

DISPUTES

The fascinating tango of interest and forex rates on large claims where set-off occurs: a case study

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Imagine the following scenario, the parties have litigated, and they are awarded the following claims:

Party A is awarded:

- US\$5 000 000,00 together with applicable interest with effect from the mora date, in this instance being 1 October 2011.
- US\$1 000 000,00 with interest from 1 September 2014.
- Party B is awarded ZAR50 000 000,00 with legal interest from 1 October 2010.

The question is then, taking interest and forex rates into account, who owes whom what, and when?

First of all, the legal rate of interest differs on the claimed amounts:

- Prior to 1 August 2014, and since 1993, the prescribed rate of interest under Government Notice No R1814 was 15,5% per annum;
- This was revised down to 9% with effect from 1 August 2014 under Government Notice No R554;
- Subsequently, and with effect from 8 January 2016, under the provisions of Section 3 of the Judicial Matters Amendment Act No 24 of 2015, the rate of interest was linked to the repurchase rate determined from time to time by the South African Reserve Bank (the repo rate);
- The prescribed rate of interest currently stands at 10,25%.

In the case of **Davehill (Pty) Ltd vs Community Development 1988(1) SA 290(A)**^[1], it was held that the prescribed rate at the time when interest begins to run is fixed at that time and remains constant, notwithstanding that the Minister may from time to time prescribe different rates.

Accordingly, the legal rate of 15,5% applies to Party B's claim and the first part of Party A's claim. The applicable rate to part 2 of Party A's claim will be 9% per annum.

There is another principal in our law which prevents a party from claiming interest in excess of the capital sum claimed. This principal is referred to as the *In Duplum* rule.

Party B's claim is now capped, because the accrual of interest has reached the value of the capital sum – Party B can therefore never claim more than R100 000,00 and that sum remains static.

Since Party A's claim arose later in time, whilst it is approaching the limit of in duplum, it has not quite yet reached that limit. Party A's claim attracts a much lower rate of interest (9%), and accordingly that claim continues to attract interest at a lower rate on an ongoing basis.

Where the interplay between these sums becomes interesting is when the parties make demands.

Of course, Party A currently enjoys collectively a higher claim as against Party B, because the interest rate (at an excess of R11,00 to the dollar) is favourable. However, the value of Party A's claim is in a constant state of flux because on a day to day basis, there is an ongoing accrual of interest, and the rates of exchange constantly move. Whilst it is always uncertain what currency fluctuations in the future will yield, Party A's position is always going to be a vulnerable and unpredictable one.

The effect of currency fluctuation can have a significant effect in the prevailing circumstances such as these, especially where the Rand strengthens as it has done over the preceding several months.

For the better part of last year, the rate of exchange in relation to the US\$ at times exceeded R15,00 to the US\$ whereas now, in February 2018, it has dipped to below the R12,00 to the US\$ mark.

Happily, certainty in our law as to the applicable rate of exchange on claims sounding in money has been crystallised^[2]: where *"it was apparent that the currency in which the appellant had "felt" the loss had been US\$... the damages awarded should be expressed in US\$... the award could be satisfied in South Africa by payment in the foreign currency or by payment of its equivalent in Rand when paid, as any other conversion date could render meaningless the award in foreign currency"*.

In other words, the date of payment, and in this scenario, the date of set-off and payment, will be the date upon which the relevant exchange rates will have bearing.

Of course, the net effect of the rate of exchange on a given day can translate into large differentials:

1. Scenario 1: exchange rate is R13,50 to the US\$ and set-off and payment takes place on 1 December 2017:

- US\$5 000 000,00 (capital) plus US\$4 777 397,26 (interest up to 30 November 2018) equals US\$9 777 397,26 multiplied by R13,50 equals R131 994 863,01;
- US\$1 000 000,00 (capital) plus US\$292 438,36 equals US\$1 292 438,36 multiplied by R13,50 equals R17 447 917,86;
- Total claim of Party A in Rands at 1 December 2017 equates to R149 442 780,87;
- Less Party B's claim of R100 000 000,00;
- Party B must pay Party A **R49 442 780,13**.

2. Scenario 2: exchange rate of R11,80 to the US\$ on 1 February 2018.

- R5 000 000,00 (capital) plus R4 911 164,38 (interest up to 30 January 2018) equals US\$9 911 164,38 multiplied by R11,80 equals R116 951 739,68;
- US\$1 000 000,00 plus US\$307 726,03 equals US\$1 307 726,03 multiplied by R11,80 equals R15 431 167,15;
- Total claim of Party A in Rands at 1 February 2018 equals ZAR132 382 906,83;
- Party B must pay Party A **R32 382 906,83**.

Thus, even though Party A's claim continues to increase with the accrual of interest, and Party B's remains static, a fluctuation of the dollar downwards by R1,70 effectively resulted in a decline in Party A's claim by **R17 059 873,30**

Since Party B's claim in Rands remain static, and because the Rand strengthens and the US\$ weakens, the effect of this change is almost doubly hard on Party A because of the set-off effect of the two different currencies.

If one were to posit a scenario whereby the Rand strengthened around the R9 mark to the dollar, all the upside value in Party A's claim would be wiped out, and set-off might possibly operate in reverse, with Party A ending up making payment to Party B.

Obviously, neither party has control over the rates and exchange applicable, but it is certainly interesting to see the interplay between the different element of an equation such as this, and what a difference two months and a few Rands and cents in an equation like this can make.

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[1] confirmed in **Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and others** [2013] 2 All SA 1 (SCA)

[2] in the case of **Standard Chartered Bank of Canada v Nedperm Bank Limited** 1994 (4) SA 747(A)



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