Case No 418/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NEDPERM BANK LIMITED

Appellant

and

MARGARET ELIZABETH LAVARACK	First Respondent
LEWIS DOUGLAS BAKER	Second Respondent
DAVID FREDERICK DEACON	Third Respondent
CHARLES PETER KERNICK	Fourth Respondent
IAN LOCKHART PORTEOUS	Fifth Respondent

CORAM: EM GROSSKOPF, NIENABER, MARAIS,

OLIVIER et SCOTT JJA

HEARD; 9 MAY 1996

DELIVERED: 31 MAY 1996

JUDGMENT

/NIENABER JA

NIENABER JA:

The appellant, a bank, (referred to hereinafter as "the Bank" or "the Perm" or "Nedperm") agreed to finance a sectional title development undertaken by a close corporation, Banner's Rest Lodge CC ("the CC"), on a property described as rem of lot 766 Glenmore on the lower Natal south coast.

The agreement between the Bank and the CC is contained in a series of inter-related documents: a main agreement, a mortgage bond, the Bank's standard terms and conditions, a letter of advice and a schedule of interest rates, to some of which I shall in due course refer.

The Bank granted the CC a loan of R4 million. One of the contract documents, the letter of advice, specified that repayment of the loan was to be by way of monthly instalments of R71 529. Another clause in another of the documents, the main agreement,

required the CC to "make payment to Nedperm of all amounts received by it from the sale of units in the Development". The crisp question is whether the CC was obliged to make a payment of a monthly instalment of R71 529 even when, at any given date, the sum of the proceeds from the sales of units, duly paid over to the Bank, exceeded the sum of monthly instalments payable under the contract up to that date. If yes, the CC was in arrears with the payment of its monthly instalments. That would mean that the Bank was entitled, as it purported to do, to invoke the acceleration clause in the contract and claim payment of the entire outstanding balance of the loan. And that in turn would mean that the Bank's action against the five respondents, members of the CC who stood surety for its debts to the Bank, would have to succeed. The answer of Thirion J, sitting in the Natal Provincial Division, was no. This is an appeal, with his leave, against that rinding.

Clause 2.2 of the main agreement reads:

> "Nedperm has agreed to grant the Owner [the CC] the said loan and to participate in the Development for a share of the profit on the terms and conditions contained herein."

The proposed development, to be known as Mbabala Lodge, was to consist of 67 sectional title units constructed on the property (comprising a Erst phase of 31 and a second phase of 36 units), which would be marketed to members of the public under the banner and with the assistance of the Bank "by means of an active marketing programme throughout its Branches in the Republic of South Africa and the canvassing of its major V.I.P clients." (Clause 12.1.3 of the main agreement). The main agreement also provided, in clause 12.1.2, that in consideration for such participation by the Bank each agreement of sale of a unit would include a clause requiring the purchaser to apply to the Bank for any loan finance which such purchaser may require to facilitate his sale. The Bank's

involvement, in short, went beyond the granting of a mere loan.

The agreement was finally concluded on 21 June 1989. The money was to be advanced by the Bank "as work progresses to the satisfaction of the Bank's valuers" (clause 4 of the letter of advice). Marketing of the units had commenced even before the agreement was finalised. Fourteen of the units had already been sold off plan. Work thereupon commenced, money was advanced and the building operations were completed by the anticipated date, 16 April 1990, at which time the balance owing inclusive of interest exceeded R4 million. The first monthly instalment was due on 15 May 1990. It was not paid, nor was the second instalment, but by 15 July 1990 an amount of R534 650 had been deposited by the CC and appropriated by the Bank in reduction of the CCs loan account.

If all had gone according to plan the entire loan inclusive of interest would have been redeemed from the proceeds of the sales

of the units in the first phase within a year or so. The CC would have made its profit from the sale of units in the second phase. But, sadly, matters did not proceed according to plan. Sales lagged and on 15 March 1992 the Bank instituted action against the respondents as sureties on the ground of the CC's failure to meet a particular monthly instalment. The amount claimed was the full amount of the loan then owing. The fourth defendant died. His executors were duly substituted as defendants in his stead.

