

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

28/12/2022

A handwritten signature in black ink, appearing to be "A. J. J.", is written over a dotted line.

Case No: 49225/2021

In the matter between:

ESKOM HOLDINGS SOC LIMITED

Applicant

and

SABIE CHAMBER OF COMMERCE AND TOURISM

First Respondent

**LYDENBURG CHAMBER OF COMMERCE AND
TOURISM**

Second Respondent

**GRASKOP CHAMBER OF COMMERCE AND
TOURISM**

Third Respondent

JUDGMENT

BARIT AJ

INTRODUCTION

- [1] This matter is an application for a declarator as to whether section 18(1) of the Superior Courts Act 10 of 2013 suspends the running of interest on a judgment debt pending the finalisation of the appeal process.
- [2] The Applicant took the view that the calculation of interest, arising from the matter which was subject to an appeal process, should be from the time the Supreme Court of Appeal gave judgment, *alternatively* from the date of the Constitutional Court's decision declining to hear leave to appeal to that Court (i.e. the Constitutional Court).
- [3] The Respondents argue that interest due on a Bill of Costs should be calculated from the date of the High Court taxing allocator, even though the matter was subject to an appeal (by the Applicants) which was eventually disposed of by the Constitutional Court.
- [4] Hence, in a nutshell, the question is the date from which the calculation of interest starts to run, on a Bill of Costs, pursuant on a costs order.

SUBSTANCE OF THE APPLICATION

- [5] In this matter, the High Court judgment of Hughes J was on 7 March 2019. The High Court taxing allocator was dated 17 May 2019. The Supreme Court of Appeal dismissed the appeal by Eskom (the Applicant) on 29 December 2020. The subsequent appeal by the Applicant to the Constitutional Court was finalised by the Constitutional Court on 1 September 2021.
- [6] The Respondents, through their attorney on 13 August 2021 directed a letter to the Applicant's attorneys in which it sought payment on the strength of the Taxing Master's allocator with interest from the date of the Taxing Master's allocator, which was 17 May 2019.
- [7] Eskom, whilst accepting to pay the costs due (and has since done so), took issue with the payment of interest that dates back to the date of the High Court judgment.
- [8] Eskom argued that the duty to pay arose once the Supreme Court of appeal dismissed the appeal and/or when the Constitutional Court declined to hear the matter.

- [9] Hence, Eskom maintained that the appeal process suspended the process and therefore there was no duty to pay before the matter was finally disposed of. Simply stated, Eskom contended that during the suspension period no duty to pay exists and therefore nor does interest accrue.

THE FACTS

- [10] Eskom was involved in litigation resulting in a judgment by Hughes J who on 7 March 2019 found against Eskom.
- [11] Eskom launched an appeal against the judgment of Hughes J in the Supreme Court of Appeal, which was dismissed by the Supreme Court of Appeal on 29 December 2020.
- [12] Eskom then approached the Constitutional Court seeking leave to be heard in the Constitutional Court. Leave was declined by the Constitutional Court on 1 September 2021.

THE LEGAL QUESTION

- [13] The question is a legal one which is whether an appeal process suspends orders and liability to the successful party, or it only delays it. If it delays it, liability to pay is retrospective.

THE LAW

[14] Section 18(1) of the Superior Courts Act No. 10 of 2013 states:

“...unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.”

[15] The Prescribed Rate of Interest Act, 55 of 1975 provides for:

“The calculation of interest on a debt, in certain circumstances; at a prescribed rate; the payment of interest on certain judgment debts.”

In terms of this Act, the following is stated:

“1. Every judgment debt, but for the provisions of this sub-section, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the date on which such judgment debt is payable, unless the judgment or order provides otherwise.

2. *Any interest payable in terms of the sub-section (1) may be recovered as if it formed part of the judgment debt on which it is due.*

3. *In this section "**judgment debt**" means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such sum of money, but does not include any interest not forming part of the principal sum of the judgment debt."*¹

[16] In the case of **West Rand Estates Ltd v New Zealand Insurance Co**² the Court stated:

"...that by our law interest began to run on the amount of Defendant's liability from the date of mora".

