REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 224/2013

In the matter between:

CHARL WILHELM RALL **APPLICANT**

And

PROFESSIONAL PROVIDENT SOCIETY INSURANCE COMPANY (NAMIBIA) LTD **RESPONDENT**

Neutral citation: *Rall v Professional Provident Society Insurance Company (Namibia) Ltd (*A 224/2013) [2014] NAHCMD 249 (22 August 2014)

Coram: UEITELE, J

Heard: 17 June 2014

Delivered: 22 August 2014

Flynote: Contract - Formation - Admission of an obligation in an existing contract - Such an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor; and it does not matter whether the acknowledgment is by way of an admission of the correctness of an account or otherwise.

Insurance - Disability insurance - Obligation to pay interest - When insurer in *mora* - Interest may be due from the nature of the case, where, for instance, the time for performance is fixed either by agreement or the law (*mora ex re*); or where in the absence of such agreement, the defendant has been called upon to perform his obligation (*mora ex pesona)*.

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Summary: The applicant was a legal practitioner of this Court. During his tenure as a legal practitioner he and PPS Namibia (Ltd) (the respondent company) concluded an agreement of insurance, in terms of which he was insured in the event that he would become permanently disabled or incapacitated to continue with his profession as a legal practitioner.

During March 2009 the applicant was involved in an accident with a bicycle. As a result of the accident the applicant sustained a brain injury which injury resulted in the applicant becoming incapable of exercising his profession as a legal practitioner. During September or October 2010, the applicant lodged a claim for the payment of the permanent incapacity benefits in terms of the insurance policy (agreement) which he held with the respondent. On 11 February 2011 the respondent rejected the applicant's claim. The applicant objected to the rejection of his claim.

As a result of his objection the applicant was evaluated by medical specialist and other advisors of the respondent, and his claim was revised and he was advised that his claim was accepted but only 20% of the benefits would be awarded to him. The applicant appealed against this 20% award. During the entire period of pursuing his claim (i.e. from October 2010 to 08 February 2012) when his claim was finally admitted and accepted, the appellant continued to pay his premiums as set out in the insurance policy contract. His appeal was ultimately reconsidered and on 08 February 2012 the respondent advised the applicant his claim was reassessed and PPS has awarded him a 100% benefit effective 27 February 2011.

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During March 2012, the respondent informed the applicant that an amount of N$8 332 929-00 was determined as the disability lump sum benefit, and that amount will also be paid to him. The respondent per e-mail dated 22 February 2012, addressed to the applicant's legal practitioners amongst others informed the applicant that the outstanding amount together with the interest should be paid to the member by no later than the end of the month.

When the respondent ultimately effected payments no interest was paid. The applicant appealed against the non-payment of the interest, the arbitrator appointed by the applicant dismissed the appeal on the ground that applicant was not entitled to *mora* interest. When applicant's appeal was dismissed he launched the present proceedings. Respondent raised to point *in limine* first being that the applicant's claim is based upon an insurance agreement, but the applicant fails to make the necessary averments in order to establish and rely on the insurance contract and that the applicant's application does not comply with rule 18(6) of the Rules of this Court (now repealed) and should therefore be dismissed. The second point *in limine* was that only a liquidated claim attracts interest. In the present case the permanent disability amount of N$ 8 332 929-00 was only determined on 8 February 2012, and thus only became liquidated on that date (i.e. on 8 February 2012) meaning that interest will only become due as from the date that the amount became liquidated.

Held, that there is ample authority to the effect that an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor; and it does not matter whether the acknowledgment is by way of an admission of the correctness of an account or otherwise.

Held further that in the present matter, the parties concluded an insurance contract, in terms of that contract the parties agreed that the respondent will indemnify and make good the loss suffered by the applicant on the happening of an uncertain event. The event in respect of which the parties contracted occurred during March 2009, when the

applicant sustained brain damages in a bicycle accident. On 8 February 2012 the respondent accepted the applicant's claim and undertook to pay the applicant the loss he (i.e. the applicant) suffered with effect from 27 February 2011 and that, the acceptance and undertaking to pay the applicant with effect from 27 February 2011 is an agreement independent and separate from the main insurance contract.

