

SOUTH AFRICA / JUDGMENT

**Da Cruz v Bernardo (2020/26428) [2021]
ZAGPJHC 493; [2022] 1 All SA 414 (GJ);
2022 (2) SA 185 (GJ) (10 August 2021)
[2021] ZAGPJHC 493**

COURT

South Gauteng High Court, Johannesburg

BEFORE

Turner AJ

CASE / FILE NUMBER

2020/26428

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2020/26428

REPORTABLE:

YES/-
OF
INTEREST TO OTHER
JUDGES: YES

REVISED:

YES/NO
Date:...10
August 2021
In

the matter between:

DA
CRUZ, VICTOR MANUEL
ROSA
Applicant
and
BERNARDO,
FERNANDO DA
SILVA
Respondent

JUDGMENT

Delivered: This judgment is handed down electronically by circulation to the parties' representatives by email.

TURNER AJ:

[1] This judgment addresses two legal questions relating to the in duplum rule.

1.1 First, whether the in duplum rule applies to mora interest claimed on a liquidated debt as contemplated in section 1(1) of the Prescribed Rate of Interest Act, 55 of 1975.

1.2 Second, whether the in duplum rule can be relied upon to limit the liability of a defendant flowing from a judgment in which the defendant is ordered to pay interest which, when calculated, exceeds the capital amount of the judgment.

[2] The current application follows a judgment granted by this Court, per Foulkes-Jones AJ, in which the applicant, as plaintiff, was successful against the respondent. The facts set out below are taken, primarily, from the judgment.

[3] In late 2007, the applicant entered into negotiations with the respondent to invest in one or more of the respondent's businesses and concluded a written agreement on 29 October 2007. The party with whom the plaintiff was alleged to have contracted was Vando Trust ("the Trust") and pursuant

thereto, the applicant made payment of R903,500.00 into an account in the name of VF Audio Visual Systems CC ("VF Audio"). It appears that the respondent was involved in controlling the affairs of both VF Audio and the Trust.

[4] Soon thereafter, the deal collapsed and on 3 December 2007, the applicant claimed repayment of his investment. Two amounts, totalling R91 000, were paid in early 2008 and when no further payments were made, the applicant instituted action on 27 May 2008 to recover the balance of the amount that he had paid. The first defendant in the action was the Trust and the second defendant was the VF Audio Visual CC. The respondent was cited as third defendant in his capacity as a trustee of the Trust.

Subsequently, the other two trustees of the Trust were joined as fourth and fifth defendants, respectively. There were a number of delays in proceeding with the litigation and, in late 2015, the respondent was joined to the action in his personal capacity, as the sixth defendant. The claim pleaded against him was for: breach of warranty of authority by him; an order that the Trust was his alter ego; and that the Trust was a sham as it did not comply with the necessary formalities for its formation.

- [5] Shortly before the trial, the Trust delivered a consent to judgment in terms of rule 31(1) for the sum of R812,500.00 together with interest thereon and payment of costs of suit. The Trust had no bank account and no funds and so its tender of judgment against it was, at best, an empty tender.[1] Consequently, the applicant pursued the respondent in his personal capacity.
- [6] In the trial before Foulkes-Jones AJ, the applicant asserted that the respondent should be found "jointly liable with the first defendant (the Vando Trust) on the basis of breach of warranty of authority by him and/or disregarding the trust form (the alter ego claim). The plaintiff also submits that the sixth defendant be held jointly and severally liable with the first defendant in respect of the latter's consent to judgment and that the court should pierce the trust veneer and hold the sixth defendant personally liable for the indebtedness of the first defendant to the plaintiff." [2]
- [7] After finding that the claim against the respondent had not prescribed [3], Foulkes-Jones AJ turned to the claims on the merits. In finding against the respondent, the learned Judge found and ordered as

follows, without any discussion on the liability for or calculation of interest payable on the capital amount of the debt:

"79. In the present matter, the third defendant and for the (sic) matter the first defendant, acted outside the scope of its authority to act and in the current matter, it would be manifestly unfair and unjust to visit the results thereof on the Plaintiff (a third party in the transaction), who bona fide parted with monies raised against his home bond. He undoubtedly relied on the representations made to him by what he perceived to be a good and trusted friend. The latter sought by his conduct to mislead not only the Plaintiff but also the Court by making misrepresentations which were untrue in his pleadings.

80. I find in all the circumstances that the conduct of the sixth defendant was opportunistic, calculated to evade his obligations to the plaintiff and that accordingly, the plaintiff must succeed on this score in his claim that the veil should be pierced. I therefore make the following order:

80.1 The Third and Sixth Defendants are ordered jointly and severally, the one paying the other to be absolved:

80.1.1 To make payment to the Plaintiff in the amount of R818,250.00; [It is common cause that the capital amount stated in the order of R818,250.00 was an error and that the correct capital amount is in fact R812,500.00.]

