

SOUTH AFRICA / JUDGMENT

Nel v Minister of Safety and Security (A1009/2010) [2012] ZAGPPHC 188 (22 August 2012)

[2012] ZAGPPHC 188

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M. Kubushi, M.F. Legodi, H.J. Fabricius

CASE / FILE NUMBER

A1009/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

CASE

NUMBER: A1009/2010

DATE:22/08/2012

In

the matter between:

ANGUS

JOHN

NELAPPELLANT

And

THE

MINISTER OF SAFETY AND

SECURITY.....RESP

ONDENT

JUDGEMENT**KUBUSHI, J**

- [1] This is an appeal, with leave of the trial court, against the judgment of Du Plessis, J delivered on the 9 July 2010, wherein he dismissed the appellant's application in terms of rule 42 of the Uniform Rules of Court. The appellant is also appealing, in the alternative, against the order, in Du Plessis, J's judgment of the 28 September 2009, to the effect that the interest on the damages awarded is payable from date of judgment as opposed to a tempore mora.
- [2] The appellant, the plaintiff in the trial court, sued the respondent, the defendant in the trial court, for unlawful arrest, detention and assault. The trial court granted judgment in favour of the appellant.
- [3] Initially the appellant had claimed damages together with interest at the maximum prescribed rate (15,5%) thereon from the date of judgment to the date of payment. On the 19 January 2009, the appellant applied for the amendment of his particulars of claim. This amendment included a prayer to replace the initial prayer for interest so that the interest claimed is awarded at the maximum prescribed rate a tempore mora to date of payment. The amendment was duly effected on the 3 February 2009. At the conclusion of the trial it was also argued on behalf of the appellant that interest on damages be granted a tempore mora to date of payment. When granting judgment, the trial court, however, overlooked the amendment and the appellant's argument and granted interest on the amount awarded at the rate of 15,5% per year, from the date of judgment to date of payment.
- [4] After the order was given, the parties' counsel approached the trial judge in chambers and made him aware of the provisions of section 2A of the Prescribed Rate of Interest Act, 55 of 1975 (the Act). Section 2A (1), read with section 1 (1) of the Act, provides that the amount of every unliquidated debt as determined by any court of law shall bear interest at the prescribed rate as at the time when such interest began to run, unless a court of law orders otherwise. The trial judge could, however, at that stage, not amend his order.
- [5] The appellant brought an application in terms of rule 42 whereby he sought to rectify the 'error' in the order. Du Plessis, J dismissed the application on the ground that he was functus officio.
- [6] During the hearing of the appeal, both counsel conceded, rightly so in our view, that the judgment of Du Plessis, J of 9 July 2010 was correct. At that stage he was indeed functus officio and could not amend his previous judgment.
- [7] The issue before us now is whether this court can interfere with the order regarding the date from which the interest is payable in the judgment of Du Plessis, J granted on the 28 September 2009.

- [8] At the hearing of the appeal the respondent's counsel was requested to first address us on the issue in question. His contention was that the appeal should not succeed because when granting the order the trial court had exercised its discretion in terms of section 2A (2)
- (5) of the Act. In terms of this section, a court may make such order as appears just in respect of the payment of interest on an unliquidated debt. He was however, constrained to explain to us when such discretion was exercised by the trial judge.
- [9] The appellant's counsel on the other hand contended that there was nothing on record that indicates that the trial court exercised its discretion. This is correct.
- [10] It is trite that a court of appeal is not entitled to set aside a decision of a trial court granted in the exercise of its discretion merely because a court of appeal would, itself, on the facts of the matter before the trial court, have come to a different conclusion. A court of appeal may interfere only when it appears that the trial court has not exercised its discretion judicially, or that it had been influenced by wrong principles, it committed a misdirection on the facts, or that it had reached a decision, which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. See *MANONG AND ASSOCIATES (PTY) LTD v CITY OF CAPE TOWN* 2011 (2) SA 90 (SCA) at 115G
- 116A.
- [11] In this instance, my view is that the trial court did not exercise its discretion at all. It has been held that, in exercising its discretion under section 2A (5) of the Act, a court must give effect to its own view of what is just in all the circumstances. (See *ADEL BUILDERS (PTY) LTD v THOMPSON* 2000 (4) SA 1027 (SCA) at 1032B - I). This the trial court did not do. On the reading of Du Plessis, J's judgment of the 28 September 2009 it is apparent that he did not exercise this discretion. There is nowhere in the judgment where he addresses the issue of interest. This court must therefore interfere.
- [12] To my mind, the trial court ought to have granted an order for interest as prayed for by the appellant, that is, an order for

interest a tempore mora to date of payment. This is the order this court must grant. The default position of the Act is that the amount of every unliquidated debt as determined by any court of law shall bear interest at the prescribed rate a tempore mora, unless a court of law orders otherwise. Where a court deviates from this position, an order that it may make, must appear just in the circumstances of that case. If Du Plessis, J wanted to deviate from this position he should have given reasons in his judgment why it was just and equitable to do so. This he did not do. Moreover, the appellant went to the extent of amending his particulars of claim, and his counsel also argued on his behalf for a prayer for payment of interest a tempore mora to date of payment. It seems to me more a matter of oversight on the part of my brother Du Plessis, J than anything else.

[13] The trial court should also have stated the date on which the interest ought to have started running. My view is that interest in this instance started running from the 30 June 2006, which is the date set in the letter of demand by the appellant to the respondent

for performance.

[14] The issue of costs was not canvassed during the hearing of this appeal and I am therefore of the view that the costs thereof must follow the outcome of the appeal.

[15] In the premise, I would make the following order:

15.1 The appeal is upheld.

15.2 Paragraph 2 of the order in the judgment of the trial court is set aside and substituted by the following order:

" The defendant is ordered to pay interest on the amount of R111 234,74 at the rate of 15,5% per year, from the 30 June 2006 to the date of payment."

15.3 The respondent to pay the costs of the appeal.

E.M. KUBUSHI, J

I concur.

M.F. LEGODI, J

H.J. FABRICIUS, J

On behalf of the appellant: Adv Z.J. Schoeman

Instructed by: John Nel & Associates c/o Friedland Hart Solomon & Nicolson

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On behalf of the respondent: Adv. D. Mtsweni

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