REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 12395/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

22/12/2023
DATE

SIGNATURE

In the matter between:

LARRY LIPSCHITZ APPLICANT

And

BRIAN STEPHEN CROOK FIRST RESPONDENT

THE SHERIFF, SANDTON SOUTH SECOND RESPONDENT

JUDGMENT

TWALA, J

[1] In this application the applicant seeks an order declaring the date at which interest commenced to run on the amount of R 2 034 738.80, being an amount in respect of costs taxed in favour of the applicant, to be the 3rd of September 2019, the date of the allocatur until the 7th of June 2023. In the alternative, the applicant seeks an order that the interest started to run from the 9th of September 2019 until the 7th of June 2023.

[2] The application is opposed by the first respondent who has filed a substantial answering affidavit which prompted the applicant to launch an application to strike out certain paragraphs of the answering affidavit which are alleged to be vexatious, scandalous and irrelevant to the determination of the present matter. Since the second respondent is not participating in these proceedings, I propose to refer to the parties as the applicant and respondent in this judgment and shall, where necessary, refer to the second respondent as the Sheriff.

[3] The facts foundational to this case are mostly common cause and are as follows: the parties agreed to refer their long running litigation to the arbitration process which culminated in the arbitration panel issuing an award on the 11th of April 2019 that amongst others, directed the respondent to pay the applicant's agreed or taxed costs of the proceedings forming the subject matter of the award.

[4] On the 23rd of May 2019 the respondent launched an application for the review and setting aside of the award on the ground of irrationality. Whilst the review proceedings were underway, on the 3rd of September 2019 the applicant taxed the bill of costs awarded by the arbitration panel and it was allowed in the sum of R 2 034 738.80 by the Taxing Master. On the 12th of March 2020 the court reviewed and set aside the award and remitted the matter back to the arbitration panel for consideration of a defence pleaded by the respondent, which was not considered by the arbitration panel, that the agreement forming the subject matter of the dispute is contrary to public policy.

[5] On the 30th of August 2021, the parties argued the issue of public policy before the panel and the panel returned its verdict by publishing an additional award on the 14th of October 2021 rejecting the defence of public policy as pleaded

by the respondent and reiterated the award which was reviewed and set aside by the court on the 12th of March 2020. The respondent refused to make payment of the taxed costs in terms of the allocatur and this prompted the applicant to launch proceedings to make the award an order of court which order was granted on the 17th of February 2022. On the 9th of March 2022, the applicant issued a warrant of execution to enforce its rights in terms of the court order.

[6] On the 15th of March 2022 the respondent brought an urgent application and obtained an interim order suspending the execution of the warrant dated the 9th of March 2022 and directing the respondent to, within ten days of the order, file an application to set aside the writ of execution. The respondent complied with the order and its application to set aside the writ of execution was heard on the 28th of September 2022 and judgment dismissing the application was delivered on the 4th of May 2023. On the 7th of June 2023 the respondent made payment of the sum of R 2 064 785.69 which he said was in full settlement of the costs, including accrued interests and the Sheriff's fees.

[7] The issues for determination in this case are two-fold: the first is the date upon which the interest commences to run given the court order granted on the 12th of March 2020 setting aside the award and, the second is whether the court order suspending the warrant of execution granted on the 15th of March 2022 suspended the running of interest on the sum of R 2 034 738.80. Put in another way, whether the running of interest on the costs award is affected by a court order setting aside such an award which is later reiterated by the arbitration panel. Furthermore, whether an order suspending the execution of a warrant suspends the running of interest on the judgment debt.

[8] It is opportune at this stage that the relevant provisions of the Prescribed Rate of Interest Act[1] are restated herein which provides the following:

> "1. Rate at which interest on debt is calculated in certain circumstances:
>
> (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

[1] 55 of 1975.

or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2)(a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relation to that debt, orders otherwise.

(2) ...

2. Interest on a judgment debt

(1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.

(2) Any interest payable in terms of subsection (1) may be recovered as if it formed part of the judgment debt on which it is due.

3 In this section 'judgment debt' means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt."

[9] It is undisputed that the parties concluded an agreement subjecting themselves to the arbitration process and that the arbitration award will be binding upon them in terms of section 3 of the Arbitration Act.[2] I do not understand the respondent to be disputing that it is liable to pay interest on the taxed bill of costs which arose from the arbitration proceedings. The dispute is about the date upon which interest is to commence running on the taxed costs amount having regard to the court order that reviewed and set aside the award. It should be noted that only the order of the interim award was set aside and not the whole body of the award which the court agreed with.

