REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: JS 986/10

In the matter between:

GRETA JOANNE SMART **Applicant**

and

BYTES MANAGED SOLUTIONS, a Division of BYTES TECHNOLOGY GROUP OF SOUTH AFRICA (PTY) LTD **Respondent**

Summary: (Application for leave to appeal – application to determine interest refused – such would amount to an impermissible variation of the judgment on a substantive matter when the court was functus officio on all issues except the determination of the quantum of the principle debt - leave to appeal refused)

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LAGRANGE, J

[1] In my judgment in this matter handed down on 29 April 2013, the substantive portion of the order read:

"[45] The respondent is ordered to pay the applicant the difference between the actual payment made to her for being on standby duty and for overtime worked and what she would have received had the formulas in 44.1 and 44.2 being applied, for the period commencing 8 December 2007 and ending 31 July 2010.

[46] The parties are directed to seek consensus on the amount due to the applicant in terms of paragraph [45] above within 15 days of the date of this order, and any amount so agreed upon in writing must be paid to the applicant within 15 days thereafter, unless the parties agree in writing to extend the payment period to another specified date.

[47] In the event the parties are unable to agree on the amount due to the applicant in terms of paragraph [45] above, either party may refer the determination of the amount to this Court, subject to such directions the Court might make as to the procedure to be adopted."

[2] No award of interest was made nor did the applicant seek such relief in her referral. It was also not recorded as a matter to be determined by the court in the pre-trial minute. The parties were able to agree on the amount specified in paragraph [45] above, but could not agree on the question of interest payable thereon.

[3] The applicant approached the court with the following request in an email dated 11 June 2013, which encapsulated the unresolved issue between the parties in the following terms:

"In terms of paragraph 46 of the judgement, the parties were directed to seek consensus on the amount due to my client, but have been unable to do so. The sticking point is <u>whether or not interest is due and payable</u> on the standby and overtime amounts ordered to be paid in terms of paragraph 45 of the judgement, <u>as provided for in terms of section 75 of the Basic Conditions of Employment Act</u>."

(emphasis added)

[4] The parties were invited to make submissions on the court's proposal to determine the outstanding matter of interest payable on the under-payments in paragraph [45] of the judgment. After considering the submissions, I made a ruling on 10 March 2014 that the court could not determine the interest due

because that was not an issue that had been reserved for determination under paragraph [47] of the judgment in the event the parties could not agree on it. I held that the court was *functus officio* in respect of any other issues falling outside the ambit of paragraph [45].

[5] The applicant now wishes to appeal against this ruling on the following grounds:

5.1 The Court should have found that the section 75[1] of the Basic Conditions of Employment Act 75 of 1997 ('the BCEA') operates *ex lege* and that interest ran from the date when the unpaid overtime and standby allowance was due.

5.2 The Court should have amplified the judgment by including an award of interest under its powers to vary the judgment in section 165 of the Labour Relations Act, 66 of 1995. In terms of the Court's power to vary the order it could supplement it by making an award of interest because this was an accessory or consequential matter overlooked or inadvertently omitted.

[6] The respondent contends in effect that:

6.1 The payment of standby and overtime due to the applicant were not amounts due and payable under the BCEA but under her contract. Accordingly the determination of interest in terms s 75 of the BCEA does not apply and, presumably, interest would be payable on those amounts only on ordinary contractual principles.

6.2 As there is no automatic accrual of interest due in terms of s 75 of the BCEA, in respect of the applicant's standby allowance and there was no claim for payment of interest before the Court, the Court cannot by means of varying its judgment under s 165, supplement the substantive relief already awarded to the applicant in the judgment.

[1] Section 75 states: *"An employer must pay interest on any amount due and payable in terms of this Act at the rate of interest prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), to any person to whom a payment should have been made."*

Evaluation

[7] The essential question remains whether or not the Court had a discretion to vary the judgment by making an additional award of interest. Even if s 75 of the BCEA does determine when interest is due and payable in respect of the applicant's overtime pay, the applicant had not sought any order for the payment thereof as part of the relief in the proceedings, nor for the payment of interest from the date on which she first demanded payment. I am not persuaded that the Court omitted or overlooked a claim for payment of interest: on the contrary, that claim was never placed before it and was only raised for the first time when the applicant sought to raise it afresh after judgment was handed down.

[8] It may be that s 75 determines liability for payment of interest if that section applies, but the claim for that interest payable in reliance on that section should still be pleaded in the relief sought as it is a distinct debt separate from the capital amount *albeit* contingent on that principal debt.[2] It is also necessary for the respondent party to have forewarning of the extent of the claims against it.

[9] The applicant could have applied at any time prior to judgment for leave to amend her statement of claim to remedy the absence of a prayer for payment of interest. If I had ordered the payment of interest by way of the ruling the applicant sought after judgment was handed down, it would have been tantamount to permitting a tacit amendment of the applicant's statement of claim to the prejudice of the respondent.[3]

[10] I am not persuaded on the basis of the authorities that it is a reasonable possibility that another Court would come to a different conclusion on whether

[2] See ***Wedge Steel (Pty) Ltd V Wepener* 1991 (3) SA 444 (W)** at 446F-I

[3] See ***Northern Burglar Proof Gate and Fence Co Ltd v Venite Construction (Pty) Ltd* 1977 (1) SA 708 (W)** on the need to plead claims for interest and costs. See also **Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)** at 692A-E in which applications by the respondent on appeal for an order that the appellant should pay interest on the principal debt from the date of the judgment of the court a quo and an order that that the appellant should pay interest from the date of the judgment on appeal were dismissed as they would amount to impermissible variations of the judgment of the court a quo to the detriment of the appellant.

the Court had authority to decide a claim for interest on the principle debt in the circumstances of this case.

Order

[11] In light of the above, the application for leave to appeal against the Court's ruling of 10 March 2014 is dismissed with costs.

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R LAGRANGE, J

Judge of the Labour Court

(In chambers)

Date issued: 25 June 2014