**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

**Reportable**

Case no: JA 86/2014

In the matter between:

**ROSS RICHARDSON** **Appellant**

and

**TECMED AFRICA (PTY) LIMITED** **Respondent**

**Heard:** **11 November 2014**

**Delivered:** **18 December 2014**

**Summary: Payment of a *pro rata* portion of the profits share for a financial year - employee claiming for the payment of the profits share - employer disputing the method of calculation and the quantum of the profit share – Labour Court ordering payment of the *pro rata* portion of the profits share to employee without interests – Labour court dismissing employer method of calculation Appeal – employee claiming payment of interest on the *pro rata* portion of the profits share - profits share a liquidated debt and employee entitled to *mora* interest on the profit share claim – Labour Court erring in finding profits share unliquidated debt – Cross-appeal employer contending that method of calculation of profits share from actual days worked by employee and not on the whole financial year - employer not submitting profit share for days worked by employee – such method impractical – literal interpretation to be given to profits share clause – cross-appeal dismissed with costs- Labour Court's judgment varied – employer ordered to pay profit share plus interests at the prescribed rate.**

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**JUDGMENT**

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Murphy AJA

[1] In a judgment handed down on 19 April 2013, the Labour Court (Moshoana AJ) ordered the respondent to pay the appellant an amount of R461 890, being a *pro rata* profit share it held was payable in terms of his contract of employment. It also ordered the respondent to pay the appellant R13290,79 in respect of unpaid salary together with interest at the prescribed rate on that amount. It refused however to grant payment of interest at the prescribed rate of 15.5% per annum on the appellant's claim for profit share. The appellant appeals against the refusal of the Labour Court to order the payment of interest in relation to the amount owing as a *pro rata* profit share. The respondent has in turn noted a cross-appeal against the order that it pay the capital amount allegedly owing as profit share.

[2] The appellant, a qualified chartered accountant, commenced employment with the respondent as a financial manager on 12 January 2009. His key areas of responsibility were to oversee and manage all functions of the commercial division and all financial responsibilities of the business of the respondent. On 18 March 2009, the appellant and the respondent concluded a contract of employment in the form of a letter of appointment ("the agreement") which was drafted by the respondent and accepted by the appellant. The effective date of the agreement is recorded to be 1March 2009. The appellant resigned from his employment by mutual agreement with the respondent less than six months later on 4 September 2009. He was accordingly employed by the respondent for a total period of approximately eight months (from 12 January to 4 September 2009) of the financial year that

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ended on 30 September 2009. The respondent's financial year runs from 1 October to 30 September. The relevant financial year of the respondent for the purposes of this matter is 1 October 2008 to 30 September 2009.

[3] The respondent failed to pay the appellant his remuneration for the period 1-4 September 2009. The Labour Court, as indicated, ordered the respondent to pay the appellant this amount (R13 290.79) with prescribed interest. There is no appeal against that order.

[4] The contested amount is that which the Labour Court held was owing in terms of the agreement as a *pro rata* portion of the profit share calculated from 1 March 2009 up to and including 4 September 2009. The relevant part of the agreement reads:

> 'Over and above the remuneration which you will receive through your employment with Tecmed Africa (Pty) Ltd ("Tecmed"), you will be eligible to participate in a profit share scheme. This profit share scheme will commence after the 3 month probationary period has expired.
>
> The purpose of the profit share scheme is to incentivise you to remain in our service and to promote the continued growth and success of Tecmed Africa by giving you an opportunity to profit in Tecmed Africa's success.
>
> Payment of a profit share ("the Profit Share") will be made to you on the following terms and conditions:
>
> 1. Tecmed Africa will pay to you 3% of EBIT (Earnings Before Interest and Tax) of Tecmed Africa (Pty) Ltd of the financial year, being the period 1 October to 30 September, as audited by the auditors of Tecmed Africa, from time to time, in accordance with standard accounting practice.
>
> 2. The Profit Share will be payable quarterly in arrears based on the quarterly management accounts in respect of the first three quarters in any financial year being overstated or understated (as the case may be), having regard to the annual audited financial statements of the Tecmed Company, the final quarterly payment will be adjusted. Profit Share scheme commences on the start of the business financial year.

