

SOUTH AFRICA / JUDGMENT

Coetzee and Others v MEC for the Department of Health, Western Cape Provincial Government and Others (C 276/2021) [2023] ZALCCT 48; (2024) 45 ILJ 104 (LC) (8 August 2023)

[2023] ZALCCT 48

COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C 276/2021

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THE LABOUR COURT OF
SOUTH AFRICA

HELD AT CAPE TOWN

Case No: C 276/2021

Of interest to
other judges/Reportable
In

the matter between:

PROF.
A R COETZEE & OTHERS
First
Applicant
and
MEC
FOR THE DEPARTMENT OF HEALTH,
WESTERN
CAPE PROVINCIAL GOVERNMENT
First
Respondent
NATIONAL
MINISTER OF HEALTH
Second
Respondent
MINISTER
OF PUBLIC SERVICE AND ADMINISTRATION

Third
Respondent
COMMISSION
FOR CONCILIATION, MEDIATION & ARBITRATION
Fourth
Respondent
COMMISSION
D I K WILSON (N.O.)
Fifth
Respondent
Date
of Set Down: 10 June 2022
Date
of Judgment: This judgment was
handed down electronically by circulation to the parties' legal
representatives by email, publication on
the Labour Court website and
release to SAFLII. The date and time for handing down judgment is
deemed to be 10h00 on 12h00 on 08
August 2023

Summary: (Interpretation of an arbitration
award – restatement of principles – Dispute over
application of in duplum rule
to accrual of interest on unpaid allowances and on whether interest
payments should be compounded – In
duplum rule not applicable –
Interest payable is simple interest not compound interest)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an application to compel the first respondent to comply fully with an arbitration award by paying the applicant's the outstanding balance of a 2017 arbitration award ('the award') amounting in the aggregate to a payment of approximately R 113 million, according to a schedule drawn up by the applicants.
- [2] The award settled a dispute about the non-payment of special skills allowance payable to the applicants by the respondent in terms of a collective agreement. In terms of the collective agreement, the department was required each month to pay the equivalent of 15% of an employee's annual basic salary, on a pro rata basis, with effect from 1 July 2003 to all those in employment when the agreement was concluded, or employed thereafter, so long as they remained employed and the agreement applied.

Background

- [3] The applicants in this matter were, or still are, 49 medical professionals, performing clinical services for the Western Cape Department of Health. They qualified for a scarce skills allowance ('the allowance') from 2003 until it was discontinued.
- [4] The award handed down by the fifth respondent ('the commissioner') had three components. The main award of 29 March 2017 held that the applicants were entitled to receive the allowance "from 1 July 2003 until 30 June 2009, plus interest." The award set out the value of the accumulated unpaid allowance due to each individual applicant ('the capital amounts'). After noting some calculation errors in his award, the commissioner mero motu issued a variation ruling on 10 April 2017 correcting the capital amounts due, totalling approximately R 14,197 million in all. The original award had also ordered the department to pay interest "on the capital amount of the claim, calculated to the date of payment ... in an amount to be agreed between the parties" by 30 April 2017, failing which either party could remit the amount of the interest owing to the arbitrator for determination.
- [5] The parties could not reach agreement on the quantum of the interest and the applicants referred the matter back to the arbitrator who determined the interest owing after considering written submissions from both the parties. The arbitrator decided:
- "I am satisfied that that interest should be paid to the Applicants at the prescribed rate of interest of 15, 5% per annum, from the date on which the payment of the allowance became due (April 2004) until the date of payment. Interest must be calculated on each monthly allowance from the date on which that monthly allowance was due and payable."*
- [6] The department paid the capital amounts due, but capped the amount of interest due up to the date of the award by applying the in duplum rule, in terms of which interest on a debt ceases to run once the accumulated interest accrued is equivalent to the principal debt. The department argued that interest had stopped running after 6.67 years, which was some time before the award was handed down. Nonetheless, it acknowledged that interest recommenced running when the award was handed down on 29 March 2017. The applicants disputed the department's reliance on the in duplum rule in calculating the interest payment due in terms of the award. Secondly, the applicants argue that interest payments should be compounded and dispute the department's payment of interest based on simple interest. It is this two-fold dispute over the proper interpretation of the award insofar as the payment of interest is concerned, which has led to the applicants launching the current application. Neither party applied to review the award, so it still stands.
- [7] The parties made reference to other previous court decisions which were part of the same litigation saga. In summary, these were:

7.1 On 13 June 2006, the applicants referred their dispute about their entitlement to the allowance under a collective agreement to the Public Service Co-Ordinating Bargaining Council (PSCBC), which ruled it had no jurisdiction to hear the matter.

