



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 268/13

In the matter between:

MAKHOSAZANA TAYLOR

Applicant

And

**O.K. BAZAARS SWAZILAND [PTY] LIMITED
T/A SHOPRITE**

Respondent

Neutral citation: *Makhosazana Taylor v O.K. Bazaars Swaziland [Pty] Limited T/A Shoprite (268/13) [2013] SZIC 29 (October 4 2013)*

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard submissions on: 13 September 2013

Judgment delivered on: 04 October 2013

Summary:

The Applicant on 25th January 2011 got an award in her favour after an arbitration process. The amount was payable on or before 28th February 2011. The Respondent failed to pay the amount on the stipulated date, but was eventually paid on 27th June 2013. The Applicant filed application for registration of the award and also applied for an order that the Respondent pays interest a tempore morae at 9% per annum calculated from 28th February 2011 to date of payment.

Held—The Industrial Court has exclusive jurisdiction to register and give effect to arbitration awards in terms of Section 84 of the Industrial Relations Act.

Held—The award of interest being a relief that is incidental to and/or ancillary to the registration of the award, the Industrial Court therefore has jurisdiction to deal with the issue of interest a tempore morae.

Held—A debtor is liable to pay interest on the principal debt if he is in mora. The Applicant’s application accordingly upheld.

**JUDGMENT
04.10.13**

[1] The Applicant is a Swazi female adult of Mbabane. She is a former employee of the Respondent. The Respondent is a public company duly incorporated in terms of the Company Laws of Swaziland.

- [2] The Applicant was dismissed from employment by the Respondent in circumstances that the Applicant claimed amounted to constructive dismissal. She accordingly reported a dispute to the Conciliation, Mediation and Arbitration Commission (CMAC). The Conciliation was unsuccessful and a certificate of unresolved dispute was issued.
- [3] Thereafter the matter did not come to the Industrial Court, but the parties agreed to refer the dispute to arbitration in terms of **Section 85 (2) of the Industrial Relations (Amendment) Act, 2005**.
- [4] The arbitrator, Happiness Dlodlu, handed down the award on 25th January 2011 in favour of the Applicant.
- [5] The Applicant was awarded a total amount of E169,893.43. The arbitrator further stated in the award that this amount should be paid at CMAC offices on or before 28th February, 2011.
- [6] The Respondent however did not pay the said amount on the said date. The Applicant thus instituted the present legal proceedings under a certificate of urgency and is seeking an order in the following terms;

- “1. *Dispensing with the requirements of the rules of court with respect to time limits and service of process and permitting this matter to be enrolled as one of urgency in so far as it pertains to the second item of relief sought hereunder.*

2. *That the arbitration award handed down by the conciliation Mediation and Arbitration Commission on 25th January 2011 and which had to be complied with by 28th February 2011, be and is hereby registered as an order of court.*

3. *Directing that the Respondent pay interest a tempore mora at 9% per annum calculated from 28th February 2011 to date of final payment.*

4. *Costs of suit in the event of opposition at attorney and own client scale.*

5. *Further and/or alternative relief.”*

[7] The Applicant’s application is opposed by the Respondent which duly filed an Answering Affidavit. Thereafter, the Applicant filed a Replying Affidavit.

- [8] The evidence before the court revealed that the Applicant has now been paid the capital amount and that this was done on 27th June 2013. This was just a day prior to the launching of the urgent application by the Applicant as the Notice of Motion shows that the papers were served in court on 28th June 2013.
- [9] It was accordingly agreed between the parties that the matter was no longer being pursued on an urgent basis. Despite the capital amount having been finally paid on 27th June 2013, the Applicant told the court that she was still pursuing the order for registration of the award so that she could be able to claim the interest *a tempore morae* at 9% per annum calculated from 28th February 2011 to date of final payment as prayed for in prayer 3.
- [10] The Respondent in its Answering Affidavit raised a point *in limine*, namely, that this court has no jurisdiction to hear and determine the claim for interest *a tempore morae* which is essentially a damages claim and does not arise out of an employer/employee relationship as contemplated by **Section 8 of the Industrial Relations Act of 2000 as amended.**

[11] **Jurisdiction:-**

The Respondent argued that this court lacks jurisdiction to entertain the issue of interest because;