80.1.2 Interest on the amount *a tempore mora* from 3 December 2007 to date of payment;

80.1.3 Costs of suit including the costs of the Sixth Defendant's Special Plea."

- [8] The judgment was delivered on 22 May 2020 and the respondent did not apply for leave to appeal. On 17 July 2020, the applicant's attorneys sent a letter to the respondent's attorney demanding payment of the correct capital amount of R812,500.00 plus interest in the amount of R1,590,952.91. The letter also set out the plaintiffs calculation of the interest awarded in terms of the Prescribed Rate of Interest

Act

- 15.5% per annum on a straight-line basis at R345.03 per day calculated from 3 December 2007 to the date of the letter.
- [9] On 30 July 2020, the respondent's attorney replied, disputing the calculation of the interest amount and contending that the in duplum rule applied to limit the interest payable by the respondent to R812,500.00. Further correspondence was exchanged in which the parties argued their respective positions. Thereafter, the following payments were made by the respondents to the applicant: (i) on 5 August 2020, an amount of R812,500.00; (ii) on 18 August 2020 a further payment of R812,500.00.
- [10] The applicant's notice of motion in the current application claims the following relief:
1. An order declaring that the in duplum rule does not apply to the moratory interest awarded in the judgment and order under Case No. 15636/2008 in the Gauteng Division of the High Court, Johannesburg, by Her Ladyship Ms Acting Justice Foulkes-Jones ("the judgment").
 2. An order declaring that the respondent remains indebted to the applicant in the amount of R785,008.56 being the balance due in respect of moratory interest awarded in the judgment.
 3. Interest on the aforesaid amount of R785,008.56 a tempore mora to date of final payment, both days inclusive.
 4. Directing the respondent to pay the applicant's costs of this application.
- [11] The respondent did not deliver an answering affidavit but instead delivered a notice in terms of rule 6(5)(d)(iii) identifying what he asserts to be the correct legal position and the point to be determined, as follows:

"The in duplum rule applies to the running of interest on the capital amount awarded in the judgment under Case No. 15636/2008 and that if the applicant is entitled to claim any additional interest, such interest is to be calculated from the date of the judgment to the date of payment of the judgment debt."

- [12] The parties are not in dispute in relation to the additional amount of the interest that would be payable if interest were to be calculated at the prescribed rate for the full period from 3 December 2007 to date of the judgment. This amount is R785,008.56, being the total interest amount of R1,597,508.52 less the R812,500.00 already paid. The parties are also not in dispute that the respondent is liable for interest on the judgment debt (taking into account the two payments of R812,500.00 made in August 2020).

- [13] Prior to the hearing, I sent a note to the parties identifying specific questions to be addressed at the hearing of the matter and invited counsel to make written submissions in advance of the hearing, if they so wished. These points were –
- i. "Does this application require the Court to interpret the judgment and order of Foulkes-Jones AJ?"
 - ii. Does the relief claimed by either party in the current application involve a variation of the order (2) granted by Foulkes-Jones AJ?[4]"
 - iii. . Is this Court functus officio in relation to the third and sixth defendants' liability to the plaintiff, for interest on the capital sum?"
- [14] On Monday 8 March, I received the parties' joint submission in response to my enquiries, to the following effect: (i) the parties are ad idem that this application does not require the Court to interpret the judgment of Foulkes-Jones AJ; (ii) neither party seeks a variation of the order granted by Foulkes-Jones AJ; (iii) the parties are ad idem that the Court is indeed functus officio in relation to the third and sixth defendants' liability to the plaintiff for interest on the capital sum per se. However, while both parties are ad idem that the Court is functus officio in relation to the liability for interest per se, it is not functus officio in relation to the issue of whether the in duplum rule applies to the interest awarded in the judgment.
- [15] During the hearing, I asked the parties whether the issue raised by them was one contemplated by the full court in Transvaal Canoe Union,[5] where the parties agree that the issue raised is accessory or consequential to the judgment and is one in which they now agree should be incorporated in the judgment.[6] Mr Kairinos SC, who appeared for the applicant, confirmed that there was no agreement of this sort and that if I found that the Court is functus officio and cannot revisit the question as to whether the in duplum rule should apply to interest awarded in the judgment, then I should make that finding and confirm the respondent's liability of the outstanding balance.
- [16] I deal with this issue in the second part of this judgment but, as neither party considers that the Court is functus officio in relation to the issue of whether the in duplum rule applies to limit the interest awarded in the judgment, I deal first with the vexed question of whether the in duplum rule applies to limit mora interest payable on a claim for a liquidated amount.

The in duplum rule

- [17] As this judgment deals with the circumstances in which the in duplum rule should apply, it would be useful at the outset to record a clear definition of the rule.
- [18] In Oneanate,[7] Zulman JA described the rule as follows:
- "It provides that interest stops running when the unpaid interest equals the outstanding capital. When due to payment, interest drops below the outstanding capital, interest again begins to run until it once again equals that amount."

[19] In Paulsen[8], Madlanga J[9] held[10]:

"It provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital. ...

". .. The overarching purpose of the rule is to protect debtors from being crushed by the never-ending accumulation of interest on an outstanding debt. As Tuchten AJ neatly put it in Bellingan"[11]

'(T)he jurisprudential foundation for the restriction [of interest to the duplum] was the policy consideration that debtors whose affairs are declining should not be entirely drained dry "'

[20] In a concurring judgment, Moseneke DCJ [12] held[13] -

"It is a common-law norm that regulates the accrual of interest on a debt that is due and payable. The rule is that arrear interest stops accruing when the sum of the unpaid interest equals the extent of the outstanding capital. ..

