

Original

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

29/2/2012

CASE NO: A1134/09

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	<i>YES/NO</i>
(2) OF INTEREST TO OTHER JUDGES	<i>YES/NO</i>
(3) REVISED	
DATE <i>29/2/2012</i>	SIGNATURE <i>[Signature]</i>

In the matter between:

IST HOLDINGS (PTY) LTD

Appellant

and

BOARDWALK LAKESIDE DEVELOPMENT
(PTY) LTD

Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] This is an appeal against the judgment and order granted by Webster J on 27 March 2009, in particular, the portion dealing with interest.

[2] The order reads as follows:

"Judgment is accordingly granted to the plaintiff in the sum of R1 149 000.00, with costs. It is ordered that the first defendant pay interest thereon at 19% per annum from 1 May 2003 until date of payment."

- [3] In January 2000 the parties concluded a lease agreement in terms of which the respondent let certain property to the appellant at an agreed monthly rental. The lease was to operate for a period of 5 years, from 1 May 2000 to 30 April 2005.
- [4] During March 2003 the appellant purported to cancel the agreement and stopped paying rental. Although the respondent rejected the cancellation of the agreement by the appellant, it accepted the failure by the appellant to pay rent as repudiation of the lease agreement and cancelled the agreement. The respondent cancelled the agreement as per clause 23 of the lease agreement.
- [5] The respondent instituted proceedings against the appellant in May 2003 in terms of which it claimed damages for loss of rental it would have earned had the appellant not breached the agreement by stopping to pay rent for the period 1 May 2003 until 20 April 2005. In its particulars of claim the respondent claimed the amount of R1 961 928.80 as damages plus interest calculated at 19% per annum.

- [6] It appears that the respondent based its claim for interest on clause 11.5 of the agreement (dealing with arrear rental) which provides that in respect of arrear rental due but unpaid, the lessor would be entitled to payment of interest calculated at the rate of 2% per annum higher than the prime rate of interest charged from time to time by the lessor's bankers on overdraft facilities, such interest to be compounded monthly from due date to date of payment.
- [7] In its plea the appellant denied being in default of the agreement and alleged that the respondent had agreed (expressly or tacitly) to the cancellation of the agreement.
- [8] In its request for further particulars, the appellant requested the respondent to furnish it with the name of its bankers and with particulars of its banker's prime rate and any fluctuations in the rate since May 2003.
- [9] The respondent's response was that its bankers are Nedcor Bank and that it would furnish the particulars about the banker's prime rate and fluctuations later. The respondent did not, however, provide the appellant with the relevant information.
- [10] On 25 February 2005 when the trial began, the parties agreed that should the court find that the appellant did not properly cancel the agreement, the

agreed quantum of damages payable to the respondent would be R1 149 000.00. This agreed amount on quantum was less than the amount initially claimed due to the fact that the appellant disputed whether the respondent had mitigated its losses.

[11] The appellant has already paid the capital amount as directed in the order of 27 March 2009.

[12] The issue in this appeal is whether the court *a quo* was correct in ordering the appellant to pay interest on the agreed capital amount at the rate of 19% per annum or at all.

[13] It is the appellant's contention that since the respondent did not, at the trial, provide evidence on what its banker's prime rate on its overdraft facilities was during May 2003, and since the court *a quo* did not deal with the issue of interest payable even though it was still not settled, the respondent was not entitled to any interest. Further, the appellant contends that in its letter dated 5 August 2009 the respondent had conceded that the interest ordered by the court *a quo* was wrong and had thereby abandoned its claim on interest on the capital amount. The appellant further contends that the **Prescribed Rate of Interest Act 55 of 1975** (the Act) is not applicable as there was an agreement between the

parties that interest payable on arrear rent would be as set out in clause 11.5 of the agreement.

- [14] The letter the respondent sent to the appellant dated 5 August 2009 reads in part as follows:

"3. So as to eliminate any doubt, we confirm that the Plaintiff has abandoned that portion of the judgment relating to the incorrect interest rate, and the Plaintiff has conceded that it is only entitled to interest on the amount awarded at the rate of 2% per annum higher than the prime rate of interest charged from time to time by the Plaintiff's bankers on overdraft facilities, from 01/05/2003 to date of payment, alternatively (and in the absence of the court agreeing to this) to interest on the amount awarded at the rate *mora* in terms of the PRESCRIBED RATE OF INTEREST ACT, 55 OF 1975, from 01/05/2003 to date of payment."

