IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

Case No: 272/2019

In the matter between:

JEANNETTE VALERIE SCALLY **Applicant**

and

FELTRA (PTY) LTD **Respondent**

JUDGMENT

GORVEN J

[1] The applicant seeks summary judgment. Her claim arises from a sale agreement where she performed her obligations. The respondent admittedly failed to pay the full purchase price which was to be paid in five tranches. It failed to pay the second and the further tranches timeously. The final tranche was due on 1 June 2014. Payments of lesser amounts were made regularly, the final one in June 2018. An amount remains outstanding.

[2] The affidavit opposing summary judgment is replete with what might be termed technical points. The only substantive defence raised to the claim was that it has prescribed. The respondent did not persist in certain of the points. There was, in any event, no merit in them and they need receive no further attention.

[3] The first point for consideration concerns interest. In the first place, it was submitted that interest is not claimable because no demand for payment of the overdue sums had been made. As a result, the respondent has never been placed in *mora*. In the second place, it was submitted that interest had been charged on interest which was impermissible. As a result, the sum claimed was subject to challenge since it arose from compounding the interest.

[4] As to the first of these, in the heads of argument it is submitted that the breach clause requires demand and none was made. The breach clause requires notice to remedy a breach within 14 days. If not remedied, it gives the right to cancel or accelerate the amounts outstanding or to claim performance. Significantly, this is said to be 'without prejudice to such other rights as the aggrieved party may have at law . . .'. The respondent in argument faintly submitted that the clause requires notice before interest can begin to run. But this misconstrues the position. It may be that demand had to be made before the amount could be claimed but this was not the defence raised. No demand needed to be made before interest started to run. As a matter of law, failure to pay on time means that *mora* operates *ex re*.[1] Interest runs from the date a payment was due. The agreement was silent concerning the rate of interest. In such circumstances, interest is

[1] *Land & Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd & others* 2013 (6) SA 319 (SCA) para 4.

claimable at the rate set under the Prescribed Rate of Interest Act 55 of 1957. Between 1 October 1993 and 31 July 2014, this was 15.5% per annum. Since the second tranche was not paid and fell due on 17 August 2013, and all of the others by no later than 1 June 2014, this is the applicable rate. This rate prevails until payment, regardless of any subsequent changes.[2]

[5] The second point on interest is that the amount claimed is arrived at by compounding interest at that rate when the agreement makes no provision for interest to be charged on interest. It is so that no provision was made in the agreement for charging interest on interest. In support of having claimed interest on interest, the applicant relied on dicta in *Davehill*[3] and *Ryton Estates*.[4] The first of these held:

'In principle there appears to be no reason why the right to claim interest on interest should be confined to instances regulated by agreement, and why it should not extend to the right to claim *mora* interest (which is a species of damages) on unpaid interest *which is due and payable*.'[5] (My emphasis.)

And *Ryton Estates* was to similar effect:

'This judgment therefore lays down that in the absence of agreement to the contrary, *mora* interest at the prescribed rate is payable on unpaid interest *which is due and payable*.'[6] (My emphasis.)

[6] Both of these matters seem to me to be distinguishable. In *Davehill*, property of the owners had been expropriated. In terms of s 12(3) of the Expropriation Act 63 of 1975, the respondent was obliged to pay interest at a statutorily fixed rate on any outstanding sums from the date it took

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[2] *Davehill (Pty) Ltd & others v Community Development Board* 1988 (1) SA 290 (A) at 300J-301E; *Crookes Bros Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) ([2012] ZASCA 128) para 22.
[3] Op cit at 298H-299B.
[4] *Ryton Estates* para 23.
[5] *Davehill* at 298H-I.
[6] *Ryton Estates* loc cit.

possession of the properties. It did not do so. The appellants sued for the interest. Soon after, the respondent paid the interest which it contended was due. Not satisfied, the appellants appealed. A further payment was made while the appeal was current. The appellants persisted, raising the point for the first time that they were entitled to *mora* interest on the interest due under the Expropriation Act. The court there held that the interest which had been paid was provided for by statute. As a result of non-payment, mora interest could be claimed because the interest in question had been due and payable.

[7] A similar situation obtained in *Ryton Estates*. Amounts contractually due on certain dates, but not paid, incorporated amounts for interest. On non-payment, *mora* interest on the interest provided for was held to be claimable because the interest component of the debt was due and payable. It is clear from the reasoning, and the facts in these two matters, that *mora* interest can be charged on interest which is due and payable.

