LL Case No 272/1990

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVSION

In the matter between:

MODIBEDI JOHANNES SETSEDI Appellant

and

MAMELODI TOWN COUNCIL First Respondent

THE MINISTER OF CONSTITUTIONAL

PLANNING AND DEVELOPMENT Second Respondent

THE ADMINISTRATOR OF TRANSVAAL Third Respondent

CORAM: VAN HEERDEN, MILNE, EKSTEEN, NIENABER JJA et PREISS AJA

HEARD: 4 NOVEMBER 1991

DELIVERED: 15 NOVEMBER 1991

JUDGMENT

VAN HEERDEN JA:

The first respondent is a local authority established under s 2, read with s 1, of the Black Local Authorities Act 102 of 1982 ("the 1982 Act"). The appellant is the occupier of residential premises situated within the area of jurisdiction of the first respondent. Prior to January 1990 the first respondent provided water, electricity, sewerage facilities and services for refuse removal in respect of the premises and levied charges therefor. The appellant received monthly accounts which included interest debits on arrear charges. Such debits were paid by the appellant in the bona fide and reasonable belief that he was obliged to pay interest. The appellant also paid certain legal charges with which he had been debited by the first respondent.

In January 1990 the appellant initiated motion proceedings in the Transvaal Provincial Division. In the main he sought orders declaring that the first respondent was not entitled to claim arrear

interest and legal costs from him, and directing the first respondent to repay to him the amounts of R103,36 and R480,01 which had been paid to the first respondent in respect of interest and such costs. The Minister of Constitutional Planning and Development and the Administrator of the Transvaal were joined as second and third respondents by virtue of their alleged "interest in the matter", but did not oppose the application.

On 29 January 1990 the first respondent made an offer of settlement in terms of rule 34(1) of the Uniform Rules of Court. The offer, which related to the claim for repayment of the amount of R480,01, read as follows:

> "GELIEWE KENNIS TE NEEM dat Eerste Respondent onvoorwaardelik die bedrag van R480,01 en kostes tot datum hiervan soos bereken tussen party en party en op die toepaslike Landdroshofskaal "A" aan Applikant ter vereffening van Applikant se eis in paragraaf 4 van Eiser se bede, asook ter vereffening van Applikant se kostes in die geheel met betrekking tot hierdie aansoek, tot datum

hiervan, aanbied."

The first respondent also delivered a notice of its intention to raise a question of law, viz, that the first respondent was entitled to charge interest on arrear service charges by virtue of the provisions of the Prescribed Rate of Interest Act 55 of 1975 ("the 1975 Act").

At the hearing of the application it was common cause that the respondent had debited the appellant with interest at the rate prescribed under s 1 of the 1975 Act. Hence the only question which fell for decision, apart from an issue as to costs, was whether that Act was applicable. The court a quo held that it was and dismissed the appellant's claims relating to the interest paid by him. As regards the other prayers, the first respondent's offer was made an order of court, but it was ordered to pay the appellant's costs. Subsequently the appellant was granted leave to appeal to this court.

S 1(1) of the 1975 Act provides that 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) - i e, the rate prescribed from time to time by the Minister of Justice ("the prescribed rate"). The cardinal question is whether the rate at which interest is to be calculated on arrear amounts owing to the first respondent is governed by another law, viz, s 48 of the 1982 Act. That section reads:

> "A local authority may, subject to section 46(9), on any arrears due to it charge interest at such rate as may be approved by the Minister."

(I shall revert to the provisions of s 46(9).)

In s 1 of the 1982 Act, as originally enacted, "the Minister" was defined as "the Minister of

Co-operation and Development". By virtue of s 1(i) of Act 58 of 1986 that definition was replaced by "the Minister of Constitutional Development and Planning". Then, by GN 20 of 2 January 1987 (Government Gazette 105665) the State President assigned the execution of the provisions contained in the 1982 Act "which assign powers, duties and functions to the Minister of Constitutional Development and Planning" to the Administrator of the province concerned. The State President also determined that, save for an immaterial exception, a reference in such a provision to the Minister should be construed as a reference to an Administrator. All this was done by virtue of the powers vested in the State President by s 15 of the Provincial Government Act 69 of 1986.

