THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 278/2022

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL:

POLICE, ROADS AND TRANSPORT,

FREE STATE PROVINCIAL GOVERNMENT **APPELLANT**

and

BOVICON CONSULTING ENGINEERS CC **FIRST RESPONDENT**

P ROODT NO

(SHERIFF BLOEMFONTEIN EAST) **SECOND RESPONDENT**

Neutral citation: *MEC: Police, Roads and Transport Free State Provincial Government v Bovicon Consulting Engineers CC* and *Another* (278/2022) [2023] ZASCA 99 (14 June 2023)

Coram: PETSE AP and GORVEN and MABINDLA-BOQWANA JJA and KATHREE-SETILOANE and MASIPA AJJA

Heard: 12 May 2023

Delivered: 14 June 2023

Summary: *In duplum* rule – post-judgment interest not disallowed by *in duplum* rule after arrear interest ceased to accrue when unpaid arrear interest equalled the capital debt whilst litigation still pending.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Daniso J**,** sitting as court of first instance):

1 Paragraph 5 of the high court's order is set aside and substituted with the following:

'5. The applicant is ordered to pay interest on the amount of R2 343 549.66, calculated at the prescribed interest rate prevailing on 6 December 2019 from that date until the date of final payment, less the amount ordered in paragraph 4 above.'

2 Save as aforesaid, the appeal is dismissed with costs.

JUDGMENT

Petse AP and Masipa AJA (Gorven JA, Mabindla-Boqwana JA and Kathree-Setloane AJA concurring):

[1] In *Linton v Corser*[1] Centlivres CJ aptly observed that 'To-day interest is the life-blood of finance, and there is no reason to distinguish between interest *ex contractu* and interest *ex mora*'.[2] This statement is as valid at the present time as it was more than seven decades ago. This appeal is essentially about *mora* interest. In particular, it concerns the issue of whether the operation of the *in duplum* rule disentitled the first respondent, Bovicon Consulting Engineers CC (Bovicon), to post- judgment interest on the amount owed to Bovicon. The Free State Division of the High Court, Bloemfontein, per Daniso J, (the high court) granted an order in Bovicon's favour against the Member of the Executive Council: Police, Roads and Transport - Free State Provincial Government (the MEC) for payment of post-judgment interest accruing to the amount owed to Bovicon by the MEC. Thus, in effect, holding that Bovicon was entitled to *mora* interest on the judgment amount for as long as it remained unpaid.

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[1] *Linton v Corser* 1952 (3) SA 685 (A).
[2] At 695G.

[2] The facts of this case are simple. On 19 August 2014, Bovicon issued summons against the MEC for payment of the amount of R1 171 774.83 for services rendered by it to the Department of Police Roads and Transport (the Department) during the period from May 2012 to March 2013. In addition, Bovicon sought interest on the amount claimed calculated at the rate of 15.5% from the due date of each invoice to the date of final payment. The last invoice became due and payable on 31 March 2013. On 12 September 2019, the amount of accrued interest equalled the capital debt. It was thus capped by the operation of the *in duplum* rule which increased the total amount owing, as at 12 September 2019, to R2 343 549.66.

[3] The matter served before Chesiwe J who, on 5 December 2019, ordered the MEC to pay to Bovicon the amount of R1 171 774.83 together with interest on the said amount 'from the due date of each invoice to date of final payment.' On 14 July 2020, seven months after the judgment, the Department paid to Bovicon an amount of R2 343 549.66. Bovicon contended that it was entitled to post-judgment interest that had accrued from 6 December 2019 to 14 July 2020. However, for its part the Department contended otherwise.

[4] On 14 August 2020, Bovicon issued a warrant of execution, against the Department and, pursuant thereto, the second respondent (the sheriff) attached some of the Department's movable property. On 27 December 2020 the MEC brought an urgent application for an order setting aside the writ and the subsequent attachment. The basis of the application was that Bovicon had not complied with s 3(1) of the State Liability Act 20 of 1957[3] and that the judgment debt comprising the capital amount and interest was, in any event, fully satisfied on 14 July 2020, including further interest that had accrued between the date of judgment and the date of final payment.

