THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 590/2011

CROOKES BROTHERS LIMITED — Appellant

and

REGIONAL LAND CLAIMS COMMISSION FOR THE PROVINCE OF MPUMALANGA — First Respondent

THE NATIONAL DEPARTMENT OF LAND AFFAIRS — Second Respondent

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA — Third Respondent

Neutral citation**:** *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga & others* (590/2011) [2012] ZASCA 128 (21 September 2012)

BENCH: CLOETE, PONNAN, CACHALIA, WALLIS JJA and SOUTHWOOD AJA

HEARD: 24 AUGUST 2012

DELIVERED: 21 SEPTEMBER 2012

CORRECTED:

SUMMARY: Contract – interpretation of - sale of immovable properties – claim for mora interest on purchase price.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Sapire AJ sitting as court of first instance).

(a) The appeal succeeds with costs to be paid jointly and severally by the respondents.

(b) The order of the court below is set aside to be replaced with:

'The respondents are ordered jointly and severally to pay to the applicant:

(i) the sum of R22 761 643,85;

(ii) interest on the sum of R22 761 643,85 at the rate of 15.5% per annum from 6 July 2010 to date of payment;

(iii) costs of suit including those of two counsel where employed.'

JUDGMENT

PONNAN JA (CLOETE, CACHALIA, WALLIS JJA and SOUTHWOOD AJA concurring):

[1] Interest, which Centlivres CJ described as 'the life-blood of finance' (*Linton v Corser* (1952 (3) SA 685 (A) at 695G), is what this appeal is about. The appellant, Crookes Brothers Limited, a public company, seeks payment of *mora* interest on the purchase price of certain immovable properties sold by it to the third respondent, the Government of the Republic of South Africa as represented by the first respondent, the Regional Land Claims Commission for the Province of Mpumalanga and the second respondent, the National Department of Land Affairs.

[2] The appellant was the owner of a number of farms situated in the Province of Mpumalanga, which formed the subject matter of land claims by various communities in terms of the Restitution of Land Rights Act 22 of 1994. Whilst the litigation was pending before the Land Claims Court and those who held legitimate claims to those properties were yet to be determined, negotiations occurred over an extended period between representatives of the appellant, on the one hand, and the respondents, on the other, which culminated on 8 April 2009 in the conclusion of a written agreement of sale in respect of some 15 properties for the aggregate purchase price of R200 million.

[3] Material terms of the agreement were:

'3.2 The purchase price shall be paid into the Designated Account by electronic funds transfer during normal banking hours by no later than the 10th (tenth) succeeding day after the Transfer Date.

...

4.1 Within 14 (fourteen) days of written request by the Conveyancers, which request shall only be made when the documents required for the transfer of the Properties are ready to be lodged with the Deeds Registry, office of the Mpumalanga Province, the Purchaser shall furnish to the Conveyancers a written undertaking from the Chief Land Claims Commissioner in the form of an undertaking contained in Annexure A in terms of which the Purchaser undertakes to pay the purchase price into the Designated Account by no later than the 10th (tenth) succeeding day after the Transfer Date.

...

6. MORA INTEREST

Should any part of the purchase price not be paid by the Purchaser to the Seller on the date on which it is due in terms of this Agreement, the Purchaser shall be liable for payment of interest to the Seller on such amount outstanding at the rate of interest (presently 15.5% per annum) prescribed from time to time in terms of the Prescribed Rate of Interest Act, No 55 of 1975 (as amended), which will be calculated from date of default to date of payment. Such interest shall be in addition to, and not in substitution for, the rights accorded to the Seller elsewhere in this Agreement.

...

9.1 The Seller shall, subject to payment of the purchase price in full, grant to the State/Purchaser occupation and possession of the Properties on the Transfer Date, it being recorded that after the Transfer Date the Properties shall be let to CBL Agri Services (Pty) Ltd in terms of the Lease Agreement

...

