IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 29523/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

E.M. KUBUSHI 6/11/2019

E.M. KUBUSHI DATE

In the matter between:

SMARTGRID ENGINEERS (PTY) LTD **PLAINTIFF**

and

PROTEA MINES (PTY) LTD **DEFENDANT**

JUDGMENT

KUBUSHI J

[1] This matter involves the question whether the *in duplum* rule is applicable to the interest owing to the plaintiff.

[2] The *in duplum* rule is a long-standing and well established part of our law. It provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital.[1] Loosely translated, *in duplum*, means "double the amount". When the rule is applied, the interest stops running, that is, when the double has been reached whether the interest rate has been agreed on by the parties or whether it is the prescribed interest rate. It is only when judgment is given by the court, in favour of the plaintiff, that interest will start running again until payment is made in full.

[3] The facts in this matter, as gleaned from the evidence of the only witness, Mr Jama Dlamini, a director of the plaintiff, who gave evidence in favour of the plaintiff, are mostly common cause.

[4] The plaintiff's claim against the defendant arises from a loan agreement in terms of which the plaintiff lent and advanced to the defendant an amount of R1 000 000 with a repayment of R2 500 000 to be effected. The allegation is that Mr Chetty a director of the defendant approached the plaintiff for a loan of R1 000 000 to put in a business venture and offered to repay it together with a return in the amount of R1 500 000. The rate of return is stated in the agreement as 250% of the capital lent and advanced.

[5] It is an express term of the agreement that

[1] See Paulsen above at para 42.

"*The Debtor acknowledges that the return is 250% of the capital lent and advanced, and confirms that the Debtor offered the Creditor this return and was not forced or induced to provide this high a return over a short period of time.*"

Mr Dlamini admitted under cross-examination that the rate of return stated in the agreement was meant as interest payable on the capital amount.

[6] The plaintiff represented by Mr Dlamini, agreed to borrow to the defendant the amount of R1 000 000 on the terms proposed by Mr Chetty, that is, that the money loaned to the defendant be paid back with the return of R1 500 000. Evidence is that Mr Chetty provided the plaintiff with a loan agreement already signed by him on behalf of the defendant. The terms of the agreement as to the amount to be loaned and the interest payable were as verbally agreed between the parties. However, the plaintiff's legal representative, on reading that agreement was not satisfied that all the salient points have been captured in that agreement. Another agreement was drafted which was eventually signed by all the parties incorporating the same amount of loan and return payable as verbally agreed by the parties and as captured in the agreement previously signed by Mr Chetty. This is the agreement that is now before the court on which the plaintiff is now claiming.

[7] It is not in dispute that the plaintiff loaned and advanced an amount of R1 000 000 to the defendant. It is also not in dispute that the defendant undertook to pay a return of R1 500 000 on the said loan the rate of which is stated as 250% of the money lent and advanced. In essence the agreement is not in dispute. It is also common cause that the defendant has failed to pay back the amount of R1 000 000 loaned and advanced to it by the plaintiff together with the interest thereon. It is also

common cause that due to the said breach the amount of R1 000 000 together with interest at R1 500 000 is now due and payable hence the proceedings instituted by the plaintiff.

[8] The defendant is not refuting the capital amount of R1 000 000 claimed by the plaintiff, but has put at issue the payment of the amount of R1 500 000 of interest claimed by the plaintiff. The argument is that the plaintiff's claim in respect of the amount claimed for interest is in excess of what is permitted to be charged in law. The amount of interest charged, according to the defendant, is excessive and cannot be justified to stand – is *contra bonos mores* – and unenforceable. The contention being that the running of interest on the loan amount ought to be capped in line with the *in duplum* rule which must not be in excess of the capital amount of R1 000 000. The defendant, as such, is prepared to pay interest of only R1 000 000 which is not in excess of the capital amount of R1 000 000 claimed.

[9] In support of its argument, the defendant referred me to the Constitutional Court judgment in *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2] wherein the court overruled the decision of the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)*[3] in which it had been held that the *in duplum* rule was suspended by the commencement of litigation, accrual of further interest, therefore, resuming from that date onwards; and confirmed the long standing decision in *Stroebel v Stroebel*[4] that held the common law principle that interest in excess of the capital amount was not claimable.

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[2] 2015 (3) SA 479 (CC) paras 46 - 52.
[3] 1998 (1) SA 811 (SCA).
[4] 1973 (2) SA 137 (T).

[10] I am in agreement with the plaintiff's submission that *Paulsen* is distinguishable from the current matter on the simple reason that the issues dealt with thereat are inapposite. In *Paulsen*, the court was faced with the question of whether or not the *in duplum* rule should operate *pedente lite* – meaning from date of service of the process initiating proceedings until the date of judgment.[5] Whereas the issue in this instance is whether the *in duplum* rule is applicable or not.

[11] To the contrary, the argument by the plaintiff is that in South African law regard is usually given to contractual freedom within certain statutory confines. The suggestion is that parties should be allowed to contract as they want. According to the plaintiff, in this instance, the *in duplum* rule should not apply to the interest due to the plaintiff because it was the parties' intention that interest be in excess of the capital amount from the word go. The interest, in this instance, unlike in *Paulsen*, had not accrued over a long passage of time, but was agreed between the parties in the agreement. For this argument the plaintiff relied on the judgment in *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others*[6]

[12] *African Dawn*, in my view, finds no application in the circumstances of this instance as that court was dealing with the question of whether the rate of interest levied in respect of a money lending agreement is usurious or not.[7] This is not the issue in this instance. I did not understand the defendant to be contesting the rate of interest charged in the agreement *per se*. The defendant, though accepting the rate of interest that was agreed between the parties, is complaining that the interest should not be in contravention of the *in duplum* rule. The defendant, as earlier stated, is prepared to pay the amount owed at the rate agreed with the plaintiff but

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[5] See Paulsen above at para
[6] 2011 (3) SA 511 (SCA).
[7] See paras 27 – 29 at 522I – 523H.

the contention is that the interest charged should not be in excess of the capital amount outstanding but must be in line with *in duplum* rule.