[5] Bovicon resisted the application and also filed a counter-application. In the counter-application, Bovicon claimed post-judgment interest of R220 332.09, calculated at the rate of 15.5% from the date of judgment, ie 5 December 2019 to the

[3] Section 3(1) of the State Liability Act reads:
'Subject to subsections (4) to (8), no execution, attachment or like process for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in any action or legal proceedings against the State or against any property of the State, but the amount, if any, which may be required to satisfy any final court order given or made against the nominal defendant or respondent in any such action or proceedings must be paid as contemplated in this section.'

date of payment, namely 14 July 2020. It also claimed interest on the said post-judgment interest calculated at 15.5% from 14 July 2020 to date of payment.

[6] In the event, the high court set aside the writ and the resultant attachment as unlawful and invalid. Bovicon was ordered to pay the costs of the main application on the scale as between attorney and client. With respect to the counter-application, the high court found in Bovicon's favour and ordered the MEC to pay Bovicon the amount of R220 332.09 – representing interest supposedly accrued on the judgment amount – together with interest on that amount, calculated at the rate of 15.5% from 14 July 2020 to the date of final payment. As in the main application, the high court ordered the MEC to pay the costs of the counter-application on the scale as between attorney and client. The present appeal by the MEC is with the leave of the high court.

[7] In pursuit of its appeal, the MEC relied on numerous grounds. These were, however, narrowed down to three points during the argument. First, it was argued that, in effecting the payment of R2 343 549.66 on 14 July 2020, the MEC had fully satisfied the judgment debt. Secondly, it was contended that even if it were found that the judgment debt was not settled in full, the rate of interest applied by Bovicon was in excess of the rate of interest prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975 (Prescribed Rate of Interest Act). Lastly, the MEC contested the decision of the high court awarding Bovicon costs on the scale as between attorney and client.

[8] As regards the first issue, counsel for the MEC argued that once accrued arrear interest became equal to the amount owing to a creditor, in this instance Bovicon, interest stopped running. Therefore, so the argument went, as the interest amount became equal to the initial debt, Bovicon was not entitled to further interest on the judgment debt beyond the date on which judgment was granted in its favour. Counsel's argument is plainly unsustainable.

[9] In *Paulsen and Another v Slip Knot Investment 777 (Pty Ltd)*,[4] the Constitutional Court considered the issue of whether interest runs anew, after it has ceased running as a result of the *in duplum* rule, from the date of judgment until the judgment debt has

[4] *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

been settled. Madlanga J, writing the main judgment, had this to say in relation to this aspect:

'It is settled law that the *in duplum* rule permits interest to run anew from the date that the judgment debt is due and payable. The usual practice for appellate courts, including this Court, is to retain the date on which the court of first instance handed down judgment as the date on which judgment debts are due and payable. In oral argument, counsel for both the Paulsen's and Slip Knot accepted that in the order, for the purposes of calculating post-judgment interest, the date on which the High Court entered judgment should be replaced with the date on which this court hands down judgment.'[5] (Citations omitted.)

[10] This reasoning was embraced and amplified by the majority as follows:

'I also embrace the manner in which the main judgment resolved the debate over post-judgment interest. For good reason it concludes that the *in duplum* rule permits post-judgment interest to run afresh at the rate set by the loan agreement from the date of the judgment to the date of payment. I support its order that the Paulsens must pay interest on the sum of the capital and the capped interest, being R24 million, at the contract rate from the date of judgment to the date of payment, limited to R24 million.[6]

Unsurprisingly, counsel was constrained to concede that his submission to the effect that Bovicon was not entitled to interest on the judgment debt was devoid of merit.

[11] Following counsel's concession, only two issues remain to be determined, namely the appropriate prescribed rate of interest and the scale of costs. As to the applicable rate of interest, Bovicon's counsel fairly conceded that the high court erred in awarding interest at the rate of 15.5% in respect of the judgment amount. Relying on *Griffiths v Janse van Rensburg and Another NNO*,[7] counsel accepted that the source for the post-judgment interest is the judgment itself. Accordingly, the appropriate rate of interest would be that prevailing at the time when judgment was granted in the high court.

[12] Insofar as the punitive costs awarded by the high court are concerned, the high court did not provide reasons as to what drove it to award costs on a punitive scale. This must be deprecated. This Court has in the past lamented the failure by judicial officers to give reasons for their decision when adjudicating cases. As *Flannery v*

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[5] Ibid para 96.
[6] Ibid para 106.
[7] *Griffiths v Janse van Rensburg NO* [2015] ZASCA 158; [2016] 1 All SA 643; 2016 (3) SA 389 (SCA) paras 35 and 37.

