Matters of interest

HCJ Flemming, formerly Deputy Judge President of the Witwatersrand Local Division of the Transvaal High Court

Einstein is reputed to have said that compound interest represents the strongest mathematical formula operating on our lives. Because of the involvement of a time factor, the doubling of the capital possibly feels slower than in the story of the doubling on the squares of a chess board. But the result can still be impressive.

Consider the individual who saves R1 000 per year starting at age 20. Assuming an annual increment of 7.2%, the investment of the first year doubles by age 30 and becomes R4 000 by age 40. By age 60 it is worth R16 000. (That proves that it is time and not the skill of an insurer that makes an old life policy worth something.) To get even with that investment by age 60 an individual who commences a similar savings pattern only at age 40 must invest the annual R1 000 plus at least R4 000 per year.

In terms of the rule of 72, an annual rate of 15.5% doubles the capital after 4.65 years. The first R1 000 becomes almost R20 000 by age 40. The older investor now has to invest R1 000 plus at least R20 000 annually. The difference becomes more tangible if the investors live beyond retirement age or lose their saving capacity for other reasons.

The power of a difference of one percentage point already justifies a query about the fairness of what courts do. It also merits the conclusion that one's best investment may be in a delaying debtor – provided he has assets – and your best wish is for delays by attorneys or the court.

This note does not deal with agreed rates of interest for mora or the agreed price for the use of money or for other forbearance on the obligation to pay. It deals with judicial discretions and practices and the laws of politicians.

Subject to some variation mainly as a result of opinions of actuaries – opining on the field of economists! – courts have often used a capitalisation rate and a discount rate of about 2.5% to 3% both in times of high inflation and in times of low inflation. Although the constancy of the level despite the contrast with the mora rate is broadly justifiable, there is no reason in logic or in fairness why judicial discretion fades to nothingness. A small sum invested for a short period will probably not produce 3% more than the inflation rate.

I turn to mora interest. Few people can now invest at 15.5% pa. Few plaintiffs can prove that so mush loss was caused by mora. Nevertheless, despite the justification for the award of mora interest being the presumed loss suffered as a result of mora, courts award 15.5% (On the *ratio* see *Bellairs v Hodnett* 1978 (1) SA 1110 (A) at 1145 *et seq* and the authorities there cited, in particular Steyn's *Mora Debitoris* and the *Enteka* case mentioned at 1146A.)

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The discrepancy between the justifying principle and the outcome in practice proves that judicial limpness is sometimes no worse that legislative interference. Neither succeeds without pro-activeness.

The history goes something like this: Some time before the *Enteka* case, the OPD more or less brushed aside attempts to obtain a level of mora interest higher than 6%. Representations followed. The view of the Department of Justice was that legislation was the only route to adaptability and the avoiding of repetitive evidence. When legislation and its implementation suffered delay, an attorney lost patience and requested the constitution of a full Bench. The matter was heard some time later. Evidence was then produced that the equivalent of what we now call the repo rate was 8.5%; banks charged borrowers at least 10.5%; the plaintiff could invest at 9.5%. Yet the 'legal rate' was raised to only 8%. A year later but in much the same economic circumstances, the Minister saw 11% as appropriate.

The Minister set the rate in terms of Act 55 of l975. In the seventies this intervention was a relief to judicial reticence. But years later, the same legislation prevents courts from being in touch. Because courts can not by evidence or otherwise be convinced to award a lower rate than the ministerial rate, courts now award 15.5% in circumstances where, not so long before writing this note, the repo rate was 7%; borrowing on bonds could be done at say 10%; the hire purchase for some sales was much lower than 22%; and investments for a year could, even for pensioners, hardly produce more that 7%. The disparity between the proclaimed rate and the real world affects all debts and may therefore not operate as 'special circumstances' to justify awarding a lower rate (*Davehill Pty Ltd v Community Development Board* 1988 (1) SA 290 (A) at 301e).

More or less the same holds true for unliquidated claims. In a personal injury case in particular, there is no real incentive to move forward expeditiously. A court will award the same amount for an injury suffered three months ago as for the same injury suffered six years ago. So the creditor obtains an increase in the award by the mere passage of time which causes a different level of judicial perception of the value of money. But now, in terms of section 2A of the 1975 legislation the creditor in addition gains by the award of interest on his (increased) claim for general damages. And again at a better rate than that for which he can contract. And without the Receiver of Revenue taking interest (in the other meaning of the word) in the replacement of lost earnings or mora interest thereon. Here there is, concededly, a discretion about *inter alia* the rate. How many

times has a court been asked to exercise that discretion?

We now live an injustice to debtors that will continue until two ministers get into action. There is no pro-active body to initiate action. On the contrary proliferation and confusion seems imminent. In terms of the National Credit Act, some minister can lay down various interest rates – for the contracts governed by the statute and so for unliquidated claims (section 103).

A side-effect of the slowness in adapting statutory control of interest rates is currently noticeable. The repo rate is used as a financial tool. It has become somewhat blunted. On the one hand companies and others live with unprecedented money flushness. Not only non-borrowers but also good clients and buyers in competitive sections of trade (and those whose increase in income transcends any temporary reticence that a new increase in rates may cause) feel no pain. On the other extreme many moneyless people such as borrowers on micro loans also feel no pain because interest rates have been pegged. Between the extremes are buyers who use debt on credit cards. They also feel no pinch from an increase in the repo rate because the pegged interest rate has not been adjusted and can not be adjusted until the National Credit Act comes into operation. The result may well be that the Reserve Bank governor has to make more increases in the repo rate than would otherwise be called for because he can influence many consumers only indirectly. That takes more time.

Space does not permit more than a mention of other tantalisers such as:

1 If mora arises though demand, the date for the commencement of mora interest has been settled by the *Bellairs* case. Mora being a form of breach of contract (a point made clear also by Steyn and by JC de Wet) the mention of a date for payment calls for actually considering whether it is set as a day when lawful demand can be made (the date upon which forbearance ends) or as a date the exceeding of which constitutes breach of contract. The distinction is illustrated by the (in some respects dissimilar) position of a cheque. Its date marks the day on which demand becomes permissible but there is technically no mora before the banker is asked to pay. The variability of concepts such as 'due' or 'payable' or 'overdue' (and the problematic art of expressing the difference in clear words) is illustrated, *inter alia*, in *Administrateur Transvaal v JD van Niekerk* 1995(2) SA 241 (A) at 25E.

2 Does the peremptory decree in the l975 Act that 'interest-will-run' mean that the *in duplum* rule does not apply?

3 What is meant in section 2A by 'service' of a demand when the signed Afrikaans text does not use words like 'aflewering' or 'betekening'?

4 Assuming that the Koran does not forbid only usurious interest or doubling of money by way of interest, is the prohibition of interest as the price of money wide enough to prohibit also a rate of delineating compensation for harm? 🕮