IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 3682/2010**

In the matter between:

S. C. DLAMINI & COMPANY **1ST APPLICANT**
TRYPHINA FAKUDZE **2ND APPLICANT**

AND

THE MOTOR VEHICLE ACCIDENT'S FUND **RESPONDENT**

Neutral Citation: **S.C. Dlamini & Company v Motor Vehicle Accident Fund**

Coram: **OTA J**

Heard: **17TH FEBRUARY 2012**

Delivered: **28TH FEBRUARY 2012**

Summary: *Claim for interest of 9% a tempora morae on damages sustained as a result of a motor accident, as well as professional fees. Held:- Respondent not in mora as the 6 months delay in payment of claim from the time acquittance form was signed by the parties, was not willful or purposeful on the part of the Respondent, as to entitle the Applicants to the mora interest claimed. Application dismissed. No order as to costs.*

JUDGMENT

OTA J.

[1] The facts upon which this case is predicated are straight forward enough, as can be seen from the Founding Affidavit. Which facts are that the 1st Applicant which is a firm of Attorneys was instructed by the 2nd Applicant to process a claim on her behalf against the Respondent. That the 1st Applicant did all the necessary work to achieve payment of the claim which was finally settled under claim No. 2004/1072.

[2] The Applicants allege, that the acceptance offer, the signed acquittance and agreed statement of professional fees were lodged with the Respondent on the 24th September 2009, on which date the claim became immediately payable. That despite numerous visits and telephone calls to the Respondent, no payment was forth coming until

March 2010, when the agreed professional fees of E94, 000-00, due to 1st Applicant, and the settlement amount of E284,950-00, due to 2nd Applicant were paid. The Applicants thus contend that they were in the circumstances deprived of the use of these funds for some six months. That in the circumstances, the Respondent became liable to pay interest on these sums from the date the offer was accepted until date of payment.

[3] It is against the backdrop of the foregoing facts that the Applicants launched the application instant, by way of Notice of Motion praying *inter alia* for the following reliefs:-

1) That the Respondent pays interest of 9% per annum *a tempore morae* on the amounts of E94,300-00 and E284,950-00, belonging to first and second Applicants respectively, from 25th September, 2009 to date of payment

2) Costs

3) Further or alternative relief.

[4] The Respondent which is opposed to this application filed an Answering Affidavit in that respect, wherein it raised a point of law in paragraph 3 thereof, seeking to defeat this application *in limine*. The Respondent also alleged facts on the merits of the application.

[5] The Respondent contends *in limine,* that the interest claimed by the Applicants is not a liquid claim easily ascertainable to be claimed in motion proceedings. That interest is a legal corollary to the principal indebtedness forming a separate and distinct indebtedness of its own. That being so, the liquidly of a claim for interest in any proceedings has to be determined quite apart from the determination of the liquidity of the principal debt preferably in action proceedings.

[6] Further, that the Respondent had neither acknowledged its indebtedness of the rate of interest nor the consequent indebtedness in respect of that interest.

That there has not also been any judgment obtained by Applicants on the principal debt together with the interest claimed at the rate of 9% per annum. That save to agree to pay first Applicant's professional fees and second Applicant's settlement amount, no agreement was ever made between the parties to pay the interest claimed at 9% per annum. Respondent thus prayed the Court that the claim for interest *a tempora morae* by the Applicants be dismissed *in limine.*

[7] The Applicants response to the point taken *in limine* can be found in paragraph 3 of their Replying Affidavit, where they contend that a debt once established is recoverable forthwith and as such is due and payable. That interest in this case began to run from the date the amount became liquidated, which date was the 24th of September, 2009, when the offer was accepted.

[8] Let me start this exercise by first agreeing with the Respondent that there has not been any judgment

obtained by Applicant on the principal debt together with the interest claimed at the rate of 9% per annum. This fact is common cause in these proceedings. However, the position of the law is that interest will be awarded in a damages action once the claim had become liquidated by the damages either being agreed upon by the parties, or quantified by an order of the Court. **Koch on Damages for lost Income edition 1984,** puts this trite principle of law in the following terms:-

‘‘ *(a) The rule of Roman Dutch Law is that liability for interest does not attach to an obligation to pay unliquidated damages only ascertainable as to amount after a long and intricate investigation. An exception to this rule arises under circumstances where the amount of damages payable could have been ascertained upon reasonable inquiry. Interest on damages only begins to run once the Defendant is in mora. By virtue of the wrongful act and the associated damage measured at the same point an uncertain indebtedness is created. In order to place the wrong doer in mora, it is necessary that the Plaintiff demands the compensation due and that the quantum of the uncertain indebtdness be ascertained. An investigation*

is commonly needed to determine the indebtedness which crystallized at the time of wrongful act''

[9] **See Vusi Ginindza and Others V Lindifa Mamba and Another Appeal Case No. 8/2001, Zodwa Emelda Madau V Swaziland Development and Savings Bank (Swazi Bank) Case No. 4408/10**

[10] It is apparent to me that the position of our law is that interest will attach to a debt founded on damages, once the debt has become liquidated by the damages being agreed upon by the parties or quantified by an order of Court.

