REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28167/2012

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

28/06/19 ML TWALA

Date **ML TWALA**

In the matter between:

MORGAN STANLEY CAPITAL GROUP INC **APPLICANT**

AND

STRATEGIC FUEL FUND ASSOCIATION **RESPONDENT**

AND

CASE NO: 28168/2012

STATEGIC FUEL FUND ASSOCIATION **APPLICANT**

AND

MORGAN STANLEY CAPITAL GROUP INC **RESPONDENT**

JUDGMENT

TWALA J

[1] The central issue for determination is whether the common law should be developed to ensure that when damages are paid to a claimant in a non-Rand currency, the interest rate applicable should follow that of the foreign currency unless there are features that render it just, fair and equitable to use the rate prescribed in section 1 of the Prescribed Rate of Interest Act 55 of 1975 (PRIA). Further issues include the appropriate date of set off and the effect on liquid and illiquid claims thereby relating to amounts payable respectively.

[2] Before this Court, is an application wherein Morgan Stanley, the applicant, seeks an arbitration award be made an order of Court and a counter – application wherein the Strategic Fuel Fund (SFF), the respondent, also seeks the arbitration award to be made an order of Court but with some ancillary orders or amendments. Retired Supreme Court of Appeal Brand J sat as the arbitrator and the appeal panel comprised retired Supreme Court of Appeal Judges R W Nugent, T D Cloete and retired High Court Judge B R Du Plessis.

[3] The applicant is Morgan Stanley Capital Group Incorporated (Morgan Stanley) a corporation registered in Delaware United States of America. The respondent is the Strategic Fuel Fund Association (SFF) an association duly incorporated and registered as such in terms of s21 of the Companies Act

No 61 of 1973 which is now deemed to be non-profit company by reason of item 4(1)(a) of the Transitional Arrangements of schedule 5 of the 2008 Companies Act. The parties are referred to as in convention.

The Arbitration

[4] It is common cause that the parties initially instituted summons proceedings in this Court which were later suspended and by agreement between the parties the claim was referred to arbitration. It is this arbitration award that is sought to be made an order of Court by the parties although based on different approaches or reasons which will appear more fully hereunder.

[5] SFF disputes that the arbitration appeal panel's award be made an order of court. The issues which SFF seeks to impugn are:

(a) The applicable rate of interest to be applied to the amounts awarded to the parties;

(b) The dates upon which the claim(s) of each party arose;

(c) the date(s) upon which set-off of the respective claims of the parties should take place;

(d) the applicable rate of exchange to be applied; and

(e) what amount is due and owing by the SFF to Morgan Stanley, or by Morgan Stanley to the SFF, as the case may be.

(f) the appropriateness of the interest rate which the appeal panel ordered, and which has an unfair and unconstitutional effect.

Background

[6] The background facts are uncontested and are as follows. SFF owns a large tank for the storage of crude oil at Milnerton and Saldanha Bay. SFF after not requiring the storage space, leased space to Masefield SA for the storage of crude oil in terms of storage agreements. By way of assignment Masefield SA ceded its rights under the storage agreement to Morgan Stanley.

[7] For purposes of this judgement it suffices to state that on 25 May 2010 SFF, Masefield SA and a company BNP Paribas agreed to the issue of a tank warrant whereby SFF confirmed that it held 991 646 bbls of Bonny light crude oil at the Milnerton site at the behest of BNB Paribas, and at the disposal and of any party it may wish to endorse to. The Tank Warrant included in the Masefield/ Morgan Capital deal was issued by SFF to the effect that 991 646 bbls were held. Morgan Stanley sold this amount of oil to Chevron. The amount was incorrect as the amount of barrels included some of the strategic stock that was held by SFF. In addition, on a date when the oil was pumped to Chevron by underground pipeline some of the crude had formed a sludge which could not be pumped. SFF should have avoided the formation of sludge which could not be pumped.