9.3 The Seller shall be entitled to all operational income accrued from the Properties up to the date of full payment of the purchase price to the Seller.

...

9.5 Ownership of and all rights and obligations, together with the benefit in and risks, attaching to the Properties shall pass to the State on the Transfer Date, from when onwards the Properties shall be at the sole risk, loss or profit of the State.

...

16.2 The registration of transfer of the Properties shall take place as soon as reasonably possible after the Signature Date.

...

18. DEFAULT

In the event of any Party committing a breach of this Agreement or being otherwise in default of the terms and conditions hereof, and remaining in default after being given 14 (fourteen) days notice in writing within which to rectify such default, the aggrieved Party shall be entitled to enforce the terms and conditions of this Agreement and sue for specific performance and any damages suffered, or to cancel this Agreement, in either event, any action taken by the Parties shall be without prejudice to their rights to claim damages arising from such default, or to any other rights the Parties may have under the common law, or otherwise. On cancellation of this Agreement, the Purchaser shall be obliged to forthwith restore possession of Properties to the Seller.'

[4] The agreement envisaged that the properties would be purchased by the second respondent and registered in the name of the third respondent for the ultimate benefit of the various communities who in due course would have emerged as having established a valid claim to one or more of the properties. Pending that determination, the properties were to be leased to a subsidiary of the appellant, CBL Agri Services (Pty) Ltd, for the purposes of farming sugar cane and subtropical fruit. The lease, which was to

commence on the date of registration of transfer, was to endure for a period of five years at an agreed rental of R2 million per annum escalating annually at 7%.

[5] Pursuant to the agreement the conveyancing attorney prepared all such documents as were necessary to be lodged with the Deeds Registry, Mpumalanga, to cause transfer of the properties to be effected into the name of the respondents. On 14 August 2009 the conveyancer despatched a letter (Annexure ‘GC3’ to the applicant’s founding affidavit) to the chosen *domicilium citandi et executandi* of the respondents, being the Office of the Chief Land Claims Commissioner of the Department of Land Affairs, informing them that all the documents necessary to cause transfer of the properties were ready for lodgment with the Deeds Registry and they were accordingly requested to furnish the written undertaking within 14 days as contemplated by clause 4.1 of the agreement. That letter, which went on to threaten the institution of a claim for specific performance and *mora* interest (computed at R84 931 per day), went unanswered. On 7 September 2009 a further letter was addressed to the respondents by the conveyancing attorney. It informed the respondents that they were in breach of their obligations under the agreement and afforded them an opportunity to remedy the breach within 14 days. That letter elicited a response from the Chief Land Claims Commissioner dated 13 September 2009, which stated: '[w]e are currently facing severe funding constraints and are not in a position to make an undertaking for payment of the agreed purchase price'. On 15 October 2009, yet a further letter was despatched by the conveyancing attorney to the Chief Lands Claims Commissioner. It set out the history of the matter and in compliance with s 4 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, gave notice of the appellant's intention to institute legal proceedings against the respondents for payment of the sum of R 200 million (against a tender to transfer the properties into the name of the respondents), *mora* interest, damages and costs.

[6] Notwithstanding having given formal notice of its intention to institute legal proceedings and it having become entitled to do so by 31 January 2010, the appellant

held off until May of that year when it launched an application in the North Gauteng High Court in which it sought the following orders:

'1. Directing the Respondents to provide the Applicant with an original and duly signed [letter of undertaking] within SEVEN (7) days of the date of this order.

2. Declaring that the Second and Third Respondents are liable for and indebted to the Applicant for the payment of interest at the rate of 15.5% per annum (or such other rate as may in future be prescribed under the Prescribed Rate of Interest Act 55 of 1975 corresponding from that time to such changed rate) on the amount of R200 million from 6 October 2009 to date of payment; alternatively.

3. Declaring that the Second and Third Respondents are liable and indebted to the Applicant for payment of interest at the rate mentioned in paragraph 2 above on the amount of R200 million from 5 September 2009 until the date of the provision of the guarantee mentioned in paragraph 1 above on the basis of the Respondents' breach of their obligation to provide such guarantee.

