



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 13654/2013

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

ADV. C BISSCHOFF N.O. obo D J REYNERS

First Respondent

THE SHERIFF OF CAPE TOWN WEST

Second Respondent

Date of hearing: 7 August 2024

Date of judgment: 16 August 2024

JUDGMENT

PANGARKER AJ

Introduction

1. The dispute between the parties revolves around a narrow issue: the calculation of interest, the application of the *in duplum* rule, the date on which post-judgment interest starts running on the judgment debt, and the rate of post-judgment interest. As counsel for the parties submitted, the dispute is a legal issue.

2. The only participating parties in this matter are PRASA, the defendant in the finalized damages action and applicant in respect of its Part B application, and Advocate Christo Bisschoff NO, in his capacity as the Court appointed curator *ad litem* for Denzil John Reyners. As there are two applications before me, to simplify matters, the parties are simply referred to herein as *PRASA* and *the plaintiff*. The Sheriff of Cape Town West, the second respondent, abides the decision of the Court.

3. In Part B of the application as contained in its Notice of Motion, PRASA seeks the following relief:

PART B:

8. *Declaring that the Applicant has satisfied the judgment debt handed down by the Honourable Justice Goliath on 03 June 2020, in the amount of R 3 326 484.00 together with the interest thereon, when it paid the amount of R3 589 397.32 on 16 April 2024;*
9. *Setting aside the warrant of execution dated 05 February 2024;*
10. *Costs of the application;*
11. *Further and/or alternative relief.*

4. The second application is the plaintiff's counter application for a declarator in the following terms:

1. *It is declared that as at 7 August 2024 (and after taking into account all payments made by the applicant to the first respondent until*

such date pursuant to the judgment delivered by the trial court on 3 June 2020 under the above case number), the applicant is presently obliged to pay the first respondent a balance of R3 912 304,30 (alternatively, a balance of R3 636 907, 58, which amount is presently due, owing and payable.

2. *The applicant shall pay the first respondent's costs of the counter-application including the costs of two counsel, on Scale C.*
3. *Further and/or alternative relief.*

5. Part A of PRASA's application was an urgent application on 19 April 2024 seeking the following relief: suspension of the execution of the June 2020 order granted by the trial Court (*"the Goliath order"*) pending the determination of Part B; an interdict preventing the sale in execution of its attached movable assets which were advertised to take place on 23 April 2024; the return of these movable assets pending the determination of the relief in Part B, and postponing Part B while reserving PRASA's right to supplement its papers, and costs.

6. On 19 April 2024, Lekhuleni J granted an order by agreement between the parties which has the effect that the sale in execution was suspended on condition that PRASA provides security to the curator to the satisfaction of the second respondent. The further orders are not referred to herein. The matter was consequently postponed for hearing of Part B to 7 August instant and all issues of costs were to stand over for later determination.

Common cause and undisputed facts

7. On 20 February 2001, Denzil John Reyners fell out of a moving train while travelling to work. The incident occurred between Ysterplaat and Mutual Stations in Cape Town. As a result of the incident, Mr Reyners sustained various bodily injuries which included a right compound depressed temporal skull fracture and severe traumatic brain

injury¹. Subsequently, a curator was appointed who issued Summons in August 2013 based on a delictual claim against PRASA.

8. Several years passed until the trial proceeded before Goliath DJP (as she then was). At paragraph [36] of the judgment, the trial Court found that the parties had settled the merits of the matter on the basis that PRASA was liable for 80% of the plaintiff's proven damages, in the event that PRASA's special plea on prescription was to be dismissed. The Court indeed dismissed the special plea of prescription and found in favour of the plaintiff.

9. On 3 June 2020, the trial Court made the following order²:

1. *The defendant is ordered to make payment to plaintiff in the amount of **R3 246 484.00, together with interest thereon from the date of service of summons to date of payment**, be awarded as damages in respect of:*
 - 1.1 *R1 371 705. 00 for past loss of earnings.*
 - 1.2 *R1 786 400.00 for future loss of earnings.*
 - 1.3 *R500 000 for future medical and other expenses.*
 - 1.4 *R500 000 for general damages.*

(My emphasis)

10. The Supreme Court of Appeal (SCA) later granted PRASA leave to appeal to the Full Court of the Western Cape High Court in respect of the dismissal of its special plea. On 12 May 2022, the Full Court upheld the appeal, set aside the trial Court's order, and substituted it with an order that PRASA's special plea succeeds with costs³.

¹ PRASA 2, p42

² PRASA 2, par [52] 1., p65 – "*the Goliath order*" as referred to during the hearing (note, the further orders at page 24 of the trial Court's judgment are not repeated herein)

³ PRASA 3, p67-115 – Mantame and Nuku JJ concurring (though for different reasons), Le Grange J dissenting

11. Unhappy with the outcome of the appeal, Advocate Bisschoff NO on behalf of Mr Reyners further appealed the decision of the Full Court to the SCA, and on 28 November 2023, the SCA handed down judgment in ***Bisschoff NO obo Reyners v Passenger Rail Agency of South Africa***⁴. In its unanimous decision, the SCA upheld the curator's appeal and set aside the decision of the Full Court, which had the effect that the order of the trial Court as per Goliath DJP dated 3 June 2020, was reinstated.

