134/85

480/84

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE SOUTH AFRICAN PERMANENT BUILDING SOCIETY	Appellant
AND	
D R POWELL	First Respondent
J H FISCHER	Second Respondent
G S SHAERER	Third Respondent

CORAM: MILLER, JOUBERT, TRENGOVE, BOSHOFF, JJA, NICHOLAS, AJA

HEARD: 7 NOVEMBER 1985

DELIVERED: 26 NOVEMBER 1985

J U D G M E N T

MILLER, JA :-

In this / .....

In this case each of the three respondents had defaulted in regard to payments due to the appellant in terms of a mortgage bond passed to secure money lent and advanced by the appellant. On the ground of such default and in accordance with the provisions of the bonds, the appellant sued each of the respondents in the Witwatersrand Local Division of the Supreme Court for, inter alia, payment of the amount of capital still owing under the bonds, interest due and costs on the attorney and client scale. The respondents offered no opposition to the claims and were in fact in default of appearance. The Court a quo, (FLEMMING, J,) in an application for default judgment, granted all the relief claimed, save only that in respect of each of the respondents it awarded costs on the party and party scale, refusing to award costs on the attorney

and client scale despite a provision in each of the bonds to the effect that the appellant would be entitled to attorney and client costs in suing for recovery of any sums due to it by the mortgagor.

The Judge a quo having refused an application by the appellant for leave to appeal against that part of the order in each case which negated the claim for attorney and client costs, the appellant successfully petitioned the Chief Justice for leave to appeal to this Court. The Judgment of the Court a quo has been reported at 1984(4) SA 574. The bank and those sued by it, reflected in the report as parties to the litigation, are not parties to this appeal which concerns only the claims of the appellant against the present respondents. I should also mention that such

differences / .....

differences as there may be in the wording in the several bonds of the provisions relating to the appellant's entitlement to attorney and client costs are of no signi= ficance in the consideration of this matter, for it is clear that in respect of each of the respondents the agreement reflected by the bond was that the appellant would be entitled to attorney and client costs.

The enforceability, in principle, of an agreement between the parties regarding the costs of litigation, has frequently been recognized by the Courts. In Santam Bank Bpk v Kellerman 1978(1) SA 1159(C) at p 1162 H - p 1163 A, GROSSKOPF, J, observed, after a review of many of the decisions of the Courts, that it had been generally, and rightly, accepted that an agreement for the payment of

attorney and client costs was not prohibited by the common law. This view was expressly accepted as correct in Sapirstein v Anglo African Shipping Co (SA) Ltd 1978(4) SA 1(AD) at 14, TRENGOVE, AJA, holding that "there can be no objection, in principle, to a Court giving effect to an agreement between parties concerning their liability for legal costs arising out of a dispute between them". The agreement about costs in Sapirstein's case related to attorney and client costs, which the Court awarded on the strength of the agreement between the parties. The question whether the Court, notwithstanding the agreement between the parties, retains a "residual discretion" to make an award of costs at variance with an award upon which the parties had agreed, was mentioned in the judgment but not

discussed, the Court finding that it was unnecessary to answer that question because whatever the true position in that regard, no grounds existed in the case before it for interfering with the parties' agreement on costs.

In Western Bank Ltd v Meyer, De Waal, Swart and Another, 1973(4) SA 697 (T) at p 701, the full Court of the Transvaal Provincial Division held that valid, effective and enforceable as an agreement between the parties regarding their liability for costs might be, such an agreement "cannot deprive the Court" of its discretion in the matter of costs. The Court's discretion, it was added, "must be judicially exercised" and it followed that

> "unless the 'lessor' (plaintiff) has been guilty of some conduct which in the opinion of the Court entitles the Court to deprive the 'lessor' of its costs, the Court is bound to award costs to the 'lessor'. Moreover for the same reason it

> is bound to award such costs on the agreed basis. Only if the Court finds that there is conduct which justifies it in depriving the 'lessor' of part or all of its costs can it disallow such costs."

It should be noted that in the Kellerman case, GROSSKOPF, J, after referring to the judgment in the Western Bank case and other decisions following upon it, gave expression to some doubt concerning the retention by a Court of any "residual discretion" in respect of an agreement by the parties in regard to costs. At p 1163 A of the report of the Kellerman case the learned Judge confessed to experiencing difficulty in finding any foun= dation in principle ("beginselgrondslag") for assumption by the Court of a discretionary power to refuse to give effect to the parties' firm agreement in regard to costs.

It is not necessary for purposes of this appeal to investigate whether a Court in general enjoys such residual discretionary power because whatever the position may generally be in regard to agreements on costs in respect of other matters, the amendment by Act 90 of 1980 of sec 5(1)(e)(i) of the Limitation and Disclosure of Finance Charges Act, No 73 of 1980 (the Act) has clarified the position in regard to matters arising from transactions which fall within the purview of the Act - i.e., in respect of money lending transactions, which the transactions between the appellants and the respondents clearly were.