The plain policy consideration underlying the rule is to prevent a broken debtor from being pounded by the ever-growing interest burden. The purpose of the rule is dual. It permits a creditor to recover double the capital advanced to the debtor whilst it seeks to alleviate the plight of debtors in financial distress."

[21] Wallis JA[14] in the earlier SCA

judgment

in Paulsen[15] had recorded the following:

"Once interest is payable on a debt the in duplum rule potentially comes into play. The effect of that rule is clear. Where a debt is owed and bears interest, the amount of such interest may not exceed the capital amount. It was argued that this restriction only applied to arrear interest but, as the cases show, that expression merely means the accumulated interest on the amount in arrears. It excludes amounts already paid by way of interest and relates only to interest that has accrued but is unpaid." (emphasis added)

[22] Paulsen and Oneanate dealt with a loan agreement and an overdraft respectively, agreements to which the rule clearly applies and neither case interrogated the type of debts that are covered by the in duplum rule. The focus of both of those cases was on whether the rule was suspended by the institution of legal proceedings to recover the debt.

[23] In LTA Construction[16] an arbitrator had determined contractual liability of the Administrator to LTA on two claims and had made an award of interest on the capital sums determined by him. The arbitrator found that the administrator was liable for: i) a capital sum of R63,080.30 plus interest from the due date 30 July 1991 until 23 December 1997 - which, at the bank prime rate provided for in the contract, amounted to R138,593.21; ii) a capital amount of R57,750 plus interest at the contractual rate calculated from 23 August

1993 which, by December 1997, equated to R63,021.25. The total amount awarded, including capital and interest, was therefore R322,444.76.

[24] After the arbitrator had handed down his award, the Administrator did not pay the total amount awarded but only paid an amount of R241,660.60 being twice the capital amount awarded (i.e. capital plus interest at in duplum). When the Administrator applied to Court on a separate issue relating to the contract, LTA brought a counter-application requesting that the arbitrator's award be made an order of Court and judgment for the unpaid difference. The Administrator resisted the counter-application asserting that its liability was limited by the in duplum rule. Only the counter application was appealed to the Appellate Division.[17]

[25] After reviewing the historical development of the in duplum rule from the Roman Law, the Law of the Middle Ages, the Dutch Jurists and the Roman-Dutch Law, Joubert JA recorded the following in relation to the in duplum rule[18]:

"Na my oordeel is die renteverbod in duplum (meer korrek ultra sortem), soos dit in die klassieke tydperk van die Romeinse reg ten opsigte van die oploop en invordering van agterstallige rente tot die bedrag van die kapitaalsom gegeld het, wel in die provinsie Holland en Wes-Friesland geresipieer. (emphasis added)

[26] The Court confirmed that the rule applied in South Africa and rejected LTA's argument that the in duplum rule applied only to loan agreements and not to other agreements.[19]

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 bet 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. (emphasis added)

[27] Having found that the rule applies to interest on debts arising from all contracts, not only loan agreements, Joubert JA confirmed the Court a quo was correct in applying the rule and limiting the interest recoverable. Importantly, the decision of an arbitrator is not a judgment, but a contractual debt, and so the Court did not see any difficulty in refusing to enforce the award for the additional interest.[20]

[28] In Bellingan[21] at p 399B, Tuchten AJ (as he then was) dealt with the in duplum rule as follows:

"The in duplum rule precludes the recovery of accumulated interest to the extent that it exceeds the capital sum. The prohibition on interest in duplum is not limited to money lending transactions. In principle it applies to all contracts arising from which a capital sum is owed which is subject to a specific rate of interest. There is no doubt that the prohibition on interest on in duplum applies to unpaid arrear ("agterstallige") interest.[22]

Mr Harris [for the respondents] submits that the operation of the rule is however not restricted to arrear unpaid interest and argues that it applies to every case in which interest exceeds the capital and remains unpaid.

After referring to *Stroebe v Stroebe*[23], the Learned Judge went on -

"Mr Harris submitted that these passages were authority for the proposition that the in duplum rule (as applied in our courts today) prohibited the recovery of unpaid interest in all cases, i.e. whether or not the unpaid interest was in arrears. I do not agree. Cillie JP was not called upon to consider this question. *Stroebe v Stroebe* is therefore no authority for counsel's contention." (emphasis added)

[29] After a brief review of the LTA decision and Roman-Dutch authorities, Tuchten AJ went on:

"I therefore conclude that under the Roman-Dutch law in force in Holland and Friesland, the prohibition of interest in duplum was by 1613 limited to unpaid arrear interest and that the jurisprudential foundation for the restriction was the policy consideration that debtors whose affairs are declining should not be entirely drained dry while persons who contrive to look after their interest have no need of such relief.

... A debtor who has stipulated for a lengthy delay between the date of the advance of the capital sum to him and the date upon which is obliged to pay the capital with interest is in my view even less in need of accommodation than the debtor who makes periodical payments of interest. There is no reported instance that I have found of to which counsel have referred me where the recipient of a long term loan was excused payment of part of the interest which had accrued on the ground that ultimately such interest exceeded the capital sum."

