Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.4542/2014

Before: The Hon. Ms Acting Justice Mangcu-Lockwood
Date of hearing: 23 October 2019
Date of judgment: 6 November 2019

In the matter between:

WENSLEY OVERSEAS LIMITED Applicant(s)

and

MAYKENT (PTY) LTD + 2 Others Respondent(s)

JUDGMENT

Mangcu-Lockwood AJ,

1. This is an application for an order declaring that the method of computing interest in respect of a settlement agreement between the parties be determined in accordance with the respondents' (hereafter referred to as 'Maykent') method, which is contained in the papers as annexure "BA5"; and that a writ of execution issued by this Court on 22 January 2018 (the writ) be set aside and the goods attached in terms thereof be released from judicial attachment. Although Maykent initially also sought an order that the

writ be stayed pending the outcome of this application, the parties have reached an agreement to that effect.

2. The background facts are common cause. In April 2014, the parties settled a court application by concluding a settlement agreement (the original settlement agreement), which was made an order of court on 11 April 2014. The relevant terms of the original settlement agreement were as follows:

> "4. The first respondent [Maykent] purchases the entire shareholding of the Applicant for the purchase consideration of Twenty Eight (28) million Rand in the First Respondent upon signature of this Agreement and payable on the following terms:
>
> 4.1 Eight (8) million Rand payable on or before 1 September 2014, or the sale of Johannesburg stores belonging to First Respondent, whichever shall be first occurring (should any such stores be sold the full proceeds thereof must be utilised to pay this liability on such proceeds becoming available);
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> 4.2 Twenty (20) million Rand payable on or before 1 April 2015, or the sale of all of Cape Town stores belonging to First Respondent, whichever shall be first occurring (should any such stores be sold the full proceeds thereof must be utilised to pay this liability on such proceeds becoming available);
> ….
>
> 5 Should the Respondents fail to make the payments provided for in clause 4.1 above in full timeously, the amount provided for in clause 4.2 shall become immediately due and payable;
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> 6 There shall be no interest applicable to the deferred payments in clause 4 supra unless any payment is overdue (including by operation of clause 5 of above), in which event interest at 15.5% per annum shall be payable on any such overdue amounts.

3. It is common cause that, instead of paying the full amount of R8 million that was due on 1 September 2014 in terms of clause 4.1 of the original settlement agreement, Maykent only paid an amount of R5 million. After the

applicant (Wensley) launched court proceedings and issued a writ of execution against Maykent for the remaining balance, the parties entered into negotiations, and eventually concluded another settlement agreement in December 2014 (the first variation agreement).

4. The first variation agreement was made an order of court on 11 December 2014, and made provision for Maykent to pay Wensley as follows:

> "4.1 The amount of R3 million on or before 22 December 2014;
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> 4.2 Interest on the above amount at the rate of 9.25% calculated from 2 September 2014 to date of payment. It is recorded that the amount of interest up to 22 December 2014 is an amount of R84,388.86;
>
> 4.3 The amount of R20 million by on or about 1 April 2015, as per the original settlement agreement.
>
> 5. The parties agree that this order be made an order of Court. But for the prayers stated in paragraphs 4.1 and 4.2 above, this order does not novate the original settlement agreement as amended."

5. On 22 December 2014 Maykent paid the amount of R3 084, 388. 86 in accordance with clauses 4.1 and 4.2 of the first variation agreement.

6. Maykent failed to pay the amount of R20 million by 1 April 2015 in terms of the original first settlement agreement and the first variation agreement. As a result, on or about 8 April 2015 the parties reached yet another agreement, which was made an order of this Court on 23 April 2015 (the

second variation agreement). The second variation agreement provides as follows:

> "By Agreement clause 4.2 of the settlement agreement made an Order of court on the 11 April 2014 before the Honourable Judge President Hlophe is amended as follows:
>
> 1. New clause 4.2
>
> The outstanding amount of R20 million will be paid as follows:
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> 4.1 R2 million on 8 April 2015 [the first instalment]
> 4.2 R6 million on 30 June 2015 [the second instalment]
> 4.3 R3 million on 2 November 2015 [the third instalment]
> 4.4 R 3 million on 4 April 2016 [the fourth instalment]
> 4.5 R3 million on 1 August 2016 [the fifth instalment]
> 4.6 R3 million on 1 December 2016 [the sixth instalment].
>
> 2.
>
> 2.1 Interest on the above amount will be at the prime rate of Standard Bank as at the date of signing of this agreement or as varied from time to time commencing from 1 April 2015 to date of final payment.
>
> 2.2 Interest will be paid together with the capital amount on every instalment due.
>
> 2.3 In the event of defendants defaulting in payment of any of the instalments as amplified in clause 4 then the full balance will become due and payable immediately.
>
> 3. The applicants [Maykent] tender wasted costs occasioned by this amendment which will not be more than R5000 plus VAT to be paid on the 8 April 2015 together with the first instalment.
>
> 4. The terms and conditions herein contained constitute the entire amendment between the parties.
>
> 5. In addition, no amendment or variation of the terms hereof shall be binding upon the parties unless reduced to writing and signed by all the parties hereto."

7. Maykent paid the amount of R2 million on 8 April 2015, and the amount of R6 million on 30 June 2015, the first and second instalments due in terms of the second variation agreement. Thereafter, a series of email correspondence ensued between the parties' attorneys regarding the interest payable on the second instalment in terms of the second variation agreement. The emails were annexed as part of the court papers.

8. On 6 July 2015, Wensley's attorney requested payment of interest on the second instalment paid. In response, Maykent's attorney requested an indication from Wensley's attorney of his calculation of the interest component. It is common cause that Wensley's attorney drafted and signed the second variation agreement on behalf of Wensley. The response from Wensley's attorney, dated 8 July 2015, is important for the determination of the central issue in these proceedings, and was as follows: *"I am certain that your clients know exactly what the amount is. I have calculated as follows in terms of the agreement. Your client owes interest for 82 days calculated as follows: 22 days in April 2015 (last payment being on 8 April 2015); 31 days in May 2015; 29 days in June 2015 (your client paying on 30 June 2015). The interest rate is currently 9.25 and therefore the daily rate is: 9.25/100 x R6 000 000 divide by 365 days =R 1520.54 per day. Total due is R124 685. This amount is to be paid in terms of section 2.2. I now await your urgent reply."*

9. The email of 8 July 2015 from Wensley's attorney calculated interest from 8 April 2015 the date of payment of the first instalment, to 29 June 2015, the

day before the second instalment was paid. It did not make any mention of interest being payable for the period before the first instalment of 8 April 2015. The method of calculating interest adopted in the email of 8 July 2015 is the method on which Maykent wishes this Court to base its declaratory order.

10. Maykent duly paid the amount of R124 685 on 8 July 2015, and the payment was received without any objection on behalf Wensley. On 2 November 2015, Wensley's attorney requested payment of the third instalment. This time, he stated that he had already worked out the interest payable, and set it out as follows in his email: *"From 1 July 2015 to 1 November 2015 total days as 124. Prime interest rate is 9,5 percent. Therefore the daily rate is: 9.5/ 100 x R3 000 000/ 365 days = R 780.82 per day. For 124 days the total is R780. 82 x 124 days = R193 643.59. Total due is therefore: Capital R3 000 000; interest R193 643.59. Total R 3 193 643.59. We await confirmation of payment."*

11. Maykent's attorney responded by email on the same day, stating as follows: *"I haven't pulled the file yet but I have no reason for doubting that the amount is due, nor the number of days being 124 and interest at 9.5%. However please note that we do not arrive at the same figure on calculation. R3 000 000 x 9,5/100 = 285 per annum/365 days = R 780.82 (191 7808) the day. Up until this point we agree. However R780.821917808 x 124 days = R96,821.9178081 (i.e. R96 821.92 rounded off) or R 780.82 x 124 days = R96, 821.68 on the rounded off per day*

amount. Instead of one or the other, these two amounts appear to have been added together making up interest of 19% which I am sure you will agree what was agreed. Again unless I am mistaken." Wensley's attorney responded stating that Maykent's attorney's calculation was correct and he had made a mistake and duplicated payment.