7.2 On 4 November 2010, the Labour Court found that the applicants were public service employees and entitled to the allowance[1].

7.3 The department appealed the Labour Court decision. In 2015, the Labour Appeal Court upheld the appeal on the ground that the Labour Court lacked jurisdiction to hear the matter[2].

7.4 The applicants then applied to review the bargaining council jurisdictional ruling, which was successful[3], and the matter was remitted back to the bargaining council. Despite this, the parties then agreed to refer the dispute to the CCMA as a demarcation dispute (as to whether the dispute fell within the PSCBC) and an interpretation and application dispute concerning the agreement. The implementation of the subsequent commissioner's award issued in 2017 is the subject matter of this application.

7.5 However, the enforcement of the award was delayed because the department brought a review application to set aside the award. The Labour Court dismissed the application, but the LAC granted leave to appeal on petition.

7.6 The LAC gave judgment on 3 May 2018, upholding the award[4]. It held that the applicants were both employees of the Universities and were in the public service.

7.7 The department then applied for leave to appeal to the Constitutional Court, which dismissed the application on 20 March 2020. In deciding that the application lacked reasonable prospects of success, it unequivocally endorsed the arbitrator's reasoning[5].

[8] The litigation subsequent to the award explains the delay in this application being launched.

[9] As at 15 May 2020, the department had paid the following amounts to the applicants:

9.1 R 14,197,532.32 being the capital amount.

9.2 Simple interest of R 27, 814, 222.61.

[10] On the applicants' version, the balance of interest due on 8 June 2022 was R 112, 970, 793.46 calculated on the basis that the in duplum rule did not apply and that interest was compounded monthly.

Merits

Preliminary jurisdictional issue

[11] When the matter was initially argued on 8 June 2022, the department argued that the court had no jurisdiction to hear the application. It pointed out that the commissioner's certified award was final and binding and for the purposes of enforcement should be treated as orders of the Labour Court. Given this, the department argued, the principle of issue estoppel operated to prevent this application being considered, because there was no basis for the commissioner's determination of interest due, to have implicitly excluded the operation of the in duplum rule, as the department never abandoned its right to rely on it. Further, it contended that in the absence of a variation of award's determination of interest,

the commissioner had exercised final jurisdiction over the matter and was also functus officio. Consequently, neither he, nor the court could reconsider it.

- [12] Assuming the department was correct, this court raised the practical difficulty that any attempt by the applicants to subsequently enforce the award by execution of a writ, would inevitably result in the parties being back in court disputing the same substantive issues about the correct interpretation of the interest provision of the award, the court requested the department's legal representatives to take instructions on whether it intended persisting with the jurisdictional point, given also the prolonged litigation over the award since 2017 and the need for finality. Pending such instructions being received, the parties nonetheless argued the merits of the application, in the event a jurisdictional ruling proved unnecessary.
- [13] On 9 June, following discussions between the parties, the State Attorney confirmed on behalf of the department that it withdrew any objection to the application being dealt with either in terms of s 158(1)(iv) or 158(1)(c) of the Labour Relations Act, 66 of 1995 ('the LRA'), and that only the merits needed to be addressed.

Issues in dispute

- [14] The central issue in dispute between the parties concerning compliance with the award, is whether interest due under the award is compounded and whether the in duplum rule applied to the interest due on the capital amounts.
- [15] The applicants contend that, in terms of the award, the department had to pay them the outstanding scarce skills allowance and consolidated interest a tempore morae up to the date of payment of the capital and all outstanding interest. Put differently, apart from the capital amounts, they claim that the interest awarded on the allowances from the time they were originally due and payable, could accrue without limit, and that interest would also accrue on the unpaid interest.
- [16] They dispute the department's claim that the interest payment awarded by the commissioner was limited by the application of the in duplum principle to an amount equal to the capital sum of the award. The relief awarded by the commissioner did not qualify in any way the

extent of interest due and payable. The award of interest was made to compensate the applicants for the delay in paying them the allowance and capping the amount of interest due would undermine that purpose. Moreover, if the department had wished to rely on the application of the in duplum rule it should have raised it as a defence, but did not do so in any of the proceedings until this application was launched.

