IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO. 72470/2018

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE DATE

In the matter between:

THE RAND WEST CITY LOCAL MUNICIPALITY **APPLICANT**

and

QUILL ASSOCIATES (PTY) LTD **1ST RESPONDENT**

THE REGISTRAR OF THE HIGH COURT **2ND RESPONDENT**

(GAUTENG DIVISION, PRETORIA)

JUDGMENT

BOTES AJ

INTRODUCTION

1. This matter concerns the application and the implementation of interesting and novel legal principles, concerning the following:

    1.1. Is a *"decision"* to issue a writ of execution, as provided for in Rule 45 of the Uniform Rules of this Court, susceptible for review, as provided for in the Promotion of Administrative Justice Act, No 3 of 2000 (hereinafter referred to as *"PAJA"*);

    1.2. Is *"interest a tempore morae"* calculated from the date when the liability arose or on the date of demand or on the date when the summons was served or on the date of judgment, as provided for in the Prescribed Rate of Interest Act, No 55 of 1975 (hereinafter referred to as *"the Interest Act"*); and

    1.3. Is value-added tax payable on an amount in respect of an order or an award that was made by a Court pursuant to the infringement of a copyright, as provided for in the Copyright Act, No 98 of 1978 (hereinafter referred to as *"the Copyright Act").*

2. The Applicant is the successor-in-title of the Randfontein Local Municipality and the Westonaria Local Municipality, after the amalgamation of the aforementioned two municipalities on 3 August 2016. The First Respondent (as Plaintiff) initiated proceedings in this Court against Randfontein Local Municipality, under case no. 36264/2013, and Westonaria Local Municipality,

under case no. 36265/2013. The two actions were consolidated and the trial was presided over by Potterill J (hereinafter referred to as *"the Court"*).

3. The Court made the following orders, apart from interdictory relief, on 31 July 2015:

> *"52.5. That the First Defendant (Randfontein Local Municipality) be ordered to pay to the Plaintiff (the First Respondent) the amount of R4 750 000,00;*
>
> *52.6. That the Second Defendant (Westonaria Local Municipality) be ordered to pay the amount of R5 750 000,00;*
>
> *52.7. Interest on the said amounts at a rate of 15,5% per annum ad (sic) tempore more (sic);*
>
> *52.8. VAT if VAT is applicable on the amounts so ordered."*[1]

4. Pursuant to the Court's judgment and order, the Applicant effected payment in an amount of R11 533 260,17 to the First Respondent on 20 December 2016.[2]

5. The First Respondent approached the Second Respondent during the beginning of July 2018 and requested the Second Respondent to issue a writ of execution, in accordance with the provisions of Rule 45(1) of this Court's rules, in an amount of R7 965 470,56. This amount is calculated and

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1 See: par 52 of the Court's judgment – pages 69 to 70 of the record

2 See: the Applicant's calculation dated 19 December 2016 – page 86 of the record and proof of payment – pages 90 and 91 of the record

compounded in accordance with the summary which was attached to the First Respondent's affidavit.[3]

6. The Second Respondent complied with the First Respondent's request and issued the writ of execution on 10 July 2018.[4]

7. The Deputy Sheriff of this Court executed the writ on 10 July 2018 by attaching an amount of R7 965 470,56 in the Applicant's bank account held at First National Bank, account no. 672-387-440-45.[5]

8. The attachment triggered this application. The Applicant applies for an order in terms of which the decision of the Second Respondent to issue the writ of execution under case no's 36264/2013 and 36265/2013, whereby the Sheriff of this Court was directed to attach and take into execution the sum of R7,965,470,56 plus interest thereon at the rate of 15,5% calculated per annum and compounded monthly as from 11 July 2018 to date of payment, and other taxed costs and charges besides the costs of the Sheriff against the *"incorporeal property"* of the Applicant held at Firstrand Bank (Randfontein), cheque account no. 672-387-440-45, be reviewed and set-aside in accordance with the provisions of PAJA, alternatively that the said *"writ of execution – incorporeal property"* be set-aside and that the *"notice of attachment in execution"* dated 10 July 2018 be set-aside.[6]

THE APPLICANT'S CAUSE OF ACTION

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3 See: calculation of interest – page 88 of the record

4 See: writ of execution – pages 14 to 16 of the record

5 See: par 10 of the Applicant's founding affidavit – page 8 of the record and the notice of attachment in execution – page 17 of the record

6 See: prayers 1 and 2 of the amended notice of motion – pages 1 and 2 of the record

9. It is the Applicant's case and contention that:

9.1. there is a dispute between it and the First Respondent as to the calculation of interest. The First Respondent, knowing about the dispute, had to give notice to the Applicant of its intention to apply for the writ to be issued and it had to serve the affidavit on the Applicant so as to enable the Applicant to make representations to the Second Respondent about its view of how the interest had to be calculated[7];

9.2. the Second Respondent should have realized that there was a dispute between the Applicant and the First Respondent on the calculation of interest, after reading the affidavit, and should have notified the Applicant of the application for the writ of execution to be issued[8];

9.3. the Second Respondent was duty bound to alert the Applicant to the First Respondent's request for a writ of execution to be issued, as provided for in Section 3 of PAJA[9];

9.4. the execution of the writ was irregular, by virtue of various technical aspects and inconsistencies[10];

9.5. the basis for the calculation of interest in law means that interest had to be calculated from the date of the order that was made by the Court on 31 July 2015 and not from the date of service of the summons and the

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7 See: par 7 of the Applicant's founding affidavit – page 7 of the record
8 See: par 8 of the Applicant's founding affidavit – page 7 of the record
9 See: par 9 of the Applicant's founding affidavit – pages 7 and 8 of the record
10 See: par 11 of the Applicant's founding affidavit – page 9 of the record

