REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/05163

In the matter between:

GREEN CONSULTING ENGINEERS CC
T/A EMCON CONSULTING GROUP **PLAINTIFF**

and

MINISTER OF WORKS AND TRANSPORT **FIRST DEFENDANT**
MINISTER OF FISHERIES AND MARINE RESOURCES **SECOND DEFENDANT**

Neutral Citation: *Green Consulting Engineers Cc T/A Emcon Consulting Group v Minister of Works and Transport* (HC-MD-CIV-ACT-CON-2019/05163) 2023 NAHCMD 342 (20 June 2023)

Coram: UEITELE J
Heard: **27 January 2021**
Delivered: **19 March 2021**
Reasons: **20 June 2023**

Flynote: Practice – Payment of interest – Difference between compound interest, simple interest and *mora* interest – Legal principles restated.

Summary: On 21 November 2019, the plaintiff commenced action by issuing summons out of this court in this matter and in four other matters which are related. In this matter, the plaintiff claimed payment from the defendants in the amount of N$92 433,09 plus interest at the prime rate plus 2 per cent on the amount of N$92 433,09, reckoned from 1 November 2019 to date of final payment. The plaintiff furthermore claimed the costs of suit.

The defendants entered notices to defend the plaintiff's claim. The court on 19 March 2021 granted orders, amongst others, that the plaintiff is entitled to claim interest from the defendants in respect of the amounts that the defendants delayed to pay to the plaintiff and that the interest that must be paid is payable from the date on which the summons were served on the defendants.

The plaintiff was unhappy with the court orders granted on 19 March 2021, and on 22 April 2021, noted an appeal against those orders by filing a notice of appeal on the e-Justice system. Because the matter was finalized and removed from the roll, when parties file documents on the case, the managing judge would not know that documents were filed unless the judge was alerted by the legal practitioner that a document was filed on the case.

In this matter, the judge was never alerted that a notice of appeal was filed or that reasons for his orders were requested. The court was thus not aware that a notice of appeal was filed and that reasons for the orders were requested. The fact that reasons were requested for the orders that the court made on 19 March 2021 only came to the court's attention on 16 June 2023, hence the belated provision of the reasons for the orders made on 19 March 2021.

Held that, in this matter, the Ministry disputed the plaintiff's claim until 21 November 2019 and the plaintiff's claim was therefore unliquidated. The defendants could thus not be in *mora*, but as soon as the Ministry agreed to the plaintiff's claim, the amount that was in dispute between the parties became liquidated and from that moment the liability of the defendants for interest upon the agreed amount commenced.

Held that, at common law, the plaintiff is entitled to *mora* interest. In the present matter, the parties did not agree on the rate of interest. It follows that the rate applicable is the rate prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975.

REASONS

UEITELE J:

Introduction

[1] Interest, which Centlivres CJ described as *'the life-blood of finance',*[1] is what this matter is about. The plaintiff is Green Consulting Engineers CC (Previously Green Consulting Engineers (Pty) Ltd) trading as Emcon Consulting Group, a private company duly incorporated in terms of the company laws applicable in the Republic of Namibia, while the first defendant is the Minister of Works and Transport. The second defendant is the Minister of Fisheries and Marine Resources. I will, in this judgment, for ease of reference refer to the Minister of Works and Transport as the Ministry.

[2] On 21 November 2019, the plaintiff commenced action by issuing summons out of this court in this matter and in four other matters[2] which are related. In this matter, the plaintiff claimed payment from the defendants in the amount of N$92 433,09 plus interest at the prime rate plus 2 per cent on the amount of N$92 433,09, reckoned from 1 November 2019 to date of final payment. The plaintiff furthermore claimed the costs of suit. The defendants entered notices to defend the plaintiff's claim.

[3] After the plaintiff had served the summons on the defendants, the Ministry paid (in this matter and in the other four matters) the capital amounts claimed by the plaintiff, but failed or refused to pay the amounts claimed as interest by the plaintiff. The parties then agreed to, in terms of rule 63 place the matter before me to determine whether the plaintiff was entitled to claim interest on the amounts that were paid late and if the

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1 In the matter of *Linton v Corser* 1952 (3) SA 685 (A) at 695G.