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> 3. In the event of the quarterly management accounts being overstated (i.e. in the event of there being an overpayment), you hereby consent to the amount of the overpayment being deducted from any monies which may be due to you (including salary).
>
> 4. In the event of the quarterly management accounts being understated (i.e. in the event of there being an underpayment), the amount of the underpayment will be included in the final quarterly payment.
>
> 5. Upon the termination of your employment for whatsoever reason ("the Date of Termination of Employment") other than where you are dismissed for reasons related to dishonesty, fraud or theft, you will be entitled to a pro rata portion of the Profit Share calculated from the commencement of the Effective Date, or the commencement of the financial year in question as the case may be, up to and including the Date of Termination of Employment, which profit share shall be paid to you within 30 days of the delivery of the audited financial statements."

[5] On 26 March 2010, the respondent received its audited financial statements for its financial year ended 30 September 2009 ("the audited financial statements"). During April 2010, the appellant delivered his statement of claim seeking an order *inter alia* for payment of a *pro rata* portion of the profits share for the 2009 financial year. In February 2013, the appellant brought an urgent application to the Labour Court for an order compelling the respondent to furnish him with a copy of the audited financial statements, which the court granted.

[6] The appellant claimed payment of the amount of R461 890.00 (the *pro rata* portion of the profit share for the financial year ended 30 September 2009 in respect of the period 1 March 2009 (the effective date) to 4 September 2009 (the date of termination)) in terms of clause 5 of the contract together with interest at the prescribed rate of 15.5% per annum calculated from 26 April 2010 (30 days after the delivery of the audited financial statements), alternatively 1 May 2010. In addition to the claim for payment of the amount of R13 290.79, being four days' remuneration together with interest thereon, the appellant further claimed payment of the equivalent of six, alternatively three,

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months' salary as notice pay. This claim was abandoned by the appellant prior to the commencement of the trial.

[7] The respondent initially opposed the claim for a *pro rata* profit share on the basis that the appellant was not entitled to any payment of profit share because the profit share scheme only commenced after 1 October 2009. In the alternative, it alleged that the employment contract was concluded as a result of a mutual mistake and was thus unenforceable. In the further alternative, it alleged that the profit share provisions involved reciprocal obligations and that the appellant had failed to discharge his obligations and thus was not entitled to claim any profit share.

[8] At the beginning of the trial, the respondent amended its reply to introduce a fourth alternative defence to the appellant's profit share claim in which it disputed the method of calculating the amount owed to the appellant in respect of the profit share claim.

[9] During argument at the trial, the respondent elected to rely solely on the newly introduced fourth alternative defence which sought only to dispute the quantum of the profit share claim.

[10] The respondent thus effectively conceded the merits of the appellant's entitlement to a profit share but contended for a different interpretation of the phrase "the *pro rata* portion of the Profit Share" in clause 5 of the agreement and a different method of calculating the amount owed to the appellant in respect of his profit share claim. The Labour Court rejected the respondent's version of the agreement and found in favour of the appellant. This finding is the issue for determination in the cross-appeal. The Labour Court held further that the appellant had successfully proven the quantum of the profit share claim in the amount of R461 890.00. As stated, the court *a quo* held that the appellant was not entitled to claim interest on the profit share claim. This is the issue for determination in the appeal.

[11] It will be best first to deal with the cross-appeal. The question to be answered is what is meant by the term "a *pro rata* portion of the Profit Share" in clause 5. The agreement defines the profit share to mean 3% of EBIT (earnings

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before interest and tax). The Oxford English Dictionary defines the phrase "*pro rata*" to mean "*in proportion to the value or extent*" or "*proportionally*". The phrase "*pro rata*" necessarily entails the questions: what period is being referred to and what is the relevant portion of that period? The respondent conceded that the relevant period for the calculation of the quantum of the appellant's profit share claim was the period from 1 March 2009 (the Effective Date) up to and including 4 September 2009 (the Date of Termination) and that the relevant financial year was the financial year that ended on 30 September 2009.

[12] The appellant contends that a *pro rata* portion is the ratio between the months worked and the full annual period. Thus if an employee worked six months of a financial year he or she would be entitled to half of 3% of EBIT. According to the appellant, the audited financial statements reveal that the EBIT for the financial year ended 30 September 2009 was R29 891 845.00. The profit share for the financial year ended 30 September 2009, on his calculation, was therefore R896 755.35 (being 3% of R29 891 845.00). The amount of R896 755.35 was therefore the total profit share for the financial year 1 October 2008 to 30 September 2009. This is what the appellant would have received had he been employed at the respondent for the full financial year. The respondent does not deny that had the appellant been employed by the respondent for the full financial year he would have been entitled to receive 3% of EBIT as his profit share. The *pro rata* portion of the profit share, in the calculation applied by the appellant, is computed by dividing the period specified in clause 5 (from the effective date to the date of termination), which is a period of 188 days, by the total period (the financial year in question), which is a period of 365 days. This gives a *pro rata* portion of the profit share of R461 890 (being about 51.5% of R896 755) which was accepted by the Labour Court as the amount of the appellant's *pro rata* claim to profit share.

