THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 211/09

In the matter between:

FEDBOND PARTICIPATION MORTGAGE BOND

APPELLANT

MANAGERS (PTY) LTD

v

INVESTEC EMPLOYEE BENEFITS LTD

FIRST RESPONDENT

CAPITAL ALLIANCE LIFE LTD **SECOND RESPONDENT**

CHANNEL LIFE LTD

THIRD RESPONDENT

Neutral citation: *Fedbond Participation Mortgage Bond Managers v Investec Employee Benefits* (211/2009) [2010] ZASCA 42 (31 March 2010).

Coram: Harms DP, Mthiyane, Mlambo, Cachalia JJA et Saldulker AJA

Heard: **25 February 2010**

Delivered: 31 March 2010

Summary: Contract – extrinsic evidence inadmissible to contradict written terms – evidence of terms of alleged common understanding inconsistent with written terms. Collective Investment Schemes Control Act – withholding of consent by manager

of a collective investment scheme – to be accompanied by reasons – failure to respond to notice of withdrawal amounts to withholding of consent without reason – does not relieve manager of obligations arising from agreement – relationship between participant and manager does not exclude manager's obligation to make payment to a participant who has complied with the agreement.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Malan J sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

JUDGMENT

MLAMBO JA

Introduction

[1] This appeal with the leave of this court, is against a judgment and order of the South Gauteng High Court (Malan J). In terms of that order the appellant, Fedbond Participation Mortgage Bond Managers (Pty) Limited (Fedbond), was ordered to pay to the first and second respondents certain amounts of money which were invested with it in terms of the Collective Investment Schemes Control Act 45 of 2002 (the CIS Act). The funds were invested in a collective investment

scheme in participation bonds,[1] called the Fedbond Participation Mortgage Scheme (the scheme) administered by Fedbond. The scheme is the successor in title, in terms of the CIS Act, to the Participation Mortgage Bond Scheme, previously operated by Fedbond in terms of the Participation Bonds Act 55 of 1981 (the Part Bonds Act) which was repealed by the CIS Act.

[2] The type of investment we are dealing with was aptly described by this court in the following terms:

'In broad, the Act is designed, *inter alia* , to enable financial institutions to offer to investors, many of whom may wish to invest relatively small amounts of money, an opportunity of participating with other investors in an investment secured by a registered mortgage bond over immovable property and yielding a competitive rate of interest. Each participant who holds such a participation in a participation bond becomes a creditor of the mortgagor to the extent of the participation. The debt so created is owed by the mortgagor to the participant and not to the nominee company in whose name the bond is registered and the rights conferred by the bond are deemed to be held by the participants (s 6(1)).'[2]

Background

[3] Before I consider the issues raised in the appeal it is necessary to traverse the background circumstances of the matter in some detail. In July 1997 Fedbond concluded a written agreement with

[1] Section 52(1): '[A] scheme of which the portfolio, subject to the provisions of this Act, consists mainly of assets in the form of participation bonds, and in pursuance of which members of the public are invited or permitted to acquire a participatory interest in all the participation bonds included in the scheme.'

[2] *Syfrets Participation Bond Managers v Commissioner, SARS* 2001 (2) SA 359 at 363G-H. Though the court there was dealing with the Part Bonds Act, this description remains true in terms of the CIS Act.

Fedsure Life Assurance Ltd (Fedlife). In terms of the agreement Fedlife undertook to pay funds to Fedbond from time to time and authorised the latter to invest those funds on its behalf upon the security of a particular participation bond[3] or bonds in the scheme. The salient features of the agreement are briefly that:

3.1 Fedbond was defined as 'the Manager'[4] and Fedlife as the 'participant';[5]

3.2 Fedbond Nominees (Property) Ltd (second respondent in the court a quo) was formed and registered for the purpose of holding participation bonds, included in the scheme, in trust as nominee for or representative of participants in the scheme;

3.3 Fedlife authorised Fedbond to invest on its behalf, upon the security of a particular participation bond or of any participation bonds, such funds as Fedlife could pay to or held by Fedbond on its behalf with specific instructions directing the investment of such funds upon the security of a participation bond or participation bonds;

3.4 any money received by Fedbond from Fedlife would remain invested for a period of not less than five years in a participation

[3] Section 52(1) 'Participation Bond' means – 'a mortgage bond over immovable property –
(a) which is described as a participation bond and is registered as such in the name of a nominee company and is included in a collective investment scheme in participation bonds; and
(b) which is a first mortgage bond or which ranks equally with another first participation bond and has the same mortgagor.'

