IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A899/2013

Date: 1/6/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....
DATE SIGNATURE

In the matter between:

JAN SAUNDERS N.O.

APPELLANT

And

THE MEC OF THE DEPARTMENT OF HEALTH:
LIMPOPO PROVINCE

RESPONDENT

JUDGMENT

PRETORIUS J,

[1] The present appeal is against the whole of the judgment delivered on 3 May 2013 in this court where the following order was granted:

"1.1 That the writ of the execution issued out of this Court on 22 March 2013 be set aside.

1.2 That it be declared that the settlement amount embodied in the Court Order granted on 19 November 2012 does not bear interest;

1.3 That the Third Respondent be ordered to pay the cost of this application."

[2] On 19 July 2013 an application for leave to appeal was dismissed. Leave to appeal against the judgment was granted to the Full Bench of this court by the Supreme Court of Appeal on 18 October 2013, hence this hearing.

[3] It is common cause that an action for damages for personal injuries was instituted on behalf of a minor child, Jaun Hendrik Smith, for damages he had suffered at his birth as a result of the negligent conduct of employees of the respondent. The question of liability was settled between the parties. The quantum portion of the claim had to be heard on 19 November 2012 in this court.

[4] The parties reached an agreement regarding the quantum of the claim. A settlement agreement was made an order of court by agreement between the parties. The order *inter alia*, reads as follows:

"By agreement between the parties the following order is made:

1. The Defendant is ordered to pay an amount of R6 500 000.00 in full and final settlement of the Third Plaintiff's claim into the trust

> *account of Hendrik van Lill Attorneys, the details being as follows…".*

[5] The full amount in the sum of R6.5million as agreed, was paid by the respondent on 18 February 2013. There was no mention of a date of payment in the draft order or any separate provisions of interest to be paid.

[6] Thereafter the appellant claimed interest on the amount of R6.5million, from the date of judgment to the date of payment of the full amount. On 19 February 2013 the appellant demanded an additional amount of R248 424.66 as interest on the amount of R6.5million which had been paid on 18 February 2013.

[7] According to the appellant the amount of interest to be paid if the provisions of the Prescribed Rate of Interest Act 55 of 1975 were to apply, would be R248 424.66 calculated at 15.5% per annum.

[8] After the respondent refused to pay any interest, the appellant caused a writ of execution to be issued on 22 March 2013 for payment of the amount as set out above. This resulted in the respondent applying to court to set aside the writ of execution as, according to the respondent, there was no basis in respect of which a writ could have been issued, as the appellant was not entitled to any interest in these circumstances. The respondent's contention was that the settlement agreement, where the parties settled the quantum at R6.5million *"in full and final settlement of the third respondent's claim"* included all outstanding amounts.

[9] The appellant opposed the application for setting aside the writ and launched a counter application for a declaratory order in the following

terms:

> *"(1) That the amount of R6 500 000.00 payable in terms of the Court order dated 19 November 2012 is a judgment debt as defined in section 2(3) of the Prescribed Rates of Interest Act, 55 of 75;*
>
> *(2) That the said amount bore interest at the rate of 15.5% per annum calculated from 17 November 2012 until 18 February 2013;*
>
> *(3) That the Applicant is ordered to pay the amount of R248 424.66 to the Third Respondent;*
>
> *(4) Cost of suit."*

[10] The application for setting aside the writ was granted and the counter application dismissed, resulting in the present appeal.

[11] The appellant relies on section 2(1) of the Prescribed Rate of Interest Act, 1975, in respect of *morae* interest to be paid by the respondent. The appellant argued that the execution in respect of the interest could have been levied on the same judgment as it involved a simple calculation to ascertain the amount of interest for the relevant period.

[12] The appellant's further argument is that the judgment debt is recoverable by levying execution and therefor any interest payable in terms of the judgment debt will be recoverable by way of levying execution. This will only be applicable if the court should decide that interest was payable as alleged by the appellant.