[30] In *eThekweni Municipality*,[24] the SCA recorded the following at paragraphs 9 and 10:

[9] The effect of the in duplum rule is that interest due in respect of a debt ceases to run when it reaches the amount of the unpaid capital sum: *Union Government v Jordaan's Executor* 1916 TPD 411 at 413. The rule is based on public policy and is meant to protect debtors from exploitation by creditors by forcing them to pay unregulated charges, and enforce sound fiscal discipline on creditors. It cannot be waived in advance or during the period of the loan: *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* [1997] ZASCA 94; 1998

(1) SA 811 (SCA). It does not relate only to money-lending transactions but applies to all contracts where a capital amount that is subject to interest at a fixed rate is owing: *LTA Construction Bpkv Administrateur, Transvaal* [1991] ZASCA 147; 1992

(1) SA 473 (A) at 482I-483A.

[10] The scope of application of the rule is succinctly set out in *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000

(2) SA 647 (W) ... where *Blieden J* said at 655D-I:

"[T]he in duplum rule is confined to arrear interest and to arrear interest alone. In my judgment the reason for this is plain: it is to protect debtors from having to pay more than double the capital owed by them at the date on which the debt is claimed ..

Counsel's reliance on the *LTA Construction* case ... for the submission that interest does not have to be in arrear for the in duplum rule to apply is, in my view, unfounded. The fact that the capital amount in each of these cases had either not been ascertained or agreed to at the date interest started to run does not detract from the fact that the interest claimed was in fact arrear interest. This is wholly different from the present case, but was to be calculated as future interest in the relevant time period involved."

...

[31] In *eThekweni Municipality*, the SCA found that the interest which formed part of the debt owed by the defendant to the plaintiff was "not conventional interest" but rather "the parties unambiguously meant it as a means of formulating a fair and proper restitution for what had been paid and received." As a result, the in duplum rule was found not to apply and the full amount claimed (which included interest beyond double the capital amount) was payable. I understand the judgment to confirm that the mere fact that interest forms part of or is accessory to the amount claimed, is insufficient to justify the application of the in duplum rule.

[32] The case of *Margo v Gardiner* [25] also provides useful guidance. After the SCA delivered a final judgment in *Gardiner and Another v Margo*, [26] the matter went back to the SCA in relation to that Court's original order of interest and the application of the in duplum rule. [27]

[33] *Margo*, as cessionary, had sued *Gardiner* for payment of the unpaid proceeds from a sale of shares which *Gardiner* was obliged to sell on behalf of one *Joubert* (the cedent to *Margo*). *Gardiner* disputed his liability but those defences were rejected and the SCA granted an order in favour of *Margo* "for payment of the amount of R1,461,432 plus interest thereon at the rate of 15.5% per annum from 1 September 1998 to date of payment." The judgment was handed down on 28 March 2006, some 7½ years after 1 September 1998 and, at the Prescribed Rate of 15.5% per annum, the total interest was approximately 116.25% of the capital sum. Pursuant to the SCA judgment, *Gardiner* made payment of what he contended was the total amount owing and it appears that *Gardiner* calculated his total liability at twice the capital sum - applying the in duplum rule to limit his interest liability. Thereafter, *Gardiner* launched an application for a declaratory order that the SCA judgment had been satisfied and *Margo* issued a writ for the balance and sought an order from the High Court

enforcing that writ of execution. Conflicting judgments were handed down by the High Court in the two applications and so the matter found its way back to the SCA.[28]

[34] The SCA disposed of the appeal on two bases:

34.1 First, relying on Oneanate[29] the Court pointed out that Margo had applied the in duplum rule incorrectly in that he had not taken into account the fact that the rule was suspended during litigation. (This judgment was given before the decision in Oneanate was overruled in Paulsen.)

34.2 Second, as is dealt with more fully in the second part of this judgment below, the Court pointed out that the order for payment of the full interest amount given by the SCA was unequivocal, had not been set aside and therefore had to be given effect to as it stood.[30]

[35] The following obiter statements were recorded by the Court which are relevant to the current dispute.[31]

"Counsel for Gardiner argued that the difference between this appeal and the Oneanate case lies in the cause of action. The cause of action however makes no difference in the application of the in duplum rule : see LTA Construction Bpk supra, Bellingan v Clive Ferreira and Associates CC and another 1998 (4) SA 382 (W); Meyer v Catwalk Investments 354 (Pty) Ltd en andere 2004 (6) SA 107 (T).

"The prohibition on interest in duplum rule is not limited to money lending transactions but applies to all contracts arising from a capital sum owed, which is subject to a specific rate of interest. (Monica Vessio A limit on the limit on interest ? The in dup/um rule and the public policy backdrop (2006) 39 De Jure 25 at 26-7).

