

SOUTH AFRICA / JUDGMENT

BNS Nominees (RF) (Proprietary) Limited and Another v Arrowhead Properties Limited and Another (19/39482) [2023] ZAGPJHC 37; 2023 (6) SA 441 (GJ) (24 January 2023)

[2023] ZAGPJHC 37

COURT

South Gauteng High Court, Johannesburg

BEFORE

N Manoim

CASE / FILE NUMBER

19/39482

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 19/39482

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

24/01/2023

In

the matter between:

BNS
NOMINEES (RF) (PROPRIETARY) LIMITED
registration
number 1995/012099/07 First
Applicant
BREDE
COALITIONS (PROPRIETARY) LIMITED
registration
number 2017/463156/07 Second
Applicant
and
ARROWHEAD
PROPERTIES LIMITED
registration
number 2011/000308/06 First
Respondent
AFFECTED
DISSENTING SHAREHOLDERS Other
Respondents

Summary:

How the court determines what a reasonable rate of interest is for purposes of section 164(15)(c) (iii) (bb) of the Companies Act.
Discretion of court discussed. Such a case to be made out in the papers as it is a factual issue. Failure to do so means court will not make the award based only on later legal argument. Approach to section considered in light of text and comparative jurisprudence.
Court awarding interest in line with founding papers at prescribed rate of interest without compounding.

JUDGMENT

(2)[1]

MANOIM J:

- [1] On 25 October 2022, I gave judgement in this case in which the applicants, who are dissenting shareholders, exercised their appraisal rights against the first respondent (“Arrowhead”) in terms of section 164 of the Companies Act 71 of 2008, (“the Act”). Omitted from my reasons and the order, was whether the applicants should receive interest on their shares in addition to the fair value determined for their shares. I will refer to this judgment as the main case.
- [2] I have since been approached by the applicants to consider this issue of interest in terms of Rule 42(1) of the Uniform Rules. Following the request, I asked the parties to file heads of argument on this issue which both have since done.

- [3] The new appraisal rights section in the Companies Act 71 of 2008, (“the Act”) gives a court a discretion to award a reasonable rate of interest to the dissenting shareholders.
- [4] There is no local case law that I have been made aware of on this point. This case therefore raises several issues; when should interest be awarded, how is a reasonable rate to be determined, should the dissenting parties or the company’s conduct be relevant to assessing the rate of interest, should an award of interest be accompanied by an order that it be compounded and if so, the period for doing so.
- [5] In this decision I first deal with a short background to the main case to which this decision should be considered ancillary, then the application of Rule 42(1) and thereafter I deal with the merits of the application for interest.

The main case

- [6] In the main case the applicants applied to the court as dissenting shareholders, to appoint one or more appraisers to assist it in determining fair value in respect of their shares in Arrowhead which had merged with another company Gemgrow. The applicants had been offered R3.75 for their shares, which whilst a premium on the then market value, they considered not to be fair value. Their case was that fair value was closer to net asset value which was then R 6.90.

Arrowhead had brought a conditional counter application for a declaration that the offer of R3.75 represented fair value.

- [7] I held, for reasons given in my decision in the main case, that R3.75 represented fair value. I thus upheld the conditional counter application and dismissed the applicants claim. A number of issues were debated in that case which I had to decide. The question of interest received scant attention from either party once the matter was argued and hence, I omitted dealing with it. However, in fairness to the applicants it must be pointed out that they did make a claim for an award of interest in their notice of motion and motivated this albeit briefly in their founding affidavit.[2]
- [8] However, the reason the issue got left behind was that from the applicants point of view the interest issue was to be left for after the determination of the appraiser who they sought to be appointed. Hence, since this was their primary relief, the interest issue was secondary and not given any mention in the debate before me.
- [9] Nor did Arrowhead give it any more attention. In its answering affidavit it simply denied the relief without anything further. Given their conditional counter claim, the issue of interest was of no concern, since it was primarily concerned with getting an order that its offer represented fair value and in this it was successful. I leave open the question whether in relation to a counter claim a company should in future address the issue of interest even if it is only to seek an order that interest not be payable. The order I gave is silent on the issue of interest. It neither awards interest nor

states that interest should not be paid.