[8] In the result SFF did not deliver the correct number of bbls of oil. This short delivery constituted claim A. Accordingly there was a short delivery of 33559 bbls oil amounting to UD$ 5 865 240. Claim B was divided into three parts, the first being delictual because of a misstatement by SFF in the Tank Warranty of the quantity of oil being stored. Morgan Stanley had placed reliance on the misstatement which resulted in paying US$1 915 013 more to Masefield SA for the oil. The second part of Claim B was a claim

for damages for failure to transfer 33 559 bbls in the sum US$ 2 890 259. The third part of Claim B was the recovery of storage charges by SFF amounting to US$ 72 713.

[9] SFF's counter-claims A and B arise from the storage agreements concluded between SFF and Masefield SA for the storage of oil at Saldanha Bay and counter-claim C relates to Milnerton. SFF ordered Morgan Stanley to remove its oil by 30 September 2011. It could not do so as it had turned to sludge. The appeal bench found that Morgan Staley had complied with its obligation and SFF had not, so counter-claim C failed.

[10] In summation of the figures the following differences arise:

10.1 Morgan Stanley contends that the SFF as at 5 December 2017 owed it $3,585,548.24, alternatively the South African Rand currency equivalent thereof, (being R48,607,484.69), together with interest thereon at the legal rate of 10.25% per annum, calculated from 5 December 2017 until date of payment in full.

10.2 SFF contends that Morgan Stanley owed it the amount of R9 860 225.55 together with interest calculated at 15.5% from 1 August 2018 until date of payment.

[11] Both parties, however, seek to have their version of the award and the supplementary award made an order of Court. However, as an alternative prayer for relief, SFF *inter alia* seeks an order that the common law be developed as set out in paragraph 1 above as follows:

'When a Court (or arbitral tribunal) orders that damages be paid to the plaintiff (or claimant) in a currency other than South African rand, the court (or arbitral tribunal) should as a point of departure apply the interest rate applicable in the state of the foreign currency, unless there are factors rendering it just, fair and equitable on the facts of the specific case that the rate prescribed in section 1 of the Prescribed Rate of Interest Act 55 of 1975 should apply.'

Orders of the appeal panel

[12] SFF seeks to set aside the award made by the appeal panel and be substituted with the following:

a) SFF must pay to Morgan Stanley the sum of US$ 3 890 259 plus interest at the prescribed rate from 22 October 2011.

b) SFF must pay to Morgan Stanley the sum of US$ 1 915 013 plus interest at the prescribed rate from 5 November 2014.

c) SFF must pay to Morgan Stanley the sum of US$ 72 713 plus interest at the prescribed rate from 5 November 2014.

d) Morgan Stanley must pay to SFF the sum of R44 292 193 plus interest at the prescribed rate from 26 October 2010.

e) Each party must pay its own costs of the arbitration and 50% of the expenses relating to the arbitration including the fees of the arbitrator.

[13] The costs awards, and the dates from which interest was to run was provisional. Both parties were given leave to make written submissions on those issues failing which the awards would become final. The parties responded positively to the invitation of the appeal panel and made submissions concerning the dates from which the interest was to run. The appeal panel then published a supplementary award declaring the provisional dates from which interest was to run in terms of paragraphs 2 (a), (b) and (c) of the award to be final. No submission was made by SFF that the interest

rate charged in terms of section 1 of PRIA is unjust, unfair and inequitable and causes distortions.