12. Maykent paid the amount of R96, 821.68 on 17 November 2015 in accordance with the agreed method of calculating interest in respect of the third instalment. Thus, the method of calculating the interest payable in respect of the second and third instalments was the same.

13. It is common cause that the Standard Bank prime rate of interest during the relevant period fluctuated and was at 9% until 31 January 2014; 9.25% between 18 July 2014 and 24 July 2015; 9.5% from 24 July 2015 to 20 November 2015; 9.75% from 20 November 2015 to 29 January 2016; 10.25% from 29 January 2016 to 18 March 2016; 10.5% from 18 March 2016 to 21 July 2017.

14. On 7 March 2016, Wensley's attorney forwarded an email dated 22 February 2016 from his client (Saramago) querying the computation of interest amounts paid in respect of the second and third instalments, and relying on different calculations from those agreed to by the parties' attorneys. In essence, the new calculation computed interest from 8 April 2015 in respect of each instalment; provided for the fluctuation of prime rates; and concluded that there was an amount of R 1, 436 790 outstanding in respect of interest. The email was in agreement with the both parties'

attorneys' calculation in respect of the second instalment, namely R124 680, since that calculation ran interest from 8 April 2015. Furthermore, according to Saramago's email, the interest payable in respect of the R2 million paid on 8 April 2015, the first instalment, was 0%.

15. Maykent's attorney queried this new calculation in a letter dated 18 March 2016. In essence, the letter referred to previous correspondence between the attorneys set out above, as well as the past payments in terms thereof, which, according to Maykent, clearly showed that the intention of the parties was that interest would only be payable on the instalments when the date preceding had lapsed, not from 8 April 2015 every time.

16. Wensley's attorney responded on 22 March 2016, stating that he had '*not applied his mind to the interest question'*, and suggested that Maykent should pay the outstanding instalments and interests in accordance with Maykent's calculations; and any disputes remaining regarding interest would be resolved thereafter.

17. Maykent paid the fourth to sixth instalments in full on 5 April 2016, 5 August 2016 and 12 December 2016. However, they short-paid the interest amounts, even based on the computation for interest already agreed to between the parties in respect of the second and third instalments. It is therefore common cause that Maykent underpaid the interest payable. The parties disagree as to the total amount of the underpayment.

18. On 13 October 2017 Wensley's attorney advised by email that he had obtained an opinion of counsel and from an auditor and was of the view that the total amount of R2 902 005.22 was outstanding from the respondents in respect of interest. In the email, Wensley's attorney also stated that Maykent's *'entire outlook on the interest is incorrect and totally unacceptable*'; *'it is virtually impossible to concede that the interest paid is true and accurate'*; *'Our respective calculations during the period of payments by your client cannot be construed as accurate'*; *'it is also acceptable in law to demand this amount now and not after the last payment in December 2016'*. Maykent's attorney disagreed in a letter dated 18 October 2017, emphasising the apparent agreement between attorneys in the emails set out above.

19. On 22 January 2018 Wensley caused a writ of execution to be issued against Maykent in the amount of R2 902 005.22. In support of the application for the writ, the applicant relied on the affidavit of a registered chartered accountant, Guillaume Johannes Oberholster (Oberholster), who was instructed by the applicant to calculate the simple interest accruing to R20 million under the following specific circumstances: (a) From 2 September 2014 to 8 April 2015, interest started accruing on the R20 million at 15.5% per annum; (b) From 9 April 2015 onwards, interest accrued on the unpaid balance of the R20 million which was paid in the various instalments from 8 April 2015 to 12 December 2016; (c) From 9 April 2015 interest accrued not at 15.5% but at the Standard Bank's prime overdraft rates that were applicable between 31 January 2014 and 20 July

2017; (d) Deduct interest payments in the aggregate of R420 919,44, which had already been paid as follows: (i) R96 686.28 on 17 November 2015; (ii) R124 223.16 on 8 April 2016; (iii) R 100 000 on 18 August 2016; (iv) R100 000 on 19 December 2016.

