


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022-22121

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|-----------------|---|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED: YES / NO |
| <u>05/01/24</u> |  |
| DATE | SIGNATURE |

In the matter between:

ELLEN VICTORIA JACOBS N.O

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Summary: RAF – Section 17(3)(a) of Road Accident Fund Act – where the parties fail to agreed on the date from which interest should run, the court cannot make an agreement for them – 17(3)(a) shall apply – capital shall bear interest from the 15th day of the order or settlement agreement following a breach.

JUDGMENT

Nkutha-Nkontwana J:

Background

- [1] This is an action for damages against the Road Accident Fund (RAF) instituted by Adv. A J du Toit N.O, the curator *ad litem* on behalf of Lizle Grobler (claimant) who had sustained injuries in a motorbike accident. The claimant died on 29 August 2023. Consequently, the plaintiff is substituted. She is the mother of the deceased claimant and duly appointed as the executrix of her estate, having received letters of executorship on 26 October 2023.
- [2] The parties reached an agreement in respect of general damages except the date of payment of the agreed quantum amount and the date from which mora interest should run. Having failed to resolve these issues, the parties agreed to argue these issues in court. The parties were requested to submit written submissions they may wish to place before the court to fortify their oral submissions not later than 20 November 2023. The plaintiff filed her written submissions on 17 November 2021; while RAF filed its written submissions on 20 November 2023.
- [3] At the heart of this matter is the interpretation of section 17(3)(a) of the Road Accident Fund Act¹ which provides:
- “No interest calculated on the amount of any compensation which a court awards to any third party by virtue of the provisions of subsection (1) shall be payable unless 14 days elapsed from the date of the court's relevant order.”
- [4] The RAF contends that, despite the provision of section 17(3)(a), it is now a standard practice that the award of damages be due and payable after 180 days of the order of court or date of settlement. To fortify this contention, the RAF places reliance mainly on two decisions of this Division, in *Road Accident Fund v Legal Practice Council and Others*,² a full bench decision, and *Motaung and Others v Road Accident Fund*.³
- [5] In essence, the RAF contends that it has been given an extension of 180 days within which to make payment in respect of all orders and settlement

¹ Act 56 of 1996, as amended.

² [2021] ZAGPPHC 173.

³ [2023] ZAGPPHC 206.

agreements. As a result, the mora interest would run after 180 days when the debt is due and payable.

- [6] The plaintiff on the other hand contends that section 17(3)(a) is unambiguous and must apply. The authorities relied upon by the RAF are distinguishable as they relate to the previously granted orders and settled matters, so she further contends. As such, the plaintiff seeks an order in terms of the draft which provides, *inter alia*, that the payment shall be made within 14 days of the order and that the RAF shall be liable for mora interest at the rate 11,25% calculated from 15 calendar days of the date of the order.

Evaluation

- [7] It is true that, as a matter of practice, parties in RAF matters often agree that payment of the capital would be effected within 180 days of the order or settlement agreement and so would interest on the capital and costs. It would seem that the practice to defer payment was brought about by the *Legal Practice Council*.⁴ In that matter, the court was requested to intervene in a dire situation as the RAF was confronted with multiple writs of execution and attachments against it which were based on previously granted orders and settlement agreements that had not been honoured. The court exercised its inherent discretion and stated that:

“I am of the view that exceptional circumstances exist, taking into account the interest of justice, for the exercise of this court's inherent common law and constitutional power to order a temporary suspension for a limited period of 180 days as from the day when argument before this court was concluded on 16 March 2021, of all writs of execution and attachments against the RAF based on court orders already granted or settlements already reached in terms of the RAF Act, which are not older than 180 days as from the date of the court order or date of the settlement reached.”⁵

- [8] It is obvious that the above order was granted on a temporary basis and based on the circumstances that the court had found to be exceptional. Most

⁴ *Legal Practice Council* above n 2.

