CONFORCE (PVT) LTD v CITY OF HARARE 2000 (1) ZLR 445 (H)

Citation	2000 (1) ZLR 445 (H)
Case No	Judgment No. HH-71-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	1 March 2000
Judgment	5 March 2000
Counsel	*F Girach*, for the applicant *L T Biti*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Arbitration — *award — rectification of by court — court's powers to interfere with award — award ordering interest to run from particular date — application of in duplum rule to arbitral awards — application to make award an order of court — grounds for* C *refusal of application — whether award contrary to public policy — whether interest runs afresh from litis contestatio — relevance to arbitration proceedings*

Interest — *date from which runs — in duplum rule — whether interest begins to run again from date of issue of summons* D

Headnote

A court should not interfere with an arbitrator's award so as to alter it to what the court thinks the arbitrator decided. However, it can interpret ambiguities. In this case, the arbitrator ordered interest to run from a date before the arbitration proceedings. The ambiguity was whether he intended the *in duplum* rule to apply. In normal E litigation the *in duplum* rule applies as a matter of law. An arbitral award may be set aside on, among other grounds, the ground that it would be contrary to public policy. The non-applicability of the *in duplum* rule would be contrary to public policy, being a violation of a fundamental principle of our law. The arbitrator's award was consistent with an interpretation favourable to the applicability of the *in duplum* rule.

Although there are cases which state that interest begins to run again when *litis contestatio* takes place, there F are others to the opposite effect. The public interest served by the *in duplum* rule is not to be identified with sympathy for the debtor, so as to say that the rule is designed to protect him. "Public interest" encompasses a wider spectrum of interests, from the protection of the debtor, to securing fiscal discipline on the part of lenders, to considerations of the justification for charging interest in the first place, that is to compensate the creditor for the deprivation of use of the money due until payment. The danger in holding that interest runs again from the date of *litis* contestatio is that an unscrupulous creditor could defeat the *in duplum* rule by instituting proceedings. G It would not be against the public interest if the *in duplum* rule were to operate so that interest stops running when the double is reached, regardless of whether proceedings have or have not been instituted.

This would apply particularly to arbitration proceedings, which are based on contract.

Decision in *Ehlers v Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H) not followed. H

Cases cited A

CBZ Ltd v M M Builders & Suppliers (Pvt) Ltd & Anor 1996 (2) ZLR 420 (H)

Ehlers v Standard Chartered Bank Zimbabwe Ltd 2000 (1) ZLR 136 (H)

Keen v Durban City Council 1951 (2) SA 548 (N)

Mawere v Mukuna 1997 (2) ZLR 360 (H)

Standard Bank of SA Ltd v Oneanate Invstms (Pty) Ltd 1998 (1) SA 811 (A)

Walenn Holdings (Pvt) Ltd v Lloyd & Anor 1996 (2) ZLR 383 (H)

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S) B

Case information

F Girach, for the applicant

L T Biti, for the respondent

Judgment

Chinhengo J: The parties in this application entered into four separate agreements for the construction of water reservoirs. This was in 1984 and 1985. The agreements were governed in certain respects by the terms C embodied in the General Conditions of Contract, a standard set of terms applicable to works in civil engineering construction. In terms of clause 69(3) of the General Conditions of Contract, any dispute between the parties would be settled by arbitration if attempts at mediation failed. Disputes indeed arose in respect of all the agreements. The disputes were about claims for delays and damages and they were of a similar nature. D Mediation must have failed. The disputes were referred to arbitration by Mr James Henry Purnel Back ("the arbitrator") on or about 25 October 1990. The arbitration proceedings were in terms of the Arbitration Act [*Chapter 7:15*]. The arbitrator made an award in favour of the applicant. The award reads: E

> "Claimant (applicant herein) is awarded:
>
> 1. The sum of $769 701.42 together with interest on that sum at the prevailing minimum commercial bank rate for overdrafts as set out in Exhibit AA, plus 2% *per annum* compounded monthly.
> 2. Costs of suit on the High Court scale, such costs to include:
>   (a) Engineer Cochrane's costs in the sum of $169 466.90;
>   (b) the Arbitrator's fees; F
>   (c) the costs of a stenographer in the sum of $500 per day together with the costs of cassettes in the sum of $419.94;
>   (d) the cost of hiring the venue for the arbitration in the sum of $4 226.
>
> The respondent's counterclaim is dismissed with costs."

