



REPORTABLE

CASE NO: SA 31/2021

IN THE SUPREME COURT OF NAMIBIA

In the matters between:

HC-MD-CIV-ACT-CON-2019/05158

**GREEN CONSULTING ENGINEERS CC
t/a EMCON CONSULTING GROUP**

Appellant

and

MINISTER OF WORKS AND TRANSPORT

First Respondent

HC-MD-CIV-ACT-CON-2019/05157

**GREEN CONSULTING ENGINEERS CC
t/a EMCON CONSULTING GROUP**

Appellant

and

MINISTER OF WORKS AND TRANSPORT

First Respondent

**MINISTER OF SAFETY AND SECURITY AND
THE NAMIBIAN CORRECTIONAL SERVICES
Respondent**

Second

HC-MD-CIV-ACT-CON-2019/05160

**GREEN CONSULTING ENGINEERS CC
t/a EMCON CONSULTING GROUP**

Appellant

and

MINISTER OF WORKS AND TRANSPORT

First Respondent

**MINISTER SAFETY AND SECURITY AND
THE NAMIBIAN POLICE FORCE**

Second

Respondent

HC-MD-CIV-ACT-CON-2019/05130

**GREEN CONSULTING ENGINEERS CC
t/a EMCON CONSULTING GROUP**

Appellant

and

MINISTER OF WORKS AND TRANSPORT

First Respondent

MINISTER OF EDUCATION, ARTS AND CULTURE

Second

Respondent

HC-MD-CIV-ACT-CON-2019/05163

**GREEN CONSULTING ENGINEERS CC
t/a EMCON CONSULTING GROUP**

Appellant

and

MINISTER OF WORKS AND TRANSPORT

First Respondent

MINISTER OF FISHERIES AND MARINE RESOURCES

Second Respondent

Coram: DAMASEB DCJ, PRINSLOO AJA and SCHIMMING-CHASE AJA

Heard: 18 July 2023

Delivered: 28 July 2023

Summary: The respondents (the Government) had contracted the appellant as consultant on several construction projects. The appellant completed the agreed work and rendered invoices some of which went unpaid. The appellant then issued demand in respect of the unpaid invoices and when still no payment was received, issued summonses in five separate but related civil cases against the Government seeking payment of the capital amounts and interest.

After pleadings closed, the parties sought and were granted an order by the managing judge to state a case for the court's decision on a question of law in terms of rule 63 of the Rules of the High Court. The stated case asked the court *a quo* to determine whether the Government was liable for interest and if so whether interest should run from date of service of summons or from the date of demand.

The High Court held it was the former. In so doing, the High Court placed reliance on the pleadings not included in the stated case to find that up to the date of service of the summons the claimed amounts were disputed and therefore unliquidated and that the amounts claimed only became liquidated from date of summons on which date the Government admitted liability.

On appeal the appellant maintained that as at the date of the stated case the amounts claimed were not in dispute and were therefore liquidated amounts which

under the common law attracted interest on the debtor being placed in *mora* by demand.

On appeal: proper approach to rule 63 explained. Stated case in terms of rule 63 must be drafted with precision and clarity. Court and parties may only rely on facts agreed and recorded in the stated case. Court may not traverse outside stated case to make primary findings of fact based on allegations and facts stated in pleadings unless incorporated in the stated case by reference.

Held that, the court *a quo* misdirected itself by finding – relying on the pleadings – that liability was only admitted on service of summons. Liability had already been admitted by the Government by making partial payment without disputing the capital amounts due; and the Government was placed in *mora* when demand was made.

Held that, when the contract does not fix a time for performance demand by the creditor is necessary in order to place the debtor in *mora*.

Held that, the court *a quo* should have held that the Government was liable to pay interest on the outstanding amounts from the date of demand.

The appeal upheld, with costs and High Court's order varied.

APPEAL JUDGMENT

DAMASEB DCJ (PRINSLOO AJA and SCHIMMING-CHASE AJA concurring):

Introduction

[1] This is an appeal against an order given by the High Court in answer to a question of law in a stated case in terms of rule 63 of the High Court Rules: When

does interest begin to run on a claim for contractual damages: from the date of service of summons or from the date of demand?