11.1 *The dispute was referred to arbitration by the consent of the parties. It was the arbitrator who was seized with the matter who could make the order that interest was payable, not any other forum.*

11.2 *The issue of the interest does not arise from an employer/employee relationship. It was neither conciliated upon nor could it be cognizable as a reportable dispute under the disputes procedures set out in Part VIII of the Industrial Relations Act.*

11.3 *The court must not permit the Applicant to enjoy multiple benefits at the expense of the Respondent in circumstances where the decision of the arbitrator does not show that the Respondent is guilty of malicious intent to delay payment to the Applicant.*

11.4 *If payment due is not effected, the affected party institutes a damages claim. A claim for damages is not available in the Industrial Court but in the High Court.*

11.5 *The Respondent having already paid the capital amount, the present proceedings are vexatious.*

[12] On behalf of the Applicant it was argued that:

12.1 *The court does have jurisdiction because the obligation to pay interest does not stand separate from the award, but it forms, in substance, an integral part of the award.*

12.2 *The process of registration and enforcement of arbitration awards falls within the jurisdiction of this court.*

12.3 *At common law, a debtor is liable to pay interest on the principal debt if he is in **mora**. The interest **a tempore morae** in the present matter arose automatically when the debtor (Respondent) was called upon by the arbitrator to make payment by 28th February 2011, but failed to do so.*

12.4 *The jurisdiction of any other court is excluded as the Industrial Relations Act gives exclusive jurisdiction to the Industrial Court in terms of Section 8(1).*

12.5 *It is a matter of equity that the interest be calculated from 28th February 2011 as the money that was due to the Applicant was being withheld by the Respondent.*

12.6 *Costs depend on the discretion of the court. **Mora** interest comes into effect by the operation of the law.*

12.7 *The Industrial Court has the necessary jurisdiction to grant the order sought because of its exclusive jurisdiction in labour related matters.*

[13] **Analysis of the Evidence and the Law Applicable:-**

The evidence in this matter revealed that the parties agreed to refer the matter to arbitration. The parties are therefore bound by the arbitration award as it was not reversed on review or appeal. The Applicant argued that the duty to pay interest arose from the Respondent's failure to pay the

amount awarded to her on the date specified by the arbitrator, being 28th February 2011.

[14] Both the court and the parties' representatives were unable to find a local precedence on this point. The authorities from South Africa do not assist the court as there are legislative inroads in that jurisdiction making it clear that arbitration awards do bear interest *a tempore morae* from the date that the judgment debt is payable, one of these being the **Prescribed Rate of Interest Amendment Act 7 of 1979**. In the case of **Gerrit Top v. Top Reizen CC, case No. J 1307/04**, the court dealt with a situation almost similar to the present one. The court in that case however was guided by the provisions of **Section 143(2) of the Labour Relations Act**, which provides for interest to run on an award from the date of the award at the same rate as a judgment debt. There is no similar provision in our Industrial relations Act.

[15] **Power to Register Award:-**

It was not in dispute that this court has the jurisdiction to register the arbitration award. The rationale for the registration of the award is so that the Applicant can enforce it as an order of the court by suing out a writ of execution. In the present case the principal debt was paid on 27th June 2013. The Applicant now wants the registration of the arbitration award

only for the reason that she wants the Respondent to be ordered to pay interest *a tempore morae* at 9% per annum calculated from 28th February 2011, because it failed to pay on that date as stipulated by the arbitrator in the award.

[16] The Respondent in this case became indebted to the Applicant on 25th June 2011 when the arbitrator handed down the award in favour of the Applicant in the sum of E169,893.43. The arbitrator using her discretion gave the Respondent more than a month's period within which to pay the amount to the Applicant as she ordered that the amount be payable on or before 28th February 2011. The Respondent failed to pay within the stipulated period.

[17] **Mora Interest**

The common law position with regard to interest is that as a general rule, a debtor is only liable for interest on the principal debt if he is in **mora**. (See: **Applebee V. Berkovitch 1951 (3) SA 236 (C)**. The liability to pay **mora** interest automatically attaches to the principal obligation by operation of law. (See: **Union Government v Jackson 1956 (2) SA 398 (A)**.)