[17] Broadly speaking the department disputes the applicants' claim that the in duplum rule only has a narrow application to certain transactions and argues that it applies equally to the type of debt arising from the award. It contends the award makes no mention of interest being compounded, and would have, if the arbitrator meant it to be. Moreover, there is no principle that compounding of interest applies automatically in such a case.

Interpretation of the award

[18] In *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A), the Appellate Division set out principles governing a court's judgment or order:

"The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules.

See *Garlick v Smartt and Another*, 1928 AD 82 at p. 87; *West Rand Estates Ltd. v New Zealand Insurance Co. Ltd.*, 1926 AD 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it (cf. *Postmasburg Motors (Edms.) Bpk. v Peens en Andere*, 1970 (2) SA 35 (NC) at p. 39F - H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see *infra*. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See *Garlick's case*, *supra*, 1928 AD at p. 87, read with *Delmas Milling co. Ltd. v Du Plessis*, 1955 (3) SA 447 (ADI at pp. 454F - 455A; *Thomson v Belco (Pvt.) Ltd. and Another*, 1960 (3) SA 809 (D))."[6]

[19] In *Administrator, Cape, and Another v Ntshwaqela and Others* 1990

(1) SA 705 (A) the Appellate division reaffirmed the dictum above, and emphasised that the enquiry into the meaning of an order is circumscribed, unless it is ambiguous[7]:

"It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's

directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and

cannot be restricted or extended by anything else stated in the judgment."

[20] The parties agree that these principles apply equally to discerning the meaning of the award. They further agree that the interest relief awarded by commissioner is clear and unambiguous. The applicants argue that the commissioner did not cap the amount of interest and consequently, the accrual of interest is unconstrained by the in duplum rule. For its part, the department submits that it is unambiguously clear from the order how interest should be calculated, and the wording of the order would have provided otherwise if the commissioner intended that that interest would be compounded. Similarly, it argues that the in duplum rule is a common law principle that applies ex lege by default. Accordingly, it was unnecessary for the commissioner to expressly mention it. The more detailed features of each argument are discussed below.

Was the accumulation of interest capped by the operation of the in duplum rule?

[21] As the arbitrator made no mention of the rule, the applicants argue that he clearly did not intend the accumulation of interest to be subject to a ceiling. They also argue that by the time the matter of interest due was argued before the commissioner, the respondents had not disputed the applicants' calculations of the accumulated interest, which had already exceeded the capital sum.

[22] The department contends that the rule applies ex lege and required no confirmation by the commissioner. In this regard it relied on a number of authorities. The enduring validity of the principle was strongly reaffirmed in *LTA Construction Bpk v Administrateur, Transvaal* [1991] ZASCA 147; 1992 (1) SA 473 (A), a judgment in which the Appellate Division dismissed an argument the rule had been abrogated by disuse:

“Advokaat Burman, namens LTA Construction Bpk, het betoog dat hierdie Hof die renteverbod in duplum behoort af te skaf omdat dit 'n anachronisme is wat teen die openbare beleid is deurdat rente nie meer immoreel is soos die Middeleeuse Kanonieke reg dit bestempel het nie. Hierdie betoog is onaanvaarbaar. Die renteverbod in duplum is alles behalwe 'n anachronisme. Dit vorm deel van ons daaglikse ekonomiese lewe. Dit vervul 'n ekonomiese funksie om skuldenaars wat hulle in finansiële vernorsing bevind, te help. Soos Huber in sy Praelectiones ad D 22.1.28 dit stel:

Nam, ut antea diximus, Legislator in moderantis usuris id inprimis spectat, ne homines angusta & inclinata re, destruantur; quales solent esse, qui usuras solvere nequeunt, creditoribus quidem raro cunctantibus exigere: Qui autem usuras prompte solvunt, non sunt in eo statu, ut egeant hoc levamine: Sic igitur nihil est causae, quemobrem usurae solutae cursum usurarum solitum abrumpere debeant.

