IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA52/2017

In the matter between:

KHWAILE RUFUS MALATJI **Appellant**

and

MINISTER OF HOME AFFAIRS **First Respondent**

DEPARTMENT OF HOME AFFAIRS **Second Respondent**

Heard: **22 March 2018**

Delivered: **15 August 2018**

Summary: *Mora* interest – determination of the date from which the *mora* interest should starts to run in respect of the retrospective payment – Labour Court substituting the award of reinstatement with a compensatory order – employer paying compensation and interests from the date of the Labour Court's judgment – employee contending that interest ought to run from the date of the award and not from date of the judgment of the Labour Court – Labour Court dismissing employee's claim –

Held that: *Mora* interest can only be levied and would accrue once the amount of compensation is ascertained or easily ascertainable. Where the award is subject

to review, it cannot be said that the quantum is readily ascertainable and that the time for performance by the debtor is fixed. This is so because there is no obligation on the debtor, under those circumstances, to pay the debt.

Further that interest could not have accrued from the date of the issue of the award, which was challenged by means of a review before the Labour Court. The judgment debtor would only be entitled to the payment of interest *a tempore morae* on the unliquidated claim from date of the award, if the award is not challenged through the review process, or from date of the judgment on review pursuant to the Court's determination of the quantum of the claim. Appeal partially upheld and Labour Court's judgment substituted with an order to the effect that the compensatory order made by it should bear interest at the prescribed rate from the date of the judgment.

Coram: Phatshoane ADJP, Jappie and Coppin JJA

JUDGMENT

PHATSHOANE ADJP

[1] At stake in this appeal, which is with leave of the Court *a quo* (*per* Harper AJ), is the date upon which *mora* interest should begin to run in respect of the retrospective pay, equivalent to nine months' salary, which the Labour Court (*per* Snyman AJ) ordered the Minister of Home affairs ("the Minister") and the Department of Home Affairs ("the department"), the first and second respondents, on 02 April 2013, to pay to Mr Khwaile Rufus Malatji, the appellant. The controversy is whether interest on the capital amount should be calculated from the date of the arbitration award, which was issued on 14 August 2006 by the General Public Services Sector Bargaining ("GPSSBC") in favour of the appellant, or from the date of the review judgment by Snyman AJ.

[2] The background to this litigation is as follows. On 28 April 2005 the department dismissed the appellant from its service as its Chief Director: Legal Services

following a disciplinary hearing where he was found guilty on various charges. He referred his dismissal dispute to GPSSBC for resolution through conciliation and arbitration. On 14 August 2006 the GPSSBC issued an arbitration award in terms of which the appellant was reinstated retrospectively to his former position. The Minister and the department were also ordered to pay him 12 months' remuneration. The award which was varied on 30 August 2006 and the terms of the variation do not form part of the record of this appeal.

[3] During October 2006 the Minister and the department launched an application to review and set aside the award issued by the GPSSBC. On 02 April 2013 the Labour Court (*per* Snyman AJ) reviewed and set aside the GPSSBC's award on the grounds of procedural unfairness of the dismissal. It substituted the relief with an amount of R399 750.00, equivalent to the appellant's nine months' salary. The award was made an order of the Labour Court in terms of s 158(1)(c) of the Labour Relations Act, 66 of 1995 ("the LRA). The Labour Court made no order in respect of the payment of interest.

[4] On 24 April 2014 the department paid the principal amount and interest from 02 April 2013, the date of the judgment of the Labour Court. However, the appellant demanded that he be paid interest from 01 September 2006, the date pursuant to the issuing of the variation award by the GPSSBC. He contended that the effect of the Labour Court's order of 02 April 2013, insofar as it substituted the award, was that he was entitled to the payment of interest on the capital amount from the date of the arbitration award and not from the date of the judgment. The gist of his argument is founded on s 143(2) of the LRA which provides:

> 'If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the award provides otherwise.'

[5] On 21 January 2015 the appellant launched an application in the Labour Court for a declaratory order that the Minister and the department were liable to pay

him interest from date of the variation of the award until 24 April 2013, i.e the date on which the department paid interest on the capital amount, at the rate of 15.5% per annum in respect of the monetary award made in his favour by the GPSSBC for the substantive unfairness of his dismissal, as substituted by the order of the Labour Court on 02 April 2013.

