IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA) 30/11/2012

CASE NUMBER: A760/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
30/11/2012 DATE SIGNATURE

In the matter between:

ARMCOIL AFRIKA (PTY) LTD APPELLANT

And

PHILIPPUS GIOVANNI TORRE NO FIRST RESPONDENT
RICHARD CASSIM NO (Jointly referred to as First
(In their joint capacity as the joint liquidators Respondent ***a quo***)
Of Armcoil Africa Holdings (Pty) Ltd, in
Liquidation)

ABSA BANK SECOND RESPONDENT
(Fourth Respondent ***a quo***)

JUDGMENT

TLHAPI J

[1] This is an appeal against the orders, particularly those contained in paragraphs 34.2, 34.3 and 34.4, of the judgment of Van Loggerenberg AJ sitting as court of first instance. The matter is before us partially with the leave of the court *a quo* and with the leave of the Supreme Court of Appeal against the said orders that are recorded in the judgement as:

'34.2 the introductory sentence of paragraph 3 of the notice of motion is amended to read as follows:

"An order, as against repayment of the subscription price of R998 000.00 together with interest thereon at the rate of 15, 5% per annum from 2 October 2004 to date of payment by the first applicant to the first respondent"

34.3 An order in terms of paragraphs 1, 2, 3(as Amended), 4 and 5 of the notice of motion is granted

34.4 An order of costs against the first applicant in favour of the first and fourth respondents is granted...'

[2] The appellant (Armcoil Afrika) launched an application for the following relief:

"1. An order declaring the Shareholders Agreement, attached as annexure 'X' to the founding affidavit of Peter Jacques Flint to have lapsed, alternatively to have been discharged, further alternatively to be null and void;

2. An order declaring the Subscription Agreement, attached as annexure 'Y' to the founding affidavit of Peter Jacques Flint, to have lapsed, alternatively to have been discharged, further alternatively to be null and void;

3. An order, as against the tender, alternatively repayment of the subscription price of R998, 000.00 by the first applicant to the first respondent:

3.1 declaring the issue and allotment by the first applicant to the first respondent of the 499 ordinary par value shares as reflected in Share Certificate No.11 and attached as annexure 'Z' to the founding affidavit of Peter Jacques Flint, to have been effected without legal cause, alternatively to be void;

3.2 restoring the aforesaid 499 ordinary par value shares to the status of authorised, but unissued, shares and/or share capital of the first applicant; and

3.3 that the said Share Certificate No.11, attached as annexure 'Z' to the founding affidavit of Peter Jacques Flint, be cancelled forthwith;"

[3] Armcoil Holdings were liquidated on 5 November 2008, that is, subsequent to the launch of the application and were substituted by the present first respondents in their representative capacities of Armcoil Holdings in Liquidation. For convenience the parties shall be referred to as they did in the court *a quo.*

[4] The application was opposed by ABSA. Condonation for the late submission of appellants Heads of Argument was not opposed and the court granted condonation with costs on an opposed scale.

[5] The Supreme Court of Appeal granted leave to appeal against the dismissal of the application for leave to appeal in respect of the sub-

paragraphs in the amended notice of appeal as noted in paragraph 4 of the order of Van Loggerenberg AJ, of the 31 May 2010 and ordered that:

> "The costs order of the court a quo in dismissing the application for leave to appeal is set aside AND the costs of the application for leave to appeal in this court and the court a quo are costs in the appeal..."

[6] In the furtherance of their business interests and ventures and, in compliance with the black economic empowerment policy of the Government of the Republic of South Africa, Armcoil Afrika identified business partners, Mr E S Ntshihlele and Mr SS Mabulu (second and third respondents in the court a quo) and, in a joint venture, Armcoil Holdings was formed to hold the black economic empowerment stake in Armcoil Afrika and, the partners so identified were appointed directors in the holding company . On 2 August 2004 a shareholders agreement (Armcoil Afrika Shareholders Agreement) was concluded in which the Armcoil Holdings would hold 49.9% (499 shares), of the issued share capital in Armcoil Afrika. This agreement was subject to the suspensive condition to be fulfilled or waived no later than the 15 September 2004 that a shareholders agreement be concluded between Armcoil Holdings, its directors and ABSA. Clauses 3.2 and 3.3 of the agreement provided:

> "3.2 Each of the parties will use its best endeavours to procure fulfilment of the suspensive condition as soon as is reasonably possible after the signature date.
>
> 3.3 Unless the suspensive conditions have been fulfilled or waived by not later that the 15 September 2004 or such later date as may be agreed in writing by the parties, the provisions of this agreement will fall away and be of no further force or effect and the status quo ante will be restored as near as

> may be. In that event any cost incurred arising from the negotiation of this agreement or its subject matter will be borne by the party incurring such costs. Neither party shall have a claim against the other in terms hereof or arising from the failure from breach of the provisions of clause 3.2;"

[7] The subscription agreement between Armcoil Afrika and its initial shareholders and Armcoil Holdings was concluded on the 11 August 2004 and this agreement was subject to its own suspensive condition to be filled or waived no later than 1 October 2004.

[8] The shareholders agreement between Armcoil Holdings, its directors and ABSA was also concluded on the 2 August 2004. According to this agreement Mr Ntshihlele would hold 54% shares, Mr Mabulu 36% shares and ABSA 10% shares and, the latter would lend an amount of R1 000 000.00 to Armcoil Holdings. This agreement was subject to a suspensive condition to be met on or before the 31 August 2004 failing which it would lapse alternatively become null and void. On the 8 September 2004 Armcoil Holdings paid to Armcoil Afrika the agreed subscription price for the shares in the amount of R998 000.00.

[9] Clauses 4.2 and 4.3 of the subscription agreement between Armcoil Holdings, its directors and ABSA were only concluded on the 22 February 2005 and it provided:

> "4.2 Each of the parties will use commercially reasonable endeavours to procure the fulfilment of the suspensive conditions as soon as reasonably possible after the signature date. The suspensive conditions had been

inserted for the benefit of all parties and will therefore only be capable of waiver by agreement in writing between the parties.

4.3 Unless the suspensive conditions are fulfilled or waived by not later that the 1 October 2004 (or such later date as may be agreed upon in writing between the parties) the provisions of this agreement, will never become of any force and effect and the status quo ante will be resorted to as near as may be. Neither party shall have any claim against the other in terms hereof or arising from the failure of the suspensive conditions, save for any claims arising from a breach of the provisions of clause 4.2."

[10] The joint venture operated without any hitch from 2004 to 2007 and in July of 2007 certain 'discrepancies and/or illegal conduct' in the day to day running of the company were discovered by Armcoil Afrika and reported to ABSA. On the 12 July 2007 Mr Ntshihlele resigned as director of Armcoil Afrika. During April 2008 Armcoil Afrika learnt for the first time that the suspensive conditions in the Armcoil Shareholders Agreement as well the Armcoil Subcription Agreement were never fulfilled, that consequently the agreements were null and void as if no such agreements had been concluded. On 28 June 2006 Armcoil Holdings, its directors and ABSA entered into an agreement to re-enter and amend the Armcoil Holdings Shareholders Agreement and the said addendum provided:

"3. EXTENSION OF FULFILMENT PERIOD

3.1 The suspensive conditions referred to in clause 3.1 of the Shareholders Agreement (the Armcoil Holdings Shareholders Agreement) were not all fulfilled or waived by 31 August 2004.

3.2 The Shareholders Agreement is hereby re-entered into and the date of fulfilment of the suspensive conditions of the Shareholders Agreement is hereby extended to 31 July 2006".

[11] Armcoil Afrika contended that due to non-fulfilment, the agreements had consequently lapsed, alternatively became null and void. Armcoil Afrika tendered repayment to Armcoil Holdings of the sum of R988 000.00.

[12] In the answering affidavit ABSA averred that it had launched an application for the winding up of Armcoil Holdings and, in the winding up papers annexed to the answering affidavit, ABSA contended that Armcoil Afrika had not tendered to pay interest on the subscription price of R988 000.00, therefore the tender was defective.

[13] The issue to be determined in this appeal is whether:

13.1 the court *a quo* ' erred in finding that Armcoil Afrika fell in *mora* immediately upon non-fulfilment of the suspensive conditions and had to pay mora interest from 2 October 2004 to date of payment by virtue of the provisions of section 1(1) of the Prescribed Rate of interest Act, 55 of 1975 ('the Act');'

13.2 'the learned Judge erred in not finding that there were special circumstances as contemplated in the Act which militated against an order that *mora* interest was payable by Armcoil Afrika'

[14] The court a quo determined that the payment of R988 000.00 by the applicant to the Armcoil Holdings was a debt which had arisen *ex contractu* and found that it was a case of *mora ex re,* where payment was not dependent upon prior demand and that it 'became due and enforceable on 2 October 2004' .

