

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Saakno: / Case number: **1/2010**
Datum verhoor: / Date heard: **27 / 11 / 2012**
Datum gelewer: / Date delivered: **14 / 12 / 2012**

In the matter between:

ALETTA MARIA MAGTELENE DU PLOOY

Plaintiff

and

**VENTER JOUBERT ING.
HEILA PISTORIUS**

First Defendant
Second Defendant

Coram: Coetzee AJ

JUDGMENT

COETZEE, AJ

[1] During or about August 2006, Aletta Maria Magtelene du Plooy (plaintiff) instructed the law firm Venter Joubert Incorporated (first defendant) and Heila Pistorius (second defendant), a professional assistant with first defendant (both defendants hereinafter referred to as "the

defendants”) to pursue and institute a delictual action against the Minister of Safety and Security (“the Minister”).

- [2] Plaintiff’s proposed claim against the Minister relates to certain injuries she sustained during a shooting incident at her home on 7 February 2006 and which occurred during a firearm and firearm-safe inspection conducted by members of the South African Police Service.
- [3] On 3 August 2006 the defendants directed a notice on behalf of the plaintiff to the Minister in terms of s 3¹ of the Institution of Legal Proceedings against certain Organs of State Act².
- [4] Defendants failed to pursue the claim and failed to timeously issue and serve summons on the Minister as a result whereof plaintiff’s claim against the Minister prescribed on 8 February 2009.
- [5] For failing to institute timeous action against the Minister, plaintiff, caused a summons to be served on defendants on 12 January 2010 claiming:

a) *Betaling van die bedrag van R920,000.00*

¹ Reference in this judgment to “the notice” is a reference to a notice in terms of s 3 of Act 40 of 2002.

² Act 40 of 2002.

b) *Rente op voormelde bedrag teen 'n koers van 15,5 % a tempore morae.*

c) *Koste van die geding.*

The cause of action is based on a delictual claim for professional negligence.

[6] Plaintiff did not direct a letter of demand to defendants prior to the institution of this action.

[7] The damages claimed by plaintiff consists of the following components, to wit: a) special damages for loss of past and future medical expenses and loss of past and future income amounting to R520,000.00 and, b) general damages amounting to R400,000.00.

[8] On 13 January 2010 defendants filed a notice of their intention to defend and the matter was, on 5 September 2012, postponed for trial on 24 November 2012

[9] On 11 September 2011 defendant delivered a notice in terms of Rule 34(1) of the Uniform Rules of Court containing the following tender:

"Take notice that defendants hereby tender without prejudice or admission of liability and by way of an offer in full and final settlement of the plaintiff's claim:

- 1. Payment of the sum of R296,262.94 (TWO HUNDRED AND NINETY SIX TWO HUNDRED AND SIXTY TWO RAND AND NINETY FOUR CENTS).*
- 2. Party and party costs as taxed or agreed, to date of this tender."*

No tender for the payment of interest was made.

[10] At the commencement of the trial counsel for plaintiff, Mrs Erasmus, informed me that the parties have settled the quantum of damages. The settlement includes plaintiff's claim for special damages and general damages. I was informed that, in terms of the settlement agreement, defendants were to pay to the plaintiff the amount of R296,262.94 in full and final settlement of the referred to components³ of the claim. Mr Joseph on behalf of defendants confirmed the settlement as formulated by Mrs Erasmus.

[11] Both counsel informed me that no agreement could be reached regarding payment of interest and costs save that Mr Joseph conceded that defendants would be liable for *mora* interest on the said amount calculated from 12

³ Paragraph 6 *supra*.

January 2010 (being the date of service of summons) to 9 November 2010 (being the date of the Rule 34(1)⁴ tender).

[12] Plaintiff on the other hand submitted that she is entitled to interest calculated at the rate prescribed in s 1⁵ of the Prescribed Rate of Interest Act⁶ from 3 August 2006 (being the date on which the notice was directed to the Minister

[13] I was requested to pronounce on the date from which interest is to be calculated and costs.