[18] Presently, the court is dealing with an arbitration award. An arbitration award differs from a court judgment and does not automatically attract

interest. Unlike in South Africa, where there exists the **Prescribed Rate of Interest Act of 1975**, there is no similar legislation locally which provides for the payment of interest on arbitration awards.

[19] In the present case however, there was a specific date on which the amount ought to have been paid by the Respondent. The Respondent failed to do that. The court is persuaded that the principles of **mora** interest should apply in this case because;

19.1 the Respondent knows the exact amount to be paid, being the sum of E169,893.43.

19.2 the amount is a liquid claim.

19.3 the amount was ordered to be payable on a specific date being 28th February, 2011.

19.4 the Respondent failed to pay on the said date, he was therefore in **mora**.

[20] In the case of **Gerrit Top v. Top Reizen CC (op cit) in paragraph 11**, the court dealing with the common law principles with regard to interest pointed out as follows:-

“Mora may take the form of *mora ex re* where, for instance, the parties have contractually agreed that a liability exists to pay interest in the principal debt; or *mora ex personal* where, in the absence of such agreement, the debtor has been called upon to perform his obligation (West Rand Estates Ltd V. New Zealand Insurance Co. Ltd. 1926 AD 173 at 195-196). A third Form of mora is what is sometimes referred to as *mora ex lege*, for instance interest a *tempore morae* payable because the law so rules. (C & T Products (Pty) Ltd. V. M.H. Goldschmidt (Pty) Ltd 1981 (3) SA 619 (C) 31 G-632 B).”

- [21] The court therefore agrees with the Applicant’s contention that there was a legal duty on the part of the Respondent to pay on or before 28th February 2011, but the Respondent failed to do so and that thereafter, liability for **mora** interest was set in motion. The Respondent did not apply to court to stay the writ of execution. In terms of Section 19 of the Industrial Relations Act, the noting of an appeal does not stay the execution of a judgement. The Applicant cannot be faulted for being co-operative and agreeing to give the Respondent the indulgence to file a review at the High Court and also to appeal to the Supreme Court. There was no evidence, nor could it be inferred from the evidence before the court, that when the Applicant agreed

to stop the execution process in order to give the Respondent the chance to file the review and appeal, she was relinquishing or waiving her rights.

[22] **Power of the Court to grant order interest a tempore morae**

The court accepts the Applicant's contention that this court has the jurisdiction to entertain the present application for **mora** interest because the matter is incidental to or ancillary to the main relief sought by the Applicant to have the award registered. The legislature has conferred the Industrial Court with jurisdiction to register arbitration awards. The legislature also conferred on this court all the powers of the High Court in the discharge of its functions under the Industrial Relations Act No. 1 of 2000, (See: Section 8 (3)). The claim for the mora interest is a matter ancillary to the registration of the award. Part of the award that the court is being asked to register, requires that the arbitration award be complied with by the Respondent on or before 28th February 2011. The Respondent failed to do that. I do not see how the court that has the power to make the arbitration award enforceable, can be said to have no jurisdiction to grant the ancillary relief of interest **a tempore morae** when there is clear evidence that the Respondent did not pay on the date stipulated by the arbitrator.

[23] As already pointed out, the liability to pay the interest *a tempore morae* arises *ex lege*. It attaches to the principal debt by operation of law. The court is not being asked to make an assessment of the amount due. There is no dispute as to how much is payable to the Applicant. There was therefore no need to report a dispute.

[24] In the circumstances of this case, the Applicant's application ought to succeed in its entirety. The court having found that interest *a tempore morae* should be paid by the Respondent, we do think it would be fair to also make an order for costs on the punitive scale as requested by the Applicant. The payment of the interest *a tempore morae* will put the Applicant in the same position that she would have been had the Respondent paid the amount on 28th February, 2011 as stipulated by the arbitrator.

[25] Taking into account all the circumstances of this case the court will make the following order;

- a) **The application is granted in terms of prayers 2, 3 and 4 of the Notice of Motion.**
- b) **The costs order in prayer 4 to be in the ordinary scale.**

The members agree.

**N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: MR. Z.D. JELE
(ROBINSON BERTRAM)**

**FOR RESPONDENT: MR.S. K. DLAMINI
(MAGAGULA & HLOPHE ATTORNEYS)**