IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) **Reportable** Yes
(2) **Of interest to other Judges** Yes
(3) **Revised:** Yes

Date: 10/11/2021

Signature.....

CASE NO: A3070/2021

In the matter between:

STEWARTS AND LLOYDS HOLDINGS (PTY) LTD — Appellant (Plaintiff *a quo*)

And

SOLID STEEL CONSTRUCTION (PTY) LTD — Respondent (Defendant *a quo*)

JUDGMENT

MAIER-FRAWLEY J (SUTHERLAND DJP concurring):

Introductory background

1. This appeal lies against the order for interest made by the court below on 27 November 2020 when it granted default judgment in favour of the appellant (plaintiff *a quo*) against the respondent (defendant *a quo*).

2. The appellant instituted action against the respondent in the Kempton Park Magistrates Court on account of the respondent's failure to make full and timeous payment for goods sold and delivered to it by the appellant during July 2019, pursuant to the grant by the appellant of an Incidental Credit Facility to the respondent in terms of a written agreement concluded between the parties ('the agreement'). When the respondent failed to enter an appearance to defend, the appellant applied in terms of Rule 12 of the Magistrate Court Rules for default judgment to be entered against the respondent for the relief sought by it in the action, which included, *inter alia,* an order for: (i) payment of the sum of R146,032.91, being the outstanding capital balance then owing by the respondent, which amount was, by the respondent's own admission, overdue for payment;[1] (ii) interest at the rate of 2% per month (equating to 24% per annum) on the reducing capital balance as from 1 September 2019 to date of final payment, both days inclusive; and (iii) costs of suit on the scale as between attorney and client.

3. The presiding magistrate granted default judgment as requested in respect of the capital sum claimed and costs, but granted interest at his own discretion at the rate of 8.75% per annum as from date of demand, namely, 19 May 2020, as opposed to the rate sought by the appellant, being the contractually agreed rate of 2% per month (24% per annum) a *tempore morae* as from 1 September 2019, being the date that the debt became overdue for payment.

4. In terms of the appellant's pleaded case, as at 31 July 2019, the respondent was indebted to it in the sum of R179,491.47 which amount was due, owing and payable on or before 31 August 2021.[2] The respondent paid an amount of R33,458.56 to the appellant, thereby reducing its indebtedness to the sum

[1] Par 12 of the particulars of claim, read with annexure 'F' thereto.

[2] Par 7 of the particulars of claim.

of R146,032.91,[3] as further evidenced by the certificate of balance attached to the particulars of claim.

5. Being aggrieved by the order as to interest, the appellant filed a Notice of Appeal in which it set out its grounds of appeal. As there is a large measure of overlap between the various grounds enumerated in the Notice of Appeal, a summary of the main grounds will suffice for purposes of this judgment. These included that the court below erred in fact and in law:

5.1. in failing to apply the well-established principle of *pacta sunt servanda* when failing to take cognisance of clause 2.3 in the agreement (which determined the date for performance) including clause 3.4 thereof, which prescribed the agreed rate of interest in the event of a payment default by the defendant by the due date for payment;

5.2. in failing to correctly apply principles of law applicable to *mora* interest in circumstances where a specific date for performance was set by agreement between the parties (*mora ex re*), being '30 days from date of statement' thereby obviating the need for a demand;

5.3. in ignoring the pleaded date for performance by the defendant in circumstances where the court below had found the averments contained in the particulars of claim to be proven facts.

6. The presiding magistrate provided written reasons in terms of Rule 51(1) for why he granted interest to be payable at the rate of 8.75% as from date of demand. These included that:

6.1. The averments made in the particulars of claim were found to be proven facts;

[3] Par 8 of the particulars of claim.

6.2. The presiding magistrate remained uncertain as to why the appellant had requested interest to run from the date of 1 September 2019;

6.3. The contractually agreed amount of interest at 2% per month constituted a penalty clause 'as it only applies upon a default.' The presiding magistrate expressed the view that the ultimate purpose of the proceedings was to restore the *status quo ante* in respect of the plaintiff, not to place it 'in a better position';

6.4. Interest was granted at the rate of 8.75% per annum at the prescribed rate of interest as from the date that the appellant had sent a demand for payment in its notice despatched in terms of section 129 of the National Credit Act 34 of 2005 (the NCA), as this was the date on which the plaintiff had 'formally' brought the indebtedness to the attention of the defendant.

