IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 457/2004

Reportable

In the matter between:

ETHEKWINI MUNICIPALITY **Appellant**

and

VERULAM MEDICENTRE (PTY) LTD **Respondent**

CORAM: HOWIE P, ZULMAN, BRAND, LEWIS JJA et MAYA AJA

HEARD: 12 SEPTEMBER 2005

DELIVERED: 29 SEPTEMBER 2005

Summary: *In duplum* rule: not applicable unless interest is payable on debt in arrear.

JUDGMENT

MAYA AJA/

MAYA AJA

[1] The sole issue that this court is called upon to determine in this appeal (before us with the leave of the court *a quo*) is whether the *in duplum* rule applies to the respondent's claim against the appellant. The judgment of the court *a quo* (Durban High Court) is now reported as *Verulam Medicentre (Pty) Ltd v Ethekwini Municipality* 2005 (2) SA 451 (D).

[2] The facts, which are common cause, are as follows. In December 1993 the parties concluded a written agreement of sale in terms of which the appellant town council sold the respondent an immovable property for the sum of R1 592 000. The purchase price was payable by way of a 10 per cent deposit in the sum of R159 000 and, thereafter, quarterly instalments which would bear interest at an agreed rate on the balance over a period of two years. Transfer of the property would be effected upon payment of the capital and interest.

[3] By October 1996 the respondent had paid a sum of R1 141 153, 48 and wished to pay the outstanding balance to take transfer. It was, however, discovered at that stage that the appellant had failed to comply with certain provisions of the Local Authorities Ordinance Act 25 of 1974 when the agreement was concluded, thus rendering the agreement invalid. The appellant consequently became liable to repay the amount of R1 141 153, 48 to the respondent.

[4] However, the parties engaged in further negotiations which culminated in the conclusion of a second agreement ('the agreement') on 1 April 1999. The terms of the agreement were, *inter alia*, that the appellant would retain the amount that the respondent had paid under the initial agreement as part payment of the renegotiated purchase price of R3 500 000. The balance of the purchase price would then be paid in cash against registration of transfer. The respondent was required to apply for a rezoning of the property. Transfer of ownership of the property would pass only if that application was successful.

[5] In the event that the rezoning application was refused, clause 12 of the agreement provided as follows:

'…

12.6 If the property has not been re-zoned in accordance with 12.3 above to the reasonable satisfaction of the Purchaser within one year after the date of signature by both parties of this agreement, or within such longer period as the Purchaser and Seller may in writing agree, the Purchaser shall be entitled, at the entire election of the Purchaser, by notice in writing to the Seller to

12.6.1 cancel this agreement, or

12.6.2 elect to proceed with this sale.

12.7 If the Purchaser cancels this agreement in terms of 12.6.1 above all amounts of money that have been retained by or paid to the Seller in terms of the FIRST AGREEMENT and or this agreement shall be immediately refunded by the Seller to the Purchaser together with interest

thereon calculated from the date of payment by the Purchaser to the date of repayment by the Seller to the Purchaser at the rate of 15, 5% per annum compounded monthly in arrears…'

[6] The respondent did not lodge the rezoning application within the period stipulated in clause 12.6 but did so only in July 2001, pursuant to pressure being brought to bear upon it by the appellant. The respondent was subsequently notified in August 2002 that the rezoning application had been unsuccessful. In September 2002, it opted to cancel the agreement in the exercise of its rights in terms of clause 12.6.1 and simultaneously invoked the provisions of clause 12.7 by claiming payment of a sum of R4 049 369,96 from the appellant. This sum of R4 049 369,96, which significantly exceeded the original capital payments, was constituted by the capital sum of R1 141 153, 48 and accumulated interest calculated at the rate of 15,5 per cent, compounded monthly in arrears, from the various dates of payment to the appellant.

[7] In response to this claim the appellant raised as a legal contention in terms of Uniform rule 6(5)(d)(iii), that the claim was subject to the *in duplum* rule and that the respondent was, therefore, only entitled to the capital sum and interest not exceeding such capital sum.

[8] Galgut AJP held that restitution should be made to the appellant on cancellation of the agreement as the respondent had not acquired possession of the

property and thus derived no benefit from it, whereas the appellant had held the capital sum for a considerable period of time. He interpreted the interest stipulation in Clause 12.7 (at 455H–I) to mean that the parties intended that the respondent would 'receive proper restitution…the full present day value of the capital it had paid all those years earlier, a consideration which the parties obviously considered fair in the light of the abovesaid circumstances'. He concluded that in any event the *in duplum* rule did not apply as the respondent did not require the protection that the rule was designed to provide and that the interest stipulation was not of the type which public policy would regard as improper and was intended to fulfil a purpose other than the one for which interest is usually intended.

