

SOUTH AFRICA / JUDGMENT

Davehill (Pty) Ltd. and Others v Community Development Board (353/86) [1987] ZASCA 120; [1988] 1 All SA 388 (A) (30 September 1987)

[1987] ZASCA 120

COURT

Supreme Court of Appeal

BEFORE

Rabie, Botha, Grosskopf, Smalberger, Boshoff

CASE / FILE NUMBER

353/86

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353/86 N v H

DAVEHILL (PTY) LIMITED & OTHERS v THE COMMUNITY DEVELOPMENT BOARD

SMALBERGER, JA :-

353/86

N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION) In the matter between: DAVEHILL (PTY) LIMITED First Appellant
GANNET ENTERPRISES (PTY) LIMITED Second Appellant
TIRA (PTY) LIMITED Third Appellant
SEVENTY FOUR WEST (PTY) LIMITED Fourth Appellant
LINFRANK (PTY) LIMITED Fifth Appellant

SONNEBLOM BELEGGINGS (EDMS) BEPERK Sixth Appellant

and

THE COMMUNITY DEVELOPMENT BOARD Respondent

CORAM: RABIE, CJ, BOTHA, GROSSKOPF, SMALBERGER,

JJA, et BOSHOFF, AJA

HEARD: 3 SEPTEMBER 1987

DELIVERED: 30 SEPTEMBER 1987

JUDGMENT SMALBERGER, JA;-

The appellants were previously the owners of

certain erven situated in West Germiston Township. These pro=

perties / 2 perties were expropriated by the respondent under the provisions of the Expropriation Act 63 of 1975 ("the Act") on 24 October 1980. On 3 December 1980 the respondent took possession of the properties concerned. Initially the parties were unable to reach agreement on the amount of compensation payable under the Act for the properties expropriated. This led to the respondent making an interim payment of compensation of R634 600,00 to the appellants on 22 May 1983 ("the interim payment"). This was done in terms of the provisions of section 11(1) of the Act. During November 1984 the respondent made a final offer of settlement to the appellants. The offer was accepted on 19 December 1984. Consequent thereon the respondent paid a further amount of R453 550,00 to the

appellants / 3 appellants on 11 January 1985 ("the final payment"). This brought the total agreed compensation paid to the appellants (exclusive of interest) to R1 088 150,00. In terms of section 12(3) of the Act the respondent was obliged to pay interest to the appellants from the date of taking possession of the properties on any outstanding portion of the compensation payable in respect thereof. It will be convenient to refer to such interest as "statutory interest". On 1 April 1986 the respondent paid statutory interest in an amount of R162 850,33 to the appellants. This was followed by a further payment of statutory interest of R224 403,40 on 5 January

1987. It is common cause that the statutory interest paid by the respondent, totalling R387 253,73, represents the full amount

of / 4 of interest payable to the appellants in terms of section 12(3). In February 1986, prior to the first payment of statutory interest by the respondent, the appellants commenced motion proceedings against the respondent in the Transvaal Provincial Division for the recovery of statutory interest due to them. The appellants proceeded with their application, despite the payment of statutory interest on 1 April 1986, because they considered the amount paid to be less than that to which they were entitled. Two days prior to the hearing of the application the appellants gave notice of their intention to amend their notice of motion to include a claim for mora interest on the amount of statutory interest outstanding

from /

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from the date of the final payment of compensation. The matter came before O'DONOVAN, J, on 23 May 1986. The amendment was sought and granted. The Judge a quo's ex tempore judgment, however, was confined to the appellants' claim for statutory interest, and omitted to deal with the claim for mora interest. He held, in effect, that the amount of statutory interest paid to the appellants on 1 April 1986 represented the full extent of the respondent's liability for such interest in terms of section 12(3). In the result he dismissed the appellants' application, but granted them leave to appeal to this Court.

On 18 September 1986 judgment was delivered in this Court in the matter of Community Development Board v Mahomed

and /

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and Others NNO (reported at 1987(2) SA 899). From the

terms of this judgment it became apparent that the amount of statutory interest paid by the respondent was insufficient, and that the judgment of the Court a quo to the contrary was wrong. This gave rise to the further payment of statutory interest on 5 January

1987. This left, as the only outstanding issue between the parties, the question whether the respondent was liable to pay mora interest to the appellants in respect of statutory interest due and payable over the period 12 January 1985 to 5 January 1987.

