THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 29/2010

SCOIN TRADING (PTY) LIMITED **Appellant**

and

BERNSTEIN, GILLIES MARTIN NO **Respondent**

Neutral citation: *Scoin Trading v Bernstein* (29/10) [2010] ZASCA 160 (1 December 2010)

Coram: HARMS DP and SNYDERS JA and K PILLAY AJA

Heard: **19 November 2010**
Delivered: **1 December 2010**

Summary: Breach of contract ─ death of debtor does not affect liability for interest.

ORDER

On appeal from: KwaZulu-Natal High Court (Durban) (Van Heerden AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The following order is inserted into paragraph 1 of the order of the court below:

'The respondent is also directed to make payment of interest on the sum of R1, 750m at the rate of 15, 5 per cent per annum from 1 January 2008 to date of payment.'

3 Paragraph 2 of the aforesaid order is replaced with the following:

'The respondent is directed to pay the applicant's costs of suit.'

JUDGMENT

K PILLAY AJA (HARMS DP and SNYDERS JJA concurring)

[1] This is an appeal from the KwaZulu-Natal High Court (Durban), Van Heerden AJ sitting as court of first instance. The appellant launched an application for payment of the balance of the purchase price of a ZAR Een Pond Overstamp gold coin together with interest at the rate of 15,5 per cent per annum from 1 January 2008 to date of payment against delivery of the coin. The court below granted the claim for the balance of the purchase price but refused the claim for interest. The matter is before us with the leave of the court below.

[2] Gregory John Till (the deceased) was an avid coin collector who purchased a number of gold coins and medallions from the appellant, Scoin Trading (Pty) Ltd, a company dealing in gold coins and similar items. During August 2007 the appellant had a rare ZAR Een Pond Overstamp gold coin ('the coin') available for sale. The deceased entered into negotiations with the appellant to buy the coin.

[3] They agreed on a purchase price of R1, 950m. The deceased paid a deposit of R200 000 and agreed to pay the balance by the end of the year. There is some dispute (which I shall deal with later) on whether it was agreed that the balance had to be paid by the end of December 2007 or when the proceeds from the sale of certain property became available.

[4] The deceased died on 16 November 2007. The respondent was appointed executor of the deceased's estate. He acknowledged liability for the balance of the purchase price of the coin but disputed liability for interest.

[5] This resulted in the appellant applying to the court below for judgment for the balance of the purchase price together with interest at 15, 5 per cent per annum against delivery of the coin. The court granted judgment for the capital sum but dismissed with costs the claim for interest. Leave to appeal was granted to this court by Van Heerden AJ.

[6] The only issue in this appeal is the liability of the estate of the deceased for the payment of interest. The issue is dependent upon two aspects, one factual and one legal. First, the parties disagreed on whether payment of the balance of the purchase price had to be made by 31 December or when the proceeds of a sale of property by the deceased

became available to him. Second, the effect of the death of the debtor on the consequences of *mora* was in issue.

[7] Sometime in August 2007 the deceased was informed that the coin had become available. He did not have the full amount available to pay for the coin. Mr Sham, the appellant's sales manager was prepared to accept a deposit and the balance later. This was conveyed in an e-mail on 27 August 2007 that reads as follows:

'Please could you set up a proposal or offer, regarding the 99 over stamp. I believe that management are looking for a deposit of at least 10 % and an idea of when or how you would be able to pay the outstanding balance. E.G: on the amount of R1, 950 000-00, a deposit of R200 000-00 and the outstanding balance to be paid over a period of three months, or within a three month period.'

The response from the deceased to this suggestion was:

'A down payment of R200 000-00 will be paid into your bank account today. Greg has liquidated a property portfolio which should all be done and dusted by the end of December. This has in the interim left him a little cash strapped. He is expecting the R60 million for the properties by the end of the year at which stage he will be able to pay the balance.'

This offer was accepted.

[8] The respondent contends that the words used in the e-mail dated 27 August 2007 mean that what the deceased was offering was not definite payment by 31 December, but rather payment from a stipulated source, namely the proceeds of the realisation of a property portfolio. Simply put, the trigger event for payment was said to be the receipt of the aforesaid proceeds.