It follows that up to the beginning of 1987 a rate of interest, for the purposes of s 48 of the 1982 Act, had to be determined by a Minister. However, since 2 January 1987 this power has vested in the

Administrator of the Transvaal in regard to local authorities (including the appellant) whose areas of jurisdiction are situated in that province. (In order to obviate repetition I shall hereinafter refer to s 48 as if at all times a rate of interest had to be approved by the Administrator.)

It is common cause that at no stage has a rate of interest been approved under s 48. Counsel for the appellant contended that because of this hiatus the respondent was not entitled to recover interest on arrear service charges due to it. The contention ran along these lines: S 1 of the 1975 Act does not apply if the rate at which interest on a debt is to be calculated is governed by any other law; the 1982 Act is such a law and s 48 thereof governs the rate of interest which may be charged by the respondent on arrears due to it; hence the respondent could not recover mora interest under the provisions of the 1975 Act even although a rate of interest had at no stage

been approved of under s 48 of the 1982 Act.

A similar contention was rejected by the court a quo. Its reasoning, though not entirely clear, may be summarised as follows:

1) S 48 of the 1982 Act does not govern a rate of interest; it merely "provides for a procedure by which the rate of interest may be determined by the Administrator".

2) The section cannot be interpreted "in such a way as to diminish the common law right of a person to claim interest on amounts outstanding to it".

3) Indeed, s 48 specifically empowers a local authority to charge interest on arrears.

4) Hence, if a rate is approved of under s 48 that rate applies; if not the 1975 Act pertains.

The corner-stone of the ultimate finding of the court a quo is (1) above. Counsel for the appellant submitted, rightly in my view, that it is based on an erroneous interpretation of s 1(1) of the

1975 Act and s 48 of the 1982 Act. It will be recalled that the former section does not apply if the rate at which interest is to be calculated is "governed by any other law". In the context in which the phrase "governed by" appears, it clearly means "regulated by" (cf the phrase "deur ... gereël word" in the Afrikaans text). The section is consequently not applicable if, inter alia, another law makes provision for the determination of a rate of interest on arrears. In such a case the law in question governs, or regulates, the rate of interest. It is not necessary that the other law should actually prescribe a rate; it nevertheless governs the rate even if it merely provides how the rate is to be determined. By way of analogy reference may be made to a contractual provision in terms of which the rate of interest on arrear amounts is to be determined by a third party. Clearly the agreement governs the applicable rate of interest whether or not a determination has been made.

S 48 of the 1982 Act provides that a local authority may charge interest on arrears at a rate approved by the Administrator. It therefore governs the applicable rate of interest. The fallacy in the reasoning of the court a quo, and in the argument of counsel for the respondent in this court, is that the phrase "governed by any other law" - in s 1(1) of the 1975 Act - has wrongly been equated with "prescribed by or under any other law". That misconception led the court to the conclusion that as long as no rate has been approved under s 48, a rate of interest chargeable by a local authority is not governed by that section.

I do not find in the 1982 Act any indication that the legislature nevertheless intended the rate prescribed under s 1(2) of the 1975 Act to apply prior to the approval of a rate under the former section. It is convenient to consider the respondent's position on the assumption that s 48 had not been incorporated in the 1982 Act. On this assumption the respondent would

clearly have been entitled to claim mora interest on arrears owing to it at the prescribed rate. There would have been no need for a provision in the 1982 Act specifically authorising the respondent to recover mora interest. Its right to claim interest, and the debtor's corresponding obligation to pay the same, would have arisen ex lege.