Held, further, that the respondent had fixed and determined the date on which it will pay the applicant the disability benefit, as 27 February 2011. Having fixed the date for paying the disability benefit, at 27 February 2011, the failure to pay the benefit on that day resulted in the respondent being in *mora ex re*.

ORDER

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1. The respondent's points *in limine* are dismissed.

2. The respondent is ordered to pay the applicant interest at the rate of 20% per annum calculated from 28 February 2011 on the amount of N$ 8 332 929-00 on the portion of that amount that remained outstanding from time to time subsequent to that date and up to the date that the full capital amount of N$ 8 332 929-00 was paid to the applicant.

3. The respondent is ordered to pay the applicant interest at the rate of 20% per annum on all premiums repaid to the applicant subsequent to 27 February 2011 from the date that the respondent received the premium until the date on which the respondent repaid the premiums to the applicant.

4. The respondent is ordered to pay the applicant *mora* interest at the rate of 20% per annum on all the incapacity payments to the applicant which are outstanding from time to time as from 28 February 2011 up to the date that the respondent pays them to the applicant.

5. The respondent must pay the applicant's costs the costs to include the costs of one instructing and instructed counsel.

JUDGMENT

UEITELE, J

A. INTRODUCTION AND BACKGROUND

[1] The applicant commenced proceedings in this court, by way of a notice of motion in which he seeks the following relief:

> '1 Ordering the respondent to pay applicant *mora* interest at the rate of 20% per annum calculated from 28 February 2011 on the amount of N$ 8 332 929-00 or that portions of the amount that remained outstanding from time to time subsequent to that date and up to the date that the full capital amount of N$ 8 332 929-00 was paid to applicant;
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> 2 Ordering the respondent to pay applicant *mora* interest at the rate of 20% per annum on all premiums repaid to applicant subsequent to 27 February 2011 from date of receipt of such premiums until repayment thereof by respondent;
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> 3 Ordering the respondent to pay applicant *mora* interest at the rate of 20% on all monthly payments outstanding from time to time as from 27 February 2011 up to the payment thereof by respondent.'

[2] The factual background to the applicant's application is as follows. The applicant was a legal practitioner of this Court. During his tenure as a legal practitioner he and PPS Namibia (Ltd) (the respondent company) concluded an agreement of insurance, in

terms of which he was insured in the event that he would become permanently disabled or incapacitated to continue with his profession as a legal practitioner.

[3] During March 2009 the applicant was involved in an accident with a bicycle. As a result of the accident the applicant sustained a brain injury which injury resulted in the applicant becoming incapable of exercising his profession as a legal practitioner. During September or October 2010, the applicant lodged a claim for the payment of the permanent incapacity benefits in terms of the insurance policy (agreement) which he held with the respondent. On 11 February 2011 the respondent rejected the applicant's claim. The applicant objected to the rejection of his claim.

[4] As a result of his objection the applicant was evaluated by medical specialist and other advisors of the respondent, and his claim was revised and he was advised that his claim was accepted but only 20% of the benefits would be awarded to him. The applicant appealed against this 20% award. I find it appropriate to mention here, that during the entire period of pursuing his claim (i.e. from October 2010 to 08 February 2012) when his claim was finally admitted and accepted, the appellant continued to pay his premiums as set out in the insurance policy contract. His appeal was ultimately reconsidered and on 08 February 2012 the respondent advised the applicant as follows:

> 'In light of the complexity surrounding your claim, further discussions were held during the course of December 2011 and January 2012, which included additional discussions with external independent psychiatric practitioners. In this regard, your claim was reassessed and PPS has awarded you a 100% *benefit effective 27 February 2011*.
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> *Please note that outstanding benefit payments due for the period effective 27 February 2011 to 31 January 2012 will be paid to you in the form of a once off lump sum benefit whereafter monthly benefits will commence effective 1 February 2012*.' (Italicized and underlined for emphasis)

[5] Per letter dated 09 March 2012, the respondent informed the applicant that an amount of N$8 332 929-00 was determined as the disability lump sum benefit, and that

amount will also be paid to him. The respondent per e-mail dated 22 February 2012, addressed to the applicant's legal practitioners amongst others informed the applicant with regard to the payment of the benefits as follows:

'Following out earlier discussion please note the following:

- With respect to the PI Benefit – We currently still have to pay the difference between the 20% award that was made to the member effective 11 February 2011 and the current 100% award effective 11 February 2011.

- I have asked out finance team to check whether Mr Rall has been paid interest on the 20% award payment that was made during September 2011. If not they will calculate interest on the full 100% award which will then be paid to him. If he has already been paid interest on the 20% then interest will be calculated on the remaining 80% effective 11 February 2012.

- The outstanding amount together with the interest should be paid to the member by no later than the end of the month, after which the monthly benefit payments will commence.

- With respect to the DISA award (lump sum disability benefit), as discussed, this claim was put forward for assessment by our Reinsurers upon validation of the PI award. They have agreed to accept liability for the claim and it has been validated effective 11 February 2011. As such please find attached, on the DISA Release form, details of the benefit amount due to the member in addition to details on the GLA pre and post the payment of the DISA benefit.

- The premiums for the DISA award will be calculated from end February 2011 to date. This amount together with interest on the amount will be refunded to Mr Rall.

- Furthermore, the premiums on the GLA will be reduced after the payment of the DISA award and the difference between the current premiums (before DISA) and the premiums after the DISA payment with be calculated from end February 2011

to date. This amount together with the interest on the amount will also be refunded to the member.

- I have asked our finance department to prepare a spread sheet with the breakdown of the above amounts for your perusal prior to payment and will forward said document to you as soon as I receive it.

- Lastly, please find attached the DISA release form with the relevant DISA information to be signed by the member and forwarded back to me as soon as possible so that we can start with the process of claim payment.

Please do not hesitate to contact me should you require any further information.'

[6] Pursuant to the acceptance of the applicant's permanent incapacity and disability claims and as accepted by the respondent, the respondent;

(a) paid to the applicant the capital amount owing under the policy;

(b) refunded to the applicant the monthly premiums (which the applicant has paid between 11 February 2011 and 27 February 2012); and
(c) paid to the applicant the difference between the 20% and 100% monthly permanent incapacity payments.

The above referred to payments were effected between March 2012 and November 2012, but no interest on the above payments was included in the payments which the respondent effected.

[7] During March 2012, the applicant's legal practitioners raised the issue of interest with the respondents, the respondent replied during June 2012 and in its reply stated that 'due to the nature of this instance' the applicant was not entitled to *mora* interest, but proceeded and offered the applicant, *mora* interest at the rate of 3.5%. The applicant refused to accept the offer of 3.5% *mora* interest tendered by the respondent. The applicant on 26 June 2012 appealed against the award of 3.5% *mora* interest

determined by the respondent. On 20 February 2013 the applicant's appeal was dismissed and the applicant resolved to institute these proceedings. It issued the application on 11 July 2013.

[8] The respondent gave notice of its intention to oppose the application on 24 July 2013 and filed its opposing affidavit on 12 September 2013. In the answering/opposing affidavit the respondent raises two issues *in limine*. The first issue raised *in limine* is the issue that the applicant allegedly failed to disclose a cause of action. The respondent justify this objection on the ground that the applicant's claim is based upon an insurance agreement, but the applicant fails to make the necessary averments in order to establish and rely on the insurance contract. The respondent further argues that the applicant's application does not comply with rule 18(6) of the Rules of this Court (now repealed). That rule requires that when a claim is based on an agreement the claimant (in this matter the applicant) must set out whether the agreement was concluded orally or in writing and if the agreement is in writing a copy of the written agreement must be annexed to the application. The respondent thus argued that, because the applicant's application does not comply with Rule 18(6) if must be dismissed.