First Respondent calculated interest on the basis of monthly capitalisation thereof, which is echoed in the writ itself where interest is to be *"calculated per annum and compounded monthly"*, which approach is wrong in law[11];

9.6. the decision of the Second Respondent to issue the writ on the basis that it was sought is *contra* the law and legislation, in particular the Interest Act[12];

9.7. the First Respondent did not attach copies of the returns of service in respect of the summonses to its affidavit and the Applicant is therefore unable to verify the date from which interest must be calculated according to the First Respondent's version[13];

9.8. the First Respondent did not attach a copy of the VAT invoice to its affidavit and it was therefore wrong to add value-added tax to the amounts ordered by the Court to be due and payable. In the summonses no value-added tax was claimed in addition to the *"reasonable royalty"* claimed in lieu of actual damages. The reasonable royalty must therefore be taken to include value-added tax, because no value-added tax was claimed in addition to the reasonable royalties. The First Respondent is not entitled to charge value-added tax on the payment which was already made by the Applicant.

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11 See: par 15 of the Applicant's founding affidavit – page 10 of the record

12 See: par 16 of the Applicant's founding affidavit – page 10 of the record

13 See: par 17 of the Applicant's founding affidavit – pages 10 to 11 of the record

Payment of value-added tax must be re-allocated to the judgment debt[14];

9.9. in the event that the First Respondent is liable to the Receiver of Revenue for the payment of value-added tax on the judgment debt, it is liable to pay the value-added tax itself and it may not add and recover value-added tax in addition to the amounts awarded by the Court in its order[15];

9.10. the full amount that the Applicant paid to the First Respondent on 20 December 2016 must be taken as payment of the entire judgment debt. Nothing may be excluded and allocated to value-added tax. The judgment debt was therefore settled *in toto* with the payments that the Applicant made to the First Respondent[16]; and

9.11. the decision of the Second Respondent to issue the writ stands to be reviewed and set-aside in terms of PAJA[17].

IS VALUE ADDED TAX PAYABLE ON THE AMOUNT THAT WAS DETERMINED BY THE COURT

10. The First Respondent is a *"vendor"*, as provided for in the Value-Added Tax Act, No 89 of 1991 (hereinafter referred to as *"the VAT Act"*). It is the Applicant's submission and contention that:

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14 See: par 18 of the Applicant's founding affidavit – page 11 of the record
15 See: par 19 of the Applicant's founding affidavit – page 11 of the record
16 See: par 21 and 22 of the Applicant's founding affidavit – page 12 of the record
17 See: par 23 of the Applicant's founding affidavit – page 12 of the record

10.1. it was wrong to add value-added tax to the amounts ordered by the Court, by virtue of the fact that the summonses which were issued by the First Respondent in the respective actions did not provide for value-added tax in addition to the *"reasonable royalty"* claimed in lieu of damages and the reasonable royalty must therefore be taken to include value-added tax[18];

10.2. the reasonable royalty must therefore be taken to include value-added tax and having regard to paragraph 52.8 of the Court's judgment it was ordered that value-added tax was only payable *"if VAT is payable on the amounts so ordered."* Regard being had to the provisions of Section 64(1) of the VAT Act, *"the amounts so ordered"* include value-added tax and the payment of value-added tax must therefore be re-allocated to the judgment debt[19];

10.3. the First Respondent is liable to the Receiver of Revenue for the payment of value-added tax on the judgment debt and it may not add and recover value-added tax in addition to the amounts awarded by the Court[20]; and

10.4. the full amount that the Applicant paid to the First Respondent must be taken as payment of the entire judgment debt. Nothing may be excluded and allocated to value-added tax. The Applicant's calculation

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18 See: par 18 of the Applicant's founding affidavit – page 11 of the record
19 See: par 18 of the Applicant's founding affidavit – page 11 of the record
20 See: par 19 of the Applicant's founding affidavit – page 11 of the record

of the amount due is correct and the judgment debt was settled in full with the payment that the Applicant made to the First Respondent[21].

11. The point of departure to determine whether or not value-added tax is payable on the amounts awarded by the Court, is to identify the nature of the First Respondent's claims which formed the subject matter of the Court's judgment. The Court found that Die Westelike Gauteng Diensteraad (hereinafter referred to as *"the WGDR"*) awarded a tender to the First Respondent, which culminated in the conclusion of a written agreement in terms of which the WGDR bought the BIQ computer software programme (hereinafter referred to as *"the BIQ system"*) from the First Respondent, which included all enhancements and improvements[22].

12. One year after the commissioning of the BIQ system the WGDR decided to enter into a support and maintenance agreement with the First Respondent, which agreement was renewable in March of every year[23].

13. During 2004 the WGDR underwent a name change to the West Rand District Municipality (hereinafter referred to as *"WRDM"*), which resulted in another agreement that had to be entered into and concluded. The terms and conditions of this agreement are not in dispute[24].

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21 See: par 22 of the Applicant's founding affidavit – page 12 of the record
22 See: par 4.2 of the Court's judgment – page 33 of the record
23 See: par 4.4 of the Court's judgment – page 34 of the record
24 See: par 4.5 of the Court's judgment – page 34 of the record

14. It was not expected from WRDM to pay for the BIQ system again. WRDM did however continue to pay the licence fees as it did in the previous years[25].

15. The First Respondent therefore gave permission to Westonaria Local Municipality to utilize the BIQ system in terms of *"an extended licence"*[26].