. . .

5. Directing the Second and Third Respondents to pay the Applicant's costs.’

[7] That application was opposed by the respondents. However, on 15 June 2010, the Chief Land Claims Commissioner, acting on behalf of the respondents, furnished the undertakings sought by the appellant. The registration and transfer of the properties was thereafter effected and the purchase price of R200 million was paid into the trust account of the conveyancing attorney on 5 July 2010.

[8] That left unresolved the relief sought in respect of interest. In support of the appellant’s entitlement to that relief, Mr Guy Stanley Clarke, its managing director, deposed to a supplementary affidavit, the material portion of which reads:

‘5.

5.1 Annexure "GC3" to the Applicant's founding affidavit is a formal demand, served on the Respondents on 17 August 2009 which placed the Respondents on terms to perform their obligations under the sale agreement within 14 days.

6.

6.1 In terms of the sale agreement (clause 1.1.6 of Annexure "GC1" to the applicant's founding affidavit), "*day*" means any day excluding a Saturday, Sunday or public holiday.

Hence, the last day for compliance by the Respondents with Annexure "GC3" to the Applicant's founding affidavit, was Friday 4 September 2009.

7.

7.1 Assuming that the undertaking had been provided on that date, and allowing a reasonable period of 14 days for lodgment of the transfer documents and for the subsequent registration of the transfer, such transfer would have been registered by not later than 25 September 2009. Had this occurred, and bearing in mind that the Respondents had a further 10 days after registration of transfer within which to pay, the purchase price of R200 000 000,00 would have been received by not later than 9 October 2009.

8.

8.1 As a matter of fact, as a result of the Respondents' initial failure to adhere to the sale agreement and their subsequent failure to comply with the notice (Annexure "GC3") the purchase price was only paid on 5 July 2010. I wish to point out that in fact the lodgment of the transfer documents and the subsequent transfer of the property took a matter of only a few days. However I have been advised that 14 days is a reasonable period of time to allow for the process of lodgment of transfer documents and the subsequent registration of transfer. The Applicant has thus given the Respondents the benefits of the doubt by adhering, in its calculations of the dates set out above, to that 14 day period.

9.

9.1 I am advised, that, in the result, the Applicant is entitled to *mora* interest at 15.5% per annum calculated on the purchase price of R200-million from 10 October 2009, being the date on which payment ought to have taken place, had the Respondents complied with the notice contained in Annexure "GC3" to the founding affidavit, to 5 July 2010, when payment was in fact received.

10.

10.1 According to my calculations, the interest for the period 10 October 2009, calculated on the basis aforesaid, amounts to R22 761 643,85.

11.

11.1 I am also advised that the Applicant is entitled to further interest on the amount of R22 761 643,85 at the *mora* rate of 15.5% per annum from 6 July 2010 to date of payment.

12.

12.1 I am advised that at the hearing of this matter an amended order prayed will be presented to this Honourable Court, in terms of which the Applicant will seek an order for:-

12.1.1 payment of the sum of R22 761 643,85.

12.1.2 payment of interest on the sum of R22 761 643,85 at 15.5% per annum from 6 July 2010 to date of payment;

12.1.3 costs of suit.'

[9] The response that the supplementary affidavit elicited from Ms Itumeleng Sarah Seboka, the acting Regional Land Claims Commissioner for the Province of Mpumalanga, was:

'42.

AD PARAGRAPHS 5 AND 6 THEREOF:

Save to admit demand, it is highlighted that the State was not in a position to furnish an undertaking due to a lack of funds.

43.

AD PARAGRAPH 7 THEREOF:

The contents of this paragraph call for legal argument that will be made during the hearing of this matter. I however wish to highlight that the issue of interest only arises in terms of clause 6 read with clause 3.2 which were duly complied with.

44.