[9] This construction is untenable. It is clear from the first e-mail that payment had to be made either over three months or within a three month

period. In response payment was not made conditional upon the sale of property, but promised by the ‘end of December’ or ‘the end of the year’. There is therefore no basis for rejecting the appellant’s submission that it was a term of the agreement that payment was to be made by the end of December.

[10] I turn now to the second issue. The respondent made two primary submissions. First, that the deceased was not at fault in failing to make payment of the balance of the purchase price, by reason of his dying before the debt became payable, and therefore was not liable to pay *mora* interest. Second, that the death of the deceased made performance impossible.

[11] The starting point is therefore an examination of the meaning of mora. The term *mora* simply means delay or default.[1] This concept is employed when the consequences of a failure to perform a contractual obligation within the agreed time are determined.[2] The date may be stipulated either expressly or tacitly and there must be certainty as to when it will arrive.[3] Thus, when the contract fixes the time for performance, *mora* (*mora ex re*) arises from the contract itself and no demand (*interpellatio*) is necessary to place the debtor in *mora*. The fixed time, figuratively, makes the demand that would otherwise have had to be made by the creditor.

[12] In contrast where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand *(interpellatio*) becomes necessary to put the debtor in *mora.* This is

[1]Wessels *Law of Contract in South Africa* vol 2 2ed 1951 para 2857 at p 777.
[2]RH Christie *The Law of Contract in South Africa* 5ed (2006) p 544.
[3]5(1) *LAWSA* 2ed para 220 at 298.

referred to as *mora ex persona*. The debtor does not necessarily fall into *mora* if he or she does not perform immediately or within a reasonable time. In this situation *mora* arises only upon failure by the debtor to comply with a valid demand by the creditor. *Mora ex persona* is so referred as it requires an act of a person (the creditor) to bring it into existence.[4]

[13] In this case it has been established that the date agreed for the payment of the balance of the purchase price was 31 December and that the debt was not paid on this date. This is therefore a situation where *mora ex re* applies.

[14] If a debtor's obligation is to pay a sum of money on a stipulated date and he is in *mora* in that he failed to perform on or before the time agreed upon, the damages that flow naturally from such failure will be interest a *tempore morae* or *mora* interest. The purpose of *mora* interest is to place the creditor in the position he would have been if the debtor had performed in terms of the undertaking. This notion was more fully explained in *Bellairs v Hodnett*:[5]

'It may be accepted that the award of interest to a creditor, where his debtor is in *mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date. . . This loss is assessed on the basis of allowing interest on the capital sum owing over the period of *mora*. . . Admittedly, it is pointed out by Steyn, *Mora Debitoris*, p 86, that there were differences of opinion among the writers on Roman-Dutch law on the question as to whether *mora* interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show

[4] 5(1) *LAWSA* para 222 at 301.
[5] 1978 (1) SA 1109 (A) at 1145D-G.

that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasised by CENTLIVRES, CJ, in *Linton v Corser*, 1952 (3) SA 685 (AD) at p 695, interest is today the "lifeblood of finance" and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.'

[15] It was submitted before this court by counsel for the respondent that to be in *mora*, failure to perform must be due to the *culpa* of the debtor and that *mora i*s referred to as the 'wrongful delay or default' in making payment or the failure without lawful excuse to perform timeously.[6]

[16] This argument found favour with the court below for the learned judge after considering the decisions in, inter alia, *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*[7] and *RB Ranchers (Pvt) Limited v McLean's Estate & another*[8] held:

'. . . it is, in my view, trite that in a contractual context an entitlement to *mora* interest presupposes some form of culpability attaching to the debtor's conduct, and more specifically his failure to pay by the stipulated date. Mora interest is, as Mr King submitted, based upon the concept of default which encompasses the notion that the debtor was capable of making payment on due date, but failed to do so. It is a damages claim which arises from wrongful conduct.'