16. Randfontein Local Municipality subsequently approached the First Respondent to implement the BIQ system on the same basis as Westonaria Local Municipality. The First Respondent consequently also provided Randfontein Local Municipality with *"an extended licence"* which enabled Randfontein Local Municipality to utilize the BIQ system[27].

17. The relationship between the First Respondent, WRDM, Westonaria Local Municipality and Randfontein Local Municipality existed from 1998 until July 2011[28].

18. WRDM addressed a letter to the First Respondent on 29 July 2011 in terms of which WRDM alleged that there was no specific termination date of the agreement that was entered into and concluded during 2004 and that the relationship between the parties continue on a month-to-month basis. WRDM notified the First Respondent of the termination of the agreement as from 31 August 2012[29].

19. The First Respondent subsequently directed WJDM's attention to the fact that the termination date of the agreement is in fact 29 February 2012. WRDM

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25 See: par 4.6 of the Court's judgment – page 35 of the record
26 See: par 4.7 of the Court's judgment – pages 35 to 36 of the record
27 See: par 4.9 of the Court's judgment – page 36 of the record
28 See: par 4.10 of the Court's judgment – page 37 of the record
29 See: par 4.11 of the Court's judgment – page 37 of the record

continued to use the BIQ system after 29 February 2012 without any support from the First Respondent[30].

20. The First Respondent informed Westonaria Local Municipality that their arrangement could no longer be allowed by virtue of the fact that the agreement between it and WRDM was cancelled. The First Respondent therefore expected from Westonaria Local Municipality to purchase its own copy of BIQ. The termination date for Westonaria Local Municipality was also 29 February 2012. Randfontein Local Municipality's termination date was also 29 February 2012[31].

21. The Applicant, notwithstanding the termination of the agreement on 29 February 2012, continued to utilize the BIQ system on the manner alluded to by the Court in its judgment, without compensating the First Respondent in any manner whatsoever.

22. The First Respondent's claims were therefore based on a royalty and monthly payment, pursuant to the extensions of the licences to Westonaria Local Municipality and Randfontein Local Municipality, which is common in the industry[32].

23. Randfontein Local Municipality and Westonaria Local Municipality were *au fait* with the fact that the copyright in respect of the BIQ system belongs to the First Respondent, as provided for in the Copyright Act. The First Respondent

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30 See: par 4.12 of the Court's judgment – page 37 of the record

31 See: par 4.13 and 4.14 of the Court's judgment – pages 37 to 38 of the record

32 See: par 17 of the Court's judgment – page 50 of the record

was therefore entitled to claim *"damages"* from the Applicant in accordance with the provisions of Section 24(2) of the Copyright Act.

24. The Court therefore found that the First Respondent's claims were *"not damages in terms of Section 24(1) of the Copyright Act, but a reasonable royalty in terms of Section 24(1A) of the Copyright Act."*[33]

25. The Court held that the Applicant infringed the First Respondent's copyright, as provided for and envisaged in Sections 23 and 24 of the Copyright Act[34].

26. Regard being had to the provisions of the Income Tax Act, No 58 of 1962 (hereinafter referred to as *"the ITC"*), the critical question in deciding whether an amount received by way of *"damages"* or *"compensation"* is subject to income tax or not, is whether such an amount was received to compensate the taxpayer, i.e. the First Respondent, for a loss of profits that it would otherwise have earned, or whether it was compensation for the loss, surrender or sterilisation of a fixed capital asset. The reason for this inquiry is that the general part of the definition of *"gross income"* in Section 1 of the ITA excludes receipts and accruals of a capital nature.

27. A useful test is to enquire whether the *"damages"* or *"compensation"* have been awarded to a Plaintiff, *in casu* the First Respondent, "*to fill a hole in the profits*" of the taxpayer, or *"to fill a hole in its fixed capital assets"*.[35]

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33 See: par 42 of the Court's judgment – pages 63 to 64 of the record

34 See: par 43 of the Court's judgment – page 64 of the record

35 See: Burmah Steamship Co Ltd v IRC 1931 SC 156

28. The fact that the *quantum* of compensation is determined with reference to the loss of revenue to the taxpayer or by the loss of future profits, is not necessarily determinative of the character of the damages or compensation.[36]

29. An amount received by way of damages is income, if the transaction out of which the claim for damages arose is one which, had it been completed, would have resulted in *"income"* and not in a capital gain or loss.

30. It therefore follows that the amounts which were awarded by the Court (R4,750,000,00 and R5,750,000,00) to the First Respondent were clearly intended *"to fill a hole in its profits"*, which would have been received as *"income"* by the First Respondent if the agreement which was in full force and effect at the time, was not breached. The amount of R10,5 million (R4 750 000,00 plus R5 750 000,00) is therefore subject to income tax, as provided for in the ITA, in the hands of the First Respondent.

31. The position pertaining to value-added tax on this amount insofar as compensation or damages are concerned, is not nearly as clear as one would expect. What is, however, clear is that one cannot merely make the general statement that all *"compensation"* and *"damages"* as such are either subject to value-added tax in the hands of the *"recipient"*, or is not subject to value-added tax.[37] It seems that delictual or consequential damages or non-patrimonial damages, i.e. for pain and suffering, are not subject to value-added tax. Other forms of compensation or damages could be subject to value-added tax.

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[36] See: Taeuber & Corssen (Pty) Ltd v CIR 37 SATC 129 at 140

[37] See: Stellenbosch Farmers' Winery Ltd v CSARS 2012(5) SA 363 (SCA) at par 41

32. The starting point in determining a liability for value-added tax is obviously the charging section of the VAT Act, being Section 7(1)(a), which provides, in the first instance, that value-added tax is levied:

> *"On the supply by any vendor of goods or services …. in the course or furtherance of any enterprise carried on by him."*

33. The term *"supply"* was considered in the matter of **Shell's Annandale Farm (Pty) Ltd v CSARS** and it was held that where fixed property was expropriated and one party's participation was involuntary, there is no *"supply"*.[38]

34. Pursuant to the aforementioned judgment, the definition of *"supply"* in Section 1 of the VAT Act was amplified also to include *"all other forms of supply, whether voluntarily, compulsory or by operation of law"*.