It will be apparent that in this award the arbitrator did not specify the date from which interest was to accrue. In his judgment, the arbitrator had, however, specified such date. His omission, therefore, did not lie in failing to G consider the question of the date from which interest was to be calculated but in failing to insert that date in his final award. By letter dated 21 July 1999, the arbitrator indicated that interest was to run from 1 February 1989. This letter was written after the applicant's legal practitioner had made an inquiry to the arbitrator in that regard. The letter reads: H

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> "Arbitration : Conforce P/L and City of Harare A
>
> Thank you for your letter of 16 th July 1999. I apologise for the oversight and confirm that as indicated on p. 35 of the award, interest is to run on the sum of $769 701.42 from the lst February, 1989."

In this application, the applicant seeks, in terms of article 35(1) of the First Schedule to the Arbitration Act ("the Model Law"), an order that the arbitration award be made an order of this court. Article 35(1) of the Model Law B provides as follows:

> "(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to the provisions of this article and of article 36."

The provisions of article 36 are not all relevant to the dispute between the parties except, as I shall show later, C article 36(1)(b)((ii), which provides that the recognition or enforcement of an arbitral award may be refused only if the court finds that its recognition or enforcement would be contrary to the public policy of Zimbabwe. If an application in terms of article 35(1) is granted, the award becomes a judgment of this court and becomes enforceable in the same manner as any judgment or order of this court. D

The respondent opposed the application on two grounds. Its heads of argument were filed out of time but condonation was granted by consent. The first ground was that the omission in the order of the date from which interest was to run could not be rectified by the arbitrator because from the minute that the arbitrator handed down the award on 24 June 1999, he became *functus officio* and could not amend his order. And because the award as handed down on 24 June did not specify the date from which interest was to be calculated, interest E could only run from the date of the award. As such, if the award were made an order of the court, it had to be made with the clarification that interest was to run from the date of the award and not from an earlier date.

The respondent did not persist with this ground of opposition. It conceded that such rectification could be F effected. The concession was proper. Article 33 of the Model Law allows any of the parties to ask for a correction of "any errors in computation, any clerical or typographical errors or any errors of a similar nature". Article 33(2) permits the arbitrator to correct a similar error or similar errors. In either case, time limits are prescribed for effecting such corrections. Under the common law an arbitrator may not correct an error in his award even if he G admits the mistake, but, as I have shown, the Model Law permits the making of such corrections. The arbitrator had, in the body of his award at p 35 granted interest from 1 February 1989. That he intended to make such an award of interest is quite obvious. The omission to insert in his final order the date from which the interest was to run was just a slight omission, a matter of mere inadvertence on his part. It was an error of the H

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nature contemplated by article 33 of the Model Law. I am satisfied that the correction was properly made and that A the respondent properly conceded on this point.

The respondent's second ground of opposition was that even if the arbitrator could correct or amend his order, which it is now accepted he was entitled to do, the order as amended did not entitle the applicant to be paid an B amount of interest which exceeded the amount of the award. The respondent's contention was that the *in duplum* rule applies to the calculation of the interest.

There are two distinct averments made by the parties in their affidavits which encapsulate the essence of the dispute between them. On the side of the applicant, these are paras 7-10 of the founding affidavit. In these C paragraphs, the applicant states that the arbitrator's award was $769 701.42, together with interest on that sum at the prevailing commercial bank rate plus two percent *per annum* compounded monthly, such interest to be calculated from 1 February 1989. In order to determine

the amount payable by the respondent, the applicant instructed Ernst & Young, Chartered Accountants, to calculate the interest on the judgment debt. The applicant attaches a schedule of calculations by Ernst & Young showing that as at 31 July 1999 the interest was $17 838 D 774.44 and the total of capital and interest as at the same date was $18 608 480.86. These are the amounts which the applicant says it is entitled to be paid in terms of the arbitrator's award.

On the side of the respondent, the relevant paragraphs are paras 2(b) and 3 of the opposing affidavit. The E respondent's contention in these paragraphs is that the applicant is not entitled to be paid as interest an amount which exceeds the capital amount. This is to say that the *in duplum* rule applies. Although the respondent also makes reference to the contention that the applicant was not entitled to any interest at all except from the date of the award, I have already stated that it did not persist with his contention for good reasons. Broadly stated, the F respondent's contention now is that the applicant is entitled to interest which is equal to the capital award and to further interest which should not exceed the amount of the judgment debt and which should be calculated from the date of the award.

Buried in the parties' respective contentions are certain important questions which are, in fact, the essence of this application. Some of these questions, except the first hereunder, were dealt with in the heads of argument. G They are the following:

1. Is this court empowered to interfere with an award made by an arbitrator in such a way as to clarify the meaning and effect of the award in so far as the interest claimable is concerned? This question can be couched in different terms: is this court empowered, despite the apparently clear H

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wording of the award that interest will run from 1 February 1989, to declare that such interest is to be A calculated subject to the *in duplum* rule?