[4] Section 1: 'A manager means a person who is authorised in terms of this Act to administer a collective investment scheme.'

[5] Section 52(1): 'A participant means a person who holds a participatory interest in all the participation bonds included in a collective investment scheme in participation bonds.'

bond or bonds included in the scheme.

[4] Pursuant to the conclusion of the agreement and from July 1997 to August 2000 Fedlife made 63 payments, totalling R46 030 000, to Fedbond for investment in the scheme. Thereafter and during 2001 Fedlife was acquired by the Investec Group and its name was, on 16 October 2001, changed to Investec Employee Benefits Limited (IEB), the first respondent in this appeal.

[5] In that year and subsequent to the acquisition of Fedlife, Fedbond sent a letter to Investec Asset Management (Pty) Ltd (IAM), IEB's asset manager, confirming the total amount of the investment (R46 030 000) in the scheme. In that letter Fedbond set out details of each investment, making up the total, as well as the maturity dates thereof. The letter also stated:

'The investment is for a period of five years and the said proceeds shall not be paid to the participant before expiry of the five years. The investments will only be scheduled for repayment on receipt of the required 3 (three) months' written notice. Interest is paid monthly in advance to the nominated bank account as per the participant.'

There is also email correspondence from Fedbond to IAM in which it was clarified that the name change from Fedlife to IEB did not affect the maturity dates of the investments.

[6] In July 2006 Deneys Reitz Attorneys, acting on the instructions of the respondents, gave Fedbond three months' notice of the

withdrawal of the total investment from the scheme. In response, Fedbond questioned the identity of the respondents as being the correct investors in the scheme, stating that in its records Fedlife had made the investments. Fedbond further requested the attorneys to provide a basis on which the respondents claimed ownership of the investments. This response was said to be necessary in terms of the Financial Intelligence Centre Act[6](FICA) which was said to make it obligatory on a manager of a scheme to have correct identities of its investors. The lawyers in return referred Fedbond to Fedlife's name change in 2001 and also tendered delivery of any document required for FICA purposes relevant to IEB. The letter concluded by stating that the July 2006 letter constituted formal notification to Fedbond of IEB's intention to withdraw the total investment.

[7] No further communication was received from Fedbond in this regard until 10 months later, in June 2007, when IEB requested Fedbond, in its capacity as manager of the scheme, to note in its records that amounts of R 35 430 000 and R5 245 000, of its investment in the scheme, were transferred to Capital Alliance Life Ltd (CAL) and to Channel Life Ltd (Channel), the second and third respondents herein, in terms of a reinsurance agreement and a sale of business arrangement, respectively. Fedbond was further requested to confirm within seven days that it had noted CAL and Channel's investments as well as confirmation that all fees and charges were paid in full. Fedbond did not respond to the notification and in October 2007 Werksmans Attorneys sent a demand to it for

[6] Act 38 of 2001.

payment of the amounts of R5 355 000, R35 430 000 and R5 245 000 to IEB, CAL and Channel respectively. That demand was based on the July 2006 withdrawal notice and June 2007 notification of CAL and Channel's investments. When the demand evoked no response from Fedbond, proceedings were initiated in the court a quo resulting in the order referred to at the beginning of this judgment.

[8] The thrust of Fedbond's opposition before Malan J, to the relief sought by the respondents, was premised on a defence disavowing their entitlement to withdraw the total investment on the basis of an alleged common understanding amongst members of the Fedsure Group which is said to have included Fedllife. Fedbond persists with that argument in this appeal amongst others.

The common understanding argument

[9] Primarily Fedbond contended that IEB was not entitled to withdraw the total investment because from 1990 to 2000 there was a common understanding by members of the Fedsure Group that Fedlife would continuously invest in Fedbond and that those investments, would form part of the long term investment arrangements between members of the group which would never be called up simultaneously; that in the event of the investments being withdrawn, this would be gradual and individual notices were required in relation to each investment at intervals not shorter than those at which those investments had initially been made. In this regard it was contended on Fedbond's behalf that these terms were incorporated, tacitly at least, into each investment made by Fedlife in the scheme.