35. The term *"services"* is defined in Section 1 of the VAT Act as:

> *"Anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, …"*.

36. The term "*enterprise"*, as far as it is relevant for present purposes, is defined in subparagraph (a) of Section 1 of the VAT Act as:

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[38] See: Shell's Annandale Farm (Pty) Ltd v SCARS 2000(3) SA 564 (CPD) at 573 C – D

"In the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic …. in the course or furtherance of which goods or services are supplied to any other person for a consideration …..".

37. The Supreme Court of Appeal was confronted with the question of the liability for value-added tax in respect of damages or compensation specifically. The Supreme Court of Appeal held in this regard as follows:

"The Tax Court found that, by agreeing to the early determination of the distribution right, the taxpayer surrendered the remaining portion of the right, and that such surrender constituted the supply of services in the course of an enterprise by the taxpayer to UD. There can be no quarrel with the correctness of these findings." [39]

38. In the light of the above quoted *dictum* of the Supreme Court of Appeal it appears that the following statement by De Koker is correct:

"The definition of the term "service" in Section 1 of the VAT includes the assignment or surrender of any right. So if a registered enterprise institutes an action for specific performance of a contract, …. certain consequences arise pursuant to a compromise reached. If a

[39] See: Stellenbosch Farmers' Winery Ltd v CSARS *supra* at par 53

compromise is reached, according to which that right to performance is surrendered in return for damages, the surrender is subject to VAT."[40]

39. There would be no reason to confine the liability for value-added tax, as set out by De Koker, to instances where a contractual right is surrendered for an amount agreed upon by way of compromise, and not to extend such liability to instances where the amount is determined by way of a judgment or by way of an award by an arbitrator.

40. In my view the contractual rights of the First Respondent, alluded by the Court in its judgment, were surrendered and replaced by the award in the amount of R10,5 million, which occurred in the course of the furtherance of the First Respondent's enterprise or normal business activities.

41. In the light of the aforementioned I am unable to identify a basis upon which to conclude that the First Respondent would not be liable for value-added tax on the amount awarded by the Court. The fact that the award was not calculated with reference to value-added tax is irrelevant.

42. As a result of the finding that value-added tax is indeed payable by the First Respondent, the following questions arise, namely:

    42.1. whether the Court's award should have mentioned value-added tax; and

    42.2. the effect of the Court's award not mentioning anything in that regard.

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[40] See : De Koker : Value Added Tax in South Africa, par 9.24

43. It is trite that any dispute about taxation is a matter between the Fiscus and the *"taxpayer"*.[41]

44. Although value-added tax is on a somewhat different footing than income tax, in that the counterparty would normally be required to pay value-added tax to the successful party, value-added tax did not feature in the pleadings and in the Court's judgment, as:

    44.1. value-added tax is a statutory duty which the First Respondent is obliged to impose and pay over to the Fiscus, and the Court has no say in that regard; and

    44.2. the payment of value-added tax should be tax neutral for the Applicant, as the Applicant would be able to claim a VAT input deduction on the amount paid.

45. The First Respondent did issue a VAT invoice to the Applicant upon payment in the amount of R9,5 million.[42] The value-added tax amounted to R1,330,000,00 (14% of R9,5 million), which amount was indeed paid by the Applicant. This amount (R1 330 000,00) was not taken into account by the First Respondent in the settlement of the judgment debt.[43]

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41 See: Pretoria Society of Advocates & another v Geach & others 2011(6) SA 441 (GNP) at par 58

42 It appears that the First Respondent did not issue a VAT invoice to the Applicant in the amount of R10,5 million, i.e. the amount which was ordered by the Court on 31 July 2015. It furthermore appears that the VAT on the amount of R9,5 million (R1,330,000,00) was paid by the Applicant to the First Respondent

43 See: par 18 of the First Respondent's affidavit in support of the writ of execution – page 24 of the record

46. Insofar as the Applicant's argument that the amount that was awarded by the Court should be regarded as including value-added tax, as contemplated in Section 64 of the VAT Act, is concerned, I am of the view that the provisions of this section do not apply as:

    46.1. the award by the Court can hardly be described as a *"price charged"* by the First Respondent; and

    46.2. the First Respondent has consistently added value-added tax to the amounts which were due and payable by the Applicant in the past.

47. In terms of Section 20(7) of the VAT Act, the Commissioner for SARS may direct that a tax invoice is not required in certain circumstances. This matter, however, does not appear to fall within the ambit of Section 20(7) of the VAT Act and I see no reason why the First Respondent should not issue a tax invoice in terms of Section 20(1) of the VAT Act to the Applicant, if it has not yet done so.[44] Such a VAT invoice will enable the Applicant to claim the value-added tax as an input deduction of the amount paid.

48. The Court was alive of the issue pertaining to value-added tax, notwithstanding that it was not specifically provided for in the pleadings or that evidence was adduced in this regard. The Court made the following observation in its judgment:

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[44] It seems that the First Respondent has not yet issued a VAT invoice to the Applicant in an amount of R10,5 million. See furthermore the comment in footnote 42 *supra*

"At the trial it was not clear if VAT is payable on these amounts ordered, but if VAT is payable then the Defendants must also pay the VAT." [45]

49. The Court consequently made a finding in accordance with the provisions of Section 24(1A) of the Copyright Act, in that it awarded an amount calculated on the basis of a reasonable royalty which would have been payable by the Applicant in respect of the work or type of work concerned, *in casu* the utilisation of the BIQ system.