[13] The provisions of section 2(2) of the Prescribed Rate of Interest Act provides:

"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.***"

[14] Section 3(1) of the State Liability Act, 20 of 1957 ("Act") provides:

"(1) Subject to subsections (4) to (8), no execution, attachment or like process for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in any action or legal proceedings against the State or against any property of the State, but the amount, if any, which may be required to satisfy any final court order given or made against the nominal defendant or respondent in any such action or proceedings must be paid as contemplated in this section."

[15] Section 4 of the Act sets out what a judgment creditor may do to ensure payment. Section 6 makes provision and sets out under which circumstances the registrar or clerk of the court would issue a warrant of execution against movable property. Section 7 provides that the sheriff may attach movable property but may not remove it. Section 8 provides that the sheriff may after the expiration of thirty (30) days remove and sell the attached property in execution of the debt. Unfortunately for the respondent this defence was never a part of the defence, not in the court a quo, during the application for leave to appeal, nor during the petition. It seems like an after-thought as it was mentioned for the first time in the respondent's present heads of argument and during argument in court.

[17] Uniform Rule 45(1) provides:

"(1) The party in whose favour any judgment of the court has been pronounced may, at his own risk, sue out of the office of the registrar one or more writs for execution thereof as near as may be in accordance with Form 18 of the First Schedule: Provided that, except where immovable property has been specially declared executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his movable property, and the registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ."

[18] In **McNutt v Mostert 1949(3) SA 253 T** at 255, Clayton J found:

"…the judgment upon which execution is issued must be a judgment from which there can be gathered what money or thing the judgment debtor must deliver…"

[19] In **De Crespigny v De Crespigny 1959(1) SA 149 NPD**, Milne J held at p152 A:

"In the result I think that it can be stated authoritatively that a writ of execution which has been issued will be held to be incompetent if the amount payable under the judgment can only be ascertained after deciding a further legal problem (I need not decide what degree of factual uncertainty in a judgment renders execution incompetent)"

[20] In the present instance the court has to decide whether the settlement

agreement, which was made an order of court, disposed of and included interest as well.

[21] In **Karson v Minister of Public Works 1996(1) SA 887 ECD** at p893, Leach J found at F-H:

> *"It is well settled that the agreement of compromise, also known as transactio, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or by increasing his liability…"*

[22] In the present instance the particulars of claim in the main action the plaintiff on behalf of the minor claimed damages in the amount of R15 451 937.13. Prayer 4 of the particulars of claim set out:

> *"4) Betaling van rente op voormelde bedrae bereken teen die voorgeskrewe rentekors, a tempore morae vanaf 'n datum soos deur die Hof bepaal word"*

[23] It is clear from the wording of this prayer in the particulars of claim that the interest would be dependent on the amount awarded in damages and that interest would be payable as from a date to be determined by the court.

[24] In **Gollach & Gomperts v Universal Mills and Produce Co 1978(1) SA 914 (AD)**, Miller JA held at p922 that:

> *"A transaction, whether extra-judicial or embodied in an order of Court, has the effect of res judicata."*

[25] At p921 C Milner JA set out:

> *"The purpose of a transaction is not only to put an end to existing litigation but also to prevent or avoid litigation".*

[26] The respondent argues that the appellant's claim for damages became *res judicata*. In **Custom Credit Corporation (Pty) Ltd v Shembe 1972(3) SA 462 (AD)**, Van Winsen JA found at p472 in relation to *res judicata*:

> *"The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the ratio underlying the rule that, if a cause of action has previously been finally litigated between parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an exceptio rei judicatae vel litis finitae. The reason for this rule is given by Voet, 44.2.1, (Gane's translation, vol 6, p. 553) as being*
>
> *'to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings'."*

[27] In **Andy's Electrical v Laurie Sykes (Pty) Ltd 1979(3) SA 341 (NPD)**, Didcott J found at p345 D-E that:

> *"And a "settlement" is sometimes an appropriate label, in common parlance at any rate, for an outright payment, as distinct from a compromise. A payment "in full settlement of your claim", on the other hand, has a very different ring. Once again, the context may illuminate something else behind the terminology (cf Moosa v Essa*

1931 NPD 365 at 367, 369). Unless it does, however, the "claim" as a whole has now become the target of the "settlement", and the "settlement" itself assumes the unmistakable hue of a compromise…"

[28] The appellant is correct when arguing that a judgment debt becomes payable on the date of judgment, unless the order provides for a later date. It is also correct that the interest thereon follows *ex lege* in terms of section 2(1) of the Prescribed Rate of Interest Act and must be calculated from the date of the order.

