Case no 274/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of

ADEL BUILDERS (PTY) LTD Appellant

and

DR J G T THOMPSON Respondent

CORAM: Van Heerden ACJ, Nienaber, Howie, JJA *et* Melunsky and Mthiyane AJJA

DATE OF HEARING: 22 August 2000

DATE OF JUDGMENT: 12 September 2000

Unliquidated damages claimed – pre-judgment interest – Discretion of Court

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J U D G M E N T

/HOWIE JA:

HOWIE JA:

[1] This matter, which involves an appeal and a cross-appeal against orders made by Mpati J in an action in the South Eastern Cape Local Division, is before us with the leave of the learned Judge. His judgment is reported in 1999 (1) SA 680 (SECLD) and I shall refer to it as "the reported judgment".

[2] Appellant company, a building contractor, undertook in terms of a written building contract to construct a house for respondent in Port Elizabeth. When the balance of the contract price remained outstanding appellant sued for payment. Respondent counterclaimed for damages for breach of contract, with interest from date of judgment, alleging that appellant's workmanship was defective in various material respects.

[3] The proceedings in convention were later abandoned and, in a document entitled "Consent to Judgment", appellant purported to submit to judgment in respect of the counterclaim. The so-called consent, which

was not a confession to judgment in terms of Rule 31, and which did not acknowledge liability in a specified sum, did no more than embody an admission of liability in respect of the "fair and reasonable cost" of the remedial action alleged by respondent to be necessary, and respondent took no judgment to enforce compliance.

[4] Later still the counterclaim was amended. A claim for consequential damages (also allegedly arising from appellant's defective workmanship) was included, the amount of damages claimed was increased and interest was now claimed "at the legal rate *a tempore morae*". The increase in the quantum claimed was due in part to the alleged consequential damages and in part to allowance for future escalation in building costs.

[5] Pleading to the amended counterclaim, appellant contended that the claim as it was prior to amendment had been resolved by the so-called consent to judgment and denied the allegations relative to consequential damages and escalation. Appellant went on to plead that it had twice previously tendered to perform the necessary remedial work at its own

expense, to which tender respondent had failed to respond. Repeating the tender, appellant denied all and any liability.

[6] Preparatory to trial of the issues in reconvention, the parties reached agreement that as at February 1992 respondent's damages in respect of necessary remedial work amounted to R330 000, of which R200 000 represented the cost of such work which had not yet been done by February 1992. They also agreed on the extent to which escalation in building costs would have increased the latter amount by the date of trial in June 1997. In addition, appellant accepted liability for respondent's costs of suit and certain qualifying expenses. Those points of accord having been reached, the parties submitted three questions for the trial Court's decision:

(1) whether in terms of the building contract consequential damages were claimable;

(2) whether respondent was entitled to allowance being made for escalation in the computation of his damages; and

(3) whether, in view of the then newly introduced s 2A of the

Prescribed Rate of Interest Act, 55 of 1975 ("the Act"), respondent was entitled to pre-judgment interest on the damages awarded.

[7] Mpati J answered the first two questions in the negative. Hence the cross-appeal. As to the third, the answer was in the affirmative. In arriving at that answer the learned Judge fixed the time of assessment of the damages as being February 1992 and the amount (as a necessary consequence of the parties' agreement) as R330 000. He then held (contrary to the argument presented to him on behalf of appellant) that s 2A of the Act, which came into operation on 5 April 1997, applied not only to future cases but also to damages claims pending before that date and therefore to respondent's counterclaim. Consequently, the trial Court, in awarding R330 000 as damages, found respondent entitled to pre-judgment interest, at the legal rate , from 1 February 1992. Against that finding the appeal was brought.

[8] In this Court the parties were represented by counsel who had

not appeared at any earlier stage of the litigation. Counsel for respondent, while not abandoning the issue of the consequential damages, did not seek to add to the submissions in his predecessor's heads of argument. In this respect counsel exercised wise judgement. There is nothing in the point. Moreover, he accepted that his client could not legally be entitled to both interest and increased damages due to costs escalation. It follows that the cross-appeal is bad.

[9] Turning to the appeal, counsel for appellant raised two points: firstly, that s 2A did not apply to claims pending before the section came into operation and, secondly, that in deciding that interest was to run from 1 February 1992, the learned Judge wrongly exercised the discretion afforded him by the section.

[10] For convenience, and because it was thus referred to during argument, I shall refer to the first contention as "the retrospectivity point". It was also raised before Mpati J who discussed it in some depth in the reported judgment (at 688 G - 692 E) before concluding that the section

applied in the present case. Since then, however, and after appellant's heads of argument were drawn by counsel who represented appellant at the trial, the judgment of this Court in *David Trust v Aegis Insurance Co Ltd* was delivered on 31 March this year and subsequently reported in 2000 (3) SA 289 (A). That matter involved a claim pending before s 2A was introduced into the Act. The section was held to be applicable. In advancing the retrospectivity point in the face of *David Trust* counsel did so with some understandable resignation. He did not seek to suggest that the judgment was wrong and it clearly disposes of the point.