[10] In considering this argument the relevant regulatory framework which governs the agreement concluded by the parties, should also be considered in addition to the evidence. In this regard s 58 of the CIS Act provides:

'Minimum investment period

An agreement in terms of which a manager accepts money for investment in a collective investment scheme in participation bonds must provide that such money is invested in such scheme for a period of not less than five years.'

[11] Furthermore, the agreement is subject to certain rules published in the Government Gazette.[7] The material provisions thereof are inter alia:

'20. Every participation bond must provide that the mortgagor must pay interest on the principal debt secured by such bond to the manager as agreed upon by the manager and mortgagor. Such interest, less the manager's administration fee and such other fees and charges as imposed and determined by the manager from time to time must within 30 days after the date on which interest payments have been received from the mortgagor, be paid by the manager to participants.

22(1) A participant may transfer, cede or encumber part or the whole of his or her participatory interest without the consent of the mortgagor concerned provided that –

(a) the manager is not obliged to note such cession, transfer or encumberance unless informed in writing thereof and such fees and charges as may be determined by the manager have been paid by such

[7] GN 577 in *GG* 24984 of 28 February 2003.

participant or his or her successor;

(b) such cession, transfer or encumberance is only enforceable against the manager if the manager has confirmed in writing that the cession, transfer or encumberance has been noted and that the aforementioned fees and charges have been paid in full; and

(c) the manager may refuse to note such cession, transfer or encumberance if such participatory interest is ceded or transferred to, or encumbered in favour of, more than one person with the result that the extent of any participatory interest held by any such person is less than the minimum investment determined by the manager from time to time.

(2) A participant may, upon the expiry of the 5-year period referred to in section 58 of the Act, withdraw part or the whole of the funds invested by him or her in a scheme, if –

(a) the manager has consented to such withdrawal: Provided that the manager may withhold such consent subject thereto that the manager furnishes reasons for withholding such consent;

(b) the participant has given the manager written notice, the period of which must be determined by the manager and disclosed in the application form, of his or her intention to withdraw such investment; and

(c) the participant has paid such fees and charges as the manager may impose.'

[12] Lastly the agreement was also subject to Fedbond's terms and conditions, contained in a document issued to investors. Some of the material terms are that:

12.1 Fedbond could accept money for investment in the scheme provided that such money was invested in such scheme for a period of not less than five years;

12.2 the Registrar had published rules consistent with the CIS Act for the administration of a collective investment scheme in participation bonds;

12.3 the rules permit transfer, cession or encumberance by a participant of part or the whole of his participatory interest;

12.4 a participant, by signature to the document agreed that upon the expiry of the five year period, the participant could withdraw his investment subject thereto that it had given Fedbond three calendar months' written notice and, in terms of rule 22(2) –

12.4.1 Fedbond had consented to such withdrawal;

12.4.2 the participant had given Fedbond three calendar months' written notice; and

12.4.3 the participant had paid such fees and charges as Fedbond may impose.

The document containing the terms was signed as required therein.

[13] Counsel for Fedbond argued that IEB was aware of the common understanding which, he said, was communicated to IAM, in a letter from Fedbond dated 2 July 2003. That letter stated inter alia:

‘The investments were not placed as a five year investment but were part of the long term funding arrangements of Fedsure for Fedbond.’

It is important to state that IAM questioned this statement, stating that it was not aware that this was so and requested full details of the arrangement referred to. No such details were forthcoming from Fedbond and when IAM persisted in its request Fedbond stated that it would not litigate the issue through correspondence.

[14] Properly viewed Fedbond’s argument in this regard suggests that the written agreement does not contain all the terms agreed by the parties and seeks the admission of facts that add to the terms thereof. This is referred to as the integration rule in terms of which extrinsic evidence of additional terms of a written agreement not embodied therein is admitted. See *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*[8] the following was stated:

‘Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the

[8] 1941 AD 43 at 47. See also *Johnston v Leal* 1980 (3) SA 927 (A) at 944B-D: ‘Furthermore, in my view, an instructive and relevant analogy is provided by cases of what is termed a "partial integration". Where a written contract is not intended by the parties to be the exclusive memorial of the whole of their agreement but merely to record portion of the agreed transaction, leaving the remainder as an oral agreement, then the integration rule merely prevents the admission of extrinsic evidence to contradict or vary the written portion; it does not preclude proof of the additional or supplemental oral agreement.’; *Capital Building Society v De Jager & others*; *De Jager & another v Capital Building Society* 1963 (3) SA 381 (T) at 382B-C; *Rielly v Seligson and Clare Ltd* 1977 (1) SA 626 (A) at 628D-E; *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A) at 26A-C.

document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence . . . .'

