



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Nos: **26222/15 - 66316/18 - 88788/19**

- (1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHERS JUDGES: YES/ NO
(3) REVISED

SIGNATURE

A handwritten signature in black ink, appearing to be "A. M. M." or similar, written over a set of horizontal lines.

DATE

07 March 2023

In the matter between:

MOTAUNG; CELE; PHOKELA

PLAINTIFFS

and

ROAD ACCIDENT FUND

DEFENDANT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on case lines. The date for hand-down is deemed to be 07 March 2023.

Summary - RAF –Section 17(3)(a) of Road Accident Fund Act – Section 2A of Prescribed Rate of Interest Act – interest on delayed settlement – when did interest accrue? – parties had precondition of acceptance of offer agreement – interest will accrue ex tempore morae – 7% and 8,25% - capital bears interest –from the date –

payment due – following the breach.

JUDGMENT

N V KHUMALO J

INTRODUCTION

- [1] The three(3) matters were set down on the default judgment trial roll for determination of the outstanding issues of quantum, specifically loss of earning capacity. The Road Accident Fund (“RAF”), the Defendant in the matter had on the date of the trial managed in all three matters to settle the different headings of damages it was being sued for, except for the issue of the interest that was payable on the capital amounts the parties had agreed upon. They mainly could not agree on the date on which the interest was to start running following the order of the court on the agreed amounts. The contention being on the exact time period that the RAF was to be allowed to pay the debt before interest will start accruing. In each of the matters the parties agreed that the issue was to be decided by the court having heard arguments presented by the parties.
- [2] The RAF had in all three matters stated, as a precondition of acceptance of the offer, that the capital amounts will be payable within a period of 180 days from the date of the court order, provided that on failure to pay within the specific period, it will be liable for interest *a tempore morae* at the rate of 7%, and 8.25% respectively, payable from the date the 180 days lapses. Its offer further stated that ‘all settled offers are captured in 30 days and payment thereof effected in 180 days from date of settlement or court order’.
- [3] The Plaintiffs, on the other hand, although they had agreed on the 180 days period within which the capital amount is to be paid in full, and that the amount will not bear interest during that period, contended that on failure to pay within

the stipulated period, the date from which interest is to be payable is to be determined exclusively by the Road Accident Fund Act 56 of 1996 ("RAF Act") and no other Act applicable. Further, that the Act prescribes an *tempore morae* of levying interest from the 15th day after the date of the court order.

[4] Sec 17 (3) (a) reads:

"No interest calculated on the amount of any compensation which the court awards to any third party by virtue of the provisions of s 1 shall be payable unless fourteen (14) days have elapsed from the date of the court 's relevant order.'

[5] The provision therefore regulates the date from when interest shall be levied on a compensatory award. The date is not to be less than 14 days from the date of the court order. The section intends to prohibit the levying of interest on the compensatory award prior the expiration of 14 days after the court order.

[6] The Plaintiffs argue that as a result of the provision of s 17(3)(a) the court cannot make an order to delay the running of interest as prescribed, irrespective of the circumstances. According to the Plaintiffs there is no provision in the Act that authorises the ordering of a delayed payment of interest nor is it within the court's discretion to order such in a matter such as this one. Further that the implication of the provision is that the payment of the compensatory amount granted in terms of the Act is to be made within fourteen (14) days after the date of Judgment.

[7] The second submission made was that therefore in law the Defendant is not entitled to an order that the interest is only payable within 180 days from the date of the order unless the parties agree thereto. The court is therefore enjoined to grant judgment on the interest against the Defendant in accordance with the Act.

[8] It is of significance to note that in all three matters, that of Motaung, Cele and Phokela, the issue of the unliquidated claim for loss of earning capacity was

resolved with the parties agreeing on the capital amounts payable and the period by when the amount was to be settled. The parties had agreed on the payment thereof being effected within 180 days after the agreed court order, upon which no interest would accrue on the amount until the agreed due date. The parties had in fact therefore agreed to a delayed payment and no accrual of interest during that period. The second submitted argument is therefore moot.

