THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 564/09

In the matter between:

ROGER HUGH MARGO **First Appellant**
SHERIFF FOR THE DISTRICT OF RANDBURG **Second Appellant**

and

TONY RICKY GARDNER **Respondent**

Case no: 511/09

In the matter between:

TONY RICKY GARDNER **First Appellant**
OTR MINING LIMITED **Second Appellant**

and

ROGER HUGH MARGO **First Respondent**
SHERIFF FOR THE DISTRICT OF RANDBURG **Second Respondent**

Neutral citation: MARGO v GARDNER
(564/09) [2010] ZASCA 110 (17 September 2010)

Coram: HARMS DP, HEHER, SHONGWE, LEACH JJA and
EBRAHIM AJA

Heard: **31 AUGUST 2010**

Delivered: **17 SEPTEMBER 2010**

SUMMARY: *In duplum* rule – its application – whether interest accumulates *pendente lite* – meaning of its suspension and consequences

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ORDER

On appeal from: South Gauteng High Court (Johannesburg) as courts of first instance).

The following order is made:

(1) In case 564/09

The appeal is dismissed with costs, the appellants are ordered to pay such costs jointly and severally, the one paying the other to be absolved.

(2) In case 511/09

(a) The appeal is upheld with costs; and
(b) The order of the court a quo is set aside and substituted with the following:

'The application is dismissed with costs.'

JUDGMENT

SHONGWE JA (HARMS DP, HEHER, LEACH JJA and EBRAHIM AJA concurring):

[1] This appeal concerns the application of an old common law rule known as the *in duplum* rule. It means in general terms that a creditor is not entitled to claim

unpaid interest in excess of the capital outstanding. An extensive discussion of its historical development is to be found in *LTA Construction Bpk v Adminstrateur, Transvaal* 1992 (1) SA 473 (A).

[2] There are in fact two appeals similar in almost all respects which were argued as one. The one is Gardner (appellant) against Margo (Respondent) (case no 511/09) and the other is Margo (appellant) against Gardner (Respondent) (case no 564/09). Gardner's appeal was with the leave of this court and Margo's with leave of the court a quo (South Gauteng High Court, Johannesburg).

[3] The appeal by Gardner is against the dismissal of his application by Horwitz AJ. The appeal by Margo is against an order of Gyanda J. Horwitz AJ concluded that the *in duplum* rule did not apply in the present instance, whereas Gyanda J on the same set of facts concluded that the *in duplum* rule was applicable and found in favour of Gardner.

[4] On 14 April 1999 Margo served a summons against Gardner (as the first defendant) and O T R Mining Ltd (as the second defendant). Mlambo J found in favour of Margo for the payment of the sum of approximately R15 000 000.00. Gardner appealed against the finding to this court. The appeal succeeded and the following order was made on 28 March 2006:

'1. Against the first defendant, for payment of the amount of R1 461 432 plus interest thereon at the rate of 15,5% per annum from 1 September 1998 to date of payment.

2. Against the second defendant, for payment of the amount of R1 461 432 plus interest at the rate of 15,5% per annum from 1 September 1998 to date of payment, the second defendant to be liable to make such payment only in the event that, and to the extent that, the first defendant fails to do so.'

The said judgment is reported as *Gardner & another v Margo* 2006 (6) SA 33 (SCA).

[5] Pursuant to the SCA judgment Gardner made a payment of the sum of R1 222 864 on 24 April 2006 and on 23 September 2006 a further R1 800 000. The

total paid at that stage amounted to R3 022 864. Gardner contended that after the second payment he understood that the two payments were made in full and final settlement of the capital (although with no proof of this). He was of the view that the only outstanding item was the question of costs of the proceedings. This contention was disputed by Margo.

[6] The relevant bills of costs were taxed and the respective attorneys exchanged a series of letters between them regarding what was still owing by Gardner. The gist of the correspondence was in respect of the calculation of the interest, as well as the taxed bills of costs. The parties also attempted to enter into negotiations of how to settle the issue of costs. A set-off was suggested regarding the payment of costs, though they failed to resolve the dispute. Margo's attorneys proposed that the payment of the outstanding amount must take place on or before 23 November 2009, failing which a writ of execution would be issued. Gardner's attorneys made a counter proposal and advised that if the parties fail to agree they will be forced to bring an urgent application to suspend the execution of the warrant. As no settlement had been reached by 27 November 2007, the proposal for payment to be made by 23 November 2007 lapsed and a writ of execution was issued.

[7] On 7 December 2007 a writ of execution was sent to Gardner's attorneys as well as to the Sheriff for service, claiming the sum of R185 983.00 being the balance of the interest owing on the judgment debt, and a sum for taxed costs. (The costs issue is not relevant in this judgment). Gardner launched an urgent application to have the writ suspended, pending the outcome of an application for a declaratory order that the SCA judgment had been satisfied, and for the setting aside of the writ. On 28 February 2008 Horwitz AJ dismissed with costs the application for a declarator, and subsequently dismissed the application for leave to appeal.

[8] On 3 October 2008 Margo caused a second writ of execution to be issued alleging that the first one reflected incorrect amounts and was therefore withdrawn. The second writ reflected the balance of the capital sum of R264 396.06 plus interest thereon at the rate of 15,5% per annum calculated form 24 September 2006 to 30 September 2008 in the sum of R82 749.02 and a further interest on R264 397.06 at 15,5% per annum calculated from 1 October 2008 to date of payment. Gardner

launched another urgent application to suspend the second writ and later launched another application to have the aforesaid writ set aside and to declare that he was not indebted to Margo for any capital sum, interest or costs pursuant to the SCA judgment. Gyanda J found in favour of Gardner and ordered Margo to pay to Gardner a sum of R5 615.83 representing the amount by which he found Gardner had overpaid and also set aside the second writ and declared that Gardner was no longer indebted to Margo. On 23 September 2009 the High Court granted leave to appeal to this court.