[6] On 19 January 2017 the Labour Court (Harper AJ) dismissed the application for the declarator. It reasoned that s143 (2) of the LRA does not address the circumstances where the award of an arbitrator is substituted with an order of the Labour Court. It held that there was a direct link between s143 and the review process because the Labour Court, when tasked to review the arbitration proceedings, essentially acts as the arbitrator to the extent determined by it in the judgment. It further held that the Labour Court is entitled to review the question of interest and decide whether to grant same from date of its judgment, or from date of the arbitration award. Where the Labour Court alters the date upon which the interest is payable, which is prejudicial to an employee or declines to order that the interest be paid, it would provide the employee with reasons for its decision. It went on to hold that where the Labour Court's order is silent on the payment of interest it does not follow that s143(2) does not apply.

[7] The Labour Court further held that where the Labour Court *"decides to substitute the award "in toto" [as it did in casu] then [it] either expressly or by necessary implication has dealt with the issue of whether interest should be payable on the sum of money. In other words, the issue of whether interest should be payable does not become an issue still to be dealt with in legal proceedings."* It concluded that it had no jurisdiction to overrule the judgment of a fellow judge and was bound by it. It further held that it could not speculate why the Labour Court had not ordered that interest be paid. It was preferable, the Court continued, for the judgment and/or order of Snyman AJ to have been appealed against.

[8] Before us the appellant contended that Haper AJ erred in holding that:

8.1 section 143(2) of the LRA does not apply where the Labour Court substitutes the decision of an arbitrator with its own. It was contended that the Labour Court's conclusion is in conflict with the authority to the effect that when the Court substitutes the arbitrator's decision it sits as an arbitrator;

8.2 the Labour Court, in substituting the arbitrator's decision '*in toto*', elected to disallow the payment of interest on the capital sum;

8.3 the order substituting the award was not intended to penalise the department by permitting that interest run from the date of the judgment. It was contended that by substituting the award with an award of compensation, as opposed to reinstatement, Snyman AJ considerably ameliorated the financial burden imposed on the respondents by the arbitrators' award, even if that award attracted interest as contemplated in s143(2) of the LRA.

[9] As already alluded to, the crux of this appeal is whether *mora* interest should be calculated from 01 September 2006, the date of the variation award by the GPSSBC or from 02 April 2013, the date of the review judgment of the Labour Court. Mr Beaton, for the appellant, contended that had Snyman AJ intended to deprive the appellant of interest in respect of the seven years from 2006 to 2013 he would have expressly said so in his judgment because his order does *"not provide otherwise"* as envisaged in s143(2). He relied on *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey No*[1] in support of the argument that interest ought to have begun to run from the date of the award and not from the date of the judgment of the Labour Court. The headnote of that case aptly summarises the Court's conclusion as follows:

> 'Every judgment debt bears interest, in terms of s 2(1) of the Prescribed Rate of Interest Act 55 of 1975, from the day on which such judgment debt is payable. A judgment debt is payable on the day upon which the trial Court hands down its

[1] 1988 (4) SA 353 (A) (*General Accident Versekeringsmaatskappy*).

> judgment, irrespective of whether the judgment is substituted or amended on appeal, so that the eventual judgment debt is only determined on appeal. Where an appeal against a judgment succeeds and the amount of the judgment debt is altered, there is no question of a new judgment, but of an amended judgment which the trial Court should have given and such judgment is of force and effect retrospectively to the date of the trial Court's judgment.'

[10] The decision in *General Accident Versekeringsmaatskappy* is distinguishable, as it concerned interest on a judgment debt in respect of a claim for damages. As observed by the Constitutional Court in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others (Myathaza),*[2] an arbitration award is not a judgment debt because it is not a judgment of a court of law. A different approach applies to arbitration awards issued under the LRA. Its dispute resolution dispensation is a special, self-standing system, with its own prescribed periods within which various steps are required to be taken. It is a system for specific disputes, which is based on special processes and principles underlying the LRA, and fora specially created for their appropriateness to that system.[3]

[11] The import of s143(2) is that the capital sum awarded would naturally bear interest at the prescribed rate unless the award provides otherwise. In *Top v Top Reizen CC,*[4] the Labour Court correctly noted that section 143(2) "does not depart from the common law position in that interest commences to run from the date on which the debtor's claim was ascertained." This brings me to the question whether the debtor's liability for the payment of interest or *mora* can be said to have arisen in an instance where the validity of the award is subject to challenge through the review process.