As at 15 March 1992 the total of payments ex sales of units exceeded the total of unpaid instalments.

It is necessary to return in somewhat greater detail to some of the terms of the conglomeration of documents constituting the agreement.

The loan was secured, first, by a first mortgage bond registered in the Bank's favour over the property concerned (6,7839

hectares in extent) as well as over an adjoining property, described as sub 1 of lot 766 Glenmore (2.0002 hectares in extent); secondly, by the five members of the CC assuming liability as sureties and co-principal debtors; and thirdly, by a cession in securitatem debiti of the CC's right, title and interest as seller in and to all the agreements of sale in terms of which units in the development were disposed of.

In terms of the proposed cession in securitatem debiti purchasers of units were obliged to make payment of their purchase prices to the Bank. On the other hand clause 7.1 of the main agreement, quoted earlier, required the CC to make payment to the Bank of all amounts received by it from the sale of units in the development. What in fact happened, was that the various purchasers paid the CC and it is common cause that the CC channelled all monies thus received to the Bank, totalling, by the

date of summons, 15 March 1992, some R4 812 444,24.

In order to effect transfer of the units sold to the purchasers it was necessary for the Bank to release such units from the operation of the bond. This was provided for in clause 14.1 of the main agreement. As units were sold, released from the bond by way of endorsements, and transferred out to the purchasers concerned, the extent of the Bank's security over the properties was of course reduced; but to the extent that the proceeds of the sales were applied to the reduction of the loan, the indebtedness was commensurately reduced. All in all some 30 units were thus released from the operation of the bond.

Both the letter of advice and the main agreement refer to a sum of R200 000 payable to the Bank by the CC. In the evidence this was described as "an administration fee" but clause 6.1 of the main agreement refers to it in different terms. The clause reads:

"6.1 The consideration to be paid by the Owner to Nedperm for the loan shall be as follows:

6.1.1. interest on the portions of the loan paid out by Nedperm from time to time at Nedperm's rate of interest charged on commercial loans from time to time in accordance with the provisions of this Agreement as read with the Mortgage Bond;

6.1.2. the sum of TWO HUNDRED THOUSAND RAND (R200 000,00) being the consideration due to Nedperm for its participation in the Development. The said sum of TWO HUNDRED THOUSAND RAND (R200 000,00) shall be paid in instalments of THREE THOUSAND AND THIRTY RAND (R3 030,00) each payable as and when Nedperm releases units from the operation of the Mortgage Bond provided that the entire sum of TWO HUNDRED THOUSAND RAND (R200 000,00) or any balance due shall be paid no later than 30th September, 1990."

To the extent that each payment of R3 030 was linked solely to the release of a particular unit and not to a series of predetermined dates, it is an indication that those amounts were intended to be redeemable from the proceeds of the sales of units.

The pivotal clauses in this appeal are clause 7.1 of the main agreement, clause 1.6 and 1.7 of the letter of advice and clauses 4, 6.1 and 7.2 of the standard terms.

Clause 7.1 of the main agreement reads as follows:

> "7.1. Interest on the loan shall be debited in accordance with Nedperm's Schedule of Standard Terms and Conditions applicable to loans and Nedperm's Rules, Regulations and Procedures from time to time. The Owner shall make payment to Nedperm of all amounts received by it from the sale of units in the Development."

Clauses 1.6 and 1.7 of the letter of advice stipulate that instalments of R71 529 per month are to be paid, commencing on 15 May 1990. Clause 4 of the standard terms provides as follows:

> "The Mortgagor shall, subject to the provisions of 5 below, pay to the Bank monthly instalments as set out in the Letter of Advice in reduction of the amount outstanding. Unless otherwise specified in the Letter of Advice, the first such instalment shall be paid on or before the 15th day of the month following the month in which the Mortgage Bond is registered and the subsequent instalments on or before the

15th day of each and every succeeding month."

"The amount outstanding" is defined in the interpretation clause of the standard terms as meaning "the total amount owing from time to time by the Mortgagor to the Bank in terms of or arising out of the provisions of the contract".

