**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**
Case No: 37/2016

In the matter between:

| | |
|---|---|
| **CHRISTIAAN JOHANNES BASSON** | **FIRST APPELLANT** |
| **PAUL DREYER** | **SECOND APPELLANT** |
| **PLOT 31 VAALBANK CC** | **THIRD APPELLANT** |

**and**

| | |
|---|---|
| **TYRONE PAUL HANNA** | **RESPONDENT** |

**Neutral Citation:** *Basson v Hanna* (37/2016) [2016] ZASCA 198 (6 December 2016)

**Coram:** Shongwe, Willis, Zondi, Dambuza and Mathopo JJA

**Heard:** 18 November 2016

**Delivered:** 6 December 2016

**Summary:** Contract: parties' failure to agree on interest rate in a contract does not render the contract invalid: claim for damages in lieu of specific performance where subject matter of the contract has been alienated, is competent in law.

---

**ORDER**

---

**On appeal from** Gauteng Local Division of the High Court, Johannesburg (P G Cilliers AJ sitting as court of first instance):

1 The appeal is dismissed with costs.

2 Paragraphs 1 and 2 of the court below's order are set aside and replaced with the following:

'1 The first defendant is ordered to pay to the plaintiff the amount of R1 212 994.80.

2 The first defendant is ordered to pay to the plaintiff interest on the amount of R1 212 994.80 at the rate of 9,5 per cent per annum, calculated from 14 September 2014 to date of final payment.'

---

**JUDGMENT**

---

**Zondi JA (Shongwe, Willis, Dambuza and Mathopo JJA concurring):**

[1] This is an appeal against the judgment of the Gauteng Local Division of the High Court, Johannesburg (P G Cilliers AJ) awarding damages in lieu of specific performance in favour of the respondent and ordering the first appellant to pay the respondent the amount of R1 762 626.46 and interest on that amount at the rate of 15,5 per cent per annum from 20 May 2008 to date of final payment. The appeal against the judgment, which has since been reported *sub nom Hanna v Basson & others* [2016] 1 All SA 201 (GJ), is with the leave of that court.

[2] One of the issues that were before the court below and which still remains an issue in this Court, is whether the parties' failure to reach consensus on the applicable rate of interest, rendered the agreement null and void. The second issue that was raised by the court a quo at the hearing of the application for leave to appeal, was whether a claim for damages as a

surrogate for specific performance is competent in law. This point was raised because of the remarks by Smallberger ADCJ in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 186B-H regarding the correctness of the majority decision in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) holding that a claim for damages in lieu of specific performance is not competent in law.

[3] At the hearing the parties informed the court, firstly, that the amount of R1 762 626.46 granted by the court below as damages is incorrect. It is not what the respondent had sought; secondly, that the court below in calculating the amount of R1 762 626.46 ignored the calculations of the appellants' actuary, on which both parties had relied at the trial; and thirdly, that the mora interest rate determined by the court below is incorrect. The mora interest should have been granted at a rate of 9,5 per cent from the date of service of the amended particulars of claim not summons.

[4] Flowing from this, the appellants informed the court that in the alternative to dismissal of the respondent's claim or absolution from the instance, it would request that it be ordered to pay R1 212 994.80, together with interest on that amount at the rate of 9,5 per cent per annum from 14 September 2014 to date of payment and costs. On the other hand the respondent indicated that it would request that the judgment be maintained except that the capital amount granted by the court below should be replaced with the amount of R1 212 994.80, together with interest at the rate of 9,5 per cent per annum calculated from 14 September 2014 to date of payment.

[5] The respondent, Mr Tyrone Paul Hanna, instituted an action against the appellants seeking an order compelling the first appellant (Basson) to transfer one third of the member's interest in the third appellant (the CC) to the respondent against payment of the outstanding balance, alternatively payment of the sum of R2 650 824.72 as damages in lieu of specific performance. Mr Paul Dreyer (Dreyer), the second appellant was the second defendant in the court below and he plays no role in this appeal.