⁵ *Id* at para 35.

importantly, unlike in the present case, the RAF did not seek an order for a stay of payments or the payment of mora interest. It only sought an order for a stay of attachments to enable it to make payment within its available resources at that time.⁶ Thus, as correctly contended by the plaintiff, reliance on this decision is misplaced.

[9] While it is accepted that the *Legal Practice Council* order has been extended by the respective orders by Van der Westhuizen J and Honourable Swanepoel J that were granted on 25 August 2022 and 9 March 2023, the extension does not assist the case of the RAF for the reasons alluded to above.⁷

[10] Likewise, reliance on *Motaung*⁸ is flawed as the court was seized with matters where there were agreements that payment in respect of capital and costs would be deferred by 180 days. In *Dunn v Road Accident Fund*,⁹ referred to with approval in *Motaung*, the court made the following observations:

“Generally *mora* interest arises from default of payment when *mora* is fixed by the time. It would not even be necessary to demand interest, as it would arise from the terms of the agreement itself. A debtor is in *mora ex re* if the contract stipulates a time for performance but the debtor fails to perform within the time frame agreed upon. When this occurs the obligations would arise from the breach of the agreement by the debtor. It is trite that *mora* may arise in three forms, namely by operation of the law (*mora ex lege*), by the terms of the contract (*mora ex re*) or by the demand duly made by the creditor (*mora ex persona*). *Christie’s Law of Contract South Africa* classifies *mora ex re* and *mora ex persona* as *mora ex lege*. The learned author at 13.2.2(b) states that

“When the contract fixes the time for performance, *mora* is said to arise from the contract itself (*mora ex re*) and no demand (*interpellatio*) is necessary to place the debtor in *mora* because, figuratively, the fixed time makes the demand that would otherwise have to be made by the creditor (*dies interpellat pro homine*).”

⁶ Id at para 38.

⁷ See CaseLines at 019-1.

⁸ *Motaung* above n 3.

⁹ [2018] ZAKZDHC 43 at para 19, see also *Land & Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd & Others* [2013] ZASCA 105; 2013 (6) SA 319 (SCA) at para 4.

[11] The converse is true in the present instance as the mora interest arises *ex lege* and not *ex re* between the parties. Put otherwise, the parties did not agree to exclude liability for mora interest which would or could arise in terms of section 17(3)(a) of the RAF Act. In *Kujawa N.O obo M.N v Road Accident Fund*,¹⁰ confronted with similar circumstances, the court held that:

“The legal position is that section 17(3)(a) of the Act regulates the issue in the absence of agreement to the contrary. The defendant submitted that this court has a wide discretion in circumstances where 'the lis' between the parties has been settled. The payment of interest is part of that 'lis' but has not been settled. The parties have not agreed on the date from which interest should run and the court cannot make an agreement for them. In the absence of a substantive application, this court lacks jurisdiction to entertain the request to alter the legislative regime applicable and does not have the wide discretion the RAF contends for.”

[12] I concur with the above observations. As such, the RAF contention that this court has jurisdiction to grant such reprieve for payment within 180 days is untenable. I hasten to add that it must be remembered that the statutory road accident scheme was introduced by government in order to regulate compensation for loss spawned by road accidents because of an increasing number of motor vehicles and the resultant deaths and bodily injuries on public roads; while the right of recourse under the common law proved to be of limited avail.¹¹

[13] Hence, it is more cogitable that in *Legal Practice Council*¹² the RAF sought the court's intervention solely to stay the execution of the court orders and settlement agreements already concluded and not the extension of payment or mora interest; which is obviously regulated by section 17(3)(a) of the RAF Act. It is without doubt that the legislature was alive to the administrative challenges that could impact on the prompt payment of the orders and deliberately deferred the running of mora interest by 14 days from the date of the court order. As correctly observed in *Kujawa*,¹³ there is no authority for the proposition that the court has the power to disallow mora interest once the debtor's liability for the payment of

¹⁰ [2023] ZAWCHC 153 at para 7.