[12] In *Intramed (Pty) Ltd (In Liquidation) and Another v Standard Bank of South Africa Ltd and Others*[5] the Court held:

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[2] 2018 (1) SA 38 (CC) at 80C para142.
[3] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* 2018 (1) SA 38 (CC) at 76F-G para 131.
[4] (2006) 27 ILJ 1948 (LC).
[5] 2008 (2) SA 466 (SCA) at 470 paras 14-17.

'[14] More than 80 years ago in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 182 this court said the following:

"Here, however, the amount of the loss incurred in respect of each item of the claim was ascertained by agreement between the parties before issue of summons, so that the defendant knew exactly what was the value of the property destroyed, for which he was held liable, and his failure to pay that amount constituted *mora* on his part. It follows therefore, that by our law interest began to run on the amount of defendant's liability from the date of *mora*. And that brings me to consider the question of what that date is."

[15] In *Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA)* at 594G - 595B this approach was reaffirmed. The following appears at 594G - E [in para 86 - Eds]:

"The only remaining issue regarding TBA's claim for *mora* interest relates to the date from which such interest should be calculated. TBA's contention is that the commencement date should be a date earlier than the date of summons because the *quantum* of its damages was readily ascertainable by PW at such earlier date. I disagree. In the first place the *quantum* was by no means capable of easy and ready proof and the fact that Reid reported on it cannot be held as an admission by PW against itself. In the second place it fails to recognise the fundamental principle that, however liquidated a plaintiff's claim for damages may be, *mora* interest can only be calculated from the date when *mora* commenced."

[16] In VG Hiemstra and HL Gonin's *Trilingual Legal Dictionary* 3 ed (1992) at 147 the phrase *a tempore morae* is defined as follows:

"vanaf die tydstip wanneer die skuldenaar in gebreke is; vanaf die tydstip van wanbetaling / / from the moment the debtor is in default."

[17] The authorities referred to in the preceding paragraphs give expression to this meaning. The phrase always has to be viewed in the context in which it is used and in particular, in relation to the attendant claim and the debtor's knowledge or ascertainment of the amount due.'

(See also: *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 652I-653B.)

[13] It is clear from the authorities cited that interest is not payable unless there is an agreement to pay it or there is default or *mora* on the part of the debtor. A judgment debtor is *in mora* from the date of payment fixed by the judgment. From this date, the judgment creditor is, at common law, entitled to interest as of right if it was duly claimed in the Court *a quo*.[6] The purpose of *mora* interest is to place the creditor in the position that he or she would have been had the debtor performed in terms of the undertaking.[7]

[14] In *Victoria Falls and Transvaal Power Co. Ltd. v. Consolidated Langlaagte Mines Ltd*,[8] the Court pronounced that:

> 'The civil law did not attribute *mora* to a debtor who did not know and could not ascertain the amount which he had to pay. 'Non *potest improbus videri, qui ignorat, quantum solvere debeat.'* (*Dig.* 50.17.99). And that rule was adopted by the Courts of Vriesland. (See Sande, *Dec.*, 3.14.9). It has also been followed in our own practice. No South African decision was quoted to us, nor have I been able to find any, in which interest before judgment has been awarded upon unliquidated damages. I do not think, therefore, that they can be given here. I do not say that under no circumstances whatever could such damages carry interest. Cases may possibly arise in which though the claim is unliquidated the amount payable might have been ascertainable upon an enquiry which it was reasonable the debtor should have made. Such cases, should they occur, may be left open. But the present matter stands in a different position. It was not possible for the defendant to know or ascertain what damage its breach of contract had caused, and it cannot therefore, on the principles of our law, be held liable for interest prior to judgment upon the amount of the damage.'