Clause 6.1 of the standard terms allows the CC, without prior notice, "to make payments in addition to the instalments stipulated for by the Bank, or agreed upon, in terms of the contract."

Finally clause 7.2 of the standard terms reads as follows:

> "The Bank shall be entitled in its sole discretion to appropriate any amounts received from or for the account of the Mortgagor towards the payment of any debt or amount owing to the Mortgagor to the Bank. If the Bank does not specifically appropriate amounts in terms hereof, all amounts received shall be deemed to have been appropriated in the first instance to reducing the interest component of the amount outstanding (resulting from interest being capitalised in terms of 3)."

To sum up. In terms of the contract documents the CC was obliged to pay: (a) R71 529 per month; (b) all the proceeds of the sales of units received by it; (c) R3 030 in respect of each sale and the balance of the R200 000 still outstanding, if any, by 30 September 1990.

The appellant's argument is that it is not permissible to apply the proceeds of (b) to the satisfaction of (a). Two reasons in particular are advanced. The main argument is that (a) and (b) are two completely separate but parallel obligations and that there can be no interaction between the two. The subsidiary argument is that if (b) can be employed in payment of (a) the security provided by the bond over the property may be wholly eroded long before the debt is extinguished.

Neither argument is convincing. I deal with them in turn.

Counsel for the appellant readily conceded that all payments

ex sales of units had to be appropriated to the reduction of the loan indebtedness until it had been fully extinguished. (Clause 7.1 of the main agreement, incidentally, does not expressly contain that qualification; as it is worded it suggests that the Bank is entitled to the proceeds of the sales even after the indebtedness had been discharged. But that can never have been the intention.) Once the concession is made, as it had to be, that the proceeds of the sales of the units had to be allocated to the reduction of the loan indebtedness, it subverts the notion that the agreement provides for two entirely separate and compartmentalised obligations, the one to pay R71 529 per month, the other to remit the proceeds of the sales, and that the latter can never be employed in satisfaction of the former. There is but one indebtedness, the loan plus interest. The contract specifies two sources for its discharge. The minimum amount to be paid in terms of the agreement is R71 529 per month.

In like manner that a debtor is permitted, pace the contract, to make a payment in advance of an instalment date (cf Bennitz v Euvrard 1943 AD 595 at 602), so too he is entitled to make a payment in excess of its amount. Provided it was intended as a payment on account of the indebtedness and accepted as such, the over-payment will discharge or reduce the indebtedness, as the case may be. There is nothing in this agreement to inhibit the CC from paying more than the minimum amount agreed upon. On the contrary, clause 6.1 of the standard terms expressly permits it. The CC may do so from its own sources of funding, if so minded. And where the proceeds of the sales over any given period exceed R71 529 per month it is obliged to do so in the terms of clause 7.1 of the main agreement.

The position is therefore as follows: (a) if there were no sales the CC had to pay R71 529 per month and it had to do so from

other resources; (b) if sales were to fall short of R71 529 per month the CC had to make up the difference from other resources; (c) where the proceeds of the sales exceeded the minimum payment required the CC was excused, for as long as that situation obtains, from paying the monthly instalments.

What the CC would obviously not have been permitted to do was to peg the payments ex sales of units to the minimum of R71 529 per month and to hold back the balance until it suited its purpose to release it: the agreement obliged the CC to pay over the entire proceeds of the sales to the Bank and any failure to do so would have been a contravention of clause 7.1 of the main agreement.

I turn to the subsidiary argument. The reasoning is as follows. If the only payments made were the monthly instalments of R71 529, the entire debt, inclusive of interest, would have been

redeemed in approximately 20 years; initially by far the greater portion of each payment of R71 529 would have been allocated to the interest as opposed to the capital component of the debt. The same would be true if the opposing view is assumed to be correct, namely, that payments ex proceeds of sales were to be regarded as payments in lieu of the stipulated instalments. In that event, if the proceeds of the sales happened, for instance, to be maintained at a level of just above R71 529 per month then, because all amounts received were deemed to have been appropriated to the redemption of interest before capital (clause 7.2 of the standard terms), the capital component of the loan would have been reduced by less than 100% of the proceeds of the sale of the unit paid over. Meanwhile, as each unit sold was transferred out, the value of the security will have decreased by an amount equivalent to 100% of the value of the unit. A reduction of the value of the security at a rate in excess of

the reduction of the capital amount owing means that a point will eventually be reached when the security is extinguished but the debt is not. A secured debt is thus converted into an unsecured one and that, so it was contended, could never have been the intention of the parties.

