



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.134/2012

In the matter between:

SIBONGILE LYDIA PEFILE N.O.

Applicant

vs

JAPHET PHASKANI MSIMUKO

Respondent

Neutral citation: *Sibongile Lydia Pefile N.O. vs Japhet Phaskani Msimuko (134/2012)*
SZHC 266 [21 December 2012]

Coram : **MAPHALALA PJ**

Heard: **JANUARY 2012**

Delivered: **21 DECEMBER 2012**

Summary: The only issue for decision by this court is whether Respondent is also entitled to *mora* interest and I find that Respondent can only be entitled to interest a *tempore morae* and not *mora* interest and so it is ordered.

[1] On the 24 January 2012 the Applicant one *Sibongile Lydia Pefile NO* filed an Application in the long form against one *Japhet Phaskani Msimuko* for orders in the following terms:

- “1. That the Honourable Court grants leave to the Applicant to serve the Respondent by substituted service.
2. That the Honourable Court declares the Applicant the owner of the property: Remaining extent of Portion 38 of Farm No.75 (Waterford Park) situate in the Hhohho District, measuring 5972 (five nine seven two) square metres.
3. That the Respondent and all those who hold the property described hereinabove through him be ejected forthwith.
 - 3.1 That the Respondent and all those who hold the property through him show cause on or before the 10th day of February 2012 why prayer 2 and 3 should not be made final.
4. That the Respondent be ordered to pay costs of this Application in the event that same is opposed.
5. Further and/or alternative relief.”

[2] The Application is supported by the affidavit of the Applicant where she set out the facts of the dispute between the parties. Pertinent annexures are also filed in support of the Application. The Respondent opposes the Application and has filed her Answering Affidavit the averments in the Founding Affidavit. In turn the Applicant filed a Replying Affidavit in accordance with the Rules of this Court.

[3] The only question for decision by this court concerns the *mora* interest as sought by the Respondent. The parties have agreed on the other substantial issues in this Application.

[4] Having considered all the arguments in this regard I have come to the view that the arguments of the Plaintiff are correct on the facts of the matter. It appears to me and in this regard I am in agreement with the Plaintiff's arguments that the flexible application of the *par delictum* rule can only be relaxed to allow for interest a *tempore morae* and not *mora* interest as the Respondents seek. In this connection I am in total agreement with the arguments of the Plaintiff at page 4 of the Heads of Arguments.

[5] In law two forms of interest have been deemed payable when a party to a contract seek relief or redress as stated in the case of *Thorough Bred Breeders Association vs Price Waterhouse 2001(4) SA 551 (SCA)* at 549 G-E, the two forms were defined as follows:

- (i) Interest a *tempore morae*: which means the day from which the debtor is in default.
- (ii) *Mora default*: which is interest: where quantum of damages was ascertainable prior to the issue of summons, or where money was long deemed payable in terms of a contract before proceedings were instituted.

[6] It appears to me that the Plaintiff's arguments are correct in this connection that because any interest which may be due to the Respondent herein has only become due and payable after the contract in question has been declared void. That the Respondent can only be entitled to interest a *tempore morae* and not *mora* interest for very reason that same amount was not and had not been declined payable to the Respondent as of 2001 and hence, the Applicant has not been in *mora* in any way whatsoever.

[7] In my assessment of the arguments I do not think that the arguments of the Defendants apply to what I have stated in paragraph [4] to [6] above.

[8] In the result, for the foregoing reasons an order is granted in terms of the Notice of Motion.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

For Plaintiff : Mr. S. Mdladla

For Defendant : Mr. M. Simelane