2. If the *in duplum* rule applies:
   (a) does the running of interest cease at the commencement of the arbitration proceedings?
   (b) does the running of interest cease at any stage, before the award is made, assuming it continues to run B despite the commencement of arbitration proceedings?
   (c) does interest run afresh from the time that the award is made?
   (d) does it only run from the time that the award is made an order of court?

The submission made in the heads of argument filed on applicant's behalf was that interest was to run from 1 C February 1989 until it reached an amount equal to the capital award. It would stop running and then commence to run afresh only from the time that the award was issued (see para 14). In terms of this submission the maximum amount of capital and interest payable by the respondent would be about $3 078 805.68. Mr *Girach,* who appeared for the applicant, departed from this submission and contended that interest continued to run D beyond the double until the award was issued and to run afresh on the judgment debt after the award. Thus instead of $3 078 805.68, being the maximum amount payable by the respondent, it was to be a sum, as I have shown, in excess of $18 000 000.

Before examining the questions which I have identified as arising in this application, it is necessary that I make certain preliminary comments. E

It is apparent that the respondent did not question the essential validity of the arbitrator's award. The respondent did not counter-apply for the setting aside of the award. It accepted that the award was valid following upon arbitration proceedings which were regular in all respects. The respondent was concerned only with the correct interpretation of the award - whether the *in duplum* rule applies or not. It was concerned with the effect of the F award in respect of the amount of interest payable by it. I am, therefore, not called upon to consider the merits of the award in any respect

whatsoever, but only to interpret it so that the parties can know how to approach the question of the calculation of interest. The applicant, on its part, also did not question the validity of the award. All it sought was that the award be enforced by making it an order of court upon which it (the applicant) may G execute.

It seems to me, therefore, that I must first be satisfied as to whether this court is entitled to interpret the arbitrator's award so as to clarify its effect in respect of the calculation of interest. This point has, I must say, exercised my mind considerably, although it was not squarely raised by the parties either in their affidavits or in their written submissions to the court. It is a question H

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which necessarily arises because of the nature of the application before me. I must deal with it. A

It is generally acknowledged in our law that a court should not interfere with an arbitrator's award even where there has been a mistake. Jacobs *Law of Arbitration in South Africa* at pp 128-129 says the following:

> "It has been held that a court should be very chary about interfering with an award on the ground that the arbitrators made a B mistake. Such interference would be justified only where the arbitrators made a mistake in reducing to writing what they had actually decided, and it should not take place where the mistake was as to the consequences of what they decided. It is submitted that this decision (in *Schoeman & Schoeman v Schoeman* 1928 CPD 564) to the effect that a court can interpret an award to determine what the arbitrators decided, is wrong and that a court has no jurisdiction to alter an award so as to accord with what the court thinks the arbitration tribunal actually decided, except in a limited sense, that is, to interpret the meaning of a word in an award where such C word is not clear, by admitting evidence to determine the application of the word concerned to the facts of the arbitration."

The learned author relied on the decision in *Keen v Durban City Council* 1951 (2) SA 548 (N) for this comment.

I agree that a court should not interfere with an arbitrator's award so as to alter it to accord with what the court thinks the arbitrator actually decided. The difficulty, as I see it, is not with this position at law. It is with determining D whether what the court is being called upon to do is to interfere with an arbitrator's award in the manner stated. It seems to me that Jacobs *op cit* has too narrowly interpreted the decision in *Keen*'s case *supra*.

In *Keen*'s case *supra,* the court was asked to interpret what the word "salary" encompassed. The facts were E these. An arbitrator was appointed to determine a dispute between a trade union and the Durban City Council as to the remuneration payable by the Council to the plaintiffs, members of the trade union. The arbitrator made an award which contained a schedule setting out the salaries to be received by various classes of plaintiffs. An action was brought by the plaintiffs for the court to determine whether the words "salary" included a special F service increment to which an employee became entitled after he had been on top of his grade for a specified period and had complied with certain conditions.

The court accepted that this was an action to construe an award and, specifically, to interpret the word "salary" where it appeared in the schedule. DE WET J at 551G-H found as follows: G

> "I am satisfied beyond any doubt that the arbitrator, when using the word 'salary' in his award included the special service increment where the particular employee had qualified for such an increment."

It is to be noted that the court in fact interpreted the word "salary" so as to give it a meaning which the court thought was the meaning intended by the arbitrators. The court did not concern itself with the question whether it had H

the jurisdiction to interfere with the award or whether it was in fact interfering with it. There was an ambiguity in A the award which needed to be clarified and the court, without much ado, proceeded to give the necessary clarification.