[9] The second point raised *in limine* by the respondent is that only a liquidated claim attracts interest. In the present case the permanent disability amount of N$ 8 332 929-00 was only determined on 8 February 2012, and thus only became liquidated on that date (i.e. on 8 February 2012) meaning that interest will only become due as from the date that the amount became liquidated. The respondent thus tendered to pay interest on the amount of N$ 8 332 929-00 from 8 February 2012 to the date of payment, but the tender is subject to the dismissal of the first raised *in limine*.

[10] In view of the above background the issues which I am called upon to determine are the following:

(a) Does the applicant's claim fail to disclose a cause of action, because the applicant failed to allege on an argument, to plead the terms of the agreement and to annex a copy of the agreement if the government was in writing?

(b) Does the interest on the amount of N$ 8, 332, 929.00 run from 28 February 2011 or from 8 February 2012?

B DOES THE APPLICANT'S CLAIM DISCLOSE A CAUSE OF ACTION?

[11] Mr Frank who appeared for the applicant, argued that the respondent's claim that the applicant lacks specificity or does not comply with Rule 18(6) is misguided, Mr Frank justifies that argument on the basis that, the applicant's claim is not based on the policy (i.e. the insurance contract). He argued that the policy is simply the background to the relief sought. The relief sought relates to the interest due in respect of payments which the respondent admitted as wing under the policy. Mr Frank argued that:

> 'In any event the relief sought by Rall is not based on the policy. The policy (which is not disputed) is simply the background to the relief sought. The relief is thus premised on an acknowledgment of liability the background to which is the policy. Surely PPS (i.e. the respondent) is not contending that if the terms of the policy had been averred this would have entitled them to renege on their acknowledgment of liability under the policy, PPS acknowledged their liability and the terms thereof and it is submitted that it was, in the present circumstances not necessary for Rall (the applicant) to set out the policy in detail'.

[12] Mr Tötemeyer, who appeared for the respondent on the other hand, argued that, the insurance agreement is central to the applicant's claim. Without the agreement there can be no claim for the applicant. He argued that;

> '…the entire claim is founded upon and in fact originates from the insurance agreement. It is trite that an insurance relationship is governed by contract. It follows, therefore, that the core of the relief sought herein by the applicant (and its entire claim for that matter) is

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founded on contract and more specifically the insurance agreement. Without on insurance agreement there can be no claim'.

[13] I am of the view that, in order to resolve the divergent arguments it is appropriate to restate some of the basic principles of the law of contract. A contract is often defined merely as an agreement made with the intention of creating an obligation or obligations[1]. From the definition of a contract professor Kerr AJ[2] has argued that the obligation to do what one has promised to do is sufficient justification for enforcing an actual agreement. It follows that once parties have agreed to create legally binding obligations they will be bound by the agreement until when they have performed in terms of the agreement. In contract there is a time when, or a period within which performance is due. It thus follow that failure to perform at the time when or during the period within which performance is due, without lawful excuse, is a breach of contract because it is failure to do what one has contracted to do.

[14] In the present matter, the parties concluded an insurance contract, in terms of that contract the parties agreed that the respondent will indemnify and make good the loss suffered by the applicant on the happening of an uncertain event. The event in respect of which the parties contracted occurred during March 2009, when the applicant sustained brain damages in a bicycle accident. On 8 February 2012 the respondent accepted the applicant's claim and undertook to pay the applicant for the loss he (i.e. the applicant) suffered with effect from 27 February 2011. I am therefore of the view that, the acceptance and undertaking to pay the applicant with effect from 27 February 2011 is an agreement independent and separate from the main insurance contract. It therefore follows that if the respondent did not pay as per its undertaking it is in breach of an agreement entitling the applicant to claim performance from the respondent alternatively damages from the failure to timeously perform. In view of this reasoning, I agree with Mr Frank, that the applicant's claim is independent of the insurance claim

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[1] ***LAWSA*** Vol 5 at paragraph 124. Lubbe Gerhardt and Christina Murray ***"Contract Cases and Material Commentary",*** 3rd ed.