The matter, however, does not end there. When they filed their heads of argument the appellants gave notice of their intention to apply at the hearing of the appeal to

further / 7 further amend their notice of motion in terms of an amended notice attached to their heads of argument. The amendment foreshadowed in the amended notice of motion sought to introduce an additional claim for mora interest on outstanding statutory interest from the date of the interim payment of compensation to the date of the final payment thereof. The application was moved at the hearing of the appeal, but not before a further amended notice of motion was handed in to replace that annexed to the heads of argument. The latter notice did not introduce anything new in principle. It merely sought to clarify the amounts of mora interest claimed by each appellant individually. Judgment was reserved on the application.

Before /

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Before dealing with the various issues that fall to be decided it is necessary to set out the relevant provisions of sections 11(1) and (3) and 12(3) of the Act as the determination of certain of the issues depends upon their

proper construction. They provide as follows:

"11(1) if the Minister deems it expedient, he may, prior to the determination of the amount of compensation payable in terms of this Act for property or for the use of property and on or at any time after the date of expropriation, but subject to the provisions of subsection (3), pay the amount offered the owner concerned as such compensation, or a portion of such amount, to the owner concerned, or the person contemplated in section 19, or deposit it with the Master or utilize it in settlement of the tax or other moneys contemplated in section 20 under the same circumstances under which he should or could have so paid, deposited or utilized such compensation had it been determined on that date.

(3) The /

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(3) The payment, deposit or utilization of

any amount under subsection (1) shall not preclude the determination by agreement or by a court contemplated in section 14(1), of a different amount as compensation, but if the amount so determined as compensation is less than the amount paid, deposited or utilized, the owner to whom or on whose behalf the last-mentioned amount was paid, or the Master with whom it was deposited, or the local authority concerned, as the case may be, shall refund the difference to the State together with, in the case of such owner or local authority, interest at the rate contemplated in section 12(3) from the date on which the amount was so paid or utilized, and, in the case of the Master, the interest accrued thereon in terms of subsection (2)." "12(3) Interest at the standard interest rate determined in terms of section 26(1) of the Exchequer and Audit Act, 1975 (Act No 66 of 1975), shall be payable from the date on which the State takes possession of the property in question in terms of section 8(3) or (5) on any outstanding

portion /

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portion of the amount of compensation payable in accordance with subsection (1)(a)(i): Provided that -

(b) from the date on which the

Minister in terms of section 11(1) pays or makes available an amount to the owner or any person referred to in section 21(4),

the amount which is so payable shall for the purposes of the payment of interest not be deemed to be an outstanding amount."

I shall commence with the appellants' claim for mora interest in respect of statutory interest outstanding over the period 12 January 1985 to 5 January

1987. In terms of section 12(3) of the Act the respondent was obliged to pay statutory interest at the prescribed rate from the date on

which / 11. which it took possession of the appellants' properties "on any outstanding portion of the amount of compensation payable". As was stated by BOTHA, JA, in *Community Development Board v*

Mahomed and Others NNO (*supra*) at 909 H - J:

"the expression 'the amount of compensation payable' must have been intended by the Legislature to refer to the amount as ultima=

tely determined Of that amount 'any

outstanding portion' must mean any part of it not yet paid as at the date of taking possession of the property and for as long as it remains unpaid thereafter. If the whole of the amount in question is paid only after it has been determined, interest will be payable on it from the date of taking possession until the date of payment."

The liability to pay statutory interest arises from considerations of equity, and was designed to compensate a person whose property has been expropriated for his loss of possession and fruits

of the / 12 of the property up to the time that compensation was paid (*Die Suid-Afrikaanse Naturellestuif v Kitchener en Andere* 1964 (3) SA 417 (A) at 423 E - F; *Community Development Board v Mahomed and Others NNO* (supra) at 915 F). In effect, statutory interest runs from day to day on the outstanding portion of the amount of compensation payable (whether it be the full amount or a reduced amount because of an interim payment in terms of section 11(1)), and ceases the moment compensation is paid in full. At that date the amount of statutory interest due can be computed at the rate prescribed in section 12(3) i.e. "at the standard interest rate determined in terms of section 26(1) of the Exchequer and Audit Act, 1975" (as to the meaning of which see *Community*

Development / 13 *Development Board v Mahomed and Others NNO* (supra)). So computed it constitutes a liquidated amount (*Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en Andere* (2) 1978(1) SA 164 (W) at 168 H).