[12] It is trite that the in duplum rule forms part of South African law. It is also axiomatic that the in duplum rule prevents unpaid interest from accruing further once it reaches the unpaid capital amount. However, it must be borne in mind that a creditor is not prevented by the rule from collecting more than double the unpaid capital amount in interest, provided that he at no time allows the unpaid arrear interest to reach the unpaid capital amount. On the facts of this appeal this court is not asked to review the order of the SCA but to give effect to it as it stands. The order of the SCA is unequivocal and does not provide for any interest ceiling. Therefore the amounts claimed in the second writ are all due and owing by Gardiner to Margo on the strength of the SCA judgment. The purpose or basis of the in duplum rule is to protect borrowers from exploitation by lenders who permit interest to accumulate. but essentially also to encourage plaintiffs to issue summons and claim payment of the debt speedily... " (emphasis added)

- [36] Toe Court went on to acknowledge that when the SCA order was granted, the interest for the period 1 September 1998 to 27 March 2006 amounted to R1,715,360.81 being an amount clearly more than double the capital amount, and gave no suggestion that the judgment was wrong. I note that, although Shongwe JA states that the "cause of action ... makes no difference in the application of the in duplum rule", the cases referred to as authority for that proposition are all cases involving contracts where the interest rate is stipulated.
- [37] In *Wouldge*, [32] a taxpayer had been found to have made a donation when he gratuitously failed to charge interest that would ordinarily have been charged. To limit his tax liability in respect of that interest donation (a gratuitous disposition) the taxpayer argued that the in duplum rule applied to limit the amount of interest that would have been payable to him by the donee. In dealing with whether the in duplum rule was applicable the SCA stated: [33]
- "It is clear that the in duplum rule can be applied in the real world of commerce and economic activity only where it serves considerations obligation public policy in the protection of borrowers against exploitation by lenders." (emphasis added)
- [38] In *eThekweni Municipality* [34] the SCA clarified that the *Wouldge* case should "not be understood to mean that the identity of the debtor (i.e. whether the debtor requires protection from exploitation) determines whether or not the in duplum rule is to be applied."
- [39] In *Drake Flemmer*, [35] the SCA was required to address inter alia the interest recoverable on an unliquidated debt. The facts, though complicated, may be summarised as follows for purposes of the current analysis. The plaintiff had been involved in a motor vehicle accident in July 1997, suffering body and brain injuries. His first attorneys (DFO) negligently settled his claim against the RAF because they only claimed for bodily injuries, failing to pick up and claim for the brain injury he suffered. Having realised the negligence, a second firm (LRI) was briefed to sue DFO but LRI allowed the claim against DFO to prescribe in December 2002. Ultimately, after appointing a third set of attorneys to sue LRI, the matter came to trial in 2015. The liability of LRI was not disputed, the focus of the judgment was on the quantum of the claim. The focus of the SCA judgment was on the date to be used to value the plaintiff's claim and how interest should be applied to ensure adequate compensation.
- [40] The Court determined that the correct date to assess the quantum of the plaintiff's loss in its claim against LRI was December 2002 as that was when LRI had allowed the claim against DFO to prescribe. The Court recognised however that the value of money in 2015 (and 2017 when the SCA judgment was handed down) was significantly different from its value in December 2002. In doing so, the Court considered it appropriate to employ the provisions of section 2A(5) of the Prescribed Rate of Interest Act which gives a Court the power to make such order "as appears just in respect of payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

- [41] Although the SCA did not substitute the amount awarded by the High Court (in dismissing the appeal) it adopted a significantly different approach to the calculation and it recognised that, on its computation, the interest it was awarding exceeded the capital amount. The SCA found that because the interest awarded to the plaintiff was interest determined at the time of judgment, it was not "arrear interest" and therefore was not struck by the in duplum rule. [36] In making this finding, the SCA confirmed that mora interest awarded on an unliquidated debt where the Court invokes its powers in terms of section 2A(5) is not struck by the in duplum rule because it does not amount to "arrear interest".
- [42] In Watson,[37] the Western Cape High Court was faced with quantifying an insurance claim where the merits in relation to the claim had been litigated to the SCA, with the result that the quantum judgment was delivered some 7½ years after summons was issued. The Court considered that the correct date on which to value the claim was in 2011, when demand was made. Having done so, it found that interest should be calculated from the date of service of the summons in September 2011, which it identified as the correct mora date. By ordering interest at a rate of 15.5% per annum for 7,5 years, the interest awarded exceeded the capital. The Court did so without demur.
- [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.
- [44] In the circumstances, I have considered whether the rule applies, having regard to the legal obligation to pay interest, the provisions of the Prescribed Rate of Interest Act, the manner in which the Courts have dealt with the rule in the cases referred to above and the stated purpose of the rule.

NATURE OF THE DEBT

- [45] There are two important distinctions to draw in analysing the various judgments and the common law authorities.

45.1 The first is the distinction between mora interest and interest determined by an agreement. In the former, the interest recoverable is accessory to the main debt as fair compensation for the delay.[38] It is not a separate obligation and cannot be recovered in separate proceedings. In the latter, the obligation to pay interest is a separate and distinct contractual obligation and, although it ordinarily would be claimed in the same action, could be claimed in separate actions. The rate of interest payable on a contractual debt is ordinarily stipulated in the agreement (though it need not be). The rate for mora interest is determined with reference to the Prescribed Rate of Interest Act, and can be applicable to a contractual debt where the contract does not prescribe the rate.

The second is the difference between mora interest on liquidated debts and mora interest on unliquidated debts. In Victoria Falls, the AD noted that in the Courts of Holland, mora interest on a liquidated debt became due at *litis contestatio* when the letter of demand was delivered.[39] In West Rand Estates[40], the AD (per Solomon JA) held that this position had changed and expressly confirmed that "after receipt of the letter of demand the defendant should be regarded to be in mora" in respect of a liquidated debt. In both West Rand Estates and Victoria Falls, the Court confirmed that mora interest did not apply to debts for unliquidated damages. Under the common law, interest was only payable on an unliquidated debt when a Court had determined the amount owing.[41] This was the common law position until the Prescribed Rate of Interest Act was amended to add section 2A.

