

SOUTH AFRICA / JUDGMENT

Maite v Borman Duma Zitha Attorneys (42064/2017) [2025] ZAGPJHC 183 (18 February 2025) [2025] ZAGPJHC 183

COURT

South Gauteng High Court, Johannesburg

BEFORE

Snyman

CASE / FILE NUMBER

42064/2017

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FLYNOTES:

PROFESSION

– Advocate – Professional

fees –

Claim

for unpaid invoices – Work on RAF matters – Issue

turned on terms relating to payment – Plaintiff

carried out

her instructions – She did the work required and rendered

proper invoices – These invoices unchallenged

by defendant

and not subject to taxation – Defendant to pay R323,095.84

and interest – Claim not succeeding where

certain invoices

not paid in full because assessed downwards by RAF – Within

context of conditions of the briefs.

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

Number: 42064 / 2017

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

18

February 2025
In
the matter between:-
LERATO
MAITE
Plaintiff
and
BORMAN
DUMA ZITHA ATTORNEYS
Defendant

JUDGMENT

SNYMAN, AJ

Introduction

- [1] This judgment illustrates why it is important that the terms of the mandate (brief) between attorneys and counsel should be confirmed by way of a proper written brief. After all, the relationship between counsel and an attorney is at the heart of it nothing else but a service agreement in terms of which counsel provides legal services to the attorney on specific terms. It is the lack of specificity in this context that gave rise the current matter now before this Court to decide. In a nutshell, the case concerns a claim by the plaintiff, which is an admitted and practicing counsel and member of the Pretoria Bar, for unpaid invoices in respect of legal services she had been briefed to render by the defendant (a firm of attorneys). It is in my view a tragedy that two such parties could not resolve this dispute amongst themselves.
- [2] Fortunately, in this case, it turned out that most of the essential facts necessary to decide the matter were either undisputed or common cause. I say this is fortunate, because it is not ideal to decide a matter based on credibility where two officers of the Court are involved, who, after all, should be credible in all respects. That being said, even officers of the Court may not be entirely forthright where it comes to serving self-interest, and in particular, where it comes to money. But insofar as I must decide between contradictory versions presented by the plaintiff and the defendant, I will do so in line with the following principles articulated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*[1]:

‘... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his

evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,

- (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed

issues.

In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. ...'

- [3] Another preliminary issue that must be dealt with is the issue of prescription. In its plea, the defendant raised a special plea of prescription, contending that the bulk of the plaintiff's claims had become prescribed in terms of the Prescription Act.[2] However, and when the trial commenced, I was informed by the defendant's counsel that the special plea of prescription had

been abandoned, and would no longer be pursued by the defendant. I will therefore not concern myself with the issue of prescription in this judgment.

- [4] The above being said, I now turn to deciding the plaintiff's claim, by first setting out the relevant background facts, as testified to by the plaintiff herself, and by Abednego Duma (Duma), one of the directors of the defendant.

The relevant background

- [5] The defendant is a firm of attorneys, conducting practice principally in the field of personal injury, and in particular, dealing with claims concerning the Road Accident Fund (RAF). In this context, the defendant would then brief advocates to appear on behalf of its clients in Court in respect of these matters.
- [6] Turning to the plaintiff, she commenced to practice as an advocate at the Pretoria Bar in November 2010. She explained that she was still brand new, so to speak, when she was briefed by the defendant, and in particular, by Duma. The defendant was in fact the first law firm to brief the plaintiff. This was confirmed by Duma, who said that the plaintiff was referred to him as a new counsel by another senior counsel, and he then commenced briefing her. It was common cause that the defendant started out briefing the plaintiff in RAF matters, where the defendant was acting on behalf of individual claimants against the RAF.