- [9] Now that the parties had agreed on the capital amount and a specific date it was due, whereupon interest was not to be levied, the contention was only with regard to the *mora* interest, the date from which the interest was to be calculated in case of non-settlement of the capital amount on due date. The Plaintiffs argued that in case of default, interest is to be levied from the 15th day of the order as prescribed by s 7 (3) (a) of the Act, which according to them is the only Act to be applicable, to determine the *mora* interest in the matters, notwithstanding the agreement on the extended period within which the amount is to be paid.
- [10] Counsel on behalf of Cele, argued that the Defendant confuses the date of payment of the judgment debt with the Plaintiff's ability to execute thereupon and entitlement thereto. He submitted, with reference to the *Road Accident Fund v Legal Practice Counsel and Others*¹ that, if the Defendant has some exceptional circumstance, which entitles it to seek an order suspending the execution steps against it in terms of the court order, it can approach the court, to grant a stay of execution.
- [11] The issue has nothing to do with execution. The contention arose only with regard to the date when *mora* will arise in case the Defendant breaches the agreement, or rather fails to pay on the agreed due date. The Plaintiffs contend to be entitled to charge interest not from the agreed due date but to revert back to the s 17 (3) (a) provisions, and charge interest from the 15th day of the court

¹ (58145/2020) [2021] ZAGPPHC 173; 2021 (2) All SA 886 GP (9 April 2021).

order. However, the parties' agreement that the Defendant was to pay the capital amount in 180 days during which period no interest would be payable created a new due date of mora. The provisions in the order reads "on payment within the stipulated period (due date) no interest will be payable. The capital amount is therefore not to bear interest during the period prior the agreed due date."²

- [12] The Plaintiffs' stance on s 17 (3) (a) failed to take cognisance of the fact that on the parties' agreement to settle, the *lis* between the parties as far as the initial dispute is concerned, stopped to exist³. The original dispute extinguished, the parties' agreement on the amount of the debt and the period within which payment is to be made with no interest accruing, that is 180 days from the date of the order, prevails. The issue of interest would then naturally arise on non-settlement of the capital amount by the agreed due date or as per the court order; see *Dunn v RAF*⁴. Timeous payment would therefore not result in the charging of interest. The provisions of s 2 of the Prescribed Interest Rate would be applicable.
- [13] Furthermore, it is not correct that the date of accrual of interest is settled by or remains in the realms of s 7 (3)(a) therefore cannot be decided upon by the court. Firstly, as mentioned above, due to the settlement agreement, it is no longer within the realms of s 7 (3)(a). If it remains in contention notwithstanding the agreed due date, the court can decide on the accrual of interest,⁵ albeit *in casu* the offer and letter of settlement intended to settle all issues pertaining to payment, that is the capital amount, the due date plus interest payable thereon. The purpose being to align the payment of compensation and the interest thereon to the Fund's systems and practical challenges experienced during

² *Dunn v Road Accident Fund* (5575/2015) [2018] ZAKZDHC 43; 2019 (1) SA 237 (KZD) (19 September 2018).

³ *Eke v Parsons* 2016 (3) SA 37 (CC) at para 25.

⁴ 2019 (1) SA 237 (KZD) (19 September 2018).

⁵ S 2A at ss 5 reads:

"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."

processing of payments, which was conceded by the Plaintiffs, except for what happens in the instance of non-payment as ordered in the specified period.

- [14] In this instance the date the capital amount is to bear interest is to be determined in terms of common law, which is a *tempore morae*, that is on non-settlement or payment by the specified due date⁶. In terms of the common law, interest cannot precede the date on which the parties had agreed the capital amount would become payable. The Plaintiff's argument of reverting to s 7 (3)(a), is therefore a non-starter. The interest is not to be determined by the date on which the quantification (or award) was made, but the due date agreed upon. The distinction between award and order being imperative, the Act at s 17 (4)(b) reads:

“Where the claim for compensation under subsection (1)-

(a)....

(b) includes a claim for future loss of income or support, the amount payable by the Fund or the agent shall be paid by way of a lump sum or in instalment as agreed upon.”

- [15] The question that also arises generally on these matters is whether it is fair and just to charge interest on amounts postulated and predicted to be a future loss, prior to the specified due date agreed upon by the parties. Taking into consideration that accrued interest is a current liability, it can only run on the monetary award only, from the date of payment.

