THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 276/2011

In the matter between

MOKALA BELEGGINGS (PTY) LTD	**FIRST APPELLANT**
WILLEM HENDRIK STEYN SNYMAN	**SECOND APPELLANT**

and

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**FIRST RESPONDENT**
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF LAND AFFAIRS	**SECOND RESPONDENT**
THE CHIEF LAND CLAIMS COMMISSIONER	**THIRD RESPONDENT**
THE REGIONAL LAND CLAIMS COMMISSIONER: GAUTENG AND NORTH WEST PROVINCE	**FOURTH RESPONDENT**
THE DEPUTY DIRECTOR: FINANCE, DEPARTMENT OF LAND AFFAIRS	**FIFTH RESPONDENT**
THE MINISTER OF FINANCE	**SIXTH RESPONDENT**
THE REGISTRAR OF DEEDS	**SEVENTH RESPONDENT**
MAHLANGU ATTORNEYS	**EIGHTH RESPONDENT**
BAROLONG BA GA MARIBA COMMUNITY	**NINTH RESPONDENT**

Neutral citation: *Mokala Beleggings (Pty) Ltd & another v Minister of Rural Development and Land Reform and others* (276/11) [2012] ZASCA 21 (23 March 2012)

Coram: **MPATI P, NAVSA, SNYDERS, MAJIEDT and WALLIS JJA**

Heard: **27 FEBRUARY 2012**

Delivered: **23 MARCH 2012**

Summary: **Mora interest – interpretation of clauses in contract affecting mora interest – mora ex re and mora ex persona.**

ORDER

On appeal from: Land Claims Court (Randburg) (Mia AJ, sitting as court of first instance):

1. The appeal is upheld.
2. The first to fourth respondents are ordered jointly and severally to pay the costs of the appeal.
3. The order of the court below is set aside and substituted with the following:

   '(a) The first to fourth respondents are ordered to pay interest to the first applicant at the rate of 15.5 per cent per annum on the amount of R1 450 000 (one million four hundred and fifty thousand rand) from 28 November 2009 until 30 June 2010 and on the further amount of R1 450 000 (one million four hundred and fifty thousand rand) from 8 December 2009 until 12 July 2010;

(b) The first to fourth respondents are ordered to pay interest to the second applicant at the rate of 15.5 per cent per annum on the amount of R1 475 000 (one million four hundred and seventy five thousand rand) from 8 December 2009 until 23 June 2010 and on the further amount of R1 475 000 (one million four hundred and seventy five thousand rand) from 28 November 2009 until 2 July 2010.

(c) The first to fourth respondents are ordered jointly and severally to pay the costs of the application.'

JUDGMENT

MAJIEDT JA (MPATI P, NAVSA, SNYDERS and WALLIS JJA concurring):

[1] 'Interest is the life-blood of finance' said Centlivres CJ six decades ago in *Linton v Corser*.[1] The learned Chief Justice made this observation in the course of finding that there is no reason to draw a distinction between contractual interest and mora interest. This appeal concerns the latter and the crisp issue is whether a purchaser who deliberately delays effecting the transfer of property and payment of the purchase price can be held liable for mora interest. The appellants, as unsuccessful applicants for, inter alia, an order awarding them mora interest in the Land Claims Court, Randburg (the LCC) before Mia AJ sitting as court of first instance, are before us with leave of this court.

[1] *Linton v Corser* 1952 (3) SA 685 (A) at 695G-H.

[2] The appellants were the registered owners of fixed property on which the Snyman family farmed. The property was the subject of a land claim which the appellants conceded. They subsequently agreed to sell the property to the State. Two agreements of sale were drawn up as the property consisted of two separate pieces of land and each appellant owned one of these. I shall revert presently to the salient terms of the agreements which were signed by the purchaser on 29 January 2009. The State, as purchaser, was to appoint the conveyancers in terms of the agreements, which is contrary to usual practice. The eighth respondent, a firm of attorneys and conveyancers, was duly appointed in this regard. The agreements provided that transfer was to be effected to the land claimants, namely the Barolong ba ga Mariba community, the ninth respondent (the community), although the National Department of Land Affairs (the department) was stipulated as purchaser, but nothing turns on this. Of importance is that the agreements provided that 'the transferring attorney undertakes to effect the transfer of the [properties] in the name of the purchaser within 2 (two) months from the date of signature of [the] agreement by all parties concerned'.[2]

