



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 460/12
Reportable

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA**

APPELLANT

and

**RYTON ESTATES (PTY) LTD
TWIGGY TIMBERS (PTY) LTD
BORK ESTATES (PTY) LTD
JAN FREDERICK NELL BRITS
GERHARDUS LE ROUX
UITGEZOCHT INVESTMENTS CC
GIDEON WILHELMUS BÜHRMANN**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT**

Neutral citation: *The Land and Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd* (460/12) [2013] ZASCA 105 (13 September 2013)

Coram: Brand, Theron and Majiedt JJA and Van der Merwe and Mbha AJJA

Heard: 20 May 2013

Delivered: 13 September 2013

Summary: Contract — mora — interest on unpaid interest — unless the parties agreed otherwise, a debtor who is in mora in regard to a contractual obligation to pay interest, is liable for payment of mora interest on the unpaid interest calculated at the prescribed rate.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Prinsloo J sitting as court of first instance):

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the high court is varied as follows:

2.1 In the matter of Ryton Estates, by deleting paragraph 1.1 thereof and substituting paragraph 2.1 thereof with the following:

‘ 2.1 die Land Bank (tensy die teendeel blyk uit die ter saaklike kontrak of daar anders met die lener beding is) nie geregtig is daarop om saamgestelde rente te hef op voorskotte of lenings wat toegestaan is ingevolge wet 13 van 1944 nie, met dien verstande dat die Land Bank geregtig is om enkelvoudige rente op agterstallige of onbetaalde rente te verhaal ten opsigte van sodanige voorskotte of lenings teen die voorgeskrewe koers of die kontraktuele koers, van tyd tot tyd, welke ook al die laagste is.’

2.2 In the matter of Brits, by setting aside paragraphs 1, 2 and 3 thereof.

2.3 In the matter of Le Roux, by setting aside paragraph 1 thereof.

2.4 In the matters of Uitgezocht and Bührmann, by setting aside paragraphs 1, 2 and 3 of the order in each matter.

3 All the matters are referred back to the high court for determination of the amounts payable by the appellant in accordance with this judgment and of costs, where applicable.

JUDGMENT

VAN DER MERWE AJA (BRAND, THERON AND MAJIEDT JJA AND MBHA AJA CONCURRING):

[1] The issue in this appeal is whether the respondents, who were in mora in regard to contractual obligations to pay interest, were liable to pay mora interest on the unpaid interest.

[2] The background of the matter can be briefly summarised. The appellant was established under s 3 of the Land Bank Act 18 of 1912. The 1912 Act was repealed by the Land Bank Act 13 of 1944, which in turn was repealed by the Land and Agricultural Development Bank Act 15 of 2002. Despite the repeal of the earlier Acts, the appellant continues to exist in terms of s 2(1) of the Land and Agricultural Development Act 15 of 2002. It is common cause that despite the repeal thereof the provisions of the Land Bank Act 13 of 1944 regulated the relationship between the parties. In terms of Act 13 of 1944 the main object of the Land Bank was the development of agriculture in South Africa by providing financial assistance to commercial farmers, inter alia from public funds.

[3] The respondents are all commercial farmers. The appellant lent and advanced funds to the respondents in terms of various written loan agreements, for present purposes all secured by mortgage bonds. These respondents were (a) the first, second and third respondents jointly (Ryton Estates); (b) the fourth respondent (Brits); (c) the fifth respondent (Le Roux); (d) the sixth and seventh respondents jointly (Uitgezocht); and (e) the seventh respondent (Bührmann). Each loan agreement provided that interest at a stipulated annual rate would be calculated on the balance of the capital outstanding from time to time. Yet, each agreement authorised the appellant to vary the stipulated interest rate without notice to the borrower at any time. It is common cause that in terms of this provision the appellant adjusted interest rates on the loans from time to time.

