IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J1307/04

In the matter between:

GERRIT TOP **Applicant**

And

TOP REIZEN CC **Respondent**

JUDGMENT

D VAN ZYL J:

[1] This is an application in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995 ("**the Labour Relations Act")** for an order that the arbitration award made by Mr R Moletsane ("the arbitrator") dated 8 March 2001 ("the award") in arbitration proceedings under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), be made an order of this court. The relevant portion of the award reads as follows:

3.1 I accordingly find that the dismissal of the applicant was unfair because the Respondent did not prove that the reason for dismissal was a fair reason related to the applicant's conduct. I however find that the Respondent followed a fair procedure.

3.2 I therefore order that the Respondent pay to the applicant compensation in the amount of R75000-00 after tax which is equal to six months (salary?**) to be paid on or before 30 March 2001.**

3.3 I make no order as to costs as the Respondent has partially been successful".

[2] The respondent, the unsuccessful party in the arbitration proceedings, opposed the application. The respondent did not place the validity of the award in issue. The basis for its opposition is that the application is an abuse of the process of the Court. According to the respondent it did not refuse to comply with the terms of the award and was prepared to pay the amount of the compensation awarded by the arbitrator. Instead, the applicant frustrated payment by launching various applications in order to secure a larger compensatory award.

[3] The history of this matter is set out in the respondent's answering affidavit. The applicant did not dispute the correctness thereof. After the arbitrator made his award on 8 march 2001, the applicant sought a variation and to that extent launched an application in terms of section 144 of the Act. In that application the applicant asked that the award be substituted with an award ordering the respondent to pay compensation equivalent to twelve months

salary. The application was dismissed by the arbitrator on 23 July 2001. On 13 August 2001 the applicant applied for rescission of the arbitrator's ruling. This application was never prosecuted and was eventually withdrawn on 2 November 2005, a day before the hearing of the present application.

[4] The next step that was taken by the applicant was the filing of an application in this Court wherein he sought an order reviewing and setting aside the award of the arbitrator and the substitution thereof with an award for compensation equal to twelve months salary. On 24 October 2001 the applicant also applied for an order condoning the late filing of the application for review. The applicant similarly did not take any steps to pursue these two applications and on 10 August 2004 withdrew the review application by filing a formal notice of withdrawal without a tender for costs.

[5] Before the filing of the aforementioned notice of withdrawal the applicant on 2 September 2003 also applied in terms of section 143(3) of the Act to the director of the CCMA to certify that the award is a final and binding award. This application was similarly not proceeded with. I was advised that the reason therefor was that section 143(3) did not apply to the award because it was made before the enactment of the said section. Despite that being the position, the application was not withdrawn and the applicant then launched the present application more than a year later on 25 August 2004. I was informed that the application in terms of section 143(3) was only withdrawn subsequent to the filing of the present application. This was quite obviously done in response to

the respondent's submission in its answering affidavit that it is undesirable for this court to make the award an order of court whilst the applicant's application to the CCMA to have the award certified was still pending.

[6] At the hearing of this matter, and in the light of the withdrawal of the rescission application, Mr Lennox for the respondent informed the Court that the respondent tendered to pay the amount of the award and that it did not persist in its opposition to the application to have the award made an order of Court. He submitted however that this Court should not order interest on the award to run from the date of the order making the award an order of Court. The reason for this submission is to be found in 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. (See para [19] below). If the award is made an order of this Court it would mean that the respondent would be liable in terms of this section for legal interest on the amount of the compensation from the date of the award, to the date of payment thereof. This, according to Mr Lennox, would result in the respondent being penalised as it would have to pay interest it would not have been required to pay if the applicant did not abuse the provisions of the Labour Relations Act by launching a number of abortive applications and thereby delaying payment of the award. Mr Hollander for the applicant on the other hand submitted that the respondent could have tendered payment of the award at an earlier date suggesting that it would have interrupted the running of legal interest.

