THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No. 025/2012
Reportable

In the matter between:

ELIZABETH CATHERINA STEYN NO **Appellant**

and

RONALD BOBROFF & PARTNERS **Respondent**

Neutral citation: *Steyn v Ronald Bobroff & Partners* (025/12) [2012] ZASCA 184 (29 November 2012)

Coram: BRAND, BOSIELO AND SHONGWE JJA AND SOUTHWOOD AND SALDULKER AJJA

Heard: 8 November 2012

Delivered: 29 November 2012

Summary: Attorney – duty of an attorney to client – breach of mandate – claim for damages for loss of interest on the amount of damages awarded to the appellant's minor son in consequence of a delay in prosecuting and finalising the claim against the Road Accident Fund (RAF) – whether the respondents acted in breach of the written mandates – whether a delay of 14½ months in finalising the claim falls short of the standard of diligence, care and skill which can reasonably be expected of a practising attorney – whether the appellant can legitimately claim mora interest as damages when the respondents did not owe her any debt.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Tsoka J sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

BOSIELO JA (BRAND JA, SHONGWE JA, SOUTHWOOD AJA AND SALDULKER AJA CONCURRING):

[1] This appeal raises the contentious question of the duties and obligations of an attorney to his/her client and the circumstances under which an attorney can be held liable for want of the requisite care, skill and diligence which he/she is expected to exercise in handling the affairs of his/her client.

[2] In order to appreciate and understand the crucial role which a present day attorney plays in many people's affairs, I deem it necessary to give a brief evolution of the profession of an attorney over the years. In his book, *The Judicial Practice of South Africa*, (4 ed) vol 1, at p 31 G B Van Zyl said the following about the profession of an attorney:

'In ancient days the profession of an attorney was considered as "*infamissima vilitas*," servile, of no value, and contemptible. But under the Roman Emperors Diocletian and Maximilian it became an office of respect and good repute. Many people still think at the present day as the ancients did before the period of these Emperors. Even Lord Macaulay, the learned historian, who in all his professional career held only one brief, for which he received a guinea, could not refrain from remarking: "That *pest* whom mortals call attorneys." But the present consensus of opinion, all the civilised world over, is that the profession of an attorney is an honourable and respectable one, and to be held in the utmost esteem. An attorney is nowadays an indispensable adjunct to everyone, not only in lawsuits but in many other private affairs, and his office is deemed both necessary and praiseworthy. It is essential, therefore, that the relationship between him and the public should be better known; as also what is expected of him and what his obligations are.'

[3] Many years ago and whilst grappling with the liability of an attorney who failed to give sufficient care and attention to the affairs of his/her client, De Villiers CJ said the following in *Van der Spuy v Pillans* 1875 Buch 133 at p 135:

'I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be proficient in his calling, and if he does not bestow sufficient care and attention in the conduct of business entrusted to him, he is liable, and where this is proved the Court will give damages against him.'

See also *Armitage Trustees v Allison* 1911 NDP 88.

The attorney's profession having become more diverse and sophisticated, these wise words are, to my mind, more apt today than they were during the time of De Villiers CJ. Indubitably, this is the yardstick against which the respondent's conduct in this case has to be adjudged.

[4] This matter is on appeal before us from the South Gauteng High Court (Tsoka J) with the leave of this court. To a large extent, the facts of this case are relatively simple and undisputed. Furthermore, the points of law raised herein are short and crisp. They are: whether in its preparation, formulation, collation,

submission and eventual prosecution of the claim of the appellant's minor son Micah (M), the respondent (a firm of attorneys) failed to act in accordance with the reasonable diligence, care and skill expected of a practising attorney or, as the appellant contended, as 'pre-eminent specialists' in the field of personal injury claims. And if not, whether the respondent can be held liable for the consequential damages suffered by the appellant, being the amount representing the interest which the appellant lost on the capital amount paid by the Road Accident Fund (the Fund) 14½ months late. Simply put, is it competent for the appellant to claim mora interest as damages in a matter where the respondent is not her debtor.

