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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
DATE; 11/11/2005
CASE NO: A1345/04

UNREPORTABLE
IN THE MATTER BETWEEN:

THE PREMIER OF GAUTENG APPELLANT

AND

ANNA FRANCINA CECILIA
VAN DEVENTER RESPONDENT

JUDGMENT

MYNHARDT, J

INTRODUCTION

[1] On 3 November 2000 the respondent fell and sustained a dislocation of her right knee. She was admitted on the same day to the Kalafong Hospital in Pretoria for treatment. She was thereafter transferred to the Pretoria Academic Hospital, also in Pretoria, where she was treated until 5 December 2000. Both these hospitals were so-called provincial hospitals which were managed and operated under the control of the Gauteng Department of Health.

[2] On or about 17 November 2000 the respondent's right leg was amputated above the knee at the Pretoria Academic Hospital. It was common cause between the parties that the medical practitioners and other hospital staff who had attended to respondent in the hospitals, were employees of the Gauteng Department of Health and that they were legally obliged to "render such medical care and treatment to the plaintiff (respondent) as could reasonably be expected of a medical practitioner (sic) in similar circumstances."

[3] In January 2002 the respondent instituted an action against the appellant in which she claimed damages for the amputation of her leg and the *sequelae* thereof. The cause of action relied on by the respondent was that the doctors who treated her in the hospital were negligent in the respects outlined in the particulars of claim.

[4] At the time of the trial before Claassen, J, which commenced on 27 January 2004, it was common cause between the parties that the doctors at the hospitals were indeed negligent in their treatment of the respondent. The so-called merits of the case had been conceded by the appellant's legal representatives. What was in issue before the trial court was the quantum of damages that the respondent had suffered.

[5] At the conclusion of the trial, and after having heard the evidence of a number of witnesses, including the respondent, the trial judge awarded a total amount of R1 275 700-00 as and for damages to the respondent. The aforesaid amount comprised a number of individual awards in respect of a number of so-called heads of damages. So, for instance, was an amount of R300 000-00 awarded in respect of general damages for pain and suffering etc.

The appellant was also ordered to pay interest on the amount of R1 275 700-00 at the rate of 5,5% as from the date of the order to the date of payment thereof.

The trial judge also ordered the appellant to pay a further sum of R171 319-00 to the respondent in respect of interest on three items. These items were the following:

(i) The cost of the initial prosthesis for the respondent's leg in the amount of R101 208-00. The interest of R24 884-00 was calculated in respect of the period from 27 September 2001 to 4 September 2003.

(ii) The cost of a spare prosthesis for the respondent's leg in the amount of R101 208-00. The interest awarded on this sum amounted to R37 000-04 for the period 27 September 2001 to 4 February 2004.

(iii) The amount of R300 000-00 (which was awarded as general damages). The interest amounted to R109 435-00 for the period 27 September 2001 to 4 February 2004.

The respondent was also awarded her costs. It is not necessary for present purposes to refer to the details of the cost order.

[6] The appellant was dissatisfied with the aforesaid order for payment of interest in the amount of R171 319-00 and certain other findings and awards that were made. Leave to appeal was sought, and granted in regard to the order for payment of interest in the aforesaid amounts on the three abovementioned items.

[7] Before this court the parties were *ad idem* that the order for interest on the amount awarded for general damages, is not an issue anymore. Counsel for appellant submitted that the respondent had "conceded the appeal" on 10 November 2004 in regard to that part of the order appealed against.

Counsel for respondent contended that the respondent had "waived any right which she may have had" in regard to interest on the amount of general damages.

It seems to me that counsel are involved in an exercise of semantics. It is neither here nor there whether the appeal was conceded in that respect or respondent had waived (or abandoned) any right. The fact of the matter is that that part of the trial court's order is not an issue anymore. I shall consequently not say anything about that aspect. Both counsel requested this court to, in any event, delete that part of the order of the court *a quo*. I shall accede to that request.

[8] The parties were also agreed that the date 27 September 2001 relates to the letter of demand which was served on the appellant on 26 September 2001. In terms of that letter of demand payment of an amount of R736 000-00 as and for damages was claimed by the respondent. Included in that amount was an amount of R300 000-00 which was claimed, according to the initial particulars of claim, for "Estimated Cost of Prosthetic Requirements" under the head of damages "Future, Hospital and Medical Treatment."