Counterclaim by SFF

[14] Central to SFF's counter application are three issues. Firstly, that the rate of interest charged on foreign currency creates a distortion to the extent that the party awarded such rate of interest receives an unwarranted and unjustified windfall. Secondly, since the SFF's claim arose in 2010 and that the individual claims of Morgan Stanley arose in 2011 and 2014 respectively, it was argued that these claims should be respectively set off against SFF's claim as and when they arose. Thirdly, and in the alternative, they submitted that the Court should consider developing the common law in regard to the award of the rate of interest on claims based on foreign currency since it is discriminatory to award a rate of interest on claims based on foreign currency under the provisions of PRIA

[15] Morgan Stanley argued that its claims were not liquid until the appeal panel made its award on the 5th of December 2017 and could therefore not be set off against the claims of SFF before the 5th of December 2017. It was only at the conclusion of the arbitration proceedings that these claims became ascertainable. Further, SFF did not raise any issue before the appeal panel regarding the prescribed rate of interest to be applied to the claims of Morgan Stanley since they are expressed in foreign currency. In fact, SFF accepted the prescribed rate of interest awarded by the appeal panel in terms of the provisions of PRIA.

[16] Morgan Stanley contended further that the dates as to when the interest should start to run were awarded at the discretion of the arbitrators and they are not the dates upon which the claims arose. If the prescribed rate of interest was inappropriate, so it is contended, SFF should have raised the issue before the appeal Panel but it failed to do so.

[17] There is nothing to suggest that the prescribed rate of rates is contrary to the good morals or public policy neither is it discriminatory or unfair in this case. The transaction between the parties is denominated in US dollars but it is for all purposes a South African transaction and is concluded in the Republic. The fluctuations between the rand and the dollar as such has nothing to do with what Morgan Stanley is entitled to. Morgan Stanley suffered damages denominated in US dollars. In *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) (SA) 474 (A) at 774 Corbett CJ held that Courts do have the power to grant judgment in a foreign currency. Morgan Stanley is entitled to be compensated in dollars and as at date of payment and at the rate of interest prescribed by law[1]

[18] Morgan Stanley argued that SFF did not raise the defence of set off as it was not pleaded in the proceedings before the Arbitrator nor before the appeal panel. Further, so the argument goes, the requirements of set off have not been met in this case since the claims were not liquid and could not be easily ascertained until they were quantified on the 5th of December 2017. It was contended further that it was incompetent of SSF to ask this Court to re-visit the arbitration award.

[19] Counsel for SFF submitted that the appeal panel found that the claims between the parties were always liquid and that the mora date was from

[1] *NMB Bank v Capsopoulos and Another* [2017] ZASCA 94

2010. Since SFF's claim arose in October 2010, therefore, so goes the argument, the claims of Morgan Stanley have been extinguished by set off as and when they arose in 2011 and 2014. It was contended further by counsel for SFF that set off need not be pleaded and can be raised at any time even after judgment and including at the execution stage.

[20] It is further contended by counsel for SFF that the rate of interest granted by the arbitrators creates distortions for it does not follow the denomination of the currency in which the judgment was granted. The distortions created by the rate of interest of a different denomination places the party who is entitled to the interest at a better position than he would have been – thus it is unfair, unjust and inequitable. It is therefore under these circumstances that the Court has to development the common law to avoid that judgments granted in foreign currency denomination be awarded the mora interest in terms of the provisions of PRIA.

[21] It is trite law that an arbitration award is final and can only be interfered with by the Court in very limited circumstances. The essential purpose of arbitration is to speedily resolve legal disputes arising from commercial relationships instead of going through the courts.

[22] I consider it appropriate at this stage to state the relevant sections of the Arbitration Act, 42 of 1965 which provide as follows:

> 'Section 28 Award to be binding
>
> Unless the arbitration agreement provides otherwise, an award shall subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.

Section 29 Interest on amount awarded

Where an award orders the payment of a sum of money, such sum shall, unless the award provides otherwise, carry interest as from the date of the award and at the same rate as a judgment debt.'

[23] I also find it necessary for the purposes of this judgment to mention Clause 12.10 of the Arbitration Agreement between the parties which reads as follows:

'Such appeal award shall be final and there shall be no further right of appeal.'

