



NORTH WEST HIGH COURT, MAFIKENG

CASE NO. CAMG 05/2012

In the matter between:

EDMORE TALABU

APPELLANT

and

KAGISO WESLEY DIKGANG

RESPONDENT

CIVIL APPEAL

GUTTA J.

A. INTRODUCTION

[1] This is an appeal against a judgment by Magistrate Maharaj in the Magistrate Court for the District of Molopo, held at Mmabatho, under case number 2605/2010, in terms of Section 83(6) of the Magistrates Court Act 32 of 1944.

[2] The appeal is limited to the order made in respect of interest on the

judgment debt on 14 September 2011 and to the cost order made on 03 October 2011.

[3] The appeal is not opposed.

B. FACTS

[4] Briefly, the appellant, who was the plaintiff in the Court *a quo*, issued summons against the respondent for payment of the amount of R70 000.00, being the damages suffered by the plaintiff as a result of negligent alternatively fraudulent misrepresentation.

[5] The Court *a quo*, on 14 September 2011, granted judgment as follows:

- “1. Plaintiff succeeds in his claim for recovery of the amount of R70,000. This amount is reduced by R10,000 to account for plaintiff's use of the vehicle in question for about one year during the period the vehicle was attached. Thus, plaintiff is entitled to payment in the amount of R60,000, plus interest at the rate of 15.5% per annum from date of judgment to date of payment.
2. The attachment of the motor vehicle in question, VW GOLF NYL 892 GP is made final, *in securitatem debiti*, relating to the debt referred to in paragraph 1 herein. Any balance remaining after payment of the said debt shall be paid over to the defendant.
3. Costs reserved for argument.”

[6] The Court *a quo*, on 03 October 2011, made the following order:

“Each party shall pay his own costs.”

C. INTEREST

- [7] The plaintiff claimed interest at the rate of 15.5% per annum from 26 January 2010 to date of payment.
- [8] The Court granted the plaintiff interest at the rate of 15.5% from the date of judgment (that is 14 September 2011) to date of payment.
- [9] The Prescribed Rate of Interest Act ("the Act") provides for the date from which interest is calculated. Section 1(1) of the Act provides, *inter alia*, that:

"... such interest shall be calculated at the rate prescribed under subsection 2 as at the time such interest begins to run, unless a court of law, on the ground special circumstances relating to that debt, orders otherwise."

Subsection (2) provides for the prescribed rate of interest, which is 15.5%.

- [10] Interest may be claimed only if there was an agreement to pay interest or because the defendant is in *mora*. *Mora* interest runs from the date on which *mora* arises. *Mora* arises in the following circumstances, where:

10.1 a date for performance has been fixed in the agreement between the parties and the debtor fails to perform on that date. See ***Van der Merwe v Reynolds* 1972 (3) SA 740 (A) at 747A–D.**

10.2 there is no time fixed for performance, a demand is necessary to place the debtor in *mora*. The debtor must be informed on or before which date he must perform, and failure to perform on that date gives rise to *mora*. See *Nel v Cloete 1972 (2) SA 15 (A)*.

[11] In *casu*, there was no agreement to pay interest, hence interest begins to run from the date the defendant was in *mora*.

[12] In terms of the agreement concluded between the plaintiff and the defendant, the plaintiff alleged that:

“ . . . after the money is transferred defendant would pick up the Mazda from the seller and deliver it to the plaintiff immediately upon his arrival back in Mafikeng alternatively **within a reasonable time.**”
(Own emphasis)

[13] Although the plaintiff alleged that the purchase price was transferred into the seller's bank account on 26 January 2010. A date for performance was not fixed as the defendant could, in terms of the agreement, deliver the vehicle within a reasonable time.

[14] Hence, we look to the letter of demand when determining from which date the *mora* interest runs. The defendant did not deny receipt of the letter. In terms of the letter of demand, the defendant was to effect payment on or before 25 July 2010.

[15] The Magistrate should have, in the circumstances, ordered interest to run

from 25 July 2010. Mr Smit, counsel for the appellant, conceded that *mora* interest runs from 25 July 2010.