Section 12(3) is silent as to when the statutory interest due is payable, that is to say, it contains no express provision in this regard. As statutory interest ceases to run the moment compensation is paid in full, and can readily be computed, there is no justification for withholding its payment beyond that date. Just as full payment of a debt and interest thereon can normally be expected to take place at one and the same time, so too can it be expected that payment of the full amount of compensation (or the balance thereof,

where / 14 where an interim payment has been made) and the payment of statutory interest due should be paid simultaneously. Furthermore, if statutory interest is not paid when the final compensation is paid the owner of property expropriated would be prejudiced by any delay in making payment thereof, which is presumably what section 12(3), having regard to its equitable origin and the purpose it was designed to achieve, would seek to avoid. With regard to the above it is to my mind clearly implicit in the provisions of section 12(3) that the respondent's obligation to pay statutory interest due arises on the same date as the final payment of compensation is made. Section 12(3) therefore fixes the time for performance. In the present instance the time for performance

was / 15 was 11 January 1985, and the respondent's failure to pay the statutory interest due by it to the appellants on that date automatically placed it in mora. (Wessels: *Law of Contract in South Africa* : 2nd Ed para 2863). This is so because, as the time for performance was fixed, mora operated *ex re* and no demand (*interpellatio*) 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 on 5 January 1987. (*West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 195/6).

In the /

16 In the course of argument Mr Burger, for the respondent, raised the question whether it was permissible, in the absence of agreement, to award interest on interest. He referred in this regard to *Stroebe v Stroebe* 1973(2) SA 137 (T) at 139 F - H. Interest on interest (compound interest) could not be claimed in Roman and Roman-Dutch Law (Voet: *Commentarius ad Pandectas* : 22.1.20 and 45.1.11; van Leeuwen: *Het Rooms-Hollands-Regt* : 4.7.6; van der Linden: *Regtsgeleerd Practicaal en Koopmans Handboek* : 1.15.3). In our modern law this principle has become obsolete, having been abrogated by disuse. (Wessels op cit p 192, note 107; *Natal Bank v Kuranda* 1907 TH 155 at 169/171). Compound interest may be expressly stipulated for by agreement, is commonplace today in commercial and finan=

cial / 17 cial 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 *Stroebe's* case at 139 F would today be dealt with under the provisions of section 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 / 18 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 statu= tory interest is, in essence, compensation for loss of posses= sion and fruits. Mr Burger further contended that as the respondent's delay in paying statutory interest was not culpable, it was not in mora. In this respect he referred to the dictum of KOTZE, JA, in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* (supra) at 195 that "a defendant cannot be said to be in mora unless he knows the nature of his duty or obligation; that is to say when and how much he has to pay". He submitted

that /

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that because of the obscure formulation of the provisions of the Act relevant to the calculation of statutory interest the respondent was unable to calculate the statutory interest due by it to the appellants before the judgment in *Community Development Board v Mahomed and Others* NNO (supra) unravelled the tangled web of legislative confusion and made such calcu= lation possible.

This argument cannot prevail. On a proper interpretation of the relevant provisions of the Act the respondent was, or should have been, able to ascertain the amount of statutory interest due by it. Legally it was therefore able to determine the amount due, and it cannot excuse its failure in this regard on account of its inability properly to interpret the relevant provisions of the Act.

I turn / 20 I turn to consider whether statutory interest is payable when an interim payment of compensation is made in terms of section 11(1). At first blush there would seem to be no sound reason for distinguishing between interim and final payments with regard to when statutory interest is payable. There are, however, certain significant differences in the two situations. The inference implicit in section 12(3) that statutory interest is payable when the final payment of compensation is made flows largely from the fact that the statutory interest due is determinable on that date, and there are no later events which can affect its final calculation. There is accordingly no reason why its payment should be withheld. The position is different in the case of an /

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of an interim payment. It is provisional in nature, and could subsequently turn out to be greater than the compensation finally determined (whether by agreement or by a court). Statutory interest may therefore ultimately be payable on a lesser amount than the interim payment of compensation. Its proper calculation is accordingly dependent upon the interim payment being less than the compensation finally determined. In that sense statutory interest is not finally determinable when an interim payment is made, and this would justify the payment thereof being withheld. In addition, the expectation that when a debt is paid in full the interest thereon will be paid at the same time is not so compelling when only a partial payment of the debt is made /