[2] The Principles of the Law of Contract, 2002, 6th ed at 19.

and there is thus no need for the applicant to plead the terms of the insurance contract or to attach the insurance contract to his claim.

[15] In the case of *Divine Gontes & Co, Ltd v Beinkinstoldt & Co*[3] the Appellate Division held that:

> 'The English practice of suing upon an account stated [the term account stated is an abbreviated form of account stated and admitted] has been known to South African practice for a long time.'

[16] In the case of *Adams v SA Motor Industry Employers Association* [4] (which has been approved by the Supreme Court[5]) Jansen, JA who wrote the judgment on behalf of that Court said:

> 'There is ample authority to the effect that an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor; and it does not matter whether the acknowledgment is by way of an admission of the correctness of an account or otherwise. (Cf *Divine Gates & Co Ltd v Beinkinstadt* & Co 1932 AD 256; *Somah Sachs (Wholesale) Ltd v Muller & Phipps SA (Pty) Ltd* 1945 TPD 284; *Mahomed Adam (Edms) Bpk v Raubenheimer* 1966 (3) SA 646 (T).) In *Christou v Christoudoulou* 1959 (1) SA 586 (T) there are *dicta* to the effect that an admission in respect of an existing debt cannot "found an independent cause of action" unless it amounts to a novation (at 587G - 588A). This, with respect, appears to rest on a misapprehension. There can be no objection in principle to a second obligation arising in respect of an existing debt, and this appears to have been recognized by this Court *(Smit v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (3) SA 338 (A) at 346G). The decisive question is whether the acknowledgment contains an express or implied undertaking to pay, a matter which relates to the intention of the parties … In the present case the acknowledgment of debt contains an express undertaking to pay, and there can be little

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3 1932 AD 256 at 263.
4 1981 (3) SA 1189.
5 Rodgerson v SWE Power and Pumps (Pty) Ltd 1990 NR 230 (SC).

doubt that the parties intended to create a new obligation in respect of the payment of the purchase price due under the deed of sale'.

[17] I have no qualms with Mr Tötemeyer's submission that the respondent is entitled to raise what he terms an 'exception in motion'. But once it has raised an exception it bears the *onus* to prove that the applicant's application does not disclose a cause of action. Can it be said in the present matter that the respondent does not know what case it has to meet? In the present case the applicant's claim is one for *mora* interest. In other words the applicant alleges that the respondent agreed to pay a liquidated amount but it delayed payment of the admitted amount. The claim is in my opinion sufficiently framed to inform the respondent the case which it is called upon to meet. I am therefore of the view that the respondent's first point *in limine* must fail.

C THE DATE FROM WHICH THE INTEREST RUNS

[18] The respondent admits that, if the point *in limine* it has raised fails, it will have to pay interest on the lump sum disability payment and interest on the monthly incapacity payments outstanding from time to time. Since the interest on the premiums and the incapacity payment was tendered and accepted it is only interest on the disability payment which is still in dispute. The respondent argues that the date from which interest is to run is the date from which the claim was quantified and liquidated. According to the respondent that date is 08 February 2012. The applicant on the other hand contends that the date from which the interest is payable is 28 February 2011.