SUBMISSIONS FOR THE APPELLANT:

[15] It is submitted for the appellant that

15.1 the agreement between the parties had not stipulated a date for performance in the event of the lapsing thereof and that it had been the intention of the parties that the status quo ante would be resorted to within a reasonable period after the lapsing of the agreement;

15.2 since the non-fulfilment of the relevant suspensive conditions fell within the peculiar knowledge of Armcoil Holdings 'it could not have been the intention of the parties that Armcoil Afrika would be obliged and become liable to repay the subscription price in circumstances where:

15.2.1 'It would not immediately have known of the non-fulfilment of the suspensive condition and the consequent lapsing of the agreement;'

15.2.2 'The return of the shares would have taken some time'

15.3 that based on the finding of the court *a quo*, Armcoil Holdings was 'the creditor, claiming payment of the subscription price and interest;' since *mora debitoris* arose only where the debt was due and payable, where the debtor had a good defence to any action against him to 'enforce the obligation, he was not in *mora*; consequently if Armcoil Holdings wanted interest, it should have brought a counter application, which it failed to bring.

15.4 the appellant questioned the procedure adopted by the court *a quo* in amending prayer 3 to provide for payment of interest;

15.5 that 'irrespective of the extraordinary nature of the proceedings' or whether the issue of interest was determined by agreement between the parties, *mora* on the part of Armcoil Afrika would only have arisen once there had been a tender on the part of Armcoil holdings for the return of the shares;

15.6 Armcoil Afrika was not in culpable default; Armcoil Afrika in the position of the debtor would be entitled to rely on an *excusatio a mora;*

15.7 that special circumstances existed justifying an order that no interest was payable and that the court a quo erred in not exercising its discretion and ordering that no interest was payable by Armcoil Afrika on the subscription price;

SUBMISSIONS FOR THE RESPONDENT

[16] It is submitted that

16.1 the appellant knew or ought reasonably have known of the requirements pertaining to the fulfilment of the suspensive conditions to because the agreements were inter-dependent on each other; upon failure of the agreements the status quo ante had to be restored by no later than the 2 October 2004; 'the time for performance was the failure of the agreement;'

16.2 the contract having fixed the time of performance, the appellant fell in *mora ex re* immediately upon non-fulfilment of the suspensive conditions; that the principles relating to *mora ex re* were consistently applied by the a courts and 'where a debtor could by the exercise of reasonable care have ascertained the facts', the creditor was not expected to make demand or *interpellatio;* therefore, the appellant was obliged to pay *mora* interest from the 2 October 2004;

16.3 the court a quo found no reason not to award interest at the prescribed rate (as provided in the Prescribed Rate of Interest Act 55 of 1975) and that the discretion so exercised should not be interfered with unless the court had erred in a material respect;

[17] It is common cause between the parties that the principles of *restitutio in integrum* are applicable. In **Extel Industrial (Pty) Ltd & Another v Crown Mills 1999 (2) SA 719 (SCA) at 732 B – C** the court held 'that a tender of restitution, or the explanation and excuse for its failure, is a

requirement in proceedings of restitution is indeed trite. A contracting party who demands restitution upon a purported rescission of the contract must tender the return of what he himself has received under the contract or its equivalent in money (Feinstein v Niggli and Another....) and his failure or inability to do so may effectively preclude or nullify his election to resile from the contract.'