[29] That will be the position when the issue of interest was not included in the court order. The appellant conceded in the heads of argument that the court order had *"finally disposed of the issues between the parties as contained in the pleadings"*. The rider to this statement is that it was never intended to include interest from the date of judgment. It is clear that the whole claim for damages was settled, but it could never include the interest which came into force once there was a judgment as that would give the defendant carte blanche to delay payments as long as it likes.

[30] In **Steyn No v Ronal Bobroff & Partners 2013(2) SA 311 (SCA)** at para 34 Brand JA held:

"In the circumstances contemplated in Bellairs, where the claimant is entitled to mora interest at the rate prescribed in the Act, our courts accept that interest constitutes a form of damages. But they do not require a claimant to prove that damages were actually sustained. ***They act on the assumption that, had the payment***

> ***been made, the capital sum would have been productively employed by the claimant during the period of mora and that the mora interest consequently represents the damages flowing naturally from the default…"*** (Court's emphasis)

[31] Interest *a tempore morae* is an ancillary obligation that automatically attaches to and is payable together with the damages in the present case.

[32] The court has to agree that if all the facts, arguments and principles as set out in the authorities, the respondent is liable for the payment of interest from the date of the settlement agreement had been made an order of court, until the date of payment. It is logical that it must be so as the respondent could take its time to pay and leave a party without any interest. The interest contained in the settlement agreement could never be the interest that becomes payable through a judgment.

[33] This court, however, finds that it is logical that interest that run from the date of judgment until payment cannot, in these circumstances, be included in the settlement agreement.

[34] Section 2 of the Prescribed Rate of Interest Act, 55 of 1975 provides that *mora* interest is payable on a judgment debt from the date of judgment. Section 2A of the Act has the effect that *"…Once judgment is granted such interest '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'".*

[36] In this instance the interest claimed is for an unliquidated debt and therefor section 2A of the Act applies, where section 2A(2)(a) provides

that a claim *a tempore morae* run from the date of the summons or demand, whichever date is earlier, until date of payment. Subsection 5 of the Act contains a rider and grants the court a discretion *"to make such order as appears just in respect of payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run"*.

[37] The present claim is for a post-judgment claim for interest on a judgment debt. The judgment making the settlement agreement an order of court created a judgment debt on which interest started to run on the date of judgment.

[38] The court has to agree, under these circumstances, that the appellant is entitled to bring a further claim for interest as this amount did not form part of the compromise which had been paid by the respondent. The interest ran from the date of the judgment until payment on 18 February 2013.

[39] Therefor I propose the following order:

1. That the appeal is upheld.

2. That the amount of R6.5 million payable in terms of the Court order dated 19 November 2012 is a judgment debt defined in section 2(3) of the Prescribed Rate of Interest Act, 55 of 1975.

3. That the said amount bore interest at a rate of 15.5% per annum calculated from 17 November 2012 until 18 February 2013.

4. That the applicant is ordered to pay the amount of R248 424.66 to the Third Respondent.

4. The respondents to pay the costs of the appeal, including the

costs of two counsel.

Judge C Pretorius

I agree.

Judge E Jordaan

I agree.

Judge DS Molefe

Case number	: A899/2013
Appeal heard on	: 20 May 2015
For the Appellant	: Adv. BC van den Heever SC &
	Adv D J Venter
Instructed by	: HENK VAN LILL ATTORNEYS
For the Respondent	: Adv. R Bedhesi SC/Adv. A Lapan
Instructed by	: STATE ATTORNEY
Date of Judgment	: 1 JUNE 2015