[15] The terms of the common understanding imply that the investments were for longer than five years and that there could be no lump sum withdrawal. These terms clearly impugn the written terms which provide for the maturing of the investments after five years. I point out further that the CIS Act, the rules and Fedbond's terms and conditions, which govern the agreement, all provide for an investment period of five years after which the investments mature. Clearly the terms of the alleged common understanding are inconsistent with and contradict the clear terms of the written agreement. They are for that reason inadmissible and unenforceable.

[16] Furthermore, the evidence of the parties' dealings with each other clearly excludes the possibility of the parties having come to an agreement encompassing the terms of the common understanding. I point out in this regard, and this is not in dispute, that when notice was given to Fedbond of the withdrawal of the total investment, it evoked no response from the latter asserting the terms of the common understanding. In my view, and purely as a matter of logic, receipt of the withdrawal notice should have impelled Fedbond to expressly withhold consent to the withdrawal and to cite the existence of the terms of the common understanding as a reason. As we all know the details of the common understanding only came in the answering affidavit despite being requested by IAM some three years

before the onset of litigation.

[17] The July 2003 letter is of no assistance to Fedbond's argument. Quite apart from the fact that this letter was not precipitated by a withdrawal notice, IAM clearly did not accept that the investments were for a period longer than five years, hence its insistence that details of the alleged long term 'arrangement' be provided. The evidence we have vindicates IAM's refusal to accept that the investments were not for five years. Such evidence is in Fedbond's August 2001 letter to IAM referred to in para 5 above as well as Fedbond's email confirmation also referred to above that the five year investment period was not effected by the name change.

[18] Incidentally the August 2001 letter and its contents was not referred to nor corrected in the July 2003 letter. Importantly, and as I state above, the latter letter is inconsistent and contradictory to the clear terms one finds in the agreement, whilst the earlier letter confirms these. I am not persuaded by the explanation in the answering affidavit that the author of the August 2001 letter, Alet Horn (Horn), was a 'new' employee who was unaware of the common understanding. If this was indeed so, one can justifiably wonder why Horn, who must have been in charge of the investment at the time, as is clear from the email correspondence, was not aware of such important terms of what was probably a very large investment.

[19] In my view the existence of the alleged common understanding was correctly rejected by Malan J. It is clearly an ill-conceived attempt

to avoid honouring the withdrawal of the investment.

Withholding of consent in terms of rule 22(2)(a).

[20] The other basis advanced for disputing the respondents' entitlement to withdraw their investments is that Fedbond had not consented thereto within the contemplation of rule 22(2)(a). As is apparent from the rule, referred to in para 11 above, the manager of a collective investment scheme may not unreasonably withhold its consent to a withdrawal but it must provide a reason(s) if it does so. As we know, Fedbond neither gave nor withheld consent when the requisite notice was given to it. It simply did nothing. It cannot be argued that Fedbond's letter questioning the identity of the respondents as being the correct investors, on receipt of the withdrawal notice, was a reason for withholding consent. Neither can it be argued that Fedbond withheld consent due to non-compliance with FICA requirements as the documents relevant in this regard were properly tendered to it.

[21] Fedbond's inaction amounts, I surmise, to a withholding of consent without a reason. For this reason rule 22(2)(a) affords Fedbond no respite. It simply has no legal basis in terms of that rule to frustrate the respondents' legitimate intention to withdraw their investments withholding consent without a reason. Its inaction cannot, in my view, shield it from its obligations in terms of the agreement, the rules and its terms and conditions. This conclusion applies equally to Fedbond's argument that it did not consent to the

cession by IEB of portions of its investment to CAL and Channel. In that regard too Fedbond simply failed to respond to the notice requesting it to note the cessions.

Debtor and creditor relationship

[22] Counsel for Fedbond argued finally that the order issued by the court a quo inclusive of the order for payment of interest was incompetent as it presupposed a debtor-creditor relationship between Fedbond and IEB. Reference was made in this regard to s 6(1) of the Part Bonds Act which provides:

'Rights of participant – (1) The debt secured by a participation bond shall to the extent of the participation granted to any participant be a debt owing by the mortgagor to such participant and not to the nominee company, and the rights conferred by the registration of any such bond shall, notwithstanding the registration of the bond in the name of the nominee company, be deemed to be held by the participants.'

