IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
Exercising its Admiralty Jurisdiction

Case No AC49/04

In the matter between:

WILLIAM ELLIS RAWSON	First Applicant / Plaintiff
JOSEPHINE RAWSON	Second Applicant / Plaintiff

and

YACHT TRANSPORT (PTY) LIMITED t/a *TARGET CRANES*	Respondent / Defendant
(Now named BABCOCK TARGET PLANT SERVICES (PTY) LIMITED)	

Court: GRIESEL J

Heard: 10 September 2013

Delivered: 17 September 2013

JUDGMENT

GRIESEL J:

[1] This application forms the final chapter (barring any possible appeal) in an action *in personam* instituted by the present applicants, as plaintiffs, against the respondent (as defendant) for damages as long ago as 2004. Their maritime claim arose from an incident that occurred at the Elliott Basin, Table Bay Harbour on 23 December 2002, when a sailing yacht belonging to the plaintiffs, *Helsal II* ('the yacht'), was damaged after it fell into the water while it was being lifted from the quay side by a crane operated by the defendant. (For convenience I refer to the parties as they were in the trial before the court of first instance.)

Brief chronology

[2] The matter has a long and tortuous history, but the only outstanding issue calling for a decision at this stage is the plaintiffs' claim for interest on the capital amount of the claim. For a proper understanding of this issue, it is necessary briefly to review the chronology of the matter.

[3] The plaintiffs, Mr and Mrs Rawson, are Australian citizens who had planned to participate in the Cape to Rio yacht race which commenced on 11 January 2003. After the incident referred to above, the damage to the yacht had to be repaired urgently by various contractors in Cape Town before commencement of the race and most of the repairs (R429 280) had been paid for on behalf of the plaintiffs by their Australian insurer by 14 January 2003. The overall claim of R483 726,50 equated to AUS$104 298,41 at the applicable exchange rate at the time.

[4] On 29 March 2004, the first plaintiff issued a writ of summons, claiming damages from the defendant in the aforesaid amount of R483 726,50. In addition, he claimed interest (at an unspecified rate) from the date of the loss on 23 December 2002 to date of payment; alternatively such interest as the court may award pursuant to the provisions of s 5(2)(f) of the Admiralty Jurisdiction Regulation Act, 105 of 1983 ('the Admiralty Act').[1] More detailed particulars of claim were delivered on behalf of the first plaintiff on 22 April 2004.

[5] After exchange of pleadings and joinder of the second plaintiff as well as a third party (the Royal Cape Yacht Club), the matter eventually came to trial before Blignault J during March 2007 in relation to the merits of the claim, with the quantum standing over for later determination, if necessary. For various reasons, completion of the trial was delayed and the evidence was only finalised on 7 February 2011.

[6] On 18 March 2011, Blignault J delivered judgment, dismissing the plaintiffs' claim. However, on appeal to a Full Bench of this Division, on 27 August 2012, the judgment of the trial court was overturned and the defendant was held liable in delict to the plaintiffs in respect of the damage occasioned to the yacht.

[7] An application by the defendant for special leave to appeal to the Supreme Court of Appeal against the latter judgment was dismissed with costs on 22 November 2012, thereby bringing finality to the plaintiffs' claim as far as the merits were concerned.

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[1] See para [10] below for the text of the relevant section.

[8] On 23 January 2013, the quantum of the plaintiffs' claim was agreed between the parties in the amount as set out in the summons. However, payment of such agreed amount was not forthcoming, nor could agreement be reached on the question of interest. This prompted the plaintiffs, on 26 March 2013, to launch the present application, claiming payment of the agreed capital of the claim, together with interest at the rate of 15.5% per annum calculated 'from 20 March 2004', which should actually be 30 March, being the date after issue of summons (as was made clear in the founding affidavit).

[9] After filing a notice of opposition the defendant, on 11 April 2013, eventually paid the agreed capital amount of the claim to the plaintiffs. However, the issue relating to interest remained in dispute. In its answering affidavit, the defendant agreed with the plaintiffs that interest on the claim should be calculated from the date indicated in the notice of motion, i.e. the date of summons. The defendant accordingly only took issue with the applicable rate claimed. In their replying affidavit, as in counsel's argument before me, however, the plaintiffs reverted to their original stance, claiming interest from the date of the loss, i.e. from 23 December 2002. In the result, the issues falling for decision herein are accordingly the date from which and the rate at which interest is to be calculated on the plaintiffs' claim.

[10] This being a maritime claim, these issues are to be considered against the background of the provisions of s 5(2)(f) of the Admiralty Act which read as follows:

'(2) A court may in the exercise of its admiralty jurisdiction –

. . .

(f) make such order as to interest, the rate of interest in respect of any sum awarded by it and the date from which interest is to accrue, whether before or after the date of the commencement of the action, as to it appears just.'

[11] As pointed out in the case of the *MT Argun*,[2] the section confers 'a wide and unfettered discretion' upon the court. As to the exercise of such discretion, Howie JA said the following in the case of *Adel Builders (Pty) Limited v Thompson* [3] in the context of the similarly worded s 2A(5) of the Prescribed Rate of Interest Act, 55 of 1975:[4]

'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 . . . 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.'

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[2] *MT* Argun *v Master and Crew of the MT* Argun *& others* 2004 (1) SA 1 (SCA) para 38.
[3] 2000 (4) SA 1027 (SCA) para 15.
[4] Section 2A(5) provides:

'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.'

Date from which interest is to run

[12] As far as the relevant date is concerned, as mentioned earlier, the plaintiffs initially claimed interest from the date of the loss on 23 December 2002. In their notice of motion in this application, however, they modified this prayer by claiming interest from the date of summons.