The amended sec 5(1)(e)(i) of the Act reads as follows:

"No moneylender, credit grantor or lessor shall in connection with a money lending transaction or a credit transaction or a leasing transaction obtain judgment for or recover from a borrower or credit receiver or lessee an amount exceeding the sum of

(a) .....;

(b) .....;

(c) .....;

(d) .....;

(e) if judgment is obtained for the payment of the principal debt or finance charges owing thereon by the borrower or credit receiver or lessee, legal costs awarded in terms of such judgment:

Provided that :-

(i) the Court in awarding such legal costs may disregard the provisions of any agreement relating to costs between the parties concerned ....."

The proviso quoted above by clear implication recognizes the permissibility and efficacy of agreements relating to costs between the parties and makes it clear that the Court has discretionary power to disregard any such agree= ment. It was correctly observed in the Western Bank case, supra,

at 701 D, that where there is residual discretionary power in the Court to refuse to award costs in conformity with the parties' agreement, such power must be exercised judicially. What this means is that a decision to exercise the power must be taken "not capriciously but for sub= stantial reasons". (Rex v Zackey 1945 AD 505 at p 513). There must exist "some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial". (Ritter v Godfrey (1920), 2 K.B. 47, quoted with apparent approval by GREENBERG, JA, in Merber v Merber 1948(1) SA 446 at pp 452-3.)

I am unable to find in the circumstances of this case that there existed any ground justifying the Court's

refusal to make an award of costs in conformity with the agreement between the parties. The learned Judge a quo considered that the Court's power in this connection extended beyond a mere "residual power" and was a power which could be exercised "whenever it would be an adequately judicial exercise of the Court's discretion, particularly to prevent the imposing of inequity or oppressiveness". (1984(4) at p 574.) But it would not be even an "adequately" judicial exercise of the Court's discretion if it were to disregard the parties' agreement for the sake of preventing inequity or oppressiveness where there was nothing to show that the agreement was in any way inequitable or oppressive, or that the appellant's conduct so rendered it. And there is no justification for finding that a

stipulation / .....

stipulation for payment of attorney and client costs is in itself inequitable or oppressive. As MILNE, J, pointed out in Claude Neon LIghts (SA) Ltd v Schlemmer 1974(1) SA 143(N) at p 152 A, when attorney and client costs are awarded to a plaintiff, "the defendant is merely being ordered to pay costs and charges which plaintiff has to incur and there is no question of unfairness to the defendant". See, too, Sapirstein's case at p 14 B - D.

It appears from the judgment a quo that what finally decided the learned Judge to disregard the agreement relating to costs was that he had before him "nothing more than the fact of such an agreement plus the fact that the matter is undefended and has taken its course as such". The learned Judge was of the opinion that in those circum= stances

"the more appropriate exercise of the Court's discretion would be to ignore the agreement between the parties".

(1984(4) SA at pp 583 H to 584 B.) This is a startling conclusion. Those very circumstances induced the Court in Kellerman's case (at p 1163 A) to decide, with self-evident justification, that whatever the position regarding the Court's residual discretion, there could be no reason or ground for refusal by the Court to enforce such an agreement in an ordinary application for default judgment; and this Court in Sapirstein's case, in similar but not identical circumstances (it was not an application for default judgment) concluded in effect that assuming the existence of the Court's "residual discretion", no grounds existed for exercising it.

Regarding the absence of any facts other than the agreement between the parties it would appear (if I correctly understand the judgment a quo) that the learned Judge considered that it was or should be for the plaintiff in such a matter to introduce further facts in order to show that it would be proper to award him the costs agreed upon. (See 1984(4) at pp 583 A and H - J, read with p 584 A.) This is insupportable. If the defendant considers that there are grounds upon which the Court should exercise its discretionary power to refuse to order the agreed costs to be paid, it is surely for him to raise the matter and to place the Court in possession of the facts and circumstances which he contends support his objection to the making of an order in the terms of the agreement.

(Cf. Shill v / .....

Cf. Shill v Milner 1937 AD 101 at p 106, in regard to a defence of impossibility of performance in answer to a claim for specific performance - and to be read with Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd; 1982(1) SA 398 (AD) at pp 442-3; Magna Alloys and Research SA (Pty) Ltd v Ellis 1984(4) SA 874 (AD) at pp 891 C - D and 897-8, in regard to enforcement or otherwise of an agreement in restraint of trade.)

A Court having before it only the lawful and enforceable agreement of the parties cannot properly exercise a discretionary power to disregard the agreement on the strength of sheer speculation as to the sort of oppressive conduct of which a person in the position of the creditor could conceivably be guilty nor on the strength of its own disapproval or sense of unease in respect of an

agreement such as the parties entered into.

The refusal to order attorney and client costs cannot be allowed to stand and the appeal therefore succeeds. Appellant's counsel intimated that his client was not asking for any costs of appeal.

The appeal is allowed.

The order as to costs made by the Court a quo is amended in respect of each of the respondents by the substitution of the words "on the scale as between attorney and client" for the words "on the scale as between party and party".

There will be no order as to the costs of appeal.

S MILLER
JUDGE OF APPEAL

JOUBERT, JA)
TRENGOVE,JA) CONCUR
BOSHOFF, AJA)
NICHOLAS,AJA)