[13] The respondent submitted that the term "*pro rata*", interpreted contextually and purposively, means something different in the agreement. It submitted that the 188 days, being the *pro rata* portion of the profit share, should be applied to entitle the appellant to receive a share of the profits earned only

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during the 188 day period between the effective date and the date of determination and not to any share of profits earned outside that period. In other words, it contended that the appellant was entitled to 3% of the EBIT earned during the period of 1 March – 4 September 2009. However, it tendered no evidence at either the trial or on appeal disclosing the actual amount of EBIT for that period, meaning that it is not possible to determine whether the amount owing to the appellant on this basis of calculation would be more or less than the amount the Labour Court ordered it to pay. Despite that, the respondent persisted doggedly with a multiplicity of submissions and arguments favouring this interpretation, arguing most notably that a purposive method of interpretation favoured its construction. In this regard, it relied on the stated purpose of the scheme being to incentivise employees to remain in service and to promote the continued growth and success of the company. Thus, not entirely unreasonably, it argued that the rewards envisaged by the scheme are bound up with the period during which the employee contributed to the success of the company, i.e. the six months that the appellant worked for the respondent. In other words, employees whose services are terminated are not entitled to share in profits earned at a time when they did not contribute to those profits. The appellant countered that these legitimate concerns are equally and adequately provided for in the manner of calculation proposed by him, which he argues is the true intention of the agreement. His method has the added advantage of easy computation with reference to the audited annual financial statements which avoids *ad hoc* computations of EBIT at different points in the financial year.

[14] The Labour Court held that the interpretation of clause 5 as contended for by the appellant was the proper interpretation of the agreement. Clause 5 of the agreement pertinently states that the calculation of the *pro rata* portion is from the effective date to the date of termination. This, it correctly observed, is the relevant period to be used to determine the *pro rata* portion of the profit share due to the appellant. Clause 1 of the agreement refers to a payment of a percentage of the EBIT *of the financial year* and makes no reference to a portion of the financial year. The learned acting judge found further that clauses 2, 3 and 4 of the agreement, which deal with quarterly interim

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payments of the profit share, reveal that "the parties were alive to the fact that the financial year-end is the most appropriate period to determine the profit". He found that the interpretation contended for by the respondent was inconsistent with the words used in the agreement and the purpose of the profit sharing scheme.

[15] The modern approach to the interpretation of contracts was recently enunciated by the Supreme Court of Appeal ("SCA") in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] as follows:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. 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."

[16] If the language of a provision seems clear and admits of little if any ambiguity, when read in its particular context, courts ought to adhere to the ordinary grammatical and literal meaning of the words. Where the context makes it

[1] 2012 (4) SA 593 (SCA) at para 18.

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plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity or anomaly the court should give a meaning to the language that avoids that result.

[17] The appellant submits that the ordinary, grammatical and literal meaning of the words used in clause 5, as read in the context of the contract as a whole, support his interpretation. Clause 1 of the agreement, read in the context of the agreement as a whole, plainly delineates the meaning of the profit share as 3% of the respondent's EBIT for the whole financial year based on the audited financial statements. The phrase "the *pro rata* portion of the Profit Share" in clause 5 clearly and unambiguously means the relevant portion of that amount. There is no absurdity or anomaly in this meaning. In the context of clause 5 and the contract as a whole, the phrase "*pro rata*" clearly means the proportional ratio of the relevant period divided by the entire period. Likewise, the literal interpretation contended for by the appellant does not lead to impracticable results. By contrast, the evidence led in the trial suggests that the respondent's interpretation of clause 5 is impractical and less businesslike in that the proposed method of calculating the quantum of the appellant's profit share would not require it to be based upon any audit of the relevant figures. Moreover, while the express purpose of the agreement is to incentivise employees to remain in service and to promote the continued growth and success of the company, since clause 5 is only operative upon the termination of employment the first purpose identified is not relevant to the interpretation of this clause.

