
SOUTH AFRICA / JUDGMENT

Nedbank Ltd v CBR Engineering CC and Others (4131/2013) [2017] ZAFSHC 239 (20 December 2017) [2017] ZAFSHC 239

COURT

Free State High Court, Bloemfontein

BEFORE

EA Pike

CASE / FILE NUMBER

4131/2013

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 4131/2013

In the matter between:

NEDBANK LTD Plaintiff

and

CBR ENGINEERING CC 1st Defendant

CA MINNIE (SNR) 2nd Defendant

CA MINNIE (JNR)

3rd Defendant

HESTER CORNELIA HENDRIKA SLABBERT 4th Defendant

MINIROCK CC 5th Defendant

VIRARNIE CC

6th Defendant

CORAM: PIKE, AJ

HEARD ON: 21 SEPTEMBER 2017

DELIVERED ON: 20 DECEMBER 2017

- [1] This court is called upon to decide, as a stated case in terms of Uniform Rules of Court 33(1) and (2), when interest begins to run on an enrichment claim against the defendants.
- [2] The plaintiff instituted summons against the defendants during October 2013, in terms of a written loan agreement signed on 6 January 2012, in terms whereof the plaintiff loaned an amount of R3 235 000.00 to the defendants. The defendants fell into arrears in respect of the loan. The defendants defended this matter and pleaded that no contract came into being. The matter was set down for hearing on 8, 9 and 11 March 2016.
- [3] On the first day of trial the plaintiff informed the defendants that it intended to amend its particulars of claim and as a result the matter was postponed sine die.
- [4] The plaintiff amended its particulars of claim on 15 June 2016 to incorporate an alternative claim for enrichment.
- [5] On 15 November 2016, by agreement between the parties, Naidoo J made the following order:

"IT IS ORDERED THAT: (By agreement)

1. The quantum and the merits of the action are separated.
 2. The defendants concede their liability on enrichment as claimed in the alternative by the plaintiff.
 3. The defendants shall effect a payment of R1 200 000,00 to the plaintiff before 30 December 2016. Should the defendants not comply, plaintiff will be entitled to issue a warrant of execution with immediate effect.
 4. The parties shall either agree on the remainder of the defendants' liability before 30 December 2016. Should this not be accomplished, plaintiff shall be entitled to place the matter on the Court roll again, or place the issue before Court as a stated case as soon as possible.
 5. All issues of costs are reserved."
- [6] The defendants did effect payment as per the court order.
- [7] It is against this background that the parties set this matter down for hearing as a stated case and appeared before me.
- [8] The relevant part of the statement of facts, presented to court, reads:

"THE DISPUTE:

9.1 Plaintiff concedes that as the order granted in its favour is based upon enrichment, it can no longer claim interest on the term loan in terms of the written agreement.

9.2 Plaintiff submits therefore that it is entitled to moratory interest on the outstanding balance as from the date of the loan, namely 6 January 2012, alternatively as from date of service of summons, until redemption thereof. Plaintiff will present before Court during the hearing calculations reflecting the latest balance owed by the Defendants based upon moratory interest.

9.3 It is Defendants' contention that that (sic) interest can only begin to run as from the date of the amendment effected in terms of Rule 28 during 2016, to base a claim on enrichment. According to Defendants, Plaintiff's causa against them only arose once the amendment was effected."

[9] Mr Williams, appearing on behalf of the plaintiff, submitted that enrichment occurred on the day the money was granted to the

defendants. Therefore interest began to run as from 6 January 2012. He contended that as the defendants did not raise a plea of

prescription to the amended causa, they were aware that the money was already claimed at the date of demand or service of the summons. He furthermore submitted that the amendment did therefore not constitute a new cause of action. Therefore it is untenable for the defendants to contend that they accept they were enriched as at 6 January 2012 but that interest can only begin to run as from the date of the amendment.

[10] He furthermore submitted that as it is a liquidated debt, section 1 of the Prescribed Rate of Interest Act, 55 of 1975, is applicable.

[11] Mr Grabler, appearing on behalf of the defendants, submitted that at the earliest, interest could only have begun to run from the date upon which the plaintiff amended its particulars of claim to incorporate an alternative claim for enrichment, thus being 15 June 2016. He contended that as the defendants' liability rises out of an agreed enrichment claim, it is an unliquidated claim that still needs to be quantified.

[12] He contended that section 2A of the Prescribed Rate of Interest Act, 55 of 1975, is applicable as the claim is unliquidated and there is no agreement as to the interest rate payable and also no agreement as to the date from which interest start to run. He furthermore submitted that the debt has to be determined by means of a binding

nexus such as a court order, arbitrator's award or agreement.

[13] Mr Grobler further submitted that summons constitutes the demand of a debt, which is the telling factor when it comes to issues of interruption of prescription. A different claim that the one sought to be prosecuted by an amendment will not defeat the running of prescription.

[14] In *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*, 2003 (5) SA 193 (SCA) [100/02] the court wrote the following:

"[15] Kudu's first contention is well founded. There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party, and having to concede the contract in which the claim has its foundation, which had not been breached by either party is of no force and effect. The first mentioned scenario gives rise to a distinct contractual remedy: (*Baker v Probert*, 1985 (3) SA 429 at 439 (A)), and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, and equitable remedy in which the contractual provisions are largely irrelevant. ... "

[15] A claim for enrichment is distinctly different from a claim based on contract. See De Vos, *Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg*, 3rd Edition, p 328,329.