- [15] The respondent has conceded that the order of the court *a quo* in respect of the rate of interest payable is incorrect since no evidence was led to prove its bankers' prime rate during the relevant period. However, the respondent contends that it is entitled to interest on the capital amount as compensation for the loss it suffered as a result of the failure by the appellant to pay rent for the remaining portion of the lease agreement. The respondent submits that it is entitled to interest as prescribed in section 1 of the Act from 1 May 2003.

[16] Section 1(1) of the Act reads as follows:

“1(1) 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 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.”

[17] I am in part in agreement with the appellant's contention that failure by the respondent to prove that its banker's prime rate during May 2003 was 17% does not entitle it being charged interest at 17% plus 2%. However, the fact that the respondent did not at the trial prove what the applicable bankers' rate on overdraft facilities was during the relevant period, does not mean that the respondent was not entitled to any interest. Firstly, the respondent sued for damages for the loss it suffered as a result of the appellant's repudiation of the agreement. As a result the respondent cancelled the agreement. Since at the time the respondent instituted the action against the appellant it had already cancelled the agreement, it could not rely on a non-existent agreement in order to determine interest due. Although the respondent based the determination of the damage it suffered on the outstanding arrear rentals, its claim was not for payment of arrear rentals but for damages. The respondent, relying on *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984(2) SA 888 (A), has submitted

that interest should be made payable as of the date of settlement, being 25 February 2005.

[18] At the time the parties reached a settlement on what the quantum of damages would in the event that the court determines that the respondent had rightly cancelled the agreement and was entitled to damages, the parties did not deal with the interest which would be payable. I am therefore of the view that section 1 of the Act would be applicable since it provides for interest in cases where the rate of interest is not governed by any other law or by agreement between the parties.

[19] With regard to the date when interest would commence, in terms of section 2A (2) (a) the respondent would normally be entitled to interest as from the date it demanded payment from the appellant or served it with summons. Alluding to the provisions of section 2A(2)(a) of the Act, the court held in *David Trust v Aegis Insurance Co Ltd* 2000 (3) SA 289 (A) at 303J -304B that:

“With effect from 11 April 1997 the Prescribed Rate of Interest Amendment Act 7 of 1997 (which amended the Prescribed rate of Interest Act 55 of 1975), sanctioned, *inter alia*, the recovery of *mora* interest in amounts awarded by a court which, but for such award, were unliquidated. 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’ (s 2A(2) (a); and see *The MV Sea Joy: Owners of the Cargo*

Lately Laden on Board the MV Sea Joy 1998 (1) SA 487 (C) at 505F-507H; *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 688G-691C). The word 'demand' in s2A (2) (a) is defined to mean a written demand setting out the creditor's claim in such a manner as to enable a debtor reasonably to assess the quantum thereof (s 4 of the principal Act)."

- [20] The respondent issued summons against the appellant in May/June 2003. This means that in general the respondent would, applying the provisions of section 2A (2) (a) be entitled to interest as from June 2003. However, even though the respondent would normally be entitled to interest from the date it served a demand or summons, taking into account that the quantum of damages in this matter was settled only on 25 February 2005, that the trial ended in 2005 and the judgment delivered on 27 March 2009, this court could exercise its discretion in terms of section 2A (5) of the Act. This section provides that a court has the power to make such order as appears just in respect of the payment of interest that shall accrue and the date from which such interest shall be payable.
- [21] I am of the view that in terms of equity, taking into account the period from the time the trial ended to the date of judgment, it would be equitable that interest should be ordered to be payable as from the date the settlement was reached rather than at the time summons were served. That is the date when the damages became liquidated which is the date on which the appellant became in *mora*.

[22] The appellant's submission that the respondent should have counter-appealed on the issue of interest holds no water as the respondent has clearly indicated its position with regard to the issue of interest.

[23] In view of the issue to be determined in this appeal, I am of the view that the appellant was entitled to appeal, in particular since in terms of the order of the court *a quo*, the appellant was ordered to pay interest from May 2003, being the date it defaulted on the rentals. In view of paragraph 21 above, I am satisfied that the appellant has substantially succeeded in this appeal and is therefore entitled to costs of the appeal.

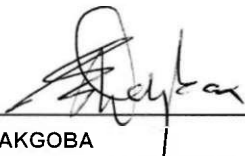
[24] In the premises the following order is made:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is substituted with the following:
"Judgment is accordingly granted to the plaintiff in the sum of R1 149 000.00 with costs. It is ordered that the first defendant pays interest thereon at 15.5% per annum from 25 February 2005 until date of payment."



NP MNGQIBISA-THUSI
Judge of the Gauteng North High Court

I agree

A handwritten signature in black ink, appearing to read 'EM Makgoba', is written over a horizontal line.

EM MAKGOBA

Judge of the Gauteng North High Court