[10] The arbitrator's award which granted the applicant costs of the arbitration proceedings on the 11th of April 2019 was reviewed and set aside by the court on the 12th of March 2021. I hold the view therefore that there was no award by

[2] 42 of 1965.

the arbitration panel between the period 11th April 2019 until the so-called "additional award" was published on the 14th of October 2021. Although the quantum of the costs was determined by the allocatur on the 3rd of September 2019, those taxed costs did not become due and payable on that date since the award that brought it into existence had been reviewed and set aside by the court. *Mora* interest could not have commenced to run on the 3rd of September 2019 since the taxed costs were not due and payable as the award which brought it into existence was reviewed and set aside by the court.

[11] It is on record that the applicant launched proceeding to appeal the decision of the court that reviewed and set aside the arbitration award, but the application for leave to appeal was refused by both the court *a quo* and the Supreme Court of Appeal – hence the separate issue that was remitted to the arbitration panel for consideration was argued on the 30th of August 2021 and an award was published on the 14th of October 2021. The ineluctable conclusion is therefore that the award of the 11th of April 2019 was extinguished by the court on the 12th of March 2020 and therefore no interest could have run on the costs that were taxed when no award existed at the time.

[12] I do not agree with the submission that the arbitration panel reinstated the award of the 11th of April 2019 when it published its award on the 14th of October 2021 by merely saying that it reiterates the order contained in paragraph 106 of the interim award. It should be recalled that the award was reviewed and set aside by a court and the arbitration panel has no authority over the court and can therefore not overturn a decision of the court. Put differently, a court order remains extant until set aside and therefore the court order setting aside the award remained extant. It is not competent of the arbitration panel to reiterate or reinstate the award which has been set aside by the court.

[13] It should be recalled that the pleaded defence that was remitted to the arbitration panel for consideration was not considered by the panel in its interim award and could have otherwise persuaded or influenced the panel when considered. The fact that it was considered, and the panel rejected it and returned an order similar to the one it made in the interim award, does not mean that the order of the interim award which was set aside by the court was

reinstated. In my view, it is a misnomer to label it an "additional award" when the interim award no longer existed as it was set aside by the court.

[14] I align myself with the decision of the court in *Administrateur, Transvaal v JD van Niekerk,*[3] which was relied upon by counsel for the applicant, that interest on a costs order can only be levied on taxed costs and that such interest is only payable from the date of the taxing Master's allocatur. However, the *van Niekerk* case is distinguishable from the present one in that the allocatur in this case was based on an award that had been reviewed and set aside by the court. In essence, there was no award at the time the allocatur was stamped and issued by the Taxing Master.

[15] I do not agree with the applicant that *Intramed (Pty) Ltd (In Liquidation) and Another v Standard Bank of South Africa Limited and Others*[4] finds application in this case. *Intramed* is distinguishable from this case in that it is the liquidators who expunged the claim of Standard Bank which had been approved in a creditors' meeting. Standard Bank applied to the court to have its claim reinstated and its claim was reinstated – hence interest was held to have commenced running from the date on which the claim was approved by the creditors. The decision of the liquidators cannot trump the decision of the court. However, it is competent for the court to set aside the decision of the liquidators.

[16] In *casu*, the award was set aside by a court and that court order was never rescinded or set aside. In compliance with the court order, the arbitration panel considered the outstanding and separate issue that was remitted to it and rejected same and found as it did in the initial award. However, the arbitration panel did not reinstate the award since it had no power to do so and was not sitting as a court of appeal, but published a new award on the 14th of October 2021 which was similar to the interim award which had been reviewed and set aside by the court. It is trite that all court orders are binding unless they are overturned on appeal or through rescission proceedings.

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[3] *Administrateur, Transvaal v JD van Niekerk en Genote BK* [1994] ZASCA 128; 1995 (2) SA 241 (A) ("*van Niekerk*").
[4] [2007] ZASCA 141; 2008 (2) 466 (SCA) ("*Intramed*").

