IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
511/2000

In the matter between

SASRIA LIMITED [Formerly THE SOUTH AFRICAN SPECIAL RISKS INSURANCE ASSOSIATION] **Appellant**

and

CERTAIN UNDERWRITERS AT LLOYDS **Respondent**

CORAM: HOWIE, STREICHER, MTHIYANE, BRAND JJA et HEHER AJA

Date heard: 11 March 2002

Delivered: 27 March 2002

***Mora* interest : tacit term as to date when debt enforceable.**

J U D G M E N T

HOWIE JA

HOWIE JA

[1] The parties to this appeal are insurers and the question is whether the respondent is liable to pay the appellant *mora* interest. Fire damaged certain timber plantations respectively insured by the parties. The cover afforded by the appellant was only operative - and the cover afforded by the respondent was not operative - if the fire was caused by labour disturbances. When, as a result of the fire, claims were made under the respective policies, the parties disputed which of them was liable. To resolve the impasse they agreed to make interim payments to the various insured. To the amount of these payments the parties contributed equally. They also agreed that when the insured proceeded against the appellant for final payments of their claims - which claims were due to proceed by way of arbitration - the result of the arbitration would determine which of the parties was liable to the insured and, therefore, which would refund half of the interim payments to the other.

Subsequently it was agreed that the arbitration proceedings would provide for recourse to an arbitration appeal tribunal. That the respondent was a party to this further agreement was never denied and as the insured and the respondent were throughout represented by the same attorney it is a matter of inescapable inference that it was such a party. (The respondent is sometimes referred to in the papers as "respondents". I shall adhere to the singular.)

[2] The arbitrator found that the fire was not caused by labour disturbances and in his award in effect absolved the appellant. That was on 20 August 1997. On 21 August 1997 the appellant, through its attorneys, claimed the refund due to it (R2,35m) and *mora* interest if payment was not made by 22 August 1997. However an appeal failed. The award of the appellate tribunal was made on 22 September 1998. Between 2 November

1998 and 19 January 1999 the respondent made five payments towards liquidating the refund.

[3] In May 1999, having not received payment of the full refund, and more particularly, having received no interest, the appellant applied to the High Court at Johannesburg for an order, *inter alia* for payment of the outstanding capital and for interest on the unpaid capital balance outstanding from time to time.

[4] The application came before Marais J who considered that what the parties had meant by resolving their dispute by reference to the result of the arbitration, and whether *mora* interest was payable, had to be determined according to the procedural principles applicable to appeals against money judgments. On this footing the learned Judge held that although liability for the refund was only finally determined when the appeal result was declared,

the date when the refund became payable was the date of the arbitrator's award and *mora* interest ran from that date.

[5] The respondent appealed to the Full Court. By a majority the appeal was upheld. Writing for the majority, Willis J held that as the parties' dispute was not itself the subject of the arbitration the principles relied upon by the Court of first instance were irrelevant. The parties had decided that their own dispute would depend simply on the result of the arbitration proceedings. It followed that the refund only became payable when those proceedings came to an end on appeal. Before that no *mora* interest could accrue. In the minority judgment Labe J adopted much the same approach as Marais J in the Court of first instance. The judgment of the Full Court is reported: see 2001 (1) SA 744 (W).

[6] With the necessary leave, the appellant seeks, in effect, restoration of the order of Marais J.

[7] The majority judgment in the Court below appears to rest essentially on the reasoning that if there was an appeal, payment of the refund would have to await the outcome of the appeal, and that *mora* interest could not have run until the capital debt was payable consequent upon the appellate award. To my mind, if I may say so with respect, those considerations are not enough to provide the answer. Resolution of the essential issue on appeal depends on what the parties variously expressed and implied (as construed in the light of the background circumstances) not as to the payability of interest (for the appellant disavows entitlement to interest as a contractual term) but as to the due time for payment of the capital debt. Obviously, liability for *mora* interest would follow inevitably if a debtor failed to pay a contractually agreed monetary obligation when performance was due and enforceable: *Bellairs v Hodnett and Another* 1978 (1) SA 1109

(A) at 1145 D-H; *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 652 H-I.

[8] What the application papers contain that is presently relevant is sparse in the extreme. The founding affidavit contains the following allegation:

> "Pending the arbitration, both applicant and respondent had agreed to make interim payments to the insured on the basis that once their respective liability had been determined through arbitration, the loser would refund the winner the amounts paid by the winner".