2 Case no HC-MD-CIV-ACT-CON-2019/05158, HC-MD-CIV-ACT-CON-2019/05157, HC-MD-CIV-ACT-CON-2019/05160, and HC-MD-CIV-ACT-CON-2019/05130.

answer to that question was in the affirmative, then the date from which the interest was payable and the rate at which the rate was payable.

[4] After the process of case management and when the matter was ripe for hearing, the Deputy Judge President, on 22 January 2021, allocated the matter for hearing to me to determine the issue identified by the parties in terms of rule 63. I heard arguments in that respect on 27 January 2021, and on 19 March 2021, I made the following order:

> '1 It is declared that:
>
> 1.1 the plaintiff is entitled to claim interest from the defendant in respect of the amounts that the defendant delayed to pay to the plaintiff;
>
> 1.2 the interest that must be paid is payable from the date on which the summons is served on the defendants; and
>
> 1.3 the interest is paid at the prescribed rate of interest which is currently 20% per annum.
>
> 2. The defendants must, jointly and severally the one paying the others to be absolved, pay the plaintiff's costs of suit on a party and party scale, the costs to include that of one instructing and one instructed counsel.
>
> 3 The matter is removed from the roll and regarded as finalised.'

[5] Unbeknown to me, the plaintiff was unhappy with the order that I made and on 22 April 2021, noted an appeal against the orders that I made by filing a notice of appeal on the e-Justice system. Because the matter was finalised and removed from the roll, when parties filed documents on that case, I would not know that documents were filed unless I was alerted by the legal practitioner that a document was filed on the case. But in this matter, I was never alerted that a notice of appeal was filed, I was thus not aware that a notice of appeal was filed.

[6] It appears that on three separate occasions, the first being on 21 July 2021, the second being on 23 August 2021, and the third and final request being on 8 October 2021, the plaintiff requested reasons for the orders that I made on 19 March 2021 from

me. I say ‘it appears’ because I was, until 16 June 2023 when the Deputy Judge President showed me copies of the correspondence sent by electronic mail to a research assistant who is no longer in the employment of the office of the Judiciary, not aware of the requests. Regrettably, the research assistant to whom the correspondence was electronically mailed, did not bring that correspondence requesting reasons for my orders to my attention or to the attention of my secretary and my research assistant. I was therefore not aware that an appeal was noted against the orders that I made and that the plaintiff requested reasons for those orders. It is for the above reasons that I am only releasing these reasons a little bit more than two years after I made the orders. I therefore sincerely apologize to the parties and to the Supreme Court for any inconvenience that this may have caused.

Brief background

[7] The brief background facts which gave rise to the plaintiff’s claim are these. The Ministry of Works and Transport, acting on behalf of the Ministry of Fisheries, during August 2008 appointed the plaintiff in terms of Government Gazette No. 593 of 25 February 1993 (the *Gazette*) and subsequent amendments, to do work on a Fish Farm Project in Leonardville, appointment number 33-08/09, Project number 2205-18. The plaintiff claims that it was, amongst other terms, appointed on the following terms:

(a) The plaintiff was appointed to render professional services consisting of all general mechanical and electrical consulting engineering services related to the Fish Farm Project in Leonardville Project.

(b) The plaintiff would be remunerated in interim payments upon the presentation of an invoice by it to the Ministry as stages of the work were completed.

(c) The plaintiff would provide invoices to the defendants upon completion of each stage of the work performed by the plaintiff and the amounts charged in each invoice was calculated according to the rates in the Gazette.

(d) The defendants would pay the invoices presented by the plaintiff strictly within 30 days, as stated on the invoices so provided, alternatively within a reasonable time.

[8] The plaintiff contends that it complied with its obligations and completed the work. It further stated that after it completed a stage of work, it sent the Ministry an invoice in respect of the stage of the work that it completed. On 25 September 2017, the plaintiff sent two invoices to the Ministry, namely invoice number BS 1791A4E for the amount of N$67 139,54 and invoice number BS179/A7MF for the amount of N$4985,18. By November 2019, the Ministry had not yet paid the plaintiff's invoices.