[5] The salient facts underpinning this case can be succinctly set out as follows: On 17 March 2006, the appellant instructed the respondent to institute a third party claim against the Fund on behalf of M for damages resulting from injuries sustained in a motor vehicle accident which occurred on 28 August 2005. It is common cause that Micah had sustained a fractured skull. The appellant and respondent had entered into three written agreements which in essence gave the respondent the mandate to investigate, process, lodge and prosecute the claim to finality. These written agreements contain the essential terms and the fee arrangements agreed upon between the parties. Pursuant to the mandate, the respondent lodged the claim with the Fund on 27 February 2007. When the Fund failed to respond to the claim, the respondent issued and served summons against the Fund on 12 December 2007. On 16 May 2008 and after the pleadings had closed, the respondents applied for a trial date. Subsequently, the matter was enrolled for trial on 1 February 2010. The trial date was allocated some months after it was applied for.

[6] The appellant testified that some time in 2008 or 2009 (she was not certain of the date) she met Mr Bezuidenhout of the respondent's firm who advised her that the

case had been enrolled for trial on 1 February 2010. It is common cause that some time in October 2009 and after the respondent had notified the appellant about the trial date, she terminated the respondent's mandate and took her file to another firm of attorneys, Norman Berger & Partners Inc. She never gave the respondents any reason for the termination of its mandate.

[7] The trial was held from 1-5 February 2010 and judgment delivered in her favour on 11 February 2010. Insofar as it is relevant to this appeal, the Fund was ordered to pay the appellant R500 000 in respect of Micah's general damages and R2 060 099 in respect of his future loss of earnings.

[8] On 16 February 2010, a mere five days after the judgment referred to above, the appellant issued summons against the respondent wherein she claimed R479 485.20, representing damages she suffered as a result of the interest which she allegedly lost and which could have accrued on the capital sum of R2 560 099 if the respondent had lodged her claim timeously, ie 14½ months earlier.

[9] In order to understand the appellant's claim, it is important to have recourse to her particulars of claim. Essentially, the appellant alleges that she instructed the respondent on the strength of the fact that it had advertised itself widely, and publicly held itself out to be a firm of specialist personal injury attorneys. The appellant avers further that it was an express, alternatively implied term of the agreements between the parties that the respondent would carry out its mandate with due skill, care, diligence and professionalism expected of a specialist firm of attorneys who held themselves out to be pre-eminent experts and specialists in the field of personal injury claims and third party matters. Importantly, the appellant alleged that, in accepting the mandate, the respondents tacitly undertook to prepare, formulate, collate, submit and

prosecute her claim against the RAF with due diligence and expedience and within a reasonable time.

[10] The essential facts which are alleged to constitute negligence and breach of duty on the part of the respondent are set out as follows in the appellant's particulars of claim:

'12 In breach of the written agreements aforesaid, Annexures "B1", "B2" and "B3", and the duty of care owed by the Defendant to the Plaintiff in her capacity aforesaid, the Defendant negligently and wrongfully failed and/or neglected properly to timeously prepare, formulate, collate, submit, institute and prosecute the Plaintiff's claim to recover damages in that it:-

12.1 failed to deliver the claim to the Road Accident Fund on or before 30 July 2006 when the Defendant could and should have done so;

12.2 delivered the claim to Defendant on 27 February 2007, some 7 months after it could and should have done so;

12.3 failed to issue and serve the Summons within a reasonable time after the expiry of the 120 day period referred to in Section 24(6) of the Road Accident Fund Act 56 of 1996 which would have expired on 28 June 2007 and that Summons accordingly could have been served on the Road Accident Fund at any time after 29 June 2007;

12.4 only issued and served Summons on 12 December 2007, some 5½ months after it could and should have done so;

12.5 failed to have any regard to the fact that after the Road Accident Fund's Notice of Intention to Defend was served on 11 January 2008 and that its Plea was due for service on or before Friday 8 February 2008;

12.6 failed to deliver a Notice of Bar in terms of Rule 26 of the Rules of this Honourable Court when it could and should have done so on 11 February 2008;

12.7 failed to have regard to the fact that had it served the Notice of Bar aforesaid the pleadings would have closed alternatively the Defendant's Plea would have received by no later than Monday 18 February 2008 and the Plaintiff's Plea to the Defendant's Counterclaims delivered by Monday 17 March 2008 at which time the pleadings in the action would have closed;