[13] I was also referred by the defendant to a judgment of the Durban & Coast Local Division in *Verulam MediCentre (Pty) Ltd v Ethekweni Municipality*[8] in support of the defendant's contention that the *in duplum* rule applies to all contracts where there is a debt subject to interest, which judgment I found apposite though for different reasons.

[14] The court in *Verulam* at 454D – E stated the following:

> *"In LTA Construction Bpk v Administrateur, Transvaal*[9] *it was authoritatively confirmed by the Appellate Division (as it was then called) that the rule, which had originated in the Roman law and subsequently received into the Roman-Dutch law, is still part of our law, Joubert JA, who delivered the judgment of the Court, traced the history of the rule, and in so doing emphasised (at 428J – 483) that it is not limited to money- lending transactions but applies to all contracts under which a debt is subject to interest at a fixed rate. He [Joubert JA] also stressed (at 482F) that its purpose was to protect debtors. In Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)*[10] *Zulman JA added (at 828D –E) that the rule is based on public policy and cannot be waived by a debtor.*[11] *It is therefore clear that there are no exceptions to the rule, the only question in a given case being whether the rule applies at all."*

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[8] 2005 (2) SA 451.
[9] 1992(1) SA 473 (A).
[10] 1998 (1) SA 811 (SCA).
[11] See AJ Kerr: The Principles of the Law of Contract 6ed p467-468.

[15] I turn now to consider whether the *in duplum* rule finds application in the interest due to the plaintiff.

[16] The *in duplum* rule has been held not to apply in cases where on the proper construction of the contract between the parties the interest provided for in the agreement was not interest in the sense referred to in the *in duplum* rule or the interest involved serves a purpose other than the ordinary function that interest fulfils;[12] and in certain transactions where public policy would not require protection of borrowers against exploitation by lenders.[13] It appears, therefore, that the test might simply be whether in the particular case public policy requires the debtor to be protected against exploitation by the creditor.[14]

[17] Therefore, in order for the rule to apply it must be shown that on the proper construction of the contract between the parties the interest provided for in the agreement was not interest in the sense referred to in the *in duplum* rule and/or that public policy requires that the defendant be protected against exploitation by the plaintiff.

[18] It is my view that in the circumstances of this matter public policy does not require that the borrower (debtor) be protected from exploitation by the lender (creditor). The defendant is a company carrying on the activities of mining. Such a company cannot be said to be vulnerable when conducting transactions concerning the borrowing of large sums of money. In this instance, the defendant approached the company for the loan.

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[12] See Verulam above at 454H-I.
[13] See Verulam above at 455A-B.
[14] See Verulam above at 455B – C.

[19] The evidence shows that the defendant through Mr Chetty approached the plaintiff for the loan and negotiated the terms of the loan with Mr Dlamini. In such negotiations it cannot be said that the defendant was subjected to the dictates of the plaintiff but the terms of the agreement were in fact proposed and by Mr Chetty. Mr Chetty without any persuasion from Mr Dlamini tendered to pay the interest as stipulated in the agreement.

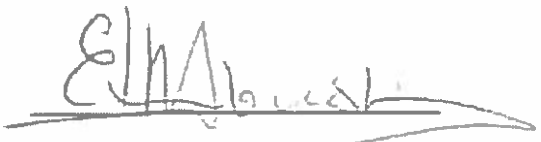
[20] The loan was sought for no other reason but to put in the defendant's business venture. The evidence shows that the defendant was in dire straits and required money urgently to pay off its debts.

[21] This was not an ordinary agreement where the *in duplum* rule would normally apply. A large sum of money was borrowed with the purpose of putting it in the defendant's business. The defendant was in no way outwitted by the plaintiff when it entered into this agreement. Mr Chetty was well aware of the consequences of entering into such an agreement and opted to do so voluntarily.

[22] I find, therefore, that the *in duplum* rule does not find application in the circumstances of this matter. The plaintiff ought to succeed in full in its claim. The defendant must pay the plaintiff an amount R2 500 000 being R1 000 000 for the amount loaned and advanced together with the interest of R1 500 000 as stated in the agreement.

[23] The plaintiff has claimed interest on the judgment amount at the rate of 10,5% *per annum* calculated and payable from 20 February 2017 to date of payment. The plaintiff conceded in argument that the applicable rate of interest is 10% *per annum* which ought to be applied to the judgment debt.

[24] In the circumstances, the defendant is ordered to pay to the plaintiff an amount of R2 500 000 (Two Million Five Hundred Thousand Rand) together with interest thereon at the rate of 10% *per annum* from the date of service of the summons to date of payment together with cost on an attorney and client scale.



E.M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

Plaintiff's Counsel	: Adv C L Markram
Plaintiff's Attorneys	: Strydom Britz Mohulatsi Inc.
Defendant's Counsel	: Adv B van der Merwe
Defendant's Attorneys	: Delia Kruger Attorneys
Date of hearing	: 30 October 2019
Date of judgment	: 06 November 2019