20. Thus, according to Wensely, interest amounting to R 2 902 005.22 is outstanding from Maykent. On the other hand, Maykent's calculation of interest outstanding, based on the method agreed by that parties' attorneys in their email correspondence, is R 16 036.33.

Issues in dispute

21. The issues for determination are the following:

21.1 Is there outstanding interest payable by Maykent for the period 1 September 2014 to 1 or 8 April 2015? If so, what is the correct method of computing the interest?

21.2 Is there outstanding interest payable by Maykent for the period 1 April 2015 to 12 December 2016? If so, what is the correct method of computing the interest?

21.3 Did the email correspondence between the parties' attorneys constitute variation or amendment of the second variation agreement?

Approach to interpreting agreements

22. The main issues for determination involve the proper interpretation of the agreements between the parties.

23. The current approach for interpreting an agreement is to discern the intention of the parties from the words used in the context of the document as a whole, the factual matrix surrounding the conclusion of the agreement and its purpose or (where relevant) the mischief it was intended to address.[1]

24. The starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions.[2] However, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being.[3]

25. As the Supreme Court of Appeal stated in para 18 of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] (Endumeni) –

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[1] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para 39 and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016(1) SA 518 (SCA) at paras 27, 28, 30 and 35.
[2] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.
[3] *Bothma* para 13.
[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself"

26. The so called 'golden rule' no longer applies.[5] In terms of that rule a court could not have regard to the surrounding circumstances if the ordinary grammatical meaning of the words used are clear, unambiguous and do not lead to an absurdity when considered in the context of the document as a whole. In the words of Spilg J in *V v V* (A5021/12) [2016] ZAGPJHC 311 (24 November 2016), '*a court is now at liberty to depart from the words used, even when they are clear and unambiguous when considered in the context of the document as a whole if, having regard to admissible background and surrounding factors, it is evident that they would lead to a result contrary to the purpose and intention of the parties or the legislature as the case might be*."[6]

27. A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the

[5] *Bothma-Bath Transport op cit* at [11] and [12].
[6] At para 12.

contract are ambiguous or lack clarity. Words without context mean nothing.[7] Background circumstances and surrounding circumstances are admissible as part of the consideration of what is now referred to as the 'context' or 'factual matrix'.[8] There is no real distinction between background circumstances and surrounding circumstance.[9]

28. Of relevance to this case is the parties' subsequent common conduct or the manner in which both parties have carried out the contract as an indication of their common understanding of its meaning. Such evidence is admissible, even where the agreement is on its face unambiguous, if the parties by consent lead such evidence.[10] When admissible, it amounts to an objective demonstration of how the parties conducted themselves, without objection, in implementing the terms of the contract. Christie[11] points out that this is in line with the current approach to interpretation, requiring consideration of the contract's factual matrix. It also amounts to conduct against interest, conduct evidencing consensus as to the application of the agreement (much in the same way as subsequent verbal confirmation as to their mutual understanding of the terms) and objective evidence of their common understanding as to the terms of their agreement

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[7] Novartis para [28].

[8] *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another B* [2008] ZASCA 94; 2008 (6) SA 654 (SCA) para 7.

[9] Novartis at 27.

[10] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 91[15].

[11] Christie's Law of Contract in South Africa 7th ed, p254.

at the time of its conclusion.[12] The fact that evidence is admissible to prove the sense in which the parties understood the contract at the time they made it, not only when the wording was an ambiguous but even when the evidence contradicts the plain meaning of the words, is also in line with the current approach to interpretation of contracts.[13]

The parties' methods of computing interest

29. As mentioned earlier, Maykent wishes the Court to adopt the method of computing interest agreed by the parties' attorneys in their email exchanges. In this regard, counsel on behalf of Maykent emphasised the importance of the intention of the parties as exhibited in the emails between the attorneys in July and November 2015. In support of this argument, this Court was referred to *Novartis v Maphil* 2016 (1) SA 518 (SCA), where the following was stated:

> "[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. "

30. On the other hand, a summary of Wensley's computation of interest is based on the following interpretation of the agreements. When Maykent failed to make full and timeous payment of R8 million by 1 September

[12] See Harms JA (at the time) in Telcordia *Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 91[15] and Lewis JA in *Rane Investments Trust v Commissioner, South African Revenue Service* 2003 (6) SA 332 (SCA) at para 27.
[13] Christie p 254 – 255.