[16] There were, in my view, no special circumstances as required in Section 1(1) of the Act for interest to run from the date of judgment as ordered.

D. COSTS

[17] A Court may grant such judgment as to costs as may be just. See Section 48(d) of the Magistrates Court Act 32 of 1944 (as amended).

[18] A Court has a discretion when awarding costs. This discretion must be exercised judicially upon a consideration of the facts in each case, which is a matter of fairness to both sides. See *Naylor v Jansen 2007 (1) SA 16 SCA at 23F–28F*.

[19] The Court, when exercising its discretion, should take all the circumstances of the case into consideration and weigh the issues. The conduct of the parties should also be considered if it will have a bearing on the issue of costs.

[20] The general rule is that a successful party is entitled to his costs and this rule should not be departed from, except where there are good grounds for doing so, such as misconduct or exceptional circumstances. However, a Court has the power to deprive a successful party of a portion or all its costs. See *Nzimande v Nzimande 2005 (1) SA 83 (W) at 107B–F*.

[21] Counsel for the appellant referred to the grounds on which a successful party may be ordered to forfeit costs, which are to be found in the text: *Van Loggereberg, The Civil Practice of Magistrates Courts in South Africa*, Jones & Buckle Vol. 2 1st Ed pp. 32–33 under the following headings:

- “[i] Making excessive demand.
- [ii] Causing unnecessary or frivolous litigation.
- [iii] Succeeding on a technicality only.
- [iv] Increasing costs through wrong procedure.
- [vi] Being guilty of misconduct generally.”

[22] The Magistrate, in her reasons for judgment, stated that the plaintiff should be denied the costs of the trial. It appears that her reason for so ordering is because of a letter dated 07 April 2011, addressed to the plaintiff's attorney, from the defendant's attorney, wherein the defendant tendered to settle the amount of R70 000.00 in monthly instalments of R5 000.00 including the interest and costs.

[23] The Magistrate stated that:

“The court is of the view that this was a reasonable offer and should have been accepted and it would have made it unnecessary to go to trial.”

[24] A Court of appeal may interfere with the Court's discretion to costs in cases of vitiation by misdirection or irregularity or in the absence of grounds on which a Court, acting reasonably, could have made the order in question. See ***Rondalia Assurance Corporation of SA Ltd v Page 1975 (1) SA 708 (A) at 720C–D; Attorney General Eastern Cape v Blom 1988 (4) SA 645 (A) at 670D–D.***

[25] I agree with the submission made by Mr Smit that the Magistrate misdirected herself for the following reasons:

25.1 The payment proposal by the respondent in the letter dated 07 April 2011 does not constitute an offer to settle in terms of the Magistrates Court Rule 18(5)(i);

25.2 The tender was not pleaded in order to disallow the respondent's liability for costs in terms of the Magistrates Court Rule 17(5);

25.3 The respondent made the offer conditional that the money is paid in instalments, which offer constitutes an offer of compromise or a conditional payment.

[26] I am accordingly of the view that the Magistrate misdirected herself by depriving the appellant, who was the successful party, of its costs.

E. ORDER

[27] In the circumstances, I grant the following order:

- a) The appeal is upheld.
- b) The judgment of the Magistrate dated 14 September 2011, under case number 2605/2010, in so far as it pertains to the commencement date of the interest, is varied and substituted with the following:

“Plaintiff is entitled to payment in the amount of R60 000.00 plus interest at the rate of 15.5% per annum calculated from 25 July 2010 to date of payment.”

- c) The judgment of the Magistrate, under case number 2605/2010, as far as it pertains to costs, is varied and substituted with the following:

“Defendant is to pay the costs of suit.”

N. GUTTA
JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 22 JUNE 2012
DATE OF JUDGMENT : 28 JUNE 2012

COUNSEL FOR APPELLANT : ADV P.J.S. SMIT

ATTORNEYS FOR APPELLANT : VAN ROOYEN TLHAPI WESSELS INC.