[18] As stated in the amended notice of appeal, the court *a quo* did not find that the performance for the *status quo ante* was reciprocal or that performance had to take place simultaneously. When Mr Stoop's submission on the enrichment claim, *conditio causa data causa non secuta*, was rejected, the court *a quo* found that the clauses relating to the restoring of the *status quo ante* were severable from the balance of the two agreements. These clauses remained operative and enforceable despite the two agreements being void. In terms of these enforceable clauses both parties had to restore what they had received in terms of the contract upon non-fulfilment of the suspensive condition and, the court a quo endorsed the applicability of the principle *restitutio in integrum*, and formulated it as follows:

> " 25.1 Ex contractu, and in terms of the clauses referred to in paragraphs 19 and 20 above, the status quo ante have to be restored as near as may between the first applicant and the first respondent in the event of the suspensive conditions not having been fulfilled.
>
> 25.2 The first applicant and the first respondent has, therefore agreed that restitution in integrum should take place on non-fulfilment of the suspensive conditions:
>
> 25.4 Immediately upon non-fulfilment of the suspensive conditions:

25.4.1 the first applicant became entitled to re-transfer of the shares;

25.4.2 the first respondent became entitled to payment of R998 000.00"

[19] In my view, it was therefore correctly submitted by counsel for the appellant that the contracts in themselves envisaged that performance for the *status quo ante* had to occur simultaneously.

[20] It was submitted for the respondent that the appellant had misconstrued the legal position and that the failure to tender shares by Armcoil Holdings did not stop the running of interest from the time it fell due by operation of law. Reliance was had to the approach by Binns-Ward AJ in **Trustees Mitchel's Plain Islamic Trust v Weeder and Another [2001] 2 All SA 629 at 646**, that the respondents could still institute a claim. Furthermore that in those circumstances the appellant could have been entitled to raise a defence of being excused from payment until the shares had been tendered. In my view this case did not deal with a situation where suspensive conditions were applicable and where the principle of *restitutio in integrum* applied as explained in paragraph [13] above.

[21] It is further argued for the respondents that they could not offer the return of the shares because the shares did not exist; they were issued

in terms of a contract that never came into existence. The first respondent therefore need not in terms of the principle of *resitutio in intergrum* tender the return of the shares and therefore *mora* ran from 2 October 2004.

[22] The meaning of *mora* was examined in **Scoin Trading Pty Ltd v Bernstein NO 2011 (2) SA 118** in the following paragraphs:

> "[11] The term mora simply means delay or default. This concept is employed when the consequences of a failure to perform a contractual obligation within the agreed time are determined. The date may be stipulated either expressly or tacitly and there must be certainty as to when it will arrive. Thus when the contract fixes the time for performance, mora (mora ex re) arises from the contract itself and no demand (interpellatio) is necessary to place the debtor in mora. The fixed time, figuratively, makes the demand that would otherwise have to be made by the creditor.
>
> [12] In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (interpellatio) becomes necessary to put the debtor in mora. This is referred to as mora ex persona"

[23] Where there was no tender by Armcoil Holdings for the return of the shares, Armcoil Afrika could not be held to be in *mora* and that it could not be said that interest was payable merely on the ground that it had tendered return of the R988 000.00. As I see it, the clauses relied

upon could not be interpreted to mean or to determine in retrospect the date of performance as being the 2 October 2004. It was therefore correctly submitted for appellant that Armcoil Afrika should have been placed in *mora debitoris*, meaning that Armcoil Holdings claim as creditor had to be enforceable. The debtor (Armcoil Afrika) must have failed to perform on a specified date made known to him and the *mora* must have been due to the fault of the debtor. **Legogote Development Co v Delta Trust and Finance Co 1970 (1) SA (T) at 587 C – E.** Even though there was an understanding that interest would be determined, the court *a quo* should have decided the issue from the premise that no case had been made out on the papers for such an order by the respondents.

[24] In the founding affidavit appellant averred that it had proceeded with the joint venture on the assumption that all was well and there was nothing in the answering papers to controvert this. To hold that the appellant was in *mora ex re* immediately upon non-fulfilment of the suspensive condition would be to ignore the basis upon which *mora debitoris* should have been established. Furthermore, the appellant played no role in the fact that the respondents failed to comply with the suspensive conditions, and no case was made out on the papers to suggest that Armcoil Afrika should reasonably have been aware of the non-fulfilment of the suspensive conditions. Armcoil Afrika was not a party to the agreements Armcoil Holdings and its directors entered into with ABSA. It was therefore correctly submitted that on the common cause facts Armcoil Afrika could not have been aware that the agreement had lapsed.