[6] The basis of the respondent's claim is that he, Basson and Dreyer concluded an agreement during 2002 in terms of which Basson agreed to sell to each of them one third of his member's interest in the CC for R624 953 payable in monthly instalments of R8 229.32 over a period of 20 years. According to the respondent the agreed rate of interest was prime plus 1 per cent per annum, fluctuating. In addition thereto the respondent agreed to pay a third of the CC's monthly maintenance and operating costs. Basson conducted his banking activities with ABSA Bank, which at the time of the conclusion of the agreement had a prevailing prime interest rate of 17 per cent.

[7] Basson and the CC defended the action and denied that the respondent was entitled to an order for specific performance or damages as a surrogate for performance. They contended among others, that the respondent, by failing to pay all amounts due by him in terms of the agreement timeously and in full, repudiated the agreement as a result of which Basson cancelled the agreement; alternatively that no agreement came into being as there was no consensus between the parties regarding the rate of interest which would apply in respect of the agreement. Basson and the CC though admitting that the interest rate was prime plus 1 per cent denied that it was a variable one. They contended that the rate was fixed.

**Factual background**

[8] It is common cause that during 2002 the respondent, Basson and Dreyer concluded an oral agreement relating to the development of the Farm Vaalbank IR, Farm No 476, Unit 31, situated on the banks of the Vaal River (the property) and a sale by Basson to the respondent and Dreyer of one third of his member's interest in the CC. At the time of the agreement Basson was the sole member of the CC which owned the property concerned. Basson undertook to develop the property by building three separate houses each with a cottage on the property. He financed the development.

[9] Building operations on the property commenced in August 2002 and were finalised at the end of November 2002. The parties took occupation of

each of the three residential units on the property on 1 December 2002. During January 2003 Basson issued to the respondent a tax invoice dated 11 December 2002 confirming the purchase price of R624 953 (the capital amount) for the sale of a 33 and a third per cent share of the member's interest in the CC, payable in monthly instalments of R8229.32. In addition to paying the monthly instalments the respondent also had to pay a third of the CC's monthly operating expenses and maintenance costs. The respondent's evidence was that in compliance with his contractual obligations, he regularly paid the monthly instalment of R8 229.32, together with his portion of the CC's expenses. That went on until 2007 when the relationship between the respondent, on the one hand, and Basson and Dreyer on the other, turned sour.

[10] It is important to mention that during the trial Basson alienated a third of his member's interest in the CC, the subject matter of the contract, to his brothers. Hence the respondent amended his claim so as to introduce an alternative claim for damages as a surrogate for specific performance.

**Agreement on the interest rate**

[11] The terms of the agreement regarding the interest rate are in dispute. Basson's evidence was that the fixed interest rate was agreed upon. Basson's words were:

'Die rentekoers kon enige kant toe gegaan het. Dit was 'n vaste betaling, daar was nie, in my tyd was daar nooit gepraat oor 'n wisselende rentekoers nie.

Wat was die, kan u onthou, Mnr Basson, wat gebeur het met die rentekoerse op daardie stadium? Was die rentekoers oppad op, of wat die rentekoers oppad af? --- Jy weet ek is nie 'n bankier nie, so ek hou nie rentekoerse dop nie, of ek het nie… Nee, ek het nie geweet wat die rentekoerse doen, of dit op of af gaan nie.'

[12] Dreyer's evidence was that the purchase price for his one third of the member's interest in the CC, similar to that of the respondent, was R624 995 from which he deducted R130 000 which he spent on the property. His evidence was that the interest rate was 18 per cent per annum and was fixed. He stated that he was aware that in 2003 the respondent had expressed a

concern to him that he was paying the interest at a fixed rate when the trend was that the interest rates were on the decline. Dreyer explained to the respondent that there was nothing he could do about it, because this was what they had agreed to pay.

[13] The court below found that although the parties agreed that the interest rate would be prime plus 1 per cent they did not reach an agreement on whether the interest rate would be fixed or variable. It found it unnecessary to make a definite finding on the disputed issue. This was so, the court below reasoned, because it was not necessary to make a finding on whether the respondent was in arrears with his repayments when Basson purported to cancel the agreement on 20 February 2008 or 27 February 2008. Basson had already taken the position before 7 June 2007 that the agreement was invalid and unenforceable and persisted in that position until 25 February 2009.