- [7] As part of the documentary evidence in this case, a total of 34 invoices rendered by the plaintiff to the defendant, over the period 2011 to 2016, was discovered, which were the invoices forming the basis of the plaintiff's claim. It was undisputed that these invoices were rendered by the plaintiff to the defendant and received by the defendant. It was also common cause that in respect of each of these invoices, the plaintiff had been briefed by the defendant to render the legal work concerned and that such work had indeed been rendered by the plaintiff. A final important common cause fact is that the defendant, or in particular Duma, had never raised a dispute with the plaintiff about such invoices, prior to the current litigation being instituted.
- [8] The issue that lies at the core of this case is then on what terms had the plaintiff been briefed by the defendant, and in particular, what were the terms relating to payment of invoices rendered by the plaintiff to the defendant. It is here where the versions of the parties depart. When considering these two versions, a clear distinction must be drawn between invoices rendered by the plaintiff to the defendant where the plaintiff had been briefed in matters of the defendant in respect of individual claimants against the RAF, and invoices where the plaintiff had been briefed by the defendant in matters on behalf of the RAF itself.
- [9] As stated, and initially, the briefs given to the plaintiff by the defendant focussed on individual claimants having claims against the RAF. These invoices were rendered in the period 2011 to 2014, and on the common cause facts are the invoices discovered as items A1 to A26 of the bundle. This however excludes the invoice found at item A10 dated 12 February 2013, which concerned consultation and drafting done by the plaintiff in an urgent application for an individual client of the defendant, one Simon Golele, against the Department of Health. In respect of all the other invoices, the plaintiff had been briefed to appear in Court on behalf of individual clients of the defendant that had claims against the RAF.
- [10] Duma explained (as confirmed by the plaintiff in her own evidence) that the defendant came onto the panel of attorneys for the RAF in and during December 2014. From that point onwards, he was instructed by the RAF itself to represent the RAF where it came to claims by individual claimants against the RAF. It followed that as a result, the defendant then commenced briefing the plaintiff to appear in Court on behalf of the RAF where it came to matters where the RAF had instructed the defendant to represent it in legal proceedings brought by such claimants. On the common cause facts, these were the invoices rendered between the period 2014 to 2016, found at items A27 to A34 of the bundle.
- [11] Where it came to the individual claimant briefs reflected by the invoices at items A1 to A26, the plaintiff testified that the briefs relating to these invoices were all for opposed trial matters.[3] She added that when she was briefed, she was not given any terms or conditions relating to the briefs. According to her, and as such, she would render invoice based on what was considered to be reasonable, considering her level of seniority and as guided by the Rules of the Pretoria Bar Council. The extract of the relevant Rules in this regard was

discovered, and was undisputed. In a nutshell in terms of these Rules, where an invoice by counsel is disputed by an attorney, such invoice may be submitted to the Bar Council for taxation. If an invoice is not disputed, then that invoice would be payable 60 days calculated from the first day of the month following the month in which the invoice was rendered. The Rules also set out what may be considered to be a reasonable fee.

- [12] The defendant however had a different take on things. It was put to the plaintiff under cross examination that she had agreed with the defendant that she would only be entitled to payment once the defendant had received payment of costs from the RAF. The plaintiff accepted that this was the case. It was then further suggested to the plaintiff under cross examination that she would only be entitled to payment of her invoices once those invoices had been taxed. The plaintiff was referred to the invoices at items A3, A5, A6, A7, A13, A22, A24 and A25 as being invoices that specifically were subject to taxation before being payable. The plaintiff disputed this was the case, and was adamant there was no condition imposed requiring her invoices to first be taxed, in order to be payable.
- [13] The plaintiff testified about the fees she levied on each and every invoice appearing at items A1 to A26. She explained why on most of these invoices there was a charge for an appearance fee in Court, followed by a reservation day fee. She referred to the Rules of the Bar Council, which allowed for a second day fee being levied where the trial she had been briefed for concluded, settled or otherwise did not proceed on the first day of the trial. She also testified to explain anomalies on some of the invoices relating to dates,[4] which was not contradicted by the defendant. She explained that all her invoices were only based on actual time spent. It was also

explored with her that for some of these invoices, there were part payments, and she confirmed that whilst this was the case, she did not know why there were only part payments, as this was never explained to her, nor was she aware of any cause of reduction of those invoices, be it by way taxation or otherwise. She was clear that considering the work she had done, all the invoices were

reasonable.