In the present application, it cannot be said that the arbitrator made a mistake. If he had made a mistake, whether of law or of fact, and, even if he had admitted that mistake, this court would ordinarily have no jurisdiction to interfere. See *Walenn Holdings (Pvt) Ltd v Lloyd & Anor* 1996 (2) ZLR 383 (H) at 359-397 and the authorities B quoted therein. The arbitrator made an award which states in clear terms that the respondent was liable "in the sum of $769 701.42, together with interest on that sum...with effect from 1 February 1989 ..." It must, therefore, be apparent that I am not here concerned with any mistake or with the consequences of what the arbitrator C decided. I am called upon to deal with an ambiguity in the words I have quoted - whether the award is to be understood in its literal sense or in the sense which any judgment or order of court must be understood. On the one hand, the award can be understood to mean what it says - that the applicant is entitled to interest beyond the double calculated from 1 February 1989 to the date of payment, which, according the applicant, is a sum exceeding $17 000 000. On the other hand, the award can also be understood in the same way that any D judgment or order of a court in ordinary litigation would be understood to mean - that the award of interest is subject to the application of the *in duplum* rule. There is therefore an ambiguity, perhaps in appearance only, which this court must clarify. *Keen*'s case *supra* can be relied upon as authority for the approach that a court can E indeed interpret the meaning of an award. It did so in that case, and I too can do so in the present case. I do not agree with Jacobs *op cit* that the *ratio* in *Keen's* case is that the court can only interpret a word in an award. Whilst in *Keen*'s case, it can be said that the court only interpreted the word "salary", a closer reading of that case reveals that in substance, it did much more than that. It interpreted the award as a whole so as to clear up F an ambiguity. I do not agree that an ambiguity which arises from the award, read as a whole, can be distinguished from an ambiguity arising from a word in an award so as to say that the court is only entitled to interfere with an arbitrator's award "in a limited sense, that is, to interpret a word in an award where such word is unclear ..." I think that where there is an ambiguity in an award, as in this case, the court is entitled to interpret the G award or any of its constitutive words or phrases, not for the purpose of determining what the arbitrator decided, but for the purpose of clarifying what he ordered to be done. This application is similar to the application in *Keen*'s case so far as the task before the court is concerned - i.e. to interpret the arbitrator's award. I find that this court is entitled to do so.

In the present case, there is a more compelling reason to clarify the H

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arbitrator's award. As I have stated above, there is no allegation that the arbitrator made a mistake. There is no A challenge to the award. Both parties are satisfied that the award was properly made. They differ only in their interpretation of it - its meaning in so far as the calculation of interest is concerned.

The orders which are routinely made by this court do not specify that the interest payable on the capital amount B shall be subject to the *in duplum* rule. The assumption is that the *in duplum* rule is applicable in all appropriate cases. There is never a need to state that it shall apply. It applies, where it must, as a matter of law. Thus, for instance, the court may in January 2000 enter judgment for the plaintiff "in the sum of $10 000 together with interest at the rate of 40% *per annum* from 1 January 1996 to the date of payment in full". A calculation of the C interest in this example will show that the amount payable as interest will have equated to the amount of the capital some time before judgment is entered for the plaintiff. But the court does not state the obvious that the plaintiff shall only be entitled to interest which does not exceed the capital sum until the judgment is given. Nor does it specify that interest on the

judgment debt shall be subject to the application of the *in duplum* rule. In one D sense, therefore, it can be said that there is no need at all to interpret the arbitrator's award in the present case. His award should be read and understood the same way as any similar order of court. On this basis, I find myself justified in providing the clarification necessary in order that the award may be enforced for the correct amount payable on its terms. The interpretation only consists in declaring what the law is, for the guidance of the E parties. It does not have the effect of altering the decision of the arbitrator or of replacing it with what the court thinks the arbitrator decided.

The other reason why I think that I must interpret the award is that there is no other approach to resolve the issue between the parties or another way in which the clarification they seek can be obtained. It is not possible for me to remit the matter to the arbitrator for him to clear up the ambiguity. Remittal arises if there is an application to F set aside the award. No such application is before me. Article 34 of the Model Law does not permit the court *meru motu* to remit a matter to the arbitrator. There has to be before the court an application to set aside the award before the court can exercise its discretion to remit. It is also in the interest of bringing this matter to finality that I must interpret the award. G

The last point I must be satisfied about is that the respondent's opposition to the award being made an order of the court is permitted under the Model Law. If no basis has been laid by reference to the provisions of the Model Law for this court to refuse to recognise and enforce the award, then I would have no power to refused to enforce it. H

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The grounds upon which a court may refuse to make an award an order of court are spelt out in the Model Law in A Article 36. The provision is couched in exhaustive terms. The court may refuse to recognise or enforce an arbitral award only if the party against whom the award is invoked furnishes proof that:

(a) a party to the arbitration agreement was under some incapacity or the agreement itself was not valid B under the law to which the parties have subjected it or under the law of the country where the award was made; or

(b) it was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case; or

(c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission; C

(d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties or it has been set aside or suspended by a court of the country in which or under the law of which the award was made; or D

(f) the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe or that the recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.