Rente is die lewensbloed van die handelsverkeer. Die afskaffing van die renteverbod in duplum is in die huidige omstandighede nie die funksie van hierdie Hof nie. Hierdie Hof het geen bevoegdheid om 'n nuttige, geldende, gemeenregtelike regsreël af te skaf nie. Dit is 'n aangeleentheid vir die Wetgewer. Ten spyte daarvan dat die Suid-Afrikaanse Regskommissie reeds in Junie 1974 die afskaffing van die renteverbod in duplum voorgestel het, het die Wetgewer tot op hede dit nie gedoen nie.

Advokaat Burman het ook betoog dat die renteverbod in duplum slegs op geldlenings betrekking het en daarom nie in die onderhawige geval toepaslik is nie. Die partye het met mekaar 'n kontrak vir die totstandbringende van werke deur LTA Construction Bpk teen vergoeding gesluit. In die algemene voorwaardes van die kontrak is daar voorsiening vir rente op die kontrakprys gemaak. Wat hierdie betoog uit die oog verloor en daarom onaanvaarbaar is, is dat die renteverbod in duplum glad nie tot geldlenings beperk is nie. In beginsel geld dit vir alle kontrakte uit hoofde waarvan 'n kapitaalsom verskuldig is wat onderhewig aan 'n bepaalde rentekoers is, soos supra aangetoon is.”[8]

(emphasis added)

[23] The most recent affirmation of the application of the principle is the Constitutional Court decision in *Paulsen & Another v Slip Knot Investments (Pty) Ltd* 2015 (3) SA 479 (CC), in which the majority of the court held:

“42] The in duplum rule is a long-standing and well-established part of our law. It provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital. For perspective, it is necessary to give a brief outline of the history of the in duplum rule in South African law. The rule has its origins in classical Roman law. The rule was carried through to Roman-Dutch law, reference to it being made by various old authorities, including, most pertinently for this case, Huber and Van der Keessel. Our common law is based on the same Roman-law rule and the rule has been recognised in local case law as far back as 1830.

[43] More recently, in *LTA Construction*, the rule was confirmed as still forming part of South African law, not having been abrogated by disuse. Indeed, in that case the Appellate Division noted that the in duplum rule is far from an anachronism, and is in fact an aspect of daily economic life under our common law.”

The case concerned whether or not the operation of the rule should be suspended when a creditor litigates to recover the debt and until judgment is handed down (*pendente lite*). The Constitutional Court overruled the decision of the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* [1997] ZASCA 94; 1998

(1) SA 811 (SCA), which held that the rule should be suspended *pendente lite* so that interest could continue accumulating without limit during that period.

[24] The applicants argue that firstly *Paulsen* and *Oneanate*, were not concerned with the validity of the rule, which both courts accepted, but with its operation *pendente lite*. They submit that neither of the decisions detract from the principle that the rule is only applicable to certain types of commercial arrangements. The last emphasised portion in the extract from the *LTA* decision (see above) stated that the application of the rule is not confined to loan agreements only, but applies to any contract in terms of which a capital sum is payable and is subject to a fixed interest rate. The department argues that, in fact, there was an agreed rate of interest applicable to unpaid allowances. Accordingly, it falls within the ambit of the type of agreement described in *LTA*, to which the in duplum rule applies.

[25] As I understand it, the department arrives at this conclusion on the following chain of reasoning. The Scarce Skills Agreement in terms of which the allowances were payable is a collective agreement. In the enforcement of that agreement, S 33A(9) of the LRA determines the applicable rate of interest. The section provides:

“(9) Interest on any amount that a person is obliged to pay in terms of a collective agreement accrues from the date on which the amount was due and payable at the rate prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the arbitration award provides otherwise.”

The relevant portions of Section the Prescribed Rate of Interest Act (PRIA) read:

“1. Rate at which interest on debt is calculated in certain circumstances

(1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2) (a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.