AD PARAGRAPH 8 THEREOF:

Save to admit that the purchase price was paid on 05 July 2010, the rest of the contents of this paragraph call for speculation and are therefore denied.

45.

AD PARAGRAPHS 9, 10 AND 11 THEREOF:

The contents of these paragraphs are denied.

46.

AD PARAGRAPH 12 THEREOF:

I note the intended amendment to the notice of motion and wish to state that such amendment is not proper and will be opposed. The applicants should use the rules of the above Honourable Court regulating amendments.'

[10] The matter came before Sapire AJ, who dismissed the application and ordered the appellant 'to pay the Respondents' costs, incurred after the Respondents complied with their contractual obligations including those attendant on the briefing of two counsel', but granted leave to the appellant to appeal to this court. In arriving at that conclusion the learned acting judge reasoned:

'Applicant's claim is really one for damages arising, from the Respondents' breach of contract in failing timeously to provide the undertaking without which transfer could not be given.

The Respondents' obligation in terms of clause 4.1 of the Agreement was to furnish the written undertaking within 14 (FOURTEEN) days of being called upon to do so. The Respondents persisted in the delay until the application for specific performance was pending.

The claim made by the Applicant is for interest on the purchase price calculated from the date upon which the undertaking was to have been furnished until the date it was in fact furnished. The question arises whether this is the appropriate measure of damages in the present instance.

The damages to which an injured party is entitled on breach of contract is the amount required to place that party in the same financial condition as it would have been had the contract been properly and timeously performed.

Where the breached obligation is to pay money on a determined or determinable date and there are no circumstances affecting the determination of damages other than the lapse of time, the interest may well be the proper measure. The agreement presently under consideration has a specific provision for the consequences of a breach by the purchaser in failing to pay the purchase price on due date, that is within 10 days of transfer. The payment of mora interest is stipulated as the appropriate and applicable penalty.

This stipulation does not apply where the breach is a delay by the purchaser in furnishing the undertaking to make payment after transfer. Rightly so, for until transfer the seller remains the owner, and in possession of the property, and as such entitled to the enjoyment of the property and its fruits.

It would be wrong in the present instance to ignore the circumstances in which the Agreement was entered into, especially the terms of the collateral Lease which in effect entitled the Applicant to remain in occupation not only until transfer but, through its subsidiary, for the period provided for in the Lease. Rental in terms of the lease did not become payable until transfer had been effected.

Counsel for the Applicant argued that this was not a relevant circumstance because the Lessee was a different persona to the Applicant.

This contention cannot be sustained. It was the Applicant which remained in possession of the Land until transfer was given and the subsidiary was only introduced as an *adjectus solutionis causa*, to take on the rights and obligations of the lessee.
From the date of transfer rental had to be paid albeit not by the Applicant itself but by its subsidiary. The overall situation is what has to be taken into account and the consolidated position of the Applicant and its subsidiary will reflect whether or not damages were occasioned by the delay. This can only be ascertained on the basis of evidence adduced by the parties'.

[11] In seeking to support the reasoning and conclusion of the court below the thrust of the respondents' case on appeal was that, on a proper interpretation of the agreement, the purchase price was payable in terms of clause 3.2 not later than ten days after the date of transfer. That having occurred clause 6 did not find application. Accordingly, so the argument went, any claim the appellant might have had to interest derived from s 1 of the Prescribed Rate of Interest Act 55 of 1975 (the Act) and not clause 6 of the agreement. And as the appellant had failed to prove actual loss or damage (but had sought to advance a case that the fact of the delay entitled it as a matter of law to payment of interest) and having regard to the 'special circumstances' which the court below (apparently unwittingly) took into account in terms of s 1 of the Act (quoted below), it properly exercised its discretion not to award any interest to the appellant.