Application of Rule 42(1)(b)

[10] Rule 42(1)(b) states:

“(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;”

[11] Courts do not lightly entertain applications to correct judgments. As explained by Ngcobo J in the Constitutional Court in *Zondi v MEC, Traditional and Local Government Affairs*[3] this is because:

“In the first place a Judge who has given a final order is functus officio. Once a Judge has fully exercised his or her jurisdiction,

his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality.” The parties must be assured that once an order of Court has been made, it is final and they can arrange their affairs in accordance with that order.[4]

[12] But the court in *Zondi* noted that there were exceptions to the general rule listing some of them as:

“(...) supplementing accessory or consequential matters such as costs orders or interest on judgment debts; clarification of a judgment or order so as to give effect to the court's true intention; correcting clerical, arithmetical or other errors in its judgment or order; and altering an order for costs where it was made without hearing the parties.”

[13] It follows from this that the award of interest on judgment debts is one example of an exception to the functus officio rule. Granted this is confined only to interest on judgment debts. The type of discretionary debt award contemplated in section 164(15)(c)(iii) (bb) is not on a strict application of the law a judgment debt. But in *Zondi* the court observed that this was the list that existed from pre-constitutional case law. The court did not see itself limited in

this way and went on to remark that:

“This list of exceptions was not considered exhaustive. It may be extended to meet the exigencies of modern times.”[5]

[14] The award of interest in an appraisal rights case is a novel question not previously up for consideration in our law. Given the door left open by Zondi for courts to consider new exceptions, I consider determining the interest issue which is a discretionary issue to be of the same genre as the list of exceptions recognised up till now by the common law. But even if it is not, it surely qualifies as an exception that meets “the exigencies of modern times”. Above all fairness to the applicants requires me to still give this issue consideration which I now go on to do.

The applicants’ case

[15] The applicants contend that the court should award interest on the determined fair value of the applicants shares at the rate of 15,5% compounded monthly from 23 September 2019 until the date of final payment. This is the case made in the recent heads of argument and was not, as I discuss later, the case made out in their founding papers.

[16] The applicants base their claim on the language in the section which says ‘... allow a reasonable interest rate’. They rely on Chancery cases in the State of Delaware as authority for an approach to how a reasonable rate of interest should be

calculated. In one case the court explained that there were two reasons for adjusting the appraisal payment with a grant of interest:

“First, “[i]t compensates the plaintiff for the loss of the use of his money during this period [and] . . . endeavors to place the dissenting stock-holder in the position she would have been in had the corporation promptly paid her the value of her shares.”³

Second, “[r]equiring the surviving corporation to pay interest . . . forces the surviving corporation to disgorge the benefit it received from having use of the plaintiff's funds.”^[6]

[17] On this approach it is argued the payment of traditional interest at the prescribed rate would under-compensate dissenting shareholders for their loss and over-compensate the company for holding the money during this period. What then is a better basis for reaching a reasonable rate of interest.

[18] The applicants solution is to argue that the compensation should be calculated using the Capital Asset Pricing Model (CAPM). I have not gone into detail on the mechanics of this model. However, it contains the following formula: $CoE = RFR + ERP$ (Where CoE = cost of equity; RFR = the risk free rate; and ERP = the equity risk premium)

[19] The applicants argue that a proxy for the RFR would be the average 10-year government bond rate for this period. This they say is 9.3%. Their source for this is a website called Investing.com. The applicants then contend for an ERP of 6.25%. This they derive from a report from audit firm PWC, who perform a biennial Valuation Methodology Survey for ERP.

[20] From this they say they should be awarded interest at the rate of the sum of these two amounts yielding an amount of R 15.55 %.

[21] But they go further into the issue of compounding. Relying on another Delaware case, *Gonsalves v Straight Arrow Publishers Inc*, which stated that an award of simple interest would not be enough to compensate the shareholder and to disgorge the company.

[22] Chancellor Chandler, the author of the decision, went on to refer to one of his earlier decisions on the issue of compound interest and noted that:

“Included in that explanation was my opinion that “[i]t is simply not credible in today's financial markets that a person sophisticated

enough to perfect his or her appraisal rights would be unsophisticated enough to make an investment at simple interest.”[7]

[23] The Chancellor went on to suggest that the interest should be compounded monthly. The applicants make the same claim in this matter that once compounding is accepted as necessary, the appropriate period for compounding to take place would be monthly.