Counsel argued that the relationship encapsulated in that provision, which was not altered by the repeal of the Part Bonds Act, between a manager of a scheme and a participant was not that of a debtor and creditor. It was further argued, relying on the judgment of this court in *Syfrets Participation Bond Managers Ltd v Commissioner, South African Revenue Service*[9] that a participant can only claim repayment of its investment in a scheme from the mortgagor, and not from the manager. This argument is also reliant on the provisions of rules

[9] (Supra) at 366A-B.

15[10]and 16[11]which provides for the procedure when a participant seeks to claim its investment from a mortgagor in a scheme.

[23] I am of the view that the relationship created when an investment is made in such a scheme is tripartite in nature. Whilst the respondents, as investors, are in fact creditors *vis a vis*the mortgagor(s), Fedbond remains in the picture as the administrator of the investment scheme. Whilst it is further correct conceptually that Fedbond as manager of the scheme does not become a debtor to a participant, the agreement between them provides for certain obligations by either. The agreement encompasses a relationship between Fedbond and the respondents in terms of which once they have complied with the agreement and the rules in terms of notice and payment of the relevant fees and charges, Fedbond as manager must honour the withdrawal notice, unless it contends that the funds are not available which will kick-start the process envisaged in rule 15 and 16. Those rules essentially provide for the procedure to be followed by a participant regarding the enforcements of its injusts against a defaulting mortgagor.

[10] Rights of participants: Recovery of debts – Despite rule 14 a participant may in respect of a participation bond instruct the manager to take all the necessary steps through and in the name of the nominee company to recover from the mortgagor such portion of the principal debt as is necessary to repay in full the participatory interest of such participant in such bond: Provided that a participant may only so instruct the manager if – (a) the mortgagor has failed to comply with the conditions of the bond; or (b) subject to the terms and conditions of the bond, the participants in the scheme (excluding the manager) in which such participation bond is included, who hold a majority in value of the participatory interests in such scheme, have instructed the manager in writing to recover from the mortgagor such portion of the principal debt as is necessary to repay in full the participatory interests of all such participants.

[11] Rights of participants: Legal proceedings – A participant may not take any action, legal or otherwise, in his or her own name to enforce the rights held by such participant in any participation bond included in a scheme.

[24] In this regard when one takes into account the agreement signed between the parties that investments were placed for five years, it must follow that once a participant gives notice to the manager to withdraw any portion of its investment on maturity thereof, the manager must honour the withdrawal notice. It can avoid honouring the requested withdrawal if for instance it cannot effect the withdrawal in view of the fact that the funds have not yet been received from the mortgager. This is not the case asserted here by Fedbond. The simple fact of the matter is that Fedbond has not asserted that it cannot pay and in terms of the agreement it must pay. The order of the court a quo was clearly correct including its order for the payment of interest. Clearly IEB as investor relies on the agreement and the terms thereof to say that on maturity of its investment it can withdraw it and that is what it did in this matter. I also point out that my conclusion does not detract from that in *Syfrets*, which in the main restated the general principles of the relationship. In any event the circumstances of our case bear no relation to those in *Syfrets*. Lastly, on this point, it is necessary to also point out that this case has nothing to do with the situation envisaged in rules 15 and 16. Clearly the order granted by Malan J was competent in all respects.

[25] In the final analysis I conclude that the respondents were perfectly within their rights to withdraw their investment at the expiry of five years. At that time the investments had matured in terms of the written agreement. The argument that individual notices of withdrawal were required is misconceived. Nowhere in the agreement, the rules

and terms and conditions does one find such a limitation. In the circumstances the appeal must fail.

[26] The following order is granted:

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

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D MLAMBO
JUDGE OF APPEAL

HARMS DP (Mthiyane and Cachalia JJA and Saldulker AJA concurring):

[27] I have read the judgment of Mlambo JA, and while I agree with his conclusion, I prefer to formulate my reasons somewhat differently.

