IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No**.: 20656/2023**

In the matter between:

SHIREEN LYNN STOFFELS First Applicant

LIZELLE HEROLD obo LEEAM SPALDING Second Applicant

and

ROAD ACCIDENT FUND Respondent

Coram: Gassner AJ

Heard: 27 May 2024

Delivered: 25 June 2024 (by email to the parties' legal representatives and by release to SAFLII)

JUDGMENT

GASSNER, AJ

Introduction

[1] The first applicant is the plaintiff and judgment creditor in an action ('the Stoffels action') against the respondent, the Road Accident Fund ('RAF'), in which

judgment was granted in her favour in the amount of R3 749 650.59 for damages, as well as costs and ancillary relief. The order was issued on 12 February 2021 ('the Stoffels judgment').

[2] The second applicant is the plaintiff and judgment creditor in an action against the RAF ('the Herold action') in which judgment was granted in her favour in the amount of R4 403 735.00 for damages as well as costs and ancillary relief. The order was issued on 5 March 2021 ('the Herold judgment').

[3] In the Stoffels action and in the Herold action the applicants (who were represented by the attorney of record in this application) claimed interest at the prevailing rate of interest, calculated from date of demand, alternatively from 14 days after date of judgment to date of final payment as well as interest on their costs from the date of the Taxing Master's allocatur to date of payment.

[4] The RAF paid the judgment debts in both actions late: in the Stoffels action only on 17 September 2021 and in the Herold action on 20 August 2021. In emails of 8 March 2022 and 1 April 2022 the attorney in the Stoffels and in the Herold actions demanded payment from the RAF in respect of interest in the amount of R145 979.55 and R130 061.00 respectively, calculated from 14 days of date of judgment to date of payment. The RAF, however, did not pay any interest nor did it respond to the demands.

[5] Interest was also demanded on the taxed costs in the Stoffels action from 14 days from date of allocatur to date of payment on 24 August 2022. In response to this demand the RAF advised in an email of 7 November 2022 that Treasury declined to make interest payments where the court order does not provide for interest. Similarly, in response to an interest demand in the Herold action, the RAF advised that:

> *'As per our internal directive regarding interest payments the court order needs to contain a clause indicating that interest can be claim(ed).'*

[6] The Stoffels and Herold judgments do not contain provisions that interest is payable on the capital amount awarded or on the costs.

[7] In light of the RAF's refusal to pay interest on the judgment debts, the applicants seek an order in the following terms:

> *'1. Directing that the Respondent be liable for and pay interest from 14 (fourteen) days after the above Honourable Court granted judgment in their respective favour on the capital amounts awarded and costs at the relevant and prescribed rate of interest;*
>
> *2. Declaring the 'Directive' of the Respondent that it will not pay or be liable for interest on Capital awards and costs to be unlawful and irregular.'*

[8] The RAF did not proceed with its conditional counter-application that this application be stayed pending the finalisation of an interest application brought by it against several parties in the Gauteng High Court, Pretoria.

[9] The applicants contend that they are entitled to post-judgment interest *ex-lege* in terms of s 2 of the Prescribed Rate of Interest Act 55 of 1975 ('PRIA') which provides that all judgment debts bear interest from the date on which the judgment debt is payable unless the court order or judgment provides otherwise.

[10] The RAF, on the other hand, contends that it cannot, and should not, be held liable for the payment of interest in circumstances where the orders the applicants rely on do not make specific provision for payment of interest. In resisting the relief the applicants seek in relation to interest, the RAF relies on the principle of *res judicata* and s 2A of PRIA which, so the RAF submits, requires courts in the case of awards on unliquidated claims to make specific orders that interest is payable on such judgment debts for post-judgment interest liability to arise.

The relevant legislative provisions

[11] The following provisions of PRIA are relevant in determining whether or not the plaintiffs are entitled to post-judgment interest:

> ‘1. *Interest on a debt to be calculated at the prescribed rate 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 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 relating to that debt, orders otherwise.*
>
> *(2)(a) For the purposes of subsection (1), the rate of interest is the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum.*
>
> *(b) The Cabinet member responsible for the administration of justice must, whenever the repurchase rate is adjusted by the South African Reserve Bank, publish the amended rate of interest contemplated in paragraph (a) by notice in the Gazette.*
>
> *(c) The interest rate contemplated in paragraph (b) is effective from the first day of the second month following the month in which the repurchase rate is determined by the South African Reserve Bank.*
>
> *(3) For purposes of this section-*
>
> *(a) 'repurchase rate' means the rate at which banks borrow rands from the South African Reserve Bank; and*
>
> *(b) 'South African Reserve Bank' means the central bank of the Republic regulated in terms of the South African Reserve Bank Act, 1989 (Act 90 of 1989).*
>
> 2. *Interest on the judgment debt*
>
> **(1)** *Every judgment debt which, but for the provisions of the sub-section, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest*

on 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 the judgment debt*.