For present purposes it can be accepted that the date 4 February 2004 is the date on which the evidence and addresses by counsel were concluded. A written judgment was handed down by the trial judge apparently on 12 March 2004. On the same day the order of the court was amended. The record which was placed before this court contains both the initial order and the amended order. Counsel were agreed that this court should regard the amended order of the court *a quo* as the official order.

The date 4 September 2003 can, for present purposes, be accepted as relating to the date on which an interim payment of R101 208-40 was made by the appellant in respect of the cost of the initial prosthesis for respondent's leg. That payment was in fact made on 9 September 2003.

[9] At the trial Mr Watson was called as an expert witness on the respondent's behalf. He is a qualified orthotist-prosthesist who has undergone the necessary training and has the necessary experience to testify as an expert on "prosthetic and orthotic requirements" of patients like the respondent.

The respondent was given a prosthesis at a provincial hospital. Mr Watson was asked to evaluate that prosthesis during October 2003. He

was not impressed with it. It fitted badly and was not of much help to the respondent. He recommended a different type of prosthesis. The respondent bought such a prosthesis. It was more suitable to the respondent's needs. The appellant made the aforesaid interim payment to defray the expenses incurred in the acquisition of the prosthesis.

Mr Watson also recommended that the respondent should acquire a second, or spare, prosthesis. It was common practice, he said, to have a spare prosthesis so that the amputee could be kept mobile in the event of the primary, or first, prosthesis undergoing repairs. He also recommended an award to cater for the replacement of the prosthesis in the future. The life expectancy for the primary prosthesis would be five years approximately, he said, whilst the life expectancy of the spare prosthesis would be approximately six years.

At the conclusion of the trial Mr Watson's evidence was not in dispute anymore. The appellant accepted what Mr Watson recommended.

[10] In his judgment the trial judge held that there was no reason why the appellant should not be ordered to pay interest on the two amounts awarded in respect of the primary and spare prosthesis. The trial judge

acceded to the request of respondent's counsel to award interest on the cost of the two prostheses for the periods as set out hereinbefore.

[11] In his judgment granting the appellant leave to appeal on these two issues the trial judge stated that the order should not have been granted. He pointed out that respondent had incurred no expenses in regard to the two prostheses prior to being compensated for them by the appellant. To the extent that she suffered any discomfort and suffering because she had to make do without a prosthesis, the trial judge said, she was compensated by the award for general damages.

THE CONTENTIONS OF COUNSEL ON APPEAL

[12] Appellant's counsel contended, in a nutshell, that the trial judge had exercised his discretion in terms of section 2A of the Prescribed Rate of Interest Act 1975, Act 55 of 1975 ("the Act") wrongly and that there were no grounds or "substantial reasons" for the exercise of the discretion in respondent's favour. Counsel aligned himself with the findings of the trial judge that the respondent had incurred no expenses in purchasing the primary prosthesis or the spare prosthesis. He also supported the finding that the respondent was compensated by way of general damages for the inconvenience and suffering she experienced without a prosthesis.

Counsel also argued that the award in regard to the spare prosthesis was an award in respect of the capitalised value of the cost of acquiring the prosthesis and that an order for interest thereon from a date prior to the date of judgment fell foul of the provisions of section 2A(3) of the Act.

[13] Respondent's counsel contended that the trial judge had merely exercised his "discretion to limit the ambit of section 2A(1) only in respect of the amount of the unliquidated debt on which interest shall run". (I quote from counsel's written heads of argument.) It was therefore not the exercise of a discretion "to award interest" but the exercise of a discretion "to limit the operation of law in respect of interest on unliquidated damages …" counsel contended further. Seen in this light, contended counsel, the order is not appealable because it was made in favour of appellant.

In any event, contended counsel, because the discretion of the trial judge was exercised in appellant's favour "to limit the operation of the law in respect of interest on unliquidated damages …" it can hardly be said that the discretion was not exercised "on grounds which were not judicial or not for substantial reasons." (I quote from counsel's written heads of argument).

