IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

DATE: 13/6/2014
CASE NUMBER: 33753/2012

A. N. H. (V. M.) **APPLICANT**

And

J. F. M. **RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] The applicant instituted these proceedings in order to recover an amount of R343 919-00 together with interest owing to her in terms of a divorce settlement. The parties were married to each other out of community of property subject to the accrual system.

[2] The parties had earlier reached an agreement that the respondent would pay the applicant an amount of R400 000-00 in respect of the applicant's share in the accrual less the amount the applicant owed to the respondent in respect of maintenance. A dispute subsequently arose as to whether an agreement had been reached on the terms of payment. This dispute led the applicant to institute the present proceedings.

[3] The application was issued on 31 May 2013 and it was served on the respondent on 7 June 2013. The application was not preceded by a demand for payment. On 25 June 2013 the respondent paid an amount of R329 903-00 to the applicant and it became common cause that that was the correct amount due to the applicant.

[4] The court is called upon to decide whether the respondent is liable for payment of interest on the amount of R329 903-00 and the costs of the application.

[5] There is no obligation to pay interest until the debt becomes due and payable. Interest would begin to run from the date of *mora* or default. In the case of *mora ex re* the claim for interest would arise from an express or tacit stipulation for interest and there is no need for a demand to place the debtor in *mora.* In the case of *mora ex persona* the claim for interest would arise from the date of a valid demand and the debtor does not fall in *mora* if he does not perform immediately or within a reasonable time: Scoin Trading (Pty) Ltd v Bernstein NO 2011 (2) SA 118 (SCA) at 120G – 121A.

[6] A demand is not a prerequisite to the institution of legal proceedings unless it is required by statute or by agreement between the parties: Hooper v De Villiers 1934 TPD 200 at 2002. The primary purpose of a demand is to inform the defendant of what is claimed against him and what will happen if the claim is not satisfied within a specified time. Generally, the defendant should be allowed a reasonable time to respond to the

demand. What is reasonable will depend on the circumstances of a particular case.

[7] In Havenga v Lotter 1912 TPD 395 the appeal court reversed an award for interest and costs where the plaintiff had sent a demand and the summons had followed immediately after the demand such that it was impossible for the defendant to have made a tender in reply to the demand before the issue of summons. The court awarded the defendant costs incurred through the issue of summons as he had tendered adequate damages within a reasonable time from receipt of the demand, but after summons had been issued. The court also expressed the view that the purpose of a demand is to put the debtor *in mora* and there should always be a reasonable time allowed for the debtor to comply with the demand.

[8] In the present case the date of service of the application must be taken as the date of demand or the date on which the respondent was placed *in mora* as there was no prior demand. Interest starts to run from the date of service: Standard Bank of SA Ltd v Lotze 1950 (2) SA 698 (C).

[9] The liability of the respondent was determined on the 14 March 2013 when the applicant accepted his offer to pay the amount of R400 000-00 less the outstanding maintenance although the date of payment had not been determined. The court accepts that it was not unreasonable for the applicant to expect that the money would be paid in a lump sum as the respondent had not proposed settlement in instalments when he made the offer. It appears that this was also the respondent's intention when he made the offer as the letter of 15 May 2013 addressed to the applicant's attorneys it is stated: "*Ongelukkig is die bedrag nie meer beskikbaar nie en stel ons voor dat ons die bedrag in paaiemente van R7500-00 betaal aan u klient"*

[10] Failure to issue a demand in circumstances where a demand is not required by law or an agreement between the parties may be relevant to interest and costs: See Havenga v Lotter (*supra*), Hooper v De Villiers (*supra*). It was argued on behalf of the respondent that as there was no prior demand, the applicant was entitled to interest from ten days after service of the application taking into account what would have been a reasonable time to respond to the demand. In the alternative, it was

submitted that the applicant was at most entitled to interest as from the date of service of the application.

[11] The respondent has known about his liability to the applicant from the 14 March 2013 and was in agreement on exactly how that liability was calculated. In my view a demand would not have taken this matter any further except to place the respondent *in mora*. Despite knowing the extent of his liability the respondent failed to make payment within a reasonable time which forced the applicant to institute legal proceedings on 31 May 2013.

[12] I hold the view that the applicant was within her rights in issuing the application and acted reasonably and the time that lapsed between the issue of the application and the date of payment was sufficient to attract interest from the date of service as the respondent had been aware of his exact liability for a reasonable period since 14 March 2014. There were no special circumstances that would have justified the delay in settling the debt on receipt of the application. In the circumstances I am of the view that the applicant is entitled to interest from the date of service of the application to the date of payment.

[13] The parties had not agreed on the rate of interest in the event of default. In a case where there is no agreement on interest the prescribed rate of interest in terms of the Prescribed Rate of Interest Act 55 of 1975 would apply, unless a court orders otherwise on the ground of special circumstances relating to that debt. That rate is currently 15.5% *per annum.*

[14] It was further argued on behalf of the respondent that the applicant was not entitled to the costs of the application as the application was frivolous and she persisted with the application even after settlement of her claim. This argument loses sight of the fact that up to and including the date of the hearing the respondent persisted in his refusal to pay interest due on the applicant's claim as well as the costs of the application. Costs are an important and integral part of litigation. A successful litigant is entitled to recover his costs where appropriate. I am of the view that the application was necessitated by the respondent and he should bear the costs.

In the circumstances the following order is made:

1. The respondent is ordered to pay to the applicant interest on the amount of R329 903-00 at the rate of 15.5% *per annum* from date of service of the application to date of payment.
2. The respondent is ordered to pay the costs of the application.

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A L C M LEPHOKO
(ACTING JUDGE OF THE HIGH COURT)

Heard on: 06 May 2014.

Judgment delivered on: 13 June 2014

For the Applicant: No appearance.

For the Respondent: Adv.: D Keet

Instructed by: Pratt Luyt & De Lange