[4] In terms of each loan agreement, the loan and interest was repayable in equal instalments annually in arrears. The first instalment was payable one year after the registration of the mortgage bond. In this way each instalment consisted of capital and interest and the date on which each instalment was due and payable was fixed by agreement. It follows as a matter of law that, in the event that any instalment was not paid in full on the due date, mora

operated *ex re*.¹ It is common cause that in many instances instalments were not paid on the due date by the respondents.

[5] After all the loans were repaid, the respondents instituted separate actions against the appellant based on the *condictio indebiti*. In particular the respondents alleged that the appellant charged compound interest, instead of simple interest on the loans; unreasonably adjusted the applicable rates of interest; and levied administration fees and diverse costs – to which it also added compound interest – all of which it was not entitled to do. The respondents consequently alleged that as a result of a bona fide and reasonable but mistaken belief they made payments to the appellant of amounts that were not due, hence their claim under the *condictio indebiti*.

[6] The appellant conceded that neither compound interest nor the administrative fees and diverse costs and interest thereon were recoverable in terms of the loan agreements. But, so it contended, the respondents were liable for mora interest on the interest not paid on due date. It thus recalculated the loans accordingly and admitted that the respondents were entitled to certain repayments and in some instances in fact made repayments to the respondents.

[7] By agreement these cases were heard together as a test case by Prinsloo J in the North Gauteng High Court. At the conclusion of the trial only two issues remained for adjudication. The first concerned the interest rates applied by the appellant in terms of the loan agreements. The second issue was whether the appellant was entitled to levy mora interest on unpaid but due and payable interest.

[8] The trial court decided the first issue in favour of the appellant. It held that in terms of the loan agreements the appellant was entitled to levy interest at the rates applied by it from time to time (Land Bank rates). This finding is not challenged before us.

¹ See *Laws v Rutherford* 1924 AD 261 at 262.

[9] As to the question of mora interest, the position taken by the respondents was that the appellant was entitled to charge simple interest on capital only and that no interest on interest could be charged in any way. The case for the appellant, on the other hand, was that, apart from simple interest on capital, it was also entitled to levy mora interest on the unpaid interest, calculated on a simple interest basis only, but at the rate then applicable on the balance of the capital outstanding, that is the Land Bank rate. Each side to the dispute employed an expert to recalculate the loans. Each expert recalculated every loan at the Land Bank rates in accordance with the position taken by his side. Both experts agreed that the recalculations by his counterpart were technically and mathematically correct. The only differences between them thus resulted from the different assumptions upon which they relied.

[10] The court a quo found that in the absence of agreement to that effect, the appellant was not entitled to interest on unpaid interest and gave judgment for the respondents in each case for the amounts calculated by the respondents' expert, taking into account repayments that had already been made by the appellant. It granted leave to appeal to this court on the issue of mora interest.

[11] In deciding this issue, it is helpful to keep the following principles in respect of interest in mind. Interest remains interest and no method of accounting (such as capitalisation) can change its nature.² Contractual interest may be compound interest or simple interest. Compound interest is interest on capital plus accrued interest. If compound interest is not provided for in an agreement, only simple interest on the capital will be payable in terms of the agreement.

[12] Mora interest, on the other hand, is something fundamentally different. It is not payable in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract, specifically mora *debitoris*.

² See *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 828F-G.

[13] The nature of *mora* interest is explained as follows in *Bellairs v Hodnett & another*.³

'It may be accepted that the award of interest to a creditor, where his debtor is *in mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date (*Becker v Stusser*, 1910 CPD 289 at p 294). This loss is assessed on the basis of allowing interest on the capital sum owing over the period of *mora* (see *Koch v Panovka* 1933 NPD 776). Admittedly, it is pointed out by Steyn, *Mora Debitoris*, p 86, that there were differences of opinion among the writers on Roman-Dutch law on the question as to whether *mora* interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasized by CENTLIVRES, CJ, in *Linton v Corser* 1952 (3) SA 685 (AD) at p 695, interest is today the "life-blood of finance" and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.

. . .

