THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 497/20

In the matter between:

THE RAND WEST CITY LOCAL MUNICIPALITY	**APPELLANT**
and	
QUILL ASSOCIATES (PTY) LTD	**FIRST RESPONDENT**
THE REGISTRAR OF THE HIGH COURT (GAUTENG DIVISION, PRETORIA)	**SECOND RESPONDENT**

Neutral citation: *Rand West City Local Municipality v Quill Associates (Pty) Ltd and Another* (Case no 497/20) [2021] ZASCA 150 (26 October 2021)

Coram: NAVSA ADP, MATHOPO, MOLEMELA, MOKGOHLOA AND GORVEN JJA

Heard: 09 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 26 October 2021.

Summary: Practice and Procedure – validity of writ of execution – Registrar issuing writ not engaging in administrative action – not reviewable under the Promotion of Administrative Justice Act 3 of 2000 - question is whether writ is in accordance with court order – respondent caused writ to be issued outside of terms of court order – impermissibly providing for compound interest and value added tax (VAT) – writ liable to be set aside.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Botes AJ) sitting as court of first instance:

1. The appeal is upheld with costs of two counsel, where so employed.
2. The order of the court *a quo* is set aside and replaced with the following order:

   '1. The "writ of execution – incorporeal property" under case numbers 36264/2013 and 362645/2013 in favour of the first respondent as execution creditor, in terms of which the Sheriff was directed to attach and take into execution the sum of R7 965 470.56 plus interest at the rate of 15.5% calculated per annum and compounded monthly as from 11 July 2018 to date of payment, and other taxed costs and charges besides the costs of the Sheriff against the "incorporeal property" of the applicant held at First Rand Bank (Randfontein) cheque account number 672-387-440-45 is set aside.

   2. The first respondent is ordered to pay the costs of the application.'

JUDGMENT

Mokgohloa JA (Navsa ADP, Mathopo, Molemela and Gorven JJA concurring)

[1] This appeal concerns the validity of a writ of execution issued at the instance of the first respondent, Quill Associates (Pty) Ltd (Quill), purportedly in accordance with an order of the Gauteng Division of the High Court, Pretoria (the trial court), dated 31 July 2015. The writ was issued against the appellant, the Rand West Local Municipality (the Municipality).

[2] The background facts are largely common cause. During 1998 a predecessor of the appellant[1] concluded an agreement with Quill, in terms of which it purchased a software program (the BIQ program) from the latter. In terms of the agreement, it was entitled to the necessary support and maintenance for a period of one year, renewable annually. During 2004 the predecessor underwent a name change. This resulted in a new agreement being entered into in terms of which it was not expected to pay for the BIQ program again, but was to continue to pay licence fees, as it did in the previous years. In July 2011, one of the appellant's predecessors gave notice to terminate the 2004 agreement and informed the first respondent that it would continue using the BIQ program on a month-to-month basis. An extended exchange of correspondence and interactions ensued between the formerly disparate municipalities, now the appellant, and Quill concerning the continued use of the BIQ program. Litigation was threatened as no new agreement could be reached concerning the future use of the BIQ program. During this period the appellant's predecessors continued using the program without paying licence fees. This caused the first respondent to institute action against the appellant's two predecessors in the trial court, claiming interdictory and monetary relief. The claim was based on an infringement of Quill's copyright in the BIQ program in terms of s 24(1) of the Copyright Act[2].

[3] After hearing evidence and argument, the trial court (Potterill J) held that they had infringed Quill's copyright and granted the interdictory relief claimed in the summons. It also concluded that a reasonable royalty was a substantive remedy. Thus, it granted a monetary judgment in favour of the first respondent together with 'interest on the said amounts at a rate of 15.5% per annum *ad*

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[1] The appellant became a successor in title of the Randfontein and Westonaria municipalities after the amalgamation of the aforementioned two municipalities on 3 August 2016.

[2] S24(1) of the Copyright Act 98 of 1978 provides:

'Action by owner of copyright for infringement

(1) Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright, and in any action for such an infringement all such relief by way of damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights.'

*tempore mor*e; VAT if VAT is payable on the amounts so ordered.' The appellant made certain payments pursuant to this order.