[9] On 21 November 2019, that is more then twenty four months after the plaintiff presented its first invoice, the Ministry paid the plaintiff's invoice number BS 1791A4E but only paid the capital sum (N$67 139,54) and not the interest (which the plaintiff calculated to be N$20 689,41 as on 21 November 2019) which the plaintiff claimed. The Ministry furthermore failed to pay the second invoice, invoice number BS179/A7MF. The capital sum on this invoice being N$4985,18 and the interest (which the plaintiff calculated to be N$2006,84 as on 21 November 2019).

[10] The Ministry's failure to pay the plaintiff's invoice for a period of over twenty four months and the Ministry's refusal to pay the interest that the plaintiff raised on the capital amounts of the invoices is what triggered the plaintiff to issue summons against the Ministry of Works and Transport and the other government ministries in this matter and the other four related matters.

Issue for determination

[11] This is a case stated by the plaintiff and the defendants in terms of rule 63 for adjudication by the court. In this matter, the plaintiff and the defendants agree that the defendants owed the plaintiff the capital amounts claimed by the plaintiff in its respective particulars of claims. The parties are, however, in disagreement as to whether or not the plaintiff is entitled to claim interest on the capital amounts claimed, the date from which the interest is payable, and the rate at which the interest is payable.

[12] As a result of their disagreement the parties, in terms of rule 63(9), requested the court to, as a matter of law, determine whether or not the plaintiff is entitled to interest

on the capital amounts claimed, the date from which the interest is payable and the rate at which the interest is payable.

Discussion

[13] I find it appropriate to, before I consider the question that confronts me, set out some of the legal principles with regard to payment of interest. In the matter of *Land Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd and Other,*[3] the South African Supreme Court of Appeal held that interest remains interest and no method of accounting (such as capitalisation) can change its nature. It further stated that contractual interest may be compound interest or simple interest. Compound interest is interest on capital plus accrued interest. If compound interest is not provided for in an agreement, only simple interest on the capital will be payable in terms of the agreement.

[14] The court proceeded and stated that *mora* interest, on the other hand, is something fundamentally different. *Mora* interest is not paid in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract, specifically *mora debitoris.* This principle was reaffirmed in the matter of *Crookes Brothers Limited v Regional Land Claims Commission for the Province of Mpumalanga and Others,*[4] where the Supreme Court of Appeal held that even in the absence of a contractual obligation to pay interest, where a debtor is in *mora* in regard to the payment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having received his money on due date.

[15] In *Bellairs v Hodnett and Another,*[5] the court explained the nature of *mora* interest as follows:

'It may be accepted that the award of interest to a creditor, where his debtor is in *mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a

[3] *Land Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd and Other* [2013] 4 All SA 385 (SCA).

[4] *Crookes Brothers Limited v Regional Land Claims Commission for the Province of Mpumalanga and Others* [2013] 2 All SA 1 (SCA).

[5] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1145D-G and 1146H-1147A.

contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date (*Becker v Stusser*, 1910 CPD 289 at p 294). This loss is assessed on the basis of allowing interest on the capital sum owing over the period of *mora* (see *Koch v Panovka* 1933 NPD 776). Admittedly, it is pointed out by Steyn, *Mora Debitoris*, p 86, that there were differences of opinion among the writers on Roman-Dutch law on the question as to whether *mora* interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasized by CENTLIVRES, CJ, in *Linton v Corser* 1952 (3) SA 685 (AD) at p 695, interest is today the "*life-blood of finance"* and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.

… As previously pointed out, *mora* interest in a case like the present constitutes a form of damages for breach of contract. The general principle in the assessment of such damages is that the sufferer by the breach should be placed in the position he would have occupied had the contract been performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party. Accordingly, such damages only are awarded as flow naturally from the breach or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom (*Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Lt*d 1915 AD 1 at p 22). In awarding *mora* interest to a creditor who has not received due payment of a monetary debt owed under contract, the Court seeks to place him in the position he would have occupied had due payment been made. The Court acts on the assumption that, had due payment been made, the capital sum would have been productively employed by the creditor during the period of *mora* and the interest consequently represents the damages flowing naturally from the breach of contract.'

[16] In the matter of *West Rand Estates, Ltd v New Zealand Insurance Co, Ltd,*[6] the court held that:

'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

[6] *West Rand Estates, Ltd v New Zealand Insurance Co, Ltd* 1926 AD 173 at 195-196.