THE PRESCRIBED RATE OF INTEREST ACT

[46] Section 1(1) of the Prescribed Rate of Interest Act provides,[42]

"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." (emphasis added)

[47] Section 2A of the Prescribed Rate of Interest Act deals with interest on unliquidated debts. For convenience, having regard to discussion below, I quote that section as well:

"2A(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1." (emphasis added)

[48] As noted above, I do not have the pleadings that served before Foulkes-Jones AJ. I proceed with the analysis however on the basis that the plaintiffs case was one for damages formulated either - i) as damages flowing from misrepresentation or a breach of warranty of authority; or ii) as restitutionary damages flowing from the termination of the investment agreement, applied to the sixth defendant following the Court's order to "pierce the veil" of the Trust. In either case, there is no agreement or law which regulates the rate at which interest is to be calculated. In terms of the common law, the debt bears mora interest and consequently, section 1(1) applies.

[49] While the provisions of the Prescribed Rate of Interest Act are to be interpreted in light of the existing common law, the common law will yield where there is conflict between the statutory provision and the common law position, the former being taken to amend the latter.[43]

MORA INTEREST

[50] There was some debate between the parties as to whether a distinction should be drawn between mora interest and arrear interest. Mr Kairinos SC, for the applicant, argued that there is a clear difference - he argued that arrear interest accumulates on a debt in terms of a contractual stipulation, while mora interest is payable in the discretion of the court and therefore only becomes an interest liability at the date of judgment. Mr Hitchings, for the respondent, argued that, because mora interest starts to run immediately on a liquidated debt, the interest accrued from the mora date until demand and judgment is properly categorised as "arrear interest".

[51] In LTA, the Appellate Division spoke of "agterstallige rente" which, as an adjective, may be interpreted as "overdue" or "in arrears". In essence, this is money (interest) that is owed and should have been paid earlier; "an amount still outstanding or uncompleted ... a debt unpaid." [44]

[52] The nature of mora interest was dealt with in *Bellairs v Hodnett* [45] where, with reference to the dicta of Centlivres CJ in *Linton*, [46] the AD held:

"Interest is today the 'lifeblood of finance' and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of mora interest seeks to compensate the creditor."

[53] The Court went on to say:

"As previously pointed out, mora interest in a case like the present constitutes a form of damages for breach of contract. [47]

The court acts on the assumption that, had due payment been made, the capital sum would have been productively employed by the creditor

during the period of mora and the interest consequently represents the damages flowing naturally from the breach of contract."

[54] In *Scoin Trading*, [48] after dealing with the mechanism to identify the mora date, the SCA held:

"If a debtor's obligation is to pay a sum of money on a stipulated date and he is in mora in that he failed to perform on or before the time agreed upon, the damages that flow naturally from such failure will be interest a tempore morae or mora interest. The purpose of mora interest is to place the creditor in the position he would have been if the debtor had performed in terms of the undertaking."

[55] The difference between mora interest and "arrear interest" was dealt with directly by the SCA in *Ryton Estates*[49] where the Court identified a clear distinction between contractual interest and mora interest. Having described the interest that may be agreed by the parties in terms of an agreement (whether it was compound interest or simple interest), the Court went on to state:

"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*."

[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 section 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 in issue.

SUMMATION

[57] On a review of all the above cases, the following principles emerge:

57.1 Where interest is calculated with reference to a rate stipulated in an agreement, whether the agreement is a loan agreement or another type of agreement, the interest which accrues on the debt cannot exceed the capital sum of the debt.

57.2 From the date of judgment in the trial Court (even if the order to pay capital and interest is only entered through substitution by an appeal Court) the capital and interest awarded is consolidated and interest runs afresh on the consolidated amount from date of judgment.

57.3 Where the debt is an unliquidated debt, interest can be claimed from date of mora:[50]

"A court determining the amount of interest to be awarded in order to 'shield the plaintiff from the corroding effects of delay' is not constrained by the *in duplum* rule and may order payment of interest in an amount exceeding the capital."

Mora interest is different from contractual interest and is awarded as compensation for loss of damage resulting from default. [51]

57.4 The obligation to pay mora interest is accessory to the primary obligation and cannot be recovered separately from the primary debt.

