

Case no. 66/90

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BOLAND BANK LIMITED

Appellant

and

THE MASTER OF THE SUPREME COURT

First Respondent

D J KLERCK NO

Second Respondent

Coram: HOEXTER, MILNE, F H GROSSKOPF, GOLDSTONE JJA et

PREISS AJA

Heard:

Delivered:

6 May 1991

27 May 1991

J U D G M E N T

F H GROSSKOPF JA:

This appeal concerns the proper interpretation of section 103(2) of the Insolvency Act 24 of 1936 ("the Act"). The crisp question to be decided is whether section 103(2), read with section 95(1) of the Act, makes provision for the payment of compound interest on a secured claim after the date of sequestration of the debtor's estate.

The appellant was the applicant in the Court a quo. The application was for an order declaring that the appellant, a secured creditor in an insolvent estate, was entitled to recover compound interest on its claim from the date of sequestration to the date of payment. The Master and the trustee in the insolvent estate were cited as respondents in the application, but they decided not to file any answering affidavits. They were not represented at the hearing of the application in the Court a quo and they both intimated that they would abide the decision of the Court.

The Master did, however, furnish a report in which he expressed the view that section 103(2) of the Act does not provide for the payment of compound interest after the date of sequestration of the debtor's estate. The application was heard in the South Eastern Cape Local Division by Jones J who held that on a proper construction of section 103(2), read with section 95(1) of the Act, the appellant was not entitled to claim payment of compound interest on its claim as from the date of sequestration. In coming to this conclusion the learned Judge relied on the judgment in the case of Central Africa Building Society v Pierce NO 1969(1) SA 445 (RAD). The Court a quo dismissed the application, but granted the appellant leave to appeal to this Court. On appeal the second respondent was represented by counsel who contended that the judgment of the Court a quo ought to be upheld for the reasons therein set forth.

The appellant's claim against the insolvent estate is secured by a "special mortgage". The mortgage bond

expressly provides for the capitalization of interest, which means that the appellant is entitled to charge compound interest, i.e. interest computed on the principal sum as well as on accrued but unpaid interest. Our Courts have for many years enforced stipulations providing for the payment of compound interest. (Natal Bank v R Kuranda and A Kuranda v Natal Bank 1907 TH 155 at 169-171; United Building Society v Labuschange 1950(4) SA 651(W); Central Africa Building Society v Pierce NO, supra, at 455 D-G; Davehill (Pty) Ltd v Community Development Board 1988(1) SA 290(A) at 298 G - I).

However, the issue in the present case is not whether the appellant was entitled to claim compound interest from the debtor in terms of the express stipulation in the bond, but whether the Act allows him to recover compound interest from the debtor's insolvent estate after sequestration. It should be borne in mind that from the date of sequestration the contractual rights of a creditor vis-à-vis the insolvent are governed by the provisions of the Act. The question

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whether the appellant is entitled to claim compound interest from the date of sequestration therefore depends upon the true construction of the relevant provisions in the Act.

It was reaffirmed by Smalberger JA in Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others 1990(1) SA 925(A) at 942I - 943A that the primary rule in the construction of statutory provisions is to ascertain the intention of the legislature. He further observed that it is now well established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the legislature could not have contemplated it. (Venter v R 1907 TS 910 at 913-4; Union Government (Minister of Finance) v Mack 1917 AD 731 at 739; Pick n Pay Retailers (Pty) Ltd v Minister of Mineral and Energy Affairs 1987(2) SA 865(A) at 876 D).

Section 95(1) of the Act provides as follows:

"The proceeds of any property which was subject to a special mortgage, landlord's legal hypothec, pledge or right of retention, after deduction therefrom of the costs mentioned in sub-section (1) of section eighty-nine, shall be applied in satisfying the claims secured by the said property, in their order of preference, with interest thereon calculated in manner provided in sub-section (2) of section one hundred and three from the date of sequestration to the date of payment, but subject to the provisions of sub-section (4) of section ninety-six."

Section 95(1) thus specifically provides for the payment of interest, calculated in the manner provided in section 103(2), from the date of sequestration to the date of payment. Section 96(4) has no bearing on the issue.