[24] It is convenient to refer to the relevant paragraphs of the arbitration award which refer to the relevant sections of PRIA which read as follows:

'Para [71] In summary, Morgan Stanley alleged that SFF was obliged to transfer all Morgan Stanley's oil being stored in SFF's tanks, which, it was common cause, was 33559 bbl; that SFF failed to do so in breach of the agreement. And that in consequence Morgan Stanley suffered damages.

Para [84] ..... there is no dispute that the damages amounted to US$3 890 259 and there is also no dispute that Morgan Stanley is entitled to mora interest on the damages from 22 October 2011.'

INTEREST

[111] Interest payable on debts is governed by the Prescribed Rate of Interest Act, 55 of 1975. Damages are considered to be unliquidated debts, which are provided for in s2A (introduced with effect from 11 April 1997) as follows:

(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.
(2) (a) ... the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.
(b) ...
(3) .....
(4) .....

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest will run.

Para [112] The parties agreed that if Morgan Stanley's Claim A were to succeed, interest should run on that award from 22 October 2011. We consider it appropriate that interest should run on its other successful claims from the date they were introduced into the pleadings, which was 5 November 2014. The amount now claimed by SFF in its Counterclaims was demanded on 19 October 2010 and in terms of the relevant storage agreements, it was payable seven days thereafter, from which date, in our view, interest should commence to run. We have nonetheless allowed an opportunity for the parties to make further submissions on the date from which interest should run should they choose to do so.'

Set Off

[25] I find myself unable to agree with counsel for SFF that the arbitration found that the claims were liquid from the date since they arose. It is an accepted principle of our law that a debt amount which is the subject of a dispute is considered to be illiquid until after it becomes clear and is no longer in dispute, then it is classified as liquidated. It is my respectful view therefore that the claims in dispute in this case were unliquidated until they were quantified by the award that was made or published by the arbitrator on the 5th of December 2017. Whilst the arbitration proceedings were unfolding, the claims remained disputed by the parties and were only determined and liquidated by the arbitration award made and published on the 5th of December 2017.

[26] Set off can operate ipso iure but both claims must be liquid. In this case the claim of Morgan Stanley was illiquid since it involved a dispute about damages whilst the claim of SFF was liquid being for the hire of tank space.

In *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 738E, Boshoff J said the following:

'Our Courts have frequently been called upon to consider whether a claim was liquidated or not for the operation of set-off. Mutual liquidity of debts is an essential pre-requisite for set-off. A debt must be liquid in the sense that it is based on a liquid document or is admitted, or its money value has been ascertained, or in the sense that is capable of prompt ascertainment.'

[27] The arbitration award, like a judgment of a court of law, is a declaration as to what the applicant was awarded. It is well established that a set-off of an unliquidated against a liquidated amount is impermissible. The claims in this case were not easily ascertainable until the award was made and published on the 5th of December 2017. I therefore conclude that the claims between the parties were unliquidated until the arbitration award was made.

[28] In *Blakes Maphanga Inc v Outsurance (144/09) [2010] ZASCA 19 (19 March 2010)* the Supreme Court of Appeal stated the following:

'It is trite that where two persons are mutually indebted to each other their obligations may be extinguished by set-off. Where debts in the same amount are set off, mutual extinction of the debts occur; but where the amounts differ the smaller debt extinguishes the larger pro tanto. However, set-off could only operate where two liquidated claims existed that could be set off against another.'

[29] I am unable to disagree with counsel for SFF that set off need not be pleaded as a defence but the declaration may be made at any time and even after judgment or during the execution stage. However, in this case, set off could not find application from 2011 and 2014 when the claims of Morgan Stanley arose respectively since they were illiquid. Not all the requirements of set off were met at that stage. It is settled law that set off could only operate where the debts of both parties are of the same nature, liquidated, fully due and payable. As alluded to above, the claims or debts of the parties were only liquidated when the arbitration award was made and published on the 5th of December 2017 and that is when set off could find application.