[4] The first respondent caused the second respondent, the Registrar of the High Court, to issue a writ of execution on the balance outstanding. In the affidavit in support of the writ, the first respondent averred that interest had to be calculated from the date of service of the summons to the date of payment 'capitalized monthly' and that interest on the balance after payment had to be 'compounded monthly'. The first respondent further claimed that VAT was payable and caused the Registrar to include all these claims in the writ. The Deputy Sheriff executed the writ on 10 July 2018 by attaching an amount of R7 965 470-56 in the Municipality's bank account. This caused the Municipality to launch an application in the Gauteng Division of the High Court, Pretoria (the court *a quo*), for an order reviewing and setting aside the writ in execution on the basis that the writ was not in accordance with the order of the trial court. More particularly that the order did not provide for interest to run from date of summons, or for compound interest or VAT. The court *a quo* dismissed the application with costs. This appeal is against that order.

[5] The high court (Botes AJ) considered that the case before it raised novel issues. First, whether a 'decision' to issue a writ of execution was susceptible to review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Second, whether interest *a tempore morae* is 'calculated from the date when the liability arose, or on a date when the summons was served as provided for in the Prescribed Rate of Interest Act 55 of 1975.' Third whether value added tax is payable on an amount in respect of an order or an award made by a Court pursuant to the provisions of the Copyright Act 98 of 1978.

[6] Reliance on PAJA as a basis for review and for the setting aside of the writ was correctly abandoned before us. It is difficult to discern what precisely the high court determined in this regard. It appeared to keep the option of a PAJA-based

review open, concluding that the Registrar could not be accused of not applying his mind, whilst at the same time accepting that the basic test is to determine whether a writ is in accordance with the court order on which it is premised. It is clear that a writ will be set aside where it does not accord with the order on which it was purportedly issued, or the facts show that the debt has been satisfied, or the order on which it was premised is itself set aside.[3] The Registrar does not engage in administrative action when he/she issues a writ. It can and ought to be challenged on the principle of legality.

[7] The high court went into a lengthy discussion on whether interest ran from the date of service of summons or from the time of the award. Botes AJ considered that he should consider what *a tempore morae* meant in the 'present context'. Significantly, the court recognized that the court order did not 'expressly state from which specific date interest should be calculated'. Relying on the decision of this court in *Drake Flemmer & Orsmond Inc and Another v Gajjar NO*[4]*,* Botes J concluded that interest must be taken to run from the date of service of the summons.

[8] In relation to compound interest the high court, relying on the decision of this court in *Davehill (Pty) v Community Development Bank*[5]*,* concluded that Quill suffered 'further damage by virtue of the fact that [the Municipality] failed and omitted to effect payment of royalties and the monthly licence fees since the date upon which the combined summonses were served on the [Municipality's] predecessors.' The high court went on to hold as follows:

'Mora interest remains a specie of damages on which [Quill] remains entitled to recover from the [Municipality]. I therefore find that [Quill] is entitled to claim compound interest from the [Municipality], in accordance with and provided for in the calculation by [Quill]'.

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[3] *Le Roux v Yskor Landgoed (EDMS) BPK en Andere* 1984 (4) SA 252 (T) at 257 B-I.
[4] *Drake Flemmer & Orsmond Inc and Another v Gajjar NO* [2017] ZASCA 169; 2018 (3) SA 353 (SCA).
[5] *Davehill (Pty) v Community Development Bank* [1987] ZASCA 120; 1988 (1) SA 290 (A).

[9] The approach of the high court was flawed. First, it failed to have regard to the relief sought by Quill before the trial court. Compound interest was not prayed for.[6] The trial court was specifically asked to determine the amount of a reasonable royalty and licence fees. At paragraphs 49 and 50 the trial court set out a range of factors taken into account to compensate Quill for the breach of its copyright. Potterill J did not at any point in the judgment allude to the impact of delay on the value of the monetary award and the need to compensate by way of a specific more onerous form of interest, namely, compound interest. In any event, compound interest is claimable in certain defined instances, which were not asserted, considered or applicable in the present case.[7] It was not for Botes AJ to visit an issue that the high court was not called upon to determine and which, by all indications in the judgment, it did not consider. Until the reasonable royalty, based on all the factors alluded to by the trial court, and licence fees were determined, there were no amounts on which interest could run. Interest would, in the ordinary course, run from that date at the prescribed rate of interest.

