CCT/141/2013
CCT/142/2013

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

VOLTEX (PTY) LIMITED t/a LITECOR BLOEMFONTEIN	**PLAINTIFF**
VOLTEX (PTY) LIMITED t/a LITECOR WELKOM	**PLAINTIFF**

AND

KAYELEM GROUP (PTY) LIMITED	**1ST DEFENDANT**
JOSEPH MOTŠOENE LEBONA	**2ND DEFENDANT**

JUDGMENT

Coram	**:**	**L. Chaka - Makhooane J**
Date of hearing	**:**	**5th March, 2015**
Date of judgment	**:**	**10th June, 2015**

SUMMARY

Costs and Interest – Parties having signed a deed of settlement – Defendants asking the Court not to grant interest at the rate already agreed upon in their contract and that plaintiff be either deprived of costs or that they be granted in part – The Court granting interest in terms of the contract between the parties – Plaintiff as the successful party and in the circumstances of the case in casu plaintiff awarded ordinary costs.

ANNOTATIONS

CITED CASES

1. Ferreira v Levin, Vryenhoek v Powell 1996 (2) SA 621 (CC).
2. Wool Wagon Lesotho (Pty) Ltd v Reitumetse Motake CIV/T/436/01 (unreported).

BOOKS

1. Herbstein &Van Winsen, The Civil Practice of the High Courts of SA 5th Ed, Vol 2, 2009.
2. M. Jocobs & J. Ehlers, Law of Attorney's Costs and Taxation, 1979.

[1] The plaintiff instituted two (2) actions against the defendants and by consent the matters were consolidated. These matters are CCT/141/2013 and CCT/142/2013 respectively. The defendants have admitted liability towards the combined capital debt, totalling four hundred and ninety one thousand nine hundred and seventy eight Maloti and fifty six lisente (M491,978.56). Certain payments were made and the balance on the capital debt is one hundred and sixty three thousand four hundred and thirty six maloti and forty four lisente (M163, 436.44). A deed of settlement was filed of record. On the 4th June, 2015 though it had already been made an order of the Court on the 5th March, 2015. The only issues are that of interest and costs.

[2] It is common cause that the defendants are indebted to the plaintiff for electrical material advanced to them by the plaintiff, for the purposes of performing electrical work as sub-contracted by Trencon Building World Belela ("Trencon"), which is currently under provisional sequestration. As earlier alluded to in the judgment, the defendants are jointly and severally liable and have agreed to pay the plaintiff the outstanding amount of one hundred and sixty three thousand four hundred and thirty six Maloti and forty four lisente (M163,436.44). The defendants also undertook to continue to pay twenty five thousand Maloti (M25 000.00) per month until the whole debt is paid in full.

[3] According to the defendants, the court is being asked to determine whether in the circumstances of this case;

a) the defendants are liable to pay costs of this suit;

b) the defendants should pay interest at the rate of 15.5% per annum a *tempore morae*, calculated from the date of service of the summons; and whether

c) the defendants are obliged to pay collection commission.

[4] **Mrs Lephatsa**, counsel for the respondents argued that even though it is trite that an award of costs is a matter wholly within the discretion of the Court, the discretion must be exercised judicially and upon consideration of the circumstances of each case, carefully weighing the various issues and the conduct of the parties and any other circumstances which may have a bearing upon the question of costs.

[5] **Mrs Lephatsa** argued that *in casu* the defendant did not intend to default in their payment. Failure to pay was caused by the non-payment of the defendants' certificates by Trencon and that it currently is in provisional liquidation. However, the Court was asked not overlook the defendants' conduct inspite of its troubles. That the plaintiff continued to make payments against all sorts of odds, should count in their favour. The defendants are said to have abandoned their defence in appreciation of their indebtedness to the plaintiff.

[6] The Court is also asked to balance the defendants' conduct against that of the plaintiff's, in that the plaintiff is said to have instituted two (2) actions against the same defendants, disregarding the fact that the cause of action arose from a single action. According to the defendants, it was unnecessary for the plaintiff to continue issuing, serving and filing further Court process in separate files even after the matter had been consolidated. After the defendants had admitted liability, they put forth a payment proposal, which was consequently rejected by the plaintiff. The defendants however, continued to make payments despite of the rejection. The defendants further lament that the plaintiff still went ahead with the proceedings until a Pre-Trial Conference ("PTC") was held. It is against this back-ground that **Mrs Lephatsa** made the submission that the Court must use its discretion by ordering that the plaintiff be deprived of its costs as a whole or a part thereof.