[16] Erasmus Superior Court Practice at D1390 refers to various court decisions that held that certain claims do not constitute liquidated amounts in money. It refers inter alia to:

"... a claim for interest against a defendant, where the defendant had never agreed to pay any interest; ... *Rief v Hofmeyr*

(1924) 45 NLR 375".

[17] Section 1 of the Prescribed Rate of Interest Act, 55 of 1975, states:

"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 purpose 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.

(b).. ..

(c)....

(3)....

(a)....

(b)...."

[18] It is clear that Section 1 of the Prescribed Rate of Interest Act, 55 of 1975, refers to matters where a debt, which is a liquidated amount, bears interest and where the rate at which the interest is to be calculated is not governed by law, agreement or trade custom. In these circumstances the interest rate shall be calculated at the rate determined by the Minister of Justice, from time to time. The current interest rate is 10.25o/o.

[19] The incorporation of section 2A to the Prescribed Rate of Interest Act, 55 of 1975, abrogated the common law principle that pre judgment interest on unliquidated damages cannot be claimed.

[20] Section 2A of the Prescribed Rate of Interest Act, 55 of 1975, states:

"2A. Interest on unliquidated debts

- (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.
- (2)
 - (a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.
 - (b) In the case of arbitration proceedings and subject to any other agreement between the parties, interest shall run from the date on which the creditor takes steps to commence arbitration proceedings, or any of the dates contemplated in paragraph (a), whichever date is the earlier."

[21] The court in Kudu (supra) at par 28 discussed section 2A:

"[28] ... The matter is now regulated by statute: section 2A of the Prescribed Rate of Interest Act, 55 of 1975 provides that the amount of every unliquidated debt as determined by a court of law shall bear interest as contemplated in section 1, i.e. at the right prescribed. Section 2A(2)(a) further provides that, subject to any other agreement between the parties (here there is none), the interest on an unliquidated debt determined by a court of law shall run from the date on which payment of the debt is claimed by service on the debtor of a demand or summons, whichever date is the earlier. ... "

[22] In Commissioner for Inland Revenue v First National Industries Bank Ltd.

[1990] ZASCA 49; 1990 (3) SA 641 (A) at p 652 the court decided as follows:

"To be in mora there must be a debt and the debt must be enforceable. The Commissioner could not be in mora as regards repayment until such time as it was decided that a duty to prepay existed. That was the very point of their understanding: that the money would only be refundable once it has been established (by a tribunal or by compromise) that the Commissioner misconstrued the statute and was obliged to repay the money. Any claim by the bank for repayment to be made prior to the determination of the dispute could be met by the Commissioner with the defence that such a claim would be premature and might get proved to be idle."

[23] Interest may be claimed only if there was an agreement to pay interest or when the defendant is in mora. Section 2A(2)(a) clearly states that interest shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier. There is no obligation to pay interest until the debt becomes due and payable. The parties has no agreement on the rate of interest, also not as to when interest will begin to run.

[24] From the above it is clear that as the amount is unliquidated and as there is no agreement as from when mora interest will start to run, that the provisions of section 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975 is applicable.

[25] The plaintiff only placed the defendants in mora on date of incorporating the claim for enrichment in its particulars of claim on 15 June 2016.

[26] I now turn to the plaintiff's submission regarding prescription and the interruption of it. In *Deez Realtors CC t/a Firzt Realty Company et al v South African Securitisation Program (Pty) Limited et al* (175/2016) [2016] ZASCA 194 (2 December 2016) the appeal court stated the following:

"[33]... This court has repeatedly emphasized that the word 'debt' bears a 'wide and general meaning' and that it 'does not have the technical meaning given to the phrase "cause of action" when used in the context of pleadings (*CGU Insurance Ltd v Rimdel Construction (Pty) Ltd*, 2003 (2) SA ALL SA 597 (SCA) at par [6]; *Drennan Maud and Partners v Pennington Town Board*,

[1998] ZASCA 29; 1998 (3) SA 200 (SCA) at 212 G 1) ...

[34]...

[35]... As emphasized by this court in *CGU Insurance*, 'the debt is not the set of material facts' required to sustain the cause of action, but rather 'that which is begotten by the set of material facts'."

[27] I am of the view that the plaintiff's amended alternative claim on enrichment is not a different debt from the one initially claimed. I, therefore, agree with mr Grobler that the service of a summons or demand serves to interrupt prescription if the debt is therein claimed, which is the case in this matter.

- [28] In respect of the costs, the defendants submitted that the plaintiff is entitled to costs it incurred from June 2016 to 26 June 2017, when the defendants formally tendered an amount of R596 379.00 as well as the costs on a party and party scale.
- [29] As I was not asked to quantify the remainder of the defendants' liability, and only to determine from when moratory interest will run, I am inclined to award the plaintiff costs as the defendants conceded liability on enrichment.
- [30] Wherefore I make the following order:
1. The defendants are ordered to pay interest on the remainder of the defendants' liability from 15 June 2016 (date of demand) to date of payment at a rate of 10.25% per annum.
 2. The defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the plaintiffs costs from 15 June 2016 to date of payment of the outstanding balance.

EA PIKE, AJ

On behalf of plaintiff: Adv A Williams

Instructed by:

Kramer, Weihmann & Joubert Attorneys

Bloemfontein

On behalf of defendants: Adv S Grabler

Instructed by:

Peyper Attorneys

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2017/239.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/nedbank-ltd-v-cbr-engineering-cc-and-others-unknown-topic-afshc-2017>

Prepared on 24 October 2026 · Esheria