[11] The second contention, that the trial Judge exercised his discretion wrongly, was not put forward as a ground in appellant's notice of appeal or in its heads of argument. To place the contention in proper context it is necessary first to refer to the relevant contents of the Act. Before the introduction of s 2A no common law principle or statutory enactment provided for the award of pre-judgment interest on unliquidated damages; in other words, damages whose quantum had to be fixed by the

court. S 1 of the Act states *i a* that if a debt bears interest and the rate of interest is not governed by law, agreement, trade custom or in any other manner then interest must be calculated at the rate from time to time prescribed in the Gazette by the Minister of Justice. S 2A is headed "Interest on unliquidated debts" and contains the following subsections (irrelevant wording omitted):

> "(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law . . . shall bear interest as contemplated in s 1.
>
> (4) (a) Subject to any other agreement between the parties the interest contemplated in ss (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.
>
> . . .
>
> (5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law . . . may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

[12] Next it is necessary to have regard to passages in the judgment of the Court below to which appellant's counsel drew our attention. They

are at 689 G-H and 692 A-B of the reported judgment. In both passages the learned judge observed that in the light of remarks in the judgment of this Court in *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA833 (A) the new section was obviously aimed at alleviating the plight of a plaintiff who has to wait a substantial period of time to establish his claim, through no fault of his own, and is paid in depreciated currency.

[13] The remaining passage in the judgment of the Court *a quo* which requires attention is that at 692 E-I of the report:

> "It remains for me to consider whether interest should be calculated in terms of s 2A (2) or 2A (5) of the Act. Mr *Van Rooyen* submitted that certain liability was conceded by the plaintiff [the present respondent] in March 1994, but that the case only came to trial more than three years thereafter. After liability was conceded in March 1994 the defendant amended his counterclaim in September 1996 to include the claim for consequential damages. I was not informed of what transpired between March 1994 and September 1996, but it was not suggested to me that the delay in the matter ultimately coming to trial was caused by the defendant. Even if it were to be argued that the delay was due to the amendment of the defendant's counterclaim, which needed to be adjudicated

> upon, I can find no reason why the plaintiff could not on its own initiative take steps to assess that part of the defendant's damages for which liability was conceded and to either make an offer of payment or a payment into Court. Mr *Buchanan* argued that in terms of s 2A (5) of the Act a court of law or an arbitrator or an arbitration tribunal has a discretion to fix the rate at which interest shall accrue and the date upon which interest shall run. I agree with Mr *Buchanan* that such discretion overrides the provisions of s 2A (2) of the Act. Mr *Buchanan* did not, however, suggest that I should fix a rate of interest different from the legal rate. As to the date from which interest shall run, I am of the view that since the parties agreed that as at February 1992 the defendant's damages stood at R330 000, interest should run from 1 February 1992."

[14] Now the argument for appellant on the discretion aspect was this. S 2A (2)(a) lays down what is to be the general position, namely, that interest runs from date of demand or summons. If a plaintiff seeks interest from an earlier time then the court must be urged to exercise its discretion under ss (5). To obtain a favourable discretionary decision a plaintiff must discharge the onus of establishing facts justifying such decision. In the present case the requisite demand had to be taken as being the amended

counterclaim, which was dated 9 September 1996. This was so, said counsel, because the counterclaim as initially formulated (filed in October 1991) had been so radically altered that the amended claim was to all intents and purposes an entirely new claim. Significantly, it included only now, for the first time, a prayer for *mora* interest and it was this new counterclaim which went to trial. Therefore, because respondent had sought interest from a date earlier than September 1996 he bore the onus referred to. According to the argument, the Court below accepted that the date of demand was the date of the amended counterclaim but, misled by its own emphasis on the mischief which s 2A aimed to remove, wrongly placed the onus on appellant to justify the lengthy delay in the recovery of his damages, thus overlooking the need for respondent to explain away its own part in the delay. In consequence, the learned Judge failed to exercise his discretion judicially, thus permitting appellate interference.