[15] *Mora* interest can only be levied and would accrue once the amount of compensation is ascertained or easily ascertainable. To my mind where the award is subject to review, it cannot be said that the quantum is readily

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[6] *Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) at 156G.
[7] *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga, and Others* 2013 (2) SA 259 (SCA) 269 at para 17
[8] 1915 AD 1 at 32

ascertainable and that the time for performance by the debtor is fixed. This is so because there is no obligation on the debtor, under those circumstances, to pay the debt. Section 145(1) of the LRA affords any party to a dispute, who alleges a defect in any arbitration proceedings under the auspices of the commission, to apply to the Labour Court within six weeks of the date that the award was served for an order, *inter alia*, setting aside the arbitration award. If the award is set aside, the Labour Court may determine the dispute in the manner it considers appropriate or make any order it considers appropriate about the procedure to determine the dispute.[9]

[16] In *Myathaza* (*supra*),[10] the Court noted that although s145(3) of the LRA empowered the Labour Court to stay enforcement of an award pending a review application, it did not follow automatically that the award was enforceable. If this were to be so, the Court remarked, applicants for review would be prejudiced, in the event that the award is set aside. In some instances, the harm would be irreparable. The arbitration awards constitute administrative action not claims capable of being enforced.[11] The last step in the adjudication of the unfair dismissal disputes is either a judgment of the Labour Court in regard to a dismissal dispute in respect of which the Labour Court has jurisdiction, or an order of the Labour Court making an arbitration award an order of that court if the dispute is one that had to be referred to arbitration after an unsuccessful conciliation process.[12]

[17] It is important to remember that the GPSSBC made an award of retrospective reinstatement in favour of the appellant. With regard to what would constitute a "debt" authorities are clear that the order of reinstatement is not an obligation to pay money or deliver goods or to render service by a judgment debtor.[13] Interest

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[9] Section 145(4) of the LRA.
[10] At para 47.
[11] *Myathaza* at para 53.
[12] *Myathaza* at para 56.
[13] *Myathaza* at para 59; *Mogaila v Coca Cola Fortune (Pty) Ltd* 2018 (1) SA 82 (CC) at para 18; *Brompton Court Body Corporate SS119/2006 v Khumalo* 2018 (3) SA 347 (SCA) 350-351 at paras 9 and 11 and authorities cited therein.

could not have accrued from the date of the issue of the award, which was challenged by means of a review before the Labour Court. In any event, the order made by Snyman AJ, insofar as it stipulates that the respondents were liable to pay the appellant nine months' salary, substantially altered the original award of reinstatement made by the GPSSBC.

[18] From the aforegoing analysis, it cannot be said that the Minister and the department were in *mora* from the date of issue of the award and/or its subsequent variation. Mr Beaton's argument, that by ordering that interest should run from the date of the issue of the arbitration award, as opposed to the date of final determination of review by the Labour Court, would encourage speedy disposition of the review applications in conformity with the general principle that labour dispute ought to be resolved expeditiously, is misplaced. Such an order will be untenable. I am not aware of any principle of the law that the debtor may be mulcted with the payment of interest for a period, in circumstances where the extent of its liability had not yet been established in that period.

[19] In conclusion, the judgment debtor would only be entitled to the payment of interest *a tempore morae* on the unliquidated claim from date of the award, if the award is not challenged through the review process, or from date of the judgment on review pursuant to the Court's determination of the quantum of the claim. To the extent that the Labour Court, correctly in my view, was disinclined to make a determination on the declarator sought, the appeal should succeed. It follows that the judgment by Snyman AJ, only to the extent that he did make an order in respect of interest, ought to be substituted by fixing the date from which the interest is to be calculated.

[20] I am of the view that in accordance with the requirements of law and fairness this is not a case where any of the parties should be ordered to pay the costs of this appeal. I make the following order.

Order

1. The appeal is partially upheld.

2. Paragraph 99.4 of the order, issued on 02 April 2013 under Case No: JR2326/2006 by Snyman AJ, is set aside and substituted with the following:

   "99.4 The award of the second respondent regarding the issue of relief, as contained in the arbitration award dated 16 August 2006 and the variation award dated 30 August 2006, are substituted by an award that the third respondent is entitled to compensation in an amount equivalent to 9 (nine) months' salary, being an amount of R699 750. This amount is to bear interest at the rate of 15.5% from the date of the judgment, being 02 April 2013, to date of final payment."

3. No order is made in respect of the costs of the appeal.

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MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

Jappie and Coppin JJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:	Adv RG Beaton SC
	Instructed by Rooth & Wessels Attorney
FOR THE FIRST AND	
SECOND RESPONDENT:	Adv PC PIO
	Instructed by The State Attorney, Pretoria.