And further:

'In the present matter the deceased died before his indebtedness became payable. . . . Mr King submitted, on behalf of the respondent, that the requirement of culpability is obviously absent in the case of the premature death (before due date of the indebtedness) of the deceased in the present matter and that accordingly the deceased cannot be blamed for such non payment. I must say that Mr King's submissions seem

[6]Respondents Heads para 4.2 at pg 6.
[7]1915 AD 1.
[8]1986 (4) SA 271 (ZS).

to me to have merit, founded in logic. In my view the deceased cannot be said to have breached the contract, nor can it be said that his death was a wrongful or culpable act such as to constitute a breach of contract. That being the case there is in my view no basis in law to find that the deceased is liable to pay damages (*mora* interest) to the applicant.'

[17] This approach is erroneous. That *mora* interest is sometimes regarded as a kind of penalty for a failure to pay on due date does not mean that the breach of contract is a delict or that a breach of contract is only established if the debtor acted 'wrongfully' or 'culpably'.

[18] It requires emphasis that unlike damages for delict, in cases of breach of contract, damages are not intended to recompense the innocent party for their loss, but to put them in the position in which they would have been if the contract had been properly performed.[9]

[19] This difference between contractual and delictual damages was succinctly stated in *Trotman v Edwick*[10] as follows:

'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.'

[20] As correctly submitted by counsel for the appellant, contractual damages do not depend on fault. All that the creditor is required to prove is that the debtor is in *mora*. It is not necessary to prove any fault on the part of the debtor.[11] The court below relied on the following statement in

[9] RH Christie *The Law of Contract* in South Africa 5ed (2006) p 544.
[10] 1951 (1) SA 443 (A) at 449B-C.
[11] *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 (1) SA 584 (T) at 587F.

Victoria Falls[12] to support his view that some form of wrongful conduct was required of the debtor before he could be said to be in mora:

'Speaking generally, the liability of a debtor for interest under the civil law depended (apart from agreement) upon whether he was in *mora. Mora* was a wrongful default in making (or accepting) payment or delivery-*Moram vocamus injustam restitutionis solutionisveaut faciendae aut accipiendae cessationem*. (Mulenbruch,Vol II sec.355). It was of two kinds, *mora* ex re, arising out of the transaction itself, and *mora* ex *persona* arising out of the conduct of the debtor.'

In that case the court had to consider whether a plaintiff was entitled to interest on unliquidated damages from the date of summons. It held not, because the debtor can only be in *mora* if he knows what the debt is that he has to pay. Without such knowledge the failure cannot be 'wrongful'. Counsel for the appellant, submitted correctly, in my view, that seen in its context the court did not intend to hold that a failure to make payment had to be culpable before interest would run but that the word wrongful or *injustam* (the Latin translation of the word wrongful) referred to in the judgment meant simply that the debtor had failed to pay without legal justification.

[21] The facts in *RB Ranchers* may be compared to the facts extant herein. The purchaser 'M' bought cattle from the seller and posted a cheque in favour of the seller for the amount due. 'M' died a few days later. The cheque was presented for payment on the day of M's death. The bank, which had been notified of M's death refused payment of the cheque. The applicant lodged a claim against the executor in M's estate for the payment due. This was paid two years later. The seller then claimed payment of interest on the selling price from date of sale until date of payment. The court dismissed the claim for interest. However, as correctly submitted by counsel for the appellant, the court's decision was

[12]Supra page 31.

based on the following three issues. Firstly, whether it was an implied term of the agreement of sale that in the event of the money not being paid in cash immediately, the purchaser would become liable for interest on the outstanding amount. The court found, after considering various authorities, that no such term could be implied. Secondly, whether purchaser was liable for damages for breach of contract for failure to pay cash immediately. Here the court concluded that it was conceded that there was no contract to pay cash immediately. Thirdly, whether the drawer of the cheque was liable in terms of s 46(1)(a) and s 56(a) of the Bills of Exchange Act Chap 277 (Z) for 'interest/damages'. The court rejected this contention on its interpretation of the aforesaid Act. It is clear from the above that the said case was decided on issues that do not apply to the present case.