12. On 5 February 2024, the plaintiff obtained a writ of execution from the Registrar of the High Court which states as follows:

TO THE SHERIFF: Cape Town West

*You are hereby directed to attach and take into execution the movable goods of the **PASSANGER (sic) RAIL AGENCY OF SOUTH AFRICA**, the above-mentioned Defendant of **Cape Metrorail, 1 Adderley Street, Cape Town**, and of the same to cause to be realised by public auction the sum of **R10 143 617.02** (TEN MILLION ONE HUNDRED FORTY-THREE THOUSAND AND SIX HUNDRED AND SEVENTEEN RAND AND TWO CENTS ONLY) being the Judgement Debt in the sum of **R3 246 484.00** (THREE MILLION TWO HUNDRED AND FORTY-SIX THOUSAND FOUR HUNDRED AND EIGHTY-FOUR RANDS ONLY) and interest thereon at 15.5 percent from date of service of summons on 23 August 2013 to date of judgement as per the *In Duplum Rule* in the sum of **R3 246 484.00** (THREE MILLION TWO HUNDRED AND FORTY-SIX THOUSAND FOUR HUNDRED AND EIGHTY-FOUR RANDS ONLY) plus further interest from date of judgement to date of Writ in the sum of **R3 650 649.02** (THREE MILLION SIX HUNDRED AND FIFTY THOUSAND AND SIX HUNDRED AND FORTY-NINE RAND AND TWO CENTS), totalling the sum of **R10 143 617.02** (TEN MILLION ONE HUNDRED FORTY-THREE THOUSAND AND SIX HUNDRED AND SEVENTEEN RAND AND TWO CENTS ONLY),*

⁴ [2023] ZASCA 160 – see PRASA 4, p116-127

which the Plaintiff recovered by Judgement delivered on 3 June 2020, and also all other costs and charges of the Plaintiff for the issuing and service of this Writ, besides all your costs thereby incurred.

*Further pay to the said Plaintiff's attorney the sum of **R10 143 617.02** (TEN MILLION ONE HUNDRED FORTY-THREE THOUSAND AND SIX HUNDRED AND SEVENTEEN RAND AND TWO CENTS ONLY) and for your doing so this shall be your Writ.*

And return this Writ with what you have done thereupon.

13. Consequent upon the issuing of the Writ, the Sheriff attached and removed 23 vehicles belonging to PRASA as set out in the Sheriff's notice of attachment in execution⁵.

14. PRASA made the following payments which it states, is in satisfaction of the principal debt:

14.1 **R3 326 484** on 15 March 2024⁶;

14.2 **R3 589 397, 32** on 16 April 2024⁷, in total **R6 835 881,32**.

15. The parties agree that interest on the capital sum as awarded by the trial Court, of R3 246 484 commenced to run from the date of service of Summons being **23 August 2013, at the rate of 15, 5% per annum**.

⁵ PRASA 6, p132-133

⁶ PRASA 7, p134

⁷ JC15.1, p218

The issues between the parties

16. There is a dispute between PRASA and the curator as to the calculation of interest. According to PRASA, it satisfied the judgment debt with interest once it made its last payment on 16 April 2024. The plaintiff calculates the judgment debt plus interest as being a total sum of R10 143 617,02, but PRASA's view is that the plaintiff's calculation of interest is incorrect as he has not suspended the running of interest after it reached the *in duplum* amount of R3 246 484 until the SCA's judgment date of 28 November 2023. The parties have provided their own calculations indicating how, in their view, the interest is and should be calculated. I set out these calculations below.

17. The major dispute revolves around the application of the *in duplum* rule and the date when post-judgment interest on the judgment debt commences. A secondary issue is whether the judgment debt comprises the capital sum awarded by the trial Court plus pre-judgment interest. In view of these disputes, and because the plaintiff has approached the matter distinguishing between pre-and post-judgment interest, the judgment thus hopes to address the issues in a similar fashion.

PRASA's calculation of interest

18. From paragraph 27 of the founding affidavit, it is apparent that PRASA uses the incorrect capital amount upon which it bases its calculation. In the trial Court's order, the capital amount awarded is **R3 246 484**, and not **R3 326 484**⁸ which PRASA uses throughout its calculation. Counsel for the plaintiff points this out in his heads of argument, but notwithstanding, the main arguments in the matter do not revolve around this issue and it does not form part of the principal disagreement on the interest calculation issue.

19. **PRASA's calculation** of interest and its indebtedness, as reflected in its affidavit supporting relief in Part B and its heads of argument, is set out below:

⁸ Par 27.2, p13

15,5% interest on R3 326 484 from August 2013⁹ to November 2023

$R3\ 326\ 484 \times 15,5\% \times 120 \div 12$

Total interest = R5 156 050, 20

End balance R3 326 484 + R5 156 050, 20 = R8 482 534, 20

*Interest became capped in terms of the **in duplum rule** at R3 326 484 until the date of the SCA's judgment (**28 November 2023**)*

11,75% interest on R6 652 968 (= R3 326 484 x 2) from 28 November 2023 to 14 March 2024¹⁰ calculated as follows:

Interest from 28 November 2023 to 31 December 2023

11,75% x R 652 968 = R781 723, 74

$R781\ 723, 74 \div 365 \times 100 = R2\ 141, 70(88)^{11}$

R2 141, 70(88) x 33 days = R70 676, 39(2)