THE LAW

[14] Section 1(1) of the Act provides, insofar as it is relevant, that if a debt bears interest and the rate thereof is not governed by, *inter alia,* any other law or by an agreement, such interest shall be calculated at the rate prescribed under subsection (2) at the time when the interest begins to run, unless a court, because of special circumstances, orders otherwise.

Section 1(2) of the Act provides that the Minister of Justice and Constitutional Development may prescribe a rate of interest from time to time in the *Government Gazette.*

[15] Section 2(1) of the Act provides, broadly summarised, that every judgment debt which would not otherwise bear a interest after the date of the judgment, shall bear interest from the day on which such judgment debt is payable, unless the judgment provides otherwise. The term "judgment debt" means, according to sub-section (3), *inter alia*, a sum of money due in terms of a judgment including a costs order.

[16] Section 2A(1) to (5) of the Act, insofar as it is relevant reads as follows:

"(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, … shall bear interest as contemplated in section 1.

(2) (a) Subject to any other agreement between the parties the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.

(b) …

(3) The interest on that part of a debt which consists of the present value of a loss which will occur in the future shall not commence to run until the date upon which the quantum of that part is determined by judgment, …

(4) …

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law … may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at

which interest shall accrue and the date from which interest shall run."

[17] It is obvious that sections 2(1) and 2A of the Act are applicable in the present case. The claim of the respondent was for payment of damages. It is trite that a claim for damages is unliquidated debt. Both counsel were agreed on this.

[18] In terms of the common law an unliquidated debt cannot carry interest. See *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 804H; *Administrateur, Transvaal, v J D Van Niekerk en Genote BK* 1995 (2) SA 241 (A) at 245H-246A.

Our courts were therefore not able to come to the assistance of a creditor who was awarded damages to compensate him/her for the depreciated value of the money which he would receive, by way of order for interest from a date prior to the date of judgment. See *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) at 841G-842A; *Administrateur, Transvaal,* at 245D-E; Adel Builders (Pty) Ltd v Thompson 2000 (4) SA 1027 SCA at 1031B.

[19] The common law position was not altered by section 2 of the Act. See *Administrateur, Transvaal* at 246A-C. As a matter of fact, the provisions of section 2(1) of the Act are, generally speaking, in accordance with the common law namely that a judgment debt is payable, and therefore bears interest, from the date of the judgment. See *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey* NO 1988 (4) SA 353 (A) at 357H, 359D and 359H.

[20] Section 2A of the Act has, however, altered the common law position in regard to unliquidated debts with effect from 11 April 1997.

In *David Trust and Others v Aegis Insurance Co Ltd and Others,* 2000 (3) SA 289 SCA the effect of section 2A of the Act was explained as follows by Nienaber JA at 303H-304E, para [39]:

> "[39] The plaintiffs' claims against Katz Salber, being for damages, are unliquidated. And since the plaintiffs' claims against the defendants in terms of s156 of the Insolvency Act are of a like quality to their claims against the defendants, these to are unliquidated. Prior to 1997 the plaintiffs would have been entitled to claim *mora* interest only from the date of judgment (*Administrateur, Transvaal v*

*J D Van Niekerk en Genote B*K 1995 (2) SA 241 (A) at 245H-J). With effect from 11 April 1997 the Prescribed Rate of Interest Amendment Act 7 of 1997 (which amended the Prescribed Rate of Interest Act 55 of 1975), sanctioned, *inter alia*, the recovery of *mora interest* on amounts awarded by a court which, but for such award, were un-liquidated. Once judgment is granted such interest 'shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, which ever date is the earlier' (s2A(2)(a); and see *The MV Sea Joy: Owners of the Cargo Lately Laden on Board the MV Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C) at 505F-507H*; Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 688G-691C.) The word 'demand' in s2A(2)(a) is defined to mean a written demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the quantum thereof. (s4 of the principal Act.) Demand was made on the defendants on 14 November 1994. It was not suggested in argument that such demand did not comply with the requirements of the subsection. Nor was it suggested that it would be inequitable if the defendants were to be held liable for the payment of *morae*

> interest from the date of demand. In terms of s2A(5) of the Act, as amended, a court is granted the power to 'make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run'. The section is doubtless intended, amongst other things, to ameliorate instances of inequity which may occur where a debtor is required to pay *mora* interest on, for instance, damages for breach of contract at a rate in excess of what his contract provided or from a date before the amending Act came into operation when 'he did not know and could not ascertain the amount which he had to pay' (*Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 32)."