[8] It is by no means clear to me that those dicta meet the present claim for interest on interest. The interest which accrues on the unpaid tranches is itself *mora* interest. There is no provision for compounding interest on any *mora* interest which might accrue. In such circumstances, I doubt that the *mora* interest can be said to be ‘due and payable’ as was the case in the above two matters. The respondent also submitted that no basis had been laid for this inclusion in the particulars of claim. This is correct. However, it is not necessary to decide this issue. Whether, in these circumstances, it is permissible to claim interest on the interest which arises by virtue of the Prescribed Rate of Interest Act may arise in a subsequent trial. It would thus be inappropriate to make a finding on the issue and I decline to do so.

[9] It is clear that such interest has been included in the sum claimed. The applicant submitted that a simple recalculation could be done which excludes any compound interest. Summary judgment should then be given in the reduced amount. If this were the only issue bearing on the present matter, I would be inclined to accede to this request. But the final point seems to me to be dispositive of the summary judgment application.

[10] The respondent raised the defence that the debt has prescribed. It submitted that the second tranche was due and payable on 17 August 2013. All other tranches were payable no later than 1 June 2014. Accordingly, all amounts outstanding were due and payable by then. The summons was served in February 2019. The amounts outstanding became due and payable well over three years prior to this. Accordingly, in terms of s 10(1) read with ss 11*(d)* and 12(1) of the Prescription Act 68 of 1969, the debt had prescribed. The response in the applicant's heads of argument invoked s 14(1) of the Prescription Act. This provides:

'The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.'

It was contended that the part payments made up till June 2018 constituted a 'tacit acknowledgement of liability' within the meaning of those words. As such, the running of prescription had been interrupted, the last interruption of which occurred during June 2018. Since each interruption causes the prescriptive period to commence anew, the claim has not prescribed.

[11] In support of her submission that part payment of a debt amounted to a tacit acknowledgement of liability, the applicant relied chiefly on *Cape Town Municipality v Allie NO*.[7] There, an arbitration award had been

[7] *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 11H-12B.

made in an amount of money, along with interest and costs, such costs to include the fees of the arbitrator. The capital sum was paid and a letter sent to the effect that, once the costs were taxed, they would be paid. The letter prompted a response to the effect that the interest portion of the award had not been paid. The costs were taxed in an opposed taxation. The appellant then sent a letter dated 3 September 1975 saying:

'Council accepts liability for payment of interest from the date of the award to 28 December 1973, on the full amount of the award . . .'.

This was later followed by a payment of interest which the appellant contended was due. Sometime later, the respondent attempted to recover the taxed costs. The appellant contended that the claim for these had become prescribed. The issue was whether the payment of interest and the letter of 3 September 1975 amounted to a tacit acknowledgement of liability and thus interrupted prescription on the claim for costs. The court held that the award was a single, indivisible award, and the acknowledgement of liability for the interest component of the award amounted to a tacit acknowledgement of liability for the whole award, including costs.[8]

[12] In arriving at a decision in that matter, the court referred to a number of old authorities. In *Lubbers & Canisius v Lazarus*,[9] the court recognised that Roman law accepted that an acknowledgement of liability could be established by conduct and not only by words. Part payment of a debt was recognised as an example of such conduct. In *De Beer v Gedye and Gedye*,[10] the court held to similar effect:

'Merlin in his *Repertoire de Jurisprudence* under the heading: "Interruption de Prescription," quotes from Dunod as follows "If the debtor admits the debt by an act of

[8] *Allie* at 15A-B.
[9] *Lubbers & Canisius v Lazarus* 1907 TS 901.
[10] *De Beer v Gedye and Gedye* 1916 WLD 133.

any kind: if he pays a part of the capital, or the arrears without protest . . . in a word whenever anything is done between the creditor and the debtor . . . which imports an acknowledgment express or tacit of the debt . . . there will be a civil conventional interruption which will prevent the running of prescription."[11]

[13] Recognition of an acknowledgement by conduct has been given specific effect in s 14(1) where a tacit acknowledgement is made sufficient. A tacit acknowledgement requires an inference to be drawn from proved facts. The test for proving a tacit contract was set out in *Standard Bank of South Africa Ltd & another v Ocean Commodities Inc & others*:[12]

'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged.'

I can see no reason why the approach to prove a tacit acknowledgement of liability should be approached differently. It seems clear that the test is objective.[13] The question is, thus, did the conduct of the debtor amount to a tacit acknowledgement of liability?

