



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 3734/18

In the matter between:

TELKOM SA SOC LTD

Applicant

and

EZEKIEL MASHABA

Respondent

Heard: 23 October 2018

Delivered: 29 November 2018

Summary: Application to set aside a warrant of execution in the amount of R 27 337 355,00. Interest calculated as interest on interest, accruing monthly. Interest is to be calculated at the prescribed rate of interest *per annum*. Questions dealt with: from what date is interest payable and how it is to be calculated.

JUDGMENT

PRINSLOO, J

Background facts:

- [1] The Respondent (the employee) is an employee of the Applicant. He was dismissed in September 2011, where after he referred an automatically unfair

dismissal dispute in terms of the provisions of section 187(1)(d) of the Labour Relations Act¹ (the LRA) to the Labour Court.

- [2] The matter proceeded to trial and judgment was handed down on 11 January 2018. The Court found the employee's dismissal automatically unfair in terms of section 187(1)(d) of the LRA and ordered the employee's reinstatement with effect from 11 January 2016. It is evident from the body of the judgment that the Court considered the delays in finalising the matter and deemed it just and equitable to order reinstatement with a backdated period of 24 months from the date of the judgment.
- [3] Pursuant to the aforesaid Court order, the Applicant filed an application for leave to appeal, which application was dismissed on 18 May 2018. The Applicant subsequently filed a petition for leave to appeal, which was refused on 21 August 2018.
- [4] The parties thereafter engaged in discussions over the employee's reinstatement and the back pay due to him. The employee was reinstated and placed in the position of 'Technical Broadband SOC Generic' with effect from September 2018.
- [5] On 21 September 2018, the Applicant's attorneys proposed that the parties meet on 27 or 28 September 2018 in order for them to discuss and finalise the calculation of the monies due to the employee.
- [6] On 26 September 2018, Ramphele attorneys, acting on behalf of the employee, addressed a letter to the Applicant's attorneys, responding to e-mail correspondence and indicated that they were likely to continue with a writ to enforce the Court order. Ramphele attorneys indicated that the calculations are completely the Applicant's responsibility and they insisted that the Applicant should do the calculations and forward it to them so that they could take instructions from the employee. It is evident from this correspondence that Ramphele attorneys rejected the invitation to a meeting to discuss the calculations and instead threatened to finalise the matter by way of execution.
- [7] In respect of the back pay, the Applicant's attorneys subsequently addressed correspondence to Ramphele attorneys on 27 September 2018, stipulating the calculation of back pay and that the amount due to the employee was R 722

¹ Act 66 of 1995, as amended.

285, which included his total package, a performance bonus and performance pay. The employee's package was calculated at his total monthly package of R 25 542,00 for the period 1 January 2016 – 1 March 2017 and R 27 075 per month for the period 1 April 2017 – 31 December 2017, totalling R 628 811,00, and added to that was a performance bonus of R 63 763 and performance pay of R 31 712,00.

- [8] On 28 September 2018, Ramphele attorneys responded to the Applicant's attorneys' letter of 27 September 2018 and agreed that payment be made in accordance with the Applicant's calculations.
- [9] On 11 October 2018 Ramphele attorneys addressed a letter to the Applicant's attorneys, raising a number of issues regarding reinstatement of the employee. Ramphele attorneys indicated that in terms of section 75 of the BCEA the employee was entitled to interest on the amounts due monthly from January 2016 until date of payment. It was stated that unless a proper calculation was done and presented within 10 days, a writ of execution would be prepared.
- [10] Maserumule attorneys, on behalf of the Applicant, responded on 16 October 2018 that the employee's annual salary package of R 334 649 is the same package the employee earned and he had been reinstated in a similar position as his previous position no longer existed. It was recorded that Ramphele attorneys accepted the calculation, after they rejected an invitation to discuss the calculations of the employee's remuneration. The final calculation was accepted and the employee was paid accordingly and the employee was not entitled to further payments. It was recorded that Ramphele attorneys could not issue a writ on an order that was complied with and for payments which they agreed to.
- [11] Nonetheless, on 16 October 2018, Ramphele attorneys filed a 'warrant of execution', claiming the amount of R 27 337 355,00, being the employee's monthly salary with interest on interest, accrued monthly in terms of section 75 of the Basic Conditions of Employment Act² (BCEA) plus a performance bonus.

² Act 75 of 1997.

[12] The Applicant approached this Court on an urgent basis to set aside the warrant so filed.