Interest from 1 January 2024 to 15 March 2024

11,75% x R6 652 968 = R781 723, 74

$R781\ 723, 74 \div 366 = R2\ 135, 85(7)$

R2 135, 85(7) x 75 days = R160 189, 27(5)

**Total post-judgment interest from 28 November 2023 to 15 March 2024
= R230 865, 66(7) (R70 676, 392 + R160 189, 275)**

**Total end balances as at 14 March 2024 on R6 652 968 + R230 865, 66(7)
= R6 883 833, 66(7) - R3 326 484 (amount paid on 15 March 2024)
= R3 557 349, 66(7)**

⁹ Service of the Summons

¹⁰ Note, 14 March 2024 is the day before PRASA made its first payment to the plaintiff in respect of its indebtedness as per the Goliath AJP order

¹¹ Brackets are inserted in PRASA's calculation as reflected in the judgment merely to round off – no other changes have been made to its calculations

11,75% interest applied on R3 557 349, 67 between 15 March and 16 April 2024
(date of second PRASA payment)

11,75% interest from 16 to 31 March 2024 on R3 557 349, 66(7)¹²
Interest accumulated from 15 to 31 March 2024 = R18 272, 72(5)

Total interest from 1 to 30 April 2024¹³ = **R34 437, 34(6)¹⁴**

End balance as at 31 March 2024 = **R3 557 349, 67 + R18 272, 72(5)**
= R3 575 622, 392

Interest accumulates on R3 575 622, 392 at R1 147, 91(1) per day

20. In light of its calculations as set out above, PRASA concludes and submits that when it made its second payment on 16 April 2024, it had then satisfied the judgment debt and the *in duplum* interest together with the post-judgment interest and does not have an outstanding balance in respect of the judgment debt. Having regard to the above calculation, the following pertinent aspects in PRASA's calculations must be highlighted and were indeed emphasized by the plaintiff's counsel:

20.1 The capital sum in the Goliath order is not R3 326 484, the figure upon which PRASA bases its calculations, but R3 246 484;

20.2 PRASA applies the *in duplum* rule to the calculation of pre-judgment interest with the result that it caps and suspends the pre-judgment interest;

20.3 Insofar as post-judgment interest on the amount of the judgment debt is concerned, PRASA commences the running of such interest from 28

¹² See para 28 – 29, PRASA's heads of argument

¹³ See calculation at par 29, PRASA's heads of argument

¹⁴ Interest accumulates at R1 147, 911 per day from 1 to 30 April 2024 as per PRASA's calculation

November 2023, being the date on which the SCA delivered its appeal judgment and order in the plaintiff's successful appeal;

- 20.4 PRASA applies a prescribed interest rate of 11,75% per annum to post-judgment interest, which the parties agree was the prescribed rate of interest on 28 November 2023.

The plaintiff's calculation of interest

21. The plaintiff's affidavit in support of its counter-application delivered on 4 June 2020 constitutes simultaneously an answering affidavit to the Part B application. In support of the plaintiff's contention that PRASA's calculation is incorrect, the plaintiff attaches two calculations to the affidavit but has requested that I nonetheless consider the additional calculations which are attached as annexures to the heads of argument¹⁵.

22. For the sake of not overburdening this judgment, only the main calculation as set out in annexure **JC1A**, is set out below as it is the calculation which the plaintiff seeks to convince the Court is correct, and should be accepted. In total, four calculations are presented and relied upon and the following must be noted from these annexures or schedules¹⁶:

- 22.1 **JC1A**, which is a duplicate of **JC1** – an interest rate of 15,5% per annum is applied throughout, in respect of pre-and post-judgment interest, and the *in duplum* rule is not applied;

- 22.2 **JC1B** – an interest rate of 9,75% per annum is applied to the post-judgment interest calculation and the *in duplum* rule is not applied;

¹⁵ Including alternative calculations in the event that it is found that the *in duplum* rule applies

¹⁶ JC1 and JC1A are the same; JC2 and JC2A are the same; JC1B and JC2B are not attached to the founding papers in the counter-application but are presented as calculations to consider depending on findings regarding the application of the *in duplum* rule and the rate of prescribed interest

22.3 **JC2A** – JC2A is presented only in the event that it is found that the *in duplum* rule does apply as needed to the calculation of pre-judgment interest and the rate of interest applied is 15,5% throughout;

22.4 **JC2B** – similar to JC2A, except that the post-judgment interest is calculated at 9,75% per annum.

23. The plaintiff's case is that the *in duplum* rule finds no application to pre-judgment interest and while the rule applies to post-judgment interest, it is not applicable in these circumstances set out later in the judgment. There is thus a request that a declaration be made that the calculation in **JC1A** be determined as the correct interest and outstanding balance, alternatively, **JC1B**, which applies the rate of interest of 9,75% being the prescribed rate as at 3 June 2020, when the trial Court granted its order. Whether JC1A or JC1B, the plaintiff's contention is that the debt has not been satisfied and that there is a balance owing by PRASA. The reference to "*current date*" on **JC1A** below, and on all the annexures, is a reference to the hearing date of 7 August 2024.