2A *Interest on unliquidated debts*

(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.

(2)(a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) interest contemplated in subsection (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.

(b) ……..

(3) ……..

(4) …….

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal 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.

(6) ……'

[12] In actions against the RAF liability for interest is further governed by s 17(3)(a) of the Road Accident Fund Act 56 of 1996 ('the RAF Act') which provides that no

interest calculated on the amount of any compensation which the court awards in terms of that act shall be payable unless 14 days have elapsed from the date of the court's order.

The interpretation of s 2 and s 2A(5) of PRIA

[13] The much-relied on passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)(*'Endumeni')* paras 18 – 25 offer guidance as to how to interpret statutory provisions. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provisions that constitute the unitary exercise of interpretation. *'The inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'* More recently, the SCA in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99 para 51 confirmed that the triade test is not an invitation to contend for a meaning *'unmoored in the text.'*

[14] It is instructive to have regard to the history and purpose of s 2 and s 2A of PRIA. Under the common law interest was payable on a judgment debt from the date of judgment provided that the judgment creditor claimed interest in the summons (see *General Accident Versekeringsmaatskappy Suid-Afrika Beperk v Bailey NO* 1988 (4) SA 353 (A) (*'Bailey')* at 359B-D). Further, under common law, a judgment creditor's claim for interest on an unliquidated claim was limited to post-judgment interest (see *Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA) (*'Adel Builders')* para 11; *Union Government v Jackson and Others* 1956 (2) SA 398 (A) at 412E; LAWSA (3 ed), Vol 14, Part 1 Damages para 32; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (AD) at 779A-D).

[15] When PRIA came into force on 16 July 1976 it did not include s 2A, headed *'Interest on unliquidated debts',* which was only introduced by s 1 of Act 7 of 1997 with effect from 11 April 1997. I will consider the purpose of s 2A later.

[16] Section 2(1) of PRIA does not specify when a judgment debt is *'payable'*. However, in light of the common law position, our courts have interpreted the section to mean that a judgment debt, in the ordinary course, is payable on the date of judgment and that interest in terms of s 2(1) runs from such date (see *Bailey* supra at 357G-H; *Saunders N.O v MEC of the Department of Health: Limpopo Province* (A899/2013), Gauteng Division, Pretoria (1 June 2015) (*'Saunders')*, a full bench decision, para 28; *Schenk v Schenk* 1993 (2) SA 346 (ECD) *('Schenk')* at 350G-H).

[17] In my view, the wording of s 2(1) of PRIA, inasmuch as it provides for interest on *'every judgment debt',* is clear. An interpretation of s 2 of PRIA which limits its application to judgment debts which arose from liquidated claims, as argued by the RAF, is irreconcilable with the plain language of s 2(1). The sub-section confirms the common law position, unless the court orders otherwise, that a judgment debtor is liable for post-judgment interest on the judgment debt irrespective of whether it arose from a liquidated or unliquidated claim. A construction of s 2(1) of PRIA which excludes from its ambit judgment debts on unliquidated claims is also without merit as there is no sound reason for differentiating between judgment debts for purposes of interest liability post-judgment on the basis of the nature of the claim giving rise to them. It is, therefore, not surprising that there do not seem to be any reported cases to the effect that s 2 of PRIA provides for post-judgment interest only in respect of liquidated claims (cf *Standard Chartered Bank of Canada* supra at 779D-E).

[18] The appellate division, as it was then, held in *Bailey* at 359C-E that s 2 of PRIA has done away with the common law requirement that a judgment creditor has to include a specific claim for post-judgment interest in the summons. By virtue of s 2(1) interest on a judgment debt now follows *ex-lege* and a judgment creditor is entitled thereto without having to specifically claim it (see also *Saunders* para 28).