Legal principles

[13] The Prescribed Rate of Interest Act³ (PRIA) provides for the payment and calculation of interest on a debt where the rate at which 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 as determined from time to time by the Reserve Bank, *per annum* and the Minister of Justice and Correctional Services publishes the applicable rate of interest in the Government Gazette from time to time.

[14] Section 2 of the PRIA provides for interest on a judgment debt and reads as follows:

- ‘(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 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.’

[15] In *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey NO*⁴ the headnote aptly summarises the Court’s conclusion as follows:

‘Every judgment debt bears interest, in terms of s 2(1) of the Prescribed Rate of Interest Act 55 of 1975, from the day on which such judgment debt is payable. A judgment debt is payable on the day upon which the trial Court hands down its judgment, irrespective of whether the judgment is substituted or amended on appeal, so that the eventual judgment debt is only determined on appeal.’

³ Act 55 of 1975.

⁴ 1988 (4) SA 353 (A).

- [16] In *Victoria Falls and Transvaal Power Co. Ltd. v. Consolidated Langlaagte Mines Ltd*⁵ the Court pronounced that:

‘The civil law did not attribute *mora* to a debtor who did not know and could not ascertain the amount which he had to pay. ‘*Non potest improbus videri, qui ignorat, quantum solvere debeat.*’ (Dig. 50.17.99). And that rule was adopted by the Courts of Vriesland. (See Sande, Dec., 3.14.9). It has also been followed in our own practice. No South African decision was quoted to us, nor have I been able to find any, in which interest before judgment has been awarded upon unliquidated damages. I do not think, therefore, that they can be given here. I do not say that under no circumstances whatever could such damages carry interest. Cases may possibly arise in which though the claim is unliquidated the amount payable might have been ascertainable upon an enquiry which it was reasonable the debtor should have made. Such cases, should they occur, may be left open. But the present matter stands in a different position. It was not possible for the defendant to know or ascertain what damage its breach of contract had caused, and it cannot therefore, on the principles of our law, be held liable for interest prior to judgment upon the amount of the damage.’

- [17] In *Malatji v Minister of Home Affairs and Another*⁶ the Labour Appeal Court (LAC) recently considered the issue of interest. Although the case concerned interest in respect of an arbitration award, the principles referred to by the LAC remain relevant and are applicable *in casu*. The LAC held that *mora* interest can only be levied and would accrue only once the amount of compensation is ascertained or easily ascertainable. Where the award is subject to review, it cannot be said that the quantum is readily ascertainable and that the time for performance by the debtor is fixed. This is so because there is no obligation on the debtor, under those circumstances, to pay the debt.

- [18] The LAC rejected an argument that the employer was in *mora* from the date of issue of the award and/or its subsequent variation as opposed to the date of final determination of review by the Labour Court as untenable as there is no principle in law which provides that the debtor may be mulcted with the

⁵ 1915 AD 1 at 32.

⁶ (JA52/2017) [2018] ZALAC 23 (15 August 2018).

payment of interest for a period, in circumstances where the extent of its liability had not yet been established in that period.

- [19] The LAC accepted that a judgment debtor would only be entitled to the payment of interest *a tempore morae* on the unliquidated claim from date of the award, if the award is not challenged through the review process, or from date of the judgment on review pursuant to the Court's determination of the quantum of the claim. It was held that:

'It is clear from the authorities cited that interest is not payable unless there is an agreement to pay it or there is default or *mora* on the part of the debtor. A judgment debtor is *in mora* from the date of payment fixed by the judgment. From this date, the judgment creditor is, at common law, entitled to interest as of right if it was duly claimed in the Court *a quo*.

Analysis

- [20] *In casu*, the employee filed a warrant of execution for the amount of R 27 337 355,00, being the employee's monthly salary with interest on interest, accrued monthly as from 1 January 2016.
- [21] In my view the employee's claim calls for two issues to be decided. First, the date from which interest is payable and second, how interest is to be calculated.

Date from when interest is payable

- [22] In the judgment of 11 January 2018, the employee was reinstated with effect from 11 January 2016. In the warrant of execution, the employee claims interest with effect from January 2016. The employee relied on the provisions of section 75 of the BCEA in support of his claim.
- [23] This claim is misguided and opportunistic for a number of reasons.
- [24] Firstly, the provisions of the PRIA are clear that every judgment debt shall bear interest from the day on which such judgment debt is payable, unless the judgment or order provides otherwise. *In casu*, there is no judgment or order that provides otherwise, thus the provisions of the PRIA must apply and they apply from the date of the judgment.

