



6 JULY 2023

Finance & Banking ALERT

IN THIS ISSUE

The application of the *in duplum* rule to post-judgment interest: The SCA clarifies the legal position

The *in duplum* rule will not come to your rescue if you fail to make post-judgment interest after arrear interest ceases to accrue when the unpaid arrear interest equals the principal debt while litigation is still pending. The Supreme Court of Appeal recently confirmed this in *MEC: Police, Roads, and Transport Free State Provincial Government v Bovicon Consulting Engineers CC and Another* (278/2022) [2023] ZASCA 99 (14 June 2023).



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

The application of the *in duplum* rule to post-judgment interest: The SCA clarifies the legal position

The *in duplum* rule will not come to your rescue if you fail to make post-judgment interest after arrear interest ceases to accrue when the unpaid arrear interest equals the principal debt while litigation is still pending. The Supreme Court of Appeal recently confirmed this in *MEC: Police, Roads, and Transport Free State Provincial Government v Bovicon Consulting Engineers CC and Another (278/2022) [2023] ZASCA 99 (14 June 2023)*.

The *in duplum* rule (rule) has the effect of limiting the amount of interest which may be recoverable, by prohibiting unpaid interest from accruing further, once the unpaid interest reaches the unpaid capital amount. The rule differentiates between arrear interest and unpaid interest in that:

- unpaid interest is interest that has accrued but which has not yet been paid; and
- arrear interest, on the other hand, is interest which accrues after the debtor has defaulted.

The rule applies only to “*arrear*” interest i.e. interest that accrues after the debtor is in default. Specifically, the rule states that once the arrear interest on a debt equals the principal amount, the interest can no longer accumulate. This means that once the amount of interest that accrues after the debtor has defaulted equals the outstanding principal, interest stops accruing.

The rule does not prevent creditors from collecting more than double the amount of principal debt. It only provides that the outstanding interest shall not be more than the outstanding principal debt at any time and as such temporarily prevents the accrual of interest but does not set out the maximum interest that can be charged by creditors on a debt.

Bovicon matter

In the *Bovicon* matter, Bovicon Consulting Engineers CC (Bovicon) issued summons against the MEC of Police, Roads, and Transport of the Free State Provincial Government (MEC) for the payment of R1,171,774.83 which was due and payable arising from the services rendered by Bovicon to Department of Police, Roads and Transport (Department). Bovicon further claimed for interest on the principal debt at the rate of 15,5% calculated from the due date of each invoice to the date of the final payment.



The application of the *in duplum* rule to post-judgment interest: The SCA clarifies the legal position

CONTINUED

Bovicon obtained judgment in the High Court against the MEC on 5 November 2019 in terms of which the MEC was ordered to pay the principal debt and interest thereon from the date of each invoice to the date of the final payment. The MEC effected payment on the judgment debt in the amount of R2,343,549.66 on 14 July 2020, which interest amount equalled twice the amount of the principal debt. Bovicon argued that it was entitled to receive post-judgment interest that accumulated from the date of the judgment until the date the MEC made the final payment.

Bovicon issued a writ of execution and attached some of the Department's movable property pursuant to the interest that was in arrears. The MEC made an urgent application to set aside the warrant of execution arguing that (i) Bovicon did not comply with the State Liability Act 20

of 1957 and (ii) that the judgment debt was satisfied by the payment made on 4 July 2020. The High Court set aside the warrant of execution and ruled the attachment unlawful. It further ruled in Bovicon's favour and ordered the MEC to pay an amount of R220,332.09 being the post-judgment interest calculated at a rate of 15,5%.

Before the SCA

The MEC appealed the judgment to the Supreme Court of Appeal (SCA) and contended, *inter alia*, that in effecting the R2,343,549.66 payment, the judgment debt was satisfied. The MEC argued that arrear interest ceased to accrue when it equalled the principal debt owed to a creditor. Accordingly, Bovicon was not entitled to additional interest on the judgment debt after the date on which judgment was granted because the interest amount had equalled the principal debt.



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2021 - 2023
ranked our Finance & Banking practice in
Band 2 Capital Markets: Debt and
Capital Markets: Equity.