[28] Malan J, in the high court, granted judgment in favour of the first respondent, Investec Employee Benefits Ltd ('Investec'), and the second respondent, Capital Alliance Life Ltd for, respectively R10 696 122.57 and R35 333 877.43. The reason for the split award is that Investec, which was previously known as Fedsure Life Assurance Ltd, had ceded part of its claim (which consisted of a number of discrete claims) to Capital. Much time was wasted in the court below on the validity of the cession but the issue was not argued in this court because it would have made no difference to the outcome of the case: the appellant, Fedbond Participation Mortgage Bond

Managers (Pty) Ltd (‘Fedbond’) is either liable for the whole amount or it is not. I shall, accordingly, not refer to Capital any further. The third respondent, Channel Life Ltd, played no role in the appeal and will be ignored.

[29] In addition to the costs order, Malan J ordered payment of interest at the statutory rate. The correctness of this order relates to the nature of Fedbond’s alleged liability, something to which I shall return during the course of the judgment.

[30] Fedbond is a manager of a participation bond scheme. Investec invested during the period 1 July 1997 and 13 August 2000 the sum of R 46 030 000 with Fedbond in terms of the Participation Bonds Act 55 of 1981. The investment consisted of a number of tranches, significantly 13 on 27 May 1998, 12 on 26 September 1999 and 17 on 13 August 2005. As manager of a participation bond scheme, Fedbond had framed rules that were approved by the registrar and these rules contained the form of agreement between a participant (Investec) and the manager.

[31] The written agreement between Investec and Fedbond authorised the latter to invest on Investec’s behalf, upon the security of a particular participation bond, the amounts invested by Investec from time to time. It also provided that the monies would remain invested for a period of not less than five years. This accorded with the provisions of the Act which provided that money invested upon the security of a participation bond included in a participation scheme

‘shall remain invested for a period of not less than five years’ (s 3(3)(d)). The rules stated that the period of five years would be calculated from the date on which the funds were invested in a participation in the scheme; and that three months’ notice was required for repayment after the five year period. Based on this, Investec’s investments matured between 2002 and 2005, and in spite of the necessary notice, Fedbond refused to repay any amounts.

[32] Fedbond’s first defence is based on the so-called common understanding between the parties which, according to the argument, overrode the written agreement and the rules. The gist of the understanding was that the money could not have been withdrawn after five years on three months’ notice. Malan J found that this understanding was in conflict with the written memorial and could, therefore, not be proved. I am prepared to go further and hold on the papers that the evidence of deponent Field, the managing director of Fedbond, was contrived. The basis of the understanding (and its main term) was that Investec’s investment in the participation bond scheme would form part of a long-term investment arrangement between the members of the Fedsure Group which, at the time, included Fedbond and Investec (under its old name) to provide long term funding for the Group. Counsel could not explain the basis of this ‘understanding’ and the consequent tacit agreement or how it could have existed in the context of a participation bond investment unless Fedbond had misappropriated the money. Once the foundation of the understanding collapses, so does the whole structure.

[33] The second defence was based on the 'rules' or regulations issued under the Collective Investment Control Act 45 of 2002.[12] This Act repealed the mentioned 1981 Act. The rules provide that a participant may, upon the expiry of the 5-year investment period, withdraw part or whole of the funds invested in a scheme 'if the manager has consented to such withdrawal: Provided that the manager may withhold such consent subject thereto that the manager furnishes reasons for withholding such consent' (rule 22(2)(a) – the other conditions are of no moment for present purposes). I have some reservations about whether this rule can apply to an investment made under the repealed Act. Section 117(2), which deals with the effect of the repeal on things done under the repealed Act, does not appear to me to affect existing contractual arrangements.[13] In any event, I do not accept that parties to a scheme may not agree on a fixed or other regime in relation to the term of the investment, provided the statutory requirement of a minimum of five years is adhered to. It is not conceivable that if a participant wishes to invest for a period not exceeding, say, five years and reaches an agreement with the manager to that effect when the investment is made that the manager may, after the five years and after all other conditions have been fulfilled, withhold his consent – even with good reasons – under the rule. The object of the rule is to regulate those cases where there is no agreement about the term of the investment.

[12] Rules for the Administration of a Collective Investment Scheme in Participation Bonds GN 577, GG 24984, 28 February 2003.
[13] Compare *Adampol (Pty) Ltd v Administrator Transvaal* 1989 (3) SA 800 (A) at 811D-812I.