- [25] Secondly, in the authorities referred to *supra* it is evident that *mora* interest can only be levied and would accrue only once the amount of compensation is ascertained or easily ascertainable and the time for performance by the debtor is fixed. Prior to the determination of the amount to be paid, there is no obligation on the debtor to pay the debt. The LAC confirmed there is no principle in law that the debtor may be mulcted with the payment of interest for a period, in circumstances where the extent of its liability had not yet been established in that period.
- [26] The LAC accepted that a judgment debtor would only be entitled to the payment of interest *a tempore morae* from date of judgment and pursuant to the Court's determination of the quantum of the claim.
- [27] *In casu*, the quantum of the employee's claim was only determined on 11 January 2018. Prior to this date, there was no obligation on the Applicant to pay the employee because the employee was dismissed and there was no order in respect of his dismissal. The employee's dismissal was only found to be automatically unfair on 11 January 2018 and he was only reinstated on this date, with effect from 11 January 2016. Prior to the Court order the amount of compensation to be paid was not fixed and there is no liability to pay where the extent of the liability had not been established.
- [28] It follows that the employee is not entitled to claim interest from a date preceding the date of the judgment.
- [29] Thirdly, reliance on the provisions of section 75 of the BCEA is misplaced. Section 75 of the BCEA provides for the payment of interest on any amount due and payable in terms of the BCEA, at the rate of interest prescribed in section 1 of the PRIA. Any monies due to the employee were due and payable in terms of an order of Court and no amount was due and payable in terms of the BCEA.

Calculation of interest

- [30] In his 'warrant of execution' the employee claims R 27 337 355,00, being his monthly salary with interest on interest, accrued monthly in terms of section 75 of the BCEA.

- [31] The employee's monthly remuneration for the relevant period (January 2016 – December 2017) ranged between R 25 542 and R 27 075 per month. The Applicant's calculation of his total remuneration for this period (excluding performance bonus and performance pay) is R 628 811,00. On the employee's calculation this amount grew to R 27 337 355,00.
- [32] The obvious question is how did an amount of R 628 811 grow to an enormous, whopping R 27 337 355,00 between January 2016 and January 2018. On the employee's version, the answer is twofold.
- [33] Firstly, it is calculated on his monthly salary with interest on interest, accrued monthly and secondly that this is provided for in section 75 of the BCEA.
- [34] I have already alluded to the fact that reliance on section 75 of the BCEA is misplaced. Section 75 of the BCEA does not provide for the payment or calculation of interest on an 'interest on interest, accrued monthly' basis. In fact, it provides for the payment of interest in accordance with section 1 of the PRIA.
- [35] Section 1 of the PRIA provides for the payment of interest *per annum* at the applicable rate of interest as published by the Minister of Justice and Correctional Services in the Government Gazette from time to time.
- [36] On 20 April 2018, the Minister of Justice and Correctional Services published a notice in the Government Gazette on the revised prescribed rate of interest and with effect from 1 May 2018, the prescribed rate of interest dropped from 10.25% to 10%. For the applicable period in this case, the interest rate was 10.25%, dropped to 10% *per annum*.
- [37] On the employee's calculation, the monthly interest payable for July 2018 was R 3 464 933 and with his salary, the total sum due was R 16 877 578. By September 2018, a mere two months later, the monthly interest was R 5 896 405 and the total sum due was R 27 337 881.
- [38] The employee's calculation is dumbfounding and shocking, to say the least. It shows a material lack of understanding of and a total disregard for the provisions of the law.
- [39] Interest on a judgment debt is simple interest, calculated on a *per annum* basis on the capital amount, at the prescribed rate of interest.

- [40] The employee is not entitled to claim interest, calculated on a monthly interest on interest basis.