[14] The appellants attack this finding. They contend that its implication is that the parties did not have consensus on a material term of the agreement, that no agreement came into being between the parties and that the respondent could therefore not claim specific performance or damages in lieu of specific performance on a non-existing agreement. The appellants maintain that the onus was on the respondent to prove the terms of the agreement, which he failed to do.

[15] Without a finding, contend the appellants, on what the parties agreed upon as far as the interest rate is concerned, it was impossible to determine the quantum, which was crucial as the determination of the balance outstanding was dependent on the nature of the interest; that is to say whether fixed or fluctuating, which is an element which the respondent had to allege and prove in order to succeed in his claim. The appellants accordingly submit that absolution should have been granted.

[16] I disagree. In general, the parties' failure to agree on the rate at which the amount payable under the agreement is to be calculated, does not render the agreement invalid. If no rate has been agreed on, expressly or impliedly,

and the rate is not governed by any other law, the rate of interest is that prescribed from time to time by notice in the gazette by the relevant Minister in terms of the Prescribed Rate of Interest Act 55 of 1975.

**Repudiation**

[17] In the particulars of claim the respondent alleged that Basson repudiated the agreement and that, at his election he was entitled to claim performance *in forma specifica* entailing an order compelling Basson to transfer a third of the member's interest in the CC to him, against payment of the outstanding amount to Basson alternatively damages as a surrogate for performance. The respondent led evidence, both oral and documentary to demonstrate that Basson had repudiated the agreement.

[18] The court below accepted the respondent's version that Basson repudiated the agreement on or before 7 June 2007 and that he did not repent his repudiation of the agreement before the attempted cancellation of the agreement on 27 February 2008. I agree with the court below's conclusion and reasoning underlying it. There is no appeal against this finding and it must therefore stand.

[19] Objectively viewed, Basson's actions after 7 June 2007 constituted conduct from which the only reasonable inference that could be drawn was that he did not regard himself bound by the agreement and that he was not prepared to perform its terms.[1] This is apparent from the correspondence which exchanged between the parties. In a letter dated 6 August 2007 Basson's attorneys informed the respondent's attorneys that there was no valid agreement between the parties. In a further letter dated 20 February 2008 the respondent's attorneys were informed by Basson's attorneys that the agreement was null and void, because of its non-compliance with the Property Time-Sharing Act and the Share Blocks Control Act.

---

[1] *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-F. This dictum was referred to with approval by this Court in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 16.

[20] The respondent himself viewed Basson's conduct as a repudiation of the agreement. Hence the respondent issued summons against Basson originally seeking an order for specific performance.

[21] Subsequent to the repudiation of the agreement by Basson in April 2007, the respondent elected to hold Basson to the terms of the agreement. The respondent repeatedly asked Basson to furnish him with the total outstanding amount so as to settle his indebtedness to Basson. When Basson threatened to cancel the agreement because the respondent was allegedly in arrears with his monthly instalments and contributions towards the expenses of the CC, the respondent made payment of the amount that was alleged to be owing. The court below's conclusion that Basson repudiated the agreement, was therefore, correct.

**Specific performance as remedy for breach**

[22] Christie's *Law of Contract in South Africa* 7 ed[2] at 616 states:

'The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated.' (Footnote omitted.)

[23] There are many cases in which it was held that if one party to the agreement repudiates the agreement, the other party at his election, may claim specific performance of the agreement or damages in lieu of specific performance and that his claim will in general be granted, subject to the court's discretion.[3]

---

[2] G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 616.

[3] *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Woods v Walters* 1921 AD 303; *Shill v Milner* 1937 AD 101; *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A); *Rens v Coltman* 1996 (1) SA 452 (A).