Helifax Estate Agencies Ltd[8] tells us, 'a requirement to give reasons concentrates the mind, [and] if it is fulfilled, the resulting decision is much more likely to be soundly based – than if it is not'. Nevertheless, counsel for the MEC readily accepted that it is trite that the award of costs is at the discretion of the court. And that absent any material misdirection, an appellate court will not interfere with the exercise of such discretion. In this case, counsel could not point to any misdirection. Thus, subject to the correction of the order of the high court as alluded to in paragraph 11 above, the appeal must fail.

[13] There is one final issue that calls for adverse comment. It is this: the high court, sitting as a court of first instance, granted leave to appeal to this Court. Section 17(6) explicitly provides that if leave is granted under subsection 2*(a)* or *(b)*[9] to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge granting leave must direct that the appeal be heard by a full court of that Division. This is the default position. It therefore goes without saying that leave to appeal to this Court against a decision of a Division sitting as a court of first instance consisting of a single judge may be granted to this Court only where: (a) the decision to be appealed involves a question of law of importance or in respect of which a decision of this Court is required to resolve differences of opinion; or (b) the administration of justice, either generally or in a particular case, requires consideration by this Court.

[14] In the light of the aforegoing, it is difficult to discern why in this instance it was thought that this case deserves the attention of this Court. This Court has in the past sounded a word of caution to Judges in the courts of first instance, emphasising that it is the duty of the Judge in the court of first instance to consider what court is the more appropriate in the circumstance of each case. Where the issue is one of fact or raises no complex legal principle, leave should, as a general rule, be granted to the

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[8] *Flannery v Helifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381H. See also: *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H-28A; *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 12.

[9] Section 17(2)*(a)* and *(b)* reads:
'*(a)* Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.
(b) If leave to appeal in terms of paragraph *(a)* is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.

Full Court. Indeed this is what the Superior Courts Act contemplates.[10] Only in circumstances where the issue raised deserves the attention of this Court because, for example, of complexity, a general question of law of importance, discordant judgments or novelty should leave be granted to this Court.

[15] In short, this means that a single Judge who would have had intimate knowledge of the issues involved in a particular case before whom those issues were debated would therefore be able to screen the case, so that matters of pure fact or fact and law – where the law is not controversial – would be referred to the Full Court. This would in turn mean that the valuable time of this Court would be profitably devoted to complex issues of law.

[16] This Court has, in the past, consistently deprecated the inappropriate granting of leave to appeal to it. This is because doing so needlessly increases the costs of litigation and, importantly, results in cases involving greater difficulty and truly deserving of its attention having to compete for a place on this Court's roll with cases which are not.[11]

[17] As a general rule, appellate courts are extremely loathe to criticise Judges in the courts of first instance in the interests of judicial comity. However, given that many admonitions in the past have gone unheeded, a time will soon come when this Court might well consider adopting a robust stance and invoke the powers accorded to it by S17(6)*(b)*[12] of the Superior Courts Act.

[18] In the result, the following order is made:

1 Paragraph 5 of the high court's order is set aside and substituted with the following:

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[10] See s 17(6) of the Superior Courts Act 10 of 2013.

[11] See, for example, *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2003 (5) SA 354 (SCA) para 6 of the concurring judgment of Marais JA; *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) para 28; S v *Monyane and Others* 2008 (1) SACR 543 (SCA) para 28; *S v Myaka* 1993 (2) SACR 660 (A) at 661i-662b.

[12] Section 17(6)*(b)* provides:
'Any direction by the court of a Division in terms of paragraph *(a)*, may be set aside by the Supreme Court of Appeal of its own accord,...,and may be replaced by another direction in terms of paragraph *(a)*.'

‘5. The applicant is ordered to pay interest on the amount of R2 343 549.66, calculated at the prescribed interest rate prevailing on 6 December 2019 from that date until the date of final payment, less the amount ordered in paragraph 4 above.’

2 Save as aforesaid, the appeal is dismissed with costs.

X M PETSE
ACTING PRESIDENT
SUPREME COURT OF APPEAL

M B S MASIPA
ACTING JUDGE OF APPEAL

APPEARANCES

For appellant:	C Georgiades SC
Instructed by:	Lebea & Associates, Johannesburg
	Lovius Block Inc, Bloemfontein
For first respondent:	S Grobler SC
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