[24] The applicants do not provide a figure for their interest claim. But Arrowhead does; in part because it wants to make the point that interest based on this approach would have a disproportionate value to the capital amount awarded on the shares as fair value. If the interest rate of 15.5 % is compounded monthly to date[8] then on the capital amount of R12,3 million in this case, the interest would amount to R7,844,420. million. But Arrowhead's

other point in calculating the figures is to compare the outcomes between the different approaches to show how significant it is. If the prescribed rate of interest is used without compounding the amount is just over R 3million; [9] roughly 40% of the amount that would be obtained using the CAPM compound interest approach. (R7,8 million).

[25] Arrowhead's counsel argue that instead of following what I will term the Delaware approach, I should instead follow that of certain Canadian courts which have cautioned against giving shareholders a “free ride”[10]

[26] However, interesting as these precedents are in enriching the debate, they should be approached with caution when deciding matters of interest compensation, where country specificity both as to business and legal practice may provide more important guidance than comparative jurisprudence. For reasons I advance later in this decision it would be premature now to elect to follow a particular path commended by either of the parties or to decide whether in this country we should forge our own. The point of departure is obviously to first consider the language of our own statute.

The legislation

[27] Section 164(15) of the Act deals with applications brought by dissenting shareholders. Section 164(15)(c) deals specifically with the courts powers. Section 164(15)(c)(iii) (bb) is the section that deals with the power to award interest. However, it aids the interpretation of this section if it is read in the context of some other paragraphs in section 164(15)(c) and hence I set them out as well below.

“(15) On an application to the court under subsection (14)-

- (a) ...
- (c) the court-
 - (i) may determine whether any other person is a dissenting shareholder who should be joined as a party;
 - (ii) must determine a fair value in respect of the shares of all dissenting shareholders, subject to subsection (16);
 - (iii) in its discretion may-
 - (aa) appoint one or more appraisers to assist it in determining the fair value in respect of the shares; or
 - (bb) allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment;
 - (iv) may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court; and ...

[28] A textual analysis of the subsection insofar as it relates to the issue in question reveals the following:

- a. The award of interest is discretionary. This illustrated by use of the modal verb ‘may’ in contradistinction with ‘must’ in the same section. This issue of interpretation is not controversial. What it does raise is on what basis that discretion is

to be exercised. For instance, as suggested by Arrowhead, does it give a court the discretion to deny interest to a dissenting

shareholder whose claims for additional compensation have proved baseless and thus serve as a means to disincentives unmeritorious

claims?

- b. Following from the first issue, if an order of interest is to be viewed as a form of incentive or disincentive to the parties, depending on the final outcome of the determination of fair value, why does the costs discretion in subparagraph (iv) refer expressly to “... having regard to any offer made by the company, and the final determination of the fair value by the court”. This phrase does not appear in the interest subparagraph and may suggest that the

issue of incentives and disincentives is something to be regulated by a costs award and hence is not relevant to the issue of whether interest should be awarded or denied.

- c. Third, the award of interest (subparagraph (bb)) is provided as an alternative option to the court if it did not go the route of appointing the appraiser (subparagraph (aa))? It is not clear why this is so, unless it is contemplated that as part of the exercise in determining fair value, the appraiser might also advise the court on whether interest should be taken into account.
- d. The qualifier that the rate of interest is to be 'reasonable' suggests that the court is not bound to follow the traditional legal rate. It suggests that evidence may be led on this point, that the standard is objective, but the rest is left unstated.
- e. The section does provide clarity on the period over which interest is to be paid from the date the company approved the resolution that gave rise to the dissenting shareholders action to the date of payment for the shares. There is no indication however whether interest should be simple or compounded.

Analysis

[29] These queries are raised to illustrate the conceptual difficulties the interest question raises and hence the danger of making this decision on an incomplete record. The reason I say the record is incomplete is this. The case the applicants now make out for a reasonable rate of interest of 15,5% compounded, is based partly on the application of the capital asset pricing model. This case was made out in heads of argument, furnished after I had made my decision in the main matter. Thus, it was all on paper and I did not have the benefit of oral argument. But that is the least of the difficulties.

This was never the case for interest made out in the application. In their notice of motion, the applicants main relief was to seek the appointment of the appraiser. It was only after that determination had been made that it sought the following relief in the Notice of Motion for the court to:

"15.1 allow a reasonable rate of interest on the amount payable to each of the Applicant and the other affected dissenting shareholders from the date the action approved by the special resolution adopted by the First Respondent on 22 August 2019 became effective until the date of final payment;

[30] That prayer simply repeats the relevant section in the Act without giving it any flesh. But in the founding affidavit the flesh is given in the following paragraphs:

"75. In terms of Section 164(15)(c) (iii) (bb), this Honourable Court may in its discretion allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment.

