IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No: 36/2018

In the appeal between:

SWAZILAND DEVELOPMENT FINANCE CORPORATION FIRST APPELLANT

And

SIBONGILE CLARA NDLANGAMANDLA t/a BAYANDZA PRE & PRIMARY SCHOOL FIRST RESPONDENT

THANDEKILE KHANYISILE MOTSA SECOND RESPONDENT

Neutral citation: *Swaziland Development Finance Corporation vs Sibongile Clara Ndlangamandla t/a Bayandza Pre & Primary School & Another (36/2018) [2019] SZHC 18 (2019)*

Coram: **JUSTICE M. C. B. MAPHALALA, CJ**
JUSTICE S. B. MAPHALALA, JA
JUSTICE A. LUKHELE, AJA

Heard : 12th March, 2019

Delivered : 31st May, 2019

SUMMARY

Civil appeal – an obligation to pay mora interest arises from an agreement between the parties during the conclusion of their contract; it also arises from the conduct of a party to the contract whenever he is in default for not paying money, delivering property or rendering services in pursuance of the contract – in those circumstances justice requires the debtor to indemnify the creditor for the wrong which he has suffered – the exception arises with illiquid damages where interest is not awarded before judgment;

In an appeal against the judgment of the *court a quo* granting mora interest in light of specific interest agreed between the parties;

Held that the respondents were obliged to pay the agreed rate of interest provided in their written contracts. Appeal upheld

JUDGMENT

M. C. B. MAPHALALA, CJ:

[1] This is an appeal against the judgment by default delivered by the *court a quo* on the 16th May, 2018. The appellant instituted action proceedings in the *court a quo* against the respondents for payment of two loan accounts lent and advanced to the first respondent at her own instance and request. The second respondent acted as the surety for payment of the second loan account.

[2] The first loan account was concluded on the 7th November 2008. The capital amount of the loan was E200 000.00 (Two Hundred Thousand Emalangeni) payable over a period of sixty months. The monthly instalment was E5, 300.00 (Five Thousand Three Hundred Emalangeni). The rate of interest on the loan account was Prime + 4.5%, which at the time was 19.5% per annum.

[3] It was expressly agreed between the parties that in the event that the first respondent acted in breach of the contract, then the appellant

would be entitled to cancel the contract and demand payment of the balance of the loan account, interest and legal costs incurred. It was further provided in the contract that in the event that the appellant institute legal proceedings against the respondents, they would be liable for payment of legal costs incurred on the scale as between Attorney and own client including collection commission and tracing fees.

[4] The first respondent breached the contract by failing to make monthly payments of the loan account as agreed between the parties. At the time of the breach of the contract, the outstanding balance of the loan account which was due and payable was E205 327.41 (Two Hundred and Five Thousand Three Hundred and Twenty-seven Emalangeni and Forty-one cents).

[5] It is common cause that on the 9th February 2012 the appellant and first respondent agreed to reschedule the first loan account. The loan account was E200 477.88 (Two Hundred Thousand Four Hundred and Seventy-seven Emalangeni and Eighty-eight cents) payable at a monthly instalment of E57 714.00 (Fifty-Seven Thousand Seven

Hundred and Fourteen Emalangeni) over eighteen months; the agreed rate of interest was Prime + 4.5% currently at 13.5% per annum. All the other terms and conditions of the original loan remained effective. It is not disputed that the first respondent only paid E20 000.00 (Twenty Thousand Emalangeni) of the loan account and subsequently breached the contract by failing to make the agreed monthly instalments. When the legal proceedings were instituted, the total amount outstanding was E305 478.96 (Three Hundred and Five Thousand Four Hundred and Seventy-eight Emalangeni and Ninety-six cents).

[6] The appellant instituted action proceedings against the first respondent for the sum of E305 478.96 (Three Hundred and Five Thousand Four Hundred and Seventy-eight Emalangeni and ninety six cents) in respect of the loan account together with interest at the rate of Prime + 4.5% currently at 14.25% per annum calculated from the date of summons to date of final payment. The appellant also sought costs of suit on the scale as between attorney and own client including collection commission.

[7] The second loan agreement was concluded on the 23rd June 2010 in terms of a written agreement signed by the appellant and the first respondent. The capital amount of the loan account was E212 000.00 (Two Hundred and Twelve Thousand Emalangeni) payable in monthly instalments of E14 232.00 (Fourteen Thousand Two Hundred and Thirty-two Emalangeni) over a period of sixty months. The agreed rate of interest on the loan account was Prime + 4.5% currently at 14.5% per annum. The other terms of contract in respect of the breach of the contract were similar to the first contract. Subsequently, the first respondent breached the contract by failing to make payments in terms of the contract. The total amount outstanding which was due and payable at the time of the breach of the contract was E227 731.96 (Two Hundred and Twenty-seven Thousand Seven Hundred and Thirty-one Emalangeni and Ninety six cents).

[8] The second respondent had executed the deed of suretyship on the 22nd June 2010 in favour of the appellant in respect of the second loan account for the fulfilment of all obligations of the first respondent to the appellant. The second respondent renounced the benefit of the

legal exception of execution and division and all other legal exceptions.

[9] The appellant further claimed against the first and second respondents jointly and severally in respect of the second loan account. The total amount outstanding at the time the contract was breached was E227 731.96 (Two Hundred and Twenty-Seven Thousand Seven Hundred and Thirty-One Emalangeni and Ninety six cents) together with interest at the rate of Prime + 4.5% currently at 14.25% per annum calculated from the date of summons to the date of final payment. The appellant further sought an order for costs of suit on the scale as between attorney and own client including collection commission.