I am unpersuaded by this argument. The potential erosion of security complained of is a mere hypothesis founded on the inability of the CC to maintain its schedule of sales. That was not an eventuality that the parties anticipated or contemplated. It has not been suggested that there is scope for a tacit term to cater for it. Such a term would have had to provide that parity should at all times be maintained between the value of the security and the amount owing. If that had indeed been the thinking of the parties, it is inconceivable that in a contract of this complexity they would not have provided for it expressly. It would then have been an

express provision that the proceeds of the sales were to be kept intact by the Bank in a fund designed to protect the equilibrium between the value of the bond and the level of indebtedness. If the entire fund were kept intact until the debt had been extinguished, the Bank would of course have become progressively over-secured; and a scaling down exercise whereby only payments ex sales of units in excess of the level of indebtedness were appropriated to the debt, would itself require a sophisticated contractual mechanism. Either way provision would have had to be made for other matters such as the interest earned by the fund, whether it accrued to the Bank or was to be applied to the debt, and so forth. Nothing of the sort can be read into this contract.

There are additional reasons why the appellant's view, based on a supposed correlation between the level of indebtedness and the value of the security, is not in my view sound. I have earlier

alluded to the payment of R200 000. The payment of R3 030 is specifically linked to the sale of each unit. If all 67 units were sold the debt of R200 000 would have been discharged. The agreement therefore recognises that the payment of R3 030 per sale can be effected from the proceeds thereof. Any such payment, accompanied as it is by the release of the unit concerned from the bond, would reduce the security without reducing the indebtedness under the loan of R4 million. A disturbance of the supposed principle of parity between the value of the security and the level of indebtedness under the loan is therefore implicit in the terms of the agreement itself.

Finally there is the consideration which weighed with the court a quo. It is stated in these terms:

> "The Owner obtained the loan in order to finance the development. Its only income from the development would be from the sale of units. If the plaintiffs counsel's contentions were to be upheld it would mean that the Owner

> would have had to find R858 348 per year from 15th May 1990 from some source other than the development, in order to pay the instalments. That would not have been feasible and it could not have been what was in contemplation of the parties when they concluded the agreement."

I fully agree. It is inconceivable that the parties could have had in mind that the CC might be obliged, for instance, to approach the Bank or some other financial institution to assist it to pay the R71 529 per month when, as it happens, the sales were generating an amount far in excess thereof.

For these reasons I agree with the court a quo. It follows that the appeal must be dismissed. There was an application for condonation by the appellant in respect of the late filing of its notice of appeal. The application was resisted by the respondents solely on the ground that the appeal lacked merit. The result at which I have arrived vindicated the respondents' counsels' attitude.

The application for condonation is accordingly refused with

costs, including the costs of appeal. Such costs are to include the costs of two counsel.

P M Nienaber Judge of Appeal

Concur
E.M. Grosskopf A
MaraisJA
Scott JA

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(APPELLATE DIVISION)

In the matter between:

NEDPERM BANK LIMITED Appellant

and

MARGARET ELIZABETH LAVARACK First Respondent

LEWIS DOUGLAS BAKER Second Respondent
DAVID FREDERICK DEACON Third Respondent
CHARLES PETER KERNICK Fourth Respondent
IAN LOCKHART PORTEOUS Fifth Respondent

JUDGMENT

OLIVIER JA:

The question to be decided in this appeal is whether payments made by the debtor in fulfilment of its obligation to pay over to the creditor the proceeds from the sale of units can be said to constitute,

simul ac semel, the fulfilment of its obligation to pay at some time in the future,monthly instalments in terms of the loan agreement.

For the reasons that follow 1 hold the view that the question must be answered in the negative.