[34] Fedbond's counsel submitted that the 'understanding' was the reason why consent was withheld. Assuming that this 'reason' was conveyed when the consent was withheld (which, on the facts, it was not) the word 'reason' in the rule is not equivalent to 'excuse'. A bad reason is no reason. A reason under the rule must be objectively justifiable.

[35] This brings me to the major point on appeal which, according to respondents' counsel, was not argued below and did not feature in Malan J's careful analysis of the facts and law. The argument was this: because Fedbond was the manager of the scheme and not Investec's debtor, judgment for the capital amount and mora interest at the prescribed rate could not have been awarded against Fedbond even if it is assumed that Investec was entitled to call up its investment.

[36] Fedbond relied in this regard on the following quotation from *Syfrets Participation Bond Managers v Commissioner, SARS*:[14]

'In broad, the Act is designed, *inter alia* , to enable financial institutions to offer to investors, many of whom may wish to invest relatively small amounts of money, an opportunity of participating with other investors in an investment secured by a registered mortgage bond over immovable property and yielding a competitive rate of interest. Each participant who holds such a participation in a participation bond becomes a creditor of the mortgagor to the extent of the participation. The debt so created is owed by the mortgagor to the participant and not to the nominee company in whose name the bond is registered and the rights conferred by the bond are deemed to be held by the participants (s 6(1)).'

[14] 2001 (2) SA 359 at 363G-H.

[37] The correctness of the quotation is not in doubt. It does not, however, deal with the full picture. Participation bond schemes work as follows: Collective investment schemes are managed by managers such as Fedbond. Managers are appointed by nominee companies who act as nominee for or representative of a participant (investor) in a participation bond. (The nominee company in this case was a party in the court below but did not take part in the appeal.) The nominee company lends money through the agency of a manager, against the security of mortgages registered over the immovable property of borrowers in favour of the nominee company.

[38] The manager is responsible for the operation of the scheme. A manager may offer and grant participation in bonds under the scheme to any person and accept money for investment on the security of participation bonds. These funds must be kept on deposit by the manager in the name of the nominee company on behalf of the investor.

[39] The manager is the person responsible for enforcement of the rights against the mortgagors and must do so through and in the name of nominee company (rule 14). A participant may not in his own name take any action to enforce his rights in a participation bond (rule 16) but may instruct a manager to do so if, for instance, the mortgagor has failed to comply with the conditions of the bond (rule 15). The rights of a participant are limited to his pro rata interest in the particular bond, and he has no other right of recovery against the manager or the nominee company (rule 18).

[40] The problem in this case is something different and may be illustrated by way of an example. Assume that the participant and manager had agreed that the investment would be for ten years only. The manager, contrary to the terms of the agreement, lends the money on a mortgage bond for a period of twenty years. After the lapse of the ten years the participant gives due notice of withdrawal of the investment. The manager is unable to call up the bond because the mortgagor is not in default and, for the same reason, the participant cannot instruct the manager to call up the bond. The participant has also no claim against money held by the nominee company. Is the participant without remedy? According to Fedbond's argument the investor has to carry this risk because it (Fedbond) is not the debtor of the participant. This means that the participant has no remedy against anyone and that the manager would be entitled to ignore investment agreements and keep the money of a participant bound up in a bond for whatever period it pleases the manager.

[41] I believe that it is an over-simplification to say that the manager does not stand in any debtor-creditor relationship with a participant. The manager undertakes by necessary implication to manage and structure the portfolio in such a manner that the bonds in which a particular participant has an interest may be called up whenever the participant is entitled to call up his investment. This obligation has nothing to do with the relationship between the manager, the mortgagor and the participant. It is an obligation of the manager towards the participant and it follows that there is in this regard a

debtor-creditor relationship between them. The manager is in other words obliged to pay a participant who, under rule 22, is entitled to payment. If the dedicated funds are not in the account of the nominee company the manager has to pay the money it has agreed to pay. And if it fails to do so it is also liable for statutory mora interest which is something different and distinct from the bond interest.

[42] I do not understand Fedbond's dilemma and delaying tactics. On its own version Investec could have called up the investments since July 2002, and that the last call could have been made in August 2005. All that was required, it said, was that the aggregate amount could not have been withdrawn on the same date and that the intervals between withdrawals could not have been shorter than between investments. Nearly five years later, and nothing has been paid or offered.

[43] For these reasons I agree with the order proposed by Mlambo JA.

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L T C HARMS
DEPUTY PRESIDENT

APPEARANCES

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