[19] The main argument which Mr Naude, counsel for the RAF, advanced to resist the applicants' interest claims, was that with the introduction of s 2A of PRIA, headed *'Interest on unliquidated debts'*, both pre- and post-judgment interest on unliquidated debts is now governed by its provisions and no longer by s 2 of PRIA. In terms of s 2A(5), so the argument goes, a court is now required to make an order in respect of the payment of interest on an unliquidated debt including the rate at which interest

shall accrue and the date from which interest shall run, for any interest liability to arise post-judgment.

[20] For the reasons which follow, I am of the view that this interpretation of PRIA cannot prevail. First, it ignores the apparent purpose for which s 2A was introduced. In terms of the common law a plaintiff could not claim pre-judgment interest on unliquidated damages from date of demand or date of summons (see *Union Government v Jackson and Others* 1956 (2) SA 398 (A) (*'Jackson')* at 412E-413A). Pre-amendment our courts remarked that the common law position was unsatisfactory because plaintiffs suffered the negative effects of inflation and trial delay (see *Bailey* at 706A-C; *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) (*'Hartley')* SA 833 (A) at 841G-842B). The South African Law Commission: *Project 78*, *Interest on Damages* Report, referred to with approval in *Hartley,* canvassed these policy considerations and recommended the insertion of s 2A in PRIA. In *Adel Builders*, para 11 the SCA confirmed that before the introduction of s 2A no common law principle or statutory enactment provided for the award of pre-judgment interest on unliquidated damages and, with reference to the remarks of the lower court, noted that s 2A was aimed at alleviating the plight of plaintiffs who had to wait a substantial period of time to establish their claim, through no fault of their own, and were paid in depreciated currency. It follows, that the purpose of s 2A was to create a statutory entitlement to pre-judgment interest on unliquidated debts from the date on which payment was claimed by service of a demand or summons and not to qualify the law governing post-judgment interest provided for in s 2 of PRIA (see also *Drake Flemmer and Orsmond Inc and Another v Gajjar NO* 2018 (3) SA 353 (SCA) (*'DFO')* paras 62 and 63).

[21] Second, the provisions of sub-section 2A(5) which confer a broad discretion on courts to make orders regarding interest on unliquidated debts must be read in the wider context of s 2A. S 2A(5) is a rider to the default position provided for in s 2A(2)(a), as read with s 2A(1), that mora interest will run on every unliquidated debt as determined by a court from date of demand or summons. It is in respect of pre-judgment interest that the court has an overriding discretion, *inter alia*, regarding the interest rate and the date from which interest shall run. It is also apparent from the phrase in s 2A(5) that the court *'may make such order as appears just in respect*

of interest' that s 2A(5) does not enjoin the court to regulate interest, as the RAF contends. The sub-section confers a wide discretionary power on courts to address different circumstances that may arise in unliquidated claims between date of demand, summons and judgment which may call for a fact-tailored interest award (see, for example, *David Trust and Others v Aegis Insurance Co Ltd and Others* 2000 (3) SA 289 (SCA) (*'David Trust')* para 39). The wide discretionary power governing pre-judgment interest in terms of s 2A(5) is to be contrasted with the *ex lege* position in respect of post-judgment interest in terms of s 2 of PRIA. That s 2A(5) confers a wide discretion in respect of pre-judgment interest (and not post-judgment interest) is also borne out by the cases in which the exercise of our courts' discretion in terms of s 2A(5) was discussed (see, for example, *Adel Builders* paras 14 – 16; *MV Sea Joy* 1998 (1) SA 487 (C) at 507H-508H; *David Trust* para 39).

[22] Third, as mentioned earlier, there seems to be no sound reason to have different interest regimes in place for post-judgment debts which arose from unliquidated claims and those that arose from liquidated claims which would be the case if the RAF's construction of s 2A(5) is to be adopted.

[23] Finally, the applicants' counsel, Mr Eia, submitted that an interest award in terms of s 2A of PRIA cannot conceivably arise in a RAF action, in that s 17(3)(a) of the RAF Act provides that no interest calculated on the amount of any compensation which the court awards shall be payable unless 14 days have elapsed from the date of the court order. In *Vermaak v Road Accident Fund* [2008] ZAWCHC 12 this court held that s 17(3)(a) of the RAF Act trumps s 2A of PRIA in relation to pre-judgment interest and consequently bars a RAF plaintiff from claiming such interest. In *DFO* paras 63 and 66 the SCA assumed that this view was correct without deciding the point.

[24] Accordingly, the RAF's main submission that the applicants are not entitled to post-judgment interest on the ground that the trial court did not make an interest determination in terms of s 2A(5) of PRIA, regarding the rate and date from which interest is to run, cannot be sustained.