[11] In casu, the Applicants had claimed compensation from the Respondent for damages sustained by a minor child, one **Sibusiso M Dlamini**, (victim), by reason of a motor accident which rendered him crippled with severe mental depletion and incapable of managing his own affairs. It is common cause that the acceptance offer, the signed acquittance and agreed statement of

professional fees were, lodged with the Respondent on the 24th September 2009. Therefore, the 24th September 2009 was the date that liability to pay interest attached to the debt already ascertained and agreed upon by the parties. In the circumstances, it matters not that the debt and interest thereon was not fixed by an order of Court. Once the parties agreed on the amounts to be paid as damages liability to pay interest immediately attached. The point taken in limine therefore fails and is dismissed accordingly.

[12] What remains for me to ascertain is if the Respondent is liable to pay the interest of 9% *a tempora morae* claimed by the Applicants. I say this because the question of interest *a tempora morae* in contract only arises where obligations imposed by the terms of a contract which are meant to be performed are not performed at all, or performed later without any lawful excuse, or performed in the wrong manner, then the party on whom the duty of performance lay is said to be in breach of the contract or *in mora* . It is this state of

affairs that would altract the payment of interest *a tempora morae.*

[13] Indeed, in the case of **Broatric Properties Ltd V Rood 1962 (4) SA 447 (T) at 450**, the word mora was defined as follows:-

‘‘ In the law of contract, the word mora means delay without lawful excuse of performance of a contractual duty, in other words mora is wrongful failure to perform timeously---’’

[14] Whether there has been a breach in each case, must however be determined according to its peculiar facts and circumstances. As the court said in **Broatric Properties Ltd V Rood (supra),** with reference to **Voet 22.1.24 in fin (Gane’s translation).**

> *‘‘ whether default is or is not understood to occur in each individual transaction is for a wise judge to access since the settling of this matter is difficult. The divine Pius gave the written answer that it can be decided by no ordinance, nor by any debate by legal writers, because it is a question rather of fact than of law’’.*

[15] The learned editor **R H Christie** in the text **The Law of Contract 3rd edition at page 551**, sets out three elements which must be proved before a debtor can be said to be in mora which are:-

1) The obligation must be enforceable against the debtor. If the debtor would have a good defence to any action that might be brought against him to enforce the obligation, then he is not in mora.
2) Performance must be due. Performance is due either by operation of the law *(mora ex lege),* by the terms of the contract *(mora ex re*) or by demand duly made by the creditors *(mora ex persona).*
3) The debtor must be or must be deemed to be aware of the nature of the performance required of him and the fact that it is due.

[16] In casu, it is common cause that there is no judgment of a Court specifying a date of payment of the claim by the Respondent. It is also common cause, that there

was no fixed date for performance in the acquittance form duly signed by the parties. The foregoing notwithstanding, the rule of thumb is that when the need arises to determine whether there has been a breach of contract, it is the contract itself which must be looked at, and the intention of parties ascertained therefrom. If the contract expressly stipulates the time of performance, then that time is of the essence. If the contract does not stipulate the time for performance, then whether time is or is not of the essence depends upon the intention of the parties to be gathered from the terms and nature of the contract and from the surrounding circumstances. The general rule however is that obligations to perform of which no definite time is specified is enforceable forthwith. See **Mackey V Naylor 1917 TD 533.**

[17] In casu, considering the nature of the claim, which was compensation for damages sustained as a result of an accident and the fact that no time was stipulated for payment, I hold the view that the claim was to be paid

forthwith. This is coupled with the fact, as clearly detailed in paragraph 7 of the founding Affidavit, that the Applicants made numerous visits and telephone calls to the Respondent but no payment was forthcoming until March 2010. I notice that the Respondent remained silent and refused to answer to these allegation in its Answering Affidavit. These allegations are thus taken as admitted and as establishing the facts stated therein. It is thus obvious to me that quite apart from the debt being payable forthwith, that there was also demand for payment of the debt, but the payment did not materialize until the 11th of March 2010. The question here is, was the Respondent *in mora* for the time lapse between the signing of the acquittance and payment of the debt or was there some lawful excuse for this apparent delay in fulfilling it's obligations?