[9] I may mention that during argument before Gyanda J, counsel for Margo raised the question whether the issues dealt with in Horwitz AJ's judgment were not res judicata as they were between exactly the same parties and in respect of exactly the same facts. Gyanda J ruled that he could not decide that question due to the fact that Horwitz AJ's judgment had yet not been signed. In view of the conclusion I hold in this matter it will not be necessary to deal with that question for purposes of this judgment.

[10] Gardner's submission was that a judgment debt accumulates interest only until the amount thereof reaches the double of the capital amount outstanding in terms of the judgment. He relied on *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd* (in liquidation) 1998 (1) SA 811 (SCA) at 827H-I, read with page 834G-I and *Commercial Bank of Zimbabwe Ltd v M M Builders and Suppliers (Pvy) Ltd & others and three similar cases* 1997 (2) SA 285 (ZH) at 303C-E. The argument failed to have regard to the full import of *Oneanate* and it is wrong to state that interest runs only (my underlining) until the amount of interest reaches the double of the capital amount. The word 'only' is in my view, misplaced because in *Oneanate* (after referring to the *Commercial Bank* case) (supra) it was held at 834H-I:

'that interest on the amount ordered to be paid may accumulate to the extent of that amount irrespective of whether it contains an interest element. This would then mean that

(i) the *in duplum* rule is suspended *pendente lite*, where the *lis* is said to begin upon service of the initiating process, and

(ii) once judgment has been granted, interest may run until it reaches the double of the capital amount outstanding in terms of the judgment.'

[11] The gist of the passage quoted above is that interest does not run only until the amount thereof reaches the double of the capital amount outstanding in terms of the judgment but it also runs *pendente lite* because, as a rule, the *in duplum* rule is suspended during the litigation. What appears to be clear in the present matter is that Gardner failed to accommodate or recognize the suspension of the *in duplum* rule during the period when the matter was pending before this court as envisaged in *Oneanate* at page 834H-I (supra). Counsel for Gardner argued that the difference between this appeal and the *Oneanate* case lies in the cause of action. The cause of action however makes no difference in the application of the *in duplum rule* see *LTA Construction Bpk;* (supra) *Bellingan v Clive Ferreira & Associates CC* 1998 (4) SA 382 (W); *Meyer v Catwalk Investments 354 (Pty) Ltd* 2004 (6) SA 107 (T). 'The prohibition on interest *in duplum* rule is not limited to money-lending transactions but applies to all contracts arising from a capital sum owed, which is subject to a specific rate of interest' (Monica L Vessio 'A limit on the limit on interest? The *in duplum* rule and the public policy backdrop' (2006) 39 *De Jure* 25 p 26-27).

[12] It is trite that the *in duplum* rule forms part of South African law. It is also axiomatic that the *in duplum* rule prevents unpaid interest from accruing further, once it reaches the unpaid capital amount. However, it must be borne in mind that a creditor is not prevented by the rule from collecting more interest than double the unpaid capital amount provided that he at no time allows the unpaid arrear interest to reach the unpaid capital amount. On the facts of this appeal this court is not asked to review the order of the SCA but to give effect to it as it stands. The order of the SCA is unequivocal and does not provide for any interest ceiling. Therefore the amounts claimed in the second writ are all due and owing by Gardner to Margo on the strength of the SCA judgment. The purpose or basis of the *in duplum* rule is to protect borrowers from exploitation by lenders who permit interest to accumulate, but essentially also to encourage plaintiffs to issue summons and claim payment of the debt speedily. Delays inherent in litigation cannot be laid at the door of litigants and it would be unfair to penalize a creditor with the application of the *in duplum* rule while proceedings are pending. Compare *Titus v Union & SWA Insurance Co Ltd* 1980 (2) SA 701 (Tk SC) 704.

[13] I agree with counsel for Margo that

'It must be borne in mind that when the SCA order was granted, the double capital would by then have been reached had the *in duplum* rule applied throughout the period from 1 September 1998 to 27 March 2006. The interest for the period 1 September 1998 to 27 March 2006 amounted to R1 715 360.81. The interest for this period was clearly more than double the capital amount.'

[14] Gyanda J found that the *in duplum* rule was applicable relying on the authority of *Oneanate.* However, in my respectful view, the learned judge omitted to deal with the position *pendente lite* which makes a huge difference on the application of the rule. This led to two conflicting judgments in which both relied on one authority namely the *Oneanate* case.

[15] It is because of the above reasons that I make the following order:

(1) In case 564/09

The appeal is dismissed with costs, the appellants are ordered to pay such costs jointly and severally, the one paying the other to be absolved.

(2) In case 511/09

(a) The appeal is upheld with costs; and
(b) The order of the court a quo is set aside and substituted with the following:

'The application is dismissed with costs.'

J SHONGWE
JUDGE OF APPEAL

APPEARANCES:

For Gardner:	Hennie M de Kock Phlip A Myburgh Instructed by: Pierre Wolmarans Manong Badenhorst Abbot van Tonder RANDBURG Naudes Bloemfontein
For Margo:	Marius van Wyk Instructed by: Johan Dreyer Dreyer & Nieuwoudt RANDBURG Symington & De Kock Bloemfontein