

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON COST AND INTEREST**

Case no: I 3045/2015

HC-CIV-ACT-DEL-2016/3653

In the matter between:

**GUNNAR JENSEN ACTING IN HIS CAPACITY
AS CO-TRUSTEE OF THE GUNNAR JENSEN
BUILDING MATERIALS TRUST
T/A PENNYPINCHERS TIMBERCITY WINDHOEK**

FIRST PLAINTIFF

**THEODORE LE ROUX DE KLERK ACTING
IN HIS CAPACITY AS CO-TRUSTEE OF
THE GUNNAR JENSEN BUILDING MATERIALS
TRUST T/A PENNYPINCHERS TIMBERCITY
WINDHOEK**

SECOND PLAINTIFF

and

PETER TYRON KOHLER

DEFENDANT

Neutral Citation: *Pennypinchers Timbercity Windhoek v Kohler* (I 3045/2015; HC-CIV-ACT-DEL-2016/3653) NAHCMD 232 (26 July 2018)

CORAM: PRINSLOO J

Heard: 23 July 2018, 24 July 2018 and 26 July 2018

Delivered: 26 July 2018

Reasons: 04 August 2018

Flynote: Costs award — When granted — Successful litigant to be reimbursed for expense of litigation — Rule not immutable that costs will always follow the successful litigant — Test in making cost-ruling is to enquire what is just in the circumstances — Justification of one instructed and two instructed — Costs of only one counsel allowed.

Summary: The plaintiffs instituted action against the defendant in two separate matters. The first matter emanated from the Windhoek Branch of Pennypinchers and the second matter from the Ongwediva Branch.

In respect of the Windhoek matter the plaintiffs had two claims. The first claim was based on a written acknowledgment of debt wherein the defendant acknowledged his liability in respect of funds he misappropriated and in respect of the second claim, it was alleged that the defendant misappropriated funds after extensive investigations took place.

In respect of the Ongwediva and Windhoek matter, the defendant's alleged misappropriation of the capital claims were settled between the parties and the court entered judgment in favour of the plaintiffs. The only issues remaining were the issue of interest and costs.

The plaintiff argued that the court should first and foremost determine whether the claims were liquidated or unliquidated claims. In respect of the claim 1 in the Windhoek matter, the plaintiff argued that whereas it is based on an acknowledgement of debt, it

would therefore constitute a liquidated claim. The plaintiff however conceded that the remaining are unliquidated claims as it could not be ascertained without an extensive investigation, ie. it was not determined by prompt and speedy determination. With respect to interest, it was thus submitted that it must be calculated from date of service of summons and in the remaining claims, interest should be calculated from date of judgment.

On the issue of costs, the plaintiff argued that the court should be guided by the relevant principles regarding costs.

The defendant submitted with respect to the interest, he is serving a long term imprisonment, and therefore the interest should be stayed until date of his release as he would suffer substantial prejudice if the interest would be allowed to run from the dates as submitted by opposing counsel. The defendant further submitted that the interest should be at a rate of 15% and not 20% as claimed by plaintiff.

On the issue of costs, the defendant submitted that he approached the plaintiff's counsel on various occasions in an attempt to settle the matter and therefore the court should not allow the costs as claimed by plaintiff.

Held – that generally a debtor, in the absence of an agreement to the contrary, has to pay interest on an amount of money owed by him from the moment he is in *mora* and it also applies in regards to a liquidated amount of damages or satisfaction and the interest becomes part of the compensation.

Held – the interest rate is governed by the *Prescribed Rate Interest Act* 55 of 1975 which is currently set at 20% per annum and the Act applies *ex lege* and the parties do not have to have any agreement on this issue.

Held further – that in respect of the issue of costs and although costs are generally awarded to a successful litigant, it is clear that in light of the foregoing discretion, it

cannot be regarded as an immutable rule that costs will always automatically follow the winning party. Rather, and in keeping with judicial discretion, a presiding officer may in fact base a cost-award exclusively upon the equities of the action. The test in making a cost-ruling is always to enquire what is just in the circumstances.

ORDER

Claim 1 on case number I 3045/2015 (judgment granted on 24 July 2018):

- a) Payment in the amount of N\$ 3,113,193.23;
- b) Interest on the aforesaid amount at a rate of 20% *a tempore morae* from 08 October 2015 to date of final payment.