24. The plaintiff's calculation of the net amount still due as at the current date (7 August 2024) as per **JC1A**¹⁷ is as follows:

<i>Date of service of Summons</i>	23 Aug 2013
A = Judgment amount	3 246 484,00
<i>Judgment date</i>	3 June 2020
<i>No. of days from service of Summons to Judgment date</i>	2 476
<i>Applicable Interest Rate</i>	15,50%
<i>No. of leap years between service of Summons and Judgment date</i>	2,00
 B = Pre-judgment interest on the capital sum from date of service of Summons to Judgment date	 3 410 764,98

C = (A + B) = The capital sum + adjusted pre-judgment interest thereon (as at the

¹⁷ Certain parts of the heading to JC1A have been deleted, and dates abbreviated

Judgment date)	6 657 248,98
<i>First Payment date</i>	15 Mar 24
<i>Amount paid</i>	3 326 484
<i>No. of days from the Judgment date until the First Payment date</i>	1 381
<i>No. of leap years between the Judgment date and the First Payment date</i>	1,00
D = Interest accrued on amount C until the First Payment date	3 901 330,30
E = (C + D) = Total amount due on the First Payment date	10 558 79,28
<i>Less: Amount of the first payment</i>	3 326 484
F = Net amount still due on First Payment date, after First Payment made	7 232 095
<i>Second Payment Date</i>	16-Apr-24
<i>Amount Paid by PRASA</i>	3 589 397,32
<i>No. of days from the First Payment date to the Second Payment date</i>	32,00
G = Interest accrued on amount F until the Second Payment date	90 465,63
H = (F + G) = Total amount due on the Second Payment date	7 322 560,91
<i>Less: Amount of the second payment</i>	3 589 397,32
I = Net amount still due on the Second Payment date, after Second Payment made	3 733 163,59
<i>Current Date</i>	7 August 2024
J = Interest accrued on amount I until current date	179 140,71
<i>No. of days since Second Payment</i>	113
<i>No. of leap years in between</i>	0,00
K = (I + J) = Net amount still due on Current date (NO in duplum rule applied)	3 912 304,30

Interest on an unliquidated debt

25. It is common cause that the plaintiff's action which was instituted in 2013 was based in delict and that the curator on behalf of Mr Reyners sued PRASA for delictual damages. PRASA had admitted liability for 80% of the plaintiff's damages and at the conclusion of its judgment, the trial Court awarded the plaintiff damages in the amounts as set out in paragraph 1 of its order.

26. The plaintiff submits that a distinction must be drawn between a liquidated and an unliquidated debt, and submissions were made regarding the moment when an unliquidated debt becomes liquidated. The argument is that prior to the trial Court's judgment and fixing of the quantum of damages to be awarded to the plaintiff, PRASA owed an obligation to the plaintiff as the quantum of such obligation had not been reduced to a definite sum of money, hence, it was an unliquidated debt. The significance of the distinction if the plaintiff's argument is followed, relates to pre-judgment interest, which I proceed to consider, commencing with the common law approach.

27. In ***Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd***¹⁸, Innes CJ stated the following with regard to the characteristic attaching to a claim for unliquidated damages:

"But it is not necessary to pursue that line of enquiry, because the question with which we are concerned is whether in a claim for unliquidated damages only ascertainable as to amount, after a long and intricate investigation, the defendant can properly be held liable for interest, prior to judgment upon the sum finally assessed."

(My emphasis)

28. Several years later, the Appellate Division in ***Union Government v Jackson and Others***¹⁹ described an unliquidated debt as "*an obligation which has not yet been reduced to a definite sum of money*". Furthermore, in an appeal against a final sequestration order, the Court in ***Kleynhans v Van der Westhuizen NO***²⁰, considered the difference between a liquidated and unliquidated claim, and with reference to various earlier authorities²¹, concluded that in respect of a claim for damages, it is usually unliquidated as the amount thereof is "*uncertain and has to be determined by the Court*"²². Thus, I accept the

¹⁸ 1915 AD 1 at 31-32

¹⁹ 1956 (2) AD 412 E-F

²⁰ 1970 (1) SA (O) at 567A-568B

²¹ See authorities referred to on pages 567 to 568, for example, *SA Fire & Accident Insurance Co. Ltd v Hickman* 1955 (2) SA 131 (C), *Toucher v Stinnes (SA) Ltd* 1934 CPD 184 at 189

²² *Kleynhans* supra at 568A

submission that an unliquidated debt owed by a debtor becomes liquidated upon the trial Court's fixing of the quantum of such damages.

29. The common law approach to interest on an unliquidated debt then envisages a consideration of what is meant by *mora*, a term often used when discussing the liability of a debtor for the payment of interest. Returning to the **Victoria Falls** judgment, one sees that a distinction is drawn between *mora ex re*, wrongful default arising out of a transaction and *mora ex persona*, default arising out of a debtor's conduct²³. In the more recent judgment of **Griffiths v Janse van Rensburg and Another**²⁴, the concept of *mora* is described as relating to "*the time at which an obligation is due*"²⁵ and that Court stated further that "*...the debtor is not in mora until the payment is due*".

30. This approach and findings support similar findings in the **Victoria Falls** and **Union Government** judgments because it follows that if a debtor did not know and could not ascertain the amount of his indebtedness to another, it must be that he would not be in *mora* until the payment is due by him. Put another way, in respect of an unliquidated damages claim under the common law, *mora* interest or pre-judgment interest could not be awarded as the amount had not been determined or fixed by a Court. This common law principle was again recognized by the SCA in **Adel Builders (Pty) Ltd v Thompson**²⁶.