[9] In response, the respondent's opposing affidavit contains the following:

> "8.1 There was indeed an agreement reached between the applicant and respondents in terms of which each of the applicant and respondents would make payment of one-half of an agreed sum pending the final determination of the matter through the arbitration procedure.
>
> 8.2 The intention of the parties to that agreement was clearly that upon the final adjudication of the matter, which in this instance included the appeal procedure and final award in the appeal procedure, the party that was successful would be reimbursed by the other party in such amount as was

paid by the successful party *pendente lite*. By a successful party I refer to either the applicant or the respondents in this application. Although the respondents were not cited as parties in the arbitration proceedings nevertheless it was understood that as far as the applicant and respondents were concerned one or either of them would bear the burden of indemnity in favour the claimants. Accordingly, in the event of the claimants not succeeding in the arbitration, the applicant would be regarded as having been successful vis-à-vis the respondents.

8.3 There was no express agreement in regard to payment of interest on the amounts paid and/or advanced by each of the applicant and respondents. It was clearly tacitly understood however that until such time as the arbitration was finally determined, which in this instance included the final adjudication after the appeal procedure, there would be no entitlement either on the part of the applicant or the respondents to claim repayment from the other.

8.4 Having regard to what is stated above, I submit that there could have been no obligation on the part of either the applicant nor the respondents to make repayment to the other until such time as the appeal award was made in the favour of either the claimants or the applicant (the respondent in the arbitration proceedings) and, accordingly, there can be no question of a party being in *mora* prior to that date. In fact, it was contemplated at the time of the agreement between the applicant and respondents that should the applicant be successful, a reasonable period of time would be required

> in order to enable the respondent to make funds available for the purpose of payment to the applicant. On this basis it must have been understood that the obligation to make payment would not arise until the expiration of a reasonable period of time after the publication of the award in the appeal."

In the replying affidavit the appellant merely denied those allegations and disputed the accompanying contentions.

[10] Certain correspondence which passed between the parties' attorneys was annexed to the founding affidavit. Very little of it assists. It suffices to refer to a letter dated 9 December 1996 in which the attorney for the respondent addressed the appellant's attorney as follows:

> "We are in receipt of a copy of your client's letter to Price Forbes in terms of which your client agrees to pay one half of the loss, the Lloyds Underwriters to pay the other half pending the outcome of an Arbitration to decide which of your client or the underwriters are liable. What now needs to be attended to is the selection of an Arbitrator, the nomination of an Arbitration Panel if the parties

> require the latter, the fixing of the venue and other logistical matters. Would you please let us have your views on the aforegoing as soon as possible".

[11] Correspondence immediately following upon that letter merely referred to details of the pending arbitration, the pleadings in which were filed during March - April 1997.

[12] Concerning the procedure to be followed in the arbitration, the appellant's attorney wrote to the respondent's attorney a letter dated 26 May 1997 in which, among other suggestions, the question of the appeal was raised. The letter also contained this paragraph:

> "We should like to agree with you that if the claim fails, your clients will, as a matter of course, refund the payments of R1 750 000 and R600 000 together with interest at 15,5%, which amounts they received by way of provisional payment, without prejudice."

(Obviously by "clients" the writer meant to refer to the respondent and by "they" he intended to refer to the insured.)

[13] Replying by letter dated 28 May 1997, the respondent's attorney did not react to the appeal suggestion but, as regards a refund, said:

> "As far as the refund of the money which has been paid to our clients in the event of our clients not succeeding is concerned, whilst the amounts will be repaid, at the time when payment was made there was no question of interest arising, we see no reason for interest to be added to these amounts".

[14] One cannot determine when the interim payments were made or what passed between the parties at that time other than the letter of 9 December 1996. It is also not apparent from the papers when the availability of an appeal procedure was finally decided upon but, by inference, it must have been between 11 June 1997, when the appellant's attorney declared in a letter of that date that the appellant would not go to arbitration except with an appeal procedure, and 16 June 1997, when the arbitration hearing was scheduled to begin. Here again, there is nothing on record to establish what was said on behalf of the parties when the appeal procedure was agreed.

[15] For the appellant it was argued that when it was agreed to provide for an appeal the parties must, in the interests of commercial efficacy, have had in mind that the usual principles applicable to an appeal in civil litigation would apply. These included the suspension of the arbitrator's award pending appeal and the retrospectivity of the appellate award to the date of the arbitrator's award in the event of a successful appeal. It followed, so ran the argument, that the time for repayment of the capital, and the time when *mora* occurred, was the date of the arbitrator's award.

[16] On behalf of the respondent it was contended, with particular reliance on the word "outcome" in the letter of 9 December 1996, that the present parties, who were not the parties to the arbitration, hitched the resolution of their own dispute to the result, not the process, of the arbitration. As the capital was not payable before the result of the appeal was declared, the respondent cannot have been in *mora* before that. In addition, so it was

submitted, the correspondence quoted shows that although interest was in contemplation before an appeal was provided for, there was nothing in the record to show that the parties dealt with the subject of interest when they eventually agreed to the appellate procedure.