[3] It was common cause on the papers that the conveyancers were ready to lodge papers in order to effect the transfer during the middle of June 2009. They were instructed, however, by their client, the department, to delay lodgement, first until 1 July 2009, then to October 2009 and eventually indefinitely. The reason given for this instruction was that the department had no funds in its budget to pay the purchase price. This, too, became common cause. These delays caused the appellants to dispatch, by registered post, written letters of demand, which I will discuss in more detail shortly.

[4] When the letters of demand proved fruitless an urgent application was launched in the LCC for various orders, including a claim for mora interest. The urgent application elicited a positive response from the department

[2] Clause 5.2 of the agreements.

inasmuch as payment of 50 per cent of the purchase price was made to the first appellant on 30 June 2010 and the balance on 13 July 2010 and to the second appellant on 23 June 2010 and 2 July 2010 respectively.[3] Registration of the transfer of the properties was also effected. But the department opposed the claims for mora interest and for a punitive costs order against it. The LCC declined to grant mora interest and made the normal costs order. In the result the claim for mora interest forms the sole subject of this appeal.

[5] The appellants' case for mora interest was based firstly, on mora ex re in reliance on clause 5.2 of the contracts and secondly, on mora ex persona by virtue of the written letters of demand. Shortly before the hearing of the matter in the court below, the appellants gave notice of an amendment of their Notice of Motion in terms whereof it relied on mora ex re as the main cause and in the alternative on mora ex persona. It was common cause in the LCC that the State was in mora regarding the performance of its obligations before the application was brought. However, it resisted the claim for mora interest on the ground that it was not obliged in law to pay interest. The LCC decided the matter on the basis that the agreement did not make provision for the payment of interest; that payment of the purchase price depended on the registration and transfer of the property and that the appellants (as applicants) failed to show when registration was effected and when payment was received in order to calculate a date from which interest should run.

Mora ex re: clause 5.2 of the agreements

[6] It is well established that 'mora' simply means default or delay and that it finds application when the consequences of a failure to perform a contractual obligation within the agreed time are determined.[4] Where a contract fixes the time (either expressly or tacitly, but with certainty as to when

[3] The agreements made provision for payment of 50 per cent of the purchase price within 30 days after the date of signature of the agreement and for payment of the balance thereof within 10 working days of the date of registration of transfer.
[4] *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) para 11.

it will arrive) for performance, mora ex re flows from the contract itself and there is no need for a demand to place the debtor in mora.[5] The award of interest to a creditor where the debtor is in mora in respect of the payment of a monetary obligation in terms of an agreement is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for his loss arising from the fact that he was not paid on the due date.[6] The loss is calculated on the basis of allowing interest on the capital sum owing over the mora period.[7]

[7] As stated, the appellants rely on clause 5.2, set out above, for mora ex re. In its judgment the LCC came to the startling conclusion that clause 5.2 is to be regarded as *pro non scripto*, since the Registrar of Deeds, and not the department's conveyancers, is responsible for effecting the registration of transfer of the property. This is a material misdirection.[8] What was required of the LCC was to interpret the clause, not to summarily dismiss it in the fashion that it did. While the provision is, on the face of it, plain and unambiguous, it is fraught with difficulties. The conveyancers, represented by the department, furnished an undertaking to have the registration of transfer effected within two months of the date of signature of the agreements. This was a tall order. But the clause cannot be interpreted as fixing a date for transfer because the actual date of transfer is always dependent on various events extraneous to the conveyancer, as it happened in this case. A subdivision and consolidation of the two properties sold by the different legal entities (the appellants) had to be effected. In order to obviate further delays, the first appellant agreed to an amendment of its sale agreement by altering the description of the property, thereby eliminating the need for a subdivision and consolidation. An addendum to that sale agreement was consequently entered into on 15 May 2009. A further cause for delay in the registration of the transfer was that the clearance certificate in respect of one of the properties had been lost and a