31. This brings me to the Prescribed Rate of Interest Act 55 of 1975 (the Act) which provides for the calculation of interest in certain circumstances, at a prescribed rate on certain judgment debts. Section 2A was introduced into the aforementioned Act by the Prescribed Rate of Interest Amendment Act 7 of 1997, and it provides Courts with the authority to award pre-judgment interest on unliquidated debts. The following sections of the Act are highlighted:

²³ Victoria Falls supra, p31

²⁴ 2016 (3) SA 389 (SCA) par 35

²⁵ Par 35 of the judgment

²⁶ 2000 (4) SA 1027 (SCA) at par 11

1. Rate at which interest on debt is calculated in certain circumstances

- (1) *If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2)(a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.*
- (2) (a) ...
(b) ...
(c) ...

2. Interest on a judgment debt

- (1) *Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.*
- (2) *Any interest payable in terms of subsection (1) may be recovered as if it formed part of the judgment debt on which it is due.*
- (3) *In this section “judgment debt” means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt.*

2A. Interest on unliquidated debts

(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.

(2)

(a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 the interest contemplated in subsection (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.

[S 2A(2)(a) am by s 172(2) (Sch 2) of Act 34 of 2005.]

(b) In the case of arbitration proceedings and subject to any other agreement between the parties, interest shall run from the date on which the creditor takes steps to commence arbitration proceedings, or any of the dates contemplated in paragraph (a), whichever date is the earlier.

(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 that part is determined by judgment, arbitration or agreement and any such part determined by arbitration or agreement shall for the purposes of this Act be deemed to be a judgment debt.

(4) Where a debtor offers to settle a debt by making a payment into court or a tender and the creditor accepts the payment or tender, or a court of law awards an amount not exceeding such payment or tender, the running of interest shall be interrupted from the date of the payment into court or the tender until the date of the said acceptance or award.

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal 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) The provisions of section 2(2) shall apply mutatis mutandis to interest recoverable under this section.

[S 2A ins by s 1 of Act 7 of 1997.]

(My emphasis)

32. Following on from the authorities referred to above and the Act, the plaintiff argues that the award of pre-judgment interest on unliquidated damages in terms of section 2A(1) is interest that was not due until the date of the Court's judgment, which is when the capital amount was determined and upon which capital sum, pre-judgment interest is awarded. The further submission is that such interest cannot be called arrear interest as it was not in arrears until the judgment date when the capital was fixed by the trial Court.

33. The plaintiff thus holds the view that because an unliquidated debt is not due until the Court's judgment fixes or grants it, thus the *in duplum* rule does not apply to pre-judgment interest on unliquidated debts but only applies to arrear interest and post-judgment interest. PRASA's argument on this point is that in terms of the common law, the debt bears *mora* interest and thus section 1(1) of the Act applies, and furthermore, that the *in duplum* rule applies *ex lege*.

Pre-judgment interest and the *in duplum* rule in this matter

34. With reference to the Act, it is important to note that section 2A(1) refers to "*the amount of every unliquidated debt as determined by a court of law... shall bear interest as contemplated in section 1*". In my view, section 2A must be read with section 2 which deals with interest on a judgment debt generally.

35. Pre-judgment interest would refer to the period from service of the Summons on 23 August 2013 to judgment on 3 June 2020, and I shall accept that the pre-judgment interest award was made in terms of section 2A of the Act on an unliquidated debt, which then became liquid when the Court fixed the quantum of damages owed by PRASA.

36. The *in duplum* rule, simply put, is that interest stops running once unpaid interest equals the capital sum²⁷, or as the plaintiff's counsel submitted, once "the double" has been reached. Insofar as the application of the *in duplum* rule is concerned, ***Sanlam Life Insurance Ltd v South African Breweries***²⁸ is authority for the view that the rule applies to arrear interest only. Arrear interest would be interest which accrued because it already became due and payable at the time of it being claimed, in other words, prior to the Court's judgment²⁹.

37. In this matter, given that the plaintiff's claim was for unliquidated damages, which then became fixed when the trial Court assessed and then awarded damages as set out in its order, plus interest payable thereon from the date of service of the Summons, it cannot be said nor held that such pre-judgment interest is or was arrear interest. Prior to the fixing of the quantum, at best for the plaintiff, PRASA had an obligation to the plaintiff on behalf of Mr Reyners in respect of the unliquidated damages. I emphasise that PRASA's obligation was not due until the payment was due hence it cannot be said that PRASA was in *mora*³⁰ until the payment was due. Put differently, and having regard to the discussion and reference to the authorities earlier in the judgment, PRASA's payment was not due until such time that the trial Court pronounced upon and fixed the quantum of damages.

38. Turning to the Act, and having regard to the wording of the trial Court's order, I share the view held by counsel for the plaintiff, that the trial Court awarded pre-judgment

²⁷ LTA Construction BPK v Administrator, Transvaal 1992 (1) SA 473 (A 482A-B; Sanlam Life Insurance Ltd v South African Breweries Ltd 2000 (2) SA647 WLD 655 D-E

²⁸ Supra footnote 28 at 655D-E

²⁹ Sanlam Life supra at 654F-I

³⁰ Griffiths v Janse van Rensburg supra par 35

interest in terms of section 2A(2) of the Act as it awarded interest on the capital sum as from date of service of the Summons on PRASA.