[22] The further point raised by counsel for the respondent was that the death of the deceased was an instance of *casus fortuitus* which amounted to supervening impossibility of performance, thus excusing the deceased from payment by 31 December. This submission is untenable. The law does not regard mere personal incapability to perform as constituting impossibility.[13] The payment of the debt is not rendered impossible by the death of the deceased; as performance of a personal nature like singing in an opera would have been.

[23] Section 35 (12) of the Administration of Estates Act No. 66 of 1965 obliges an executor to pay creditors and distribute the estate to its heirs only once a Liquidation and Distribution Account has lain for inspection and has been confirmed by the Master. Except for the risk of personal

[13]WA Ramsden *Supervening Impossibility of Performance in the South African law of Contract* (1985) p 17.

liability if he overpays, it is not unlawful for an executor to pay a creditor's claim before the confirmation of such account.

[24] The court in the *RB Ranchers*' matter found that the applicant's rights against the executor are, as set out, in Meyerowitz[14] which reads:

'Unless the claim carries interest, the creditor will not be entitled to interest between the date of death and payment of the claim, except for the period after the executor becomes obliged to pay and the creditor has demanded payment, ie the executor is put in *mora*.'

[25] The court concluded that the only basis upon which a claim for interest could succeed in that matter was on the basis that the executor wrongfully or culpably delayed payment, for which no foundation was laid in the papers. In the present matter the claim is one which carries interest. The creditor is therefore entitled to interest from the date of *mora* to the date of payment of the debt.

[26] Christie[15] states appropriately:

'The question, of course, is whether any particular contract is enforceable by and against the estate (represented by the executor) or whether the deceased's death discharged it without liability on either side by a process akin to supervening impossibility. The question may be answered by the contract itself, which may expressly provide for its discharge on the death of one or either of the parties, or may bind the executor to perform or may make some other special provision. Failing such express provision the nature of the rights and duties arising from the contract must be examined, together with the surrounding circumstances, in order to see whether there is any indication of a *delectus personae* or an intention that the rights and duties should not be transmitted by death. In the absence of any such indication the general principle is that they are so transmitted and are enforceable by or against the executor.'

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[14] *Administration of Estates and Estate Duty* 2007ed s 16.3 at 219.
[15] Op cit pp 493-494.

[27] The argument that the deceased's estate is not liable for *mora* interest, on the facts of the present case, is in any event self-defeating as the respondent conceded liability for the balance of the purchase price, despite the death of the deceased. The executor as administrator of the estate is obliged to pay the debt. Part of the debt is the interest. There was no need for the appellant to have entered into an agreement with the deceased that his estate would be liable for interest as was required by the court below. The duty to pay interest arose from the contract itself and the failure to perform on due date.

[28] In this case the time fixed for performance of the contract was 31 December 2007. Payment was not made on that date. The agreement that bound the deceased's estate was for payment by 31 December and the consequences of *mora*, the liability to pay interest, commenced the next day.

[29] I accordingly find that the appellant is entitled to interest *a tempore morae* on the outstanding balance of the debt. The *mora* rate of interest is governed by the Prescribed Rate of Interest Act 55 of 1975. It is not in dispute that the current prescribed rate of interest is 15,5 per cent per annum.

[30] In the circumstances the following order is made:

1 The appeal is upheld with costs.

2 The following order is inserted into paragraph 1 of the order of the court below:

‘The respondent is also directed to make payment of interest on the sum of R1, 750m at the rate of 15,5 per cent per annum from 1 January 2008 to date of payment.’

3. Paragraph 2 of the aforesaid order is replaced with the following:

‘The respondent is directed to pay the applicant’s costs of suit.’

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K Pillay
Acting Judge of Appeal

APPEARANCES:

APPELLANT: N Segal

	Instructed by Gary Segal Attorneys, c/o TC Mehta & Co, Durban Lovius Block, Bloemfontein
RESPONDENT:	JC King SC Instructed by Goodrickes Attorneys, Durban Symington & De Kok, Bloemfontein