[18] Were the respondent's interpretation of clause 5 to be preferred, the immediate difficulty is that the exact quantum of the profit share claim on this basis remains unknown, notwithstanding the fact that the respondent has had over four years to calculate it. In the absence of evidence as to the EBIT earned during the relevant 188 day period, or evidence that might disprove the appellant's uncontested evidence that earnings for that financial year were relatively stable throughout that year, the best evidence available to the court for computing the quantum of the profit share claim in accordance with the respondent's method was that presented by the appellant. The Labour Court

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would have had to rely on such evidence, being all that was at its disposal, to apply the respondent's method and most likely would have discovered that there was much ado about nothing in the dispute about the manner of calculation. On the available best evidence, the Labour Court reasonably could have assumed that the EBIT earned during the period 1 March 2009 to 4 September 2009 approximated the *pro rata* proportion of the EBIT earned for the whole financial year (i.e. 188 / 365 x R29 891 845). This amounts to the sum of R15 396 348 and 3% of that is R461 890.43 the same amount that the appellant was awarded by the Labour Court. It is therefore more probable than not that the method of calculating the quantum of the profit share claim on the basis of the respondent's interpretation of clause 5 might have produced a substantially similar result, unless there was a dramatic spike in profits in the earlier period of the 2009 financial year (October 2008–March 2009); of which there is no objective evidence and which the appellant testified without challenge was not in fact the case. The respondent in any event has conceded that the profit share claim calculated according to its interpretation might in the final analysis be the same as the amount claimed by the appellant and may even be a greater amount.

[19] Perhaps what is most important and deserving of repetition is that clause 5 clearly links the method and timing of the calculation of the *pro rata* profit share to the delivery of the audited financial statements. That, in my view, is an almost conclusive indication that the clause envisages a *pro rata* amount of the calculated annual EBIT rather than a share of EBIT over the actual period of employment. The EBIT for the relevant 188 days in this case would not be disclosed in the audited financial statements. Hence, the correct interpretation is that the words "calculated from" in clause 5 require the *pro rata* portion of the profit share to be calculated with reference to the company's annual performance and not for the EBIT to be calculated from the effective date/commencement of the financial year to the date of termination. What has to be calculated for the purpose of the *pro rata* determination is the period of employment between effective date and termination and not the amount of EBIT earned in the period.

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[20] The Labour Court accordingly did not err in its interpretation of the agreement or the calculation of the amount owing.

[21] The respondent on appeal sought to introduce a new defence to the merits of the appellant's profit share claim to the effect that it was a discretionary bonus and not a contractual obligation. This constitutes a new defence that the respondent normally would not be entitled to raise for the first time on appeal, particularly as it was not covered by the pleadings, nor canvassed or investigated at the trial.[2] The defence is in any event unsustainable. The written terms of the contract unambiguously confer a contractual entitlement. Moreover, the evidence led at the trial that the profit share was a contractual obligation was not controverted. Besides, in closing argument at the trial, counsel for the respondent expressly conceded that the appellant was entitled to a portion of the profit share and that the issue to be determined was the method of calculation and quantum of the profit share claim.

[22] The respondent belatedly has sought to argue that the EBIT figure relied on by the Labour Court is not correct and that expert evidence was required to determine it. The evidence of the appellant, the respondent's erstwhile financial manager and a qualified chartered accountant, was not meaningfully challenged or controverted at the trial and was to the effect that EBIT equated to the "operating profit" figure in the financial statements, being gross profit plus other income less operating expenses. The net profit for the year is reflected as the operating profit plus investment revenue (interest received) less finance costs (interest paid) and taxation. The operating profit figure is thus the net profit before interest received, interest paid and taxation. It is the earnings before interest and taxation are taken into account – in other words EBIT. The uncontroverted evidence led at the trial is that the EBIT for the financial year ended 30 September 2009 was the figure of R29 891 845 reflected as operating profit in the audited financial statements. No attempt was made by the respondent to contradict this figure and no alternative number was put to the appellant in cross-examination. The respondent did not submit at any time that this figure was in any way inaccurate or incorrect.

[2] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para 30; *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) at para 20.

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[23] The respondent's belated submission, raised for the first time in its heads of argument filed in this appeal, is that the EBIT could conceivably be the profit before taxation figure of R14 453 450. That figure takes no account of the interest received or paid. It is the earnings before taxation, as opposed to the explicitly agreed earnings before *interest* and taxation. EBIT as contemplated in the agreement self-evidently takes account of the line items for interest without distinguishing between interest revenue and expenditure. Notes 16 and 17 to the audited financial statements describe the investment revenue figure as "interest revenue" and the finance costs figure as, *inter alia*, "other interest paid."