[12] The first issue for consideration therefore is whether clause 6 does find application. I must confess to having some difficulty in following why clause 6 would not apply in a situation such as this. Of the many obligations imposed on the parties, two that were imposed on the respondents, are relevant for present purposes. Sequentially they were: first, to furnish a guarantee within 14 days of a written request (clause 4.1); and, second, to pay the purchase price no later than ten days after transfer (clause 3.2). The second was not an independent and self-standing obligation but was dependent for its fulfilment upon the first. The respondents' obligation to fulfil the second could thus hardly have arisen until the first had been satisfied. The respondents breached the agreement by not furnishing the written undertaking for the payment of the purchase price within 14 days of being called upon to do so as required by clause 4.1. They failed

to do so, because on their own version they then lacked the funds to pay the purchase price within ten days of transfer. That breach, until it was cured, caused a delay in effecting transfer of the properties and consequently, a commensurate delay in the payment of the purchase price.

[13] That such a state of affairs had come to pass was entirely the respondents' fault. They had contracted on the basis that they had funds at their disposal to meet their contractual obligations, when in truth, as it subsequently emerged, they did not. By not furnishing the undertaking the respondents deliberately frustrated the operation of the agreement. And in so doing they delayed the payment date. They thus rendered the 14 days envisaged in clause 4.1 illusory and meaningless. And in blatant disregard of the contractual scheme and the time frames that had been agreed upon, simply furnished the guarantee when it was convenient for them to do so. Thus despite their admitted breach, which in turn delayed payment, the respondents seek to maintain with impunity the benefit of the agreement. Respondents' counsel was constrained to concede during argument that, had the undertaking been furnished but for some or other reason not been met, then clause 6 could have been relied on by the appellant to claim *mora* interest. But where, as here, there had simply been a refusal to furnish the requisite guarantee, clause 6 could not be invoked by the appellant. To my mind to treat a deliberate refusal to perform more generously than ineffective or defective performance would be strained and tortuous. It follows, in my view, that clause 6 does indeed find application. The court below reached a contrary conclusion. But even had it been justified in its conclusion on that score (which it had not), as I shall show presently, the matter did not end there.

[14] Even in the absence of a contractual obligation to pay interest, where a debtor is in mora in regard to the payment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having received his money on due date. Centlivres CJ made that plain in *Linton v Corser* supra (at 695G-696A), when he stated:

'The old authorities regarded interest *a tempore morae* as "*poenaal ende odieus*", *vide Utrechtsche Consultatien*, 3, 63, p. 288. Such interest is not in these modern times regarded in that light. To-day interest is the life-blood of finance, and there is no reason to distinguish between interest *ex contractu* and interest *ex mora*. *Milner's* case is, as far as I have been able to ascertain, the only case which applied the old authorities, and in *Johnston v Harrison*, 1946 N.P.D. 239 at p. 251, the Court was not slow in distinguishing that case. The question that now arises is whether we should apply the old Roman-Dutch Law to modern conditions where finance plays an entirely different role. I do not think we should. I think that we should take a more realistic view than in a matter such as this to have recourse to the old authorities.'

[15] It is so that *mora* interest is a species of damages (*Davehill (Pty) Ltd & others v Community Development Board* 1988 (1) SA 290 (A) at 298I-J). But as is evident from the approach of Sapire AJ to the enquiry that confronted him, he lost from sight the following important distinction drawn by Fagan JA in *Union Government v Jackson & others* 1956 (2) SA 398 (AD) at 411C–412A:

'In considering this question of taking into account the time that may elapse between the date when a man is deprived of an asset and that of his being reimbursed by receiving compensation for it, we must be careful to distinguish between two different approaches that call different legal principles into play and may therefore diverge greatly in their application to particular circumstances. The one approach is to treat this lapse of time as merely an element — one of many items — which the Court may be urged to bring into its reckoning in computing or estimating the damage which a plaintiff has suffered and for which he should be recompensed. A set-off of interest on the capital amount awarded for the expropriation of a trading store and outbuildings against a claim for loss of rentals was applied by this Court in the case of *Union Government v Maile*, *supra*, especially at p 11. I mention this example to illustrate the point that there may be circumstances in which the interest-bearing potentialities of money play a part in the computation of damages. In *Maile's* case those potentialities counted in reduction of the plaintiff's claim, but there may well be cases where they will count the other way.