[9] The effect of the *in duplum* rule is that interest due in respect of a debt ceases to run when it reaches the amount of the unpaid capital sum: *Union Government v Jordaan's Executor* 1916 TPD 411 at p 413. The rule is based on public policy and is meant to protect debtors from exploitation by creditors by forcing them to pay unregulated charges, and enforce sound fiscal discipline on creditors. It cannot be waived in advance or during the period of the loan: *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA). It does not relate only to money lending transactions but applies to all contracts where a capital amount that is subject to interest at a fixed rate is owing:

LTA Construction Bpk v Administrateur, Transvaal 1992 (1) SA 473 (A) at 482I-483A.

[10] The scope of application of the rule is succinctly set out in *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) where Blieden J said at 655D-I:

'[T]he *in duplum* rule is confined to arrear interest and to arrear interest alone. In my judgment the reason for this is plain: it is to protect debtors from having to pay more than double the capital owed by them at the date on which the debt is claimed…

Counsel's reliance on the *LTA Construction* case … for the submission that interest does not have to be in arrear for the *in duplum* rule to apply is, in my view, unfounded. The fact that the capital amount in each of these cases had either not been ascertained or agreed to at the date interest started to run does not detract from the fact that the interest claimed was in fact arrear interest. This is wholly different from the present case, where interest was at no time in arrear, but was to be calculated as future interest in the relevant time period involved.'

[11] The parties, although they did not contend that the agreement was ambiguous in any respect, differed in their interpretation of the nature of the agreement and the true purpose of the interest stipulation. It was contended on the appellant's behalf, firstly, that in determining the nature of the agreement it had to be considered that there were two sale contracts embodied in the agreement; alternatively, it was dual and conditional (on the rezoning application) in nature.

Reliance for this submission was placed on clause 18 of the agreement which deals with the rights and claims of the parties arising from the initial agreement. Secondly, so the argument went, the interest clause agreed upon by the parties was accumulated or unpaid interest, similar to that applicable to a bank overdraft facility, intended to make good the amount paid under the initial agreement. The interest was not due as long as no demand for payment of the 'debt' was made, but once such demand was made it ran for the entire period thus rendering the 'debt' subject to the *in duplum* rule.

[12] It is well established that the approach to be adopted in ascertaining the common intention of parties to a contract is first to determine the ordinary grammatical meaning of the words employed in the agreement, having regard to the context in which the relevant word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract: *P G Bison Ltd v The Master* 2000 (1) SA 859 (SCA) para 7; *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768A-B and *Metcash Trading Ltd v Credit Guarantee Insurance Corp of Africa Ltd* 2004 (5) SA 520 (SCA) para 10. What the nature of the agreement and the objective of the interest clause are in the instant case must, accordingly, be ascertained by analysing the relevant words in the context of the contract as a whole and the common intention of the parties.

[13] Clause 18 reads:

‘Provided that

18.1 the property is duly transferred into the name of the Purchaser in accordance with the provisions of the agreement, or

18.2 failing such transfer, the sums referred to in 2.3 of this agreement together with interest thereon calculated from the date of payment to the Seller to the date of repayment to the Purchaser at the rate of 15, 5% per annum, are duly repaid by the Seller to the Purchaser,

The Purchaser hereby waives any claim which it may have against the Seller under the FIRST AGREEMENT for damages and any rights or claims which either party may have against the other arising from the FIRST AGREEMENT shall be deemed to be extinguished.’

[14] In my view, the words in the clause, read in their ordinary sense, do no more than make provision for the parties’ rights arising out of the initial agreement in the event that the intended transaction did not come to fruition. It is plain from the terms of the agreement that the parties, confronted with the problem of the invalidity of the initial agreement and still keen to contract with each other, sought to find a solution. They therefore renegotiated another sale agreement and, in that exercise, compromised any claims they might have had against each other under the initial agreement. There is only one agreement and the waiver clause cannot be understood to indicate the existence of two contracts.

[15] Regarding the true nature of the interest stipulation in clause 12.7, it is significant that when the parties concluded the agreement they agreed that only the sum of R1 141 153,48 would be credited to the renegotiated purchase price which, by that stage, was more than double the original amount. The appellant argued that if the parties intended the interest clause to achieve 'full restitution' as the court *a quo* found, then both the capital amount and interest would have been credited to the new purchase price. I have difficulty understanding this submission. This, to my mind, is precisely one of the facts which show that the parties did not intend the interest clause to be interest in the ordinary sense. They fixed interest to run only if the sale transaction did not come to pass. It was therefore meant to serve as compensation only in that event. Agreeing that interest would run from the date of payment was, undoubtedly, a deliberate choice. Nothing precluded the parties from stipulating that it would run, for example, from the date of cancellation of the agreement, bearing in mind that if the rule was applicable interest would already have exceeded the capital payments when the agreement was concluded. This clearly is not conventional interest. The parties unambiguously meant it as a means of formulating a fair and proper restitution for what had been paid and received.

[16] Another submission made on the appellant's behalf was that the *Sanlam* case is distinguishable from the present one. There the parties concluded a contract which provided that if the 25 year lease in issue were to be terminated before its

expiry by effluxion of time, the respondent would take transfer of the leased property against payment to the applicant of a specified capital sum together with interest thereon, calculated from the date of commencement of the lease to the date of transfer of the property. The court held, *inter alia*, that the *in duplum* rule did not apply to the interest claimed because it was not interest in the sense intended in the rule, but was agreed upon by the parties to fix what they considered to be a fair price for the property if the lease was cancelled within the 25 year period.