[7] In support of his argument Mr Lennox relied **inter alia** on the decisions in **Phillips v Botha** 1999 (2) SA 555 (SCA) and **Price Water Coopers and Others v National Potato Co-Operative Ltd** 2004 (9) BCLR 930 (SCA) where it was held that a court is entitled to protect itself and others against the abuse of its process. An abuse would occur when the legal process is diverted from its true course to serve extortion or oppression or to exert pressure in order to achieve an improper end. What must be proved is **mala fides.** The use of a particular court procedure for a purpose other than that for which it is primarily intended may be evidence of **mala fides.** However, in order to prove **mala fides** a further inference that an improper result was intended is required. (See Para [51] of the **Price Waterhouse** case **(supra)** at page 945.) What is clear from the authorities referred to by Mr Lennox is that the power of the Court to prevent an abuse of its legal process is to be exercised with great caution and only in a clear case.

[8] Having regard to the history of the dispute between the parties, there is no doubt that the applicant's conduct leaves much to be desired. He embarked on a number of applications subsequent to the award in an apparent attempt to have the amount of compensation awarded to him increased. Some of the applications were not only filed out of time but were also not prosecuted, while the application for the certification of the award was clearly ill advised. Then, after more than four years, he decided to execute upon the award by asking that it be made an order of this Court. This he did whilst some of the aforementioned applications for the setting aside of the award were still pending. To make matters worse, the applicant failed to deal with the respondent's allegations

in this regard in reply, with the result that this court has not been favoured with an explanation for the aforementioned state of affairs.

[9] Applying the authorities relied on to the facts of the present matter, what this Court is requested to do is to infer an intention on the part of the applicant to cause the respondent financial harm. This is to be inferred from the fact that the applicant delayed payment of the amount of the compensation awarded by instituting the aforementioned proceedings. Although the applicant chose not to deal with the respondent's allegations by the filing of a replying affidavit, my **prima facie** view is that it cannot be said that the only inference to drawn from the applicants' conduct is that he was **mala fides** and intended an improper result. It is important in this regard to note that it was not the respondents' case that there was no merit in the respective applications launched by the applicant and I was not asked to consider this aspect.

[10] Essentially, the question that arises for decision is whether this Court has the power in the context of the Labour Relations Act to order, in an application to have the award of an arbitrator made an order of Court, that the award shall not accrue interest where the conduct of the applicant is reprehensible to the extent that it justifies censure. The answer to this question is in my view to be found in the legal nature of **mora** interest.

[11] 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.** (**Applebee v Berkovitch** 1951 (3) SA 236 (C) at

240H-241A and Corbett**, The Quantum of Damages** Vol 1 4th ed by JJ Gauntlett at 23). **Mora** may take the form of **mora ex re** where, for instance, the parties have contractually agreed that a liability exists to pay interest on the principal debt; or **mora ex persona** 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) at 631G -632B).**

[12] A further rule is that a debtor is not in **mora** and liable for the payment of interest when he did not know and could not ascertain the amount which he had to pay. Accordingly, interest would not commence to accrue or be awarded if the claim is for an unliquidated amount (**Victoria Falls and Transvaal Power Ltd v Consolidated Langlaagte Mines Ltd** 1915 AD 1 at 31-32; **WestRand Estates Ltd v New Zealand Insurance Co. Ltd (supra)** at 195; **Union Government v Jackson** 1956 (2) SA 398 (A) at 412E-416H; **Adampol (Pty)Ltd v Administrator Transvaal** 1989 (3) SA 800 (A) at 817A; **SA Eagle Insurance Co. Ltd v Hartley** 1990 (4) SA 833 (A) at 841H-I and **Administrateur Transvaal v J D Van Niekerk en Genote Bk** 1995 (2) SA 241 (A) at 245H-J). The position may be different where the amount payable was readily ascertainable by the debtor, or is the subject of agreement between the parties. (see the authorities cited above. See also **Russel and Loveday v Collins Submarine Pipelines Africa (Pty) Ltd** 1975 (1) SA 110 (A) at

155D) and **Muller v Mutual and Federal Insurance Co Ltd and Another 1994** (2) 425 (C) at 446 C -448A).