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[5] Ibid.
[6] *Bellairs v Hodnett and another* 1978 (1) SA 1109 (A) at 1145D-E.
[7] *Bellairs at* 1145E-F; J van Zijl Steyn, *Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg*, pp 84 – 85.
[8] Counsel for the department conceded this point during argument.

new one had to be obtained from the municipality. Thus the date on which the conveyancers were first ready to lodge transfer documents was the week following on 11 June 2009. These examples illustrate that clause 5.2 could not and did not establish mora ex re. That being the case, one is constrained to consider the breach provisions in the sale agreements and the written notices, as I do next.

Mora ex persona: the written notices

[8] Where a contract does not contain an express or tacit stipulation with regard to the date when performance is due, a demand is needed to place the debtor in mora, ie mora ex persona.[9] In *Linton v Corser,* supra, the court held the purchaser liable for mora interest (it was a case of mora ex persona) for delaying the signing of the transfer documents and the delivery of the necessary guarantees. Mora in the present matter concerned a delay in the payment of the purchase price as a result of the department's delay in having the registration of transfer effected by its conveyancers. As stated, the fact of and the reason for the delay was common cause. The delay was deliberate, due to the department's financial constraints and resultant inability to pay the purchase price. Of course our law does not require fault on the part of a debtor for a contractual damages claim. All that is required is proof that the debtor is in mora.[10]

[9] The sale agreements contained a breach provision. Clause 14.1 made provision for the prejudiced party to notify the defaulting party to rectify the default, whereafter the former would have the right, in the event of a continued default for 14 days after receipt of the notice, to claim specific performance or to cancel the agreement or to refer the matter to the LCC for adjudication. Clause 15.1 set out the parties' chosen domicilia; in the case of the purchaser it is stipulated as 'care of the Chief Land Claims Commissioner

[9] *Scoin Trading (Pty) Ltd v Bernstein NO*, para 12.
[10] *Scoin Trading (Pty) Ltd v Bernstein NO,* para 20.

(ie the third respondent), Department of Land Affairs, 184 Jacob Maré Street, Pretoria'. Clause 15.3 provided that all notices required in terms of the agreements were to be in writing and were to be delivered either by hand or sent by pre-paid registered post. It also contained a deeming provision to the effect that notices by registered post would be considered as having been received by the addressee 14 days after it was posted, unless the contrary is proved.

[10] The appellants, through their attorneys, caused letters of demand to be sent by registered post. Both letters, although bearing different dates, namely 21 October 2009 in respect of the first appellant, and 28 October 2009 in respect of the second appellant, were dispatched on 30 October 2009. They were both addressed to 'Barolong ba ga Mariba, c/o The Chief Land Claims Commissioner, Department of Land Affairs, Private Bag X03, Pretoria', and copied to the Deputy Director of Finance at the same address and also to the department's conveyancers. As stated, the letters were sent by registered post, but in the case of the copy to the conveyancers, they were transmitted by telefax. The department took issue firstly with the fact that the letters had been addressed to the community and not to the department (as the purchaser stipulated in the agreements) and secondly with the postal address which was not the address stipulated in clause 15.1 set out above.

[11] The department's case on the issues raised in respect of these notices was pleaded in a rather disingenuous fashion. It did not allege that it had not received the notices. The answer to the alleged dispatch of the notices was instead a bare denial that the notices had been sent as alleged. The fact that they had been addressed to the community, instead of the department, was also raised. But counsel for the department was driven to concede that the contents of the notices themselves were plain and unambiguous, namely to put the department on terms regarding the registration of transfer. He correctly conceded that if the department had indeed received the notices, it could not have harboured any doubt as to what was required of it. The

department has not raised a real and bona fide factual dispute in its answer. It contented itself with an evasive answer to which it is bound.[11]

[12] The failure to state positively that the department did not receive the letters may have been contrived, since the letters were in fact sent to its postal address and copied to the Deputy Director of Finance in the office of the Chief Land Claims Commissioner and to the department's conveyancers. Clause 4.6 of the agreements designated the Deputy Director of Finance as the official responsible for making payment of the purchase price. The inference is compelling that receipt of the letters could not be denied in view of this fact.