[14] Plaintiff's counsel submitted that I have a discretion in terms of s 2A(5) of the Act and urged me to exercise my discretion in favour of plaintiff and order defendants to pay to plaintiff interest calculated at the prescribed rate from 3 August 2006 to date of payment.

[15] In this regard Mrs Erasmus contended that in order to exercise my discretion in favour of the plaintiff, I should take into account that: (a) defendants were, from the outset and in particular from the 3rd of August 2006 aware of all facts in order to assess the quantum of plaintiff's damages, and (b) plaintiff would have been entitled to *mora* interest from at least 3 August 2006 if the claim against the Minister was

⁴ Paragraph 8 *supra*.

⁵ See paragraph 21 *infra*.

⁶ Act 55 of 1975 "the Act".

properly pursued, and (c) defendants are the sole cause for the almost seven years delay in the finalization of the matter and more importantly, for depriving plaintiff of the utilization of her capital.

[16] Mr Joseph argues that:

- a) The provisions of s 2A⁷(5) are not applicable as plaintiff cannot get more than what she has claimed. He submits that any interest that she might have been entitled to if the claim was properly pursued by the defendants would constitute a resultant damages claim against the defendant for their breach of mandate and that this claim for damages should have been included as an interest component of damages. He then argues that it follows that the general principle as provided for in s 2A(2)(a) would be applicable.
- b) He further contended that, even if he is wrong and I do exercise my discretion I would not be at liberty to determine the date of mora to be 3 August 2006 and or any date earlier than the date of summons as s 2A(2)(a) provides for interest to run either from the date of service of demand or service of summons.

⁷ Reference in this judgment to Section 2A is a reference to section 2A of the Act.

- c) He then argues that if I am to exercise my discretion I have to determine a date of *mora* and as no summons was served on the Minister the only other date would be the date of the notice. He then submits that the notice fails to meet the provisions of s 2A(2)(a). This submission is based on the following two grounds:
- i. The notice does not constitute a demand in that, in order for a demand to satisfy the purpose of establishing *mora ex persona*, for the purposes of s 2A(2)(a) there has to be an unequivocal demand that performance/payment should be effected on a certain date; and,
 - ii. alternatively, and if it be found that the notice does constitute a demand, that demand fails to meet the provisions of s 2A(2)(a). In this regard he submits that s 2A(2)(a) provides for the demand for payment of the debt to be a demand directed to the "debtor". The "debtor" in terms of the notice is the Minister and not the defendants, hence, no demand was directed to the debtor.

[17] This argument, in my view, cannot succeed.

Does the interest claimed constitute a resultant damages claim against the defendants

[18] Plaintiff's claim against defendants is not for damages resulting from injuries sustained as a result of the negligent acts of the employees of the Minister, but for loss of her opportunity to claim against the Minister. These claims are conceptually different. In this regard Cachalia JA said the following:

*"The damages that are to be assessed are the damages suffered by the plaintiff as a result of the negligence of the defendants in having allowed her claim for loss of support against the Fund to become prescribed. The fact that the quantum of damages suffered by the plaintiff may be the same as the amount of her loss of support and the fact that such damages have to be determined by reference to her loss of support do not make the present action an action in which damages are assessed for loss of support"*⁸

[19] Although plaintiff's claim for special and general damages as a result of the defendant's contractual breach may be the same as her claim for special and general damages as a result of the Ministers negligence, her overall patrimonial loss might differ. Such difference might be, for example her legal fees paid to the defendants. To be successful in recovering such expenses it will have to be included as a component of damages.

⁸ Erasmus Ferreira & Ackermann v Francis 2010 (2) SA 228 (SCA) at 223 B-E, paragraph 12

[20] For the reasons set out hereunder, I am of the view that any interest that she might have been entitled to if the claim was properly pursued by the defendants does not constitute a resultant damages claim against the defendant for their breach of the mandate.