The other approach is that of dealing with the liability to pay interest as a consequential or accessory or ancillary obligation (the three adjectives are used as interchangeable words in the judgments in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at pp 177, 193), automatically attaching to some principal obligation by operation of law. The best illustration of this type is the liability for interest *a tempore morae* falling on a debtor who fails to

pay the sum owing by him on the due date. Here the Court does not make an assessment; it does not weigh the pros and cons in order to exercise an equitable judgment as to whether, and to what extent, the interest-bearing potentialities of money are to be taken into account in computing its award. The only issue is whether the legal liability exists or not; if it does, the rest is merely a matter of mathematical calculation: the legal rate of interest on a definite sum from a definite date until date of payment. The award of interest by the Provincial Division clearly falls under the second of the two compartments of my classification.'

[16] Sapire AJ appeared not to appreciate that he was dealing with an enquiry under what Fagan JA described as the second of the two compartments of his classification. It follows that he misconceived the enquiry. For our courts have come to accept without requiring special proof that a party who has been deprived of the use of his or her capital for a period of time has suffered a loss (*Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 85). And that, in the normal course of events, such a party will be compensated for his loss by an award of *mora* interest (*Bellairs v Hodnett & another* 1978 (1) SA 1109 (A) at 1145 D-G). As it was put in *Bellairs* '... 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.'

[17] The term *mora* simply means delay or default. 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*. 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 referred to as *mora ex persona*. (See *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) paras 11 & 12.) The purpose of *mora* interest is therefore to place the creditor in the position that he or she would have been in had the debtor performed in terms of the undertaking. Here a demand (*interpellatio*) was necessary to place the respondents in *mora*.

[18] It is common cause that such a demand was received by the respondents on 19 August 2009. It was not disputed that the appellant was ready and willing to pass transfer to the respondents when that letter of demand was despatched. Nor was it disputed that on receiving the required undertaking the conveyancing attorney would have taken immediate steps to lodge the necessary documents in the Deeds Registry to cause transfer of the properties sold to pass to the respondents. Accordingly on an application of common law principles the respondents were in *mora* and an obligation to pay interest to the appellant on the purchase price had accrued. That notwithstanding, the learned acting judge in the court below held:

'The interest on the purchase price is in the present instance not a proper measure of damages. The Applicant may well have a claim for damages arising from the delay, but it is illiquid and will have to be proved by demonstrating an overall financial loss occasioned by the delay. This the applicant has not done, and may not do in motion proceedings.'

Such an approach, which finds no support in the authorities, cannot be endorsed. It follows that the appellant ought to have succeeded in the court below. That, ordinarily at any rate, ought to dispose of the matter. But, as I shall show, even if one were to approach the matter on the basis postulated by the respondents, they still ought not to have succeeded in the court below.

[19] Although there is no explicit indication in the judgment of the court below that it had s 1 of the Act in mind, it was submitted on behalf of the respondents that it approached the matter mindful of that section. And that, what it in fact embarked upon was indeed the exercise envisaged by that section. In my view even if one were to accede to the argument on behalf of the respondents that any right as the appellant may have to interest derives from s 1 of the Act and not clause 6 of the agreement, the conclusion of the court below that the appellant was not entitled to any interest whatsoever cannot be supported.

[20] The relevant part of s 1 of that Act reads:

'1(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 prescribed under subsection (2) 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) The Minister of Justice may from time to time prescribe a rate of interest for the purposes of subsection (1) by notice in the *Gazette*.'