[18] The Respondent contends that the delay was for a justified lawful cause. It alleges in paragraph 8 of its Answering Affidavit that between the 24th of September

2009, when the acquittance was signed by the parties, and the 11th of March 2010, when the monies due were paid, that the parties were still genuinely engaging and that the Respondent did not delay the payments on purpose.

[19] The Respondent detailed the nature of engagement which it alleges subsisted between the parties in paragraphs 7.1 to 7.8 of its Answering Affidavit, exhibited to these allegations are annexures A, B & C respectively. These paragraphs state as follows:-

'' 7.1 By the 25th September, 2009, the parties had agreed and signed an acquttance to pay attorney for the victim (Sibusiso M. Dlamini) duly represented by Applicants;

7.2 When the Respondent was ready to pay the claim in October, 2009 on instructions by the Applicants to pay same in the name of ***Sibusiso M. Dlamini*** *(''the victim''), the Respondent through its investigation noted that ;*

7.2.1 the victim had reached the age of majority which meant that he was entitled to receive the payment in person and not through the Applicants;

7.2.2 the victim is crippled and suffered from severe mental depletion which according to medico reports he was incapable of managing his own affairs;

7.3 By letter dated 7th October 2009, the Respondent notified the First Applicant and requested that a Curator bonis be appointed to take care of the affairs of the victim and to accept payment on his behalf.

See LETTER ATTACHED AND MARKED ‘‘A’’,

7.4 On the 11th December, 2009, the First Respondent obtained an Order appointing the Second Applicant as Curtor bonis of the victim, see: ORDER ATTACHED AND MARKED ‘‘B’’;

7.5 Respondent was ready to pay out the claim to the First Applicant when it demanded that an amount of E94,300-00 (Ninety Four Thousand Three Hundred Emalangeni) paid to it as legal fees by virtue of a power of attorney signed by the Second Applicant. See: FEE NOT ATTACHED AND MARKED ‘‘C’’

7.6 The Respondent queried the demand as it was of the view that it was not in the best interest of the victim for the following reasons;

7.6.1 The First Applicant had earlier on produced a signed Power of Attorney authorizing him to recover a collection commission of 15% of the total claim;

7.6.2 Subsequent to that and when the claim was payable it sought to be paid 25% of the claim on the basis on the Second Applicant's consent.

7.7 The First Applicant responded in February, 2010, to say that the fee agreement was amended by increasing the original agreement to 25%. See: LETTER DATED 2ND FEBRUARY, 2010 AND MARKED ''D''.

7.8 The Respondent had to seek legal advice from its attorneys on the turn of events and that it did in the middle of February, 2010;''

[20] I notice that the Applicants did not deny the fact that the parties were engaged in the way and manner the Respondent alleges that they were engaged, save to maintain that the facts alleged by the Respondent in paragraphs 7.6 to 7.8 of its Affidavit, did not detract from the fact that when agreement was reached the debt became immediately due and payable. These facts are demonstrated in paragraphs 6,7,8 and 9 of the Replying Affidavit.

[21] I find that I must depart from the posture adopted by the Applicants on this issue. I say this because it is apparent from paragraph 7.2 of the Answering Affidavit, that the Respondent was ready to pay the claim in October 2009, and on instruction to pay the same to **Sibusiso M Dlamini**, the victim, as opposed to 2nd Applicant who had ordinarily represented him as his guardian, he being a minor, the Respondent mounted an investigation and discovered that the victim had attained the age of majority. This state of affairs necessitated that a *curator bonis* be appointed to take care of the affairs of the victim and to accept payment on his behalf, since he was rendered mentally incapable of managing his own affairs due to the accident. Thus, by letter dated 6th October 2009, annexure A, the Respondent notified the 1st Applicant of this fact and requested that a *curator bonis* be appointed. Annexure A reads as follows:-

> *'' October 6, 2009*
>
> *SC Dlamini & Associates*
> *P. O. Box 663*
> *MBABANE*

Dear Sirs,

MVA CLAIM NO: 2004/1072
INSURED/DRIVER: ZWELI HLATSHWAYO
THIRD PARTY: TRYPHINA FAKUDZE

We acknowledge receipt of your correspondence of the 24th September instant, contents of which have been noted.