12.8 failed to deliver the Notice of Bar aforesaid until 2 April 2008 with the result that the Road Accident Fund's Plea was only served on 11 April 2008;

12.9 only delivered the Plea to the Road Accident Fund's Counterclaims on 7 May 2008 at which time the Pleadings closed;

12.10 only applied for a trial date on 16 May 2008 when it could and should have applied for a trial date on 17 March 2008, some two months later that it could and should have done so had it not been negligently dilatory as set out above;

12.11 omitted

13. It was foreseeable alternatively ought to have been foreseen by the Defendant that the failure to timeously:-

13.1 deliver the Plaintiff's claim;

13.2 issue Summons;

13.3 ensure the close of pleadings;

would result in the Plaintiff suffering damages in her representative capacity.'

[11] Before I can deal with the merits of this appeal, it is imperative to decide first, whether the claim herein is based on delict or contract. Mr Ancer argued without conviction that this claim was delictual. His main premise seems to be that it is because the respondent held itself out to be a firm of pre-eminent expert personal injuries attorneys and further that by failing to lodge the claim expeditiously, the respondent was in breach of that duty. He was however at great pains to explain how this claim could be said to be delictual whilst the appellant relied on a breach of a duty arising out of the three written agreements she had signed with the respondent. When confronted with this intractable difficulty, he conceded, rather reluctantly, that the pleadings herein were not felicitously drawn.

[12] I agree with Mr Ancer that plaintiff's particulars of claim are not a model of clarity. The seeds of Mr Ancer's confusion lie in para [12] quoted in full in para [10] above. It is plainly incongruous for the appellant to allege a breach of the written agreements aforesaid, Annexures 'B1' 'B2' and 'B3' as the basis of her claims (which is clearly contractual) and in the same breadth rely on an alleged breach 'of the duty of

care owed by defendant to Plaintiff' which is plainly a delictual claim.

[13] What is clear from the pleadings however, is that the appellant relied on the three written agreements she had entered into with the respondent. Evidently, these are the three agreements which regulated the relationship between the appellant and the respondent. It follows ineluctably that the appellant's case is contractual and not delictual. Dealing with a similar problem in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A), the Grosskopf AJA stated the following at 499D-E.

'…In the present case we do not have an infringement of any of the respondent's rights of property or person. The only infringement of which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those which would place it in the position it would have occupied if the contract had been properly performed.'

[14] Having had to determine whether the Acquilian action could be comfortably accommodated in a purely contractual setting like in this case, Grosskopff AJA concluded in *Lillicrap* at p 501G-H that he considered that policy considerations militated strongly against delictual liability being imposed for the negligent breach of a contract. The learned judge enunciated the principle lucidly as follows at 499A-501H.

'In applying the test of reasonableness to the facts of the present case, the first consideration to be borne mind is that the respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services.

The learned judge continued at 499D-F to emphasize that: the only infringement of which the respondent complains is the infringement of the appellant's duty to perform specific professional work with due diligence; and the damages which the respondent claims, are these which would place it in the position it would have occupied if the contract had been properly performed.'

Based on the fact that the appellant's main contention is that the respondent, being a firm of attorneys, failed to execute their mandate with the necessary diligence, skill and care required of a reasonable attorney as contemplated in their written agreements, I find, as Grosskopff AJA did in Lillicrap that this case has to be resolved on the principles of contract and not delict. See also *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) at para [6].

[15] I now revert to the salient facts of this case. In her evidence, the appellant emphasized the fact that she had advised the respondent through its candidate attorney, one Ms Jacqueline Boucher (Boucher) that Micah required urgent medical attention because of his condition and as a result she needed this case to be finalized quickly. Importantly the appellant conceded that Boucher had advised her that such matters do take some time to finalize.