[2] There is a preliminary matter of a condonation application and reinstatement of the appeal because of non-compliance with the time limits under Supreme Court Rules 8(2)(b) (lodging of an appeal record within three months from date of order appealed against); 11(10) (parties to hold a meeting to agree on the appeal record and submitting a report to the registrar); 14(2) (provision of security by the appellant before lodging record of appeal) as a result of which the appeal lapsed – hence the condonation and reinstatement application. For the reasons that I set out at the end of this judgment, the condonation application is granted and the appeal reinstated.

[3] The appellant was contracted as a consultant by the Government of Namibia on several construction projects. It completed the agreed work and rendered invoices to the Government, some of which went unpaid. The appellant then issued demand on 10 July 2019 for the unpaid amounts and when still no payment was received, issued summonses against the Government in five separate but related cases.

[4] After pleadings had closed the parties sought and were granted an order by the managing judge to state a case for his decision on questions of law in terms of rule 63 of the High Court Rules. That resulted in a stated case in the following civil cases then pending in the High Court as HC-MD-CIV-ACT-CON: 2019/05158; 2019/05157; 2019/05160; 2019/05130 and 2019/05163.

[5] The stated case related to all five cases and each is couched in identical terms except for differences in the amounts involved. Each records that summons was issued on 21 November 2019 in respect of a capital amount with interest. Each case records that 'Prior to summons being issued the Plaintiff send (sic) a letter of demand on 10 July 2019'.

[6] Each case ends with the following words: 'The parties agree that the main issue for determination in this stated case is whether the Plaintiff is entitled to interest as claimed, and if so:

- a. Whether interest can be claimed per the summons, alternatively as per the letter of demand or further alternatively, from the date of summons.
- b. What percentage in interest the Plaintiff is entitled to claim, if any.
- c. Costs of suit'.

[7] At the end of the listed cases, the document containing the stated case ends with the respective contentions of the parties 'In respect of all matters' as follows:

'27. The plaintiff's case is that the agreement between the parties made no provision for interest, but the Plaintiff is entitled to receive payment within a reasonable time. Plaintiff has charged the Defendant interest at prime plus 2% as from 60 days after the invoice.

28. The defendant's case is that the Plaintiff cannot claim interest because the agreement between the parties made no provision for interest.

29. The parties agree that the determination of the above legal issues will resolve all 5 matters.'

[8] There is an 'Annexure' ('A'-'E') attached to each case recording 'Payments received to date'. In other words, it is accepted in each of the five cases that (a) there is an outstanding indebtedness which is due and owing, (b) that partial payment had been made in respect of the respective amounts claimed, and (c) that the only issue between the parties is liability for interest and the date from which it runs, should such liability exist.

The High Court

[9] The parties argued the stated case and on 19 March 2021 the court *a quo* made an order, without reasons, only under case no: 2019/05160 as follows:

'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.'

[10] In response to that order, the appellant lodged an appeal, citing all five cases, and without the benefit of the court *a quo's* reasons. The appeal was thereafter set down for hearing in the June – July 2023 term of this Court but when it was called on 19 June 2023, we postponed the appeal hearing in order for the learned judge to furnish his reasons for the order. The reasons were released on 20 June 2023 only under case no: 2019/05163 (not under no.: 2019/05160 as per the order of 19 March 2021). Be that as it may, when the reasons became available in the intervening period, the appellant delivered an amended notice of appeal focussing on one aspect of the order only: when should interest on the capital amounts begin to run?

[11] The narrow ground of appeal therefore focuses on the following finding by the High Court at para 20 of the cyclostyled reasons:

[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.' (My underlining for emphasis).

Grounds of appeal

[12] The appellant contends that the court *a quo* erred in finding (a) that the Government disputed the appellant's claim until 21 November 2019 and (b) that the claim was unliquidated.

[13] It is appellant's contention that the Government in its respective pleas under the five cases admitted the capital amounts and only disputed the interest. In doing so, the capital amounts were – by virtue of the admission – liquidated and the court *a quo* erred in finding otherwise.

[14] The appellant further contends that the Government did not dispute that demand was made on 10 July 2019 and for that reason the court *a quo* misdirected itself in finding that the Government was only placed in *mora* upon service of summons.

Issue on appeal

[15] The crisp issue that has crystallised on appeal is whether on the date of demand (or as at the date of the stated case), the Government's admitted liability to the appellant was liquidated or unliquidated. Mr Ncube for the Government accepted during oral argument that if the amounts owed were liquidated the court *a quo*'s order cannot be sustained. According to Mr Ravenscroft-Jones for the appellant, it was not in dispute on the date of the stated case that the amounts due and owing were liquidated because at all material times the capital amounts were not disputed by the Government.