Claim 2 on case number I 3045/2015 (judgment granted on 24 July 2018):

- c) Payment in the amount of N\$ 911 960.73;
- d) Interest on the aforesaid amount at a rate of 20% *a tempore morae* from date of judgement to date of final payment.

Claim on HC-MD-CIV-ACT-DEL-2016/03653 (granted on 23 July 2018):

- e) Payment in the amount of N\$ 873 292.72;
- f) Interest on the aforesaid amount at a rate of 20% *a tempore morae* from date of judgement to date of final payment.

Costs:

- g) Cost to be cost of one instructed and one instructing counsel.

RULING

Prinsloo, J:

Introduction

[1] The parties in this matter are Gunnar Jensen acting in his capacity as co-trustee of the Gunnar Jensen Building Materials Trust t/a Pennypinchers TimberCity Windhoek and Theodore Le Roux De Klerk acting in his capacity as co-trustee of the Gunnar Jensen Building Materials Trust t/a Pennypinchers TimberCity Windhoek, hereafter referred to as 'Pennypinchers'. The defendant is Peter Tyron Kohler, as a former employee of Pennypinchers.

[2] The plaintiffs instituted action against the defendant in two separate matters. The first matter emanated from the Windhoek Branch of Pennypinchers¹ and the second matter from the Ongwediva Branch.² These cases were consolidated and I will for purposes of this ruling refer to the cases as the Windhoek matter and the Ongwediva matter respectively.

[3] In respect of the Windhoek matter the plaintiffs have two claims. The first claim is based on a written acknowledgment of debt wherein the defendant acknowledged his liability in respect of funds he misappropriated from Pennypinchers. The second claim emanating from the Windhoek branch is in respect of money that was misappropriated during the same period as in respect of claim one, however, these funds were determined to be misappropriated by the defendant only after an extensive investigation.

[4] In respect of the Ongwediva matter, it is alleged that the defendant misappropriated money during the period of 2013 to 2015 whilst employed by

¹ Case number: I 3045/2015.

² Case number: HC-CIV-ACT-DEL-2016/3653.

Pennypinchers Ongwediva, in the capacity of manager. These funds were also determined to be misappropriated by the defendant after an extensive investigation.

[5] The defendant's alleged misappropriation of the capital claims were settled between the parties and the court entered judgment in favour of the plaintiffs as follows:

On the Windhoek matter:

- a) Claim 1: Payment in the amount of N\$ 3,113,193.23;
- b) Claim 2: Payment in the amount of N\$ 911 960.73;
- c) On the Ongwediwa matter: Payment in the amount of N\$ 973 292.72.

Defendant's counterclaim was withdrawn. The only matter that remains for determination is the issue of interest and costs.

On the issue of interest

[6] Mr. Töttemeyer argued that the court should first and foremost determine if the claims were liquidated or unliquidated claims. In respect of the claim 1 in the Windhoek matter, Mr. Töttemeyer argued that whereas it is based on an acknowledgement of debt, it would therefore constitute a liquidated claim. He however conceded that the remaining claims are unliquidated claims as it could not be ascertained without an extensive investigation, ie. it was not determined by prompt and speedy determination.

[7] In respect of claim 1 of the Windhoek claim, it was thus submitted that the interest must be calculated from date of service of summons and in respect of the remaining claims interest should be calculated from date of judgment.

[8] On the issue of costs, Mr. Töttemeyer argued that although in the Windhoek matter the plaintiff claimed costs of one instructing and one instructed counsel and in the Ongwediva matter the cost one instructing and two instructed counsel, the court should be guided by the relevant principles regarding costs, and I will paraphrase, i.e.:

- a) Where money or property is involved, its amount or value involved;
- b) The nature and complexity of the matter or the novelty of the questions involved;
- c) The skills, specialized knowledge and responsibility required of, and the time and labour expended in preparing for the trial.

[9] The question now is whether it was a wise and reasonable precaution to have two instructed counsels? In reply to this question, Mr. Totemeyer submitted that due to the complexity of the matter, it was a reasonable precaution by plaintiff to engage two instructed counsel and therefore prays for the cost of one instructed and two instructed counsel to be awarded to the plaintiff in respect of the consolidated case.

[10] Mr. Töttemeyer also argued with regard to the necessity of all the plaintiff's witnesses until and including the 24th of July 2018 with regard to the consultations and drawing of their witness statements, all further attendances in relation thereto including further consultations and preparations for trial and the attendances of the witnesses Swartz, Bester and Jensen at the trial until the matters were settled on Tuesday, the 24th of July 2018.