[13] In respect of illiquid claims that are not readily ascertainable or were not fixed by agreement, interest starts to accrue from the date of judgment, provided it was specifically claimed. (**Russel N D and Loveday NO v Collins Submarine Pipelines Africa (Pty)Ltd (supra)** AT 156G; **Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd** 1977 (3) SA 670 (A) at 692 A-D; **Bailey N O v General Accident Insurance Co Ltd** 1987 (2) SA 702 (C) at 707F and **Roberts v London Insurance** 1948 (2) SA 840 (W) at 840-841).

[14] The liability to pay **mora** interest automatically attaches to the principal obligation by operation of law. (**Union Government v Jackson and Others (supra)** at 411G-H). Therefore, once the liability of the debtor to pay **mora** interest had been established, the creditor is as of right entitled thereto. It is not a matter of discretion (see **International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd** 1955 (2) SA 1 (W) at 28A; **Russel N O and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd (supra) at 156 G; Katzenellenbogen Ltd v Mullin** 1977 (4) SA 855 (A) at 855 D-E; **Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd (supra)** at 692A-B and **Schenk Schenk** 1993 (3) SA 346 (E) at 351 A-B).

[15] To summarise: the ordinary rule is that a debtor's liability for interest only arises when the debt has been liquidated, that is, if the debt is capable of prompt ascertainment, if the quantum thereof has

been determined by agreement between the parties, by an order of court or otherwise. See **Union Government v Jackson (supra)** at 412D-E; **Kleynhans v Van der Westhuizen** 1970 (2) SA 742 (A) at 749(A) and **Fattis Engineering v Vendick Spares (Pty) Ltd** 1962 (1) SA 736 (T) at 738F). A Court of law does not have a discretion to either reduce or refuse an award of interest once the debtor is **in mora.**

[16] The common law position, namely that a debtor is only entitled to interest on an unliquidated claim from the time that the court had assessed the quantum thereof and delivered judgment, is now embodied in section 2 (1) of the Prescribed Rate of Interest Act 55 of 1975 as amended ("**the Prescribed Rate of Interest Act").** However, contrary to the position before, it is no longer necessary for the judgment creditor to specifically claim interest (**Bailey N O v General Accident Insurance Co Ltd (supra)** AT 707F). The said section provides as follows:

> "**Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise."**

[17] A material change to the common law position was brought about by the promulgation of the Prescribed Rate of Interest Amendment Act 7 of 1979. This Act **inter alia** added section 2A in the Prescribed Act of Interest Act. The relevant portions thereof read 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) …

(b) In the case of arbitration proceedings and subject to any other agreement between the parties, interest shall run from the date on which the creditor takes steps to commence arbitration proceedings, or any of the dates contemplated in paragraph (a), whichever date is the earlier.

(3) …

(4) Where a debtor offers to settle a debt by making a payment into court or a tender and the creditor accepts the payment or tender, or a court of law awards an amount not exceeding such payment or tender, the running of interest shall be interrupted from the date of the payment into court or the tender until the date of the said acceptance or award.

(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 the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

[18] The purpose of this section is clearly three fold. Firstly, it provides for the automatic award of interest on an unliquidated debt which

at common law was not possible until the debt had been liquidated by agreement between the parties or by a court of law or arbitrator. Secondly, it provides for the interruption of the running of interest in certain circumstances. Lastly, it empowers the court or arbitrator, in the last instance and in order to avoid inequitable results, to **inter alia** fix the rate of interest and the date from which it is to run (see **Adel Builders (Pty) Ltd v Thompson** 2000 (4) SA 1027 (SCA) at 1032 C-I and **Skilya Property Investments (Pty) Ltd v Lloyds of London** 2002 (3) SA 765 (T) at 816 D-G).

[19] Turning to the present matter, the amount awarded to the applicant by the arbitrator is **"compensation"** as provided for in section 193 (c) of the Labour Relations Act. Because the amount to be awarded as compensation by an arbitrator is not reasonably easy to ascertain, it constitutes in my view an illiquid claim and a claimant would, in terms of the common law position, not be entitled to interest on the amount awarded to him until determined by the arbitrator. See **Cato N O v Group Areas Development Board** 1966 (2) SA 117 (T) at 126E).