[7] On the question of interest, the defendants prayed that the Court should grant the plaintiff interest at the reduced rate of 6% per annum, because the 15.5% claimed by them was too high and it would cause irreparable harm, in view

of the fact that they had lost a lot of money due to Trencon's failure to pay them for the work done. The Court was referred to the case of **Wool Wagon Lesotho (Pty) Ltd v Reitumetse Motake**[1], where Guni J remarked that a high interest rate makes it impossible for poor borrowers to pay off their debts.

[8] It is unnecessary to deal with the question of the collection commission since both parties agree that it does not arise. The Court will not grant a prayer that has not been prayed for.

[9] **Mr Loubser** for the plaintiff in response argued that it is trite that a creditor is always paid interest that he is entitled to. *In casu* it was agreed between the parties that the interest that will apply will be at the rate of 15.5%. This was in the contract between the parties.

[10] As for the costs, **Mr Loubser** showed that in the contract the parties had agreed to costs on an attorney and client scale, however, they (plaintiff) were not asking for costs on that scale, they simply wanted an award of ordinary costs. The Court was asked to grant an order of costs to be paid jointly and severally.

[1] CIV/T/436/01 (unreported)

[11] It is a bit puzzling that the defendants are not disputing that it was one of the terms of the contract that interest be paid at the rate of 15.5 %. This it appears is common cause. It is however, the defendants argument that the Court should use its discretion by either refusing to grant an order of interest or to reduce the rate of interest from 15.5 % to 6 %. The defendants claimed that they may never recover their claim from Trencon and consequently they stood to suffer irreparable harm. Interestingly the defendants fail to show the Court why they willingly got into a contract agreeing to the payment of 15.5 % interest rate, which they now claim it is high. The defendants cannot at this time be heard to say that a term of their contract should not be given effect at the time that it has become due. I am of the opinion that the plaintiff as a creditor deserves its interest at the agreed rate.

[12] It is trite that costs follow the event. Also trite is that an award of costs is a matter wholly within the discretion of the court and as a general rule costs are awarded to a successful party in order to enable him/her to recover the expenses to which he/she has been put by having been compelled to either initiate or to defend litigation[2]. A costs order is not intended as a compensation for a risk to which a litigant has been exposed, but a refund of expenses actually incurred[3].

[13] *In casu*, the defendants having been served with the summons (as amended) decided to defend the action. By doing so they set the wheels in motion. From then on papers were exchanged between the parties and then filed of

[2] M. Jacobs & J Ehlers, Law of Attorney's Costs and Taxation, 1979,P1-
[3] Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa 5th Ed, Vol 2, 2009, P951 - 952

record. The defendants cannot be then heard to say, because at some point they changed their minds and decided to admit liability, the plaintiff's conduct warrants that they be deprived of a costs order. It is my humble opinion that had the defendants admitted liability from the onset, the course of this matter would have been different. That they finally did admit liability and that despite the plaintiff's protest over the amount offered as monthly instalments they continued to pay, is commendable. However, that did not extinguish the debt, nor its interest.

[14] I am convinced that the plaintiff's conduct in the circumstances of this case does not warrant that they be deprived of a costs order in whole or in part. The plaintiff being the successful party in this case deserves an award of costs. In **Ferreira v Levin, Vryenhoek v Powell**[4], Ackermann J, on costs stated that:

> *"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs."*

[15] In the premises and in exercising my judicial discretion and also having taken into consideration the circumstances of this case, the plaintiff being the successful party is awarded interest at the rate agreed upon by the parties in

[4] 1996 (2) SA 621 (CC) at 624

their contract, which is 15.5%, with costs on the ordinary scale. The order is granted against the defendants jointly and severally. It is so ordered

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L. CHAKA-MAKHOOANE
JUDGE

For Plaintiff : **Mr Loubser** (instructed by Webber Newdigate).

For Defendants : **Mrs Lephatsa (**Messrs Mofolo, Tau-Thabane & Co).