(2)(a) For the purposes of subsection (1), the rate of interest is the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum.”

S 33A(9) effectively gives an arbitrator a similar, though seemingly wider, discretion than a court under s 1(1) of PRIA to determine a rate of interest which is different from the prevailing prescribed rate of interest at the time.

The department contends that this stipulation of the interest rate payable on unpaid amounts due in a collective agreement is no different, in principle, from other contracts in terms of which a capital sum is due and that specify the rate of interest accruing on the capital amount. As far as I could ascertain, all the cases the court was referred to, in which the in duplum rule applied, concerned agreements in which the applicable rate of interest had been determined by the parties themselves as an integral part of their commercial transaction. In Paulsen, in deciding that the court should entertain the appeal because the suspension of the in duplum rule pendente lite concerned an arguable point of law of general public importance, the majority of the court found that it was a matter of general public importance, because:

“Charging interest on commercial transactions is so widespread as to affect a large number of members of society. Likewise, there are countless people and entities that charge and derive a financial benefit from interest. A pronouncement either way on whether the in duplum rule is suspended pendente lite will affect many on either side of the scale.”[9]

I do not think a statutory provision which stipulates an interest rate which accrues on unpaid amounts due to an employee under a collective agreement determining remunerative allowances is akin to interest agreed upon by parties as an integral part of a commercial transaction. S 33A(9) determines both when and at which rate interest starts to accrue on unpaid amounts. It has far

more in common with the application of the ordinary principle of mora interest accumulating on a liquidated debt, where the purpose of accrual of interest and liability to pay it is a form of recompense for due payment being received late. The Supreme Court of Appeal described mora interest in *Land and Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd and Others* 2013 (6) SA 319 (SCA) thus:

- [11] ... Interest remains interest and no method of accounting (such as capitalisation) can change its nature. Contractual interest may be compound interest or simple interest. Compound interest is interest on capital plus accrued interest. If compound interest is not provided for in an agreement, only simple interest on the capital will be payable in terms of the agreement.
- [12] Mora interest, on the other hand, is something fundamentally different. It is not payable in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract, specifically mora debitoris.
- [13] The nature of mora interest is explained as follows in *Bellairs v Hodnett and Another*:

'It may be accepted that the award of interest to a creditor, where his A debtor is in mora in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date (*Becker v Stusser* 1910 CPD 289 at p 294). This loss is assessed on the basis of allowing interest on the capital sum owing over the period of mora. “

In my view, s 33A(9) of the LRA simply particularises the application of s1(1) of PRIA, so that mora interest can be applied in the context of disputes about non-compliance with collective agreements, which are determined by an arbitrator rather than a court.

- [26] Moreover, the High Court decision in *Da cruz v Bernardo* 2022 (2) SA 185 (GJ), which concerned the application of the in duplum rule to mora interest claimed on a liquidated debt under s 1(1) of PRIA, the court found that all the judgements referred to in its extensive canvassing of authorities, involved contractual claims where the rate of interest was fixed by the parties. The applicant in that case had applied for an order that the rule did not apply to the moratory interest awarded in another judgement of the High Court. The judge summed up the survey of authorities considered:

“[43] The above analysis indicates that not all debts that attract or include interest are struck by the in duplum rule. The question in the current matter is whether the rule applies where mora interest is claimed on a liquidated amount and there is no agreement on the rate to be applied. All of the cases and the examples in the old authorities in which the in duplum rule is discussed and applied involve contractual claims where the interest rate is fixed by agreement between the parties. Counsel was unable to point to one case or example involving the application of the in duplum rule to mora interest on a liquidated amount and, in my research, I have been unable to find one.”

[27] The court further noted that:

“[56] Having regard to the above and the provisions of the Prescribed Rate of Interest Act, Mr Kairinos made the further point, with which I agree, that the Prescribed Rate of Interest Act does not impose a ceiling on interest liability and does not expressly incorporate an in duplum principle. In s 103(5) of the National Credit Act, the legislature has imposed a statutory in duplum principle in relation to credit agreements falling within the provisions of the National Credit Act. The legislature did not impose such a constraint in the Prescribed Rate of Interest Act (where it could easily have done so) but instead has given discretionary powers to the court hearing each matter, to determine how interest should be calculated if there are special circumstances relating to the debt at issue.”