2014, and instead paid an amount of R5 million, it breached the terms of clause 4.1 of the original settlement agreement. This breach triggered two provisions of the original settlement agreement, namely clauses 5 and 6. In terms of clause 5, the full R20 million was immediately due and payable. In terms of clause 6, the interest amount of 15.5 % per annum was payable on the overdue amount R20 million. Thus the 15,5% interest payable on the R20 million started running from 1 September 2014 when Maykent defaulted on the R3 million payment, until 8 April 2015, when the first instalment on the R20 million was paid. Thereafter, interest on the amount of R20 million accrued, not at the rate of 15.5%, but at the Standard Bank prime rates which varied over time between 9 April 2015 and 12 December 2016. Furthermore, the purpose of the first variation agreement was to provide for the payment of the outstanding R3 million, and the interest payable in terms thereof.

31. As set out in the chronology of events above, there was a time when Wensley's attorney, the author and signatory of the second variation agreement, held a different view regarding the method of calculating the interest. He now states that, with the benefit of hindsight, the method calculation he agreed to with Maykent's attorneys by email on 8 July 2015 and 2 November 2015 was incorrect.

32. Yet another method of calculation was presented by the client, Saramago on 7 March 2016, which only applied the prime rates applicable for each period of payment; concluded that there was no interest payable before 8

April 2015; and concluded that the total interest due from Maykent was R 1 436 790. No mention was made in his email of the running interest at 15,5% from September 2014.

Interpreting the agreements for the period of 1 September 2014 to 1 April 2015

33. The amount of R3 million should have been paid by 1 September 2014 in terms of clause 4.1 of the original settlement agreement, and it was not. It was therefore overdue in terms of that agreement. This is the reason that the first variation agreement was entered into on 11 December 2014. By then, the amount of R3 million had been overdue by at least three months. Two more consequences flowed from Maykent's default in paying the R3 million by 1 September 2014. In terms of clause 5 of the original settlement agreement, the amount of R20 million became immediately due and payable. And in terms of clause 6, because both the amounts of R3m and R20m were overdue, interest started to run on both amounts at the rate of 15,5%.

34. However, the effect of the first variation clause was to deal with both of these consequences. Regarding the outstanding amount of R3 million, after providing for its payment in clause 4.1, clause 4.2 provided that Maykent was required to pay *'interest on the above amount at the rate of 9,25% calculated from 2 September 2014 to date of payment. It is recorded that the amount of interest up to 22 December 2014 is an amount of R84*

388.86'. Thus the effect of clause 4.2 was to change the rate of interest payable on the outstanding R3 million from 15,5% to 9,25% with effect from 2 September 2014. The parties effectively settled the outstanding debt of R3 million and the interest payable thereon in the first variation agreement.

35. Regarding the amount of R20 million which became 'immediately due and payable' when Maykent failed to make full and timeous payment of R8 million, the parties agreed to clause 4.3 in the first variation agreement. Clause 4.3 of the first variation agreement provides for the payment of 'the amount of *'R20 million by on or about 1 April 2015, as per the original settlement agreement'*. (own emphasis) The argument on behalf of Maykent is that this provision placed the parties back in the position they were in terms of the original settlement agreement. It rendered the R20 million no longer 'due and payable' as contemplated in clause 5 of the original settlement agreement, and provided for an agreed mechanism for Maykent to pay the amount of R20 million by 1 April 2015. The effect was that the trigger of clause 6 of the original settlement agreement was stopped. I agree with this interpretation. Had the parties intended that the R20 million would remain 'due and payable' after the first variation agreement, clause 4.3 would not have been employed by the parties. If the interpretation employed by Wensley is adopted, it would render clause 4.3 meaningless. The function of the provision was to re-set the clock in terms of the original settlement agreement. I am fortified in my view by the terms of the second variation agreement in which the parties sought to amend clause 4.2 of the original settlement agreement. In that agreement, which

was the settlement of the debt outstanding on the amount of R20 million, no mention is made of an accrued interest at the rate of 15.5% which would have been outstanding at that point from 2 September 2014. Given that the parties sought to provide for the payment on the outstanding amount of R20 million, one would have expected the parties to mention the interest at the rate of 15,5% and to provide for its payment going forward, similar to the manner in which it was done in respect of the outstanding R3 million in the first variation agreement.

