IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: A56/18

In the matter between:

NEDBANK LIMITED Appellant

and

CBR ENGINEERING CC 1st Respondent
C.A MINNIE SNR 2nd Respondent
C.A MINNIE JNR 3rd Respondent
HESTER CORNELIA HENDRIKA SLABERT 4th Respondent
MINIROCK CC 5th Respondent
VIRARNIE CC 6th Respondent

CORAM: MBHELE, J *et* MHLAMBI, J *et* DANISO, AJ

JUDGMENT BY: MHLAMBI, J

HEARD ON: 26 NOVEMBER 2018

DELIVERED ON: 06 DECEMBER 2018

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[1] This an appeal against the whole judgment of Pike, AJ handed down on 20 December 2017. It is the appellant's contention that the court a quo erred in:

1.1 Finding that the defendants to pay interest on the remainder of their liability to plaintiff only as from 15 June 2016 to date of payment at a rate of 10.25 % per annum;

1.2 Not finding that the interest on the defendants' liability should have run since date of service of summons in 2013;

1.3 In ordering the defendants, jointly and severally, the one paying, the others to be absolved, to pay the plaintiff's costs only from 15 June 2016 to date of the payment of the outstanding balance;

1.4 Not finding that the defendants were liable for the entire costs of the plaintiff's action;

1.5 Not finding that the enrichment took place on the day that that the money was granted to the defendants on 06 January 2012;

1.6 Not finding that plaintiff's claim was a liquidated debt but found the claim to be unliquidated;

1.7 In applying section 2A of the Prescribed Rate of Interest Act, 55 of 1975, instead of applying section 1 of the said Act to the matter at hand;

1.8 In its interpretation and application of the case law cited in **Kudu Granite Operation (Pty) Ltd v Caterna Ltd**[1];

1.9 In finding that the initial liquidated claim became an unliquidated claim once the particulars of claim were amended to include a claim for enrichment;

1.10 In finding that the interest on the debt could only run as from the date of the amendment of the particulars of claim, even where section 2A of the Act is applicable.

Background

[2] The court *a quo* was called upon to decide, as a stated case in terms of Uniform Rule of court 33 (1) and (2), when interest began to run on an enrichment claim against the respondents.

[3] In the court a quo the appellant was the plaintiff and the respondents were defendants. The plaintiff had instituted summons against the defendants during October 2013 based on a written loan agreement signed on 06 January 2012 in terms whereof the plaintiff loaned an amount of R 3 235 000 to the defendants. The defendants fell into arrears in respect of the loan. The defendants defended the matter and pleaded that no contract

[1] 2003 (5) SA 193 (SCA).

came into being. The matter was set down for hearing on 08, 09 and 11 March 2016.

[4] On the first day of the trial the plaintiff informed the defendants that it intended to amend its particulars of claim and as a result the matter was postponed *sine die.* The plaintiff amended its particulars of claim on 15 June 2016 to incorporate an alternative claim for enrichment. On 15 November 2016, by agreement between the parties, Naidoo, J made the following order:

"It is ordered that: (by agreement)

1. *The quantum and the merits of the action are separated.*

2. *The defendants concede their liability on enrichment as claimed in the alternative by the plaintiff.*

3. *The defendants shall effect a payment of R 1 200 000.00 to the plaintiff before 30 December 2016. Should the defendants not comply, plaintiff will be entitled to issue a warrant of execution with immediate effect.*

4. *The parties shall either agree on the remainder of the defendants' liability before 30 December 2016. Should this not be accomplished, plaintiff shall be entitled to place the matter on the court roll again, or place the issue before court as a stated case as soon as possible.*

5. *All issues of costs are reserved."*

[5] The statement of facts was couched as follows:

> *"The dispute:*
>
> *9.1 The plaintiff concedes that as the order granted in its favour is based upon an enrichment, it can no longer claim interest on the term loan in terms of the written agreement.*
>
> *9.2 Plaintiff submits therefore that it is entitled to moratory interest on the outstanding balance as from the date of the loan, namely 06 January 2012, alternatively as from the date of service of summons, until redemption thereof. Plaintiff will present before court during the hearing calculations reflecting the latest balance owed by the defendants based upon moratory interest.*
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> *9.3 It is defendants' contention that that (sic) interest can only begin to run as from the date of the amendment effected in terms of Rule 28 during 2016, to base a claim on enrichment. According to defendants, plaintiff's causa against them only arose once the amendment was effected."*

Issues to be determined

[6] The issue to be determined is when interest began to run on the enrichment claim against the respondents.

The Parties' submissions

[7] Mr Lubbe, on behalf of the appellant, submitted that the crisp issue in this appeal is the date on which the appellant was entitled to levy moratory interest on the amount of money by which the

first respondent was unjustifiably enriched. It was argued in the court a quo on behalf of the appellant that the date should be the date of the initial loan, namely 06 January 2012, alternatively, as from the date of service of the summons until the redemption thereof. The court erred in finding that the amount of the debt was an unliquidated debt and, as such, subject to the provisions of section 2A of the Prescribed Rate of Interest Act, 55 of 1975, instead of section 1 of the same Act. The court *a quo* erred furthermore in finding that the respondents were only placed in *mora* on the date of the amendment of the particulars of claim on 15 June 2016 as the respondents were already placed in *mora* when the original summons was served upon them several years prior to the amendment. The finding was therefore untenable as it had the effect that the initial liquidated claim became an unliquidated claim once the particulars of claim were amended. The amendment did not constitute a new cause of action as the outstanding amount on 15 June 2016 was exactly the same amount as had been sued for initially. The court *a quo* also erred in its application of the law cited in **Kudu Granite Operation (Pty) Ltd v Caterna Ltd[2].** The appeal should therefore succeed with costs.

