

**IN DIE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE No: 574/2001

In the matter between:

R ZOIO

PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY

DEFENDANT

HEARD ON

4 September 2009

JUDGMENT BY:

C.J. MUSI, J

HEARD ON:

30 October 2009

- [1] This is an application by the defendant/applicant for leave to appeal against my judgment delivered on 26 May 2006. The respondent/plaintiff also brought an application for variation of my order, failing which that he be granted leave to appeal against such refusal. Although the respondents' application is out of time, the parties agreed that condonation should be

granted for such late filing. It was granted. I will henceforth refer to the parties as the plaintiff and the defendant.

[2] In the said judgment I made the following order:

“(a) The plaintiff’s claim succeeds. The defendant is ordered to pay the plaintiff an amount of R600 000.00 plus 15,5% interest thereon from date of judgment...”

[3] The defendant attacks the credibility findings that I made in respect of all the witnesses called by the plaintiff. The defendant called no witnesses to testify on his behalf. The argument of the defendant is in essence that the finding that the plaintiff’s damages amounted to R600 000.00 is not borne out by the facts.

[4] The defendant contends that the plaintiff’s (Zoio junior) evidence in relation to the ownership of the money and the stolen amount should not have been accepted. I have, in my judgment, dealt with the previous inconsistent statement that Zoio junior made. The explanation that Zoio jnr gave is plausible and it is supported by the letters that his erstwhile

attorney, Zürich, wrote. It is clear that Zoio jnr, like the defendant, misunderstood the legal position in relation to bringing foreign currency into this country.

[5] It was argued that Zoio junior's evidence in relation to why he did not request his father to deposit the money into his bank account is improbable. It might sound improbable that he would go to such length to save less than R4000.00. The fact of the matter, however, is that a large sum of money was transported by the deceased. It is also clear that some of that money was given to the deceased by Zoio junior's sister. The fact that unconventional ways of transferring money from one person to another was used does not mean that Zoio jnr is lying about this aspect. There is no other evidence, objective or otherwise, to gainsay the evidence of Zoio junior that he borrowed money from his father which money was collected by the deceased. There is also no evidence to gainsay his evidence that he gave R200 000.00 to the deceased.

[6] The attack on Zoio senior's evidence is also without substance. He might have used unconventional ways of transporting, changing and transferring the money but this

does not, without more, mean that his evidence should be rejected as false.

- [7] The applicant's argument that it is improbable that Zoio senior would take practically all his savings and borrow it to his son is also without merit. He did not give it as a donation. He lend it to him with the understanding that it would be repaid. Parents are known to go to great lengths to assist their children. I do not think that Zoio senior is an exception.
- [8] There is no reason for me to reject Zoio senior's evidence that he is a gambler and that he changed the foreign currency at a casino. Again this might be an unconventional way of doing things but it does not warrant the rejection of his evidence as false.
- [9] It is correct that Dos Santos conceded during cross-examination that they did not count each and every note. His evidence is however clear that the bundles of notes amounted to R600 000.00. His evidence should however not be viewed in isolation. Zoio senior testified about the

R400 000.00 that he gave to his daughter to hand over to his son or the deceased. She testified that she gave the money to the deceased. When the deceased arrived at Dos Santos's place they counted and repacked the money. The bundles amounted to R600 000.00.

[10] The evidence of Heyn was clear. He received R100 000.00 and his colleagues received more than that. Heyn might be a dishonest person. He clearly had motive and reason to lie during the criminal proceedings (both at investigation phase and in court). The fact that he was convicted of theft of an amount less than R100 000.00 is neither here nor there. It is known that accused persons would say anything to escape punishment or to receive a lesser punishment. I did not get the impression that he lied about the amount of money that he received. In any event in his confession he stated that he received between R90 000.00 and R100 000.00.

