



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG**

Case no: **13712/2024P**

In the matter between:

GWAYI INVESTMENTS (PTY) LTD

Applicant

and

PHIRI-COMBRINK INC

First Respondent

CRISTAL DAWN VAN ECK

Second Respondent

REGISTRAR OF DEEDS, KWAZULU NATAL

Third Respondent

JUDGMENT

Siwendu J:

[1] This is the return day of a Rule Nisi, granted by the urgent court on 6 September 2024 before Pitman AJ.

[2] The application involves a dispute following a cancellation of a sale of a property described as Erf 1[...] V[...] Extension 12, Province of KwaZulu Natal,

situated at [...] E[...] Street, Vryheid (the property) concluded by the applicant and the second respondent on 24 May 2024.

[3] The applicant, Gwayi Investments (Pty) Ltd (Gwayi Investments), is a registered company based in Vryheid, represented by Mr Mukura. The first respondent is Phiri and Combrink Inc (Phiri and Combrink), a law firm, incorporated in terms of Section 8 (c) of the Companies Act 71 of 2008. The second respondent is Ms Crystal Dawn Van Eck (Ms Van Eck), the seller of the property. The third respondent is the Registrar of Deeds, KwaZulu Natal (the Registrar). The Registrar plays no role in these proceedings, having been cited in the official capacity as the Registrar.

[4] The background to the application can be briefly stated. The property at issue was sold through an Estate Agent (Mr Hlophe) trading as Hlophe Properties Pty (Ltd). Gwayi Investments made an offer to purchase the property for R790 k. An Agent's commission of R 20k was payable to the Estate Agent on registration of transfer.

[5] Clause 7 of the Sale Agreement nominated Woodhead Bigby attorneys as the conveyancers to register the transfer of the property. Notwithstanding, Phiri and Combrink attended to the transfer of the property. It is common cause that on 24 May 2024, Phiri and Combrink presented Gwayi Investments with a pro-forma account for the payment of the purchase price plus transfer costs. Gwayi Investments duly deposited the sum of R 818 311.38 in Phiri and Combrink's Trust Account on 27 May 2024. I pause to mention that the proof of payment bears the name of the payer as Grefs Holdings (Pty) Ltd, but nothing turns on this for the present purposes.

[6] Subsequent to the payment, a dispute ensued between Gwayi Investments and Ms Van Eck about the vacant occupation of the property. Gwayi Investments alleges occupation of the property was agreed to orally. It appears

there were occupiers on the property, and the seller could not grant Gwayi Investments vacant occupation. There is no dispute on the papers that Mr Phiri and Mr Hlophe attempted to resolve the occupation dispute without success.

[7] On 22 July 2024 Mr Mukura sent an email stating that:

“As per our discussion, I would like to confirm that you have assured me that the tenant at no. [...] E[...] Street, Vryheid would have vacated the place by the 31st of July 2024.

If this is not the case, regrettably I will have to cancel the deal.”

[8] 20 August Mr Mukura wrote again that:

“Please note again that despite giving the agent an extension for them to give me access to the property until the 04th of August, they have failed to do so.

As previously agreed, please note that I am no longer interested in the property at no.[...] E[...] Vryheid because I have not managed to get access.

I will await the next step from you towards reimbursement of the amount paid towards the property.”

[9] It appears there was no satisfactory response to the emails, as a result, he instructed GJ Vonkeman Attorneys (Vonkeman Attorneys) on behalf of Gwayi Investments to cancel the sale and reimburse the amounts paid. On 23 August 2024 Vonkeman Attorneys dispatched a letter to Ms Van Eck and Phiri Combrink detailing a several grievances about the sale transaction, demanding the repayment of the purchase price and cancelling the sale agreement.

[10] Material to the cancellation was the failure to give vacant possession. Mr Makuru alleges the sale was cancelled because of a continued breach of an oral agreement to grant him occupation.

[11] Mr Makuru states that he subsequently became aware that there were at least three versions of the sale agreement. The material terms were unilaterally amended after he made the offer to purchase, increasing the purchase price.

Further amendments made were in respect of the party responsible for pest control and electrical compliance certificates. The latter obligations were unilaterally transferred to Gwayi Investments. In addition, Gwayi Investments was held liable for the payment of the Estate Agent's commission when there was no obligation to do so in the sale agreement. He alleges in the founding affidavit that Phiri Combrink made the payment to the Estate Agent before effecting the transfer.

[12] There are other allegations made on the papers against the Estate Agent and Phiri Combrink. Those disputed facts have receded to the background, and I need not chronicle them. As a result, by the time the application was heard, the disputed issues had narrowed.

[13] The upshot is that despite the cancellation and discussions between Mr Phiri, Mr Makuru, Mr Vonkeman, the matter was not resolved. Phiri Combrink's stance was it would proceed to lodge the documents and pass transfer. On 4 September 2024, Mr Vonkeman dispatched another letter to Phiri Combrink recording that the intention to proceed with the lodgement of the transfer unless there was a Court interdict preventing the transfer is "unfortunate" and "mala fide."