[20] As stated earlier, section 143 (2) of the Labour Relations Act specifically deals with the issue of interest in that it provides for interest to run on an award for the payment of a sum of money from the date of the award at the same rate as the rate prescribed in respect of a judgment debt in terms of section 2 of the **Prescribed Rate of Interest Act 55 of 1975.** It reads as follows:

> **"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."

A similarly worded section is contained in the Arbitration Act 42 of 1965 (section 29).

[21] The effect of section 143 (2) is that an award of any sum of money automatically attracts post-award interest at the rate set by the statutory instruments made under the Prescribed Rate of Interest Act, unless the arbitrator specifies that the award shall not carry interest. It is clear that section 143 (2) does not depart from the common law position in that interest commences to run from the date upon which the debtor's claim was ascertained. The arbitrator however has a veto by the exercise of which he may direct that the award will not carry interest at all. Unless he so directs, the award will automatically carry interest at the same rate as a judgment debt. See **Timber Shipping Co SA v London and Overseas Freighters Ltd** [1971] 2 ALL ER 599, [1972] AC 1**; Rocco Guiseppe and Figli v Tradax Export SA** [1983] 3 ALL ER 598 and **Walker and Others v Rome and Others** [1999] 2 ALL ER (Comm) 961, where the English Courts dealt with an equivalent section (section 20) in the 1950 Arbitration Act).

[22] Returning to the provisions of 2A of the Prescribed Rate of Interest Act, it is clear from a reading of sub-sections (1) and 2 (b) that it also applies to unliquidated debts determined by an arbitrator or an arbitration tribunal. This raises the question whether it would also find application to an award made by an arbitrator in terms of the provisions of the Labour Relations Act. The answer to this question

lies in turn in the question whether the provisions of sections 2A and 143(2) are capable of being read together. The reason therefor is that section 210 of the Labour Relations Act provides that if there is any conflict between that Act and the provisions of any other law, the provisions of the Labour Relations Act shall prevail. There are two material differences between the two sections. The first is that, as stated earlier, section 2A gives a discretion to the arbitrator in the last instance to **inter alia** fix the rate of interest and the date from which it is to run. In terms of section 143 (2) on the other hand, the arbitrator can do no more than specify that the award shall not carry interest. The second and more material difference lies in the fact that the peremptory provisions of subsection 2 (b) of section 2A results in an arbitration award automatically attracting interest from a date earlier than the date of the award and before the quantum of the amount owing was determined by the arbitrator. This is clearly a departure from the common law position as affirmed by section 143 (2). It entitles the debtor to pre-award interest and is clearly in conflict with the provisions of section 143 (2) of the Labour Relations Act.

[23] In my view, the two enactments are clearly inconsistent. Although they both deal with the same subject matter, they cannot stand together and are incapable of being read "**as forming one system and interpreting and enforcing each other" (**compare **R v Maseti and Others** 1958 (4) SA 52 (E) at 53 E-H and **Petz Products v Commercial Electrical Contractors** 1990 (4) SA 196 (C) at 204 H-J). I may add that different considerations may apply to section 29 of the Arbitration Act, which, **prima facie,** may have been impliedly repealed by section 2A of the Prescribed Rate of

Interest Act. (See generally **Ntuli v Benoni Town Council and Another** 1957 (3) SA 597 (WLD) at 602 A-G and **Kent N O v S A Railways and Another** 1946 AD 398 at 405). It is not necessary for purposes of this judgment to express any further views in this regard. Even if sections 2A and 143 (2) are found not to be inconsistent, I am of the view that on a proper reading of subsections (1) and (5) of section 2A, the discretionary power to order interest to accrue from a date other than that envisaged in subsection 2 (b), rests in the functionary who determines the unliquidated debt. Applied to the present matter, that functionary would be the arbitrator who determined the amount of the compensation awarded to the applicant. Accordingly, subsection (5) does not assist the respondent in its argument.