76, I respectfully submit that the prescribed rate, is the most appropriate rate of interest to be applied from the applicable date and same has been provided for in the Notice of Motion." (My emphasis)

[31] Thus, the applicants never made out the present case they contend for in the founding affidavit. They needed to do so. What constitutes a reasonable interest rate is not a question of law. It is a question of fact which must be pleaded. Use of particular pricing model whether it is CAPM or some other is matter for expert evidence requiring both motivation and calculation. This is so elementary a legal proposition it does not require authority to establish but to the extent that it does, as counsel for Arrowhead point out, the case of *Molusi and Others v Voges NO and Others* does so. There the Constitutional Court held;

“It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in Sunker:

‘If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on.’[11]

[32] To summarise. The applicants needed to make out in their founding papers what reasonable rate of interest they were contending for and the factual basis for doing so. They did this only in respect of the prescribed rate, not what they now contend for. This claim therefore cannot be sustained. This then leaves the question of whether the applicants should be denied any interest at all. That was the primary contention advanced by Arrowhead. The basis for this argument was that the applicants conduct in persisting with this litigation should be met with disapproval, and hence a denial of interest, because the court has found the company’s offer reflected fair value and hence the litigation was opportunistic.

[33] But as I remarked earlier, the costs award in the section deals specifically with this conduct issue. It is not clear that the interest award should be used for this purpose as well. Not, at the very least, without Arrowhead making out such a case in its conditional counter claim. It did not do so. In its answering affidavit in the main claim, it put up a bare denial.[12] It needed to do more than this to make a case, as it does now in the heads of argument, for no interest to be payable. This is also a factual question – like the applicants, if it wanted the court to exercise this discretion in its favour, it needed to make this case out in the papers.

[34] To be fair to Arrowhead in the alternative it concedes to an award of interest in line with the founding affidavit. This is the position I will adopt. This is because in this matter this is the case made out on the papers and which has not been seriously disputed by Arrowhead. The applicants are entitled, absent any evidence to the contrary, to be compensated by way of interest for the period between the date of the resolution (23 September 2019) and the date of payment. Their claim was based on the prescribed rate of interest, and this serves, at least for the purpose of the record in this case, to be an adequate proxy for a reasonable rate.

Costs

[35] Since neither party was entirely successful each can bear its own costs.

ORDER: -

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

In terms of Rule 42(1)(b) of the Uniform Rules, read with section 164(15)(c) (iii) (bb) of the Act, the Court's order of 22

October 2022 is varied, by the addition of the following additional paragraphs, which will become paragraphs 4 and 5 of that order:

- (4) The applicants are awarded interest on the determined fair value of their shares, for the period from 23 September 2019 to the date of payment. This amount is payable at the prescribed legal rate of interest applicable during this time period, without compounding.
- (5) There is no order as to costs in respect of the application for interest payment in terms of section 164(15)(c) (iii) (bb) of the Act.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHNANNESBURG

Date of applicants heads of argument: 11 November 2022.

Date of first respondent's heads of argument: 21 November 2022

Date of judgement: 24

January 2023

Representations:

Counsel for the Applicant:

R D E Gordon

Instructed by.

Pike Law

Counsel for the First Respondent: A

Cockrell SC with N Ferreira

Instructed by:

Cliffe Dekker Hofmeyr

-
- [1] The judgment in the main application dated 22 October 2022 is the first judgment hence the reference to (2).
- [2] I deal with this more fully later in this decision.
- [3] 2006 (3) SA 1 (CC)
- [4] Supra, paragraph 28
- [5] Supra, paragraph 29.
- [6] Chang's Holdings v Universal Chems. & Coatings, Inc., C.A. No. 10856 (Del. Ch. Nov. 22, 1994).
- [7] Civil Action No. 8474 (Del. Ch. Sep 10, 2002)
- [8] I am assuming this is at the date of the fling of the Arrowhead heads of argument on 21 November 2022.
- [9] More precisely this figure is R 3,065,371
- [10] Smeenk v Dexliegh Corp (H.C.J.) 1990 Can II 6935 (ON SC).
- [11] 2016 (3) SA 370 (CC) at paras 27-28.
- [12] See supplementary answering affidavit Case Lines 001-35.
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