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is made. Thus one has less reason to suppose that the Legislature intended that when an interim payment was made, statutory interest thereon should be paid as well. Furthermore, whereas section 11(3) makes provision, where the amount of compensation ultimately determined is less than the interim payment in terms of section 11(1), for the refund to the State of the difference together with interest thereon from the date of payment at the rate of interest contemplated in section 12(3), it makes no provision for the refund of excess statutory interest paid. Were statutory interest to be payable when an interim payment is made, and a refund becomes necessary because the final determination is less than the interim payment, such refund should embrace not only

the / 23 the difference between the amount of interim compensation paid and the compensation finally determined, but also the statutory interest which would have been paid on that difference from the date of possession of the property concerned to the date of the interim payment. Section 11(3), however, does not provide for the repayment of the latter amount. The omission to make provision in this regard lends support to the conclusion that the Legislature did

not intend statutory interest to become payable when an interim payment is made. It may be suggested that the Legislature's failure to provide therefor was a casus omissus, but if on a reasonable construction of an Act a casus omissus can be avoided, it should be (Dhanabakium v Subramanian and Another 1943 AD 160

at 170 / ...

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at 170; Koller, NO v Steyn, NO en 'n Ander 1961 (1) SA 422

(A) at 429 C). Nor can one construe the concluding words of section 11(1), which provides for an interim payment to be made by the Minister prior to the determination of the amount of compensation payable "under the same circumstances under which he should or could have so paid such compensation had it been determined on that date", as indicative of the Legislature's intention to put final and interim payments of compensation on a par as far as the time for payment of statutory interest is concerned.

The conclusion to which I therefore come is that the provisions of section 12(3), read with sections 11(1) and (3) of the Act do not require the payment of any statutory

interest / 25 interest to be made at the time when an interim payment of compensation is made in terms of section 11(1). Statutory interest is only payable when the final payment of compensation is made. From this, it follows that the amendment sought at the hearing of the appeal to extend the appellants' claim for mora interest seeks to introduce an issue untenable in law, and for that reason alone it must be refused.

I come now to the final issue, viz., the rate at which mora interest due to the appellants is to be calculated. It is common cause that the Prescribed Rate of Interest Act 55 of 1975 applies to mora interest, and that its provisions govern the applicable rate. The relevant part of section 1 of that Act reads as follows:-

"1(1) If /

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"1(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 prescribed under subsection (2) 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) The Minister of Justice may from time to time prescribe a rate of interest for the purposes of subsection (1) by notice in the Gazette."

Section 1(1) is couched in peremptory terms, and its application is obligatory, not discretionary (*Katzenellenbogen Ltd v Mullin* 1977(4) SA 855 (A) at 885 G). To give effect to the intention of the Legislature the words "shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run" must be given their ordinary

and literal meaning. Such meaning is clear. The rate prescribed under subsection (2) at the time when interest begins to run governs the calculation of interest. The rate is fixed at that time and remains constant. Subsection (1) does not provide for the rate to vary from time to time in accordance with adjustments made to the prescribed rate by the Minister of Justice in terms of subsection (2). The fact that the Minister may from time to time prescribe different rates of interest therefore has no effect on the rate applicable to interest which has already begun to run. The plain meaning of the words in question must be adopted as they do not lead to "some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature

could / 28 could not have intended" (per STRATFORD, JA, in *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129).

The only exception to the above method of calculation is where "a court of law, on the ground of special circumstances relating to that debt, orders otherwise". "Special circumstances" are not defined in the Act. It is not necessary for the purposes of the present appeal to consider what circumstances are envisaged under that term. The existence or otherwise of special circumstances in any given case must needs depend upon the facts and circumstances of that case. What is clear is that the special circumstances must relate to a particular debt, not to debts in general. The mere fact that the Minister may from time to time vary

the / 29 the prescribed rate of interest in terms of subsection (2), a matter affecting debts in general, cannot per se constitute a special circumstance relating to a particular debt. The appellants' reliance upon this consideration as a special circumstance is therefore without substance. The appellants did not suggest that the record revealed any special circumstances which might justify a departure from the application of a fixed rate of interest.