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

- [58] What then of mora interest on a liquidated debt? Is it classified with and subject to the same constraints as interest contractually agreed, or is it to be determined in a similar way to mora interest on unliquidated debts? For the reasons set out below, I find it is the latter.
- [59] The purpose of the rule was, from Roman times, to prevent lenders from exploiting borrowers in respect of debt agreements. [52] The in duplum rule is a rule of law which cannot be waived[53] and a Court may not order interest in contravention of the rule.[54] The rule has been stated to apply to arrears interest "agterstallige rente" on all contracts in which a capital sum owing is subject to a stipulated exchange rate.[55]
- [60] Mora interest, being different from contractual interest, [56] is concerned with compensation for loss or damage arising from default by the debtor where no interest is agreed. The circumstances in which a liquidated debt giving rise to mora interest may be recoverable covers a broad territory[57] and may cover circumstances as broad as theft[58] to goods sold and delivered. Further, a Court does have some flexibility in determining defendant's liability for mora interest in terms of the Prescribed Rate of Interest Act and so, like with an unliquidated claim, the defendant's liability for interest is not certain until the Court has delivered its judgment.
- [61] As appears from the Drake Flemmer and Watson examples, delays in litigation may run longer than it takes for the interest to equal the capital at the applicable mora interest rate. In these circumstances, it is preferable, as a matter of public policy and in the interests of justice, for the Court to retain a discretion on how interest should be awarded, exercised on the facts of each case. Where the Court has such a discretion, it could exercise that discretion to limit interest payable to a dilatory plaintiff or to allow that interest where the defendant is the reason for the delay. Section 1(1) of the Prescribed Rate of Interest Act provides the court with that discretion. In my view, the "special circumstances" which give a court the discretion set out in section 1(1) of the Prescribed Rate of Interest Act would include circumstances where a plaintiff has been dilatory or where delay ought not to be visited on one of the parties.
- [62] In the circumstances, I find that there is no basis for concluding that the in duplum rule should be implied into the award of interest in the order handed down by Foulkes- Jones AJ to limit the moratory interest awarded to the plaintiff. In my view, the law does not preclude the plaintiff from recovering mora interest on its liquidated debt in an amount that exceeded the capital amount of the original debt.

Functus officio

- [63] I turn now to deal with the question of whether this Court can revisit the order granted by Foulkes-Jones AJ, in circumstances where both parties suggested it could.
- [64] In *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977
- (4) SA 298 (A) at 304 D-I, Trollip JA recorded the following:

"First, some general observations about the relevant rules of interpreting 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 its 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 *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 (AD) at pp. 454F - 455A; *Thomson v Belco (Pvt.) Ltd. and Another*, 1960 (3) SA 809 (D).

[65] These principles have been confirmed and relied upon without any material qualification in both the Supreme Court of Appeal and the Constitutional Court.[59] The point was reinforced in *Ntshwaqela*[60]

Similarly, the order with which a judgment concludes has a special function: it is the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it.

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.

- [66] Mr Hitchings, for the respondent, argued that if the in duplum rule applies, it applies as a rule of law and must be implied automatically to reduce the amount which would otherwise be recoverable in terms of paragraph 80.1.2 of the order. He argued that it was not necessary for the defendant to plead the application of the in duplum rule in order to avoid an order such as that given in paragraph 80.1.2 and that it was for the plaintiff to have argued the inapplicability of the in duplum rule before Foulkes-Jones AJ. I have set out above the reasons why I consider that the in duplum rule does not apply to limit mora interest claimable on a liquidated debt but, even if I am wrong in that regard, I cannot agree with these submissions.
- [67] First, the principles set out in *Firestone* would be severely undermined and significant uncertainty would arise if clear and unambiguous orders of the High Court were to be subject to implied terms which varied their meaning. Rule 42 provides a concerned party with the option of approaching the original court for a variation of the order and the appeal procedures are available to a party who wishes to collect an order. In the absence of a variation to the order or an appeal judgment overturning the order, the order must stand and be enforced according to its terms.
- [68] Second, as Harms JA colourfully explained in *F&I Advisors*, [61] a defendant that wishes to rely on the in duplum rule must raise the defence. While the Court can take a point of illegality *mero moto* if the defendant does not plead it, it can and will only do so if the illegality is obvious and all the necessary and relevant facts are before it. In any event, the question of whether the court should or should not have taken account of the in duplum rule is a matter that might have been relevant if the judgment of Foulkes-Jones AJ had been taken on appeal. However, it has no relevance in the current circumstances.
- [69] In *Margo (2)*, Shongwe JA was faced with a similar argument and gave it short-shrift. Accepting that the amount of the interest awarded in *Margo*
- (1) exceeded the capital, the learned Judge held:

On the facts of this appeal this court is not asked to review the order of the SCA, but to give effect to it as it stands. The order of the SCA is unequivocal and does not provide for any interest ceiling. Therefore the amounts claimed in the second writ are all due and owing by Gardner to Margo on the strength of the SCA judgment.

- [70] In the current matter, I am asked to assess the liability of the respondent to the defendant following the judgment of Foulkes-Jones AJ. To me, the order made by the Learned Judge establishing the respondent's liability to the plaintiff for interest on the capital sum is unequivocal and it does not provide for an interest ceiling. As such, the judgment should be enforced on its terms, which includes payment by the defendant of the additional interest amount of R785,008.56, in addition to any outstanding interest owed on the judgment debt.

Order

[71] In the circumstances, I make the following order:

- a) The respondent is liable to pay to the applicant the amount of R785,008.56, being the balance due in respect of moratory interest awarded in the judgment and order under Case No. 15636/2008 in the Gauteng Division of the High Court, Johannesburg, by Her Ladyship Ms Acting Justice Foulkes-Jones ("the judgment").
- b) Interest on the aforesaid amount of R785,008.56 a tempore mora to date of final payment, both days inclusive.
- c) The respondent is to pay the applicant's costs of this application.