7. Additional reasons were provided by the court below after receipt of the appellant's notice of appeal. These included that:

7.1. 'Payment is only due and payable when a statement has been sent to the defendant' whereas the particulars of claim were silent as to when (if at all) a statement was sent to the defendant. The presiding magistrate indicated that he thus saw it fit to exercise his discretion in granting interest from the date that the S129 Notice was emailed to the defendant, 'even though it was not necessary';

7.2. The presiding magistrate accepted as a proven fact, the allegation in the particulars of claim, namely, that that the National Credit Act 34 of 2005 (the NCA) was not applicable, in which regard, he expressed the further view that section 8(3) of the NCA 'excludes the particular credit facility from being a credit agreement as interest is only payable upon default.'

8. Whether or not the court below erred in ordering interest to be paid on the overdue indebtedness at a different rate and from a different date to that which was provided for in the agreement, is what principally informs the present appeal.

Discussion

9. Clause 2.3 of the agreement provides for the time for performance, in other words, the date by which payment was to be made by the respondent, as purchaser, for goods sold and delivered to it by the appellant, as seller. Clause 2.3 reads, in relevant part, as follows:

> " Unless otherwise stated in any quotation given by the seller or elsewhere in writing by the seller payment of the purchase price in respect of any goods dispatched by the seller shall be paid by the purchaser within 30 days from date of statement. ..."

10. Clause 3.4 of the agreement provides for the payment of interest on any amount not paid by the respondent on due date. It reads as follows:

> " All payments delayed after the due date for payment shall bear interest at the maximum rate of interest...prescribed from time to time in terms of the National Credit Act, 2005 (currently 2% per month) or at such lesser rate as the seller determines from time to time in its discretion."

11. In terms of clause 14 of the agreement, a certificate issued under the hand of any director or manager reflecting the amount due by the purchaser to the seller at any given time, 'shall be *prima facie* evidence and proof of the amount due by the purchaser to the seller'.

12. In terms of the certificate of balance (annexure 'E' to the particulars of claim), a manager in the employ of the appellant certified that the

respondent was indebted to it for the capital sum of R146,032.91 and interest thereon at the rate of 2% per month from 1 September 2019 to date of final payment, both days inclusive. Given that the respondent failed to defend the action, there was no evidence before the court below to rebut the effect of the certificate of balance. But more significantly, the certificate was introduced in paragraph 10 of the particulars of claim and its contents thus formed part of the factual allegations found to be proven by the court below.

13. The appellant's claim was founded on the respondent's default of performance in breach of its contractual obligations to make payment of the contract price by the agreed due date for payment, namely, 31 August 2019. The defendant was thus in *mora* (default of performance) on 1 September 2019.[4] That much is evident from the allegations made in paragraph 7 of the particulars of claim.

14. The legal position that prevails when a debtor fails to make timeous performance in circumstances where the time for performance was set by contract, is aptly encapsulated by the learned author, RH Christie, in his book titled 'The Law of Contract in South Africa'[5] as follows:

> " When the contract fixes the time for performance *mora* is said to arise from the contract itself (*mora ex re*) and no demand (*interpellatio*) is necessary to place the debtor in *mora* because, figuratively, the fixed time makes the demand that would otherwise have to be made by the creditor...This principle has consistently been applied in our courts, and if the terms of the contract are clear the principle must be applied no matter how hard the result may be."

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[4] This is by virtue of the fact that the appellant sold and delivered goods to the respondent at the latter's special instance and request for the period ending 30 days before.

[5] 5th ed, at page 498 *et seq.* See too: Van Loggerenberg: *'Erasmus Superior Court Practice'* 2nd ed (RS 15) vol 2, at p D1-178A.

15. As the learned author further points out:[6]

> "(f) Interest
>
> ...The general damages that flow naturally from breach will be interest *a tempore morae*".[7]

16. That the respondent was liable for interest from 1 September 2019 follows both *ex lege* and from the provisions of the written agreement as set out above. A failure to make payment by the time fixed for performance in the contract created *mora ex re* and no demand (*interpellatio)* was thus necessary to place the debtor in *mora.* The demand contained in the notice delivered by the appellant in terms of s129 of the NCA was therefore not required in order to place the respondent in *mora.* The notice was ostensibly sent in compliance with the statutorily prescribed procedural requirements of the NCA for purposes of debt enforcement, in so far as the credit facility granted to the respondent in terms of the agreement fell within the purview of the NCA.[8] This did not detract from the fact that there existed no substantive requirement in law to first make demand in order to place the respondent in *mora.*

17. *Pacta sunt servanda* is a well-established principle of common law which, in lay terms, means that agreements must be honoured by the parties. It underscores the notion that parties exercise their constitutional right of freedom to contract when they freely and voluntarily enter into agreements. This is one of the reasons why courts have, time and time again, upheld the

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[6] Id, at p 565.