The contract:

The terms of the composite contract dealing on the one hand with the total debt and on the other hand with the manner in which that debt has to be liquidated, are the following:

The debt:

In terms of the grant of the building loan ("the grant") the amount of the loan was R4 million. It would bear interest at a rate prescribed in the schedule of standard terms and conditions ("the schedule"), calculated monthly in advance on the 16th day of each month. Such interest would be capitalized and thereupon it would form portion of the total amount outstanding. In terms of the grant interest

would run on the portions of the loan paid out by the bank from time to time.

Furthermore, in terms of the agreement ("the agreement") signed by the bank and the borrower respectively on 15th and 21st June 1989, the borrower was also indebted to the bank in the sum of R200 000 as an "administrative fee".

The liquidation of the debt:

The composite contract made provision for the following obligations relating to payment:

(i) The grant provided in paras. 1.6 and 1.7 that monthly instalments would amount to R71 529, payment thereof to commence on 15th May 1990. The obligation to pay monthly instalments was reiterated in para. 4 of the schedule, which reads as follows:

> The mortagor shall.. . .pay to the Bank monthly instalments as set out in the letter of Advice [i.e. the grant] in reduction of the amount outstanding. Unless otherwise

specified in the letter of Advice, the first such instalment shall be paid on or before the 15th day of the month following the month in which the Mortgage Bond is registered and the subsequent instalments on or before the 15th day of each and every succeeding month. (My underlining.)

(ii) The last sentence of clause 7.1 of the agreement reads:

The Owner shall make payment to Nedperm of all amounts received by it from the sale of units in the Development. (My underlining.)

(iii) Para. 6.1.2 of the agreement stipulates that the amount of R200 000 (the administration fee) shall be paid in instalments of R3 030 each, each payable as and when the bank releases units from the operation of the mortgage bond, provided that the entire sum of R200 000 or any balance due shall be paid no later than 30th September 1990. (My underlining.)

The last obligation mentioned under (iii) is only indirectly relevant to the issue under discussion. The crux of the issue stems from the fact that the borrower failed to make any payment of instalments under (i) above at all when they became due and payable, but it did pay over the amounts received by it from the sale of those units sold before the issue of summons, i.e. it did fulfil its obligation under (ii) above.

The borrower argues that the sum paid under (ii) exceeds the sum due under (i), and that it was not in arrears with its obligation under (i) when action was instituted.

The bank argues that fulfilment of (ii) cannot be and was not fulfilment of (i), as these two obligations are independent and cumulative. By paying over the proceeds of the sale of the units, the borrower fulfilled its duty under (ii) and that obligation only. For such payment to be considered also payment in advance of the monthly instalments due under (i) one has to read (erroneously) something into the composite contract that is not there at all, viz. a qualification of obligation (i) (i.e. of

clause 1.7 that monthly instalments shall be paid in the amount of R71 529 as from 15th May 1990) . The bank's case is that the respondents have not relied on any tacit or implied term to introduce such qualification and that a proper construction of the composite contract does not lend itself to the interpretation contended for by the respondents.

The first step in the enquiry then takes us to an analysis and interpretation of the terms of the composite contract. If it appears from such enquiry that payments of the proceeds from the sale of units were automatically simul ac semel prepayment of future instalments, cadit quaestio. It it appears otherwise, the second step is to examine the common law rules governing payment, the onus to prove payment of a particular debt and the allocation of debts in the context of the particular facts of the case.

The interpretation of the composite agreement.

Because our law in principle accepts that consensus is the foundation of contractual liability, it also still adheres mainly to the historical-psychological method of interpretation as opposed to the normative approach. It is therefore necessary to determine the

common intention of the parties as a fact existing at the time of contracting. (See Farlam and Hathaway, Contract: Cases, Materials and Commentary, revised by Lubbe and Murray, 3rd ed. Juta, 1988 at 451, 461, 463 and 469 for a discussion of the two approaches. The normative approach is best advocated by the Dutch writer J M van Dunne in his doctoral thesis,
Normatieve Uitleg van Rechtshandelingen:

Een
onderzoek naar de grondslagen van het geldende verbintenissenrecht, Deventer, 1971, at 7 et seq.).