In the *Adel Builders* case Howie, JA as he then was, writing for the court, had to deal with an argument that a party who claimed interest in terms of section 2A of the Act from a date earlier than the date of demand, bore an onus to establish the necessary facts justifying such a decision. This argument was rejected by the learned judge of appeal. In regard to the exercise by the trial judge in that case of his discretion to order interest to

run from an earlier date than the date of demand, the learned judge of appeal said the following at 1032G-I, para 15:

> "Indeed, having resolved to order interest pursuant to ss (5) and not ss (2)(a), there was no need to determine the date of demand. Acting in terms of ss (5), it was open to the Court, in fixing the date from which interest was to run, to give effect to its own view of what was just in all the circumstances. No question of onus was raised then or in the notice of appeal. Nor could it have been. The discretion afforded by s2A(5) was of the nature referred to in a long line of cases in this Court from *ex parte Neethling and Others* 1951 (4) SA 331 (A) onwards. Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them. But there are no *facta probanda*. No enquiry arises as to whether a necessary fact has been successfully proved. Similarly, absence of proof does not result in failure on any issue. Indeed, there are no evidential issues to attract any onus."

It was ultimately found by the learned judge of appeal, at 1034B-F (para [22] of the judgment) that the exercise of the trial judge's discretion was not "flawed in any of the respects mentioned at 335D-E of *Neethling's* case."

DISCUSSION

[21] The submission by the respondent's counsel that the trial judge has exercised a discretion to limit the operation of the law is without merit. Counsel submitted, as a premise for the submission, that section 2A and section 1 are linked through the phrase in section 2A that a judgment debt "shall bear interest as contemplated in section 1". Consequently, submitted counsel, a judgment debt bears interest in terms of section 2A because the law, section 1, so provides. That is why, according to counsel, the trial judge really did not exercise a discretion to order payment of interest.

Counsel is wrong. The only link brought about by the abovementioned phrase is that the same rate of interest applies to interest under section 2A that applies under section 1. See *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 SCA at 205D-E.

Moreover, section 2A(5) provides that the court may make such order "as appears just" in respect of the payment of interest, the rate of interest and the rate from which interest shall run, "Notwithstanding the provisions of this Act". The word "Notwithstanding" and what follows on it must be interpreted in its context *(National Gambling Board v Free State Gambling Board and Others* [2001] 3 All SA 529 (A) at 533g). The phrase "Notwithstanding the provisions of this Act" means in ordinary language: "despite" or "in spite of" the provisions of the Act. See *Kotze NO v SANTAM Insurance Ltd* 1994 (1) SA 237 (C) at 247C-D. In *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 SECLD at 692H Mpati J, as he then was, held that the discretion of the court "overrides the provisions of s2A(2) of the Act." That finding was not deviated from by Howie JA on appeal but was implicitly accepted as correct.

It therefore follows that Claassen J in the present case exercised his discretion which he had in terms of section 2A(5) in ordering the appellant to pay interest on the cost of the acquisition of the two prostheses.

[22] Counsel for the appellant argued in regard to the order for interest on the cost of the spare prosthesis that the trial judge was precluded from making such an order in terms of section 2A(3).

It is true that the learned judge said in his judgement at 598 of the record, that the estimated cost of the prosthesis as calculated by Mr Watson is a capitalised figure.

It is true that it seems as if the calculated cost of the spare prosthesis was capitalised. However, Watson's evidence is clear that the respondent should already have received a spare prosthesis. The trial judge also ordered interest to run on R101 208,00 in regard to the spare prosthesis. This appears to be in conflict with item 43 of annexure "B" to the learned judge's judgment from which it appears that he awarded R148 865,00 in respect of the spare prosthesis which is indeed a capitalised amount.

I cannot, therefore, agree with counsel's argument. The capital amount on which interest was to be calculated in respect of the spare prosthesis was indeed the amount of the actual cost thereof based on the interim payment of 9 September 2003.