As previously pointed out, *mora* interest in a case like the present constitutes a form of damages for breach of contract. 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, so far as this can be done by the payment of money and without undue hardship to the defaulting party. Accordingly, such damages only are awarded as flow naturally from the breach or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom (*Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at p 22). 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

³ *Bellairs v Hodnett & another* 1978 (1) SA 1109 (A) at 1145D-G and 1146H-1147A.

during the period of *mora* and the interest consequently represents the damages flowing naturally from the breach of contract.’

[14] This principle is succinctly stated in Christie⁴ 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*’,

and has repeatedly been stated and confirmed by this court.⁵

[15] The words ‘monetary obligation under a contract’ or ‘contractual obligation to pay money’ appear to be wide enough to include an obligation in terms of a contract to pay interest. The question therefore is whether there is any reason not to apply this principle where a debtor is in *mora* in respect of a contractual obligation to pay interest.

[16] In *Davehill (Pty) Ltd & others v Community Development Board*⁶ the appellants were the owners of certain properties that were expropriated by the respondent under the provisions of the Expropriation Act 63 of 1975. The respondent took possession of the properties on 3 December 1980. The agreed compensation in respect of the expropriation was finally paid by the respondent to the appellants on 11 January 1985. In terms of s 12(3) of the Expropriation Act, the respondent was obliged to pay interest, at a statutorily determined rate from the date of taking possession of the properties, on any outstanding portion of the compensation payable in respect thereof. This was for convenience referred to as statutory interest. This court found that the obligation to pay the statutory interest arose on the same date as the final payment of compensation was made, that is 11 January 1985. The statutory interest was only finally paid on 5 January 1987. The question arose whether the respondent was liable to pay *mora* interest on the statutory interest from

⁴ R H Christie *The Law of Contract in South Africa*, 6 ed (2011) at 530.

⁵ See *Union Government v Jackson & others* 1956 (2) SA 398 (A) at 411G-H; *Thoroughbred Breeders’ Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 593-594 paras 82-85; *Mokala Beleggings & another v Minister of Rural Development and Land Reform & others* 2012 (4) SA 22 (SCA) at 25 para 6; *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga & others* 2013 (2) SA 259 (SCA) at 268-269 paras 15-17; *Steyn NO v Ronald Bobroff & Partners* 2013 (2) SA 311 (SCA) at 322-324.

⁶ *Davehill (Pty) Ltd & others v Community Development Board* 1988 (1) SA 290 (A).

the date on which it was due and payable until it was paid, that is from 12 January 1985 to 5 January 1987.

[17] The court in *Davehill* found for the appellant on this issue and concluded:⁷

'In the present instance the time for performance was 11 January 1985, and the respondent's failure to pay the statutory interest due by it to the appellants on that date automatically placed it in *mora*. (Wessels *Law of Contract in South Africa* 2 ed para 2863). This is so because, as the time for performance was fixed, *mora* operated *ex re* and no demand (*interpellatio*) was necessary to place the respondent in *mora*. The statutory interest due being a liquidated amount, and the respondent being in *mora*, the appellants are entitled, in keeping with general principles, to *mora* interest from 12 January 1985 on the amount of statutory interest outstanding until it was paid in full on 5 January 1987.'

[18] In deciding this issue the court had to deal with an argument on behalf of the respondent that it is not permissible to award interest on interest in the absence of agreement. Smalberger JA dealt with the argument in the following terms:⁸

'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 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. To the extent that the decision in *Stroebe* v *Stroebe* (*supra*) is in conflict with this broad principle it cannot be supported. The problem which arose in *Stroebe*'s case at 139F would today be dealt with under the provisions of s 2 of the Prescribed Rate of Interest Act 55 of 1975.

Subject to what has been said above, it is not necessary in this judgment to attempt to define under what circumstances and within what limits a claim for interest on interest will lie. Suffice it to say that in principle there can be no objection to a claim for *mora* interest on outstanding statutory interest, bearing in mind that statutory interest is, in essence, compensation for loss of possession and fruits.'

⁷ At 298D-F.

⁸ At 298H-299B.