Section 103(2) reads as follows:

"The interest mentioned in subsection (1) shall be calculated at the rate of eight per cent per annum, unless the amount of any claim bears a higher rate of interest by virtue of a lawful stipulation in writing, when the interest on that amount shall be calculated at the stipulated rate of interest."

Applying the said rule of construction to the wording of section 103(2) it is in my view clear that its provisions

relate only to the rate at which interest is to be calculated, and not to any other manner of calculating interest. A creditor is entitled in terms of section 103(2) to claim interest at the "stipulated rate", but there is nothing therein which allows him to enforce any other contractual right relating to interest, such as an express stipulation for the payment of compound interest. The word "interest" standing alone, in my view, denotes simple interest only. Had the legislature intended to make provision for the payment of compound interest by an insolvent estate it could easily have done so, e.g. by allowing a secured creditor to claim "any interest" stipulated for. (Compare section 50(1) of the Act where such words are in fact used).

It is true, as was pointed out by Mr Nepgen on behalf of the appellant, that section 95(1) provides that interest on a secured claim shall be calculated "in manner provided" in section 103(2) and not "at the rate" therein

provided. Counsel submitted that where there is a contractual stipulation governing the calculation of interest, the words "calculated in manner provided in subsection (2) of section one hundred and three" in section 95(1) really refer to the manner of calculating interest actually stipulated for by the creditor. I fail to see how these words in section 95(1) can have the alleged effect of extending the plain meaning of section 103(2). In any event, it seems to me to be clear that in using the expression "in manner provided" in section 95(1) the legislature did not intend to say anything more than that interest on the amount of a secured claim shall be calculated "according to the provisions" of section 103(2). This construction is supported, moreover, by the wording of the Afrikaans version of section 95(1), which incidentally is the signed text. According to the Afrikaans version interest has to be calculated "volgens die voorskrif van subartikel (2) van artikel honderd-en-drie".

Counsel also relied on the appellant's right in terms of section 103(2) to claim a "higher rate" of interest by virtue of a lawful stipulation. He submitted that the payment of compound interest, which was lawfully stipulated, would yield a higher return and therefore a higher effective rate of interest. In my view there is nothing in the wording of section 103(2) to suggest that the legislature had a "higher effective rate" in mind; the section merely refers to a "higher rate". If counsel's argument were correct the effect would be that a claim for compound interest at the maximum rate permissible under the Usury Act would inevitably lead to the payment not only of a higher rate of interest, but a legally impermissible one.

The learned Judge in the Court a quo expressed the view that the capitalization of interest involves a process whereby interest becomes capital after a specified period of time. Moreover, it appeared to the learned Judge to be contrary to the intention of the Act, and the notion of a

concursum creditorum, that the capital amount of a claim should increase after sequestration. Counsel for the appellant submitted that this approach was incorrect inasmuch as the agreement to calculate interest on accrued interest does not have the effect of converting interest into capital. He referred us in this connection to a dictum of Innes CJ in the case of Rooth & Wessels v Benjamin's Trustee and Another 1905 TS 624, at 633-634, where the learned Chief Justice rejected the contention that interest becomes capital once it is capitalized. (See also Volkskas Bpk v Meyer 1966(2) SA 379(T) at 380 G - 381 H). However, it is not necessary for the purposes of this case to say any more about this aspect of the matter.

I am not persuaded that the legislature intended to make provision for the payment of compound interest on a secured claim from the date of sequestration of the debtor's estate to the date of payment. In my judgment the appeal should accordingly be dismissed.

In conclusion I would like to sound a note of warning that greater care should be taken in preparing the record of the proceedings to be lodged with the Registrar of this Court. The record presented to us in this case contained a wasteful duplication of the notice of motion, the founding affidavit and all the annexures thereto. Had the appeal succeeded a special order for costs may well have been considered.

For the reasons set out above the appeal is dismissed with costs.

F H GROSSKOPF JA.

HOEXTER	JA	
MILNE	JA	
GOLDSTONE	JA	
PREISS	AJA	Concur.