[23] The next question is whether or not the trial judge should have ordered interest to be paid on the two amounts of R101 208,00 respectively for the two prostheses.

In *ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335D-E it was laid down that a court of appeal would only be justified to interfere with the exercise of a trial judge's discretion if it can be found that the discretion was exercised capriciously or upon a wrong principle or if the court 'has not brought its unbiassed judgment to bear on the question or has not acted for substantial reasons." See also *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 SCA at 625 F-G; *Western Cape Housing Development Board and Another v Parker and Another* 2005 (1) SA 462 (C) at 466F-467F.

[24] I have already referred to the remarks of the trial judge in his judgment granting leave to appeal, that the two orders for interest in respect of the prostheses should not have been made. I agree with that view of the trial judge and the reasons given by him. As far as compensation of the respondent by way of general damages is concerned, I would like to refer to paragraph 7 of the trial judge's judgment where he dealt with the issue of general damages and the award that should be made therefor. In paragraphs 7.1.6, 7.1.7, 7.1.8 and 7.2.5 of his judgment the trial judge had regard to the fact that the respondent would not be able, in the future, to walk or move around freely and comfortably despite the prosthesis and other aids and appliances that she had received, she had fallen at least four times because of her disability. The mere fact that she had a stump

and an artificial limb in itself would be and is, a disfigurement, the trial judge said.

The most important factor, in my view, is the fact that the respondent had not incurred any expenses in acquiring the two prostheses. The primary one was paid for by the appellant on 9 September 2003 and the spare one could be purchased with the amount awarded in respect thereof, R148 865,00 which obviously was calculated on the basis that inflation was taken into account. There is, therefore, no talk of the respondent being paid in depreciated currency to recompense her for expenses which she had incurred prior to the date of judgment. There was therefore no need for an order relating to interest. What is more, the trial judge should under section 2A(5) have made an order nullifying the effect of sections 2A(1) and 2A(2)(a).

Consequently I am of the view that the two orders for interest should be set aside on the grounds mentioned at 335D-E of *Neethling's* case.

It follows that the appeal must succeed.

THE RECORD

The record that was prepared for purposes of the appeal comprises seven volumes. It includes all the evidence that was adduced at the trial. This was unnecessary. Prior to the hearing of the appeal I requested both counsel to indicate to this court which portions of the record would be relevant for the determination of the appeal. Counsel agreed that only the pleadings, the evidence of Mr Watson and that of the respondent, the two statements at pages 556 and 557 of the record, the judgment, the amended court order, the amended notice of application for leave to appeal, the judgment in terms of which leave to appeal was granted and the notice of appeal, would be relevant. All of this could have been included in three volumes at the most. That means that four volumes could have been excluded which were, in any event, unnecessary and irrelevant for the determination of the appeal.

At the hearing of the appeal counsel were requested to address the court on this issue. Copies of letters that were written by the two attorneys of record to each other were placed before us. From these letters it appears that the appellant's attorney was adamant that all the evidence that was adduced at the trial should be included in the record. His attitude was that the respondent's legal representatives could "debate the merits or de-merits (sic) of the inclusion of same in court should the appeal proceed."

The attitude of the appellant's attorney was wrong and unreasonable. As a result thereof unnecessary costs were incurred in preparing the record for purposes of the appeal.

It would be unfair to saddle the unsuccessful respondent with the unnecessary costs that were incurred in preparing the record. In my view the appellant should bear those costs.

It therefore follows that the court order in favour of the appellant, because of the appeal succeeding, should be qualified by excluding the unnecessary costs incurred in respect of preparing the record. In my view it would be fair to the parties to disallow half of the costs of preparation of the record.

THE ORDER

1. The appeal is upheld with costs excluding half of the costs incurred in respect of the preparation and copying of the record.

2. The orders of the court *a quo* in paragraphs 3.1, 3.2 and 3.3 of the amended order of 12 March 2004, are set aside;

3. The order contained in paragraph 6 of the amended order of 12 March 2004, is amended by deleting the reference to paragraph 3 therein.

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S J MYNHARDT

JUDGE OF THE HIGH COURT

I agree

_____

E BERTELSMANN

JUDGE OF THE HIGH COURT

I agree

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N RANCHOD

ACTING JUDGE OF THE HIGH COURT