[30] There is no merit in SFF's argument that the prescribed rate of interest charged in this case is causing distortions since the judgment is in a foreign denomination of US dollars. Although SFF is not appealing the arbitration award, it sought this Court to interfere with the award of the prescribed rate of interest since it alleges it creates a windfall for Morgan Stanley and therefore it is unfair, unjust and inequitable and contrary to public policy. This issue was not raised before the appeal panel and it is not competent for SFF to raise it before this Court. The parties chose to subject themselves to arbitration and the arbitrator's decision and/or award is final and can only be appealed against in very limited circumstances. [2] It is not permissible for SFF to seek to resolve the issues arising between itself and Morgan Stanley in a piece meal fashion and in different fora.

[31] *In Riversdale Mining Limited v Du Plessis (536/2016) [2017] ZASCA 007 (10 March 2017)* the Court stated the following:

> '[28] So, did the arbitrator exceed his jurisdiction in deciding the issue? The basic principle in the interpretation of arbitration clauses is that they must be construed liberally to give effect to their essential purpose, which is to resolve legal disputes arising from commercial relationships before privately agreed tribunals, instead of through the courts. When businesspeople choose to arbitrate their disputes they generally intend that all their disputes to be determined by the same tribunal, unless they express their wish to exclude any issues from the arbitrator's jurisdiction in clear language. There is thus a presumption in favour of 'one stop arbitration'.

[32] Section 29 of the Arbitration Act provides for an award which orders the payment of a sum of money to carry interest at the same rate as a judgment debt. Section1 of PRIA provides that if a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by

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[2] [2] Cool Ideas 1186 CC V Hubbard & Another 2014 (4) SA 474 (CC)

an agreement, such interest shall be calculated at the rate which may from time to time be prescribed by the Minister of Justice. It is my considered view therefore that the appeal panel awarded the rate of interest as provided for by law and SFF should have raised the rate issue at that stage.

[33] It is apparent from the particulars of claim to the summons that Morgan Stanley sought interest on its claims to be at the legal rate until date of payment. When SFF was pressed as to why this interest argument was not an issue before the arbitrator and the appeal panel, it was submitted that it only became clear to SFF that the rate of interest awarded was creating distortions when its Chief Financial Officer was calculating the amount to be paid to Morgan Stanley.

The Legislative Scheme of PRIA

[34] Section 2A of PRIA was introduced with effect from 11 April 1997. In relevant part it provides as follows:

> (1) 'Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.'

[35] PRIA does however provide for an exception to this provision in s2A(5) which provides that an order can be made which appears 'just in respect of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest will run'. Clearly therefore SFF had an opportunity to raise the issue of the appropriate interest rate in relation to non-Rand awards. In particular s2A (5) is clear in its terms that interest rates can be adjusted on the basis that it appears just. Section 2A (5) reads as follows:

> *'(5)* Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest will run.'
>
> Underlined for emphasis

[36] The appeal panel considered the issue of the interest rate during their determination of this case and used their discretion as empowered by s 2A(5) of PRIA to set the rate applicable and the date from which it is to run. I hold the view therefore that nothing prevented SFF from raising the issue of alleged distortions, the unjust and unfair windfall in favour of Morgan Stanley when it was invited by the appeal panel to make submissions on the dates upon which interest was to start running.

[37] I find myself in agreement with counsel for Morgan Stanley that there is nothing unjust or unfair or inequitable about the award of the prescribed rate of interest in this case. Morgan Stanley was awarded damages determined in US dollars and is entitled to the rate of interest as prescribed by law in the Republic. It is my respectful view that there is no justification for the Court to develop the common law with regard to the determination of the rate of interest to be awarded in judgments or orders given in foreign currency. The Court as well as the arbitrator or the appeal panel, in my view, has an unfettered discretion to deal with the rate of interest to be awarded in judgments or orders granted in foreign currency in terms of the provisions of s2A(5) of PRIA.