[11] The defendant is of the view that I could not on the evidence before me find on a balance of probabilities that R600 000.00 was stolen out of the car because:

- There was no direct evidence

- The money was already out of the packet when the police found it
- The deceased could have used some of the money

[12] It is the duty of the plaintiff to present sufficient evidence to prove his damages. The plaintiff must adduce all the available evidence, in that regard, and not leave it up to the court to guess what his damages are. When all the available evidence was presented the court has a duty to award damages. In **Hersman v Shapiro & Co** 1926 TPD 367 at 379 Stratford J puts it thus:

“Monetary damages having been suffered it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered the court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced, in those circumstances the court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.” See also **Mkwazi v Van deer Merwe and Another** 1970

(1) SA 609 (A) at 631 F to 632 B. **Venter v Bophuthatswana Transport Holdings (Edms)Bpk** 1997

(3) SA 374 (SCA) at 381 – 382. **Mutual & Federal Insurance Co Ltd v Da Costa** 2008(3) SA 439 (SCA) at 445 paragraph 20.

[13] Although there was no direct evidence as to how much was taken by the policemen, the plaintiff presented all the available evidence in order to establish that R600 000.00 was taken. To find that the deceased used some of the money would amount to speculation without foundation. The fact that the money was already loose when the police arrived at the scene is also of no avail to the defendant. There is no evidence that any other person opened the boot or took items from the vehicle.

[14] The totality of the evidence shows the following:

- The plaintiff gave the deceased R200 000.00.
- The plaintiff's father gave his daughter R400 000.00 to give to the plaintiff, which she did.
- Dos Santos and the deceased counted some of the money and from the packaging of the rest of the bundles it was R600 000.00.

- Heyn received R100 000.00 and his colleagues more.
- The plaintiff adduced all the evidence that he could in order to establish that his damages amounted to R600 000.00.

[15] It is my considered opinion that there is no reasonable prospect that another court may come to a different conclusion in relation to the amount of the money and to whom it belonged. The defendant's application ought to be dismissed.

[16] On 8 September 2006 the plaintiff filed a notice of motion wherein he sought the following relief:

“1. Dat die klaarblyklike fout in paragraaf 1 van die Bevel uitgereik op 26 Mei 2006 reggestel word sodat dit soos volg sal lees:

“1. That the plaintiff's claim succeeds. That the defendant pay the plaintiff an amount of R600 000.00 plus 15,5% interest thereon from 25 October 2000 to date of payment”

Alternatiewelik tot paragraaf 1 hierbo

2. Dat aan die Eiser kondonasie verleen word vir die laat aflewer van 'n Aansoek om Verlof tot

Appél, die besonderhede waarvan blyk uit paragraaf 3 hierbenede.

3. Data an die Eiser verlof verleen word om teen die uitspraak van sy Edele Regter Musi gelewer op 26 Mei 2006 te appelleer op grond daarvan dat die geleerde Regter regtens en/of feitlik fouteer deur:

- 3.1 Nie die versoek van die Eiser se advokaat tydens argument dat rente gelas word om te loop vanaf datum van aanaming te gesien het as 'n informele versoek om 'n wysiging van die tweede bedde tot die Besonderhede van Vordering nie.

- 3.2 Deur nie te bevind het nie dat aanmaning gedoen was op 25 Oktober 2000 alternatiewelik op die laaste op die 12de Junie 2001 toe dagvaarding beteken was nie.

- 3.3 Deurdat die Agbare Regter fouteer het deur te gelas het dat rente slegs vanaf datum van vonnis synde die 26ste Junie 2006 sou loop.

4. Koste van hierdie aansoek slegs ingeval van opponering daarvan.

5. Verdere en/of alternatiewe regshulp."

[17] The basis for the relief sought in paragraph 1.1 of the plaintiff's application is that I did not consider the informal request for an amendment of the pleadings made during

closing argument. During closing argument Mr De Koning said the following:

“All we need to prove is who is the owner and how much was stolen and I submit that that has been adequately proved and I call upon Your Lordship to give judgement as prayed in the Particulars of claim, payment of the R600 000.00 and interest a *tempore mora*, not from date of judgement – My Lord, I will have to apply for the amendment of that – of prayer (b) – from the date of *mora*, and the date of *mora* My Lord, at least to be the 11th of April 2001 at 15,5% and costs of suit...”

[18] Mr De Koning is of the view that this informal application for an amendment ought to have been granted. He further contends that in as far as I did not consider it; I should vary my order accordingly because there is a patent error or omission in the order.