¹¹ See: *Law Society of South Africa and Others v Minister for Transport and Another* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 17.

¹² Above n 2.

¹³ Above n 10.

interest has arisen. The creditor is entitled to interest as a matter of right.¹⁴ As such, the question of discretion or the making of an equitable judgment does not arise.¹⁵

[14] Pertinent also are sections 2 and 2A the Prescribed Rate of Interest Act¹⁶ (PRI Act) which provide:

“2. Interest on a judgment debt. —

- (1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless the judgment or order provides otherwise.
- (2) Any interest payable in terms of subsection (1) may be recovered as if it formed part of the judgment debt on which it is due.
- (3) In this section the ‘judgment debt’ means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt.

2A. Interest on unliquidated debt. —

- (1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law ... or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.
- ...
- (3) interest on that part of a debt which consists of the present value of a loss which will occur in the future shall not commence to run until the date upon which the quantum of that part is determined by judgment, arbitration or agreement and any such part determined by arbitration or agreement shall for these purposes of this Act be deemed to be a judgment debt.
- (4) Where a debtor offers to settle a debt by making a payment into court or a tender and the creditor accepts the payment or tender, or a court of law awards an amount not exceeding such payment or tender, the running of interest shall be interrupted from the date of the payment into court or the tender until the date of the said acceptance or award.
- (5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law ... may make such order as appears just in respect of the payment of interest on an

¹⁴ See *Top v Top Reizen* CC [2006] ZALC 43 at para 24.

¹⁵ *Id.*

¹⁶ Act 55 of 1975 as amended.

unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.

- (6) The provisions of section 2(2) shall apply *mutatis mutandis* to interest recoverable under this section.” (Own emphasis.)

[15] It follows that the plaintiff will be eligible for mora interest in terms of section 17(3)(a) of the RAF Act.

[16] The RAF further contends that the matter became settled by agreement in respect of general damages as the offer was made without prejudice in its entirety. Thus, if the plaintiff intended to reject the offer, the matter should have been postponed *sine die* and the matter dealt with in its entirety at the next trial date. This is so, it is further contended, because the matter was not ripe for trial as the plaintiff had only filed one expert report and on the doors of court served the remaining expert reports, she had no witnesses in court and the hospital records and all the underlying objective facts remained in dispute.

[17] In my view, the RAF contestation is stillborn as it is overtaken by the events. It concedes, correctly so, that the issues I have to pronounce on are when the quantum will fall due and when mora interest will commence to run. Since it accepts that general damages have been settled, in consequence the agreement in respect of that matter must stand.

[18] Lastly, on the issue of costs, there is no merit in the RAF's contention that the provisions of section 3 of the State Liability Act ¹⁷ should be taken into account in respect of a costs order. A judgment debt includes the order as to costs.

Conclusion

[19] In all the circumstances, the Draft Order attached hereto and marked “X” is hereby made an order of court.


P Nkutha-Nkontwana J
JUDGE OF THE HIGH COURT, JOHANNESBURG

¹⁷ Act 20 of 1957.

Appearances:

For the applicant: Adv D A Louw


Instructed by: Leon JJ Van Rensburg Attorneys

For the first respondent: Ms Riyasha David & Ms S Ameersingh

Instructed by: State Attorney

Date of hearing: 26 October 2023 & 03 November 2023

Date of Judgment: 05 January 2024


05/01/24

“X”

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 22121/2022

ON THIS THE 09TH DAY OF NOVEMBER 2023
BEFORE THE HONOURABLE NKUTHA-NKONTWANA J

In the matter between:

GROBLER: ELLEN N.O.in her capacity as Executrix
OBO LIZLE GROBLER

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the parties/their legal representatives by email. This Order is further uploaded to the electronic file of this matter on CaseLines by the Judge or his/her Secretary. The date of this Order is deemed to be 27 October 2023.