[24] Turning then to the question posed, this Court does not have the inherent power under the common law to award **mora** interest when it is not due. Conversely, there is no authority for the proposition that the court has the power to disallow such interest once the debtor's liability for the payment of interest has arisen. The creditor is of right entitled to interest. No question of discretion or the making of an equitable judgment arises. In the present matter the debtor's liability to pay interest arose from the making of the award. The provisions of section 143 (2) are clearly peremptory and effectively adds **"automatic"** interest on a sum awarded by an arbitrator. A claimant to whom compensation had been awarded is therefore entitled to interest from the date of the award unless the arbitrator specified that the award shall not carry interest. In the present matter the arbitrator did not say anything to negate the effect of section 143 (2) of the Labour Relations Act.

[25] The validity of the award not being in dispute, the applicant is entitled to enforce his right to have the award made an order of Court. (See **Cape Town Municipality v Allie N O** 1981 SA 1 (C) at 4 F-H and **Vidavsky v Body Corporate of Sunhill Villas** 2005 (5) SA 200 (SCA) at 207J). The obligation to pay interest does not stand separate from the award but forms, in substance, an integral part thereof. The obligation to pay interest arose from the award and the applicant is entitled to implement the award in its entirety (See **Cape Town Municipality** case **(supra)** at 12H-13H). To hold otherwise would be to interfere with the award made by the arbitrator and to allow in effect an appeal from the award or a review thereof. I accordingly conclude that no inherent power vests in this court to show its displeasure with the conduct of the applicant by ordering that the award of the arbitrator shall not carry interest at all or from a date other than the date of the award, as contended by counsel for the respondent.

[26] However, the matter does not end there. As stated earlier, it is common cause that the respondent tendered payment of the amount awarded by the arbitrator as compensation. It is an accepted rule of our law that the effect of a tender of the amount claimed "**met openbeurs en klinkende munt"** is that a debtor is regarded as being no longer **in mora** and is consequently exonerated from all liability for subsequent interest as well as legal costs. (See Lee **An Introduction to Roman Dutch Law** 4th ed at 260; **Odendaal v Du Plessis** 1918 AD 470 at 475, 478, 480-481; **B & R Investments (Pty) Ltd v Laubscher** 1951 (2) SA 567 (T) at 570E-F and **Boland Bank Bpk v Steele** 1994 (1) SA 259). It was not suggested

on behalf of the applicant that the tender did not constitute a valid tender. The only remaining question is whether section 143 (2) in any way altered the common law position that tender prevents interest from continuing to run. **Prima facie,** statutes must be interpreted in the light of, and in conformity with the common law. (See generally Du Plessis **The Interpretation of Statutes** at 69 and Devenish **The Interpretation of Statutes** at 159 -161). A change to the common law by statute "…**must either expressly say that it is the intention of the legislature to alter the common law, or the inference…must be such that we can come to no other conclusion"** (per Wessels J in **Casserley v Stubbs** 1916 TPD 310 at 310. See further the authorities cited at footnote 38 page 161 of Devenish **Interpretation of Statutes** (**supra**). There is nothing in the wording of section 143 (2) that supports an express or implied change to the common law position.

[27] Accordingly, the respondent is held not to be liable for interest on the amount of the award after the date of the tender of payment on 29 November 20. The respondent could effectively have avoided the negative effect of section 143 (2) had it tendered payment of the amount of the award at an earlier date. There was no reason for it not to have done so because the respondent on its own version did not dispute its liability to pay the applicant the compensation awarded to him by the arbitrator. The respondent therefore only has itself to blame in this regard.

[28] Insofar as the question of costs is concerned, I am of the view that the manner in which the applicant conducted himself in the exercise of the remedies available to him in terms of the Labour

Relations Act and his dilatoriness in enforcing the award calls for censure. In the circumstances, I am of the view that this is an appropriate case where the applicant should not only bear the costs of the application but that such costs should be on an attorney and client scale.

[29] In the result, I make the following order:

(a) The arbitration award made on 8 March 2001 under case no GA 52967 is hereby made an order of this Court.

(b) The respondent is not liable for legal interest on the amount of the said award subsequent to 29 November 2005.

(c) The applicant is to pay the costs of the application on an attorney and client scale.

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D VAN ZYL J

FOR THE APPLICANT	**: ADV L HOLLANDER**
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FOR THE RESPONDENT	**: ADV M LENNOX**
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Date of hearing	: 29 November 2005