[19] I have pointed out above that in all contracts, even in those contracts where nothing is said on the question of performance, there is a time when, or a period within which performance is due. If a party to a contract delays to perform a contractual obligation that party is said is said to be in *mora*[6]. The consequences for a debtor who

[6] Mulligan G.A "*Mora"* 1952 South African Law Journal 276.

is in *mora* is that interest is payable on liquidated amounts[7]. In the case of *West Rand Estates Ltd v New Zealand Insurance Co Ltd*[8] Kotze, JA said:

> 'In connection with a claim for interest we have to consider the question of *mora*, and the distinction between an action for liquidated and unliquidated damages. Liability for the payment of interest through delay in the performance of his obligation or duty by the defendant may arise in one of two ways. Interest may be due from the nature of the case, where, for instance, the time for performance is fixed either by agreement or the law (*mora ex re*); or where in the absence of such agreement, the defendant has been called upon to perform his obligation (*mora ex pesona)*. In the former case no interpellation is necessary; in the latter the debtor must be formally called upon for performance. But we must bear in mind that a defendant cannot be said to be in *mora* unless he knows the nature of his duty and obligation; that is to say where and how much he has to pay. Hence a claim for unliquidated damages, which have to be investigated and ascertained does not bear interest. But as *certum est quod certum redid potest*, circumstances may occur to take a case out of the operation of this rule. The parties may for instance, investigate and agree as to the amount of damage sustained and from that moment the liability of the debtor for interest upon the agreed amount may well be considered to have commenced'.

[20] Also see the case of *C & T Products (Pty) Ltd v MH Goldschmidt (Pty) Ltd*[9] where Friedman, J said:

> '*Mora* is a wrongful delay or default in making payment, and arises the moment the debtor becomes obliged to pay. The obligation to pay interest on the amount owing likewise arises from the moment the debtor is in *mora*. *Mora* is generally divided into two categories, i.e. *mora ex persona* and *mora ex re*. *Mora ex persona* arises out of the conduct of the debtor and occurs when due demand (*interpellatio*) has been made upon the debtor, who has failed to satisfy such demand. *Mora ex re* on the other hand arises out of the transaction itself and is not dependent upon prior demand. This occurs, for example, where the date for payment is fixed by agreement between the parties. (See

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7 Kerr (supra) at 616.
8 1926 AD 173 at 195.
9 1981 (3) SA 619 at 631.

Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at 31; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 195.)'

[21] In the present matter Mr Tötemeyer has referred me to the respondent's rules more so to rule 11.3 which reads as follows:

'The Administrator or the insurer is not obliged to pay a disability sum insured in respect of a policy holder, unless and until the Administrator has received:

11.3.1 proof to the satisfaction of the Administrator and the insurer of the disability and the age of the policy holder; and

11.3.2 where proof of insurability was required such further information the Administrator and the insurer may require.'

He thus argued that the capital amount was only established and thus quantified once proof to the satisfaction of the respondent of the disability relied upon has been submitted and the date of qualification is 08 February 2012.

[22] I do not agree with Mr Tötemeyer's submission for the following reasons, the applicant submitted his claim during September/October 2010 and during February 2011 the respondent admitted that the applicant was partially disabled. It follows that the Administrator or the insurer must have been satisfied during February 2011. My reasoning is fortified by the letter written, on 11 February 2011, by the respondent to the applicant stating amongst others the following:

'Your case was considered by our Medical Officer Committee on 9 February 2011. The meeting considered all the documentation supplied and assessed you to be less than 20% Partially Permanently Incapacited…'

From the above letter it appears that the respondent was, already on 11 February 2011, satisfied that the applicant was disabled, albeit only at 20%. On 08

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February 2012 the respondent advised the applicant that his claim was *reassessed* and he was awarded a 100% benefits effective 27 February 2011. (Italicized and underlined for emphasis)

[23] In addition to the above letters, the applicant during November 2012 disputed the rate of interest offered to him and also the date from which the interest was to be calculated. The arbitrator appointed by the respondent to arbitrate the dispute said the following:

> 'At the outset I have to point out that, after having studied the contents of all the correspondence and other documentation pertaining to his dispute, I am of the view that there is only one issue still in dispute in this matter.
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> The outstanding issue in my opinion is the question whether, as contended by you, *mora* interest is payable on the amounts payable to your client. It is notable, however, that in the subject line to your above mentioned letter of 23 November 2012 you had indicated that in addition to the dispute as to the appropriate interest rate, your client's appeal is also against the date from which said interest is to run.
> In this respect I refer you to the spread sheet which had been attached by Mr McKay to the above-mentioned e-mail of 02 November 2012. *This spread sheet clearly indicates that interest on all payable amounts had been calculated from 27 February 2011*. It is my view therefore that the date from which interest is to run is not in dispute any more…'
> (Italicized and underlined for emphasis)

[24] I therefore have no doubt in my mind that the respondent had fixed and determined the date on which it will pay the applicant the disability benefit, as 27 February 2011. Having fixed the date for paying the disability benefit, at 27 February 2011, the failure to pay the benefit on that day resulted in the respondent being in *mora ex re*. I am satisfied that the facts in this case are distinguishable from the case of *Du Toit v Standard General Insurance Co*[10]. In that case, Du Toit (the applicant) was the beneficiary in terms of two life assurance policies issued by Standard General

[10] 1994 (1) SA 682.

Insurance Co (the respondent) on the life of the applicant's wife. The policies were dated 1 April 1992 and 1 May 1992. Each policy provided that the '*sum assured is payable if the life assured dies before the policy expiry date'* and further that the *'company requires satisfactory proof of the following: the circumstances giving rise to the benefits . . .'*. The applicant's wife was murdered on 12 June 1992. Thereafter there were rumours that the applicant might possibly have been implicated in his wife's death. On 29 June 1992 payment in terms of the policies was claimed on the applicant's behalf. A 'Claimant's declaration' in which was set out certain information in connection with the claim was inter alia filed with the claim. The respondent acknowledged receipt of the documents on 21 August 1992 and intimated that the matter would receive further attention when the report of the inquest and the post mortem examination was received. The inquest was held on 1 June 1993 in which the magistrate found that it was not possible to make a finding as to the identity of the person or persons who were responsible for the deceased's death. On 11 June 1993 the applicant launched an application in a Local Division for payment in terms of the policies and payment of interest thereon a tempore morae at 18,5% per annum from 13 June 1992 to date of payment. The full capital amount was paid by the respondent on 25 June 1993. At the hearing of the application the only question left for decision was that relating to the payment of interest from the date upon which the claim had been made against the respondent (i.e. 29 June 1992).

[25] In that case (*Du Toit v Standard General Insurance Co* case) it was held, that the date of performance had not been determined beforehand and, should *mora* be relevant in this case, it could only be a case of *mora ex persona*[11].

[26] In the result I make the following order:

1. The respondent’s points *in limine* are dismissed.

[11] At 688.

2. The respondent is ordered to pay the applicant interest at the rate of 20% per annum calculated from 28 February 2011 on the amount of N$ 8 332 929-00 on the portion of that amount that remained outstanding from time to time subsequent to that date and up to the date that the full capital amount of N$ 8 332 929.00 was paid to the applicant.

3. The respondent is ordered to pay the applicant interest at the rate of 20% per annum on all premiums repaid to the applicant subsequent to 27 February 2011 from the date that the respondent received the premium until the date on which the respondent repaid the premiums to the applicant.

4. The respondent is ordered to pay the applicant *mora* interest at the rate of 20% per annum on all the incapacity payments, to the applicant, which are outstanding from time to time as from 27 February 2011 up to the date that the respondent pays them to the applicant.

5. The respondent must pay the applicant's costs the costs to include the costs of one instructing and instructed counsel.

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Judge

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APPEARANCES

APPLICANT:	Mr T Frank, SC Instructed by Du Pisani Legal Practitioners
RESPONDENT:	Mr R Tötemeyer, SC Instructed by Koep & Partners Legal Practitioners

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