THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 629/06

In the matter between:

INTRAMED (PTY) LTD (IN LIQUIDATION)	First Appellant
MACMED HEALTHCARE LTD (IN LIQUIDATION)	Second Appellant
and	
THE STANDARD BANK OF SOUTH AFRICA LTD	First Respondent
THE MASTER OF THE HIGH COURT	Second Respondent
(EASTERN CAPE DIVISION)	
BRIAN BASIL NEL	Third Respondent
MICHAEL LEO DE VILLIERS	Fourth Respondent

Coram: *Harms ADP, Navsa, Lewis, Maya JJA et Malan AJA*

Date of hearing: **6 November 2007**
Date of delivery: **20 November 2007**

Summary: Locus standi of bank seeking removal of joint liquidators – dependent on whether bank still a creditor – bank relying on judgment which in effect reinstated claim expunged by Master at appellants' request – judgment granting interest on claim *a tempore morae* – held that this meant interest from time of proof of claim – held bank remained a creditor and thus had locus standi.

Neutral citation: This judgment may be referred to as *Intramed v Standard Bank* [2007] SCA 141 (RSA).

NAVSA JA

NAVSA JA:

[1] The issue in this appeal is whether the first respondent, a company with limited liability and carrying on business as a registered bank, had locus standi to apply in the court below (the Grahamstown High Court), inter alia, for an order for the removal of Mr Brian Basil Nel and Mr Michael Leo De Villiers, the joint liquidators of the first appellant, a company in liquidation. Messrs Nel and De Villiers were the third and fourth respondents in the court below. The answer to the question posed is dependent on whether, at the relevant time, the bank was a creditor of the first appellant. This in turn depends on the meaning and effect of part of an order issued by the Johannesburg High Court.

The background

[2] Macmed Health Care Limited was the holding company of the Macmed group of companies that included 90 subsidiaries. On 9 November 1999 the company was finally liquidated in what was regarded as a major commercial collapse. This was followed by the liquidation of 45 of its subsidiaries, including Intramed (Pty) Ltd. Both the holding company and Intramed (Pty) Ltd were liquidated because they were unable to pay their debts. Intramed was a manufacturer of intravenous fluids and medicines. In 'modern' language, Macmed was regarded as a major player in the health industry.

[3] I shall, for the sake of convenience, refer to the first and second appellants as Intramed and Macmed, respectively, whether referring to them in their pre- or post-liquidation state. The first respondent shall be referred to as the bank.

[4] The third and fourth respondents became joint provisional liquidators of Intramed during December 1999. On 31 May 2000 their provisional appointment was made final. The third respondent was also appointed joint liquidator of Macmed and all its affected subsidiaries. In the court below the

third and fourth respondents, to whom I shall refer as the liquidators, were cited both in their official and personal capacities.

[5] On 10 May 2000, at a first meeting of creditors of Intramed, the bank proved a claim against Intramed in an amount of R107 728 483.64. The basis of the bank's claim was a suretyship signed by Intramed for the indebtedness of Macmed. Almost six months thereafter, on 2 November 2000, the liquidators, acting in terms of s 45 of the Insolvency Act 24 of 1936 (the Act), lodged a report with the Master of the High Court in which the Master was requested to expunge the bank's claim. The liquidators challenged the bank's claim on the basis that the underlying documents were not executed with the necessary company authority. The bank, through its attorneys, filed submissions with the Master opposing the application for expungement. On 12 January 2001, however, the Master expunged the bank's claim.

[6] After the expungement the liquidators instituted action in the Johannesburg High Court against the bank for payment of R15 283 144.68, which they alleged was an amount standing to the credit of Intramed in its current account with the bank as part of a cash management system. For present purposes it is not necessary to deal with the basis of that claim. The bank not only defended the action but responded by counterclaiming the amount of its expunged claim. The bank also sought an order declaring that its claim was secured by a cession of book debts ─ the cession having been executed by Intramed in its capacity as surety in favour of the bank for Macmed's debts.

[7] In response to the bank's counterclaim Intramed pleaded the lack of authority on which the liquidators had relied in their report to the Master. On 20 August 2004 the Johannesburg High Court (CJ Claassen J) dismissed Intramed's claim, rejected its defence in relation to the bank's counterclaim, issued the declaratory order and ordered Intramed to pay the bank's considerable costs (the trial in the Johannesburg High court lasted seven weeks). The following is the relevant part of the Court's order:

'2. Defendant's counterclaim is upheld and Plaintiff is ordered to pay the defendant the sum of R107 728 463,64 as well as interest on the aforesaid amount at the prescribed rate, *a tempore morae*.
3. It is declared that the defendant's … claim against the plaintiff … is secured by the cession of book debts as reflected in Annexure D…'.

