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Judgment No. SC 3/06
Civil Appeal No. 234/05

ATIWONEYI MILES MASIYIWA v (1) FELIX MUNETSI GAPA (2)
DEPUTY SHERIFF OF HARARE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GWAUNZA JA
HARARE, JANUARY 10 , 2006

G Gapu, for the appellant
No appearance for the respondents

GWAUNZA JA: After hearing argument in this matter, we issued
the following order:

- “1. The appeal be and is allowed with costs.
2. The judgment of the court *a quo* is altered to read as follows:
 1. Defendant shall pay plaintiff damages based on the current market value of the property in issue. Such value shall be determined by an estate agent appointed by the Registrar of this Court.
 2. The Defendant shall pay interest on the market value of the property at the prescribed rate from 4 July 2005, being the date of the evaluation, up to the date of payment in full.
 3. Defendant shall pay costs of suit.”

We indicated that the reasons for this judgment would follow, and these are they:

The appellant does not appeal against the substantive part of the judgment of the court *a quo*, which ordered him to pay to the respondent damages in an amount equivalent to the current market value of the property in dispute. He is appealing against paragraph 2 of the same judgment, which ordered that he should also pay interest on those damages, at the prescribed rate, from the date of the summons to the date of payment.

His sole ground of appeal reads as follows:

“The court *a quo* erred in law by ordering that interest be calculated with effect from the date of summons up to the date of payment when damages were to be based on the current market value of the property assessed three years later. Interest should be calculated with effect from the date of service on the appellant of the assessed value of the property.”

In support of this argument, the appellant contends correctly as follows in his heads of argument:

“1.1 It is a well settled principle of our common law that a debtor is liable for interest while he is in *mora*. ‘There can be no doubt that, on a claim for unliquidated damages, the defendant cannot be in *mora* until the quantum of the damages has been fixed by the judgment of the Court.’ *R.H. Christie, The Law of Contract in S.A.* (third edition) Butterworths (1996) pages 565 – 566. *Wessels, The Law of Contract in South Africa* (second edition) Butterworths 1951, 3355. See also *Victoria Falls & Transvaal Power Company Limited v Consolidated Langlagte Mines Limited* 1915 AD1, at pages 31 – 33, *Union Government v Jackson* 1956 (2) SA 398 (A) at p 412E, *West Rand Estates Limited v New Zealand Insurance Company Limited* 1926 AD 173, at pp 195 – 196.”

The appellant submits, accordingly, that he was in *mora lege* with effect from 19 July 2005 when he was served with the Writ of Execution, and should therefore be ordered to pay interest from that date.

As indicated the Court finds there is merit in the appellant's contention that the appellant could not be held to have been *in mora* from the date the summons was issued. The appellant argued that the correct date from which he should be regarded as having been *in mora* was the date he received the warrant of execution against his property, that is 19 July, 2005. The Court is, however, of a different view. The issuance of a warrant of execution normally follows the failure by a defendant or respondent to comply with an order of the court requiring him, for instance, to pay a certain amount of money to the plaintiff or applicant. It is therefore premised on the assumption that prior notice, as to the effect of the court order, would have been received but ignored by, the party required to comply with the order in question. By the same token, the appellant must be taken to have received notice of the evaluation of the property in question, on the date of the evaluation report, that is 4 July 2005. This is the date from which he should appropriately be regarded as having been *in mora* for purposes of the payment of interest.

The Court was persuaded by the appellant's further contention that since the court *a quo* clearly had not applied its mind to the issue of interest, there was no fear of this Court being deemed to have interfered with the discretion of the court *a quo*.

All in all, the decision of the court *a quo* on the question of interest could not be allowed to stand, hence the order referred to at the beginning of this judgment.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Scanlen & Holderness, appellant's legal practitioners