[21] Three submissions were urged upon us by counsel for the appellant with respect to the construction that should be placed on the section: First, the introductory words of the section 'if a debt bears interest' vests a court with a discretion, to be exercised on equitable grounds, only to reduce the rate of interest and not to disallow interest in its entirety. Second, the section only finds application to a situation where there is no agreement. There being an agreement in this case, the section did not find application. Third, the debtor and not the creditor bore the onus of establishing special circumstances. There may well be something to be said for each of those submissions. But it is not necessary for the purposes of this judgment to consider their validity. I accordingly do no more than merely mention them.

[22] In *Davehill* (at 300J-301E), Smalberger JA stated:

'Section 1(1) is couched in peremptory terms, and its application is obligatory, not discretionary (*Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 885G). To give effect to the intention of the Legislature the words "shall be calculated at the rate prescribed under s (2) as at the time when such interest begins to run" must be given their ordinary and literal meaning. Such meaning is clear. The rate prescribed under ss (2) at the time when interest begins to run governs the calculation of interest. The rate is fixed at that time and remains constant. Subsection (1) does not provide for the rate to vary from time to time in accordance with adjustments made to the prescribed rate by the Minister of Justice in terms of ss (2). The fact that the Minister may from time to time prescribe different rates of interest therefore has no effect on the rate applicable to interest which has already begun to run. The plain meaning of the words in question must be adopted as they do not lead to "some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended" (per Stratford JA *in Bhyat v Commissioner for Immigration* 1932 AD 125 at 129).

The only exception to the above method of calculation is where "a court of law, on the ground of special circumstances relating to that debt, orders otherwise". "Special circumstances" are not

defined in the Act. It is not necessary for the purposes of the present appeal to consider what circumstances are envisaged under that term. The existence or otherwise of special circumstances in any given case must needs depend upon the facts and circumstances of that case. What is clear is that the special circumstances must relate to a particular debt, not to debts in general.'

[23] What appeared to weigh with the court below was that the appellant continued to have the benefit of the properties either as the owner until the date of transfer or for a period of five years beyond that date in terms of the lease through its subsidiary, CBL Agri Services. The conclusion that the appellant's continued possession of the properties constituted a benefit is at odds with the evidence. Mr Clarke dealt in his replying affidavit with the assertion in Ms Seboka's answering affidavit that the appellant had 'unhindered and uninterrupted possession of the property [and] continued to use the property and enjoyed the fruits or proceeds of the said farm, as it always had', thus:

'13.2 While the Applicant enjoyed the fruits of the properties during the period of the delay, it is simply wrong to say that it suffered no prejudice. The Applicant in fact suffered significant prejudice due to delays caused by the State during the entire sale process.

...

13.5 Because the properties sold constituted a substantial portion of the Applicant's assets the sale agreement had to be approved by a special general meeting of the Applicant's shareholders. A second valuation of the properties was called for and carried out by the same valuer who had initially valued the properties on behalf of the State. The second valuation, dated 13 March 2009, put the value of the properties at R267.7 million, an increase of no less than R31.5 million in the value of the properties.

...

13.7 The significance of the above is that no adjustment was ever made to the price of the properties to take account of the general increase in the value of agricultural properties during the period in question and, specifically, the very substantial increase in the value of the properties as outlined above. The Applicant received no benefit from this very significant increase in the value which attached to the properties when they were finally transferred. Such benefit, had the Applicant received it, far exceeds the value of the interest now claimed.

13.8 Furthermore, as a result of the uncertainty surrounding the future of the properties which constituted a significant portion of the Applicant's assets, the Applicant was unable to devise any long-term financial and investment strategy for a financial return on these assets or the funds which stood to be realised by their sale.

13.9 In addition, the very nature of the situation, the Applicant was limited in as far as planning, development and investments in the properties were concerned.'