[16] I interpose to state that the appellant was the only witness who testified during the trial. The respondent closed its case without presenting evidence. It is clear from the appellant's evidence that at all material times during the processing of this claim, she was uncertain of the nature, extent and possible sequelae of the head injury suffered by Micah. However, what is clear from her evidence is that she was at all times seriously worried about what would happen to Micah. An EEG examination had revealed some abnormalities. Furthermore, during an MRI scan on 12 June 2006, it was discovered that Micah had a tumor in the brain. During a subsequent visit to Dr Anderson, he advised her after consultation with one Dr Omar, Head of Neurology, that Micah needed an urgent operation. This operation was done on 28 June 2006. Initially there was some doubt and fear whether the tumour was linked to the head injury until one Dr Louw opined that he could not link the tumour to the head injury.

[17] Importantly, the appellant testified that as Micah had never manifested these symptoms in the past, she was confused and required a second medical opinion to allay her fears. This is understandable. This second opinion was given later by Dr Marus. Sometime in September 2009, she met Bezuidenhout of the respondent who advised her that the case had already been enrolled for trial and further that they might get about R2 million as damages.

[18] In October 2009, the appellant cancelled her mandate to the respondent and instructed her present attorneys. Asked why she did so, she explained that she was aggrieved by the fact that, instead of taking Micah to various doctors for further medical examination and reports, the respondent expected her to do that. She found this to be cumbersome and unacceptable. It is clear from the evidence that the appellant never complained to the respondent of any delays regarding the preparation, submission and prosecution of this claim. Neither did she write any letter to the respondent to register her dissatisfaction in this regard. Even at the crucial time when Bezuidenhout advised her that the case had been enrolled for trial, she never voiced any complaint regarding the alleged delays.

[19] The primary issue to be decided in this appeal is, whether, given the circumstances of this case, it can be said that the respondent's conduct by delaying the finalization of this claim by 14½ months (the delay is not disputed) amounted to a failure to measure up to the conduct expected of a reasonable attorney acting with due care, skill and diligence.

[20] Mr Ancer for the appellant, argued forcefully that the respondent's conduct must be measured not against that of an ordinary reasonable attorney but that of a 'pre-eminent specialist personal injury attorney'. This argument was premised on the

fact, which was common cause, that the respondent had widely advertised themselves as 'specialists in major personal injury law'. The logical conclusion is that it should be held to the standard which it professed to possess. It was contended further that a pre-eminent specialist personal injury attorney would have appreciated that the appellant required this claim to be finalized without any undue delay and further that any undue delay would cause her financial loss in the form of interest which she could earn on the money if the claim was finalized timeously and the money received was invested.

[21] The other issue closely allied to the above, was the correct quantification of the appellant's damages. Mr Ancer submitted that the appellant was entitled to claim interest at 15,5% over a period of 14½ months on the capital amount of R2 560 099. This is alleged to be interest which she could have earned if the claim had been lodged timeously and the money invested. The 14½ months period represent the period during which the claim should have been lodged and finalized (this was not disputed). He contended that the interest rate of 15,5% was based on the interest rate prescribed by the Minister of Justice in terms of the Prescribed Rate of Interest Act 55 of 1995. In consequence no evidence was adduced to prove this.

[22] On the other hand, Mr Stockwell for the respondent submitted that the appellant is bound by the written mandates she entered into with the respondent. He submitted that there is nothing in the three written mandates to the effect that the respondent had agreed or undertaken to execute the mandate as 'pre-eminent specialist personal injury attorneys'. He contended that as the respondent had accepted the mandate as a firm of ordinary reasonable attorneys, its conduct had to be measured against that of an ordinary reasonable attorney. He contended further that, in order to determine if the respondent failed to live up to the standard of a reasonable attorney, it was imperative that evidence of an expert in third party claims should have been adduced to explain to

the court how a reasonable attorney, faced with the same facts as in this case, would have dealt with this claim. Absent such evidence, he contended that the court had nothing against which to measure the respondent's conduct. Mr Stockwell submitted further that a determination of such a tricky question would depend on the facts of the case, the nature of the injuries, their sequelae and the complexity of the case, all of which was, admittedly, never put before the court below.