50. I therefore find that value-added tax is payable by the Applicant on the amount that was awarded by the Court in its judgment dated 31 July 2015, as amplified by the orders which were made on 15 September 2015 and 11 May 2017 respectively.

IS THE FIRST RESPONDENT ENTITLED TO CLAIM INTEREST ON THE AMOUNTS AWARDED BY THE COURT *A TEMPORE MORAE*, I.E. FROM THE DATE UPON WHICH THE SUMMONSES WERE SERVED

51. The summonses were served:

    51.1. on Randfontein Local Municipality on 15 July 2013; and

    51.2. on Westonaria Local Municipality on 17 July 2013.[46]

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45 See: par 51 of the Court's judgment – page 69 of the record

46 See: par 22.3 of the First Respondent's affidavit in support of the writ of execution – page 27 of the record and the Sheriff's return of service – page 129 of the record

52. The First Respondent claims interest calculated from the date upon which the summonses were served on the Applicant's predecessors, which is evident from the calculation upon which the First Respondent relies.[47]

53. It is the Applicant's submission and contention that:

53.1. this basis for the calculation of interest in law means that interest had to be calculated from the date of the order and not from the date of service of summons. Interest awarded *a tempore morae* means that the interest has to be calculated from the date upon which the judgment debt became due and *in casu* the debt became due on the date of the order;[48]

53.2. the First Respondent indicated that it calculated interest on the basis of monthly capitalisation thereof. This is echoed in the writ itself where interest is to be *"calculated per annum and compounded monthly"*. This is wrong in law;[49] and

53.3. the writ of execution is *contra* the law and legislation, in particular the Prescribed Rate of Interest Act, No 55 of 1975. The interest *in casu* was specifically claimed and granted *a tempore morae* which brings it within the ambit of Section 2A(5) of the aforementioned Act and outside the ambit of Section 2A(2)(a) thereof.[50]

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47 See: calculation of interest – page 88 of the record

48 See: par 14 of the Applicant's founding affidavit – page 10 of the record

49 See: par 15 of the Applicant's founding affidavit – page 10 of the record

50 See: par 16 of the Applicant's founding affidavit – page 10 of the record

54. The First Respondent calculated the interest on R10,5 million at 15,5% per annum from 17 July 2013 to date of partial payment, capitalised monthly in the total amount of R7 300 991,90.[51]

55. The Applicant effected payment in the amount of R11 533 260,17 to the First Respondent on 20 December 2016, which reduced the capital amount then due and payable from R17 800 991,90 to R6 267 731,73, which latter amount was still due and payable to the First Respondent. Interest at the rate of 15,5% per annum must still be added from 21 December 2016 to date of final payment.[52]

56. The present investigation is firstly into the question of how (on what basis) the interest on the capital amounts should be calculated. This question has two components:

    56.1. from when (what date) is interest to be calculated; and

    56.2. can interest be recovered on arrear interest, i.e. compound interest.

57. Fundamentally, the relevant question is what the words *"a tempore morae"* mean in the present context. Translated, the words effectively mean *"for the period of default",* thus restating the question as *"when did the period of default commenced?"*.

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[51] See: par 21.2 of the First Respondent's affidavit in support of the writ of execution – page 25 of the record

[52] See: par 21.4 and 21.5 of the First Respondent's affidavit in support of the writ of execution – page 25 of the record

58. The amounts awarded by the Court were unliquidated amounts and the *"default"* commenced on either:

    58.1. the date that the law expressly prescribed in this regard; or

    58.2. from the date on which the capital amount became due and payable.

    The Applicant submits that the interest should be calculated from 31 July 2015, i.e. the date of the order, as opposed to the First Respondent's submission that interest should be calculated from 17 July 2013.

59. The relevant and applicable sections of the Interest Act provides that:

> *"2A.* ***Interest on unliquidated debts***
>
> *(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a Court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in Section 1.*
>
> *(2) (a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) 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 is the earlier."*

And:

> *"(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a Court of law, or an arbitrator or an arbitration tribunal 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."*

60. The Court did not expressly state from which specific date interest should be calculated.[53]

61. On a proper interpretation and analysis of the order that was made by the Court on 31 July 2015, it is evident that interest should be calculated *"a tempore morae"*. It did so knowing that the starting date of the period for which interest is to be calculated is prescribed by Statute, i.e. the Interest Act, and it does not have to be repeated in the Court order. It is only when the Court determines that the interest should run from a date different from that prescribed by the Interest Act, that the Court should expressly determine the starting date of the period for which interest is to be calculated, regard being had to what is provided for in Section 2A(5) of the Interest Act.

62. The Supreme Court of Appeal held in this regard as follows:

> *"Section 1(1) is couched in peremptory terms, and its application is obligatory, not discretionary (authorities omitted). To give effect to the intention of the Legislature the words "shall be calculated at the rate prescribed under section (2) as at the time when such interest begins*

[53] See: par 52.7 of the Court's judgment - page 70 of the record

to run" must be given their ordinary and literal meaning. Such meaning is clear. The rate prescribed under subsection (2) at the time when interest begins to run governs the calculation of interest. The rate is fixed at the time and remains constant. Subsection (1) does not provide for the rate to vary from time to time in accordance with adjustments made to the prescribed rate by the Minister of Justice in terms of subsection (2). The fact that the Minister may from time to time prescribe different rates of interest therefore has no effect on the rate applicable to interest which has already begun to run. The plain meaning of the words in question must be adopted as they do not lead to "some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a Court or law is satisfied the legislature could not have intended"." (authorities omitted)[54]

63. The rate determined by the Court is 15,5% per annum, which was the rate prescribed at the time when the summonses were served on the Applicant's predecessors. The rate prescribed at the date when the Court made its order was 9% per annum. If the Court intended that interest should commence on 31 July 2015, it would probably have ordered a rate of 9% per annum instead of 15,5% per annum.