[16] The manner in which the parties pleaded the stated case was, as will now become apparent, in no small measure responsible for the confusion that crept in in the manner that the matter was adjudicated.

Proper approach to rule 63

[17] In relevant part, rule 63 provides:

'Special case and adjudication upon points of law and facts

63. (1) The parties to a dispute may, after institution of proceedings, agree on a written statement of facts in the form of a special case for adjudication by the managing judge.

(2) The statement referred to in subrule (1) must set out the facts the parties agree on and the questions of law in dispute between the parties and their individual contentions and the statement must be -

(a) divided into consecutively numbered paragraphs and accompanied by copies of documents necessary to enable the managing judge to decide on the questions; and

(b) signed by each party's legal practitioner or where a party sues or defends personally by such party and the signed documents must be annexed to the statement.

(3) The managing judge must set down a special case for hearing.

...

(5) At the hearing of a special case the managing judge and the parties may refer to the entire contents of the documents referred to in subrule (2) and the managing judge may draw any inference of fact or of law from the facts and documents as if proved at a trial.

...

(9) If the question in dispute is one of law and the parties are agreed on the facts, the facts may be admitted and recorded at the trial and the managing judge may give judgment without hearing evidence.'

[18] The proper approach to a stated case under rule 63 has been explained in two judgments of this Court.¹ These cases emphasise the importance of precision and clarity in the formulation of a stated case. It is important in crafting such case that the trial judge is not left to guess what the facts are which have been agreed upon by the parties. The purpose of the rule is to place the court in the position to decide a clearly defined question of law on the basis of agreed facts.

[19] That purpose is defeated if what the court has to do is to itself first determine the relevant facts to be able to decide the parties' chosen question(s) of law. It is perfectly permissible for a court in a stated case to draw inferences from agreed facts. What is not allowed is for the court to make primary findings of fact which the parties had not agreed upon in the stated case – which includes the documents 'accompanying' it. It is tolerably clear from subrule (5), read with subrule (2), that if reliance is to be placed on factual material contained in documents extraneous to the stated case, those documents must 'accompany' the stated case. That includes any part of the pleadings. The court cannot assume that every aspect of the pleadings is, as a matter of course and without more, part of the stated case. It is of course open for the parties to, by reference, incorporate into the stated case any fact appearing in a pleading.

[20] But unless there is compliance with rule 63(2)(a), it is not open to the court to traverse outside the stated case and rely on some other document in order to draw inferences necessary for determining the question(s) of law.

¹ *Paschke v Frans* 2015 (3) NR 668 (SC) and *Mbambus v Vehicle Accident Fund* 2015 (3) NR 605 (SC).

[21] As this Court said in *Mbambus* (at para 16) 'A court can only deal with a stated case where the facts are agreed upon and the court is asked to make a determination of the inferences or the law to be drawn from those facts'. In *Mbambus*, the matter was remitted to the High Court because on appeal, this Court was satisfied that the stated case did not meet the specificity and clarity required under rule 63.

[22] The procedure contemplated in subrule (1) of rule 63 is different from that envisaged in subrule (9). The latter subrule envisages a formal admission and recording of facts on the basis of which the court gives judgment on a disputed legal question. The common denominator between the two subrules is that both eschew the hearing of oral evidence. But under subrule (1), the parties prepare a written agreement of facts which does not necessarily involve admissions as does subrule (9). The important point to be made though is that the parties must apply their minds to which subrule of rule 63 they are invoking and specify that in the stated case to be presented for the managing judge's approval.

[23] Paragraphs [4] – [8] above, I set out in detail the content of the stated case incorporating the five cases which were 'consolidated' for the purpose of the court *a quo's* determination. Suffice it to say, the stated case does not specify under which subrule of rule 63 the parties were proceeding. Yet, in its written reasons the court *a quo* states that they were proceeding under subrule (9). Assuming it was under that subrule, the stated case contains no memorial of 'admitted' facts. On the contrary, assuming that it was in terms of subrule (1), nowhere does it 'set out the facts the parties agree on' nor does it specify 'copies of documents necessary to enable the

managing judge to decide on the questions'. In fact, the only documents that are specifically incorporated by reference in the stated case are annexures ('A'-'E') reflecting payments already made in respect of the claimed amounts under the five cases. Only those annexures are therefore part of the stated case as contemplated in subrule (2).