[23] Regarding the quantum, Mr Stockwell contended that as the respondent did not owe the appellant any money, there was no underlying debt and therefore the appellant was in law not entitled to claim mora interest at the prescribed rate. He submitted further that it was incumbent upon the appellant to adduce evidence of what she would have done with the money, in other words, whether she would have invested it and, crucially, what interest she would have earned on such investment. He concluded by contending that the mere fact that there was some delay (which was not disputed) does not, without more, mean that the appellant suffered any financial loss. He submitted that on the contrary, the delay might have resulted in the amount ultimately awarded to the appellant having appreciated in the interim.

[24] The question that we need to answer therefore is whether by lodging the claim 14½ months late, the respondent breached the tacit terms of its written agreements with the appellant. Otherwise stated, the question is whether in so failing to comply, the respondent failed to act with the necessary care, skill and diligence expected of an ordinary reasonable attorney.

[25] What is clear from the above is that due to his injury to the head, Micah underwent numerous medical tests to determine the nature and extent as well as the sequalae of his injuries. No evidence was led regarding the amount of time which was

spent in attending to the various doctors, the time it took to secure the appointments and how long it took for the respondent to receive the medical reports from the various doctors. It is clear from the appellant's evidence that this was a sensitive and complicated case which required patience and care for it to be handled properly. It could not be rushed as it was important that the true nature, extent and sequelae of Micah's injuries be accurately assessed. Manifestly, such an assessment was necessary for the accurate quantification of Micah's damages.

[26] The answer to the two critical questions posed above lies paradoxically in another question, namely, how does one determine how a reasonable attorney would have acted in similar circumstances. It is unfortunate that there is paucity of evidence regarding the nature and extent of the injuries sustained by Micah, their impact and sequelae and, importantly, whether Micah still required further medical treatment and if so, what kind of medical treatment and what its duration would be. All that one could glean from the record is that Micah had suffered a fractured skull. Importantly, the first EEG test revealed some abnormalities whilst the CT scan showed calcification of the back of his spine. The appellant feared that Micah might develop epilepsy. To compound her anxiety a tumor was discovered on his brain during an MRI scan. She was later advised by Dr Anderson, after discussion with Dr Omar that Micah needed an urgent operation. In the midst of all these, Dr Louw gave her a report that he did not think that the tumour in Micah's brain was caused by the accident. Understandably, as a result of all these developments, she was confused and required a second opinion. To my mind, all this is eloquent testimony that this case was not one of the run-of-the-mill cases. It was complex and required due and proper care and attention by a conscientious attorney. Importantly, the appellant was alive to this and as a result she was even amenable to a postponement of the trial. I am driven to conclude that her belated complaint of the alleged delay was contrived and ill-

conceived. Given the above scenario, I am unable to find that a delay of 14½ months was unreasonable.

[27] In the absence of clear evidence to prove what a reasonable attorney in the position of the respondent, faced with a similar case under similar circumstances, would have done, I am unable to conclude that the respondent failed to act with the necessary care, skill and diligence which would ordinarily be expected from a reasonable attorney. It is axiomatic that the conduct of a reasonable attorney concerning a case that he/she handles will primarily be determined, amongst others, by the facts and circumstances of the case, the investigations which had to be done, the nature and extent of the injuries suffered and the complexity of the matter. It would in my view be unwise to attempt to determine the conduct of a reasonable attorney in vacuo. As Van Zyl eloquently stated in his work, The Judicial Practice of South Africa (above) at p 46, '…the degree of negligence or want of prudence, or useless work, must depend upon the nature of each case.'

[28] In any event, none of the three written mandates concluded and signed by the parties stipulated any specific time frames within which the respondent was expected to finalize this claim. The appellant never testified that there were any such specific time limits. All she could say and did state is that she had impressed it on Boucher, the candidate attorney that she would like this matter to be finalized as soon as possible. In the same vein she had been forewarned by Boucher that such matters take time. Regrettably, she never explained what she meant by the expressions 'as soon as possible' or 'within a reasonable time'. Suffice to state that the phrases 'as soon as possible' or 'within or reasonable time' are nebulous and relative and can only be determined in relation to the facts and exigencies of the case as well as its complexity. On the facts of this case, I am unable to find that the respondent failed to act within a

reasonable time, or for that matter with due diligence, care and skill as an ordinary reasonable attorney would have acted.