39. The plaintiff relies on ***Drake Flemmer & Orsmond Inc and Another v Gajjar***³¹, a judgment of the SCA, while PRASA has tellingly not addressed this judgment in its submissions. I point out that most, if not all, the recent authorities which PRASA rely upon, relate to interest and the *in duplum* rule on liquid claims as opposed to an unliquidated debt such as the plaintiff's damages claim. In ***Drake Flemmer***, Rogers AJA (as he then was) writing for the Court, considered the application of the *in duplum* rule to pre-judgment interest on an unliquidated debt.

40. At paragraph [83] of ***Drake Flemmer***, the SCA stated that interest is not ordinarily awarded from a date earlier than demand or service of Summons. Furthermore, having regard to ***Da Cruz v Barnardo***³² and ***Watson and Another v Renasa Insurance Company Limited***³³, it is evident that the *in duplum* rule applies to pre-judgment interest which is arrear interest and that not all debts that attract interest are hit by the *in duplum* rule. The important point is that these factors are not considered nor addressed in PRASA's argument which advances the view that the *in duplum* rule applies in this matter because it operates *ex lege*.

41. In my view, PRASA's reliance on the Constitutional Court judgment of ***Paulsen v Slip Knot Investment 777***³⁴ for its contention that the *in duplum* rule applies to pre-judgment interest attaching to all judgment debts loses sight of the fact that here we are dealing with an unliquidated debt, where there was no arrear interest, and in ***Paulsen***, the Court considered a loan agreement between the parties in terms of which the Paulsens had bound themselves as sureties. Furthermore, while the general principles regarding the *in duplum* rule were addressed in ***Paulsen***³⁵, the Constitutional Court did

³¹ 2018 (3) SA 353 (SCA)

³² [2022] 1 All SA 414 (GJ) para 41-43

³³ [2019] ZAWCHC 7 par 71

³⁴ 2015 (3) SA 479 (CC)

³⁵ From par [43] of the judgment

not address the application of the rule to pre-judgment interest, in relation to an unliquidated debt.

42. Thus, the argument that the *in duplum* rule does apply to pre-judgment interest in this matter, without addressing authorities such as **Drake Flemmer**, is unconvincing. Having regard to the above discussion and findings, I hold a similar view as counsel for the plaintiff, that there was no arrear interest in that interest had not accrued and was not due prior to the trial Court's judgment.

43. It is not necessary, in my view, to determine whether the pre-judgment interest awarded by the trial Court in its order was also awarded having exercised a discretion in terms of section 2A(5) of the Act, because as stated above, my finding is that the trial Court did so in terms of section 2A(2), read with section 2A(1) and (6). To conclude this point, I find that the *in duplum* rule is not applicable to the award of pre-judgment interest in this matter.

Post-judgment interest

44. The parties are agreed that the *in duplum* rule does apply to post-judgment interest, however, they differ on the date from which to calculate that interest and also the prescribed rate at which interest is to be calculated. In this regard, I refer to the parties' respective calculations earlier in the judgment. The plaintiff is of the view that post-judgment interest is calculated and runs from the date of the trial Court's judgment on 3 June 2020, while PRASA submits that it runs from the date of the SCA judgment which upheld the plaintiff's appeal, being 28 November 2023.

45. In order to solve this dispute, the question is whether post-judgment interest is calculated on the capital sum only or on the judgment debt. Turning to **Paulsen**³⁶ yet again, the Constitutional Court, when determining whether post-judgment interest ran on

³⁶ 2015 (3) SA 479 (CC) at para 99-100

the whole judgment debt or only the capital amount, did not disagree with the SCA's findings in the earlier appeal to the effect that post-judgment interest ran on the whole of the judgment debt including accrued interest. This is echoed in various authorities such as **Drake Flemmer**, which makes it clear that the interest runs on the capital plus pre-judgment interest awarded thereon³⁷. Thus, the capital sum plus pre-judgment interest constitute the judgment debt.

46. Secondly, in respect of the date of commencement of the running of post-judgment interest, Mdlanga J in Paulsen writing for the majority, stated the following³⁸:

“Post-judgment interest

[96] It is settled law that the in duplum rule permits interest to run anew from the date that the judgment debt is due and payable.³⁹ The usual practice for appellate courts, including this Court, is to retain the date on which the court of first instance handed down judgment as the date on which judgment debts are due and payable.⁴⁰ In oral argument, counsel for both the Paulsens and Slip Knot accepted that in the order, for the purposes of calculating post-judgment interest, the date on which the High Court entered judgment should be replaced with the date on which this Court hands down judgment.

³⁷ Supra par 87

³⁸ I have retained the citations and references as they appear in the footnotes to paragraphs [96] to [98] of the Paulsen judgment

³⁹ See *Oeanate* above n 15 at 834H; *Stroebel* above n 74 at 139D-E; *Commercial Bank of Zimbabwe* above n 64 at 300B-C; and *Absa Bank Ltd v Erasmus* [2006] ZAWHCC 25; 2007 (2) SA 545 (C) (*Erasmus*) at paras 29-30.

⁴⁰ See *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9; 2012 (9) BCLR 951 (CC) at paras 7-8 which quoted, with approval, *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey NO* 1988 (4) SA 353 (A) at 358H-I.

[97] Were the High Court's date of judgment to be used as the date from which the judgment debt is due and payable, this would have the effect of suspending the in duplum rule for the pendency of the appellate litigation, thus allowing interest to accrue during this period. The same reasons that led me to conclude that the rule applies pendente lite, lead to the conclusion that the date this Court hands down judgment should be the date from which the running of interest recommences. I am, therefore, of the view that we should oblige the request of the parties.