36. Accordingly, I find that no interest continued to run on the amount of R20 million between 1 September 2014 and 1 April 2015 because both the amounts of R3 million and R20 million had been settled in the first variation agreement. The amount of R20 million was no longer overdue and there was therefore no interest payable thereon in terms of clause 6 of the original settlement agreement.

37. Wensley relies substantially on clause 5 of the first variation agreement, which provides that, but for the prayers stated in paragraphs 4.1 and 4.2 of the first variation agreement, i.e. the clauses providing for the payment of the R3 million and the interest payable thereon at the rate of 9,25%, the first variation agreement *'does not novate the original settlement agreement as amended'*. It was not part of Maykent's case that there has been novation. There is, in any event, no evidence of a clear and

unequivocal intention and consensus to novate the original settlement agreement by the parties, as is required in terms if the case law.[14]

38. The effect of the novation clause is that, but for clause 4.1 of the original settlement agreement, the original settlement agreement remains intact. Since the first variation agreement dealt with the payment for the outstanding amount of R3m out of the R8 million, there was no longer use for clause 4.1 of the original settlement agreement. However, it is evident from the second variation agreement, discussed below, that clause 4.2 of the original settlement agreement remained intact. This had been echoed in clause 4.3 of the first variation agreement. As a result, clause 6 of the original settlement agreement also remained intact. Therefore, the effect of the computation of interest employed by Maykent and this Court in respect of the period 1 September 2014 to 1 April 2015 does not have the effect of novating the original settlement agreement.

39. The next question is the computation of interest on the amount of R20 million after the second variation agreement.

Interpreting the agreements for the period of 1 April 2015 to 12 December 2016

40. It is common cause that Maykent failed to pay the amount of R20 million by 1 April 2015, and once again, in order to avert further legal proceedings, the parties concluded the second variation agreement.

[14] *Swadif (Pty) Limited v Dyke NO* 1978 (1) SA 928 (A) at 940G-H.

41. The intention of the second variation agreement is expressed in its opening line, namely to amend clause 4.2 of the original settlement agreement, and it does do by replacing it with a new clause 4.2. Similar to the first variation agreement, the intention of the new clause 4.2 is to provide a mechanism for the payment for the payment of the amount in default, and for the calculation of the interest amount thereon.

42. The 'old' 4.2 of the original settlement agreement provided for the full payment of the R20 million by 1 April 2015. The new clause 4.2 of the second variation agreement provides for payment of the R20 million in instalments. Thereafter, the following is stated: *'interest on the above amount will be at the prime rate of Standard Bank as at the date of signing of this agreement or as varied from time to time commencing from 1 April 2015 to date of final payment.'* (own emphasis) On behalf of Wensley it was argued that the reference to an 'amount' in this clause could only have been to the R20 million, and not to the individual instalments. Maykent's argument was that the reference to an 'amount' must have been a typing error. However, Maykent's counsel could not provide any substantiation for this contention. There was no support for this contention from the evidence, and it was not raised in the papers. I must therefore accept that the parties intended to refer to an 'amount', namely the R20 million. The phrase in the provision: '*commencing from 1 April 2015 to date of final payment"* is, in my view, a reference to the main subject of the clause, the *'interest on the above amount*'. This provision can only mean that the calculation of interest on the amount of R20 million was to resume from 1 April 2015.

43. In my view, this provides an answer for whether the agreement provides for the calculation interest at a reducing capital balance, or on the basis of each separate instalment. My view in this regard is supported by the context of the agreement. The significance of the commencement date of 1 April 2015 is that the R20 million was due on that date in terms of the original settlement agreement and the first variation agreement. There was no argument from Maykent to the effect that the stated date of 1 April 2015 was an error. If this correct, then interest was also payable on the first instalment amount of R2 million. Based on this interpretation, in terms of the second variation agreement the interest was to be calculated based on the reducing capital balance of R20 million. The interest, however, was to be calculated at Standard Bank's prime rate as from 1 April 2015 to date of final payment.