Our attention was drawn to the fact that this Court has in the past awarded *mora* interest at the rates prescribed from time to time under Act 55 of 1975 for the period of application of each particular rate. We were referred in this regard to the cases of *Rielly v Seligson* and

Clare /

30 *Clare Ltd* 1977(1) SA 626 (A) and *Katzenellenbogen v Mullin* (supra). In *Rielly v Seligson* and *Clare Ltd* this Court did not seek to interpret the provisions of section 1(1) but merely gave effect (at 642) to a request by counsel for the appellant (which was not opposed by the respondent's counsel) to award interest at the rate prescribed from time to time. The situation that arose in *Katzenellenbogen Ltd v Mullin* is clearly distinguishable from the present as portion of the *mora* interest awarded related to the period before Act 55 of 1975 came into operation. We were further advised that such orders were frequently found in the judgments of Provincial Divisions. Insofar

as such judgments are not based on a finding of special circumstances as envisaged in section 1(1)

of Act / 31 of Act 55 of 1975, or on an agreement between the parties, they are clearly wrong. It is common cause that the prescribed rate of interest applicable on 12 January 1985, the date on which mora interest began to run on the outstanding statutory interest, was 11% per annum. Mora interest accordingly falls to be awarded at that rate. At the hearing of the appeal the respondent accepted that if it was liable for mora interest, such interest had to be calculated on the individual amounts set out in paragraphs 2.2 and 2.3 of the amended notice of motion handed in at the commencement of the appeal. Effect will be given thereto in the order to be made.

With / 32 With regard to costs, these must follow the result. The appellants failed in their application to further amend their notice of motion. The amendment sought was an extension of their main claim and involved little in the way of additional argument on appeal. It was not contended on the respondent's behalf that the refusal of the application to amend should result in any order as to costs in its favour. The appellants have enjoyed substantial success on appeal, and no adverse order as to costs against them would be justified save to the extent of depriving them of their costs attendant upon the preparation and service of the further amended notice of motion. The respondent's offer of R224 403,40 in respect of the balance of statutory interest

due /

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due by it was made under cover of a letter dated 2 January

1987, the final paragraph of which reads:-

"Be pleased to take notice further that my client hereby tenders and offers to pay all your party and party costs incurred up until receipt of this cheque, such costs to include all the costs incurred in the Court a quo as well as your client's appeal costs including the costs undergone in taking instructions (re?) settlement upon receipt of the attached cheque."

The appellants accepted the tender of costs contained in the

respondent's letter. It is not disputed that the award

of costs should include the costs of two counsel.

One further matter falls to be mentioned. It was

brought to our attention at the hearing of the appeal that in

terms / 34 terms of Government Notice No 655 of 27 March 1987 the

assets, rights, liabilities and obligations of the respondent have since 1 April 1987 vested in the Development and Housing Board established under the Development and Housing Act 103 of 1985. As an undertaking was given by the respondent and/or the Development and Housing Board to honour any judgment given against the respondent nothing turns on the provisions

of the Notice referred to.

In the result the following order was made:

- (1) The appellants' application to further amend their notice of motion is refused;
- (2) The appeal is allowed, with costs. Such costs include:
 - (a) those tendered by the respondent in its letter of 2 January 1987; (b) those incurred subsequent to the acceptance of the tender;
 - (c) the costs of two counsel, but exclude the appellants' costs attendant upon the preparation and

service /

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service of the further amended notice of motion;

- (3) The respondent is ordered to pay mora interest at the rate of 11% per annum from 12 January 1985 up to and including 1 April 1986 in respect of:
 - (i) the first appellant, on the sum of R121 366,78;
 - (ii) the second appellant, on the sum of R51 994,32;
 - (iii) the third appellant, on the sum of R22 768,26;
 - (iv) the fourth appellant, on the sum of R60 906,53;
 - (v) the fifth appellant, on the sum of R53 874,40;
 - (vi) the sixth appellant, on the sum of R7 582,40.
- (4) The respondent is ordered to pay mora interest at the rate of 11% per annum from 2 April 1986 up to 5 January 1987 in respect of:-

- (i) the /

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- (i) the first appellant, on the sum of R74 641,16;
- (ii) the second appellant, on the sum of R25 103,46;
- (iii) the third appellant, on the sum of R15 189,85;

(iv) the fourth appellant, on the sum of R36 608,74;

(v) the fifth appellant, on the sum of R27 463,72;

(vi) the sixth appellant, on the sum of R44 878,43.

J W SMALBERGER JUDGE OF APPEAL

RABIE, CJ)BOTHA, JA) CONCUR GROSSKOPF, JA) CONCURBOSHOFF, AJA)

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