[24] *Farmers' Co-operative Society*[4] concerned a claim for the delivery of certain movables, alternatively for damages. The question was whether specific performance should be decreed.[5] Innes JA answered that question as follows at 350:

'*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE, C.J., in *Thompson vs. Pullinger* (1 O. R., at p. 301), "the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt." It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. . .'

[25] In *Woods*[6] the court was concerned with the action to enforce the execution and performance of a contract for the lease of certain land with a furnished house and other buildings thereon. The question related to the basis of assessment of damages when an alternative prayer for damages is granted. Innes CJ stated at 310:

'It is a common practice, in South Africa to add to a prayer for specific performance, an alternative prayer for damages. That course has been followed in the present case. Damages so claimed must, of course, be proved and ascertained in the ordinary way. The authorities do not warrant a punitive assessment.'

[26] *Victoria Falls & Transvaal Power Co Ltd*[7] also concerned the question of an assessment of compensation. Innes CJ stated at 22:

'The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. The reinstatement cannot invariably be complete, for it would be inequitable and unfair to make the defaulter liable for special consequences which could not have been in his

---

[4] Ibid.
[5] At 349.
[6] Supra fn 3.
[7] Supra fn 3.

contemplation when he entered into the contract. The laws of Holland and England are in substantial agreement on this point. Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom (see *Voet* 45, 1, 9, Pothier, *Oblig* sec. 160; *Hadly v Baxendale*, 9 Exch. p. 341; *Elmslie v African Merchants Ltd*., 1908, E.D.C., p. 8-9, etc.).'

[27] From the above analysis it seems that the principle, that a party who is, prima facie entitled to specific performance may claim in the alternative damages as surrogate for specific performance, has been consistently followed by the courts until the majority in *ISEP Structural Engineering & Plating Ltd v Inland Exploration* brought doubt as to the correct position.

**Competency of respondent's claim**

[28] It was submitted by the appellants that the respondent's claim for damages as a surrogate for specific performance should fail because that claim is not competent in law. *ISEP* was cited as authority in support of that proposition. In response the respondent submitted that his claim for damages in lieu of specific performance is competent in law and that the principle stated in *ISEP* should not be followed as it is against weighty authority and besides criticism, its correctness was doubted by this Court in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* referred to above.

[29] In *ISEP Structural Engineering & Plating (Pty) Ltd* the city council sold certain property 'voetstoots, absolutely as it stands' to the respondent, Inland Exploration Company. The purchase price was agreed upon after some negotiations which involved the refusal by the seller to warrant that the property would be reinstated to its original condition. The lessee of the property, *ISEP*, had constructed certain concrete ramps on the property. In terms of a lease between the seller and *ISEP*, it was obliged, on termination of the lease to reinstate the premises to their original condition. The lease terminated before the sale to the respondent. Subsequent to the sale the seller ceded to the respondent its right against *ISEP* to have the property restored. The respondent instituted an action against *ISEP* claiming the sum

of R15 000 alleged to be the costs of restoring the leased premises to the same condition in which it was received by *ISEP* in terms of the lease between the city council and *ISEP*. The respondent's claim was a claim for damages in lieu of specific performance.

[30] The three main judgments that were delivered were those of Jansen JA, Van Winsen AJA and Hoexter AJA. Kotze JA concurred in the judgment of Van Winsen AJA and Viljoen JA concurred in the judgment of Hoexter AJA. Hoexter AJA agreed with Jansen JA's conclusion that our law does not recognise a claim for the objective value of the performance as an alternative remedy to specific performance.

[31] Jansen JA stated at 6G-H:

'That a plaintiff may claim either specific performance or damages for the breach (in the sense of *id quod interest*, ascertained in the ordinary way) is, on the authorities cited, beyond question. And it would seem that fundamentally these are the only alternatives recognized in our practice (leaving aside the possibility of a combination of the two), particularly in respect of an obligation *ad factum praestandum*. Certainly no cogent authority has been cited to us to show that there is any other. However, it has been suggested that there is the possibility of a plaintiff claiming "damages" in the sense of the objective value of the performance in lieu of the performance itself. This would not be damages in the ordinary sense at all, but amount to specific performance in another form.'