[14] As already alluded to, on 6 September 2024, Gwayi Investments obtained an interim order interdicting by way of a Rule, calling on the respondents to show cause why an order should not be granted:

- (i) interdicting the respondent from taking further steps to transfer the property;
- (ii) declaring the deed of sale *null and void ab initio* alternatively cancelled by Gwayi Investments
- (iii) directing the first and second respondent to pay the sum of R 818 311.38 with interest thereon on the prescribed rate calculated from 23 August 2024 to date of payment, jointly and severally, the one paying the other to be absolved.

(iv) Costs on an attorney and client scale.

[15] Only Ms Van Eck opposed the confirmation of the Rule. Mr Phiri filed a confirmatory affidavit in support of allegations relating to him. It bears mentioning that the return date for the *Rule nisi* was 25 November 2024. However, by consent between the parties, the hearing was adjourned *sine die*, with the respondents agreeing jointly and severally to pay the costs occasioned by the postponement.

[16] It was common cause that by the time of the hearing of the application on 4 August 2025 after the interim order obtained on 6 September 2024:

(i) Ms Van Eck had repaid the purchase price and the transfer costs to Gwayi Investments on 13 September 2024. She had found another buyer for the property.

(ii) The Estate Agent refunded the Gwayi Investment the commission paid to the Estate Agent. It was found the sale agreement did not create a liability for the payment of the commission on the Applicant.

[17] At the first hearing of the application on 4 August 2025, Counsel for Ms Van Eck sought condonation for the late filing of the Heads of Argument. The application was not seriously opposed by Gwayi Investment and condonation was granted.

[18] Gwayi Investment sought the confirmation of the Rule with regards to the declarator that:

(a) the sale signed on 24 May 2024 in respect of the property is declared null and void *ab initio*; and

(b) confirmation of the cancellation of the sale

(c) interest at the prescribed rate, calculated from 23 August 2024 to date of payment, the one paying the other to be absolved

(d) Costs of the application on an attorney and client scale.

[19] It was common cause on the papers that Ms Van Eck repaid the purchase price. Notwithstanding, Counsel for Ms Van Eck sought to contend that Gwayi Investment repudiated the sale agreement, and I should determine the validity of the cancellation of the sale and/or the dispute about whether the sale was null and void ab initio. In the court's view, the repayment of the purchase price means the principal dispute about whether parties concluded a binding and an enforceable agreement of sale and/or whether the Gwayi Investments validly cancelled the sale agreement fell away. Although parties sought to argue this, a determination of those issues would have no practical effect on the parties.

[20] To my mind, Ms Van Eck's conduct evinces an acceptance of the cancellation of the agreement. Regardless of how Ms Van Eck's conduct is characterised; by repaying the purchase consideration and transfer costs to Gwayi Investments, she indicated by her conduct that she no longer wanted to be bound to sale agreement. Her motive for the repayment is not relevant. She has not counter claimed for damages. It is safe to assume this is because there were none suffered since she states she found another buyer for the property.

[21] Accordingly, what remained unresolved narrowed to the question of (i) interest claimed by the Gwayi Investment and (ii) the liability for legal costs.

[22] Since the funds were deposited into Phiri Combrink's Trust Account, in anticipation of the transfer, during the hearing, a question arose as to (i) the entitlement to the interest claimed (ii) the terms of the deposit and the vesting of the interest and (iii) where liability for the payment of the interest lay.

[23] The question of the entitlement appeared to implicate Section 86 (5) of the Legal Practice Act 28 of 2024¹ since it involved the payment of funds into

¹ Section 86 (5) -Trust accounts

(5) Interest accrued on money deposited in terms of this section must, in the case of money deposited in terms of—

the Attorneys Trust Account in anticipation of a transfer. The sale agreement is silent as to the applicable terms to the deposit.

[24] Parties were granted leave to make written submission to the Court on these issues and address the motion Court on 12 August 2025. I am indebted to both Counsel for their submissions and have carefully considered them in the light of existing authorities.

[25] The submissions clarify that what Gwayi Investment seeks is quintessentially *mora interest* at prime rate from the date of demand on 24 August 2025 to date of payment. It submits that its claim is not that of interest earned on the capital while in the attorneys Trust Account but a common law claim.

[26] As said, in the present case, the sale agreement is silent about the terms of when interest would be considered due and payable in the event of a breach or cancellation of the sale agreement. It is clear from the authorities is that *mora interest* is predicated on the existence of a liquidated debt. The Court in *Land and Agricultural Development Bank of South Africa v Ryton Estates (Pty) and Others*,² with reference to the decision in *Bellairs v Hodnett and Another* confirmed the nature of *mora interest* stating that:

“It may be accepted that the award of interest to a creditor, where his debtor is *in mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date (*Becker v Stusser*, 1910 CPD 289 at p 294).”