[19] I respectfully agree that there is no principle that stands in the way of a finding that in the absence of agreement in this respect, a creditor should be compensated by an award of mora interest on unpaid interest for the loss or damage suffered as a result of not receiving the agreed interest on time. Clearly it must similarly be assumed that the interest would have been productively employed had it been paid on the due date. Also, no consideration of public policy points the other way. On the contrary, taking into account that interest is the 'life-blood of finance' it is in the public interest that creditors be compensated when debtors fail to make payment of agreed interest on the due date.

[20] Section 1(1) of the Prescribed Rate of Interest Act 55 of 1975 provides as follows:

'If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection 2 as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.'

In terms of s 1(2) the Minister of Justice prescribed the rate of interest at 15,5 per cent per annum for the purpose of s 1(1).⁹

[21] As mora interest represents damages, the rate thereof is not governed by agreement or in any other manner. It follows that mora interest is payable at the prescribed rate.

[22] I accept that parties may by agreement exclude liability for mora interest. The effect of such agreement would be, as I have said, to exempt a party from common law liability for damages for breach of contract. Such agreement must be clear and unambiguous. As Marais JA said in *First National Bank of SA Ltd v Rosenblum & another*:¹⁰

'In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and

⁹ By notice in GN R1814, GG 15143, 1 October 1993.

¹⁰ *First National Bank of SA Ltd v Rosenblum & another* 2001 (4) SA 189 (SCA) at 195H.

unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out.'

[23] This judgment therefore lays down that in the absence of agreement to the contrary, mora interest at the prescribed rate is payable on unpaid interest which is due and payable.

[24] Counsel for the respondents argued that the parties hereto did agree to exclude liability for mora interest. In this regard he relied solely on the fact that the loan agreements provided only for interest on capital and not for interest on interest. But these provisions have to do with contractual interest only. They do not deal with breach of contract and therefore cannot be understood to constitute an agreement to exclude common law liability for damages in the form of mora interest.

[25] It follows that the appeal must succeed. However, although the Land Bank rates applied in the appellant's aforesaid recalculations were mostly lower than the prescribed rate, they did during some periods exceed the prescribed rate. The appellant accepts that it is only entitled to mora interest calculated at the lower of the applicable Land Bank rate and the prescribed rate from time to time. At the hearing of the appeal this court requested the appellant to recalculate all the loans in accordance with this approach, on the understanding that the parties could reach agreement in this regard. The parties were however unable to reach such agreement. In the result the matter should be referred back to the court a quo for determination of the amounts, if any, payable by the appellant in accordance with this judgment. Since it accepts liability in principle for repayment in all the matters, save for *Uitgezocht* and *Bührmann*, the appellant did not appeal against the orders of the court a quo in respect of interest on judgment debts and costs. In consequence these orders must stand.

[26] In result the following order is made:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the high court is varied as follows:

2.1 In the matter of Ryton Estates, by deleting paragraph 1.1 thereof and substituting paragraph 2.1 thereof with the following:

‘ 2.1 die Land Bank (tensy die teendeel blyk uit die ter saaklike kontrak of daar anders met die lener beding is) nie geregtig is daarop om saamgestelde rente te hef op voorskotte of lenings wat toegestaan is ingevolge wet 13 van 1944 nie, met dien verstande dat die Land Bank geregtig is om enkelvoudige rente op agterstallige of onbetaalde rente te verhaal ten opsigte van sodanige voorskotte of lenings teen die voorgeskrewe koers of die kontraktuele koers, van tyd tot tyd, welke ook al die laagste is.’

2.2 In the matter of Brits, by setting aside paragraphs 1, 2 and 3 thereof.

2.3 In the matter of Le Roux, by setting aside paragraph 1 thereof.

2.4 In the matters of Uitgezocht and Bührmann, by setting aside paragraphs 1, 2 and 3 of the order in each matter.

3 All the matters are referred back to the high court for determination of the amounts payable by the appellant in accordance with this judgment and of costs, where applicable.

C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant: T W Beckerling SC (with him M J Sawyer)
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