[17] The appellant's contention was that in the present case the interest clause is not stipulated in a way which shows, as in the *Sanlam* case, that it is merely a component of a formula designed to determine the quantum of a capital obligation, but describes a capital debt which must be repaid upon the happening of one of a number of events, and that the language used then indicates expressly that interest will be added to that debt. I do not agree. The determinant feature present in both matters is that the parties fixed an interest rate which was to be applied over a period of time to achieve a fair and proper restitution.

[18] The authorities to which reference is made in paragraph 10 above make it abundantly clear that the rule applies only to arrear interest. In the present matter no debt was owing and no interest accrued until the rezoning application was refused and the respondent elected to cancel the agreement. The interest in issue is,

therefore, not arrear interest. It was not the appellant's case, in any event, as indicated previously, that it is arrear interest. The *in duplum* rule is, in the circumstances, not applicable in the instant case.

[19] For reasons which appear hereunder, I revert briefly to some of the findings made by the court *a quo*. In arriving at his conclusion, Galgut AJP considered various relevant decided cases and said at 454G-455C:

'[In] the case of *Sanlam Life Insurance Ltd v South African Breweries Ltd* [supra] …Blieden J held (at 655B-C) that the [*in duplum*] rule did not apply to the interest at issue because on a proper construction of the contract between the parties the interest provided for in the agreement was 'not "interest" in the sense referred to in the *in duplum* rule' but that the parties had intended the interest 'to fix what the parties considered to be a fair price for the asset to be purchased if the lease was cancelled within the 25-year period'.

It would appear from this that where on a proper construction the interest at issue serves a purpose other than the ordinary function that interest fulfils, the *in duplum rule* will not apply.

It may well be that the test is not as strict as that, however, because Blieden J went on to refer (at 655E-F) to single capital annuities and similar investments, and pointed out that concerns doing business of those kinds do not require protection and that public policy would not require that the investors concerned be limited by the rule, and in *Commissioner, South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA), which admittedly turned on entirely different facts, Froneman AJA said (at 75B-C) that the *in duplum* rule can be applied only where it serves considerations of public policy in the protection of borrowers against exploitation by lenders.

It appears therefore that the test might simply be whether in the particular case public policy requires the debtor to be protected against exploitation by the creditor.

On either test, however, it is clear that the *in duplum* rule does not apply.'

[20] In view of the conclusion that I have reached, it is not strictly necessary to decide the correctness or otherwise of the findings relating to the two tests (which the learned judge coined the 'strict' and the 'lenient' tests, respectively). It must however be pointed out that his interpretation of the *Woulidge* case, regarding the extent of the *in duplum* rule's application, appears to be based on an error. The judgment is reported both in the South African Law Reports (the version indicated in para 20 above on which the court *a quo* relied) and the All South African Law Reports. The relevant portion is quoted as follows in the SALR at para 12:

'It is clear that the *in duplum* rule can be applied in the real world of commerce and economic activity *only* where it serves considerations of public policy in the protection of borrowers against exploitation by lenders (*LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482F-G; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA) at 828D).

(My emphasis.)

[21] The correct quotation is, however, the one contained in the other report, [2002] 2 All SA 199 (SCA) and it reads as follows at para 12:

‘It is clear that the *in duplum* rule can *only* be applied in the real world of commerce and economic activity where it serves considerations of public policy in the protection of borrowers against exploitation by lenders…’

(My emphasis.)

[22] It is readily apparent, on a comparison of the two quotations, that the word ‘only’ is misplaced in the first version, thus giving the sentence a meaning that is completely different to what Froneman AJA obviously intended to convey, which also does not tally with the *dicta* expressed in the decided cases on which he relied in that regard. The court *a quo*’s conclusion about the so-called ‘lenient’ test namely, that the enquiry is merely ‘…whether in the particular case public policy requires the debtor to be protected against exploitation by the creditor’, which invariably necessitates an enquiry into the identity of the debtor instead of the nature of the debt, is thus based on an incorrect premise.

[23] Furthermore, whilst it may be so that the *in duplum* rule is founded on public policy considerations, it now forms part of positive law. Consequently, public policy is not the criterion in deciding whether or not the rule applies. As was correctly submitted on the appellant’s behalf, the rule is not qualified so that it applies only where a debtor cannot cope with the burden of interest exceeding the capital sum. The *Woulidge* case should accordingly not be understood to mean that

the identity of the debtor (ie whether the debtor requires protection from exploitation) determines whether or not the *in duplum* rule is to be applied.

[24] Having said that, the ultimate conclusion of the court *a quo* was nevertheless correct. The appeal is accordingly dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

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MML MAYA
ACTING JUDGE OF APPEAL

Concur: Howie P
Zulman JA
Brand JA
Lewis JA