S 48 of the 1982 Act therefore cannot be construed as an empowering provision in the true sense of those words. Although it is couched in permissive terms, the legislature must have intended that a local authority could charge mora interest only if a rate had been approved by the Administrator and then, of course, at that rate. This is to some extent borne out by the phrase "subject to section 46(9)" which appears in s 48. S 46 creates machinery for the recovery, by a local authority, of certain heads of damages suffered by it as a result of misconduct of a member or employee of that authority. The amount in question is to be

determined by an official of the local authority who by notice must order the malfeasor to pay the same within a certain period. S 46(9) then provides that if the debtor fails to pay the amount within that period it shall be deemed that a debt is created to the local authority, and that interest calculated at the rate prescribed under the 1975 Act shall be payable on the debt from the date of the notice.

It is clear that, as regards debts governed by s 46, the debtor has to pay interest at the rate prescribed under the 1975 Act whether or not a general rate has been approved of under s 48 of the 1982 Act. The fact that the legislature provided that the prescribed rate would apply only in regard to a class of debts owing to a local authority - also in the absence of an approval under s 48 - affords some indication that it was not intended that that rate should be applicable in regard to other debts. Indeed, had the legislature intended the prescribed rate to

apply in the absence of an approved rate, s 48 would surely have read as follows:

> "A local authority may ... on any arrears ... charge interest at such rate as may be approved by the Minister or, if no rate has been approved, at the rate prescribed under [the 1975 Act]".

Counsel for the respondent submitted that s 48 of the 1982 Act should be restrictively interpreted so as to avoid a construction that would entail an infringement of an existing right, i e the right to recover mora interest at the rate prescribed under s 1(2) of the 1975 Act. It suffices to say i) that the respondent was established subject to all the provisions of the 1982 Act and that s 48 thereof consequently did not take away a pre-existing right of the respondent, and ii) that the Administrator was empowered to approve of a rate of interest at any time after the inception of the Act. It may well be due to an oversight that no such rate has as yet been determined. In any event, there is no ambiguity in the

wording of s 48.

Finally, there is much to be said for the argument, put forward by counsel for the appellant, that there is a perfectly good reason why the legislature intended that a local authority should charge interest on arrears at the rate approved by the Administrator, and only at that rate; the reason being that such an authority is established for the benefit of residents of its area, and that it is not a commercial institution. The legislature may therefore well have thought that the prescribed rate, which is appropriate in respect of commercial transactions, would not be apposite in relation to amounts owing by residents for service charges, etc. It is true, as pointed out by counsel for the respondent, that a general rate approved of under s 48 would also apply to interest on arrears owing to a local authority pursuant to an ordinary mercantile transaction, but the legislature in all probability envisaged that the vast

bulk of the income of a local authority would be derived from residents.

In the result I am of the view that the respondent was not entitled to debit the appellant with interest on arrear service charges. On the assumption that the appeal would be allowed, counsel were in agreement that the order set out hereunder should be substituted for the relevant orders of the trial court.

The respondent lodged a cross-appeal. It is, however, unnecessary to set out the order against which it was directed. Firstly, counsel for the respondent rightly conceded that the cross-appeal merited consideration only if the appeal were to be dismissed. Secondly, the respondent did not apply for, and hence did not obtain, leave to appeal: Goodrich v Botha and Others 1954 (2) SA 540 (A) 544; Gentiruco A G v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) 606-8, and cf Protea Assurance Co Ltd v Presauer Developments (Pty) Ltd 1985 (1) SA 737 (A).

The following orders are made:

1) The appeal succeeds with costs and the following is substituted for paragraphs 1 and 2 of the order of the court a quo:

"The respondent is directed to pay to the appellant the amount of R103,36"

2) The respondent is ordered to pay the costs occasioned by the lodging of the cross-appeal.

H J O VAN HEERDEN JA

MILNE JA

EKSTEEN JA

NIENABER JA

PREISS AJA

CONCUR