Kindly be advised that we have noted that the claimant's minor child has since attained the age of majority and in the circumstance we would request that the claimant obtains a court order appointing her as curator bonis given the fact that the said child is crippled, dependent of the mother and suffering under severe mental depletion as per numerous doctor's report. Given the above circumstances, the said child is unable to manage his own affairs.

Trusting the above to be in order.

Yours faithfully

BN FAKUDZE (Miss)
FOR MANAGING DIRECTOR

[22] It is on record that it was not until the 11th of December 2009, and by a Court order, that 2nd Applicant was appointed curator bonis to the property of **Sibusiso Dlamini,** with power to receive take care of, control and administer all the property constituting the estate of **Sibusiso Dlamini,** as is evidenced by annexure B.

[23] I agree entirely with **Mr S. Masuku** in oral submissions, that the appointment of a curator bonis when the victim attained the age of majority was imperative under the law, in view of his mental disabilities, to ensure that payment was made to a person recognized in law as competent to receive same in discharge of the Respondents obligations. A person with mental disabilities is like a child, or even worse than a child in that state. Clearly there was good reason for appointing a curator bonis in that kind of situation. It appears to me therefore, that the Respondent cannot be said to be in mora for the delay in performance of its obligation in these transactions as occasioned in these circumstances.

[24] Then there is the question of the delay occasioned by a need to resolve the actual percentage of the claim payable as legal fees. It is obvious from annexure C, that on the 23rd of September 2009, the 1st Applicant made a claim for 25% of the total

claim of E377,250-00 amounting to E94,300-00. The Respondent alleges in paragraph 7.6 of its pleadings, that it queried this demand as it was of the view that it was not in the best interest of the victim, reason being that the first Applicant had earlier on produced a signed power of Attorney authorizing him to recover a collection commission of 15% of the total claim.

[25] It is on record that the Respondent received a reply to its queries by letter dated 2nd February 2010, exhibited herein as annexure D, notifying the Respondent that the fee agreement was amended by increasing the original agreement to 25%.

[26] It is worthy of note that the Applicants did not deny that 1st Applicant initially claimed professional fees of 15%. They did not deny that the increment of the professional fee to 25% was queried by the Respondent. They did not also

deny that they finally gave a response to the queries on 2nd February 2010. The response supplied by the Applicants in relation to these allegations is as contained in paragraph 9 of the Replying Affidavit to wit:-

> *''The statement of agreed fees was lodged with the respondent on the 24th September, 2009 and on that date the fees became immediately payable. The agreement was between the first and second Applicants and it had nothing to do with the first Respondent''.*

The facts alleged by the Respondent in these respects are

thus established.

[27] I find a need to stress here, that irrespective of the fact that the fees were agreed upon on the 24th September 2009, and became payable forthwith, the issue of the appointment of the *curator bonis* and the increment of the legal fees to 25% of the claim, obviously necessitated that the parties were

still genuinely engaging at least until the 2nd of February 2010. The question of the professional fees payable, was predicated on the total amount claimed. It was thus incumbent upon the Respondent to resolve the issue of the increment in the professional fees before disbursing payment to any of the Applicants. I hold the view that the Respondent as a diligent establishment was well entitled to query this fact. Infact, I am bound to say that failure do to so in these 58 circumstances would tantamount to abdication of the Respondent's duties. The Respondent cannot be said to be in mora for the delay occasioned by these factors. Especially as it is replete from the record, that it timeously brought these issues to the attention of the Applicants. The time lapse within which the Applicants responded to these issues can hardly be attributed to the Respondent.

[28] I do not consider the time between the 2nd of February and the 11th of March when the monies were paid to be of any moment in these transactions, especially in the face of the fact that the Respondent alleges that part of this period was utilized consulting with their attorneys prior to payment in view of the issues that had arisen. These averments have not been challenged or controverted by the Applicants. They thus stand established.

[29] It would appear to me in the circumstances, that the delay in payment of the debt until the 11th March 2010, was neither willful nor purposeful. The Respondent, was clearly not in mora as to entitle the Applicants to the mora interest claimed.

[30] In the final analysis, I find that this application lacks merits. It fails accordingly. On these premises, I make the following orders:-

1. That the Applicants claim for interest of 9% *a tempora morae* be and is hereby dismissed.
2. No order as to costs.

For the Applicants: Mr S. C. Dlamini

For the Defendant: Mr S. Masuku

DELIVERED IN THE OPEN COURT IN MBABANE ON THIS THE……DAY OF……2012

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OTA J

JUDGE OF THE HIGH COURT