[7] '*A tempore morae*' being a Latin phrase denoting the date on which the obligation to pay became due, *in casu*, 31 August 2019, being the interest charged when payment is not made timeously.

[8] Reference to the notice delivered in terms of s129 of the NCA was presumably made in support of the alternative averments in par 13 of the particulars of claim.

principle. A failure by our courts to do so may lead to an imposition of the court's own sense of fairness and, as a result, the creation of a contract that was not initially agreed to or intended by the parties. In *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* and Another 2009 (3) SA 78 (C) Davis J held that '... without this principle, the law of contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties'.

18. The learned magistrate was thus not at liberty to impose an interest rate contrary to the rate that was agreed upon by the parties. Nor was he entitled to exercise a discretion for purposes of deviating from the rate expressly sanctioned by statute (the NCA), being the statute that regulates the species of contract forming the subject of the present matter, namely, an incidental credit agreement.[9] The learned magistrate thus erred not only in ordering interest to run from date of demand, being a date later than the contractually agreed upon date, but erred in granting interest at a lower rate than that which was both contractually agreed upon by the parties and sanctioned by statute.

19. As an aside, application by the learned magistrate of the prescribed rate of interest (presumably a reference to the Prescribed Rate of Interest Act, 55 of 1975) was misguided by reason of the fact that section 1 of that Act specifically provides that the prescribed rate only applies in the *absence of agreement* or other methods which would set the interest rate.[10]

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[9] That the facility granted to the respondent was that of Incidental Credit as defined in the NCA permits of no dispute, regard being had to the provisions of ss 8(3)(i); 8(3)(ii)(bb) and 8(3)(b)(ii) of the NCA in relation to the facts in *casu*. The appellant placed reliance on the provisions of the NCA in the alternative, per the allegations pleaded in par 13 of its particulars of claim. See too the provisions of section 1 read with sections 5(2)(a); 5(3)(b); and 8(1)(a) read with the provisions referred to above.

[10] Section 1 of the Prescribed Rate of Interest Rate Act 55 of 1975, reads as follows:
"*Interest on a debt to be calculated at a prescribed rate in certain circumstances (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*

20. As regards the learned magistrate's reference to a 'penalty' (presumably a reference to the Conventional Penalties Act, 15 of 1962), suffice it to say that the appellant did not seek a penalty and damages in the court below, and the issue of a penalty stipulation did not arise for determination by the court. As pointed out in *Ndaba,*[11] "...it is impermissible for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. (See in this regard: Kauesa v Minister of Home Affairs & others 1996 (4) SA 965 (NmS) at 973J-974A; Welkom Municipality v Masureik & Herman t/a Lotus Corporation & another [1997] ZASCA 14; 1997 (3) SA 363 (SCA) at 371G-H)."

Costs of appeal

21. The appellant seeks costs of the appeal on the scale as between attorney and client, being the relevant scale provided for in clause 15 of the agreement consequent upon any action being instituted by the seller against the purchaser for the recovery of amounts due to the former under the agreement. The appellant claims such costs, mindful, however, that the respondent elected not to oppose either the application for default judgment in the court below or this appeal, and also did not participate in the present proceedings.

22. In *Consolidated Steel Industries,*[12] a Full bench in this division had occasion to decide comparable issues to those which arose for consideration in these

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agreement or a trade custom or in any other matter, such interest shall be calculated at the rate prescribed under subsection (3) 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."

[11] *Ndaba v Ndaba* 2017 (1) SA 342 (SCA), par 35.