- [14] Ironically, and where it came to the testimony of Duma, he had nothing to say about any of these invoices at items A1 to A26. He did not testify that the invoices were somehow unreasonable or otherwise in error. He never contradicted that these invoices were indeed payable. And further, he never said that these invoices were subject to taxation as a condition of the briefs provided to the plaintiff. Where it came to the short payments on some of the invoices, he actually did not offer anything in evidence as to why this was so.

[15] Going to the invoices at A27 to A34, things were, in the end, fairly straight forward and uncontentious. It was established by way of the plaintiff's own testimony and a specific concession made by her under cross examination, that where it came to her being briefed by the defendant to appear in Court on behalf of the RAF itself, this was always done in accordance with a brief template, which formed part of the documentary evidence in the bundle. This brief reflected the following as the brief conditions:

- '1. Counsel is requested to proceed on trial on merits and quantum.
2. By accepting this instruction, and given that we are instructed by the RAF to brief you, we confirm that you have agreed to the following terms:
3. That your fees will be computed strictly in accordance with the RAF Tariff as communicated to us by the Fund from time to time.
4. That you will be entitled to payment of your fees only when we have received payment from the Fund. We undertake to ensure that we submit our accounts (which would include your invoice) to the Fund timeously.
5. That you will be entitled to such fees as allowed by the Fund, after your account has been taxed off, if indeed taxed off. You will accordingly not be entitled to claim from our firm, the difference between your invoice and what has been allowed by the Fund.
6. You are also requested to return our brief together with your invoice within 5 (five) days after the trial date.'

[16] The plaintiff further testified that she was well aware of a further condition relating to briefs where she would be representing the RAF, which was that where it came to preparation, she would not be permitted to levy a fee for more than five hours, no matter what the nature of the matter was. Duma elaborated on this, by explaining that it did not mean that a fee of five hours preparation would always be charged, but how many hours would be accepted by the RAF would depend on the nature and complexity of the matter, but limited to five hours.

[17] It appears that in the case of all of the invoices at items A27 to A34, there has been payment made by the defendant to the plaintiff, however not full payment. So, in short, there appeared to always be a short payment by the defendant of these invoices. According to the plaintiff, she did not know why these invoices were short paid. She stated that she was unaware of any taxation of these invoices that reduced the amounts, and she was never informed by the defendant why these deductions had been made. It was put to her under cross examination that these payments came about after taxation and that she had agreed to this, which proposition she disputed.

[18] In presenting his testimony, Duma explained that in every case where the defendant acted for the RAF, he would render invoice to the RAF for services rendered, and he would, as supporting documents to that invoice, also include the invoice from counsel (in this case the plaintiff) as well as the invoices of any other service provider. The RAF would then assess

these invoices against what was allowed by it in terms of the service agreement with the defendant, which included the provisions relating to counsel's fees. This was why these conditions were specifically contained in the briefs to counsel. He would then receive what he described as a 'trigger document' from the RAF which reflected what it would pay on the invoices submitted, and counsel would then be paid based on such document.