ORDER

HAVING heard Counsel,

IT IS ORDERED THAT:

1. Defendant is liable for 100% of the Plaintiff's damages.
2. The Defendant shall pay to the Plaintiff the capital amount of *R1 500 000* (One million five hundred thousand rand) made up as follows:

General damages : R1 500 000

3. Payment shall be made within **14 calendar days** into the trust account of Leon JJ van Rensburg Attorneys, namely:

Account Holder: Leon JJ van Rensburg
Bank: ABSA
Branch: President, Germiston
Account number: 250 492 219
Branch code: 334 542

4. The Defendant shall be liable for interest on the capital amount at the rate of **11,25% p.a.** calculated from **15 calendar days** of date when the payment is due to date of full and final payment, both days inclusive.
5. The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended, to reimburse him for **100%** of the costs of his future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle accident that occurred on **25 September 2004** after such costs have been incurred and upon proof thereof.
7. The Defendant shall capture the payment of the capital amount on its Registered not yet paid (RNYPD) list by no later than 30(thirty) days from the date of this Court order being granted.

8. The Defendant shall pay the Plaintiff's taxed or agreed party costs on the High Court scale, up to and including the 09th of November 2023. Costs for the 26th and 27th of October 2023 is limited to 50% payable by the Defendant, in accordance with the discretion of the Taxing Master, including, but not limited to:

8.1 The travelling and accommodation costs of the Plaintiff to and from all medico-legal appointments, including all attendances thereon or in connection therewith;

8.2 The costs of counsel on trial to date, including counsel's consultations with the attorney, plaintiff, experts and witnesses and the drafting of a case summary and/or heads of argument; costs for trial limited to the 26th of October 2023, 27th of October 2023 and 06th of November 2023, further limited as per paragraph 8 above;

8.3 The costs of the attorney's consultations with the experts;

8.4 The costs incurred for the application for the appointment of the curator ad litem;

8.5 The reasonable costs for the appointment of the curator ad litem, inclusive of but not limited to his fees for preparation, consultations held and curator's report;

8.6 The costs of the experts *infra* in preparing their reports, addendum reports and statutory forms, in consulting with the attorney and/or counsel as well as their preparation, reservation and qualifying fees, if any:

8.6.1 Dr. C F Kiecke (orthopaedic surgeon);

- 8.6.2 Dr. Shafik A Parker (neurosurgeon);
- 8.6.3 Dr. M.S Motebejane (neurosurgeon);
- 8.6.4 Dr. Monica van Niekerk (educational psychologist);
- 8.6.5 Dr. Charmaine Gordon (clinical and neuropsychologist);
- 8.6.6 Robyn Hunter (Occupational therapist);
- 8.6.7 Dr. Johan de Beer (Industrial psychologist);
- 8.6.8 GW Jacobson Actuaries.

8.7 The reasonable taxable costs associated with preparing the application in terms of rule 38 and preparing and obtaining the affidavits of the relevant witnesses.

9. The parties shall first attempt to settle the Plaintiff's party and party costs. In the event that costs are not agreed, the Plaintiff shall:

9.1 Serve a notice of taxation on the Defendant
and

9.2 Allow the Defendant **14 calendar days** to make payment of the taxed costs.

10. The Defendant shall be liable for interest on the costs at the rate of **11,25% p.a.** calculated from **15 calendar days** of the date of agreement thereto or taxation, whichever is applicable, to date of full and final payment, both days inclusive.

11. The aspects of loss of income and past medical/caretaker expenses are postponed sine die.

BY THE COURT

REGISTRAR

Counsel for the Plaintiff: Adv. Wiam (DA) Louw
082 452 8482
Advwlouw@gmail.com

Instructed by: Leon JJ van Rensburg Attorneys
Mr. U Jordaan
011 873 0383
uys@leonjvanrensburgattorneys.co.za