Quite evidently, all except one of these grounds are not relevant to this application. The only relevant ground is E that concerning the public policy of Zimbabwe.

Recently, in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S), the Chief Justice had occasion to state what public policy entails. He said at 464C-D that:

> "Public policy is an expression of vague import. Its requirements invariably pose difficult and contentious questions. See generally F *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7I-9G for a useful survey of the authorities dealing with the problem. In order to ascertain the meaning of this elusive concept, in the context of the Model Law, regard is to be had to the structure of articles 34(5) and 36(3) which deal with two aspects."

The two aspects which the Chief Justice examined are the circumstances connected with the making of the G award and the substantive matter of the award. In respect of the latter he said at 465B-D:

> "The substantive effect of an award may also make it contrary to public policy. For example, an arbitral award which, after a consideration of the merits of the dispute, endorsed an agreement to break up a marriage, or the dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the public policy of Zimbabwe ... In my opinion, the approach to be adopted is to construe the public policy H

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defence as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise A the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated."

Continuing with this theme and in direct relation to the case before him, the Chief Justice said at 466C-G:

> "*In casu*, the effect of an enforcement of the arbitral award will be to allow Maposa to take advantage of a position that he B deliberately engineered. Counsel for ZESA submitted that this 'turns justice on its head'; the error of the arbitrator being so fundamental as to make a refusal to set aside the award, or, to permit the enforcement of it, a violation of Zimbabwe's elementary notions of justice ... Under article 34 and 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so C far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it."

This statement shows that the only recognised ground on which I may decline to enforce the arbitral award *in casu* is that of public policy. The non-applicability of the *in duplum* rule in the present case would, in my view, D result in the violation of a fundamental principle of our law. It is on this basis that the respondent's opposition to the application would be justified. The public policy defence applies. So if the award was clearly one that was inconsistent with an interpretation that the *in duplum* rule applies, I would refuse to make the award an order of E the court. But the position is different as I have shown above. The arbitrator's award is consistent with an interpretation favourable to the applicability of the *in duplum* rule.

It is not in dispute that interest was ordered to run and therefore did run from 1 February 1989. It is not clear exactly when the arbitration proceedings were commenced. It must have been on or before 16 May 1991. If the proceedings began on or before 16 May 1991, then according to Ernst & Young's schedule of interest, the F interest on the amount of the award had not equated to that amount by the time the proceedings were begun. The question before me is therefore - did the commencement of the arbitration proceeding suspend the in duplum rule?

Arbitration is founded on contract. The parties agree to submit their dispute to arbitration - see G *Walenn Holdings (Pvt) Ltd v Lloyd & Anor supra* at 401E. This contractual basis is what the Chief Justice refers to in *Maposa*'s case *supra* as "party autonomy ... a paramount feature under the arbitration regime in this country". The parties agreed that interest would accrue on the amount owing by the respondent to the applicant. The applicant was therefore entitled to claim it from before the award was made. They did not H

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specify whether interest would run afresh at the commencement of the arbitration or that it would cease to run at A that point. They had the freedom to agree on what was to happen. They did not reach any agreement. How then is the matter of interest to be

approached? The answer is to be found in the decided cases on the *in duplum* rule. That the *in duplum* rule applies to an award of interest in arbitration proceedings seems to be trite. Butler and Finsen *Arbitration in South Africa: Law and Practice* deal with the question under a subheading "Interest on B the award" at pp 275-276 and state in context that:

> "It is a rule of the common law that the amount of interest accumulated cannot exceed the capital sum, but where the rule applies, interest starts to run again from the date of judgment." C

The context in which this statement is made shows that the accumulation of interest is the same in arbitration as it is with other debts. In *CBZ Ltd v M M Builders & Supplies (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H), Gillespie J dealt with the question whether interest that has already reached the double starts to run afresh at the stage of *litis contestatio*. At 437D-E the learned judge, after an examination of the authorities, said: D

> "... I think that ... there is even less cause in the present day than there was in Huber's time to regard interest as commencing afresh from the time of *litis contestatio* despite the fact that interest equating to the double had already accrued. The view that interest commences anew from the time of judgment is to be preferred."