[32] He went on to say at 7E:

'A case which seems more in point is *National Butchery Co v African Merchants Ltd* 1907 EDC 57 where damages were granted "in lieu of specific performance", but this seems but slender authority for this Court, in effect, to recognize a remedy akin to specific performance in the shape of a claim for the objective value of the performance.

It may be pointed out, if there were justification for recognizing such a remedy, it would entail the introduction of a number of ancillary rules. Has the plaintiff an election of claiming either performance or its objective value? If he claims the latter, may the debtor tender actual performance? (Cf D Joubert "Skadevergoeding as Surrogaat van Prestasie" 1975 *De Jure* 32; "Some Alternative Remedies in Contract"

1973 *SALJ* 37 at 44 - 47.) If specific performance were to be refused because it would operate "unreasonably hardly" on the defendant, would the plaintiff still be entitled to the objective value of the performance itself? It would seem not - otherwise the very hardship leading to refusal of the specific performance could still be inflicted upon the debtor by granting the objective value of the performance, as would be illustrated by the case of an obligation to reinstate in respect of a building destined for immediate demolition. In a case such as the present, the award of the objective value (reasonable costs of reinstatement) would be as unreasonable as an order for specific performance.'

[33] There has been severe criticism of the majority decision in *ISEP*[8] and Smallberger ADCJ in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) para 74 doubted its correctness and said that a reconsideration of the majority decision is called for.

[34] In *Mostert NO,* Mostert, a curator of a certain pension fund, instituted action against Old Mutual for damages. Mostert's claim arose from two payments made by Old Mutual to a third party. The payments were made pursuant to an insurance policy in terms of which Old Mutual held the pension fund's investment. Mostert's main claim was based on an alleged breach by Old Mutual, when making the payments, of its contractual obligations to the pension fund under the policy.

[35] In his particulars of claim Mostert had alleged that the pension fund had suffered damages as a result of such breach. Mostert did not seek to claim damages as a surrogate for performance. He disavowed reliance on that claim.

[36] Smallberger ADCJ remarked that Mostert's claim for damages as a surrogate for performance was competent unless the majority decision in *ISEP* precluded that claim, which he doubted it did. He stated, however at para 75 that:

---

[8] See for instance Oelofse (1982) *TSAR* at 63 et seq and those that are cited in para 74 of *Mostert NO v Old Mutual*.

'From a practical point of view, it would have made no difference in the present matter had Mostert claimed damages as a surrogate for performance, and the claim had been recognised on the basis that *Isep's* case was wrongly decided . . . The approach to the quantification of the fund's loss would therefore have basically been the same had the claim been one for damages as a surrogate for performance rather than damages for breach.'

[37] The question is whether this is an appropriate matter in which to reconsider the correctness of the majority decision in *ISEP*. In my view, this is not. *ISEP* is distinguishable from the facts of the present matter. There, the court dealt with a lease and the case concerned the obligation of reinstatement under a lease. What was said there is no more than a ratio in regard to the limited class of contracts of reinstatement under a lease and does not constitute a ratio of general application in the law of contract.

[38] Furthermore, the practical difficulties expressed by Jansen JA in *ISEP* at 7F of the judgment as justification for not recognising a claim for damages in lieu of specific performance, do not arise in the present matter. For instance, Jansen JA pointed out that recognising such a remedy would entail the introduction of a number of ancillary rules to deal with the possibility of a contest between the specific performance and the economic value for specific performance. There is no such contest in this matter and the award of the objective value of performance would not cause Basson any hardship. The respondent does not have to choose between the two remedies. He is restricted to a claim for the economic value for specific performance following alienation by Basson of the property forming the subject matter of the contract. Thus specific performance has become impossible. Where specific performance is not possible, the parties have no choice.[9]

[39] To the extent that what was said by Jansen JA in *ISEP* at 6G-H and 7E may be construed as constituting the ratio of general application in the law of contract, I have a difficulty with it. Justice cries out aloud for damages in lieu of specific performance in this particular case, precisely because specific

[9] 'Some Alternative Remedies in Contract' 1973 SALJ 37 at 46.

performance by the appellants is not possible. This is the case in which 'justice between the parties can be fully and conveniently done by an award of damages'. (*Farmers' Co-operative Society* at 350)

[40] The respondent is ready to carry out his own obligation under the agreement and has a right to demand either literal performance, or monetary value of the performance, from Basson. The respondent's claim for damages, to the extent that he seeks the monetary value of the performance, is akin to a claim for the replacement value of the lost property.