[8] Subsequent to its success in the Johannesburg High Court the bank received a total dividend of R128 124 478.36 from Intramed. It is necessary to record that the book debts which constituted the bank's security, were collected and amounted to approximately R19 million.

[9] In April 2005 the bank applied in the Grahamstown High Court for, inter alia, the removal of the liquidators ─ the motivation for the removal, which is not in issue in this appeal, appears later in this judgment.[1] The bank set out the basis on which it contended it had locus standi as follows. The interest payable by Intramed on the amount of R107 728 463.64 was approximately R83 million, calculated on the basis of simple interest at the rate of 15.5 per cent per annum on the judgment debt from the date of the proof of claim, namely 10 May 2000. It had not received full payment and remained a creditor of Intramed. It thus had the necessary locus standi to bring the application. In the event that it was held that payments received from Intramed ought to be applied first to capital and only thereafter to interest, then on that basis, as at 20 September 2005, the amount outstanding on its claim was R52 368 418.60. On either basis it was a creditor of Intramed.

[10] In the court below Intramed and Macmed raised a number of points *in limine*. The only one we need be concerned with and on which this appeal turns is that the bank had no locus standi to apply for the removal of the liquidators. Intramed and Macmed contended that since the bank relied on the judgment obtained in the Johannesburg High Court it was entitled, in terms of the order referred to in para 7, to interest only from the date of judgment and not from date of liquidation. That being so, the interest the bank was entitled

[1] Para 21.

to on the amount of R107 728 463.64 was less than the total of R128 124 478.36 the bank had already received.

[11] As can be seen from the order quoted in para 7 above, Intramed was ordered to pay the bank the amount claimed, with interest thereon at the prescribed rate *a tempore morae*. The Grahamstown High Court (Liebenberg *et* Plasket JJ) reasoned that since the action in the Johannesburg High Court was necessitated by the expungement of the bank's claim, the practical effect of the judgment was to confirm the validity of the claim which had to be reinstated and that, but for the judgment, the bank would have been entitled to interest on the amount of its claim from the date of liquidation in terms of s 95(1) of the Act.[2] The court below concluded that, since the bank had not abandoned its right to interest when it instituted its counterclaim and obtained the judgment, it was entitled in terms thereof to interest from the date of liquidation and, on any calculation, this meant that it remained a creditor of Intramed. Thus, the point *in limine* was dismissed with costs including the costs of two counsel.

[12] It is against that and other related conclusions that Intramed and Macmed presently appeal. Before us, counsel for Intramed and Macmed conceded that in the event of this court finding that the effect of Claassen J's judgment was that the bank was entitled to interest from the date of liquidation or of proof of claim, the appeal is liable to be dismissed.

[13] Intramed and Macmed, in dealing with the order made by Claassen J in relation to payment of the bank's claim and interest thereon, relied on a number of authorities which state that a judgment debtor is only liable for

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[2] Section 95(1) provides:
'The proceeds of any property which was subject to a special mortgage, landlord's legal hypothec, pledge or right of retention, after deduction therefrom of the costs mentioned in subsection (1) of section *eighty-nine*, shall be applied in satisfying the claims secured by the said property, in their order of preference, with interest thereon calculated in manner provided in subsection (2) of section *one hundred and three* from the date of sequestration to the date of payment, but subject to the provisions of subsection (4) of section *ninety-six*.'

interest *a tempore morae* from the date of judgment or the date fixed thereby.[3] The authorities relied on relate to unliquidated amounts. It follows in such instances that interest would ordinarily run from the date of judgment or a date determined by a court.

[14] More than eighty years ago in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 182 this court said the following:

'Here, however, the amount of the loss incurred in respect of each item of the claim was ascertained by agreement between the parties before issue of summons, so that the defendant knew exactly what was the value of the property destroyed, for which he was held liable, and his failure to pay that amount constituted *mora* on his part. It follows therefore, that by our law interest began to run on the amount of defendant's liability from the date of *mora*. And that brings me to consider the question of what that date is.'