*[98] However, I emphasise that this logic applies because the Paulsens' appeal was meritorious, and indeed the order I propose differs materially from that of the High Court and Supreme Court of Appeal. I am here not concerned with totally unmeritorious, unsuccessful appeals brought as a dilatory tactic. In such instances, different considerations must apply, for the reasons explained by Labe J in Certain Underwriters.*⁴¹

47. From the above paragraphs in **Paulsen**, it is evident that the Constitutional Court recognised that judgment debts are due and payable from the date on which the trial Court or Court of first instance gave judgment. Moreover, the Paulsens' circumstances were very specific and peculiar in that as debtors, the capital in respect of a loan agreement was R12 million but due to accrued interest, it had ballooned to R72 million by the time the matter came before the Constitutional Court. They were the successful

⁴¹ In a dissent in *Certain Underwriters at Lloyds v South African Special Risks Association* [2000] ZAGPHC 2; 2001 (1) SA 744 at para 15, Labe J explained that it is "common sense" that interest should run from the date of judgment in the court of first instance and not from the date of the judgment in the court of appeal because "it is unthinkable that a [losing] party . . . should be entitled to lodge a frivolous appeal against an award, and thereby delay the period from which interest should run on the award". This reasoning plainly does not apply to meritorious, successful appeals.

debtors to a large extent and it is apparent from the quoted paragraphs, that before the Constitutional Court, the parties had either agreed or accepted, that for purposes of calculating post-judgment interest, the High Court (Court a quo) judgment date would be replaced with the date of the Constitutional Court's judgment. Thus, in doing so, the Constitutional Court departed from the "usual practice" that post-judgment interest was calculated from the date of the trial Court's judgment, that is, the date when the judgment debt becomes due and payable.

48. PRASA's submission is that the date of the SCA's appeal judgment should be used to commence the running of post-judgment interest because, it argues, **Paulsen** says that it is the date of the appeal judgment which should be the commencement date of the interest calculation. I disagree with this view because the point must be made that the Constitutional Court's decision to use its judgment date to calculate post-judgment interest was based on the parties' agreement/acknowledgement to do so, the Paulsen's massive judgment debt which was largely made up of accrued interest and that the Paulsens were the successful debtors in that Court. Furthermore, the circumstances which led the Constitutional Court to use its own judgment date instead of the High Court judgment date was the exception to the general rule and practice regarding the commencement date of post-judgment interest, as seen from the above discussion of the judgment.

49. Significantly, **Paulsen**, in my view, did not do away with the rule or practice, as referred to in **General Accident Versekeringsmaatskappy SA BK v Bailey NO**⁴², that the date on which the trial Court handed down judgment, is the date upon which the debt is due, and it follows, that it is that date (when the debt is due) which constitutes the commencement date for the running of post-judgment interest, in this instance, 3 June 2020. Lastly, section 2(1) of the Act makes it clear that every judgment debt "*shall bear interest from the day on which such judgment debt is payable*". There can thus be no doubt that the day on which the judgment debt becomes due and payable is the day on which the trial Court's judgment is handed down.

⁴² 1988 (4) SA 353 (A) 358-359

50. Insofar as the rate of interest applicable, the 11,75% used by PRASA is unsustainable as it relates to the prescribed rate of interest as at the SCA appeal judgment date, which I have already found is not the commencement date for the calculation of post-judgment interest. I have considered the plaintiff's submissions that he has continued to apply 15,5% interest per annum from the trial Court's judgment date to date of payment. In doing so, he relies on **Davehill (Pty) Ltd v Community Development Board**⁴³ which states that:

"The rate prescribed under subsection (2) at the time when interest begins to run governs the calculation of interest. The rate is fixed at that time and remains constant. Subsection (1) does not provide for the rate to vary from time to time in accordance with adjustments made to the prescribed rate by the Minister of Justice in terms of subsection (2). The fact that the Minister may from time to time prescribe different rates of interest therefore has no effect on the rate applicable to interest which has already begun to run."

51. By all accounts the reliance on **Davehill** seems to suggest that the 15,5% interest rate awarded in the trial Court's order in respect of pre-judgment interest should be constant and applicable to the calculation of post-judgment interest as well. Thus, **Davehill** is authority that the rate of interest which applied at the commencement of the matter, should apply throughout. However, the recent SCA judgment of **Member of Executive Council Police, Roads and Transport, Free State Provincial Government v Bovicon Consulting Engineer CC and Others**⁴⁴, which does not refer to **Davehill**, holds at paragraph [11] that:

*"Accordingly, the appropriate rate of interest would be that prevailing at the time when judgment was granted in the high court"*⁴⁵.
(my emphasis)

⁴³ 1988 (1) SA 290 AD 301A-B

⁴⁴ 2023 JDR 2090 (SCA) para 11, 18

⁴⁵ The judgment emanated from the High Court

52. In **Bovicon**, the SCA replaced the High Court's order of 15,5% with the prescribed interest rate applicable at the time when the High Court judgment was granted. Having regard to the above authorities and the provisions of section 1(1) read with sub-section 1(2) of the Act, I am more inclined to align myself with the **Bovicon** judgment that the applicable rate to apply to post-judgment interest is the rate of interest applicable at the time that the trial Court delivered its judgment, on 3 June 2020, as opposed to the 15,5% per annum applicable when the matter commenced. Accordingly, the rate of interest applicable on the 3 June 2020 was 9,75% which I find applicable to post-judgment interest⁴⁶.