[25] The court a quo was not called upon to make a finding on whether special circumstances existed justifying the non-payment of interest. It was submitted for the appellant that it would have been possible to order that interest at whatever rate be paid from a different date 'e.g. from date of any tender made by Armcoil Holdings for the return of the shares or interest could have been zero rated. The following special circumstances were mentioned:

25.1 the appellant on taking legal advice in April 2008 was made aware that the suspensive conditions had not been fulfilled;

25.2 the respondents failed to inform the applicants and failed to obtain their consent with regard to the 're-entering' into the conclusion of the addendum which purported to extend the date upon which the suspense conditions had to be fulfilled;

25.3 the fact that the court a quo held that there were reasonable prospects of success appeal including a finding that appellant's ignorance of the non-fulfilment of the suspensive conditions was reasonable;

25.4 had the shares been returned they could have been re-allotted;

[26] I agree with the submission that the court a quo on the order given regarding interest payable, could have exercised its discretion and, found that valid reasons as stated in appellants heads of argument

existed, for a finding that special circumstances were present, qualifying the court to determine a different interest rate. However, taking into consideration that the respondents have to date not tendered the return of the shares and having regard to the conclusion reached above, that until such time that Armcoil Holdings tendered the return of the shares and placed Armcoil Afrika in *mora debitoris*, the R988 000.00 was not due and no interest was payable.

POTTERILL, J

[27] I read the judgment of Tlhapi J and agree with the content and result. I wish to add the following thereto.

[28] On behalf of the respondents it was furthermore argued that they could not offer the return of the shares because the shares did not exist; they were issued in terms of a contract that never came into existence. The first respondent therefore need not in terms of the principle of *resitutio in intergrum* tender the return of the shares and therefore *mora* ran from 2 October 2004.

[29] This argument must be rejected. The court *a quo* correctly found that the non-fulfilment of the suspensive conditions rendered the two agreements null and *void ab initio*. The court a quo was also correct in finding that the clauses relating to the restoring of the status *quo ante* were severable from the balance of the two agreements and these clauses remained operative and enforceable despite the two agreements being void. In terms of these enforceable clauses both

parties had to restore what they had received in terms of the contract upon non-fulfilment of the suspensive conditions; *restitution in integrum* is a reciprocal duty.

[30] The appellant tendered the re- payment of the subscription price upon the cancellation of the share certificate and the restoration of the receipt of the shares whereas the first respondents never tendered the return of the shares. In a reciprocal contract there can be no *mora debitoris* until there is a tender of return, *in casu* by the first respondent. As there was no tender by the first respondent the appellant was not placed *in mora* or differently put, the appellant was entitled to raise the non-tender as a dilatory defence.

[31] The appellant tendered restitution the moment it obtained legal advice that the contracts were void. The appellant could not have known prior to that date that the contracts were void because the appellant was not a party to the subscription contract. The appellant could thus not be in *mora* because they were not culpable.

[32] The appellant did not fall into *mora* the moment there was non-fulfilment of the suspensive conditions. The restoring of the *ante quo* was not to be effected on 2 October 2004 because this was the date agreed to upon which the obligation arose and not the performance. A date for the performance was not agreed upon and therefore *mora ex persona* is required. The appellant cannot be held to be in *mora* until the first respondent as a creditor sought the re-payment of the amount which

the first respondent never did. The court *a quo* thus erred in amending the prayer of the appellant in the notice of motion to include interest payable.

[33] It is trite that costs follow the event. The appellant succeeds on appeal and thus entitled to costs. The Supreme Court of Appeal ordered the costs of leave to appeal in the court a quo and those of Supreme Court of Appeal respectively to be costs in the appeal.

[34] In the result the following order is made:

34.1 The appeal is upheld with costs which shall include:

34.1.1 the costs of application for leave to appeal in the court a quo

34.1.2 the costs of application for leave to appeal in the Supreme Court of Appeal

34.1.3 the costs of two counsel where so employed;

34.2 The orders stipulated in paragraphs 34.2 and 34.4 of the court a quo's judgment are hereby set aside and replaced with the following:

34.2.1 the points in limine raised by the second respondent are dismissed;

34.2.2 an order is granted in terms of paragraphs 1, 2, 3, 4 and 5 of the notice of motion;

34.2.3 the first and second respondents are jointly and severally ordered to pay the costs of the first applicant which costs include the costs consequent on the employment of two counsel, when so employed.

W TLHAPI

(JUDGE OF THE HIGH COURT)

AML PHATUDI

(JUDGE OF THE HIGH COURT)

S POTTERILL

(JUDGE OF THE HIGH COURT)

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