[17] In **Geyser v Du Pont**³, the Court ordered a litigant to pay costs of suit with interest on it as from the date from the Taxing Master's allocator. This means that a successful party is entitled to his costs immediately after judgment and as soon as the cost can be taxed.⁴

¹ The Prescribed Rate of Interest Act, 55 of 1975; Sec 2

² West Rand Ltd v New Zealand Insurance Company 1926 AD 173 at 182

³ Geyser v Du Pont 1968 (4) SA 69 (W) at 80

⁴ See: Trust Bank an Afrika Bpk v Lief, 1963 (4) SA 752 (T) at 757

THE ARGUMENT

[18] Eskom referred to the case of ***Khwaile Rufus Malatji v Minister of Home Affairs and Department of Home Affairs***⁵ to support its contention. In this matter the Labour Appeal Court held that mora interest can only be levied and would accrue only once the amount of compensation is ascertained or easily ascertainable. Hence, where the award is subject to review, it cannot be said to be that the quantum is readily ascertainable and that the time for performance by the debtor is fixed. This is so because there is no obligation on the debtor, under those circumstances to pay the debt. Eskom in the matter before this Court contends that based on the ***Malatji*** matter, Eskom had no obligation to pay interest as from the time of the Trial Court order, because the order was subject to an appeal process. It therefore follows that the duty to pay, does not arise at that point because it is suspended.

Eskom maintains, that once the Appeal Court gives judgment, or the matter is finalised in the Constitutional Court, the duty to pay only begins then. This according to Eskom would be the start of the accrual of interest.

Eskom in this respect quotes the following from ***Malatji***:

⁵ *Khwaile Rufus Malatji v Minister of Home Affairs*: The Labour Appeal Court of South Africa, Johannesburg. (Case No: SA 52/2017)

*“It is clear from the authorities cited, that interest is not payable unless there is an agreement to pay it or there is default or mora on the part of the debtor. A judgment debtor is in mora from the date of payment fixed by the judgment. From this date the judgment creditor is, as common law entitled to interest as of right if it was duly claimed by the Court a quo.”*⁶ (**Malatji v Minister of Home Affairs and Another**)

However, the contention by Eskom, with respect to the Malatji matter being applicable to the current issue before this Court cannot be sustained:

Firstly, in the **Malatji** matter, the Labour Appeal Court said that in the matter of **Myathaza v Johannesburg Bus Services (SOC Ltd)**⁷, the Constitutional Court stated that:

“...an arbitration award is not a judgment debt because it is not a judgment of a Court of law.” (**Malatji, para 10**)

Secondly, further (in para 16) of the **Malatji** judgment, the following was stated:

“The arbitration awards constitute administrative action not claims capable of being enforced.” (**Malatji, para 16**)

⁶ Malatji v Minister of Home Affairs and Another (2018) 49 ILJ (ALL)

⁷ Myathaza v Johannesburg Bus Services 2018 (1) SA 38 (CC) 80, para 142

The **Malatji** matter was one involving an arbitration award.⁸

- [19] Eskom mentions matters, in support of their argument that if the judgment is under review or appeal, the duty to pay does not arise and therefore the Applicant (Eskom) cannot be in mora. However, those matters do not support Eskom's contention.

THE BAILEY JUDGMENT

- [20] In 1988, the question posed to this Court arose in the Appellate Division in the matter of **General Accident Versekeringsmaatskappy Suid-Afrika Beperk v Bailey**⁹.

- [21] The question in the **Bailey** matter, was if a damages award granted by a trial Court, was altered or amended by the Appeal Court – (i.e. increased or decreased) – should interest on the amended amount be calculated from the date of the trial Court's judgment or the date of the Appeal Court's judgment.

⁸ Khwaile Rufus Malatji v Minister of Home Affairs: The Labour Appeal Court of South Africa, Johannesburg, paragraph 3 and 4 (Case No: SA 52/2017)

⁹ General Accident Versekeringsmaatskappy Beperk v Bailey 1988 (4) SA 353 (A)

- [22] The Applicant's counsel, in the **Bailey** matter conceded that where the judgment is not altered, but only in that instance, interest in that would run from the date of judgment in the trial Court. This means that when the judgment in the trial Court is correct, it does not lead to the conclusion that there is a new judgment as the original judgment stands intact and remains as it was.
- [23] But in contrast to this, the Applicant in the **Bailey** matter maintained that where the appeal succeeds and the monetary amount of award is altered (or amended) whether by increasing or decreasing it, there is now a new judgment with respect to the monetary award which is only payable from the date of the judgment of the Court of Appeal.
- [24] Smallberger AR, in his judgment said that the argument of the Appellant can have absurd and unreasonable results. If the claimant is successful with respect to the amount of damages granted in the appeal with the monetary amount being increased this will result in the interest on the original damages amount, which the trial court awarded to the Appellant being lost. This is because there is a new judgment. Hence, a loss of interest between the date of the trial court's decision and the increased award of the appeal court.¹⁰