[21] It has been authoritatively stated that, before the introduction of s 2A, no common law principle or statutory enactment provided for the award of pre-judgment interest on unliquidated damages.⁹ To place the issue in proper context it is necessary first to refer to the relevant contents of s 2A which reads as follows:

"2A. Interest on unliquidated debts.—

(1) *Subject to the provisions of this s the amount of every unliquidated debt as determined by a court of law,, shall bear interest as contemplated in s 1.*

(2)

(a) *Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 the interest contemplated in subs (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.*

(b)

(3) *The interest on that part of a debt which consists of the present value of a loss which will occur in the future shall not commence to run until the date upon which the quantum of*

⁹ Adel Builders (Pty) Ltd v Thompson 2000 (4) SA 1027 (SCA) on 1031 at paragraph 11.

that part is determined by judgment, shall for the purposes of this Act be deemed to be a judgment debt.

(4)

(5) *Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.*

(6)"

[22] Section 1 of the Act provides for the situation where a debt, being a liquidated amount, bears interest and the rate at which the interest is to be calculated is not governed by law, agreement or trade custom. In these circumstances the interest rate shall be calculated at the rate determined by the Minister of Justice, from time to time.

[23] In as far as s 1 do not provide for the calculation of interest on unliquidated debts, Grosskopf JA, prior to s 2A being enacted, in *SA Eagle Insurance Co Ltd v Hartley*¹⁰, remarked as follows:

'If a plaintiff through no fault of his own has to wait a substantial period of time to establish his claim it seems unfair that he should be paid in depreciated currency. Of course, in respect of many debts this problem is resolved (or partially resolved) by an order for the payment of interest, and the Prescribed Rate of Interest Act 55 of 1975 is flexible enough to permit the Minister of Justice to prescribe rates of interest which reflect the influence of inflation on the level of rates

¹⁰ 1990 (4) SA 833 (A) at 841G--842A

generally (see s 1(2)). Its application is, however, limited to debts bearing interest (s 1(1)); and it is trite law that there can be no mora, and accordingly no mora interest in respect of unliquidated claims of damages. See Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at 31--3, a decision which has been consistently applied and followed, also in this Court. It follows that there is no mechanism by which a court can compensate a plaintiff like the present for the ravages of inflation in respect of monetary losses incurred prior to the trial. In other jurisdictions a statutory power to award interest is used for this purpose. See, for example, Cookson v Knowles (supra) and Wright v British Railways Board (supra). Whether our Courts should have a similar power, and what precise form it should take, is not, however, something we can lay down. It is essentially a matter of policy which is for the Legislature to decide. . . . It is comforting to know that the Law Commission is at present considering this topic.'

[24] From the above it is clear that the learned Judge found that the unfairness relates to a plaintiff being paid in depreciated currency.

[25] In terms of s 2A(5) I have a discretion, '*(n)otwithstanding the provisions of this Act*' and, therefore, notwithstanding the terms of s 2A(2)(a), to make "*such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run*".

[26] After the coming into operation of s 2A, Mpati J (as he then was), in *Adel Builders Pty Ltd v Thompson*,¹¹ expressed

¹¹ *Adel Builders (PTY) Ltd v Thompson* 1999 (1) SA 680 (SE) at 689 G-H.

himself, approving the remarks made by Grosskopf JA,¹² in the follows terms regarding the aim of the s 2A:

"This section came into operation on 5 April 1997 and is clearly aimed at alleviating the plight of a plaintiff as referred to by E M Grosskopf JA in SA Eagle Insurance Co Ltd v Hartley (supra), viz that a plaintiff who has to wait a substantial period of time to establish his claim through no fault of his own is paid in depreciated currency. The section confers a right on a party to be paid mora interest, to which he was not entitled before the amendment, on an unliquidated debt."

[27] The purpose of s 2A is therefore, in my view, not to compensate a creditor for his patrimonial loss but to compensate the creditor's patrimonial loss in real monetary value and not in depreciated currency. Interest in terms of s 2A can therefore not be regarded as the "interest component of the plaintiff's damages".

The applicability of s 2A(2)(a)

[28] As to the applicability of s 2A(5) *vis-à-vis* s 2A(2)(a), Mpati J¹³ (as he then was) said, with which I respectfully agree, the following:

"Mr Buchanan argued that in terms of s 2A(5) of the Act a court of law or an arbitrator or an arbitration tribunal has a discretion to fix the

¹² Paragraph 22 *supra*.