In seeking the common intention of the contracting parties, one must apply to the composite contract a contextual approach. This requires ..."that regard must be had not only to the language of the rest of the provision concerned or of the contract as a whole, but also to considerations such as the apparent scope and purpose of the provision." (Melmoth Town Board v Marius Mostert (Pty) Ltd 1984 (3) SA 706 (A) at 728 G per Van Heerden JA) . The apparent scope and purpose of the provisions of the contract (as they appear from the document itself) may be complemented by such information regarding the background circumstances under which the contract was concluded as will enlighten the Court on the broad context in which the

words to be interpreted were used (Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) at 624 F-G; Jaga v Dönges NO: Bhana v Donges NO 1950 (4) SA 653 (A) at 662 G-H). It follows that interpretation of a contract should not proceed from a consideration of the words and terms of the contract in abstracto, but always having regard to the broad context, nature and purpose of the contract (Swart en 'n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202 B-D).

On this approach, the following facts appear to be relevant:

(a) The borrower, Banners Rest Lodge CC, whose members are the respondents, wished to develop a piece of land at Munster as "Mbabala Lodge". The development would produce 67 units, which would be registered on a sectional title basis and sold to the public. When negotiations between the borrower and the bank started in March/April 1989, the projected profit forecast was R2,76 million, and 14 units had already been sold off plan. It was also envisaged that the first phase, consisting of 31 units,

would be completed in 6 to 8 months, i.e. at the latest by April 1990. That is why para. 1.10 of the grant stipulates the completion date as 16th April 1990.

(b) The borrower needed to secure R4 million to complete the first phase of the project, and wished to make withdrawals against this sum from time to time as necessary. Interest on the amount advanced would run from the moment of each advance, capitalized as aforesaid. Provisions to this effect were made in the grant and the agreement. Should the building work on the property not be completed by 16th April 1990, interest would be charged on the full amount of the loan, i.e. R4 million, from that date. This was provided for in the further conditions annexed to the grant.

(c) It was agreed that the financing by the bank would take the form of a conventional mortgage bond, the capital and interest to be paid off by monthly instalments over a period of time. That is why the grant

refers to monthly instalments of R71 529. It was common cause that if no earlier capital redemption was effected, the total amount outstanding would be liquidated after twenty years.

(d) The obligation to pay monthly instalments would commence only one month after the envisaged completion date, i.e. on 15th May 1990, so as to give the borrower an opportunity to complete the building work without having to pay interest before such completion. That is why para. 1.7 of the grant provides for 15th May 1990 as the commencement date for payment of monthly instalments.

(e) The release of each unit from the bank's mortgage bond,as it was sold, would diminish the security provided by the bond; on the other hand, the total amount outstanding would be reduced by the said payments.

(f) It was envisaged that the first phase of the development, consisting of 31 units, would

be completed early in 1990 and that sales of the units would continue throughout, reducing the total indebtedness of the borrower to the bank within a very short period. If this had not taken place before 16th April 1990, monthly instalments as aforesaid would become due and payable as from 15th May 1990.

(g) The purchase price of a number of units sold was paid over by the borrower to the bank, the amount of the debt commensurately lessened, and the relevant units were released from the mortgage bond. A number of units remained unsold because of a slump in the market.

(h) The borrower did not effect payment of any instalments as envisaged by the grant, nor did it allocate or designate any payment as prepayment of a monthly instalment or instalments. However, by the time of issue of summons the total amount paid by way of the payment of the proceeds from the said sales exceeded the amount which was due and

2 payable in the form of instalments. If one allocates the proceeds from such sales to the instalments, the borrower was not in mora. But if one allocates the proceeds from sales to fulfilment of an obligation to pay to the bank the full proceeds from such sales, and only to the fulfilment of that obligation, the borrower was in mora as from 15th May 1990.

(i) The grant, incorporating the obligation to make monthly payment of instalments, is dated 3rd June 1989. The written agreement relating to the payment of the proceeds from the sale of units and the payment of the fee of R200 000, was signed by the appellant and the borrower respectively on 21st and 15th June 1989, i.e. quite some time after the date of the grant.