[24] The determination of the EBIT for the financial year is a question of fact that was not disputed during the trial. It is not an opinion held by the appellant and thus need not meet the requirements for the admission of expert evidence, as the respondent contends. No expert was required to determine the EBIT. The figure is apparent from the financial statements. Hence there is no basis for this court to exercise its powers in terms of section 174(a) of the Labour Relations Act[3] to admit further evidence and to permit the respondent an opportunity to lead expert evidence in relation to the proper interpretation of the agreement, the calculation of EBIT or the defence that the profit share was a discretionary benefit and not a contractual obligation.

[25] In the result, the cross-appeal is without merit and should be dismissed

[26] The appellant's appeal, as explained earlier, is concerned with the refusal of the Labour Court to award him interest on the judgment debt. Having held that respondent was indebted to the appellant in the amount of R461 890, the Labour Court held with regard to interest as follows:

> 'I now turn to the issue of interest. To my mind the operative words in section 1 of the Prescribed Rate of Interest Act is 'if a debt bears interest'. In other words not all debts bear interest. The only evidence before the Court is that the payment of profit share becomes due on delivery of the audited financial statements. There is no evidence that the amount earns interest. In

[3] Act 66 of 1995.

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my mind the amount was not liquidated until the Court accepted the Applicant's interpretation of clause 5. Accordingly I do not accept that the Applicant is entitled to interest from April 2010 to date of payment. There is no doubt in my mind that what the Applicant is claiming is contractual damages. He alleges breach of a contract as a result of which he suffered damages. It is trite that a claim for damages is unliquidated debt. In terms of the common law an unliquidated debt cannot carry interest. Accordingly, the claim of interest is dismissed.'

[27] The appellant submitted that the Labour Court erred in reaching the above findings for various reasons. His criticisms of this aspect of the judgment are well-founded. First of all, the appellant's profit share claim is not a damages claim arising from a breach of contract, but a claim for specific performance of the respondent's obligations in terms of clause 5 of the agreement. The appellant sought an order that the respondent pay to him money in pursuance of a contractual obligation. The claim for interest on the profit share claim is accordingly a claim for *mora* interest that commenced running when the profit share claim first became due and payable, alternatively when the appellant first made demand for payment of the profit share by serving the statement of claim on the respondent. The profit share claim is a liquidated debt. But even if the profit share claim is an unliquidated debt, then the appellant would still be entitled to *mora* interest from the date of service of the statement of claim until date of final payment by virtue of sections 2A(1) and 2(2)(a) of the Prescribed Rate of Interest Act[4] ("the Act").

[28] In terms of clause 5 of the agreement, the respondent was obliged to pay to the appellant a *pro rata* portion of the profit share by 26 April 2010. The fact that the appellant pleaded that the respondent breached the agreement by not paying him the amount owed to him does not result in the claim for payment becoming a claim for damages arising out of the breach. It remains a claim for specific performance, and not for damages.[5] The award of interest to a creditor, where the debtor is in *mora* is based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has

[4] Act 55 of 1975.
[5] *Director General, Department of Public Works v Kovac Investments* 2010 (6) SA 646 (GNP) at 648H-649A. See also RH Christie *The Law of Contract in South Africa* 5ed, p522.

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suffered as a result of not receiving his money on the due date. This loss comprises the interest on the capital sum owing over the period of *mora*.[6] The Labour Court consequently erred in finding that the profit share claim did not bear interest due to a lack of evidence in this regard as no such evidence was required. The entitlement to *mora* interest on the profit share claim flows from the applicable legal principles and normally will not require additional evidence.

[29] Section 1(1) of the 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, such interest shall be calculated at the prescribed rate 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. The prescribed interest rate for the relevant period was 15.5% per annum.[7] The Labour Court did not exercise its discretion to make an order to vary the effect of section 1 of the Act; nor did it find that any special circumstances existed that would justify such an order.