Jacqueline King ranked by
Chambers Global 2017 - 2023 in
Band 2: Capital Markets: Debt.

Deon Wilken ranked by
Chambers Global 2021 - 2023 in
Band 3: Banking & Finance.

Jenni Darling ranked by
Chambers Global 2021 - 2023 in
Band 4: Banking & Finance.

Sammy Ndolo ranked by
Chambers Global 2023 in
Band 4: Banking & Finance.

The application of the *in duplum* rule to post-judgment interest: The SCA clarifies the legal position

CONTINUED

The SCA relied on *Paulsen and Another v Slip Knot Investment 777 (Pty) Limited* [2015] (3) SA 479 (CC) where the Constitutional Court (CC) considered the issue of whether interest runs anew, after it has ceased running as a result of the rule, from the date of judgment until the judgment debt has been settled. The CC held that it is settled law that the rule permits interest to run anew from the date that the judgment debt is due and payable.

The SCA found that interest ran anew post judgment until the judgment debt was satisfied and that the date on which the High Court handed down its judgment was the date (i) on which the judgment debt became due and payable and (ii) when calculating post judgment interest. The SCA dismissed the appeal and ordered the MEC to pay interest on the amount

of R2,343,549.66, calculated at 15,5% from the date after judgment of the High Court until the date of final payment.

The *Bovicon* judgment confirms that debtors cannot evade their obligations to satisfy the post-judgment interest on a principal debt when the arrear interest is due and payable. When a court issues its judgment on a debt case, it is common for the debtor to be ordered to pay not only the principal amount owed, but also post-judgment arrear interest. By charging arrear interest on the outstanding amount, creditors are adequately compensated for the time value of money and the potential financial implications they may incur until the final payment is made.

**Mashudu Mphafudi, Michael Bailey
and Xitsundzuxo Mathebula**



OUR TEAM

For more information about our Finance & Banking practice and services in South Africa and Kenya, please contact:



Mashudu Mphafudi

Practice Head & Director:
Finance & Banking
T +27 (0)11 562 1093
E mashudu.mphafudi@cdhlegal.com



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com



Sabelo Goma

Director:
Finance & Banking
T +27 (0)11 562 1602
E sabelo.goma@cdhlegal.com



Adnaan Kariem

Director:
Finance & Banking
T +27 (0)21 405 6102
E adnaan.kariem@cdhlegal.com



Mbali Khumalo

Director:
Finance & Banking
T +27 (0)11 562 1765
E mbali.khumalo@cdhlegal.com



Jacqueline King

Director:
Finance & Banking
T +27 (0)11 562 1554
E jacqueline.king@cdhlegal.com



Pitso Kortjaas

Director:
Finance & Banking
T +27 (0)11 562 1589
E pitso.kortjaas@cdhlegal.com



Phetole Modika

Director:
Finance & Banking
T +27 (0)11 562 1625
E phetole.modika@cdhlegal.com



Deon Wilken

Director:
Finance & Banking
T +27 (0)11 562 1096
E deon.wilken@cdhlegal.com

Kuda Chimedza

Senior Associate:
Finance & Banking
T +27 (0)11 562 1737
E kuda.chimedza@cdhlegal.com

Koketso Maake

Senior Associate:
Finance & Banking
T +27 (0)11 562 1618
E koketso.maake@cdhlegal.com

Ernest Maboko

Senior Associate:
Finance & Banking
T +27 (0)11 562 1771
E ernest.maboko@cdhlegal.com

Brian Muchiri

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E brian.muchiri@cdhlegal.com

Stephanie Goncalves

Professional Support Lawyer:
Finance & Banking
T +27 (0)11 562 1448
E stephanie.goncalves@cdhlegal.com

Michael Bailey

Associate:
Finance & Banking
T +27 (0)11 562 1378
E michael.bailey@cdhlegal.com

Damaris Muia

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E damaris.muia@cdhlegal.com

Thato Sentle

Associate:
Finance & Banking
T +27 (0)11 562 1844
E thato.sentle@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2023 12476/JUL