[17] In deciding what the parties intended as regards the due date for payment of the refund, the starting point must be that when the interim payments to the insured were made, and certainly when the letter of 9 December 1996 was written, there was only one possible due date. With no appeal procedure in contemplation the due date had to be the date of the arbitrator's award. The evidence reveals no alternative as at that stage. And between then and the agreement to provide for an appeal nothing was said or done which altered the position. The focus is then squarely on the latter agreement and what it entailed.

[18] If the parties resolved upon a new due date they must have done so contractually. In the absence of express terms in this regard the question must be whether there was agreement by way of a tacit term.

[19] The financial realities in the light of which that question must be answered are clear and compelling. Before an appeal procedure was mooted there would have been no reason to contemplate any appreciable delay between the date of the arbitrator's award and the refund payment. However, when the parties agreed to the availability of an appeal they must have foreseen that the eventual winner might be kept out of its money for a considerable time. The amount of the refund due to the winner of the parties' dispute was in excess of R2 000 000. That is a substantial sum. Interest on it at 15,5 per cent per year (the rate referred to in the correspondence and not queried) would plainly be commercially significant. It is not realistic to think that the parties were unaware of these

considerations. The appellant, after all, was due to pay *mora* interest to the insured if it lost the arbitration. It would have been anomalous, had it been liable for the refund, that it would not also have been liable to pay *mora* interest to the respondent. The converse holds good, too, if it was for the respondent to refund the appellant.

[20] Whether a tacit term was agreed depends, according to trite law, on the answers the parties would probably have given to certain crucial questions had they been asked at the relevant time.

[21] Plainly, what applied to the one applied to the other. Their respective situations did not differ. Either the one had to make the required refund or the other had to. It was not a case where they might have given differing answers.

[22] At the time the letter of 9 December 1996 was written what was in dispute between the parties was the same fundamental factual issue that

arose as between the insured and the appellant in the arbitration i e whether the fire was due to a labour disturbance. The arbitrator's award would decide that question for the parties. The effect of their agreement and the effect of his award would be the same as if the loser had been ordered to refund the winner. In other words, properly construed, their agreement was that they would treat and react to the award as if it were a money judgment against the loser. That was the position prior to the question of an appeal being raised.

[23] If it had been pointed out to the parties when they agreed to the appeal provision (assuming that it was not present to their minds before) that attaching refund liability to the date of the appellate award instead of the date of the arbitrator's award would result in a material loss of interest to the winner of their dispute, it is strongly improbable that they would have switched the due date to the date of the appellate award. Putting it another

way, if advised that that interest loss would not occur if the principles applicable to an appeal against a money judgment in the context of civil litigation were applicable to the arbitration appeal and to their own position vis à vis each other, it would, I think, have been their unhesitating and unified response that those principles were indeed to apply.

[24] As to the submission on behalf of the respondent that the appellant's attorney's letter of 26 May 1997 specifically raised the question of interest, and that it was not expressly dealt with when the parties decide to provide for an appeal, there are several considerations to be borne in mind. The first is that a tacit term may exist not only where the contracting parties have thought about the matter but also where they have not. The enquiry here is what they would have answered on the matter had it been drawn to their attention when the appeal procedure was finally agreed to. The letter in question was written before that, at a time when, although the issue of a

possible appeal was first being suggested, the refund date was still to be the date of the arbitrator's award. As mentioned already, there would then have been no cause to expect delay between that date and the payment of the refund. The answer of the respondent's attorney of 28 May 1997 that he saw "no reason for interest to be added" must be read in the correct context. In that context he was not contemplating the ramifications of an appeal. He was addressing the question of contractual interest as from the date of the provisional payment to the insured. In all these circumstances the correspondence relied on by the respondent's counsel does not militate against the existence of the tacit term under discussion.

[25] I conclude, therefore, that when the parties agreed to provide for an appeal it was a tacit term of their agreement, firstly, that the due date for payment of the refund remained the date of the arbitrator's award and, secondly, that if there should be resort to an appeal the arbitrator's award

would be suspended pending appeal and the appellate award would either leave the arbitrator's award undisturbed or reverse the incidence of liability retrospectively to the date of the arbitrator's award.

[26] It follows that *mora* interest was payable by the respondent to the appellant from the date of the arbitrator's award. The decision of Marais J was, with respect, correct and the appeal to the Court below ought to have failed.

[27] These conclusions make it unnecessary to consider whether the respondent was, in substance, a party to the arbitration and subsequent appeal. The impression that it was, does tend to linger. If indeed it was, then a quite separate basis might have existed for the same finding adverse to it in this appeal. That is a question one need not now pursue.

[28] The appeal is allowed with costs. The order of the Court below is set aside and replaced by the following order.

"The appeal is dismissed, with costs."

CT HOWIE
JUDGE OF APPEAL

CONCURRED:

STREICHER JA
MTHIYANE JA
BRAND JA
HEHER AJA