[19] Mr Botha strenuously opposed the application to vary my order. Mr Botha pointed out that although he did not hear the informal application for an amendment there was no basis for such amendment. Mr Botha pointed out that the plaintiff did not comply with the Rule 28. No reason was given as to why there was non compliance with Rule 28 at the time that the

informal application for an amendment was made. He further contended that the plaintiff prayed for an order in his pleadings and that such order was granted, there was therefore no reason to vary the order.

[20] Mr De Koning on the other hand argued that informal applications for amendment are, in practice, brought on a daily basis. He was of the view that his purported application was sufficient.

[21] Rule 28 reads as follows:

- (1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be affected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

- (4) If any objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice to the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).
- (6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.
- [7] Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
- [8] Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rule 23 and 30.
- [9] A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

[10] The court may, notwithstanding anything to the contrary in this rule, at any stage before judgement grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

[22] The Rule does not make provision for informal applications. Although it does not make provision for informal applications for amendments, amendments are in practice sought and granted after an informal request from the bar. Those kinds of amendments are generally allowed where there is no prejudice or where such amendment is harmless or where the parties agree thereto.

[23] It is the duty of the party desiring an amendment to request it. Mr De Koning conceded that his purported application for amendment was not couched eloquently. In it he stated that he will have to apply for an amendment. He however argued that what he meant to convey was that he is applying for an amendment. That is not what he said. He said that he will have to apply for an amendment. This clearly refers to some future action. I am therefore not surprised that neither I nor

Mr. Botha perceived or experienced what was said as an application for an amendment. In my view Mr. De Koning should not be allowed to peddle what he actually said to what he meant where his words are clear and unambiguous. Even if I accept, which I do not, that he meant that he is applying for an amendment such amendment can not be granted.

[24] Any application for an amendment had to be brought before judgment. Judgment in this matter was delivered on 26 May 2006. No application for an amendment, in terms of Rule 28, was delivered before the date of judgment. All reasons given after the date of judgment as to why an application in terms of the Rule was not filed are irrelevant.

[25] The court has discretion to allow or refuse applications for amendment of pleadings. An application for amendment is not a mere formality that is granted when requested. The court is duty bound to consider prejudice to the other party. The plaintiff bears the onus to show that the other party will not suffer irreparable prejudice. In **Euroshipping Corp of Monrovia v Minister of Agriculture** 1979 (2) SA 1072

(CPD) at 1090 B-C Friedman J stated, correctly, that “there is in an application such as this an onus on the party seeking the amendment to establish that the other party will not suffer irreparable prejudice and as Schreiner J said on the sixth rule enumerated in **Unicon Bank of South Africa Ltd v Woolf** (supra at 225).”

“When there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused.” The plaintiff has not shown, during the purported application, that the defendant will not suffer prejudice. The defendant argued that it would be prejudiced if the amendment and consequently the variation of the order was allowed because it was not given the opportunity to object or make its views known in relation to the purported application.

[26] When the purported application was made Mr De Koning did not even give a reason as to why it was made at that late stage. I therefore did not have any indication as to the *bona fides* of the plaintiff. Delay per se is no ground for refusing an application for amendment.

[27] In **Trans-Drakensberg Bank Ltd v Combined Engineering** 1967 (3) SA 632 (D & CLD) at 640 H Caney J pointed out that “The amendment will be refused only if to allow it

would cause prejudice to the other party not remediable by an order for costs and, where appropriate, a postponement. It is only in this relation, it seems to me, that the applicant for the amendment is required to show it is *bona fide* and to explain any delay there may have been in making the application, for he must show that his opponent will not suffer prejudice in the sense that I have indicated...” See also **Thekwini Properties (Pty) Ltd v Picardi Hotels Ltd** 2008 (2) SA 156 (D & CLD) at paragraph 9.

[28] It is clear that the “informal” application for amendment was not in compliance with Rule 28. It lacked vital averments in relation to an explanation for the delay, the *bona fide* of the plaintiff and whether the opponent will suffer any prejudice. The plaintiff could and should have applied for a postponement in order to deliver his notice of intention to amend his pleadings. He chose, at his peril, not to do so.

[29] It must be remembered that “informal” applications for amendments are ordinarily granted where it is clear that there would be no prejudice or where it is clear that there is a minor mistake in the pleadings that ought to be remedied or where the opponent agrees thereto. Where an informal

application, like this, is made and there is clear indication that prejudice will result or where there is doubt as to whether prejudice would result it should be refused. Worst still if it is asked at such a late stage and no explanation is given for the delay or the *bona fides* of the applicant, and why an application in terms of the Rules was not brought.