DA Turner AJ

Date of hearing: 10 March 2021

Date of judgment: 10 August 2021

Appearances:

On behalf of the applicant: Adv G Kairinos SC

Instructed by E Da Cruz Attorney

On behalf of the defendant : Adv B Hitchings

Instructed by Martins Weir-Smith

[1]

Judgment

para 78

[2] Judgment para 31.7

[3] Judgment para 73

[4] Judgment paragraph 80.1.2, quoted above

[5] Transvaal Canoe Union v Butgereit and Another 1990 (3) SA 398 (T) at 403E- 404E

[6] Transvaal Canoe Union supra at 404E.

[7] Standard Bank of South Africa Limited v 011eallate /11vestme11ts (PM Ltd (i11 liquidatio11) [1997] ZASCA 94; 1998 (1) SA 811 (SCA) at 827H

[8] Paulsen and Ano v Slip Knot Investments 777 (Pty) Ltd 2015 (3) SA 479 (CC).

[9] Jafla J and Nkabinde J concurring.

- [10] Paulsen at para 42 - 44
- [11] Bellingan v Clive Ferreira & Associates CC and others 1998 (4) SA 382 (W) at 399 B-E.
- [12] Mokeng CJ, Khampepe J, Leeuw AJ and Van der Westhuizen J concurring
- [13] At 107 ff
- [14] With whom Mpati P, Shongwe JA and Mathopo AJA concurred.
- [15] Paulsen and Ano v Slip Knot Investments 777 (Pty) Ltd 2014 (4) SA 253 (SCA) at para 17.
- [16] LTA Construction Bpk v Adminstrateur, Transvaal 1992 (1) SA 473 (A)
- [17] The judgment a quo is reported at Administrasie van Transvaal v Oosthuizen en ander 1990 (3) SA 387 (W).
- [18] from 481H
- [19] P 482H - 483A.
- [20] Administrasie van Transvaal v Oosthuizen en ander 1990 (3) SA 387 (W) at 3971
- [21] Supra.
- [22] LTA Construction Bpk, supra.
- [23] Stroebel vStroebel 1973 (2) SA 137 (T) at 138-139.
- [24] eThekwini Municipality v Vendam Medi Centre (Pty) Ltd [2006] 3 All SA 325 (SCA) at para 9.
- [25] Margo and A,w v Gardiner and A,w 2010 (6) SA 385 (SCA)
- [26] Gardiner and A110 v Margo 2006 (6) SA 33 (SCA).
- [27] Margo (supra).
- [28] I have attempted to get access to those two judgments, without success.
- [29] Standard Bank v Oneanate (supra).
- [30] Margo at para 12.
- [31] Margo from para 11 - 12.
- [32] Commissioner. South African Revenue Service ,. Woulidge 2002 (I) SA 68 (SCA) at para 12.
- [33] Woulidge at para 12.
- [34] At paras 20 and 23.
- [35] Drake Flemmer and Orsmond Inc and Ano v Gaiaar NO 2018 (3) SA 353 (SCA)
- [36] Druke Flemmer at paras 84 - 86.

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- [37] Watson and Ano v Renasa Insurance Co Ltd 2019 (3) SA 593 (WCC) at para 71ff.
- [38] West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 185
- [39] Victoria Falls Power Co. v Consolidated Langlaagte Mines 1915 AD 1 citing Voet, 22.1.11; Wassenaar, Jud. Pract. (1.21.10); Merola, Manier van Proced. (4.42.5.2)
- [40] West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 183
- [41] Victoria Falls (supra)
- [42] Section 1 (1) remains unamended. Other subsections of section 1 were amended by Act 24 of 2015.
- [43] Kking and Others NNO v De Jager and Others 202 I (4) SA 1 (CC) at [141]
- [44] Oxford English Reference Dictionary, 2nd Ed 1996.
- [45] Bellairs v Hodnert and Ano 1978 (1) SA 1109 (A) from 1145- 1148.
- [46] Linton v Corser 1952 (3) SA 685 (AD) at 695.
- [47] Bellairs at 1146H- 1147A.
- [48] Scoin Trading (P(v) Ltd v Bernstein 2011 (2) SA 118 (SCA) at paras 11 - 14.
- [49] Land and Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd and others 2013 (6) SA 319 (SCA) at paras 11-14.
- [50] Prescribed Rate of Interest Act section 2A.
- [51] Ryton Estates para 12.
- [52] Paulson para 44, 107 and 122; Oneanate at 828 D-E; LTA Construction at 477C.
- [53] Paulson para 122, Oneanatep 828D-E.
- [54] F&l Advisors Edms Bpk en Ander v Eerste Nasionale Bank van Suid-Afrika Bpk [1998] ZASCA 65; 1999 (1) SA 515 (SCA) at 525E.
- [55] LTA Construction p 4821- 483A.
- [56] Ryton Estates para 12.
- [57] Fatti's Engineering Co Ltd v Vendick Spare., Ltd 1962 (1) SA 736 (T).
- [58] Nedcor Bank V Behardien 2000 (1) SA 307 (C).
- [59] Zondi v MEC Traditional and local Government Affairs and others 2006 (3) SA 1 (CC) paras 28 - 29; Ela11 Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd and others 2019 (3) SA 441 (SCA) para 16.
- [60] Administrator, Cape and Another v Ntshwaqela and Others 1990 (1) SA 705 (A) at 716 B-D

[61] Supra at 525 E-G.

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