[28] In conclusion on the application of the in duplum rule, the court found

“[57.5] The Prescribed Rate of Interest Act does not impose an in duplum principle on the recovery of mora interest.”

For the reasons stated above, I believe this applies equally to an award of interest made under s 33A(9) of the LRA. Accordingly, the accrual of interest due to the applicants in terms of the award was no limited by the application of the in duplum rule.

Were the applicants entitled to payment of compound interest in terms of the award?

[29] It has already been noted that the arbitrator made no mention that interest should be compounded in the award. On the face of it this is an indication he was not of the view it should be. The applicants argue both that the commissioner was aware of their contentions that interest should be consolidated as the only way to fully compensate the applicants for the non-timeous payment of remuneration they could have obtained a return on. Indeed, their written submissions made to the arbitrator canvass the same arguments advanced before this court in favour of interest being compounded. In any event, as a matter of law, the applicants contend that compound interest is simply a logical application of the principle of mora to unpaid interest. In much the same way the department argued that the in duplum rule applied as a matter of law, even if the award was silent on the issue, the applicants argue that the obligation to pay payment of interest on interest is an inherent implication of an award of mora interest, when the facts warrant it.

[30] In support of the legal principle, the applicants referred to the SCA decision in Davehill (Pty) Ltd and Others v Community Development Board 1988 (1) SA 290 (A). Apart from deciding that the rate of interest applicable to a debt under s 1 is the rate that is current when interest begins to run, the Appellate Division held that:

“Compound interest may be expressly stipulated for by agreement, is commonplace today in commercial and financial dealings and has been sanctioned by our Courts for many years. In principle there appears to be no reason why the right to claim interest on interest should be confined to instances regulated by agreement, and why it should not extend to the right to claim mora interest (which is a species of damages) on unpaid interest which is due and payable. To the extent that the decision in Stroebe v Stroebe (supra) is in conflict with this broad principle it cannot be supported. The problem

which arose in Stroebel's case at 139F would today be dealt with under the provisions of s 2 of the Prescribed Rate of Interest Act 55 of 1975.

Subject to what has been said above, it is not necessary in this judgment to attempt to define under what circumstances and within what limits a claim for interest on interest will lie. Suffice it to say that in principle there can be no objection to a claim for mora interest on outstanding statutory interest, bearing in mind that statutory interest is, in essence, compensation for loss of possession and fruits.”[10]

[31] In Ryton Estates (supra), the court had to consider if an obligation to pay interest under a contract, was just another ‘monetary obligation under a contract’ which in itself would attract mora interest if the debtor had not complied with the obligation[11]. The court concurred with the dictum of the court in Davehill, cited above and held:

“[19] I respectfully agree that there is no principle that stands in the way of a finding that in the absence of agreement in this respect, a creditor should be compensated by an award of mora interest on unpaid interest for the loss or damage suffered as a result of not receiving the agreed interest on time. Clearly it must similarly be assumed that the interest would have been productively employed had it been paid on the due date. Also, no consideration of public policy points the other way. On the contrary, taking into account that interest is the 'life-blood of finance' it is in the public interest that creditors be compensated when debtors fail to make payment of agreed interest on the due date.”

I will return to the applicant’s submissions based on Davehill and Ryton later in the discussion.

[32] The department contends that on a plain reading of the relief awarded, read with the arbitrator’s reasons, the only reasonable interpretation of the interest relief he awarded, is that he did so, while fully mindful of the applicants’ argument that interest should be consolidated, but simply said that his order “falls squarely within the ambit of Section 33A(9) and, because he did "not believe that there [was] any reason why [he] should depart from the provisions of that section", he ordered that:

"21. Interest shall be calculated at a rate of 15.5% per annum on the amount of each monthly allowance payable to each Applicant, from the date on which that monthly allowance was due and payable, until date of payment."

The department asserts the absence of any mention in the award that such interest should be compounded is telling, particularly as it was specifically argued for before him.