He is more explicit in this view at 437F-438C. GILLESPIE J dealt only with the question whether interest which has already reached the double commences to run again at *litis contestatio*. His conclusion was an emphatic no. E The learned judge did not, however, deal with the question whether interest which has not reached the double before *litis contestatio* continues to run despite this stage having been reached. In para 10 of the applicant's heads in *casu,* the question which was not dealt with by GILLESPIE J in *M M Builder's* case *supra*, and the law applicable is put thus: F

> "whether or not the *in duplum* rule is suspended once proceedings have been commenced was not decided in the leading case in this country, *Commercial Bank of Zimbabwe v M M Builders* 1996 (2) ZLR 420. However, the South African Supreme Court of Appeal has now held that public policy does not require the rule to run once proceedings have been instituted and therefore the *in duplum* rule is suspended from the institution of proceedings until judgment. See *Standard Bank v Oneanate* 1998 (1) SA 811 at 834 H." G

A view contrary to the decision in *M M Builders'* was expressed by Malaba J in *Ehlers v Standard Chartered Bank Zimbabwe Ltd*

HB-4-2000. * In that case, the respondent issued summons on 3 October 1995

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claiming from the applicant the payment of $2 052 346.42 with interest thereon at the rate of 41% *per annum* as A from 1 September 1995. Default judgment was entered against the applicant on 7 November 1996. In terms of the judgment, the applicant was ordered to pay the amount claimed plus interest calculated from 1 September 1995. At the time of the issue of the summons, unpaid interest on two of the applicant's loan accounts giving rise B to the respondent's claim had become equal to the unpaid capital. The double had been reached. The applicant paid the judgment debt but applied for an order that the interest charged and recovered pursuant to the default judgment for the period 1 September 1995 to 7 November 1996 be refunded to him. The applicant contended that as the unpaid interest had reached the double as of 1 September 1995 in respect of the two loans, the respondent had no right to charge interest for the period 1 September 1995 to 7 November 1996 and C that accordingly the default judgment had unlawfully required him to pay interest accruing on the debt during that period. He argued that the judgment by default should have required him to pay interest only from the date of judgment, that is to say, as from 7 November 1996. He claimed as overpaid interest the sum of $602 271.03 and prayed for the partial rescission of the judgment in order that he could defend the claim for interest in respect of D the period 1 September 1995 to 7 November 1996. His Lordship dismissed the application and stated at p 5 ± of the cyclostyled judgment that:

> "It is clear therefore, that the defence based entirely on the proposition that interest starts to run afresh only after the date of judgment where the *in duplum* rule applies and that

the court which ordered the applicant to pay interest from a date earlier than 8 November E 1996 was wrong, has no prospects of success on the merits."

In reaching this conclusion, MALABA J clearly differed from the decision in *M M Builders* case *supra*. He stated at p 3-4 ± of his judgment as follows:

"The defence the applicant intends to raise to the claim of interest from 1 September 1995 to 7 November 1996 derives support from the decision of Gillespie J in *Commercial Bank of Zimbabwe Ltd* case *supra* at pp 436C-439C. The learned judge with the F concurrence of Smith and Blackie JJ rejected a view of the *in duplum* rule which regarded interest as commencing to run afresh from the date of *litis contestatio* despite the fact that it would have become equal to the unpaid capital. This view of the law is expressed in Joubert *Law of South Africa* Vol 15 p 199 and 297 where the writer states that:

'Interest runs only until the sum of the interest unpaid is equal to the sum of the capital, with the result that the lender can never claim interest in an amount exceeding the sum of the loan. *After* litis contestatio *interest will commence to run again so that the* G *court may award interest from that time in addition to the permitted interest*' (emphasis is mine).

The learned judge preferred the view that interest only commences to run anew as from the date of judgment. I must, with respect, express my dissent from the decision in

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Commercial Bank of Zimbabwe's case *supra*, on the date from which interest commences to run afresh in a case where the *in* A *duplum* rule applies. This view of the law does not give effect to the policy behind the *in duplum* rule nor does it recognise the discretion enjoyed by the court in the matter."

MALABA J found support for differing from the decision in *M M Builder's* case *supra* in the judgment of Zulman JA in *Standard Bank of South Africa Ltd v Oneanate Investments (Pvt) Ltd* 1998 (1) SA 811 (A), a decision of the B full bench of the Appellate Division of the Supreme Court of South Africa. Decisions of the South African Courts which, like our courts, operate in a Roman Dutch system of law, and particularly decisions of the Supreme Court of South Africa and its full bench have the highest possible persuasive value for the courts in Zimbabwe. But of course our courts are not bound to follow them. It is correct that in *Oneanate*'s case *supra* the Supreme Court of South Africa on this point differed from the decision in *M M Builder*'s case - see the C judgment at 834B-H. It seems to me that the decision on this point was not entirely based on the law as expounded by the old authorities of Roman-Dutch law. There are authorities on both sides of the question, as pointed out by ZULMAN JA at 832-833. The decision seems to me to have been based more directly on the learned Judge of Appeal's understanding of what public interest in the modern setting requires. He said at D 834B-D:

"It might at this stage be helpful to repeat the justification for the *in duplum* rule ... It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation of lenders who permit interest to accumulate. If that is so, I fail to see how a creditor who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in the legal proceedings, keeps the creditor out of his money. No principle of public policy 'is involved in providing the debtor with protection E *pendente lite* against interest in excess of the double. *Since the rule as formulated by Huber does not serve the public interest, I do not believe that we should consider ourselves bound by it.* A creditor can control the institution of litigation and can by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor however has no control over delays caused by the litigation process'" (emphasis is mine). F

After indicating how long the proceedings had taken from service of the summons to the final disposition of the matter, ZULMAN JA further supported the conclusion he had reached at 834F:

"If one accepts that interest and indeed compound interest is 'the life blood of finance' in modern times I am of the opinion that one *should not apply all of the 'old Roman Dutch Law to modern conditions where finance plays an entirely different role...'*" (emphasis G is mine).

The rationale for the *in duplum* rule and its origins are fully examined by GILLESPIE J in *M M Builders*' case *supra*. I am much persuaded by his Lordship's reasoning and

understanding of the rationale and origins of the rule. I do not need to traverse the same ground. If I understand the reasoning H

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of GILLESPIE J correctly, then I venture to say that the public interest served by the *in duplum* rule is not to be A identified with sympathy for the debtor, so as to say that the rule is design to protect him. I view the public interest involved as encompassing a wider spectrum of interests, from the protection of the debtor, to securing fiscal discipline on the part of lenders, to considerations of justification for charging interest in the first place i.e. to B compensate the creditor for deprivation of use of the money due until payment (*Mawere v Mukuna* 1997 (2) ZLR 360 (H) at 364G) and to the interests of commerce generally and to perhaps many more interests. Thus the public interest cannot be restricted to one or two considerations i.e. the protection of the debtor and the dictates of modern commerce. But even if it were to be so restricted, I cannot see anything incompatible with the rule C serving those interests if it were to be applied in the manner advocated for in *M M Builders'* case. The creditor's claim for interest would be limited to an amount that does not exceed the capital. In my view, the danger in adopting the approach in *Oneanate* and *Ehlers* cases *supra* is that an unscrupulous creditor only has to institute action to defeat the *in duplum* rule. He may so act as to ensure that the institution of proceedings and the attainment of the double coincide with the result that the rule is rendered inoperative. I do not see anything that is D against the public interest, or the interest of modern finance, if the *in duplum* rule operates in the manner outlined by GILLESPIE J and the old Roman Dutch authorities which espouse the view that once the double has been reached, interest must stop to run regardless of the institution of proceedings, or that the stage of *litis contestatio* has been reached. Where in particular the double has not been reached, I find no relevance at all of E the event of institution of proceedings. Interest must continue to run until it equates to the capital amount and then cease to run. It may thus equate to the capital amount soon after or long after the institution of proceedings, but that is immaterial. I am therefore unpersuaded by the conclusion reached on this point in *Oneanate* and F *Ehlers* cases. I must respectfully express my dissent from those judgments. I appreciate that the law must be certain and that it is most undesirable for judges to differ on fundamental principles of law. There would appear to be a need for the difference of opinion on this point to be placed before the Supreme Court as soon as possible, either by way of an appeal or in a suitable case, as a reference of a point of law. Consistency in the law is G paramount in the administration of justice.

If I am wrong in the conclusion I have come to on the question of whether, if during the course of litigation the amount of interest equates to the capital amount, interest stops running and only commences to run once judgment is pronounced, proceeding, as I have done, on a consideration of the legal position with respect to ordinary litigation, I am comforted by the fact that H

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I am, in this application, concerned with arbitration proceedings. I have already stated that arbitration is based in A contract. The parties have a much greater control of the proceedings. The argument that the debtor should not be protected from the consequences of the delays interest in legal proceedings as contended in the passage I have cited from *Oneanate supra* would seem to me to find no application in arbitration proceedings. The parties are in the position, and are able, to determine and demand on their reference when the arbitration proceedings B should be concluded. Arbitration proceedings are renowned for the speed with which they are conducted, although this was not the case with the proceedings which have resulted in the present application. They were begun in the first half of 1991 and the award was only issued in 1999. The comment by EDWARD DAVIES J as quoted by Butler & Finsen *op cit* at p 19 is most apposite in relation to these proceedings: C

> "Many years ago, a top-hatted old gentleman used to parade outside these Law Courts carrying a placard which bore the stirring injunction 'Arbitrate - don't litigate'. I wonder whether the ardour of that old gentleman would not have been dampened somewhat had he survived long enough to learn something about the present case."