64. In addition, the essential nature of *mora* interest must also be taken into account. *Mora* interest is a species of damages. The Supreme Court of Appeal considered this issue with reference to the judgment in the matter of

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[54] See: Davehill (Pty) Ltd v Community Development Board 1988(1) SA 290 (AD) at 300 I – 301 C

Union Government v Jackson & others 1956(2) SA 398 (A) at page 411 C – 412 A, in the following manner:

> *"In considering this question of taking into account the time that may elapse between the date when a man is deprived of an asset and that of his being reimbursed by receiving compensation for it, we must be careful to distinguish between two different approaches that call different legal principles into play and may therefore diverge greatly in their application to particular circumstances. The one approach is to treat this lapse of time as merely an element – one of many items – which the Court may be urged to bring into its reckoning in computing or estimating the damage which a Plaintiff has suffered and for which he should be recompensed. A set-off of interest on the capital amount awarded for the expropriation of a trading store and outbuildings against a claim for loss of rentals was applied by this Court in the case of Union Government v Maile, supra, especially at page 11. I mention this example to illustrate the point that there may be circumstances in which the interest-bearing potentialities of money play a part in the computation of damages. In Maile's case those potentialities countered in reduction of the Plaintiff's claim, but there may well be cases where they will count the other way.*
>
> *The other approach is that of dealing with the liability to pay interest as a consequential or accessory or ancillary obligation (the three adjectives are used as interchangeable words in the judgments in West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at pages 177 and 193), automatically attaching to some principle*

obligation by operation of law. The best illustration of this type is the liability for interest a tempore morae falling on a debtor who fails to pay the sum owing by him on the due date. Here the Court does not make an assessment; it does not weigh the pros and cons in order to exercise an equitable judgment as to whether, and to what extent, the interest-bearing potentialities of money are to be taken into account in computing its award. The only issue is whether the legal liability exists or not; if it does, the rest is merely a matter of mathematical calculation : the legal rate of interest on a definite sum from a definite date until date of payment."[55]

65. The law on this subject matter has been settled by the Supreme Court of Appeal in the matter of **Drake Flemmer & Orsmond Inc & another v Gajjar NO**[56] in which the following was stated:-

"(68) In summary, the correct approach in the present case would have been for the Plaintiff to prove the nominal value of his damages as at the notional trial date of 1 December 2002. That would have been the value of the claim against DFO which LRI allowed to prescribe on 21 December 2002. The time value of money would have been dealt with by an order for interest in terms of Section 2A(5), such interest to run from 21 December

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[55] See: Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga 2013(2) SA 259 (SCA) at par 15

[56] 2018(3) SA 353 (SCA)

2002. Put differently, Section 2A(5) provides the means by which a Court in this country can apply the interest-rate solution.

[69] Instead, the Plaintiff quantified his damages as at 1 December 2015. Is he to be non-suited on this account? This depends on whether the material in the record allows us to derive at a reasonable figure for the Plaintiff's damages as at December 2002. If so, prescribed interest as from December 2002 would be a matter of arithmetical calculation."

And:

"[80] The Court a quo did not have occasion to consider Section 2A(5) because it expressed damages in December 2015 terms. I am entirely satisfied, however, that if the Court a quo had instead expressed damages in December 2002 terms, the only just order would have been to apply Section 2A(5) so as to shield the Plaintiff from the corroding effects of delay for which LRI, not he, was responsible. There is no question of onus in relation to Section 2A(5). The Court, having regard to all the facts of the case gives effect to its own view as to what would be just (Adel Builders (Pty) Ltd v Thompson 2000(4) SA 1027 (SCA). It is unnecessary to decide whether in the circumstances of the present case the Court should have reduced the prescribed rate from 15,5% to prevent over-compensating the Plaintiff. What is incontrovertible is that there would have been

no legitimate grounds to reduce the rate to a figure lower than that which would cover intervening CPI inflation (a simple interest rate of 7,9%). The Plaintiff does not ask for more."

And:

"(85) In the present case the interest the Court a quo could have imposed in terms of Section 2A(5) would not have been arrear interest. Until the Court invoked its power in terms of Section 2A(5), the only interest that would run on the unliquidated debt would, at most, be interest in terms of Section 2A(2)(a), i.e. ***interest from date of demand or summons****. Upon the Courts exercising its power in terms of Section 2A(5), additional interest in respect of the earlier period would there and then become owing. Stated differently, the in duplum rule is concerned with the running of interest, the effect of the rule being to cause interest to stop running once the unpaid interest equals the capital. In a case such as the present, the interest which the Court can award in terms of Section 2A(5) in respect of the period prior to demand or summons is* ***not*** *interest which was running at that earlier time."*

And:

"(88) In summary, where an attorney's negligence results in the loss by a client of a claim which, but for such negligence, would have contested, the Court trying the claim against the attorney must assess the amount the client would probably have recovered at

the time of the notional trial against the original debtor. Where the original claim is one for personal injuries, the evidence available and the law applicable at the notional trial date would determine the recoverable amount. The nominal amount in rand which the client would have recovered against the original debtor represents the client's capital damages against the negligent attorney. If justice requires that the client be compensated for the decrease in the buying power of money in a period between the notional trial date and the date of demand or summons against the attorney, the remedy lies in Section 2A(5) of the Interest Act. If Section 2A(5) were invoked, the Court would not necessarily apply the prescribed rate but might choose instead to adopt a rate which would neutralize the effect of inflation."