Res judicata

[25] The RAF submitted, in the alternative, that if s 2 and not s 2A(5) of PRIA governs the applicants' entitlement to post-judgment interest, they are precluded from claiming such interest as this issue is *res judicata*. In this regard, the RAF relies on the fact that both in the Stoffels and in the Herold summons the applicants incorporated a prayer for interest at *'the prevailing rate of interest calculated from date of demand, alternatively from 14 days after date of judgment to date of final payment'* and in respect of costs of suit *'at the prevailing rate of interest from date of the Taxing Master allocatur to date of final payment.'*

[26] The *res judicata* defence, in my view, is misconceived. On the basis of *Bailey* the applicants, in terms of s 2 of PRIA, were entitled to post-judgment interest as a matter of law and did not have to include a claim for such interest in their summons. No adjudication was required to found their entitlement to interest on the judgment debt which in terms of the definition in s 2(3) also includes an order as to costs. The Stoffels and the Herold judgments are silent as to interest either on the judgment debt or in respect of costs and did not include an order varying the *ex lege* position provided for in s 2 of PRIA. Given that s 2 of PRIA provides that post-judgment interest runs, *ex lege*, unless the court orders otherwise, it cannot be inferred that the court adjudicated on post-judgment interest. Inasmuch as the post-judgment interest has not been adjudicated upon, I conclude that the RAF cannot resist the applicants' interest claims on the basis of *res judicata* (see *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 (SCA) at 239F-H).

[27] It should be noted that in *Saunders* the court came to a similar conclusion. In that case the judgment incorporated a settlement agreement which was silent as to the interest payable on the damages award against the MEC. The court upheld the appellant's argument that although the damages claim was compromised, this did not include a compromise of the appellant's interest claim which only came into force on judgment. The court accordingly held, on the basis of s 2(1) of PRIA, that the appellant was entitled to claim post-judgment interest on the judgment debt.

The writ argument

[28] The RAF raised the further argument that the applicants would be precluded from issuing out valid writs in terms of Rule 45 as the orders are silent as to interest.

It highlighted that with the 2016 amendment to S 2(1) of PRIA uncertainty may arise about the applicable mora rate as the Minister of Justice has not consistently and correctly implemented the publishing of the applicable interest rates. However, I am not seized with an application concerning the enforceability or validity of a writ of execution; the applicants in terms of prayer 1 of the notice of motion simply seek an order regarding their entitlement to and payment of post-judgment interest on the judgment debts payable by the RAF. Accordingly, I am not asked to decide for the purposes of this application the enforceability of any writs issued out on the strength of the declaratory order sought and the practical (and possible legal) ramifications that may arise if the Minister of Justice does not publish the correct mora interest rate within the period specified in the amended ss 1(1) and (2) of PRIA.

Conclusion in respect of the relief the applicants seek in prayer 1 of the notice of motion

[29] In the circumstances, I find that the applicants have established an entitlement to post-judgment interest on the judgment debts payable by the RAF, as sought in prayer 1 of the notice of motion. Regarding the interest on costs the Stoffels and Herold actions are on a different footing as the costs in the Herold action were not taxed but agreed. Interest on the the costs in the Stoffels action is to run 14 days from date of allocatur and in the Herold action, 14 days from the date the costs were settled in terms of the agreement recorded in the letter dated 26 October 2021, signed by the attorneys of the RAF and the second applicant's attorney.

[30] The RAF's counsel was critical of the fact that the rate of interest is not specified in the order which the applicants seek. However, the order sought is broadly in line with the post-judgment interest order granted by the appellate division in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA (1) AD at 16A-C and could be quantified in an affidavit should this become necessary (see *Butchart v Butchart* 1997 (4) SA 108 (W) at 112B-G)

The RAF's directive

[31] The applicants seek further declaratory relief against the RAF in broad terms, namely that *'the Directive of [the RAF] that it will not pay or be liable for interest on capital awards and costs to be unlawful and irregular'.* In my view, the determination of the additional declaratory relief sought centers on two questions. First, have the applicants established the existence of such a directive on the papers? And second, should the court exercise its discretion in terms of s 21(1) of the Superior Courts Act 10 of 2013 in circumstances where the applicants' entitlement to post-judgment interest has been determined in their favour pursuant to the relief sought in prayer 1 of the notice of motion?