[30] Although I did not consider the purported application in my judgment it is in my view clear that it was never worthy of any consideration. The plaintiff asked, in his pleadings, for interest from date of judgement. The order was so granted. There is no ambiguity, patent error or omission in the order.

[31] Mr De Koning referred me to section 2 (1) of the Prescribed Rate of interest Act 55 of 1975 and argued that the amount (R600 000.00), bears interest from the day on which the judgment debt is payable. His argument was that, in terms of that section, the money was payable at date of demand but the latest on the date on which the summons was served on the defendant. I disagree.

[32] Section 2 of the aforementioned Act reads as follows:

“2. Interest on a judgment debt.-

- (1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.
- (2) 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.
- (3) In this section “judgment debt” means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt.”

[33] In **General Accident Versekerwysmaatskappy SA Bpk v Bailey N.O** 1988 (4) SA 353 (AA) at 357 G-H it was stated that:

“Soos alreeds aangedui, dra elke vonnis skuld rente, luidiens artikel 2 (1) van Wet 55 van 1975, vanaf die dag waarop die vonnis skuld betaalbaar is. Die vraag ontstaan, wanneer is ‘n vonnis skuld betaalbaar?

In die gewone gang van sake is dit betaalbaar op die datum wanneer dit deur die uitspraak van die verhoof bepaal word..." See also

Administrateur, Transvaal v J D van Niekerk en Genote

Bk 1995 (2) SA 241 (AD) at 244 G-H.

[34] My order is therefore clear that the judgment debt is payable from the date of my judgment. In my view Mr De Koning's argument that I should vary my order because the judgment debt was *ex lege* payable at date of demand or date of service of the summons can not be accepted. It only became a judgment debt on the date determined by me in my judgment.

[35] As indicated above, the application to vary my order was accompanied by an application for leave to appeal.

[36] The first ground of the plaintiffs' application for leave to appeal is that I erred by not accepting the request of plaintiff's counsel as an informal application for amendment. I have dealt with this argument above and stand by what I have said in relation to this purported application for amendment.

[37] The other grounds are interrelated. In essence the submission is that I erred by not finding that the plaintiff was entitled to interest from date of demand or date on which summons was served.

[38] It is common cause that the letter of demand dated 25 October 2000 was written on behalf of Mrs Fortunato - the deceased's wife – and not the current plaintiff. In that letter the demand is that the defendant should pay Mrs Fortunato an amount of R600 000.00.

[39] The pleadings clearly state that the plaintiff asks for interest from date of judgment. It is not for me to amend the pleadings on behalf of the plaintiff and order that the interest should be paid on a date other than the date requested by the plaintiff in his pleadings. In my view there are no reasonable prospects that another court could come to another conclusion on these issues. This application ought to be dismissed with costs.

[40] There is a last issue that I want to deal with and that is the delay in arguing these applications. I had indicated from the time that the application for postponement was granted that I am available on any Friday to hear these applications. Bosielo AJP, as he then was, wrote me a letter enquiring about my availability. I reiterated my availability on any Friday of the parties' choice. After I heard nothing from the parties, I requested my clerk to call Mr Botha and Mr Kuyler on 13 August 2008. Mr Botha indicated that he does not know what the status of the matter is and that he will revert. He did not. Mr Kuyler indicated that he is waiting for a date.

[41] When I enquired from both Mr De Koning and Mr Botha what the reasons were for the delays in this matter, both could not give me an explanation save to say that they could not get a suitable date. Mr De Koning informed me that he wrote a letter to the Judge President to enquire about this matter but he also confirmed that they could not agree on a suitable date. Needless to say these kinds of delays do not augur well for the administration of justice. The delays in this matter are inordinate and unacceptable. I can however not apportion blame on anyone.

[42] I accordingly make the following order:

- a. The defendant's application for leave to appeal is dismissed with costs.**
- b. The plaintiff's applications for variation and leave to appeal are dismissed with costs.**

C.J. MUSI, J

On behalf of the Plaintiff: Adv. De Koning

On behalf of the Defendant: Adv. Botha
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