[24] Subrule (5) states:

'At the hearing of a special case the managing judge and the parties may refer to the entire contents of the documents referred to in subrule (2) and the managing judge may draw any inference of fact or of law from the facts and documents as if proved at a trial.'

[25] Given the non-compliance with the rule, I have sympathy for the learned judge *a quo* in seeking succour from the pleadings to determine the questions of law that he was asked to determine. That is the only inference one can draw from the conclusion arrived at by the learned judge that until 21 November 2019, the Government had disputed indebtedness to the appellant. That finding is not reconcilable with the fact that the Government did not dispute the claimed amounts in the stated case; nor is there any reference in the stated case that the court had to determine whether or not the amounts claimed were liquidated or unliquidated. In its reasons the court below equates the date of summons with the date on which the Government admitted liability, yet, there is no such fact recorded in the stated case. To do that, clearly, the court *a quo* had to traverse outside the stated case.

[26] Both counsel recognised during oral argument that the managing judge was saddled with a stated case which was less than perfect. Therefore, unless we are able to determine the selected question of law on facts and inferences that are common cause on the face of the stated case (which includes the annexures) the appropriate course would be to remit it to the High Court as was done in *Mbambus*.

[27] Mr Ravenscroft-Jones for the appellant urged us not to follow that course because, he submitted, the remaining question of law is susceptible of determination on common cause facts apparent on the stated case from which inferences can be drawn, which are: the fact of the indebtedness, the amounts owed; that a letter of demand was made on 10 July 2019 and that summonses were issued on 21 November 2019.

[28] As this Court said in *Paschke* about an imperfect stated case.²

‘Nevertheless, where a court of first instance has permitted use of the rule 33(1) procedure and decided an issue on a stated case, even where the appellate court has reservations as to whether the procedure should have been followed, appellate courts have generally determined the appeal on the merits.’³

[29] An important concession made by Mr Ncube for the Government in oral argument on appeal greatly ameliorates the difficulties posed by the stated case. Both in his heads of argument and oral argument on appeal, Mr Ncube placed on record

² 2015 (3) NR 668 (SC) para 9.

³ *Bane & others v D'Ambrosi* 2010 (2) SA 539 (SCA), *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 631B – E and *Sibeka & another v Minister of Police & others* 1984 (1) SA 792 (W) at 795A – C.

that the delay in the payment of the amounts owed to the appellant was due to the interruption in government operations caused by the Covid-19 pandemic – in other words, not that they were disputed. In his written submissions Mr Ncube also, by reference to the plea filed of record, stated that ‘the respondents disputed the interest amounts’. Now, the inescapable inference to be drawn from stating that interest payments were disputed, alongside the statement that payments were delayed by Covid-19, is a concession that the capital amounts were not in dispute. That is to be considered together with the fact that the Government does not in the stated case deny that the claimed amounts are due and owing.

[30] On the contrary, the annexures to the stated case show that the Government made partial payments after being invoiced. Partial payment – which in some cases predate service of summons – constitutes admission of liability contrary to the court’s finding otherwise. Once liability was admitted the amounts claimed became liquidated. For example, Annexure ‘A’ shows payments made by the Government on 10 August 2019 and 25 September 2019 which is prior to the date of 21 November 2019 identified by the court *a quo* as the critical date. Similarly, Annexure ‘C’ which relates to case no.: 2019/05160 under which the court *a quo* issued the order of 19 March 2021, includes payments made on 25 November 2016 and 10 September 2019.

[31] In the light of the above, the High Court’s finding that the Government’s indebtedness to the appellant was unliquidated until 21 November 2019 is irreconcilable with the facts that are common cause *ex facie* the stated case.

[32] It must therefore be accepted, as argued by Mr Ravenscroft-Jones, that the amounts recorded in the stated case were liquidated and were due and payable on demand. This was, as I already stated, an improperly drafted stated case and if the judge *a quo* had doubts whether the amounts were liquidated, he should have either refused to hear the matter on a stated case basis or sought clarification from the parties.

[33] It follows that the only issue between the parties as at the date of the stated case was whether the claimed amounts attracted interest, if so, from what date and the rate of interest. As I have already demonstrated, it became apparent on appeal that the only live controversy between the parties is the date from which interest is due. That relates to para 1.2 of the court *a quo*'s order quoted at para [9] above.

[34] Since the finding by the learned judge that the indebtedness was unliquidated prior to 21 November 2019 is a misdirection, the relevant legal question the court *a quo* was asked to answer ought therefore to have been determined on the basis that the indebtedness related to liquidated amounts.