[12] *Consolidated Steel Industries (Pty) Limited t/a Global Roofing Solutions v Carrack In re: Consolidated Steel Industries (Pty) Limited t/a Global Roofing Solutions v Sonstep Trading (Pty) Limited and Another* (A3031/2020) [2021] ZAGPJHC 422 (30 August 2021), an unreported judgment of a Full Bench in this division.

proceedings, on fairly similar facts. There, the plaintiff had sued the defendants in the Magistrates Court for goods sold and delivered pursuant to the grant of an incidental Credit Facility arising from a written agreement between the parties, which included a suretyship. The plaintiff proceeded only against the surety when applying for summary judgment. The presiding magistrate granted judgment in respect of the capital claim and costs in accordance with the agreement, but granted interest in his own discretion, at the prescribed rate, as opposed to the agreed rate, to run from date of service of summons and not *a tempore morae* as was sought. One differentiating feature between that case and the present one is that although the plaintiff succeeded in the appeal against the order for interest, it did not seek a cost order against the respondents, who had neither opposed nor participated in the appeal. In upholding the appeal, Matthuysen AJ expressed the view that the respondent 'should not be punished by a cost order in this appeal'. The court appears to have been swayed by the insubstantial amount of R3,240.00 which the appellant had lost by virtue of the lower interest rate awarded in the lower court and so ordered that the costs of the appeal be borne by the appellant.

23. In the present case, counsel for the appellant submitted that the commercial reality is that the interest order of the court below effectually forced the appellant to finance the respondent's default for a period of 8 months and 18 days, calculated from 1 September 2019 to 18 May 2020, and by not awarding interest at a rate of 2% per month *a tempore morae*, the appellant stood to forfeit or lose an amount of R33,823.11 in circumstances where the appellant itself was not at fault, given that it had performed its obligations under the agreement and was impelled by the respondent's ongoing default to pursue its rights of recovery under the agreement.

24. It was further submitted that the amount of R33,823.11 cannot be considered to be a negligible amount when regard is had to the broader economic impact and knock-on effect that a loss of interest would ultimately have on the profitability and sustainability of the appellant's business. A loss of interest could effectively wipe out the entire profit margin on a transaction. Moreover, it was submitted that such type of forfeitures or losses accumulate quickly, given the prevalence of the use of Incidental Credit Agreements in the steel business, being the market in which the appellant trades, where the commodity in question is traded at extremely thin margins. Whether a loss arises from theft or otherwise, the appellant would have to successfully conclude at least several more similar transactions just to cover costs, wages and the like in order to achieve a sustainable measure of profitability. Whilst the grant of credit entails the risk of non-payment, the costs of credit insurance and lost profit, coupled with the fact that the money was not paid on time, means that the seller may well have to fall back on its own overdraft and pay the lost interest to the bank. Hence interest *a tempore morae* is designed to place a seller (such as the appellant) in the position it would have been in, had the breach not occurred.

25. The aforementioned considerations carry a measure of persuasion in the light of the pervading commercial realities. A further reality is that the appellant was impelled by the respondent's own default to institute legal action for the recovery of overdue amounts together with interest as was agreed to be payable in respect of all late payments. In our view, the appeal process is an extension of the recovery process which commenced by way of action but only became finally resolved on appeal. The appellant was impelled by an incorrect application of the principles of *mora* by the court below, to vindicate its right to payment of interest at the contractually

agreed rate as from the date fixed by operation of law in its quest to recover what was manifestly due to it under the agreement in question.

26. The apparent appetite by the court below to adopt a moralistic approach (or one sympathetic to the debtor) as regards the rate at which interest fell to be awarded, resulted in a misapplication of the law on the facts at hand. Simply stated, such approach called for correction on appeal. Unfortunately, cases are not decided on the basis of sympathy or the feelings of a judicial officer. As Van den Heever JA put it in *Preller v Jordaan,*[13] 'if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge'. This is because reasonable people, including judges, may differ on what is equitable and fair.[14]

27. For these reasons, we see no reason to deprive the appellant of its costs on appeal at the scale of costs provided for in the agreement.

28. In the circumstances, the following order is granted:

ORDER:

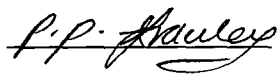
1. The appeal is upheld with costs on the scale as between attorney and client.
2. The order of the court below in respect of interest is set aside and replaced with the following order:

   " Interest at the rate of 2% per month on the reducing capital balance *a tempore morae* as from 1 September 2019 to date of final payment, both days inclusive."

[13] 1956 (1) SA 483 (A) at 500.
[14] In this regard, see: *Potgieter and another v Potgieter NO* 2012 (1) SA 637 (SCA) at para 34.

A. MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

I agree and it is so ordered:



R. SUTHERLAND
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	4 November 2021
Judgment delivered	10 November 2021

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 10 November 2021.

APPEARANCES:

Counsel for Appellant:	Mr. CD Roux
Attorneys for Appellant:	RC Christie Incorporated

No appearance for the Respondent.