The point is that if parties to arbitration proceedings are aware that they cannot waive the operation of the *in* D *duplum* rule in any way whatsoever and in particular if the creditor who is kept out of his money is aware of the requirements of the *in duplum* rule the parties, or the creditor, should insist that the arbitrator determines the dispute within the shortest possible time. If they do not do so and allow arbitration proceedings to continue almost interminably they have themselves to blame if they are hit by the rule, as they surely will be. Any prejudice E which they may suffer will be entirely to their own account. I am aware that the law of arbitration follows closely and in most respects upon the law of ordinary litigation, but differences exist. And I have no hesitation at all in stating that even if the law on the *in duplum* rule in relation to its suspension at the commencement or institution of proceedings is as stated in *Oneanate* and *Ehlers,* it should not be the same in respect of arbitration F proceedings.

To summarise: the conclusion I have reached is that interest was ordered to run from 1 February 1989. The amount of interest should have equated to the sum of $759 701.42, long before the award was issued. According to the schedule by Ernst & Young, this would have been about the end of June or beginning of July 1992. In my G judgment, the interest stopped running at that point. It had reached the double. The *in duplum* rule was operative. It was not suspended by the institution or commencement of the arbitration proceedings. On an application of the *in duplum* rule, as I have found in this judgment, the award should have been worded more precisely to the effect that, as at the date of the award, the applicant was entitled to be paid the sum of $1 539 402.84. H

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The ambiguity which was created by the wording of the award was the reason that the applicant contended that A the *in duplum* rule was suspended by the commencement of the arbitration proceedings and that as a consequence it was entitled to be paid as interest the sum of $17 838 779.44. This case, if anything, is a typical example to show that the approach adopted in *Oneanate* and *Ehlers* can be unconscionable if the "old Roman Dutch law" on the application of the *in duplum* rule were not binding on us. B

The parties to this application did not make an issue of it whether interest begins to run afresh from the time that the award is made. They both appeared to accept that interest begins to run again from the time that the award is made. They must have relied on *M M Builders* and *Oneaneate supra*. The question is not before me for C decision but I may in passing refer to the passage in *M M Builders* case *supra* which may have escaped the attention of the parties' legal practitioners. At 435A GILLESPIE J says:

> "The principle of interest commencing to accrue afresh upon judgment was approved in *Administrasie van Transvaal v Oosthuizen en 'n Ander* 1990 (3) SA 387 (W) but held not to apply to the award 'of an arbitrator'."

That this is the position is also stated by Butler & Finsen *op cit* at p 276 where reference is made to the decision D in *Oosthuizen's* case *supra*. I find myself hamstrung to further address an issue which was not of concern to the parties. The applicant will therefore be entitled to recover further interest from the date of the award and such interest is to be calculated on the amount of the award, being $1 537 402.84, from 25 June 1999 to the date of payment in full, provided, for the avoidance of doubt, that the amount of such interest shall not exceed the E amount of the award. The award issued by the arbitrator, in my view, did not have to be interpreted at all if the parties had understood the correct application of the *in duplum* rule to the calculation of interest in this case. But for the need to clarify the position the award could very well have been recognised and enforced as it was framed by the arbitrator. The applicant has succeeded in its main relief, which was to have the award made an order of F this

court. It did not succeed in its argument on the interpretation of the award. The respondent succeeded in the latter connection. I think in the circumstances it is only fair that I do not award costs against any of the parties.

In the result the full order is -

IT IS ORDERED THAT: G

1. The arbitral award issued on the 24 June 1999 in favour of the applicant against the respondent be and is hereby recognised and enforced.
2. The respondent shall pay to the applicant.
   (a) the sum of $1 539 402.84 (being $769 701.42 capital award and $769 701.43 interest on the capital award) together with interest thereon with effect from 25 June 1999 at the prevailing minimum H

commercial rate for overdrafts, as set out in Exhibit "AA" plus 2% *per annum* compounded monthly A provided that the amount of interest so payable shall not exceed the sum of $1 539 402.84.

   (b) Costs of suit on the High Court scale, such costs to include:
      (i) Engineer Cochrane's costs in the sum of $169 466.90;
      (ii) the arbitrator's fees;
      (iii) the costs of a stenographer in the sum of $500 per day together with the costs of cassettes in the B sum of $419.94;
      (iv) The cost of hiring the venue for the arbitration in the sum of $4 226.
3. The respondent's counterclaim is dismissed with costs.
4. There will be no order of costs in respect of this application. C

Byron Venturas & Partners, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

* See p 136 of this volume. - *Editor*.
† See p 141 of this volume. - *Editor*.
‡ See p 139 of this volume. - *Editor*.