[33] The department also referred to the case of Mashaba & another v Telkom (2020) 41 ILJ 2437 (LAC). The court was dealing with a dispute concerning a writ which had been issued in respect of a judgment ordering the retrospective

reinstatement of an employee by the Labour Court. The employer had simply paid him his salary for the period of his retrospective

reinstatement. He claimed interest was due and payable on the backpay on the basis that the backpay was akin to a payment of arrear wages. He also compounded the interest payment in his calculation. The LAC confirmed the decision of the court a quo that the employer could never have been in mora until the debt had been liquidated, which only occurred when the Labour Court had ordered his reinstatement and quantified the extent of its retrospectivity. Section 75 of the Basic Conditions of Employment Act, 75 of 1997, which provides that an employer is liable for interest at the prescribed rate of interest on any amount that is payable under that Act, which was not paid^[12], was applicable only to liquidated debt and not an unliquidated debt like a claim for reinstatement. The debt arising in a retrospective

reinstatement order is only capable of ascertainment when judgment is handed down and the liability for backpay cannot antedate the judgement^[13]. The LAC went on to discuss the issue raised by the writ:

“[12] ... The first appellant’s claim thus raises the question of the appropriate method for levying interest on backpay and whether interest is payable on the pre-judgment interest payable on the capital amount of an unliquidated debt (once judicially determined) on a compounded basis. In argument, we were referred to no judicial authority or statutory provision which offers definitive guidance. In Land & Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd & others, the Supreme Court of Appeal held that a debtor who is in mora in regard to a contractual obligation to pay interest is liable for mora interest on the unpaid interest calculated on a simple basis at the prescribed rate. Considering that a debtor in a claim for an unliquidated debt will not be in mora before the judicial determination of the amount of the unliquidated debt, interest on the pre-judgment interest on the amount of the unliquidated debt (which normally runs from the date of demand or summons in terms of s 2A of PRISA) is arguably only payable from the date of judgment. It is doubtful though that such interest is payable on a compounded basis. There is, however, for reasons that follow, no need to pronounce definitively on the issue in this appeal. It is a matter best left open for determination after fuller argument.”

As it happened the LAC disposed of the writ on the basis that the Labour Court’s order of retrospective reinstatement was an order ad factum praestandum and therefore not capable of execution by a writ^[14]. Apart from the LAC expressly not deciding to determine the question of compounding interest payments, the discussion of the appropriate

rate of interest was somewhat obiter in nature given that it was unnecessary for its decision. Nonetheless, it is significant it did not consider the application of compounding interest to be unproblematic and expressed doubts that it was.

^[34] The two SCA decisions provide the strongest support for the applicants’ argument, but the reluctance of the LAC to readily regard the principles apparently stated therein as settled, means it is necessary to consider the reasoning in those decisions a bit more closely to determine if they must obviously apply to the arbitration award. A cursory reading of the relevant dicta in those decisions certainly might suggest that both judgments considered it simply to be a matter of logic that the principle of mora interest, should apply equally to that interest itself. There are two concerns with this approach.

[35] Firstly, in Davehill the case concerned interest payments payable under s 12(3) of the Expropriation Act 63 of 1975. The section provided that the expropriating authority was obliged to pay interest to the former owner from the date of possession on any outstanding portion of the compensation due to the owner. The court held that the liability to pay this 'statutory interest' arose from "considerations of equity, and was designed to compensate a person whose property had been expropriated for his loss of possession and the fruits of the property up to the time the compensation was paid"[15]. Section 12(3) contained no express provision for the date of payment of this statutory interest. The court held that it was implicit that the obligation to pay statutory interest due arises on the same date as the final payment of compensation is made. On that date,

"... the respondent's failure to pay the statutory interest due by it to the appellants on that date automatically place it in mora... This so because, as the time for performance was fixed, mora operated ex re and no demand (...) was necessary to place the respondent in mora. The statutory interest due being a liquidated amount, and the respondent being in mora, the appellants are entitled, in keeping with general principles, to mora interest from 12 January 1985 on the amount of statutory interest outstanding until it was paid in full..."