The law on interest

[35] A debtor is in *mora* in respect of a particular obligation when – ⁴

- '(i) the obligation is enforceable against it and it has no defence to any action intended to enforce the obligation;

⁴ RH Christie *The Law of Contract in South Africa*. 5 ed 2006 p 497-498.

- (i) the performance is due; and
- (ii) the debtor is or is deemed to be aware of the nature of the performance required of it and that performance is due. It is not necessary to prove that the debtor's default is wilful or negligent.'

[36] When the contract does not fix a time for performance, demand by the creditor is necessary in order to place the debtor in *mora*.⁵ The irrelevance of wilfulness or negligence to the question whether or not a debtor is in *mora* is important because of the concession made on behalf of the Government that the default in payment was due to the interruptions caused by Covid-19.

[37] It must follow that with the letter of demand on 10 July 2019 in respect of all amounts claimed under the five cases, the Government was placed in *mora* as of that date. And as the learned judge *a quo* correctly states (at para 19) of his reasons:

'The creditor is entitled to claim . . . 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 dependent 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.'

[38] I can hardly improve on this accurate statement of the law.

[39] In addition, under the common law, where the amount claimed is liquidated, interest thereon is payable either on the date of agreement or the date of demand,

⁵ *Ibid* p 500.

whichever is later (*West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 195-6; *Union Government v Jackson* 1956 (2) SA 398 (A) 412E and *Probert v Baker* 1983 (3) SA 229 (D) at 236H-237B) confirmed on appeal on other grounds. It is common cause that in the present case there was no agreement on interest.

[40] In his supplementary heads of argument, Mr Ravenscroft-Jones submitted that should the appeal succeed, the court *a quo*'s order shown at para [9] above should be varied only in respect of para 1.2 therein, such that interest is payable from date of each invoice, alternatively from date of demand, being 10 July 2019. In light of the conclusion to which I have come, the interest payable should run from the date of demand.

[41] For all of the above reasons, the correct answer in law then which the court *a quo* should have given is that the Government became liable to pay interest on the outstanding amounts in the five cases listed in the stated case from the date of demand.

[42] For the avoidance of doubt, in view of the discrepancy between the case references under which the order and the reasons were given, the parties had accepted at para 29 of the stated case that the court's decision would resolve all five cases. That much was confirmed on appeal.

Condonation application

[43] The condonation application is not opposed. The appellant's legal practitioner of record, Ms Vermeulen, deposed to an affidavit in support of the condonation application to explain the non-compliance with rules of this Court.

[44] The deponent states that she lodged the notice of appeal on 22 April 2021 without having sight of the court *a quo's* reasons for its order. She then erroneously diarised the filing of the record for 19 July 2021 – when it should have been 19 June 2021 alleging that occurred because she mistakenly computed the *dies* from the date of filing the notice of appeal instead of the date of the order.

[45] As regards security, Ms Vermeulen states that her opposite number gave feedback on the amount of security only on 13 July 2021 and that it was her intention to file the security and the record on the same day. The record was however filed without her knowledge on 19 July 2021 and she filed the bond of security on 20 July 2021 – a mere day after the record was lodged. The *bona fides* of the explanation has not been placed in dispute and must therefore be accepted.

[46] I am satisfied that the reasons for the delay are satisfactory, that every period of delay has been satisfactorily explained and that the appellant has good prospects of success on appeal as shown in the body of the judgment.

Costs

[47] Costs must follow the result.

Order

[48] In the result the following order is made:

1. The application for condonation is granted and the appeal is reinstated.
2. The appeal succeeds and para 1.2 of the order of the High Court is set aside and replaced with the following:

‘1.2. The interest that must be paid in HC-MD-CIV-ACT-CON-2019/05158; 2019/05157; 2019/05160; 2019/05130; 2019/05163 is payable from the date of demand, being 10 July 2019’.

3. The respondents shall pay the appellant’s costs on appeal, jointly and severally, the one paying the other to be absolved, to include costs of one instructing legal practitioner and one instructed legal practitioner.

DAMASEB DCJ

PRINSLOO AJA

SCHIMMING-CHASE AJA

APPEARANCES

APPELLANT:

JP Ravenscroft-Jones

Instructed by Ellis Shilengudwa

Incorporated

RESPONDENTS:

J Ncube

Government-Attorney