¹³ Adel Builders (PTY) Ltd v Thompson 1999 (1) SA 680 (SE)

*rate at which interest shall accrue and the date upon which interest shall run. I agree with Mr Buchanan that such discretion overrides the provisions of s 2A(2) of the Act.*¹⁴

(my underlining)

[29] There is no indication that the legislator intended to limit the courts discretion to the provisions and/or ambit of s 2A(2)(a). If “*service on the debtor of a demand or summons*” is overridden by the discretion it becomes irrelevant. The date from which interest is to run should be a date which is, in the exercise of the discretion, “*just*”.

[30] I am therefore of the view that respondent’s submissions referred to in paragraphs 16(b) and (c) (*supra*) cannot succeed.

The exercising of my discretion.

[31] The approach to be adopted by this court in the exercise of its discretion has been referred to by Howie JA¹⁵:

Acting in terms of ss (5), it was open to the Court, in fixing the date from which interest was to run, to give effect to its own view of what was just in all the circumstances The discretion afforded by s 2A(5) was of the nature referred to in a long line of cases in this Court from Ex parte Neethling and Others 1951 (4) SA 331 (A) onwards.

¹⁴ At 692 G-H

¹⁵ Adel Builders (Pty) Ltd v Thompson 2000 (4) SA 1027 (SCA)

Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them. But there are no facta probanda. No enquiry arises as to whether a necessary fact has been successfully proved. Similarly, absence of proof does not result in failure on any issue. Indeed, there are no evidential issues to attract any onus.

[32] In exercising the discretion the court may order interest to run from a date prior to the date of demand (or service of summons) or from a date subsequent to the date of demand (or service of summons) and to such a date or dates as might be just, having regard to the circumstances of each case.

[33] I now turn to facts and circumstances to be weighed in the exercise of my discretion.

[34] The proper pursuing of plaintiff's claim was entirely left in the hands of defendants who accepted the mandate in their capacity as plaintiff's legal advisors and in whose competency plaintiff trusted. I have already referred to the submissions made by plaintiff's counsel¹⁶. I agree that those facts and circumstances can and should be taken into account in exercising my discretion.

[35] Defendants advanced no facts or circumstances to be weighed in the exercising of my discretion. There was no

¹⁶ Paragraph 14 *supra*.

suggestion that the delay in finalizing the matter almost seven years after plaintiff instructed defendants to pursue her claim can be attributed to plaintiff's conduct, nor can I find any.

[36] I can see no good reason, nor has any good reason been advanced, why I should not exercise my discretion in favour of plaintiff as I am of the view that it would not be just to pay her in depreciated currency and to deprive her of being paid in real monetary value.

Determining the rate of interest and the date from which interest should accrue.

[37] Defendants were, from the outset and in particular from the 3rd of August 2006, aware of all facts in order to assess the quantum of plaintiff's damages and she would have, on probabilities, been awarded interest from at least 3 September 2006 being thirty days after the notice if the claim was pursued by defendants.

[38] I am therefore of the view that it would be just to order that interest should run from 3 September 2006 to date of payment.

[39] I can see no reason why plaintiff should not be entitled to the statutory rate of 15,5%.

Costs

[37] There are no reasons why I should deviate from the general principle that the successful party be awarded costs and I shall order thus.

IN THE RESULT I MAKE THE FOLLOWING ORDER:

- 1. DEFENDANTS ARE ORDERED TO PAY TO PLAINTIFF INTEREST AT THE RATE OF 15.5% CALCULATED ON THE AMOUNT OF R296,262.94 FROM 3 SEPTEMBER 2006 TO DATE OF PAYMENT.**
- 2. DEFENDANTS ARE ORDERED TO PAY PLAINTIFF'S COSTS JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED.**

**COETZEE WJ
ACTING JUDGE**

<u>For the Applicant:</u>	Adv. S. Erasmus oio Duncan & Rothman Inc.
<u>For the Defendant:</u>	Adv. B. Joseph oio Venter & Joubert Inc.