[17] It is now settled that in interpreting any document, the court must first have regard to the plain, ordinary, grammatical meaning of the words used in the document. While maintaining that words should generally be given their grammatical meaning, it has long been established that a contextual and purposive approach must be applied to interpretation of documents.

[18] In *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*[5] the Supreme Court of Appeal stated the following:

> "[61] It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] All SA 262; [2012] ZASCA 13, stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an un-business-like result. These factors have to be considered holistically, akin to the unitary approach."

[19] In the recent past, the Constitutional Court had an opportunity to deal with the issue of interpretation of documents in *University of Johannesburg v Auckland Park Theological Seminary and Another*[6] wherein it stated the following:

> "[65]: This approach to interpretation requires that 'from the outset one considers the context and the language together, with neither predominating over the other'. In *Chisuse*, although speaking in the context of statutory interpretation, this Court held that this 'now settled' approach to interpretation, is a 'unitary' exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.
>
> [66]: The approach in *Endumeni* 'updated' the position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to

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[5] [2018] ZASCA 176; 2019 (3) SA 398 (SCA).
[6] [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) (11 June 2021).

Endumeni that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, form the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and knowledge at the time of those who negotiated and produced the contract."

[20] It is my considered view therefore that what the arbitration panel meant by saying that they reiterate the order contained in paragraph 106 of the interim award, is that they are making the same order as was made in the interim award which was reviewed and set aside. Put differently, the panel was saying it has not been persuaded otherwise from the initial order it made in the interim award and should be read as if incorporated in the new order. The arbitration panel could not breathe life into an order that does not exist. The intention is plain that it was making the same order as it did in the first place.

[21] Counsel for the respondent submitted that interest on the taxed costs only commenced to run on the 17th of February 2022 when the two awards were made an order of court. Furthermore, so it was contended, the interest stopped running on the 15th of March 2022 when an interim order was granted by the court suspending the operation of the writ pending the launch of the application to rescind the writ by the respondent. In other words, the running of interest on the taxed costs was suspended from the 15th of March 2022 until the 4th of May 2023 when an order was made dismissing the application for rescission of the writ.

[22] I am unable to agree with these contentions. Firstly, the parties agreed to engage in the arbitration process and that they will abide by the decision of the arbitrators. The arbitration panel published its award on the 14th of October 2021 and that is the date upon which the interest commenced running on the taxed costs. The making of the award an order of court on the 17th of February 2022 was a mechanism of enforcing the award. Once the award was made an order of court, then the applicant was able to enforce his rights in terms of the award by issuing the writ of execution. The taxed costs became due and payable on the date of the award which is the 14th of October 2021 and not when the award was made an order of court.

[23] Secondly, the order of the 15th of March 2022 suspended the operation of the writ of execution and not the award which made the taxed costs due and payable on the 14th of October 2021. Therefore, the running of interest on the taxed costs was not suspended but only the execution of the writ was suspended pending the launch of the rescission application and the outcome thereof. Once the application for rescission of the writ of execution was dismissed on the 4th of May 2023, the suspension of the operation of the writ of execution fell away and the respondent enjoyed no further protection from the order of the 15th of March 2022.

[24] The ineluctable conclusion is therefore that the running of interest on the taxed costs amount commenced on the 14th of October 2021 and continued until the 7th of June 2023 when the respondent made the payment.

[25] The applicant brought an application for striking out of certain paragraphs in the answering affidavit of the respondent which it alleges are scandalous, vexatious, and irrelevant to the determination of the issues in this case.

[26] The paragraphs complained of are mentioned in the applicant's replying affidavit and allege that the applicant approached the court with unclean hands in that he attempted to enforce payment of the interest before he instituted these proceedings – thus taking the law into his own hands. Although the respondent disputed the amount of interest demanded by the applicant, on the 8th of May 2023 and 8th of June 2023 the applicant persisted in his demand and instructed the Sheriff to attach and remove the motor vehicles of the respondent. Furthermore, it was contended that the applicant was not honest with the court as he concealed all these facts when he brought this application.

[27] I am unable to disagree with counsel for the respondent that the respondent had a right to appeal the judgment of the 4th of May 2023 and had a period of fifteen days from the date of the order within which to exercise his right to appeal. However, it should be recalled that an order of court is effective immediately unless it specifically states that it will take effect at a particular time. The fifteen days period is afforded by the Rules of Court to the unsuccessful party within which to apply for leave to appeal, but it is not a bar on the successful party to

enforce his rights in terms of the order. It is trite that the filing of the notice for leave to appeal suspends the operation of the order, but before the notice is filed, the successful party is entitled to execute the order.