[38] SFF has failed to demonstrate that Morgan Stanley was not entitled to the rate of interest as awarded by the arbitration award nor that set off of the claims of the applicant against it should be applicable as from 2011 and 2014 when these claims arose. I find that the claims became liquidated on 5th of December 2017 when the arbitration award was published and therefore set off could only operate from that date as the requirements thereof were met on that date.

[39] The conduct of SFF is that of a litigant at a late stage in the litigation seeking to develop the common law in accordance with the Constitution. This was referred to in the case of *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC). Van der Westhuizen writing for the Court stated the following at para40:

> 'In Carmichele Ackermann J and Goldstone J stated that 'where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.' The court reminded us though that, when exercising their authority to develop the common law, '(j)udges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary'. The principle of separation of powers should thus be respected.'

[40] In this case the Legislature has addressed the issue of interest payable on debts in terms of PRIA. Damages are considered to be unliquidated debts, which are provided for in s2A of PRIA (introduced with effect from 11 April 1997). This provision enables the court to make an order as appears just in respect of interest on an unliquidated debt. There is therefore no necessity to develop the common law.

[41] I am mindful of the fact that SFF is an organ of the State relying on the public purse for its funding. I accept that it has to take all precautionary measures to ensure the proper utilisation of the public purse and make payment only where it is obligated to do so. However, what is disconcerting in this case is that Morgan Stanley as early as the 12 April 2018 and in writing, invited SFF, owing to the differences in the interpretation of the award, that both parties should approach the appeal panel for clarification of the award. Morgan Stanley's motivation for the suggestion to approach the appeal panel was premised on the escalation of costs and the on-going escalation of interest. SFF however, refused to seek clarification from the appeal panel and intimated that it would approach this Court for a declaratory order to obtain clarity on the interpretation and implementation of the award.

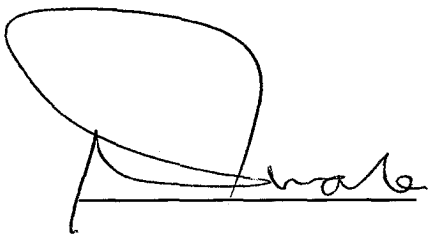
[42] As referred to above the issues between parties were subject to arbitration and they were supposed to have been fully ventilated at the arbitration stage. The parties elected the arbitration process and approaching the arbitrators to clarify the award would have resolved the issue between the parties speedily and brought finality to the matter in a more cost-effective manner. The ineluctable conclusion is that nothing prevented the parties from approaching the appeal panel for clarification of the award and there is no plausible reason why SFF refused to do so. The attitude displayed by SSF was not that of a party who was concerned with the costs and the interest attracted by the debt on a daily basis. The attitude of the SFF was obstructive and intended to delay Morgan Stanley receiving its compensation. This kind of behaviour cannot be countenanced from an organ of the State even if it were dealing with a multi-national corporation.

[43] I find that SSF should bear the costs. Although the appeal panel was functus officio, at the very least the appeal panel could have been approached and it would have been up to them if they thought it appropriate to clarify their award if it was ambiguous and capable of different interpretations. SFF were therefore not justified in refusing to approach the arbitrators for direction on their award.

[44] In the result Morgan Stanley must succeed in accordance with the prayers in the notice of motion and SFF's counterclaim falls to be dismissed.

[45] I therefore make the following order:

1. Prayers 1, 2 and 3 of the notice of motion are granted.
2. SFF's counter-application is dismissed with costs including costs of two counsel.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree

VICTOR M

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 29th April 2019

Date of Judgment: 28th June 2019

For the Applicant: Adv. A Subel, SC
Adv. A M Smalberger, SC

Instructed by: Werkmans Attorneys
Tel: 011 535 8447

For the Respondents: Adv. PF Louw, SC
Adv. R Mastenbroek

Instructed by: Hogan Lovells (South Africa) Inc.
Tel: 011 775 6366