[15] This argument cannot succeed. Nothing in the passage at 692 E - I of the reported judgment, cited above, and nothing elsewhere in the

Court's reasoning warrants the conclusion that the amended counterclaim was found, or even assumed, to constitute respondent's demand in this case. The learned Judge was not requested to decide when demand was made and he did not purport to do so. Indeed, having resolved to order interest pursuant to ss (5) and not ss 2(a) there was no need to determine the date of demand. Acting in terms of ss (5), it was open to the Court, in fixing the date from which interest was to run, to give effect to its own view of what was just in all the circumstances. No question of onus was raised then or in the notice of appeal. Nor could it have been. The discretion afforded by s 2A (5) was of the nature referred to in a long line of cases in this Court from *Ex Parte Neethling* 1951 (4) SA 331 (A) onwards. Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them. But there are no *facta probanda*. No enquiry arises as to whether a necessary fact has been successfully proved. Similarly, absence of proof does not result in failure on any issue. Indeed, there are no evidential issues to attract any onus.

[16] In the learned Judge's evaluation of the facts and circumstances in the present case he took into account (at 692 F) the absence of any suggestion that the pre-trial delay was due to respondent. Appellant's counsel suggested, as I understood him, that there was indeed fault on respondent's part which the Court overlooked. However, I can find nothing in the record to substantiate that suggestion. True, the Judge held, in assessing damages, that it would have been reasonable for respondent to have had the outstanding remedial work done in February 1992 but that is quite another matter. It does not bear upon the delay in his getting his just recompense from appellant. The inescapable truth is that appellant was all along liable to pay respondent damages. But when appellant admitted liability in the so-called consent to judgment (on 16 March 1994), there was careful avoidance of an admission of liability in a specified amount. If he had sought to use this admission to his advantage, respondent in all likelihood faced the prospect of having to litigate in any event to have the "fair and reasonable" costs referred to in the consent judicially quantified.

I say that because all appellant ever tendered (the first time being on 25 March 1994) was its own performance of the remedial work, albeit professionally supervised. In view of the history of this matter it is not surprising that respondent declined the offer. In the result, therefore, respondent was driven to wait a particularly long time, while, as is notorious, the value of money depreciated.

[17] As against those considerations, there is the circumstance (referred to at 692 G) that appellant could, on its own initiative, have taken steps to assess at least the costs referred to in the consent to judgment and have made a tender in money or a payment into court. Such an assessment should not have proved an obstacle. Appellant is, after all, in the relevant trade. So far I can find no fault at all with the learned Judge's approach.

[18] There remains the reason for fixing 1 February 1992 as the date from which interest was to run. In that regard Mpati J said that this was because February 1992 was agreed upon as the time when the damages (but for the consequential damages) were fixed. It is not apparent if the learned

Judge considered any other dates. Eligible choices were, of course, the date of the counterclaim as initially formulated (1 October 1991), the date of the consent to judgment (16 March 1994), the date of the first tender (25 March 1994), the date of the amended counterclaim (9 September 1996) and the date of judgment.

[19] Whatever might, notionally, be said of these various possibilities, it seems appropriate to decide when respondent's demand was made in this case (he issued no summons). It can then be seen whether the date fixed by the Court pre- or post-dated demand and then what further implications follow.

[20] The counterclaim as originally formulated was for damages (with interest from date of judgment) to pay for remedial work necessary by reason of defective workmanship *i a* in respect of the house's roof, foundations and interior. In the consent to judgment in March 1994

appellant admitted the need for remedial work in the same three respects and, in addition, in regard to a certain window beam. In the amended counterclaim all four areas of complaint were set out. What was added was the allegation that appellant had taken unreasonably long to do the contract work, and then there were the allegations in respect of consequential damages and escalation to which I referred earlier. Not surprisingly, the quantum of the claim was increased and, as I have also mentioned, the interest prayer was changed to claim interest "*a tempore morae*". When eventually the parties agreed to the figure of R330 000 that sum clearly pertained only to the cost of remedial work, without any involvement of consequential damages or escalation.

[21] From this summary it is plain that the counterclaim as initially formulated, as later amended and as the subject of the eventual quantum agreement just mentioned, was essentially always one in which the central thrust was the recovery of damages representing the cost of remedial work

necessitated by defective workmanship. (In fact even the alleged consequential damages were said to flow from the self-same breach.) The amendment did not, therefore, change the nature of the claim in any important respect. It was fundamentally the same claim that was made in the counterclaim filed in October 1991. The alteration in the interest prayer is neither here nor there. It was always a claim for *mora* interest, for even when interest runs from the date of judgment it is still *mora* interest (*David Trust* at 303 I). In any event the demand that is relevant is not the demand for interest but the demand for damages. The date of demand in this matter was therefore 1 October 1991 and it is obviously in favour of appellant, not respondent, that the date fixed by the Court for the running of interest was later than that.

[22] It cannot be said that the exercise of the Court's discretion here was flawed in any of the respects mentioned at 335 D - E of *Neethling's* case.

[23] It is consequently ordered that the appeal and the cross-appeal

are both dismissed with costs.

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C T HOWIE

VAN HEERDEN ACJ)
NIENABER JA)
MELUNSKY AJA)
MTHIYANE AJA)

CONCUR