[33] In support of the existence of the RAF directive, the applicants rely on the following evidence:

33.1 an email dated 7 November 2022 in the Stoffels action from a writs officer of the RAF's Cape Town office in which she conveyed the following to the applicant's attorney, *'Kindly note that the attached Court Order does not make reference to your claim for costs interest. Please note that Treasury will not make payment, where the Court Order is silent on interest'* (own emphasis);

33.2 an email dated 7 October 2022 in the Herold action from a junior writs officer of the RAF Cape Town office notifying the second applicant's attorney that *'[A]s per our internal directive regarding interest payments the court order need to contain a clause indicating that interest can be claim (sic). In the attached court order nothing is stipulated and therefore we cannot proceed with requesting interest payment';*

33.4 a subsequent email dated 28 July 2023 from the same RAF officer to the applicant's attorney declining to share *'our internal directive'.*

[34] It seems that in the Stoffels action the RAF email was in response to a demand from the first applicant's attorneys to pay interest on the costs and not a response to a demand to pay interest on the capital. It is not clear from the papers

whether the RAF reply in the Herold action was in response to a demand to pay interest on the costs or on the costs and the capital award.

[35] The RAF in its answering affidavit deposed to by its regional manager of its Cape Town branch denies that there is any RAF directive which *'dictates whether or not [RAF] is liable for the payment of interest.'* Given the uncertainty as to the existence of the RAF's directive and, to the extent that it may exist, its content and ambit, I am of the view that the directive has not been sufficiently established on the papers to found the additional declaratory order which the applicants seek.

[36] The further obstacle to granting the declaratory relief in respect of the RAF directive is that if the applicants are awarded post-judgment interest pursuant to prayer 1 of the notice of motion, and this aspect has been determined in their favour, they will no longer continue to be *'interested parties'* in respect of the legality of the directive (see *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 16 regarding the essential requirement that the applicant for a declaratory order must be a person interested in an *'existing, future or contingent right or obligation'* although the existence of a dispute is not necessarily a prerequisite for the discretionary power conferred by s 21(1)(c) of the Superior Courts Act).

[37] Even if I am incorrect in concluding that the applicants do not retain an interest in respect of the legality of the (alleged) directive, for the reasons which follow I am not persuaded that I should exercise my discretion and grant the broad relief they seek in terms of s 21(1). First, the applicants right to post-judgment interest on the RAF judgment debts, both in respect of the capital awards and in respect of costs, are clearly addressed in terms of the relief granted pursuant to prayer 1 of the notice of motion and there is no cogent reason to grant further relief which in effect would secure the same rights. Second, the order sought in terms of prayer 2, in the absence of clear evidence as to the precise terms of the directive the applicants complain of, may give rise to uncertainty.

[38] In view of the aforegoing, I dismiss the applicants' application for the declaratory relief sought in prayer 2 of the notice of motion.

Order

[39] In the result, I make the following orders:

1. In the Stoffels action under case number 2866/15 the Road Accident Fund ('the RAF') is declared to be liable for and directed to pay interest to the first applicant at the legal rate of interest as prescribed in s 1 of the Prescribed Rate of Interest Act 55 of 1975, as amended ('PRIA'):

    1.1 on the judgment debt payable by the RAF, in terms of the order granted in the Stoffels action, from 14 (fourteen) days after the court granted judgment to date of final payment; and

    1.2 on the costs payable by the RAF from 14 (fourteen) days after date of the taxing master's allocatur to date of final payment;

2. In the Herold's action under case number 9006/16 the RAF is declared liable for and directed to pay to the second applicant interest at the legal rate of interest prescribed in s 1 of PRIA:

    2.1 on the judgment debt payable by the RAF, in terms of the court order granted in the Herold's action, from 14 (fourteen) days after the date the court granted judgment to date of final payment; and

    2.2 on the costs payable by the RAF from 14 (fourteen) days after the parties settled the quantum of the costs payable by the RAF in the Herold's action to date of final payment;

3. The application for the relief sought by the applicants in prayer 2 of the notice of motion is dismissed;

4. The RAF is to pay the applicants' costs on scale B.

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GASSNER, AJ

Appearances:

Applicants' Counsel:	**Advocate P Eia**
Instructed by:	**A Batchelor & Associates**
Respondent's Counsel:	**Advocate G Naudé and Advocate M Moodley**
Instructed by:	**Malatji & Co Attorneys**
	c/o Werksmans Attorneys