Conclusion and costs

53. The submission by PRASA in reply that regard must be had to the definition of “*debt*” and the Prescription Act 68 of 1969 in that a delictual claim will give rise to a debt, does not advance PRASA’s case in this matter. In view of my findings above, the calculation submitted by PRASA in its Part B application is thus incorrect for a number of reasons apparent from my discussion and findings in this judgment. Furthermore, my finding is that the *in duplum* rule is not applicable to the pre-judgment interest and that the post-judgment interest rate of 9,75% is applicable as from 3 June 2020. I have had regard to the plaintiff’s calculations as set out in its annexures referred to in the judgment and given the finding on the interest rate, I agree that the calculation of the amount still due to the plaintiff is as set out in schedule/annexure **JC1B** (copy attached hereto).

54. Furthermore, the *in duplum* rule finds no application because the post-judgment interest has not yet reached the double of the judgment debt which is **R6 657 248,98**⁴⁷. To clarify, the post-judgment interest which has accrued on the judgment debt as at 7 August 2024 is **R2 454 062, 61 + R56 905, 80 + R67 986,61 = R2 578 955, 02**⁴⁸, hence

⁴⁶ GNR 397 of 27 March 2020 (GG No. 43146)

⁴⁷ C on annexure JC1B

⁴⁸ D+G+J on annexure JC1B

the running of such interest has not yet become capped and suspended by the *in duplum* rule. On the calculation as per **JC1B**, I find that PRASA's net amount still due to the plaintiff is **R2 320 322, 68**.

55. On the issue of costs, I have considered the submissions of the parties and see no reason why the merits related to Part A should be considered in light of the fact that the parties reached agreement on 19 April 2024 as to the conduct of the matter. Given the disparity in calculations and disputes on material issues such as the applicability of the *in duplum* rule, the commencement date of the running of post-judgment interest, and the rate of interest, I disagree with PRASA's view that the Plaintiff's decalarator application was not necessary. As costs are in the discretion of the Court, and the plaintiff is successful, the costs awarded shall include costs related to Part A which stood over on 19 April 2024.

Order

56. In the result, the following order is granted:

56.1 The application for relief claimed in Part B of the application is dismissed with costs (see paragraph 56.3 below).

56.2 The counter-application is granted in the following terms:

It is declared that as at 7 August 2024, and after taking into account payments made by the applicant (PRASA) pursuant to the judgment of the trial Court dated 3 June 2020 under the above case number, the applicant is presently obliged to pay the first respondent (plaintiff) a balance of **R2 320 322, 68**, which amount is presently due, owing and payable, together with interest thereon at the rate of 9,75% per annum from such date to date of payment.

56.3 The applicant is ordered to pay the first respondent's costs of Part A and Part B of the application which shall include costs of 19 April 2024 and costs related to steps taken in execution of the trial Court's judgment, as well as costs of the counter application. Costs include the costs of two counsel where so employed on scale C.

M PANGARKER
ACTING JUDGE OF THE HIGH COURT

For Applicant **F Nalane SC**
 E Muller

Instructed by: **AMMM Attorneys Inc.**
 Mr E Malapane

For Respondents: **M Crowe SC**
 P McKenzie

Instructed by: **Jonathan Cohen & Associates Attorneys**
 Mr J Cohen

WCHC Case No. 13654/13: calculation of net amount still due as at current date, being 7 August 2024

(15.5% until Judgment,9,75% thereafter on the capital sum + pre-judgment interest)	
Date of service of Summons	23 August 2013
A = The capital sum of the trial court's judgment	3 246 484,00
Judgment date	03 June 2020
No. of days from service of Summons to Judgment date	2 476
Applicable Interest Rate	15,50%
No. of leap years between service of Summons and Judgment date	2,00
B = Pre-judgment interest on the capital sum from the date of service of the summons to the judgment date	3 410 764,98
C = (A + B) = The capital sum + pre-judgment interest thereon (as at the judgment date)	6 657 248,98
First Payment date	15-Mar-24
First amount paid by PRASA	3 326 484
Applicable Interest Rate	9,75%
No. of days from Judgment date until First Payment date	1 381
No. of leap years between Judgment date and First Payment date	1,00
D = Interest accrued on amount C until First Payment date	2 454 062,61
E = (C + D) = Total amount due on First Payment date	9 111 311,59
Less: Amount of first payment	3 326 484
F = Net amount still due on First Payment date, after First Payment made	5 784 828
Second Payment Date	16-Apr-24
Second amount paid by PRASA	3 589 397,32
Applicable Interest Rate	9,75%
No. of days from First Payment date to Second Payment date	32,00
G = Interest accrued on amount F until Second Payment date	56 905,80
H = (F + G) = Total amount due on Second Payment date	5 841 733,39
Less: Amount of the second payment	3 589 397,32

I = Net amount still due on Second Payment date, after Second Payment made	2 252 336,07
Current date	07 August 2024
J = Interest accrued on amount I until current date	67 986,61
No. of days since Second Payment	113
No. of leap years in between	0,00
K = (I + J) = Net amount still due on Current date (in duplum rule NOT applied)	2 320 322,68