[10] The summons were duly served upon the first and second respondents, and, they did not defend the action proceedings. Subsequently, the appellant applied for judgment by default in terms of Rule 31(3) (a) of the High Court Rules. The Court granted default judgment in favour of the appellant in respect of both loan accounts. The Court ordered payment of E305 478.96 (Three Hundred and Five Thousand Four

Hundred and Seventy-Eight Emalangeni and Ninety-six cents) against the first respondent in respect of the first claim together with interest a *temporae morae* at the rate of 9% per annum and costs of suit. The Court further ordered the first and second respondents to pay the sum of E227 731.96 (Two Hundred and Twenty-Seven Thousand Seven Hundred and Thirty-one Emalangeni and Ninety-six cents) in respect of the second claim together with interest a *temporae morae* at the rate of 9% per annum and costs of suit. The first and second respondents were ordered to pay the second loan account jointly and severally the one paying the other to be absolved.

[11] The appellant noted an appeal against the judgment of the *court a quo* in respect of the orders relating to the rate of interest. There are two grounds of appeal. Firstly, that the *court a quo* erred in holding that in civil proceedings a creditor is not entitled to recover the agreed interest on a commercial debt. Secondly, that the *court a quo* erred in holding that a creditor is only entitled to recover *mora* interest where there exists an agreement on the computation of the interest. The appellant further sought that the appeal should be upheld with costs.

[12] The appeal ought to succeed on the basis that in civil proceedings, the creditor is entitled to recover the agreed amount of interest on a commercial debt. In addition the creditor is entitled to recover *mora* interest where the defaulting party has breached the agreement by failing to perform in terms of the contract; *mora* interest is not depended solely upon the agreement of the parties.

[13] His Lordship Justice Innes CJ in Victoria Falls & Transvaal Power Co., Ltd v Consolidated Langlaagte Mines, Ltd[1] had this to say:

> **"Speaking generally, the liability of a debtor for interest under civil law depended (apart from agreement) upon whether he was in *mora*. *Mora* was a wrongful default in making (or accepting) payment or delivery . . . . 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."**

[1] 1915 ADI at 31 - 32

[14] The full bench of the South African Appellate Division in Bellairs v Hodnett and Another[2] had this to say:

> **"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* . . . . . 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**

[2] 1978 (1) SA 1109 AD at 1145

award of *mora* interest seeks to compensate the creditor."

[15] Justice Pillay AJA delivering the majority judgment of the Supreme Court in Scoin Trading v Bernstein[3] approving the judgment in Bellairs v Hodnett[4] had this to say:

> **"11. The starting point is therefore an examination of the meaning of *mora*. The term *mora* simply means delay or default. This concept is employed when the consequences of a failure to perform a contractual obligation within the agreed time are determined. The date may be stipulated either expressly or tacitly and there must be certainty as to when it will arrive. Thus when the contract fixes the time for performance, *mora (mora ex re)* arises from the contract itself and to demand *(interpellatio)* is**

[3] 2011 (2) SA 118 SCA at

[4] Supra footnote 2

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 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 to since it requires an act of a person (the creditor) to bring it into existence.

. . . .

> **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."**

[16] Ponnan JA in Crookes v Regional Land Claims Commission[5] had this to say:

> **"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**

[5] 2013 (2) SA 259 SCA para 17

necessary to put the debtor in *mora.* This is referred to as *mora ex persona* . . . .

The purpose of *mora* interest is therefore to place the creditor in the position that he or she would have been had the debtor performed in terms of the undertaking."

[17] It is common cause in this matter that the parties concluded two written contracts in terms of which the appellant lent and advanced sums of money to the first respondent. The two loan accounts were payable in monthly instalments over periods of sixty months. The first respondent failed to pay the loan accounts as stipulated in the contracts. The second respondent had acted as surety in respect of the second loan account.

[18] The contracts further provided for specific rates of interest payable in the event the first respondent was in default together with legal costs at attorney and client scale as well as collection commission. In the circumstances the Judge *a quo,* with respect, misdirected herself when

he directed the first and second respondents to pay *mora* interest at the rate of 9% per annum when the contracts provided for a specific commercial rates of interest.

[19] The first and second respondents did not defend the legal proceedings in the *court a quo* as well as before this Court. Consequently, there is no basis for this Court to make an order for costs. In addition the Appellant's Attorney did not pursue an order for costs.

[20] Accordingly, the following order is made:

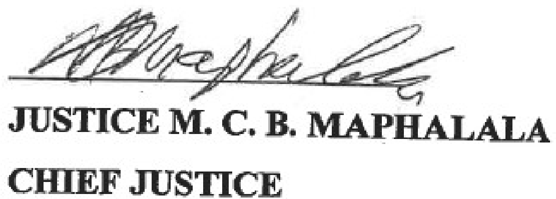
1. The appeal is allowed.

2. The judgment of the *court a quo* is set aside and substituted with the following judgment:

(a) The first respondent is directed to pay interest at Prime + 4.5% at the rate of 14.25% per annum in respect of the first loan account.

(b) The first and second respondent are directed to pay interest at Prime + 4.5% at 14.5% per annum in respect of the second loan account jointly and severally the one paying the other to be absolved.

For Appellant : Attorney Zweli Jele



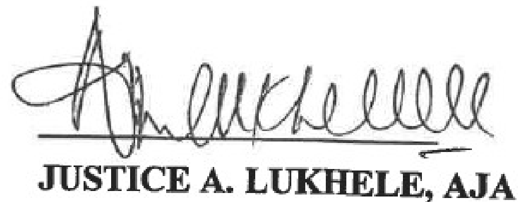
JUSTICE M. C. B. MAPHALALA

CHIEF JUSTICE

I agree

JUSTICE S. B. MAPHALALA, JA

I agree



JUSTICE A. LUKHELE, AJA