[41] A creditor's right to demand performance from the debtor cannot be at the debtor's mercy. The exercise of that right cannot depend on what the debtor chooses to do with the asset to which the creditor's right relates. To say that a claim for damages as a surrogate for specific performance is not recognised in law, would deprive the creditor of the right, where it has elected to enforce the contract, to be put as much as possible, in the position that it would have been in if the performance was made *in forma specifica*.

[42] The respondent is entitled to the relief that he seeks. He has established that he concluded a valid agreement with Basson; that Basson repudiated the agreement; that he was willing to carry out his obligation under the agreement; and that he had elected to hold Basson to the terms of the agreement. Because of Basson's conduct, which rendered specific performance impossible the respondent amended his particulars of claim so as to introduce a claim for damages in lieu of specific performance. The parties have agreed on the quantum and the mora interest rate to be awarded should the appeal fail. This means that the judgment of the court below should be corrected to the extent proposed by the parties. As regards the question of costs, there is no reason to deprive the respondent of his costs.

**The Order**

[43] In the result the following order is made:

1 The appeal is dismissed with costs.

2 Paragraphs 1 and 2 of the court below's order are set aside and replaced with the following:

'1 The first defendant is ordered to pay to the plaintiff the amount of R1 212 994.80.

2 The first defendant is ordered to pay to the plaintiff interest on the amount of R1 212 994.80 at the rate of 9,5 per cent per annum, calculated from 14 September 2014 to date of final payment.'

_____

**D H Zondi**
**Judge of Appeal**

**Willis JA (partially dissenting):**

[44] I agree with the order proposed by Zondi JA. I have, however, two qualifications to his reasoning, which I think need to be mentioned. The first is that, to the extent that *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) does not allow any exceptions to the principle that, in the law of contract, there are only two alternative remedies for an aggrieved party: specific performance or damages for breach, this case illustrates that such a principle cannot be sustained – at least not without qualification. There has been clear authority, in this court previously, that a claim for damages in lieu of specific performance could, in certain circumstances, succeed. See, for example *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 at 350 and *Victoria Falls and Transvaal Power Company Limited v Consolidated Langlaagte Mines Limited* 1915 AD 1 at 22. *Mostert No v Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA), to which Zondi JA has referred, also seems to be consonant with this line of reasoning on the matter.

[45] My second qualification relates to the question of the rate of interest. In my opinion, the probabilities in this case make it much more likely that a rate of interest had been agreed upon than not. Furthermore, it is more probable, in the circumstances, that the interest rate would have been calculated by

reference to the prime rate than the appellants' contention is that there was a flat rate (18%), especially as this was a long term venture. The question of the rate of interest to be applied in this case is largely irrelevant because, if I understood counsel for both sides correctly during the course of argument, they agreed that, if damages were to be awarded, the most practical and efficacious way of dealing with the issue would be to apply the prescribed rate of interest, as gazetted by the Minister in terms of the Prescribed Rate of Interest Act 55 of 1975. For this reason, I have no difficulty with Zondi JA's proposed order.

_____

**NP Willis**
**Judge of Appeal**

APPEARANCES:

| | |
|---|---|
| For appellants: | D T v R Du Plessis SC<br>Instructed by:<br>Olivier & Malan Attorneys, Randburg<br>c/o Phatsoane Henney Inc, Bloemfontein |
| For respondent: | G M Young<br>Instructed by:<br>Goërtz Attorneys Inc,<br>c/o DM Bakker Attorneys,<br>c/o Craig Baillie Attorneys, Johannesburg<br>c/o Symington and de Kok, Bloemfontein |