Costs

- [41] The last issue to be decided is the issue of costs.
- [42] In so far as costs are concerned, this Court has a broad discretion to make orders for costs according to the requirements of the law and fairness.
- [43] Considering the merits of this application, there is no reason in law or fairness not to make a cost order in favour of the Applicant. I can see no reason why the Applicant should be burdened with the legal costs incurred as a result of the employee's conduct. The Applicant was forced to approach this Court in view of the threat of execution to the value of more than R 27 million, which amount is not due and payable to the employee and which execution would have vast and severe consequences for the Applicant.
- [44] The Applicant is entitled to costs. The question is who should be ordered to pay the costs.
- [45] Ms Makamu on behalf of the Applicant submitted that a cost order *de bonis propriis* should be made. The employee, an individual and layperson, who relied on the advice and assistance of his attorney, should not be burdened with costs in this instance.
- [46] I invited Mr Ramphele in argument to make submissions as to why he should not be held liable for the costs. Mr Ramphele submitted that if his interpretation of section 75 of the BCEA is correct, his calculation is correct and the employee is entitled to the amount he claims. He further submitted that if his interpretation of section 75 is incorrect, the Court should provide clarity and the attorney should not be punished for interpreting the said section. To punish him with a costs order, would be to deny the employee access to justice and would be an infringement on Mr Ramphele's constitutional right of freedom of expression.
- [47] It has to be made clear: attorneys are not expected to interpret legislation, that is the function of the Courts. Attorneys are expected to read legislation and case law and to advise their clients accordingly.

[48] Mr Ramphele persisted with his argument that section 75 of the BCEA means that interest is to be paid on interest.

[49] I have already alluded to the fact that Section 75 of the BCEA does not provide for the payment or calculation of interest on an 'interest on interest, accrued monthly' basis. In fact, it provides for the payment of interest in accordance with section 1 of the PRIA, which provides for the payment of interest *per annum* at the applicable rate of interest. Had Mr Ramphele properly read and understood section 75 of the BCEA, he would have noticed that it made specific reference to section 1 of the PRIA, which section he should have read and considered before issuing the warrant of execution on the basis that he did. He should have noticed that his interpretation of section 75 of the BCEA was not only quite unnecessary but also clearly incorrect.

[50] In *SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others*⁷ the Constitutional Court ordered costs *de bonis propriis* on a scale as between attorney and client and held that:

'An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.'

[51] In *Indwe Risk Services (Pty) Ltd v Van Zyl*⁸ the Court considered circumstances where a *de bonis propriis* cost order was warranted and held that:

'I am also mindful of the fact that an order for costs *de bonis propriis* is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office. Such an order shall not be made where the legal representative has acted *bona fide* or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of *bona fides* or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order

⁷ 2009 (1) SA 565 (CC) at para 54.

⁸ (2010) 31 ILJ 956 (LC).

against the representative to indemnify the party against an account for costs from his own representative. (See in general Erasmus *Superior Court Practice* at E12-27.) ‘

- [52] *In casu*, it is evident that the warrant of execution filed by Mr Ramphele, the opposing affidavit, deposed to on advice of Mr Ramphele, as well as the heads of argument completely ignored the provisions of the PRIA and reliance was placed on the Constitution and section 75 of the BCEA. This, notwithstanding the fact that section 75 of the BCEA specifically provides for interest with specific reference to the PRIA.
- [53] Mr Ramphele calculated interest and opposed this application without any reflection as to the provisions of the PRIA and without any consideration of the applicable case law. Even his reliance on section 75 of the BCEA is misplaced and ignored the fact that the said section refers to the PRIA. One could reasonably accept that a practising attorney assisting a paying client, should at least consider the law and the applicable legislation before a warrant of execution on an obviously impossible amount is issued, forcing the Applicant to approach this Court for urgent relief.
- [54] To persist with his calculation and arguments, Mr Ramphele did not merely make an error of judgment and his conduct does not indicate *bona fides*. Ramphele Attorneys acted in a manner that constitutes a departure from their office by persisting with a calculation which they should have known was wrong. Forcing the Applicant to come to Court and persisting with the absurd calculation of interest in Court, made matters worse. This Court's displeasure should be known to the attorneys.
- [55] This is an exceptional case where the employee's representative acted in a manner that justifies an order for costs *de bonis propriis*. I am of the view that Ramphele Attorneys should be ordered to pay the Applicant's costs *de bonis propriis*. I am guided by the principles set out by the Courts in making such an order, mindful that it is awarded only in exceptional cases.
- [56] In the premises I make the following order:

Order:

1. The warrant of execution issued by Ramphele Attorneys is set aside;
2. Ramphele Attorneys are ordered to pay the Applicant's costs *de bonis propriis*;

3. The Registrar of the Labour Court is directed to serve a copy of this judgment on the Law Society.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms Makamu of Maserumule Attorneys

For the Respondent: Mr T Ramphele of Ramphele Attorneys