¹⁰ Bailey at p358

Further, if the amount is decreased on appeal, it will also have the same negative effect on the claimant as then the claimant will lose all the interest, in the time between, albeit on a reduced amount.¹¹

[25] The Appeal Court concluded from this that it would be unjust with respect to the prevailing principle to paying of interest, in order to compensate the Claimant. It would have only resulted in money due to the Claimant being forfeited by the Claimant due to the Defendant's action. This would only lead to the Defendant's benefit.

[26] In summation, Smallberger AR stated that it is not a new judgment, as the Court of Appeal is not a court of first instance, but what has taken place is an amended judgment of the Trial Court. In other words it is the decision of the Trial Court which should have been given in the first instance.¹²

[27] ***General Accident Versekeringsmaatskappy Suid-Afrika Beperk v Bailey*** states:

[28] In the Bailey matter, the Court refer to two decided English cases:

¹¹ Bailey at p379. "*Selfs op die verminderde bedrag*"

¹² See Bailey at p360 "*Daardie vonnis moet gereken word om van krag te wees vanaf die datum wanneer die verhoorhof uitspraak gegee het, m a w dit het terugwerkende krag tot die datum van die verhoorhof se uitspraak – juis omdat dit die vonnis is wat die verhoorhof moes gegee het*"

(a) The first being **Borthwick v The Elderslie Steamship Company**¹³.

Here the Court stated:

“...the judgment is not ipso facto antedated by reason that it is substituted for the judgment of the court below.”

*It cannot, I think be properly said that the judgment of the Court of Appeal must be regarded for all purposes as if it had been the judgment given by the Judge in the Court below. The judgment in favour of the Plaintiff must be treated as of the date on which it was given by the Court of Appeal, subject to the right of the Court to antedate its judgment”.*¹⁴

From this it can be seen that the decision is based on there being no automatic antedating of the judgment but however the Court might do so as it has the right to do it.

(b) The second matter being **Cook v J L Kier & Co Ltd**¹⁵ where Lord Denning stated that: *“The increase of £5 456 dates back to the date of the Judge’s judgment on 25 March 1969”* and ordered that interest will run from that date namely 25 March 1969.

¹³ Borthwick v Elderslie Steamship Company (No. 2) 1905 (2) KB 516 at p519 and 521

¹⁴ See Bailey at p360

¹⁵ Cook v J L Kier & Co Ltd 1970 2 ALL ER 513 (CA)

[29] The Court in the Bailey case accepted the latter judgment (**Cook v Kier**) as being the correct approach to the matter.¹⁶

[30] In the Respondent's heads of argument, their counsel has made the following statement:

*"Generally, it can be said that a litigant choosing the particular legal strategy at his peril if it leads to failure. Eskom decided to take the matter on appeal which choice is ultimately made at its own peril. The status of judgments remains unaffected if an appeal is refused. Accordingly, the cost are always due and payable on the date of taxation, however the Chambers of Commerce and Tourism were only prohibited from pausing the cost order in light of Eskom's failed legal strategy to appeal the matter."*¹⁷

In this matter, the declaratory order asked of this Court, is in order to resolve a legal uncertainty existing between the parties. Hence the order is as follows:

1. That interest on the costs be calculated as from the date of the Trial Court judgment or from the date of the Taxing Master's allocator, if the matter goes to the Taxing Master.

¹⁶ See Bailey at p380 "*Hierdie benadering is in ooreenstemming met my siening van ons regsposisie in dié verband. Borthwick se saak is moontlik van die onderhawige te onderskei, maar in soverre dit nie die geval is nie, moet die aangehaalde dicta as in stryd met ons regsposisie beskou word*"

¹⁷ Respondent's heads of argument, para 23

2. That any appeal or review of the Trial Court's decision only delays the judgment and as such interest accrues from the date of the trial court judgment or from the date of the Taxing Master's allocator, if the matter goes to the Taxing Master.

SIGNED AT PRETORIA ON THIS THE 28 DAY OF DECEMBER 2022.



L BARIT
Acting Judge of the High Court
Gauteng Division, Pretoria

Counsel for the Applicant: Advocate M.R. Maphuta
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Counsel for the Respondent: Advocate HP Wessels
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