[30] The Labour Court erred in finding that the appellant's profit share claim was not liquidated until the court accepted his interpretation of clause 5. The interpretation by a court of a contract gives effect to the common intentions of the parties to it. When a court rules that a particular interpretation of a contract is correct, it is objectively determining what the common stated intention of the parties was at the time they concluded the contract. A claim for a "liquidated amount in money" is a claim for an amount ascertained or capable of speedy and prompt ascertainment.[8] The liquidity of a debt does not depend upon the ability of the party relying upon it to prove either the existence or the amount of the indebtedness but upon its actual existence. The important question is whether the factors on which the claim is based were actually in existence at the time.[9] When the amount is due upon a contract and the exact amount due

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[6] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1145D-F.
[7] GN R1814 in *GG* 15143 of 1 October 1993. The rate was recently amended to 9% with effect from 1 August 2014 with the promulgation of GNR 554 in GG 37831 of 18 July 2014. The prescribed rate of interest which applied when the debtor was placed in mora will remain applicable to that debt.
[8] *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 738F-G; *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA) at 238E-F.
[9] *Fatti's Engineering Co (Pty) Ltd* supra at 738H-I and 740C-D.

is simply a matter for calculation from figures in books, the claim is a liquidated one. The appellant's profit share claim is a liquidated debt because it was capable of speedy and prompt ascertainment by means of a simple arithmetical calculation as soon as the audited financial statements became available. The respondent was in possession of its audited financial statements from 26 March 2010. Hence, the quantum of the appellant's profit share claim was ascertainable by means of a simple arithmetical calculation on this date.

[31] But even had the claim been one for unliquidated damages, the appellant would still have been entitled to interest. At common law an unliquidated debt does not bear interest, but legislation can decree that it does.[10] The common law position was altered by section 2A of the Act in relation to unliquidated debts with effect from 11 April 1997. Section 2A(1) of the Act provides that the amount of every unliquidated debt as determined by a court of law shall bear interest at the prescribed rate. Section 2A(2)(a) of the Act provides that the interest contemplated in section 2A(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. In *David Trust and Others v Aegis Insurance Co Ltd and Others,*[11] the SCA remarked on the effect of section 2A of the Act as follows:

> 'Prior to 1997 the plaintiffs would have been entitled to claim mora interest only from the date of judgment. With effect from 11 April 1997 the Prescribed Rate of Interest Amendment Act 7 of 1997 (which amended the Prescribed Rate of Interest Act 55 of 1975), sanctioned, inter alia, the recovery of mora interest on amounts awarded by a court which, but for such award, were unliquidated. Once judgment is granted such interest 'shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, which ever date is the earlier.' The word 'demand' in s2A(2)(a) is defined to mean a written demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the quantum thereof.'

[10] *Adampol (Pty) Ltd v Administrator Transvaal* 1989 (3) SA 800 (A).
[11] 2000 (3) SA 289 (SCA) at 303H-304E, paragraph 39.

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[32] The appellant demanded payment of the profit share claim during April 2010 when his statement of claim was served on the respondent (i.e. some time before 1 May 2010). The appellant's statement of claim meets the definition of 'demand as it sets out the claim in such a manner that it enabled the respondent to reasonably assess the quantum thereof. For these reasons, were it an unliquidated claim the appellant would be entitled to interest on the profit share claim at the prescribed rate of interest from 1 May 2010 until date of final payment.

[33] The respondent has endeavoured to rely on section 2A(5) of the Act which empowers a court to 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. It argued that the Labour Court exercised this discretion in refusing to grant interest and had done so judicially. That is factually incorrect. The Labour Court clearly misconstrued the provisions of the applicable law. It assumed incorrectly that it is not permissible to award interest in relation to an unliquidated debt. In any event, the debt in question here was, as I have found, a liquidated debt. Moreover, no case was made out in the court below for the imposition of a rate of interest below the prescribed rate.

[34] The Labour Court was of the opinion that the appellant was entitled to his costs because he had been substantially successful. I see no reason to interfere with that order. The respondent abandoned most of its defences during the trial and the appellant succeeded on his main claims. I am further of the view that the appellant is entitled to his costs on appeal.

[35] In the premises, the following orders are made:

35.1 The appeal is upheld and the order of the Labour Court is varied and substituted as follows:

"i) The respondent is ordered to pay the applicant the amount of R461 890 together with interest on this amount at the prescribed rate of 15.5% per annum from 26 April 2010 to the date of final payment.

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ii) The respondent is ordered to pay the applicant the amount of R13 290.79 together with interest at the rate of 15.5% calculated from 30 March 2010 to date of final payment.

iii) The respondent is ordered to pay the costs of the application."

35.2 The cross-appeal is dismissed.

35.3 The respondent is ordered to pay the costs of the appeal and the cross-appeal.

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JR Murphy AJA

I agree

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Waglay JP

I agree

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Dlodlo AJA

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APPEARANCES:

FOR THE APPELLANT: Adv GJA Cross

Instructed by Gordon Holtman Attorneys

FOR THE RESPONDENT: Adv K Lapham

Instructed by Schindlers Attorneys

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