[8] Mr Grobler, on behalf of the respondents countered that the appeal was without merit. The court *a quo* had applied the law correctly. He pointed out that the appellant was not entitled to claim interest on what it had advanced to the respondents in terms of the contract as there was no agreement between the parties as to the levying of interest at any specific rate, the date of

[2] 2003 (5) SA 193 (SCA).

commencement and so on because the respondents' liability arose out of an agreed enrichment claim. The claim was not quantified and therefore unliquidated. He referred to a number of decided cases and submitted that in the absence of an agreement as to the interest rate payable and the date of calculation (and because the claim is unliquidated) rendered section 2A of the Prescribed Rate of Interest Act applicable. The legislature created an entitlement to claim interest on an unliquidated debt on condition that the debt itself must be determined by means of a binding nexus such as a court order, arbitrator's award or agreement. Without such an order, award or an agreement, interest is not yet payable and may not be claimed. For purposes of interest there must not only be a debt but the debt must also be enforceable. The debt becomes enforceable upon a court order being granted. An enrichment action is distinctly different from a claim in contract as the *facta probanda* are significantly different.

Discussion

[9] In support of his submissions, Mr Grobler referred to **Kudu,** *supra,* and the following quotation:

> *"[15] Kudu's first contention is well-founded. There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in Baker v Probert 1985 (3) SA 429 (A), a judgment relied on by the Court a quo) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a distinct contractual*

remedy: Baker at 439A and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant."

[10] Even though it was conceded in paragraph 10 of the appellants' heads of argument that the position enunciated in paragraph 28 of the **Kudu** decision[3] could not be faulted, it was stated that the facts of the matter were totally different from the one at hand. The matter in that case revolved around the value of some 179 blocks of granite delivered pursuant to an agreement whereas *in casu,* a fixed amount of money was loaned, the terms of the contractual agreement having been amended to a claim of unjust enrichment. The court expressed itself as follows in paragraph 18[4]:

"[18] Before turning to a consideration of whether Caterna established a case in these regards, it is necessary to advert to a further misconception which affected both counsel and the Court a quo. This was to treat the granite blocks as if they were a subject-matter of the agreement of sale when it came to the question of what the defendant was liable to restore. Clause 4.1 of the agreement, understood in its proper perspective, meant that the blocks were no more than the coinage by which part of the obligation to pay the price for the shares and loan account was discharged. Each block was by agreement between the parties accorded a specific monetary value. On failure of the agreement Caterna was no more entitled to return of the individual blocks than it would have been to the actual notes in the denominations used to discharge a liability to pay in cash. Nor, if the

[3] Supra.
[4] Kudu, supra.

value attributed by the parties to the blocks had been less or more than their market value, would either party have been entitled to insist on repayment of the difference, but only a return of the purchase price as agreed between them, i.e. that portion of the price of R4 million represented by blocks and quantified by reference to the Ruenya B price list. One is not thereby giving effect to contractual provisions of a contract which has failed; one is simply identifying the true substance of the prestation in terms of the transaction, which in this case was the payment of a monetary price and not the sale of blocks. The misconception led to at least half the trial being devoted to a determination of the market value of the granite blocks, a wholly irrelevant exercise." It would appear that this submission is misplaced.

[11] We were referred to the following passage in **Commissioner for Inland Revenue vs. First National Industrial Bank Ltd**[5] which reads as follows:

"I have to disagree. To be in mora there must be a debt and the debt must be enforceable. (Steyn Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg at 40; De Wet and Yeats Kontraktereg en Handelsreg 4th ed at 147; Joubert (ed) Law of South Africa vol 5 para 203.) The Commissioner could not be in mora as regards repayment until such time as it was decided that a duty to repay existed. That was the very point of their understanding: that the money would only be refundable once it has been established (by a tribunal or by compromise) that the Commissioner misconstrued the statute and was obliged to repay the money. Any claim by the Bank for repayment to be made prior to the determination of the dispute could be met by the Commissioner with the defence that such a claim would be premature and might yet prove to be idle.

[5] 1990 (3) SA 641 (A) at page 652

That, in my view, is the short and simple answer to the Bank's contention: the Commissioner was not in mora and so cannot be liable for interest at tempore morae."

[12] The above sums up the issues before us and confirm that the respondents were not in *mora* until such time that it was decided that a duty to repay existed. In the circumstances this appeal stands to be dismissed.

[13] In the result the successful party is entitled to the costs.

[14] In the light of the above I propose the following order:

Order

1. The appeal is dismissed with costs.

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J. MHLAMBI, J

I concur

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M. MBHELE, J

I concur

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NS. DANISO, AJ

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