66. I embrace the aforementioned approach which has the following effect:

66.1. the First Respondent is reimbursed or compensated as from the date upon which the summonses were served on the Applicant's predecessors, i.e. 17 July 2013; and

66.2. the First Respondent would, if everything went according to plan, have earned the royalties and monthly licence payments of R57 000,00 per month.

67. I am therefore satisfied that the manner in which the First Respondent calculated the interest, i.e. as from 17 July 2013, is in accordance with the authorities referred herein *supra* and in accordance with the provisions of the Interest Act.

IS THE FIRST RESPONDENT ALLOWED AND ENTITLED TO CLAIM

COMPOUND INTEREST

68. Centlivres CJ described interest as *"the life-blood of finance"*.[57] In its calculation in respect of interest, the First Respondent provides for compound interest, which is *"interest on interest"*.[58]

69. The Supreme Court of Appeal pronounced on this aspect as follows:

> *"Interest on interest (compound interest) could not be claimed in Roman and Roman-Dutch law (authorities omitted). In our modern law this principle has become obsolete, having been abrogated by disuse (authorities omitted). Compound interest may be expressly stipulated for by agreement, is commonplace today in commercial and financial dealings and has been sanctioned by our Courts for many years. In principle there appears to be no reason why the right to claim interest*

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57 See: Linton v Corser 1952(3) SA 685 (AD) at 695 G - H

58 See: par 21.6 of the First Respondent's affidavit in support of the writ of execution – page 25 of the record

on interest should be confined to instances regulated by agreement, and why it should not extend to the right to claim mora interest (which is a species of damages) on unpaid interest which is due and payable."[59]

70. The fact of the matter is that the First Respondent suffers further damage by virtue of the fact that the Applicant failed and omitted to effect payment of the royalties and the monthly licence fee since the date upon which the combined summonses were served on the Applicant's predecessors. *Mora* interest remains a specie of damages on which the First Respondent remains entitled to recovered from the Applicant. I therefore find that the First Respondent is entitled to claim compound interest from the Applicant, in accordance with and provided for in the calculation relied upon by the First Respondent.[60]

IS THE SECOND RESPONDENT'S DECISION TO ISSUE THE WRIT OF EXECUTION SUSCEPTIBLE TO BE REVIEWED AND SET-ASIDE IN ACCORDANCE WITH THE PROVISIONS OF PAJA

71. The Applicant applies for an order in terms of which the Second Respondent's decision to issue a writ of execution under case no's. 36264/2013 and 36265/2013 be reviewed and set-aside in accordance with the provisions of PAJA, for the following reasons:

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59 See: Davehill (Pty) Ltd v Community Development Board 1988(1) SA 290 (A) at 298 G – J

60 See: calculation of interest, page 88 of the record

71.1. The decision was made without applying *audi alteram partem* and without applying Section 3 of PAJA, which makes the decision procedurally unfair within the ambit of Section 6(1)(c);[61] and

71.2. The decision was materially influenced by an error of law on the question of how the interest on the judgment debt had to be calculated, which brings it within the ambit of Section 6(1)(d);[62]

71.3. The decision contravenes the law (the Value-Added Tax Act and also the Prescribed Rate of Interest Act) within the ambit of Section 6(1)(f)(i);[63]

71.4. The decision is unsubstantiated in fact and in law and so unreasonable that no reasonable person could have so exercised his/her powers or perform his/her functions, which brings it within the ambit of Section 6(1)(h);[64] and

71.5. The decision was taken without consideration of the effect thereof on the public well-being and without compliance with Section 4 of PAJA, which rendered it unconstitutional and unlawful in terms of Section 6(1)(i).[65]

72. The First Respondent submits that the issuing and execution of a writ of execution does not fall within the ambit of PAJA and that the Applicant has

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61 See: par 23.1 of the Applicant's founding affidavit – page 12 of the record
62 See: par 23.2 of the Applicant's founding affidavit – page 12 of the record
63 See: par 23.3 of the Applicant's founding affidavit – page 12 of the record
64 See: par 23.4 of the Applicant's founding affidavit – page 13 of the record
65 See: par 23.5 of the Applicant's founding affidavit – page 13 of the record

misconceived its remedy. It is trite that not all acts by State actors are administrative acts that fall within the ambit of PAJA and are reviewable under PAJA.[66]

73. A well-established distinction between legislative, executive and judicial acts by State actors is recognised, finding its existence in the doctrine of separation of powers between the legislative, executive and judicial spheres of the State that is fundamental to the constitutional dispensation of our jurisprudence.[67]

74. Administrative action is recognised as actions falling within the executive sphere of Government, but even in that sphere all actions by State actors within the executive branch of Government do not constitute administrative actions for purposes of PAJA.