[13] In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)*[12] the Constitutional Court had to consider the adequacy of notices sent by pre-paid registered post by a municipal council to a defaulting ratepayer prior to the institution of court proceedings, in terms of s 105 of the Durban Extended Powers Consolidated Ordinance 18 of 1976 (N). The court found[13] that '[t]here is no evidence of any significant unreliability of the post office nor of any indication that delivery of notices sent by registered post is hampered by an unacceptable degree of post office inefficiency. The notice provisions that require posting are reasonably capable of bringing the hearing to the attention of the person affected'.

[14] The appellants have consequently established that the letters of demand had been received and that the department had been properly placed in mora. There was no quarrel with the appellant's contention that, in the

[11] *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) para 13.
[12] *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC).
[13] *De Beer* para 20.

circumstances, mora interest should commence running 28 days after the date of dispatch of the letters by pre-paid registered post, ie as from 28 November 2009.[14]

[15] It was common cause that the appellants had suffered loss as a result of the delay. The appellants' farming enterprise was the main source of income for the Snyman family. They had sold all their cattle during April 2009 in anticipation of the transfer of the properties to the State, which they had to vacate within 48 hours of the registration. The appellants were plainly dependent on payment of the purchase price to re-establish their farming business or to establish other enterprises from which to derive income. The financial prejudice and loss flowing from the State's prevarication is self-evident.

[16] Lastly, there is a disturbing aspect which must be addressed. In the founding affidavit on behalf of the appellants, the deponent relayed advice that she had received that the department was on record as stating that it only pays out monies due in respect of agreements entered into (in respect of land claims), when ordered to do so by a court of law. This damning accusation was left unanswered by the department. It is troubling that a State department can adopt such an attitude, which is to be strongly deprecated. It may well be that the department is under severe strain to meet the financial (and, it seems, the administrative) demands imposed by the land reform process. The restitution of land under the Restitution of Land Rights Act 22 of 1994, is not only a constitutional imperative but a highly emotive issue as well. Considerable circumspection, diligence and sensitivity are required on the part of all concerned, including departmental officials. Agreements to purchase land for restoration to dispossessed communities should be honoured in accordance with the terms agreed upon, lest the already demanding challenges of the process are further exacerbated.

[14] Calculated on the basis of 14 days' notice in terms of clause 14.1 added to the 14 days of the deeming provision in clause 15.3, set out above.

[17] The appeal must therefore succeed. The matter was not of sufficient complexity to warrant the employment of two counsel. It is hardly surprising that in the court below and in the preparation of heads of argument for this court the appellants, who now seek the costs of two counsel, utilised the services of one counsel only. The following order is made:

1. The appeal is upheld.
2. The first to fourth respondents are ordered jointly and severally to pay the costs of the appeal.
3. The order of the court below is set aside and substituted with the following:

'(a) The first to fourth respondents are ordered to pay interest to the first applicant at the rate of 15.5 per cent per annum on the amount of R1 450 000 (one million four hundred and fifty thousand rand) from 28 November 2009 until 30 June 2010 and on the further amount of R1 450 000 (one million four hundred and fifty thousand rand) from 8 December 2009 until 12 July 2010;

b. The first to fourth respondents are ordered to pay interest to the second applicant at the rate of 15.5 per cent per annum on the amount of R1 475 000 (one million four hundred and seventy five thousand rand) from 28 November 2009 until 23 June 2010 and on the further amount of R1 475 000 (one million four hundred and seventy five thousand rand) from 8 December 2009 until 2 July 2010.

c. The first to fourth respondents are ordered jointly and severally to pay the costs of the application.'

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

Counsel for appellants	:	H S HAVENGA SC (with him OSCHMAN I)
Instructed by	:	Lourens Attorneys c/o Pieter Moolman Attorneys, Bryanston
		Symington & de Kok, Bloemfontein
Counsel for respondents	:	P NONYANE
Instructed by	:	The State Attorney, Pretoria
		The State Attorney, Bloemfontein