In my view the interpretation of the composite contract advocated by the respondents is untenable for the following reasons:

(a) It is clear that the dominant obligation of

3 the borrower was to pay the monthly instalments. Not only was such obligation chronologically the first one to be undertaken, but the evidence is to the effect that the loan was given on the ordinary home-owner's commercial terms, i.e. the debt had to be paid in monthly instalments which would reduce the interest and capital indebtedness. The obligation to pay the monthly instalments would endure even if no units were sold, or if the proceeds from the units sold were insufficient to extinguish the whole debt. On the other hand, if the debt was extinguished after 20 years solely by the borrower paying the monthly instalments, the obligation to pay over the proceeds from the units would fall away, because such payment would then be indebitum.

(b) It is also clear that the two obligations, the one to effect payment of monthly instalments and the other to pay over the proceeds from the sale of units were expressed as two separate obligations. The

4 one arose from the grant, the other from the agreement. The one, for payment of the monthly instalments, arose on a specified date, became due and payable on specified dates, and was for the payment of a sum of money fixed and certain. The other, the payment of the proceeds from the sale of units, was a conditional debt, i.e. it became due and payable only upon the happening of a future, uncertain event, viz. the sale of a unit. It was not for a specified amount, but for the proceeds from the sale, whatever they might be. And it would terminate on an unspecified date, i.e. when all units had been sold.

(c) The two obligations are treated as separate, distinct obligations in the composite contract, and there is no indication that payment of the one would be considered as payment for the other. This proposition is evident and incontrovertible in the case of payment of the monthly instalments. Suppose the borrower had paid four monthly instalments on due date, i.e. R286 116, and

5 then sold the first unit for R250 000. An argument by the borrower that it was exempt from payment of the proceeds from the sale of the unit because it had paid these proceeds in advance by paying the said monthly instalments would rightly be regarded as absurd: in paying the instalments the borrower liquidated a particular obligation in terms of the composite contract and it could not, by the very same payment, also claim to have fulfilled another obligation. In such a case it could hardly be argued that liquidation of the one debt was simultaneously liquidation of the other. The same logic, and the same legal principle must surely apply to the actual facts now under discussion: here, conversely, the borrower paid over proceeds of sale with no express agreement or allocation that the payment should serve as monthly instalments. By paying as it did, the borrower was fulfilling a separate and distinct contractual obligation and its intention could not have been otherwise. By

6 accepting the proceeds from the sale, the bank was accepting payment in fulfilment of a particular obligation of the borrower, and its intention could not have been otherwise.

(d) There are, in my view, no indicia in the composite contract that payment of the proceeds from the sale of a unit was simultaneously prepayment of future instalments. On the contrary, the obligation to pay monthly instalments is expressed in absolute, unqualified terms. The verb shall, not may, is used, indicative of a peremptory obligation. There is no cross-reference to payment of the proceeds from the sale of units which one would have expected had it been the intention that such payment would be an alternative manner of liquidating the obligation to pay monthly instalments.

(e) That the interpretation favoured by the respondents is untenable, can also be illustrated by the following example:

Suppose the borrower had sold a unit for R150 000, and with the money in hand had approached the bank and offered to pay R71 529 thereof as a prepayment of a future instalment, not yet due, and the balance in satisfaction of its obligation to pay over the proceeds from the sale. Suppose also that the contract was silent on this point. Surely the bank justifiably would have responded that such allocation was unacceptable, because its effect would be that the capital redemption, envisaged by the obligation to pay over the proceeds from the sale, would then fall short by R71 529. Or, to put it differently, to the extent that part of the payment went as payment of future instalments, there was non-fulfilment of the obligation relating to capital redemption. Under the common law, the bank would have been entitled to reject such an offer or allocation by the debtor, by virtue of the rule that a debtor cannot by anticipation extinguish debts not yet due to the detriment of debts already due. (Executors of Jacob Watermeyer v Executor of

8 E B Watermeyer 1870 Buch 69 at 71 in medio). Can the intention that such an allocation would take place automatically each time the proceeds from a sale were paid over be found in the documents making up the composite contract? In my view the answer is no.