[28] I do not understand the respondent to be saying that the applicant agreed not to execute the order pending an application for leave to appeal to be launched. To say that the respondent had fifteen days to consider his options whether to launch the appeal proceedings or not does not in itself prevent the successful applicant from executing the order. Even before the award was made an order of court, the applicant was entitled to enforce his rights in terms of the award for it was obtained by agreement between the parties as they agreed to subject themselves to the arbitration process. It cannot be said therefore that the applicant resorted to self-help when he sort to enforce his rights in terms of the award.

[29] I agree with the applicant that the impugned paragraphs of the answering affidavit are of no assistance to this court in determining the issues in this case. No other purpose is served by these paragraphs in these proceedings except to paint a picture of a litigant who is hellbent on harassing another. Such conduct by a litigant is frowned upon and deserves to be visited with an adverse costs order. It is my respectful view therefore that these paragraphs as mentioned in the replying affidavit are vexatious and scandalous and falls to be struck out from these proceedings.

[30] After the applicant made its closing reply at the hearing of this case, the respondent, belatedly brought an application from the bar that the proceedings and the rendering of the judgment be postponed to afford him an opportunity to bring review proceedings on the award granted by the arbitration panel on the 14th of October 2021. Counsel for the respondent contended that the respondent was not aware that the applicant would place reliance on the wording of the award of the 14th of October 2021 which award was never challenged by the respondent.

[31] I disagree. It has been clear from the beginning that the applicant relies on the wording of the award, especially that it reiterates paragraph 106 of the interim

award which is the paragraph that awarded the applicant the party and party costs to be taxed or agreed upon. It is now more than two years since the award was published and the respondent has done nothing to review and set aside the award – thus he has acquiesced the award. Furthermore, there was no substantive application for a postponement before me and no purpose would be served to postpone the rendering of judgment at this late stage except to delay the finalisation of the matter between the parties which should not be countenanced.

[32] Although dealing with the issue of delay in the prosecution of an appeal, in *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited,*[7] the Supreme Court of Appeal stated the following:

> "[45] The application for leave to appeal was heard on 15 May 2020. And the judgment of the high court granting leave to appeal to this court was handed down on 26 October 2020 after undergoing a period of gestation of some five month. It is necessary to say something about this. An undesirable development appears to be taking root in some courts where applications for leave to appeal are invariably not dealt with and disposed of expeditiously. This is regrettable as delays in the disposition of applications for leave to appeal have a negative impact on the administration of justice. I mention this not to censure the learned Judge a quo but purely to sound a word of caution, namely that if delay of this nature go unchecked, they have the potential to bring the administration of justice into disrepute."

[33] I understand the above authority to be saying that there should be finality in the litigation between the parties, otherwise there is an inherent potential of prejudice being suffered by one of the parties. The delay in bringing the application for a postponement and the effect of the postponement would have on this case, has the potential of impacting negatively in the efficient functioning of the Court and the administration of justice. I am of the respectful view therefore that there is no merit in the application for a postponement and it falls to be dismissed.

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[7] [2022] ZASCA 56; 85 SATC 216.

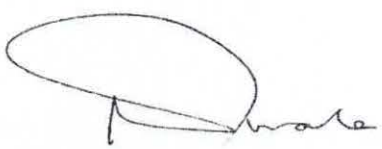
[34] In the circumstances, I make the following order:

[1] It is declared that the respondent is liable to pay interest at the prescribed rate on the sum of R2 034 738.80 to the applicant from the 14th of October 2021 until the 7th of June 2023.

[2] The respondent is liable to pay the costs of the application including costs occasioned by the employment of two counsel.

[3] The application to strike out certain paragraphs of the answering affidavit is granted.

[4] The respondent is to pay the costs of the application on the scale as between attorney and client.



M L TWALA
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 22nd of December 2023.

APPEARANCES:

For the Applicant:	Adv R Hutton SC Adv C Picas
Instructed by:	Werksmans Attorneys
For the Respondents:	Adv E Rudolph

Instructed by:	David Kotzen Attorneys
Heard:	27 November 2023
Delivered:	22 December 2023