75. The Applicant, in its heads of argument, made out a case which brings the Second Respondent's decision to issue the writ of execution within the ambit of PAJA. The Applicant, *inter alia*, relies on the provisions of the Superior Courts Act, No 10 of 2013, and on the judgment of the Supreme Court of Appeal in the matter of **Minister of Home Affairs v Calabrini Centre**, *supra*, with specific reference to paragraphs 48 to 51 of the judgment. It is, for purposes of this judgment, unnecessary to make a finding whether PAJA is in this instance applicable. The Applicant amended prayer 1 of its notice of motion by introducing the following alternative:

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66 See: Minister of Home Affairs v Scalabrini Centre 2013(6) SA 421 (SCA)

67 See: South African Association of Personal Injury Lawyers v Heath & others 2001(1) SA 883 (CC)

"In the alternative that the said "writ of execution – incorporeal property" be set-aside." [68]

76. The Applicant submits that a judgment creditor may sue out of the office of the Second Respondent for a writ of execution in accordance with the provisions of Rule 45(1) of the Uniform Rules of this Court and the only meaning that can be ascribed to the duty of the Second Respondent to issue a writ is that the Second Respondent must apply his/her mind and must decide whether the writ is justified. The Second Respondent does not sign and stamp the writ as a *"zombie"*.
77. The Applicant furthermore submits that a Registrar must issue a writ duly sought but must refuse to issue a writ wrongly sought. The Registrar must apply his/her mind to the writ submitted to him/her for issuing and must satisfy himself/herself that the document is correct and in accordance with the order upon which the issuing thereof is sought. Only then may he/she *"rubberstamp"*.

78. When a Registrar does not apply his/her mind or makes another mistake in respect of which grounds for review are present, the decision to issue the writ must be reviewed and set-aside. In the present case the Applicant submits more than sufficient reasons to substantiate review and setting aside of the Second Respondent's decision are advanced in the affidavits filed on behalf of the Applicant and referred to in the Applicant's heads of argument.

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[68] See: the Applicant's notice of proposed amendment in terms of Rule 28 – pages 226 to 227 of the Record

79. Pursuant to the amendment of its notice of motion the Applicant advanced the following argument in support of the relief it applies for:

79.1. The requirements for setting aside a writ for execution are dealt with in the matter of **Le Roux v Yskor Landgoed (Edms) Bpk**, where the following was said:

> *"Die algemene reel is dat 'n eksekusielasbrief tersyde gestel sal word as die lasbrief nie ondersteun of nie verder ondersteun word deur sy causa nie. Die causa is die skuld en die vonnis wat daarop verleen is."* [69]

79.2. One of the specific instances where a writ will be set-aside is:

> *"Waar die lasbrief nie in ooreenstemming met die vonnis is nie."*

80. The Applicant therefore submits that when a Registrar does not duly apply his/her mind or makes another mistake in respect of which grounds for review are present, the decision to issue the writ must be reviewed and set-aside. I am, with respect, in agreement with the Applicant's submission in this regard, but on a proper interpretation and analysis of the papers before this Court, it is evident that the Second Respondent decided to issue the writ of execution on the basis and in accordance with the evidence which are contained in the affidavit which was submitted to him/her in support of the First Respondent's request for a writ of execution to be issued.[70]

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69 See: Le Roux v Yskor Landgoed (Edms) Bpk 1984(4) SA 252 (TPA) at 257 B - C

70 See: the First Respondent's affidavit in support of the writ of execution – pages 18 to 88 of the record

81. I am therefore not persuaded that the Second Respondent erred in fact or in law by issuing the writ of execution. On the objective evidence contained in the First Respondent's affidavit in support of the writ of execution, it is evident that the First Respondent is entitled to the amounts alluded to and provided therein. The Second Respondent's decision can therefore not be criticised and the Applicant has therefore failed to demonstrate that the writ of execution is not supported by its *causa*, as provided for in this Court's judgment in the matter of **Le Roux v Yskor Landgoed (Edms) Bpk**, *supra*. The writ of execution is supported in accordance with what is provided for and contained in the Court's judgment and order.

82. The writ of execution is therefore not susceptible to be set-aside, as applied for by the Applicant. No evidence has been adduced in support of the Applicant's contention that the Second Respondent did not apply his or her mind when the writ of execution was issued. The Second Respondent issued the writ of execution strictly in accordance with the evidence that was placed before him/her, which evidence is premised on the Court's judgment and order.

CONCLUSION

83. In the premises I am satisfied and persuaded that:

83.1. Value-added tax is payable on the amount that was determined by the Court, being R10,5 million;

83.2. The First Respondent is entitled to claim interest *a tempore morae* on the amount of R10,5 million at the rate of 15,5% per annum calculated from the date upon which the summonses were served;

83.3. The First Respondent is allowed and entitled to claim compound interest from the Applicant;

83.4. The Second Respondent's decision to issue the writ of execution is not susceptible to be reviewed and set-aside; and

83.5. The costs of this application should follow the result.

It therefore follows that the application should be dismissed with costs.

84. The First Respondent initiated an application on 10 June 2019 in accordance with the provisions of Rule 6(11), read together with the provisions of Rule 6(5)(e) of the Uniform Rules of this Court. This application was initiated pursuant to the amendment that was effected to prayer 1 of the Applicant's notice of motion. The purpose of this application is to demonstrate that the Applicant has failed to adduce any facts or grounds whatsoever in support of the relief applied for as a result of the amendment, i.e. the alternative claim. This application is not opposed and, insofar as it may be necessary, it is appropriate to make an order as applied for by the First Respondent in this regard.

ORDER:

In the premises an order in the following terms is made:

1. **Permission is granted to the First Respondent to deliver a further affidavit dealing with the consequences of the amendment of the Applicant's notice of motion;**
2. **No order in respect of the costs occasioned by the First Respondent's application to file a further affidavit is made; and**
3. **The application is dismissed with costs.**

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F W BOTES

Acting Judge of the High Court of South Africa

APPEARANCES

Date of hearing : 05 August 2019
Date of judgment : 16 April 2020

Applicant's Counsel	:	Adv.: J J Botha
Applicant's Attorneys	:	SMITH VAN DER WATT INC
1st Respondent's Counsel	:	Adv.: S D Wagner SC
1st Respondent's Attorneys	:	A L MAREE INC