[24] No evidence was adduced as to the maturity of the sugar cane crops, the crushing cycle of the sugar mills or when the tropical fruit on the properties would have been ripe for harvesting. It was thus impossible to have assessed whether or not there was any real benefit for the appellant. Moreover, whilst there may well have been some kind of filial relationship between the appellant and its subsidiary CBL Agri Services, there is no evidence that the latter, a separate and distinct juristic entity, had acted as an agent for an undisclosed principal, in this case the appellant, or had transferred its rights in terms of the lease agreement to the appellant. (See *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A) at 674H-J.) Even if it were to be accepted that CBL Agri Services had in fact acted as an agent for the appellant, the simple truth is that the appellant could have continued to enjoy the fruits of the collateral lease with the benefit of the purchase price of R200 million. Thus even were it to have been permissible for the court below to have embarked upon this enquiry, it ought, in my view, to have arrived at a contrary conclusion. It follows that even on this leg of the case the respondents ought to have failed.

[25] The fact that the appellant may have had the benefit of the property is irrelevant where, as here, a default interest clause had been agreed on and the seller's continued possession of the sold property occurred as a consequence of the purchaser's deliberate default. Acceptance of the proposition that there should be no liability for interest in the circumstances of this case implies that a purchaser such as this can breach its payment obligations with impunity, whilst at the same time maintaining the benefit of the bargain that has been struck. That proposition merely has to be stated to be rejected.

[26] Properly analysed the gist of the respondents' case is that they were somehow excused from performing their contractual obligation because of a lack of funds. In *Mokala Beleggings & another v Minister of Rural Development and Land Reform & others* 2012 (4) SA 22 (SCA) para 8, this court dealt with a similar argument thus:

'. . . In *Linton v Corser* supra the court held the purchaser liable for mora interest (it was a case of mora ex persona) for delaying the signing of the transfer documents and the delivery of the necessary guarantees. Mora in the present matter concerned a delay in the payment of the purchase price as a result of the department's delay in having the registration of transfer effected by its conveyancers. As stated, the fact of and the reason for the delay were common cause. The delay was deliberate, due to the department's financial constraints and resultant inability to pay the purchase price. Of course our law does not require fault on the part of a debtor for a contractual damages claim. All that is required is proof that the debtor is in mora.'

Majiedt JA, however, later, remarked *en passant* (para 15):

'It was common cause that the appellants had suffered loss as a result of the delay. The appellants' farming enterprise was the main source of income for the Snyman family. They had sold all their cattle during April 2009 in anticipation of the transfer of the properties to the state, which they had to vacate within 48 hours of the registration. The appellants were plainly dependent on payment of the purchase price to re-establish their farming business or to establish other enterprises from which to derive income. The financial prejudice and loss flowing from the state's prevarication are self-evident.'

Those considerations, as I have endeavoured to show and my learned colleague Majiedt earlier in his judgment appreciated, are irrelevant to an enquiry such as the present.

[27] It remains to observe that the conduct of the officials in the employ of respondents evokes strong feelings of disquiet in one. Because of their conduct the public purse is much the poorer. As I have already pointed out for as long as the purchase price remained unpaid interest accrued at R84 931 per day. To that must be added the costs of what can only be described as ill-advised and morally unconscionable litigation. In *Mokala Beleggings (Pty) Ltd*, Majiedt JA observed (para16):

'It may well be that the department is under severe strain to meet the financial (and, it seems, the administrative) demands imposed by the land reform process. The restitution of land under

the Restitution of Land Rights Act 22 of 1994, is not only a constitutional imperative but a highly emotive issue as well. Considerable circumspection, diligence and sensitivity are required on the part of all concerned, including departmental officials. Agreements to purchase land for restoration to dispossessed communities should be honoured in accordance with the terms agreed upon, lest the already demanding challenges of the process be further exacerbated.'

[28] In the result:

(a) The appeal succeeds with costs to be paid jointly and severally by the respondents.

(b) The order of the court below is set aside to be replaced with:

'The respondents are ordered jointly and severally to pay to the applicant:

(i) the sum of R22 761 643,85;

(ii) interest on the sum of R22 761 643,85 at rate of 15.5% per annum from 6 July 2010 to date of payment;

(iii) costs of suit including those of two counsel where employed.'

V M PONNAN
JUDGE OF APPEAL

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