- [16] It is therefore imperative that sight should not be lost that these are hypothesized exceptional circumstances, with the extent and time of the loss being postulated to happen in future. As a result, it is principle that the Act would provide for alternative settlement of the amount by agreement, either in delayed or instalment payment rather than on the date of the award. In *Dunn supra*, found the argument submitted on behalf of the Respondent (the RAF) sensible,

⁶ *Land & Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd & others* 2013 (6) SA 319 (SCA) para 4.

that interest would run only upon Respondent defaulting on payment. Further that the provisions of the RAF Act contemplate payment in a lump sum or by instalments. He submitted that the mere fact that payment by instalments is contemplated, it cannot be construed that interest would run from the date of the 'award', but it should run from the date when it is due for payment.

- [17] In *Land & Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd & Others supra*, the Supreme Court of Appeal held that mora interest constitutes a form of damages for breach of contract and 'the general principle in the assessment of such damages is that the sufferer by the breach should be placed in the position he would have occupied had the contract been performed accordingly'. The court further held that 'in awarding *mora* interest to a creditor who has not received due payment of a monetary debt owed under contract, the Court seeks to place him in the position he would have occupied had due payment been made. The Court acts on the assumption that, had due payment been made, the capital sum would have been productively employed by the creditor during the period of *mora* and the interest consequently represents the damages flowing naturally from the breach of contract.'
- [18] I am therefore of the view that if the parties agree on an amount of a debt, especially a future loss and a date on which the mount will be due for payment, and there is a dispute about the date from which the interest is to accrue on failure to adhere to the agreed due date, a court can make a determination on the date the capital amount is to bear interest after considering the surrounding circumstances and the applicable law. The Plaintiff should not be in a better position than he would have been, had the debt been paid on due date.
- [19] As a result, *ex lege* mora interest arises on default or failure to pay on the agreed due date whereupon the creditor is entitled to claim interest on the outstanding capital amount. The date when interest is to accrue is fixed by the time for payment agreed upon by the parties. The capital amount can therefore only bear interest from the date on which payment was due. The creditor is entitled to claim even without a specific contractual provision to pay interest.

[20] In *Christie*,⁷ referred to and endorsed by the court in *Land*, the principle is stated as follows:

‘When a debtor’s contractual obligation is to pay money, and he is *in mora*, the general damages that flow naturally from the breach will be interest *a tempore morae*’

Requiring the application of s 17(3) under such circumstances goes against the recognised *mora ex re* interest. The parties would have to specially agree to that for it to be enforceable, absent an agreement, as in *casu*, the *mora ex re* applies.

[21] The following provisions of the PRI Act are relevant:

...

“2. Interest on a judgment debt

- (1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless the judgment or order provides otherwise.
- (2) Any interest payable in terms of subsection (1) may be recovered as if it formed part of the judgment debt on which it is due.
- (3) In this section ‘judgment debt’ means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt.

2A Interest on unliquidated debts

⁷ Christie, RH & Bradfield, GB, (2011) *Christie’s The law of contract in South Africa*, 6th ed, LexisNexis, at 530.

- (1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law ... or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.
- (2) 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, arbitration, or agreement and any such part determined by arbitration or agreement shall for this purposes of this Act be deemed to be a judgment debt.
- (4) Where a debtor offers to settle a debt by making a payment into court or a tender and the creditor accepts the payment or tender, or a court of law awards an amount not exceeding such payment or tender, the running of interest shall be interrupted from the date of the payment into court or the tender until the date of the said acceptance or award.
- (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.
- (6) The provisions of section 2(2) shall apply *mutatis mutandis* to interest recoverable under this section. “

[22] The Plaintiffs will therefore be entitled, as in terms of the common law, to interest on the capital amounts only from the due date of payment if the Defendant fails to make payment timeously as agreed in terms of the court order.

[23] I, as a result make the following order:

1. On Defendant's failure to settle the capital amount in 180 days as agreed upon by the parties, the outstanding amount will bear interest at the prescribed rate ex tempore more calculated from the agreed due date to date of final payment.

In Motaung v RAF case no 26222/2015:


2. The Draft Order that is on case line 0-59-0-62, bar paragraph 3 thereof that is to be deleted, is by agreement incorporated to the order herein and hereby made an order of court.

In Cele v RAF case no: 66313/2018

3. The Draft Order that is on case line 12-1-12-5, bar paragraph 3 thereof that is to be deleted, is by agreement incorporated to the order herein and hereby made an order of court.

In Phokela vs RAF Case no: 88788/2019

4. The Draft Order that is on case line 12-1 -12-5 bar paragraph 2 thereof that is to be deleted, is by agreement incorporated to the order herein and hereby made an order of court.



NV KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Date heard:

27 July 2022