[10] It is so that compensation in the form of a monthly licence fee from the time of the service of the summons and until the Municipality ceased infringement of Quill's copyright was sought, but that was catered for when the trial court made its award. Interest was not sought[8] nor granted on the basis reflected in the writ.

[11] Botes AJ's reliance on *Drake Flemmer* is unhelpful and was misplaced. The principal issue in that case was how to account for the effects of inflation and trial delay on the value of the claim.[9] It involved a claim against attorneys for professional negligence in the conduct of a client's claim against the Road Accident Fund where the claim was settled well below its true value.[10] The evidence adduced at the trial was directed at proving the amount he would have

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[6] This appears from the recital of the relief sought set out at para 1 of that judgment.
[7] *Euro Blitz 21 (Pty) Ltd Another v Secena Aircraft Investments CC* [2015] ZASCA 21; JOL 32990 (SCA).
[8] Para 1 of the trial court's judgment and paras 12.1 to 12.3 of the relief sought by Quill.
[9] Fn 4 para 1.
[10] Fn 4 para 1.

been awarded had his claim against the Fund been properly conducted and to that end his claim was actuarially valued at a particular point in time.[11] The court in that case noted that the claim was based on breach of contract. That essentially was the basis on which the monetary claim was assessed. An award of contractual damages is designed to put the aggrieved party in the position he would have enjoyed had the mandate been properly performed.[12] As can be seen it is thus a very different case on the pleadings, the law, and the facts from the one in the instant case.

[12] So too, was the high court's reliance on *Davehill*. That case concerned an expropriation under the provisions of the Expropriation Act 63 of 1975. In terms of s 12(3) of that Act, the Community Development Board was obliged to pay interest to the appellants from the date of taking occupation of the properties on any outstanding portion payable in respect thereof.[13] That was described by the court as statutory interest. The pleadings in that case sought *mora* interest on the amount of statutory interest outstanding. That was what the court in that case was asked to adjudicate. It then proceeded to deal with the question of the rate of *mora* interest in terms of the Prescribed Rate of Interest Act 55 of 1975. It was concerned with the meaning of 'special circumstances' in s 1(1) of that Act, entitling a court to depart from those provisions concerning the rate of interest. Special circumstances relate to the facts of a particular case, which must be raised and adjudicated.[14] In that case special circumstances were found wanting. Once again, the pleadings, the law and the facts of that case are far removed from that of the present.

[13] Lastly, in relation to the question of VAT, the high court was not called upon to decide whether it was payable. That was a question for the trial court, which had avoided that question and made an order, which, impermissibly, was vague and unenforceable. The high court was not sitting as a court of appeal on the

[11] Fn 4 para 3.
[12] Fn 4 paras 40 and 41.
[13] *Davehill* 295 E- I.
[14] *Davehill* 301 D-F.

correctness of the conclusions reached by the trial court. Its duty was to look to see if the writ was in accordance with the order and not to embark on answering the novel questions it identified.

[14] The Municipality was thus undoubtedly correct in its stance on the time from when *mora* interest started to run, namely, the time of the determination by the trial court, of what was due to Quill in the form of reasonable royalty and licence fees. So too, the Municipality was correct in relation to compound interest and VAT. Quill sought more than its pound of flesh. The writ was not in accordance with the order of the trial court and is liable to be set aside.

[15] The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel, where so employed.

2 The order of the court *a quo* is set aside and replaced with the following order:

> 1 The 'writ of execution – incorporeal property' under case numbers 36264/2013 and 36265/2013 in favour of the first respondent as execution creditor, in terms of which the Sheriff was directed to attach and take into execution the sum of R7 965 470.56 plus interest thereon at the rate of 15.5% calculated per annum and compounded monthly as from 11 July 2018 to date of payment, and other taxed costs and charges besides the costs of the Sheriff against the "incorporeal property" of the applicant held at First Rand Bank (Randfontein) cheque account number 672-387-440-45 is set aside.
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> 2 The first respondent is ordered to pay the costs of the application.'

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FE MOKGOHLOA

JUDGE OF APPEAL

APPEARANCES:

For appellant:	A F Arnoldi SC and J J Botha
Instructed by:	Smith Van der Watt Inc., Krugersdorp
	Symington and De Kok Inc., Bloemfontein.
For respondent:	S D Wagener SC
Instructed by:	A L Maree Inc., Pretoria
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