[15] In *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 594G-595B this approach was reaffirmed. The following appears at 594G-E:

'The only remaining issue regarding TBA's claim for *mora* interest relates to the date from which such interest should be calculated. TBA's contention is that the commencement date should be a date earlier than the date of summons because the *quantum* of its damages was readily ascertainable by PW at such earlier date. I disagree. In the first place the *quantum* was by no means capable of easy and ready proof and the fact that Reid reported on it cannot be held as an admission by PW against itself. In the second place it fails to recognise the fundamental principle that, however liquidated a plaintiff's claim for damages may be, *mora* interest can only be calculated from the date when *mora* commenced.'

[16] In V G Hiemstra and H L Gonin's *Trilingual Legal Dictionary* 3 ed (1992)

p 147 the phrase *a tempore morae* is defined as follows:

'vanaf die tydstip wanneer die skuldenaar in gebreke is; vanaf die tydstip van wanbetaling / / from the moment the debtor is in default.'

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[3] See *General Accident Versekeringsmaatskappy Suid-Afrika v Bailey NO* 1988 (4) SA 353 (A); *Administrateur, Schenk v Schenk* 1993 (2) SA 346 (E); *Transvaal v JD van Niekerk en Genote BK* 1995 (2) SA 241 (A).

[17] The authorities referred to in the preceding paragraphs give expression to this meaning. The phrase always has to be viewed in the context in which it is used and in particular, in relation to the attendant claim and the debtor's knowledge or ascertainment of the amount due. In the present circumstances Intramed and the liquidators would have been aware of the basis, particulars and precise amount of the bank's claim at the time that it was proved at the first meeting of creditors, namely 10 May 2000. It is therefore abundantly clear that this is the *mora* date and that, in terms of the order of Claassen J, interest would run from that time, rendering the bank a creditor. The primary question posed in para 1 above must therefore be answered in the affirmative.

[18] The appellants submitted, rather tentatively, that giving effect to the judgment of the Johannesburg High Court in this manner would have the result that interest of 15.5 per cent would be awarded in respect of that part of the realisable property not subject to the bank's security beyond the interest rate of 8 per cent provided for in s 103(2) of the Act. We are not required to address that issue or the basis of calculation of interest on one or other of the bases set out in para 9 above. These are matters to be dealt with in the liquidation process.

[19] There is one further aspect that requires attention, namely, the issue of the conduct of the liquidators and its impact on costs.

[20] The liquidators are not litigation-shy. Not only was the litigation against the bank pursued, but after expunging a claim by another registered bank, BOE bank, the liquidators litigated against it on the same basis as it did in the case before Claassen J ─ denying authority on the part of officers of the company. That case culminated in an appeal to this court, resulting in success for BOE

bank.[4] In engaging in such litigation and denying authority to sign the underlying documents in both cases the liquidators ignored the manner in

[4] *De Villiers and Another NNO v BOE Bank Limited* 2004 (3) SA 1 (SCA).

which Macmed and Intramed did business. In the present case in the first liquidation and distribution account the liquidators provided for payment to themselves of fees of approximately R21.2 million. This gave rise to a dispute with the Master. It culminated in a ruling by him which fixed their total remuneration at an amount of R3 250 000. An application to court to review the ruling of the Master was unsuccessful. In that matter both the high court and this court[5] ordered the liquidators to pay the costs of the litigation personally. Considering this background and the manner in which its claim was treated by the liquidators, it is hardly surprising that the bank sought their removal as liquidators.

[21] In the present case the liquidators chose not to pursue the appeal themselves. They were, after all, personally affected and had a direct interest in the court below and in the outcome of this appeal. It is difficult to avoid the inference that Intramed and Macmed are the appellants in order to avoid the risk of another costs order against the liquidators personally. The present appeal, as demonstrated above, is devoid of merit. The costs of litigation will impact on creditors. We seriously considered ordering the liquidators to pay the costs *de bonis propriis*. On balance, however, considering that Macmed is a creditor and that Intramed had a sufficient interest in the appeal we decided, as the order will reflect, not to do so.

[5] *Nel & Another NNO v The Master (ABSA Bank Ltd & others intervening)* 2005 (1) SA 276 (SCA).

[22] The following order is made:

'The appeal is dismissed with costs including the costs of two counsel.'

M S NAVSA
JUDGE OF APPEAL

CONCUR:

Harms ADP
Lewis JA
Maya JA
Malan AJA