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 persona*). 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 or obligation; that is to say when 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 reddi 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. It seems fair and reasonable that the defendant should indemnify the plaintiff for the full loss suffered, and this admits of the payment of interest as well, once the damage has been ascertained and agreed upon between them (cf. Grotius, 3.24.19).'

[17] This principle is succinctly stated in Christie,[7] as follows 'When a debtor's contractual obligation is to pay money, and he is in *mora*, the general damages that flow naturally from the breach will be interest *a tempore morae'.*

[18] I accept that parties may, by agreement, exclude liability for *mora* interest. The effect of an agreement of that kind is to exempt a party from common law liability for damages for breach of contract. Such agreement must be clear and unambiguous. As Marais JA said in *First National Bank of SA Ltd v Rosenblum & Another:*[8]

'In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out.'

[19] From the cases that I have referred to in the preceding paragraphs, a number of principles emanating from a creditor's right to claim interest may be formulated as follows:

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[7] R H Christie *The Law of Contract in South Africa* 6 ed (2011) at 530.

[8] *First National Bank of SA Ltd v Rosenblum & Another* 2001 (4) SA 189 (SCA) at 195H.

(a) If a debtor is late with the payment of a money obligation under a contract, the creditor is entitled to claim *mora* interest on the outstanding debt due to the debtor's failure to make payment on the due date.

(b) The creditor is entitled to claim this interest even without a specific contractual provision to pay interest. *Mora* interest constitutes compensation for loss resulting from a breach of contract and is not governed nor dependant on an agreement. *Mora* interest is a common law right, meaning that it automatically applies to contracts unless it is expressly, plainly and unambiguously excluded by agreement between the parties.

(c) If the contract fixes the time for payment, no demand is necessary to place the debtor in default and interest is payable from the date on which payment was due.

(d) If the claim is for unliquidated damages the defendant cannot be in *mora* until the *quantum* of damages has been fixed by a judgment of the court or by agreement between the parties.

(e) Where the parties have fixed the amount of damages by agreement, the damages are no longer unliquidated and interest on the agreed amount is payable from the date of the agreement or the date of demand whichever is later.

(f) If a contract or agreement is silent on the rate of interest, then interest can be claimed at the prescribed rate. *Mora* interest can only be claimed at the prescribed rate.

[20] In this matter, the Ministry disputed the plaintiff's claim until 21 November 2019 and the plaintiff's claim was therefore unliquidated, the defendant could thus not be in *mora*, but as soon as the Ministry agreed to the plaintiff's claim, the amount that was in dispute between the parties became liquidated and from that moment the liability of the defendants for interest upon the agreed amount commenced.

[21] I have thus come to the conclusion that in light of the authorities that I have referred to in this judgment, the question to be adjudicated is therefore answered in favour of the plaintiff, namely that, at common law the plaintiff is entitled to *mora*

interest. In the present matter, the parties did not agree on the rate of interest. It follows that the rate applicable is the rate prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975.

Costs

[22] What is left is the question of costs. The basic rule with regard to costs is that all costs, unless expressly otherwise enacted, are in the discretion of the judge, and the discretion must be exercised judicially,[9] that is, not arbitrarily. An award of costs ought to be fair and just between the parties.[10] It has also been held that another general rule is that the successful party must be awarded his or her costs, and the rule ought not to be departed from without good grounds.[11] But the rule is subject to the abovementioned overriding principle that the award of costs is in the discretion of the judge (it depends upon the circumstances of the particular case).

[23] In my view, the plaintiff was successful and no special circumstances were placed before me to depart from the general rules and for that reason, I find that the plaintiff is entitled to its costs. It is for the above reasons that I made the orders that I made on 19 March 2021.

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S F I UEITELE

JUDGE

[9] *Hailulu v Director of the Anti-Corruption Commission and Others* 2014 (1) NR 62 (HC).
[10] *Fripp v Gibbon & Co* 1913 AD 354.
[11] *Letsitele Stores (Pty) Ltd v Roets* 1959 (4) SA 579 (T).

APPEARANCES:

PLAINTIFF:	J P Ravenscroft-Jones Instructed by Ellis Shilengudwa Inc., Windhoek
DEFENDANT:	N Tjahikika Of Government Attorney, Windhoek