[29] To encapsulate:

(a) The appellant set out to prove that the respondent had failed to execute its mandate with the skill, diligence and care required from a reasonable attorney.

(b) The only evidence proffered was, however, that of the appellant herself who did not practice nor was she qualified as an attorney.

(c) Shorn of unnecessary detail, her evidence established two things. First, that her claim against the Road Accident Fund could notionally have been brought before the court much earlier and, secondly, she wanted her claim to be finalized as a matter of urgency.

(d) In argument counsel for the appellant contended that in the circumstances the delays were so unreasonable that it justified the inference of negligence on the part of the respondent. Or, in legal parlance, *res ipsa loquitur*, which literally means that the facts spoke for themselves.

(e) But having regard to the authorities, this is clearly not a case of *res ipsa loquitur*. That expression only comes into play if the accident or occurrence would ordinarily not have happened unless there had been negligence, the court is not entitled to infer that *res ipsa loquitur* (see eg *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA) para 41). As I see it, the mere fact that the respondent did not bring the matter before court in the shortest possible time-frame does not necessarily justify the inference of negligence. Even on the assumption that the appellant took a long time which could, on the face of it, conceivably be described as unreasonable, the enquiry whether this constituted lack of skill, diligence and care on the part of the respondent would, in my view, still raise the question: what were the circumstances? Logic dictates that once that question is raised *res ipsa loquitur* cannot apply.

(f) It follows that the appellant could only establish her case through the expert testimony of a practicing attorney that, in the prevailing circumstances, a reasonable attorney would have brought the matter to court earlier, and if so, how much sooner.

(g) It is true, as the appellant contended in argument, that the respondent led no evidence to explain the delay in bringing the matter to court. But the onus remained on the appellant. Unless and until she established a prima facie case of negligence, which she did not, the respondent was under no duty to give any explanation.

[30] Based on the above exposition, I am of the view that the appellant failed to make out a case entitling her to the relief sought.

[31] In the result the appeal is dismissed with costs.

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L O Bosielo
Judge of Appeal

BRAND JA (BOSIELO, SHONGWE JJA, SOUTHWOOD AND SALDULKER AJJA CONCURRING IN THE JUDGMENT OF BRAND JA)

[32] I have read the judgment of my brother Bosielo JA in this matter and I agree with his reasoning as well as his conclusion that the appeal cannot succeed. Yet I thought that perhaps I should say something about the quantification of the damages claimed by the appellant because it appears to proceed from a premise which is fundamentally flawed. Unless attention is called to this fundamental flaw, it may perpetuate and snare future litigants in the same trap.

[33] The appellant led no evidence that, if she had received the award of R2 560 099 fourteen and a half months earlier she would have earned any particular rate of interest or, indeed, that she would have invested the money at all. She simply quantified her claim on the basis of the award times 15,5 per cent per annum divided by twelve months times the fourteen and a half months. In argument counsel for the appellant confirmed the suspicion that the 15,5 per cent was the rate prescribed by the Minister of Justice in the *Government Gazette* of 1 October 1993 in terms of the Prescribed Rate of Interest Act 55 of 1975. For the proposition that the appellant could legitimately calculate the damages sustained by her minor son in this way, she sought to rely on the following statements in *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1145D-H:

'It may be accepted that the award of interest to a creditor, where his debtor is *in mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date . . .. This loss is assessed on the basis of allowing interest on the capital sum owing over the period of *mora* . . .. Admittedly, it is pointed out by Steyn, *Mora Debitoris*, p. 86, that there were differences of opinion among the writers on Roman-Dutch law on the question as to whether *mora* interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasized by CENTLIVRES, C.J., in *Linton* v. *Corser*, 1952 (3) S.A. 685 (A.D.) at p. 695, interest is today the "life-blood of finance" and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.'