(a) subsections (2) and (3), be paid over to the Fund and vests in the Fund; and
(b) subsection (4), be paid over to the person referred to in that subsection: Provided that 5 per cent of the interest accrued on money in terms of this paragraph must be paid over to the Fund and vests in the Fund.

² [2013] 4 All SA 385 (SCA)

[27] In *Crookes Brother Ltd v Regional Land Claims Commission, Mpumalanga and Others* ³ (*Crookes Brother*), a dispute which, like the present case arose in the context of a sale of property, the Court explained with reference to long standing authorities that *mora* arises from the “loss of productive use of the money”. Once a creditor is deprived of moneys due, the issue is whether a legal liability exists or not and the rest is a matter of mathematical computation. The Court held that:

“Even in the absence of a contractual obligation to pay interest, where a debtor is in *mora* in regard to the payment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not receiving his money on due date.”

[28] To the question when the debt would have been created, again the Court in *Crookes Brothers* ⁴ makes it plain that where a contract does not contain an express term or stipulation, a demand becomes necessary to put the debtor in *mora*. This position was subsequently confirmed by the majority judgment in *Griffiths v Janse Van Rensburg and Another NNO* ⁵

[29] Accordingly, I agree with Counsel for Gwayi Investments that the interest claimed became due from the date of demand to the date of payment. Although on the papers demand was made on 23 August 2024, Gwayi Investments seeks interest from 24th August 2024 to the 13 September 2024.

[30] The Rule issued called on the respondents to show cause why they should not be held liable jointly and severally. I deal with this issue jointly with the question of the costs of the application.

Costs

³ 2013(2) SA 259 (SCA) at paras 14 onwards

⁴ See at para 17

⁵ 2016(3) SA 389 (SCA) at para 35

[31] What stands out in the present case is the nominal amount of interest claimed estimated to be in the region of R55000.00 and the persistence with litigation.

[32] Despite walking away from the fraught sale soon after the interim interdict, the matter was allowed to proceed to the motion Court Roll on the return date on 25 November 2024. Ms Van Eck filed her answering affidavit on 22 November 2024. A replying affidavit by Gwayi Investments followed and was delivered on 20 March 2025. On 9 May 2025, Gwayi Investment's attorneys filed their Heads of Argument and Practice Note, and simultaneously with the certificate of readiness. On the other hand, the respondents sought condonation for the late filing of the Heads of Argument. They did so on 31 July 2025, the eve of the hearing when the matter was set down for hearing on 4 August 2025, an inconvenience to the Court.

[33] At the hearing Counsel for the respondents sought to suggest that Ms Van Eck was the sole party to the litigation. This is not borne out by the papers on record. Her answering affidavit is accompanied by Mr Phiri's confirmatory affidavit. The papers reflect that they are filed on behalf of both respondents and the attorneys of record act for both respondents. What is more, Phiri and Combrink did not file a notice to abide to clearly indicate they are indeed a neutral party to the litigation.

[34] Despite the sale no longer being alive, the respondents persisted with the litigation and to oppose the matter on the basis that there was a valid agreement. To my mind, once Ms Van Eck accepted the cancellation and repaid the capital, it was open to the parties to attempt to amicably resolve the narrow dispute. In the broader scheme, involves a nominal amount of the interest and costs. Probably the cost of the litigation will outstrip the interest claimed.

[35] A sensible result of an amicable resolution would have been that parties would agree to a discharge the Rule rather than persist with costly litigation. It is permissible for a party to abandon a judgment in its favour in terms Rule 41(2).⁶

[36] In view of the stance by Phiri and Combrink, Gwayi Investments was compelled to instruct attorneys GJ Vonkeman to follow up on the cancellation and obtain an urgent interdict. It is fitting that both respondents are held jointly and severally liable for the costs at scale C.

[37] In the result, I make the following order:

1. a. Paragraph 1.1 and 1.2 of the Rule Nisi issued on 6 September 2024 is discharged.
- b. Paragraph 1.3 of the Rule Nisi is discharged only to the extent of the order for the payment of the sum of R818 311.38.
2. The respondents are ordered jointly and severally, the one paying the other to be absolved to pay the Applicants:
 - a. Interest on the sum of R 818 311. 38 at the prime rate of interest calculated from 24 August 2024 to the date of payment on 13 September 2024
 - b. Costs occasion by the urgent interdict and this application, including the Cost consequent on the employment of Counsel
 - c. The Cost in paragraph b shall be computed on Scale C

NTY SIWENDU J

⁶ See *Coetzer v Wesbank t/a Firstrand Bank Limited* 2022(2) SA 178 (GJ) para 26-27

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10 am on the 15 August 2025.

Date of Hearing:	04 & 12 August 2025
Date of Judgment:	18 August 2025
Counsel for the Applicant:	C Pretorius SC
Instructed by:	GJ Vonkeman Attorneys C/O Tatham & Wilkes Inc
Counsel for the 1 st & 2 nd Respondents:	M B Pedersen
Instructed by:	M B Pedersen Attorneys C/O SLK Attorneys