[36] In Ryton Estates the question of interest being payable on interest arose because recipients of Land Bank loans, for which they were required to pay interest, claimed the bank was not entitled to charge them interest on their arrear interest payments and that they were only obliged to pay the interest on the outstanding loan balances. In terms of the loan agreements payments of interest and capital were due and payable in equal annual instalments. The court noted that "It follows as a matter of law that, in the event that any instalment was not paid full on the due date, mora operated ex re." [16] Relying on the decision in Davehill, the court confirmed that interest was payable on the interest instalments not paid on the due dates:

"[19] I respectfully agree that there is no principle that stands in the way of a finding that in the absence of agreement in this respect, a creditor should be compensated by an award of mora interest on unpaid interest for the loss or damage suffered as a result of not receiving the agreed interest on time. Clearly it must similarly be assumed that the interest would have been productively employed had it been paid on the due date. Also, no consideration of public policy points the other way. On the contrary, taking into account that interest is the 'life-blood of finance' it is in the public interest that creditors be compensated when debtors fail to make payment of agreed interest on the due date."

[37] What is immediately apparent is that in both cases the interest that was levied on interest, was mora interest levied on specific statutory or contractual payments of interest due and payable, which were not paid on time.

[38] Secondly, S 33A(9) merely says that interest on unpaid (remunerative) amounts due will accrue at a certain rate. It does not say that the interest accruing on unpaid remuneration must be paid by a certain date, so that the employer is automatically in mora for that accrued interest. Accordingly, it seems that the principle of compound interest as expressed in Davehill and Ryton Estates is not support the existence of a general principle that interest is automatically applicable to accrued mora interest.

[39] Consequently, I am not persuaded that the applicants were entitled as a matter of law to be paid interest on their outstanding allowances on a compounded basis. Of course, that does not mean simple interest did not start running on the interest which had accrued by the date of the interest award on 15 May 2017, in terms of s 143(2) of the LRA, but that is quite a separate issue from the determination of the interest payable under the award.

Costs

[40] As both parties have been partially successful, it is appropriate they should bear their own costs.

Order

[1] The First Respondent must comply with the award of the Fifth Respondent under the Fourth Respondent's case number WECT 15599-16, in its entirety, by paying the applicants the balance of the award, on that basis that:

1.1 the in duplum rule does not apply to interest accrued from the date on which the payment of the allowance first became due (April 2004) until the date of payment, and

1.2 interest payable in terms of the award is simple interest.

[2] Each party must pay its own costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives For the Applicant R Stelzner SC instructed by MacRoberts Inc. For the Respondents A C Oosthuizen SC assisted by B Joseph SC and J Williams instructed by the State Attorney, Cape Town.

[1] Coetzee and Others v Member of the Executive Council for the Provincial Government for Health and Others, unreported judgment of the Labour Court, Case No C751/08 (4 November 2010) (unreported judgment)

[2] Member of the Executive of Western Cape Provincial Health Department v Coetzee (2015) 36 ILJ 3010 (LAC)

[3] Coetzee and Others v The Public Health and Development Sectoral Bargaining Council and Others, unreported judgment of the Labour Court, Case No C819/15 (12 July 2016).

- [4] The MEC for the Department of Health, Western Cape v Coetzee and Others, unreported judgment of the Labour Appeal Court, Case No CA5/18 (3 May 2018)
- [5] MEC for the Department of Health, Western Cape v Coetzee and Others (2020) 41 ILJ 1303 at paragraph 9.
- [6] At 304 D-I and confirmed in Zondi v MEC, Traditional And Local Government Affairs, and Others 2006 (3) SA 1 (CC) at paras 27-29.
- [7] At 715F-716D
- [8] At 482E-483A.
- [9] At para [27].
- [10] At 298H-C
- [11] At paras [13] – [14].
- [12] Viz: Section 75 of the Act states: 75 Payment of interest An employer must pay interest on any amount due and payable in terms of this Act or the National Minimum Wage Act, 2018, at the rate of interest prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), to any person to whom a payment should have been made.
- [12] Viz: Section 75 of the Act states:
- 75 Payment of interest
- An employer must pay interest on any amount due and payable in terms of this Act or the National Minimum Wage Act, 2018, at the rate of interest prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), to any person to whom a payment should have been made.
- [13] At paragraph 10.
- [14] At paragraph 20.
- [15] At 297G-H
- [16] At para 4.

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