44. It is correct that in the emails between the parties' attorneys referred to earlier, and indeed from the client, Saramago, there was no interest calculated from 1 April 2015. Their interest calculations started from 8 April 2015. However, this was clearly an erroneous calculation when regard is had to the agreements. There is no ambiguity regarding the date of 1 April 2015 in clause 2 of the second variation agreement. Similarly, the calculation of interest based on each separate instalment was an erroneous interpretation of the agreements. There was no agreement for evidence to be led before me, entitling me take into account the parties' subsequent conduct after the conclusion of the agreements as

contemplated in the case law.[15] I am therefore unable to come to the assistance of Maykent in this regard.

Amendment or variation

45. An alternative argument on behalf of Maykent is that, through the email correspondence, the parties amended or varied the second variation agreement by agreeing to a new method of computing the interest payable; and that the email correspondence between the parties is binding as it complies with clause 4 of the second variation agreement, and constitutes an amendment or variation reduced to writing and signed between the parties. Clauses 4 and 5 of the second variation agreement provide as follows:

> *'4 The terms and conditions herein contained constitute the entire amendment between the parties.*
>
> *5 In addition, no amendment or variation of the terms hereof shall be binding upon the parties unless reduced to writing and signed by all the parties hereto.'*

46. Wensley's response to this argument is that the email correspondence cannot be read as an amendment or variation of the second variation agreement because the parties' attorneys' emails were seeking to execute or confirm the terms of the second variation agreement, and did not seek to amend or vary it. And to the extent that the parties' calculations differed

[15] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 91[15].

from the method of calculation set out in the second variation agreement, they were both wrong.

47. In my view, when one has regard to the email correspondence, the parties clearly did not intend to amend the agreement via the emails. The clear intention of the emails was compliance with, and the practical outworking of the second variation agreement.

48. I am therefore not satisfied, on a balance of probabilities, that there was an amendment or variation of the second variation agreement,

49. As a last resort, Maykent relied on the *contra proferentem* rule, to *"cut Gordian knot"*, not to determine common intention of the parties, but to give effect to the agreement between the parties. However, the *contra proferentem* rule applies in the event of real ambiguity in the interpretation of an agreement, and requires a written document to be construed against the person who drew it up.[16] I am not satisfied that there was such real ambiguity in this case.

The writ of execution

50. In light of the above, I am of the view that Wensley is entitled to interest arrears on the reducing capital amount of R20 million calculated from 1

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16 *Fedgen Insurance Ltd. v Leyds* 1995 (3) SA 33 (AD).

April 2015, at the applicable Standard Bank prime rates. This means that the amount in the writ of execution which was issued on 22 January 2018 is inflated and needs re-calculation in accordance with this judgment. It would be just and equitable for Maykent to first obtain an opportunity to pay the arrears in accordance with this judgment, failing which Wensley may later approach this Court for an appropriate order. In the circumstances, the writ of execution should be set aside.

51. In the result, the following order is made:

a. The method of computation of interest contained in annexure "BA5" is dismissed.

b. It is declared that there is no outstanding interest payable by the respondents in respect of the period 1 September 2014 to 1 April 2015;

c. The interest rate payments owed by the respondents to the applicant are to be calculated from 1 April 2015 to 12 December 2016, based on the reducing capital amount of R20 million, at the Standard Bank prime rates applicable in each instalment payment period.

d. The writ of execution issued by this Court on 22 January 2018 is hereby set aside.

e. Each party is to pay its own costs.

N. MANGCU-LOCKWOOD

Acting Judge of the High Court

APPEARANCES:

For the Applicant:	Adv. A. Kantor SC
Instructed by:	Salvatore Puglia Attorneys
For the Respondent:	Adv. B. Hansen
Instructed by:	AR Lawyers, Cape Town