[14] *Allie* recognised that to establish this depended on a conspectus of all the relevant proved facts on the point. The fact that part payments have been made is not decisive:

'But it is conceivable that there may be circumstances in which it would not be correct to infer an acknowledgment of liability for a balance from the making of a payment simply because, objectively regarded, it is a part payment. There may be something in prior dealings between the parties, or the prior or contemporaneous conduct of the debtor, which would negate such an inference.'[14]

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[11] *De Beer* at 137.
[12] *Standard Bank of South Africa Ltd & another v Ocean Commodities Inc & others* 1983 (1) SA 276 (A) at 292A-B.
[13] *Allie* at 7I-8C.
[14] *Allie* at 12B-C.

If, as is clear, the tacit acknowledgement arises largely from conduct, the possibility that evidence of the circumstances under which the payments were made might put a different blush on things seems self-evident. Those circumstances would need to be considered in order to properly draw an inference as to whether there has been a tacit acknowledgement of liability. I therefore respectfully agree with this dictum.

[15] The significance of this for the present matter is clear. This is an application for summary judgment. In its affidavit opposing summary judgment, the defendant raised a defence of prescription. Such a defence, when raised, places an onus on the debtor to allege and prove the date when the prescription commenced.[15] Once proved, the onus then shifts to the creditor to allege and prove the interruption of prescription.[16] In the present matter, allegations concerning interruption are contained, not in the pleadings, but in the heads of argument. These simply refer to the list of payments made after 1 June 2014 until June 2018 which were annexed to the particulars of claim in support of the contention that the payments amount to a tacit acknowledgement of liability.

[16] The problem is that the respondent has had no opportunity to lead evidence of any circumstances under which these payments were made. As was held in *Allie*, these may cast a different light on the matter. The issue of the interruption of prescription was not pleaded in the particulars of claim. This is understandable since it would ordinarily be raised in a replication to a plea of prescription rather than in particulars of claim. The respondent could not have known that the applicant would rely on an

[15] *Gericke v Sack* 1978 (1) SA 821 (A) at 826B-827H.
[16] *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA) ([2002] 3 All SA 309) at 495, para 5 of the second judgment. Two judgments were delivered in this matter, each with their own paragraph numbers. The second judgment concurred in the main judgment with one reservation. There was no difference on the question of onus.

interruption. It was therefore not alerted to deal with the issue in the opposing affidavit. I accordingly do not have any evidence of the respondent on the issue before me. Granting summary judgment would deny it an opportunity to place its version before a court. This offends the basic principle of *audi alteram partem*. In the result, I am satisfied that the respondent has raised a defence which gives rise to a triable issue. As a consequence, summary judgment must be refused and the respondent given leave to defend the action.

[17] In case I am wrong on this issue, even where the requirements for summary judgment are met, a court retains a discretion to refuse summary judgment.[17] Rule 32(5) of the Uniform Rules of Court states:

'If the defendant does not . . . satisfy the court [that there is a bona fide defence to the action] . . . the court may enter summary judgment for the plaintiff.'

As has been stated in numerous judgments, summary judgment is a drastic remedy. It does not allow for the matter to proceed to trial. This is why a court may exercise a discretion to refuse summary judgment. That discretion must be exercised judicially and cannot be founded on a caprice.[18] To close the door on the ventilation of the issue of prescription would not be appropriate in the circumstances of this matter. It may well be that an injustice would result should summary judgment be granted. I would therefore be inclined in any event to exercise my discretion against granting summary judgment.

[18] The respondent conceded that, if summary judgment were refused, the case meets the requirement for being referred to the expedited trial roll under KwaZulu-Natal practice direction 21.3. I agree with this concession.

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[17] *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 58H-59A.
[18] *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229B-H.

[19] In the result:

1. Summary judgment is refused.
2. The respondent is given leave to defend the action.
3. The costs of the summary judgment application are reserved for decision by the trial court.
4. The matter is referred to the expedited roll in terms of KwaZulu-Natal practice direction 21.3.

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GORVEN J

DATE OF HEARING:	6 June 2019
DATE OF JUDGMENT:	11 June 2019
FOR THE APPLICANT:	EJB Lingenfelder of Lingenfelder Attorneys.
FOR THE RESPONDENT:	I Topping SC instructed by Derek Sathenna Attorneys, locally represented by SL Kunene & Partners.