(f) The only mention in the composite contract of anticipation of payments is in clause 6.1 of the schedule, and it is against the interpretation contended for by the respondents. It reads as follows:

> The Mortgagor shall be entitled at any time and without notice to make payments in addition to the instalments stipulated for by the Bant, or agreed upon, in terms of the contract. (My underlining.)

I am of the view that clause 7.1 of the agreement, which provides for payment of the proceeds from the sale of units, was intended not to be in conflict with, but reconcilable with clause 6.1 of the

9 schedule. The two clauses make it clear, in my view, that payment of the proceeds from the sale of units as "agreed upon in terms of the contract" were "in addition to the instalments stipulated" - and not as prepayment of future instalments.

In my view the respondents' contention, as far as it is based on the interpretation of the composite contract, must fail.

That introduces the second phase of the enquiry, viz. the application of the common law to the facts. Under the common law, a debt cannot be paid by instalments without special agreement. It follows that a debtor is not entitled to pay instalments on account against the wish of the creditor unless in accordance with the terms of an agreement to that effect (Bernitz v Euvrard 1943 AD 595 at 602 in fine - 603).

This rule accords with the basic point of departure that payment of a debt is a bilateral juristic act, requiring consensus between the creditor and the debtor. (Saambou-Nasionale Bouvereniging v Friedman

0 1979 (3) SA 978 (A) at 992 H-993E; Volkskas Bank Bpk v Bankorp Trust (h/a Trust Bank) en 'n Ander 1991 (3) SA 605 (A) at 612 C-E).

It is also trite law that the onus to prove valid payment rests on the debtor (Pillay v Krishna 1946 AD 946 at 955).

From these basic principles of law it follows logically, in my view, that where there are two obligations to be fulfilled by a debtor, he bears the onus of proving, not simply that a payment was made, but also of proving the necessary consensus regarding which debt was paid. I agree, therefore, with the formulation of the relevant principle by Viljoen AJ in Italtile Products (Pty) Ltd v Touch of Class 1982 (1) SA 288 (0) at 290 H, viz.:

> Although I have myself also not found authority dealing with a case such as the present, where payment is admitted but there is a dispute regarding the debt for which it was intended, I have no doubt that the onus of proving, not only that payment was made, but that the debt in question was

> 1 paid, rests upon the debtor. This is in accordance with the principle that it is the party making a positive averment who bears the onus of proof. Moreover, it seems to me that the very requirement that a debtor should prove payment of a debt, in itself necessitates proof that the debt in guestion has been paid and not simply that a payment has been made to the creditor.

As pointed out above, such onus would require proof of consensus regarding the identity of the debt being paid.

Did the respondents in the present case acquit themselves of this burden?

It was never averred by nor argued on behalf of the respondents that there was, subsequent to the conclusion of the original, composite contract, consensus that payment of the proceeds from the sale of units would be accepted as prepayment of future monthly instalments.

It was never averred by nor argued on behalf of the

respondents that the borrower had allocated payment of the proceeds from the sale of units to pre-payment of monthly instalments. What is more, they have not proved any acceptance by the bank of any such payments as prepayment of monthly instalments.

In the view that I take of the matter, the bank was entitled to allocate the said payments in the manner in which it did. When the borrower did not pay the monthly instalments on due date, it committed a breach of contract, which entitled the bank to put the acceleration clause in operation. As sureties, the respondents are liable in terms of the composite agreement.

It was agreed between the parties that should the appeal succeed, the order set out hereunder, shall replace that of the court a quo.

I would, therefore, have made the following order:

The appeal succeeds with costs, including the costs of two counsel. The order made by the court a quo is replaced by the following order:

1. There shall be judgment for the plaintiff against respondents in solidum for payment of the sum of R3 398 912,33 together with interest thereon at the rate of 18,75% subject to the variation thereof in terms of the plaintiff's schedule of interest rates) calculated from 10th November 1993 to date of payment.

2. Defendants are ordered to pay plaintiff's costs of suit on the scale of attorney and client, including the costs of two counsel.

P J J OLIVIER JA