[34] In the circumstances contemplated in *Bellairs*, where the claimant is entitled to *mora* interest at the rate prescribed by the Act, our courts accept that interest

constitutes a form of damages. But they do not require a claimant to prove that damages were actually sustained. They act on the assumption that, had the payment been made, the capital sum would have been productively employed by the claimant during the period of *mora* and that the *mora* interest consequently represents the damages flowing naturally from the default (see eg *Bellairs* 1146H-1147A; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) paras 82-83). What is more, liability for *mora* interest is not dependent on fault. The claimant is therefore not required to prove that the delay in payment was due to the negligence of the debtor. All that the claimant need prove is that payment was not made on due date (see eg *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) paras 15-17).

[35] But I believe that reliance on *Bellairs* in the circumstances of this case demonstrates a fundamental misconception. *Bellairs* deals with *mora* interest. So does the Prescribed Rate of Interest Act. The term *mora* simply means delay or default. The *mora* interest provided for in the Act is thus intended to place the creditor, who has not received due payment of a monetary debt on due date, in the position he or she would have occupied had due payment been made. Thus understood the *mora* interest contemplated in *Bellairs* and in the Act is what the Roman Dutch authorities described as 'belangende het gene aan de principale saak toevallig is' which was translated in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 177, with reference to these authorities as 'ancillary or accessory to the principal obligation'.

[36] This is to be contrasted with a case such as the present where the interest is not ancillary or accessory to any principal monetary debt, but is used as a component in the calculation of damages for alleged breach of mandate. Differences between the two situations are explained thus by Fagan JA in *Union Government v Jackson* 1956

(2) SA 398 (A) at 411C-H:

'In considering this question of taking into account the time that may elapse between the date when a man is deprived of an asset and that of his being reimbursed by receiving compensation for it, we must be careful to distinguish between two different approaches that call different legal principles into play and may therefore diverge greatly in their application to particular circumstances. The one approach is to treat this lapse of time as merely an element – one of many items – which the Court may be urged to bring into its reckoning in computing or estimating the damage which a plaintiff has suffered and for which he should be recompensed. . . .

The other approach is that of dealing with the liability to pay interest as a consequential or accessory or ancillary obligation . . . automatically attaching to some principal obligation by operation of law. The best illustration of this type is the liability for interest *a tempore morae* falling on a debtor who fails to pay the sum owing by him on the due date. Here the Court does not make an assessment; it does not weigh the pros and cons in order to exercise an equitable judgment as to whether, and to what extent, the interest-bearing potentialities of money are to be taken into account in computing its award. The only issue is whether the legal liability exists or not; if it does, the rest is merely a matter of mathematical calculation: the legal rate of interest on a definite sum from a definite date until date of payment.'

[37] The same differences between the two situations can be illustrated with reference to *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga* [2012] ZASCA 128. What the appellant, Crookes Brothers, claimed was *mora* interest at the prescribed rate of 15,5 per cent on the purchase price of land which was not paid on the date agreed upon in the deed of sale, but only some months later. The court of first instance dismissed the claim, essentially, on the basis that the claimant enjoyed the benefit of remaining in occupation of the land during the period of its debtor's default. On appeal this court, however, referred to the distinction between *mora* interest, on the one hand, and interest as a component in the calculation of damages, on the other, which was underscored by Fagan JA in *Jackson*. With reference to this distinction, this court then held that the claim in *Crookes Brothers* fell within the first category of *mora* interest. In this light, so it was held, the claimant was

entitled to *mora* interest calculated at the prescribed rate in terms of the Act; that it was not required to prove any actual damages; and that, in that event, the fact that the claimant enjoyed the benefit of possessing the land during the period of *mora* was of no consequence.

[38] By contrast, it is clear to me that in this matter interest was not claimed as an accessory or an ancillary obligation to a principal debt. The Road Accident Fund was the appellant's debtor for the amount of the award. The respondent was not. There was therefore no principal debt owing by the respondent. The rate of interest prescribed under the Prescribed Rate of Interest Act therefore simply did not apply. In consequence I agree with the respondent's argument that, absent any evidence that had the appellant received the amount of the award fourteen and a half months earlier, it would have been invested at a certain rate of return, the appellant had failed to establish a quantified claim for damages. For this reason alone – and apart from all the other reasons that appear from the judgment of Bosielo JA – I therefore believe the appeal should fail.

F D J BRAND
JUDGE OF APPEAL

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