt, NO v Knox** (*supra*) at 639D-E, after analysing the meaning of the terms “*liquid document*” (Rule 32(1)(a)) and a “*liquidated sum in money*” (Rule 32(1)(b)) concluded that they represent different categories of claims. He held that it is possible that a particular claim can qualify for both categories. But there is a clear line of dichotomy between the two. Rule 32(1)(a) covers claims which are based on a liquid document, while Rule 32(1)(b) makes provision for money claims in a specific amount where all the elements of a liquid document is not present.

19. The rate of interest is not stipulated in the bond. The applicant claimed 12% per annum which according to the allegations in the summons was fixed by it acting in pursuance of powers conferred upon it by the bond. The bond provides for finance charges on all amounts secured by the bond, if not otherwise agreed upon, be reckoned at the current rate charged by applicant from time to time in respect of the relevant facility. *Ex facie* the bond the finance charges have not been stipulated or agreed upon. The rate to be charged from time to time in respect of the facility is not clear and certain *ex facie* the bond and in the view of the court is not easily ascertainable. The court cannot allow the legal *mora* interest in view of the uncertainty of the nature and scope of the facility mentioned in the bond. There is no indication how the 12% interest claimed on the capital amount is arrived at. The *causa* as stipulated in the bond is so wide that I have found that it could include both liquidated and unliquidated claims. The certificate of indebtedness is possibly a mechanism to overcome the problem, as it would have been prima proof of the amount owing by the respondent to the applicant and could have evidenced a liquidated amount in money. It was not done in the present case.

20. I accordingly hold that the amounts claimed have not been agreed upon nor are they capable of speedy and prompt ascertainment. In my view the amounts

claimed are not liquidated amounts of moneys for purpose of the summary judgment application.

DECLARE PROPERTY EXECUTABLE

21. The final issue is the question of whether the court can declare property executable in an application for summary judgment. There have been conflicting decisions on this issue. In view of the conclusion I have come to in this matter, it is not necessary for me to make a formal finding on this issue. However, I am persuaded that, although Rule 32 does not specifically provide for property to be declared executable, it is an incidence of the judgment as provided for in Rule 45(1). I agree with the decision of **Zulman, J** in **Nedperm Bank Ltd v Verbi Projects** 1993 (3) SA 214 (W) at 219C and **Didcott, J** in **First National Bank of SA Ltd v Ngcobo and Another** 1993 (3) SA 490 (D) that an order for the property to be declared executable is an ancillary relief to summary judgment. In my view nothing prevents an applicant from seeking such relief in an application for summary judgment. However, such relief will only be available if summary judgment is granted. (See **Nedcor Bank Ltd v Kindo and Another** 2002 (3) SA 185 (C) at 188B-D.)

CONCLUSION

Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd
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22. In view of the conclusion that I have come to it is unnecessary for me to consider the various defences which have been raised by the respondent in its opposing affidavit. Suffice it to say that some of those defences may have merit. In the premises summary judgment is refused and the respondent is given leave to defend the action. Costs shall stand over for determination at the trial.

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