[13] I have serious doubts whether it is open to the plaintiffs, in the absence of a formal amendment of their notice of motion, to 'resurrect' a claim that had been modified in favour of the defendant, irrespective of whether or not this amounted to a waiver. Be that as it may, I do not find it necessary to make a definite finding in this regard, as I am of the view, in the exercise of my discretion, that the date of summons is in any event the appropriate date from which interest on the plaintiffs' claim ought to be calculated in this instance.

[14] In this regard, the trite principle in our law, prior to the enactment of s 2A of the Prescribed Rate of Interest Act in 1997, was that no interest was recoverable on unliquidated claims for damages. The rationale for this principle is that it is not just or equitable to hold a defendant liable to pay interest on a claim whose *quantum* he or she could not reasonably be expected to assess.[5] These considerations were recognised by the legislature in enacting s 2A(2)(a) of the Prescribed Rate of Interest Act, which provides that interest on an unliquidated debt shall ordinarily 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'. A '*demand*', in turn, is defined as 'a written

[5] *MV Seajoy* 1998 (1) SA 487 (C) at 507H-I.

demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the quantum thereof'.[6] In the *Seajoy, supra,* it was held by Thring J that by 'summons' the legislature must have had in mind a combined summons as contemplated by Uniform Rule 17(2)(a), because an ordinary summons (or writ of summons, as in this case), would ordinarily contain only 'the bare bones of the *quantum* of the plaintiff's claim'.[7]

[15] Having regard to the rationale for these provisions, namely that interest should not start to run until such time as the debtor is in a position reasonably to assess the quantum of damages, I respectfully agree with Thring J's approach. Adopting the same approach, the date from which interest should be calculated in the present case is accordingly 22 April 2004, being the date on which the plaintiffs' original particulars of claim were delivered.

Rate of interest

[16] Turning now to the rate of interest to be used, the plaintiffs asked that interest be awarded at the prescribed rate, as promulgated by the Minister in terms of the Prescribed Rate of Interest Act, namely 15,5% per annum.[8] By way of motivation for this rate, it was pointed out on behalf of the plaintiffs, *inter alia*, that they (or rather their insurers) had to pay for the repairs to the yacht in 2003, amounting to some AUS$104 000, while the capital amount they received ten years later, in

[6] Section 4(ii) of the Act.
[7] *MV Sea Joy, supra, loc cit.*
[8] Government Notice No R1814 (GG 15143 of 1 October 1993).

April this year, was less than half of that amount due to depreciation of the South African currency against the Australian dollar in the meantime.

[17] It is of course true, as pointed by Grosskopf JA, that 'currency nominalism, for whatever reason, is firmly entrenched in our law'.[9] This means that –

'. . . a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation.'[10]

[18] The plaintiffs, as creditors, thus bore the risk of depreciation of the currency in which they had paid the accounts and in which they framed their claim against the defendant herein. Nonetheless, as pointed out in *Hartley*, '[i]f a plaintiff through no fault of his own has to wait a substantial period of time to establish his claim it seems unfair that he should be paid in depreciated currency'.[11] Those remarks were made at a time before unliquidated debts attracted interest and were more than likely partly responsible for the later introduction of s 2A into Act 55 of 1975.

[19] On behalf of the defendant, it was submitted in its answering affidavit herein that 'due consideration ought to be taken of aspects relevant to the protraction of the litigation'. However, as the defendant readily conceded, the delay in the resolution of the proceedings cannot be blamed in any way on the plaintiff.

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[9] *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) at 840F-G.
[10] *Hartley* at 839G-H.
[11] At 841G.

[20] The defendant also argued that awarding the prescribed interest rate would be unjust having regard to the notorious fact that interest rates prevailing in the market place at the present time are far lower than that rate. It was accordingly suggested on behalf of the defendant that the money market call rate paid by the large commercial banks from time to time would be the appropriate rate. However, the defendant made no effort to place any evidence on record as to what that rate is or how it fluctuated over the past ten years. And, as Howie JA made clear in *Adel Builders*, *supra*,[12] 'if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them.'

[21] From the plaintiffs' replying affidavit it appears that the money market call rate currently paid by Standard Bank is around 4,35% per annum. Awarding interest to the plaintiffs at these kinds of rates would not, in my view, be 'just'. The defendant retained the use of its money for the full period of ten years, which it could have utilised in its business or have invested elsewhere at more attractive rates. The plaintiffs, by contrast, are being paid in 'depreciated currency' and have already seen their capital being halved over the same period.

[22] As rightly submitted on behalf of the plaintiffs, in awarding interest the court will have regard to the principle in Admiralty Law that that a plaintiff should, as far as possible, obtain full restitution for its loss.[13] Thus, as suggested by Hofmeyr,[14] s 5(2)(f) of the Admiralty Act

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[12] Para [11] above.
[13] See Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa*, 2 ed at p 239 and the authorities cited in n 138.
[14] Hofmeyr *op cit* at pp 239–240.

empowers the court to have regard to the equities and to encompass the more generous basis upon which interest is awarded in admiralty.

[23] In the circumstances, I am of the view that the prescribed rate of 15,5% would be the appropriate rate to apply in the present circumstances.[15]

Order

[24] For the reasons set out above, the following order is issued:

The defendant is ordered to pay -

(a) interest on the sum of R483 726,50, calculated at the rate of 15,5% as from 22 April 2004 to 11 April 2013;

(b) further interest on the amount of interest calculated as above at the rate of 15,5% as from 12 April 2013 to date of payment;

(c) the costs of the present application, including the costs previously reserved.

B M GRIESEL
Judge of the High Court

[15] See also *MV Seajoy*, *supra*, at 508G-509B; and *MT Argun* 2003 (3) SA 149 (C) at 164G-I.