[11] In reply to the submissions made on behalf of the plaintiff, Mr. Kohler submitted that as he is serving long term imprisonment therefore the interest should be stayed until date of his release as he would suffer substantial prejudice if the interest would be allowed to run from the dates as submitted by opposing counsel. Mr. Kohler also submitted that the interest should be at a rate of 15 % and not 20 % as claimed by plaintiff.

[12] On the issue of costs, Mr. Kohler submitted that he approached the plaintiff's counsel on various occasions in an attempt to settle the matter and therefore the court should not allow the costs as claimed by plaintiff.

On the issue of Interests

[13] Generally speaking a debtor, in the absence of an agreement to the contrary, has to pay interest on an amount of money owed by him from the moment he is in *mora*. This also applies in regards to a liquidated amount of damages or satisfaction and the interest becomes part of the compensation.³ In the instance where the claim is an unliquidated amount, i.e. where the precise amount is to be determined through a long and complex investigation the defendant was traditionally not liable to pay interest in the absence of an agreement to such quantum or unless the amount has been assessed.⁴

[14] The interest rate is governed by the *Prescribed Rate Interest Act* of 1975⁵ which is currently set at 20 % per annum. Section 1 of the Act states as follows in this regard:

'(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.'

³ *Attorneys Fidelity Guarantee Fund v Tony Allem (Pty) Ltd* 1990(2) SA 665(A) (the fund pays mora interest in the case of theft of trust money by an attorney from the moment of summons).

⁴ *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines* 1915 AD 1 at 31-32: where it is impossible for a debtor to determine what damage his breach of contract has caused, he does not have to pay mora interest until the amount has been estimated- it may be different from the amount that can be ascertained through a reasonable investigation).

⁵ Act 55 of 1975.

[15] The Act applies *ex lege* and the parties do not have to have any agreement on this issue. The claim 1 in respect of the Windhoek case is based on liquid document of which the money value has been ascertained and which is admitted by the defendant. The plaintiffs placed the defendant in *mora* by virtue of the summons and therefore interest at the prescribed rate should be calculated from date of service of the summons, which was 08 October 2015. As for the remaining claims, it was evident from the evidence led before me that there were extensive investigations in this matter to determine the amount of money appropriated by the defendant and I am therefore in agreement that these claims are illiquid claims and therefore interest would only be calculated from date of judgment.

[16] I cannot accede to the request of the defendant to stay the running of the interest till the date of his release nor can the court accede to the defendant's request to an interest rate of 15 % as requested, for reasons set out above.

On the issue of cost

[17] Generally, costs are awarded to a successful litigant to reimburse the expense to which the litigant has been put by having been involved in litigation.

[18] Although costs are generally awarded to a successful litigant, it cannot be regarded as an immutable rule that costs will always automatically follow the winning party. Rather, and in keeping with judicial discretion, a presiding officer may in fact base a cost-award exclusively upon the equities of the action. The test in making a cost-ruling is always to enquire what is just in the circumstances.

[19] On the issue of witnesses, the court can remark the following: from the proposed pre-trial order which was made an order of court, it was evident that there was quite a number of issues in dispute in respect of which a number of witnesses had to testify. This matter was settled only after two days of trial and the witnesses listed in the pre-trial order was either at court or available on short notice to testify. The witnesses'

statements were drafted and filed in terms of case management orders and in preparation for trial counsel and had to consult with the said witnesses. I am therefore satisfied that these witnesses were necessary witnesses up to including 24th of July 2018.

[20] That leaves the question of costs of two counsels. From the voluminous discovery which mainly consist of bank statements of Pennypinchers and there was clearly a lot of preparation for the instructing counsel in this matter but in my view , the employment of two instructed counsel was not justified.

[21] My order is therefore as follows:

Claim 1 on case number I 3045/2015 (judgment granted on 24 July 2018):

- a) Payment in the amount of N\$ 3,113,193.23;
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Costs:

- g) Cost to be cost of one instructed and one instructing counsel.

J S Prinsloo
Judge

APPEARANCES:

PLAINTIFF:

R Töttemeyer (with him A S van Vuuren)

instructed by Behrens & Pfeiffer, Windhoek

DEFENDANT:

In person