- [19] Duma testified that in the case of each and every one of the short payments to the plaintiff with regard to the invoices at items A27 to A34, this was because the RAF has assessed the invoices of the plaintiff, and reduced the same. He added that for every one of these invoices, the full day fees invoiced by the plaintiff had been paid, as she invoiced those fees in terms of the agreed tariff with the RAF, and it was only in respect of the preparation times charged by the plaintiff that the RAF had an issue, and reduced the invoices. He testified that in each case of this happening, he had in fact explained this to the plaintiff.
- [20] When the plaintiff commenced being briefed by the defendant, she did her own invoicing. She explained that there is a service provider that renders accounting services to counsel, such as preparing and submitting invoices, doing reconciliations, and then also collecting payment of these invoices, called Auxcon. Initially, being new in practice, the plaintiff did not have the funds for this service, however in 2014, she engaged the services of Auxcon, who then reconciled her accounts. It was Auxcon that then engaged the defendant about payment of the outstanding invoices.
- [21] According to Duma, he had numerous meetings with Auxcon, where he discussed all the plaintiff's outstanding invoices and explained why they were not paid, or were not payable.
- [22] On 6 December 2016, Auxcon sent a letter of demand to the defendant, demanding payment of the outstanding amount in respect of the invoices rendered by the plaintiff, totalling R483 618.61. In this letter, it was also noted that there was short payment on some invoices, and the defendant was asked for particulars why this was so. It was stated that if it was alleged that those short payments were due to taxed bills, that such taxed bills be provided, failing which it will be accepted that the invoices are correct. It was demanded that payment be made within seven days, failing which the matter will be handed over for collection.
- [23] Duma answered this letter of demand by e-mail on the same date (6 December 2016). In this e-mail, he stated that the plaintiff had been promised that the defendant was committed to paying her for the services she rendered. He indicated that it was taking longer than expected in recovering moneys from the RAF, and the plaintiff was urged to be patient. No mention was made of any of the plaintiff's invoices being taxed off, being unreasonable, or not being due and payable. Auxcon in turn responded on 6 December 2016 to the e-mail of Duma. In this e-mail, it was inter alia stated that the letter of demand was sent out of frustration, because despite several attempts to meet with Duma, and then confirming meetings with him, it was found that he was not in when Auxcon attended at his offices.

[24] In the end, and despite the intervention of Auxcon, the plaintiff's invoices remained unpaid. This then led to the threatened collection proceedings, and the summons being issued against the defendant on 1 November 2017.

Analysis

[25] From the outset, I am compelled to point out that several material pieces of testimony given by Duma when he testified, was never put to the plaintiff under cross examination to respond to. This included that Duma had several meetings with the plaintiff, who even came to his office, to discuss the issues relating to her invoices. Another important aspect never put was Duma's contention that for all matters where the defendant acted for claimants against the RAF, this was done on contingency, and all the service providers (including the plaintiff) understood that if the defendant did not win the case, they would not be paid. Duma also said that it was permissible for counsel to approach the RAF directly to enquire about invoices. And finally, Duma had said that he had various meetings with Auxcon where he provided them with all the information they had sought. Duma was actually asked on several occasions under cross-examination why this evidence was not put to the plaintiff during the course of her cross-examination, and he answered that he had no explanation why this happened.

[26] The implications of these kind of failures were identified in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[6] as follows:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her

character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

The Court added the following:[7]

'The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.'

[27] In *ABSA Brokers (Pty) Ltd v Moshwana NO and Others*[8], the Court said:

'It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *Van Tonder v Killian NO & ander* 1992

(1) SA 67 (T) at 72I). He has not only a right to cross-examination but, indeed, also a responsibility to cross-examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart & Mansell v Snobberie (Cape) (Pty) Ltd* 1984

(1) PH F19 (A)). A failure to cross-examine may, in general, imply an acceptance of the witness's testimony. In this regard

Pretorius has the following to say in *Cross-examination in SA Law* (Butterworths

1997) at 149-50:

'... [I]t is unjust and unfair not to challenge a witness's account if offered the opportunity, then later argue - when it is no longer possible for the witness to defend himself or offer an explanation - that his evidence should not be accepted. ...'

[28] Thus, and as a general proposition, insofar as any testimony presented by the plaintiff is contrary to this testimony offered by Duma which was not put to her under cross-examination, I will accept the evidence of the plaintiff.

[29] The above being said, the proper point of departure in deciding this matter is determining what the plaintiff needed to prove in order to succeed with a claim for the payment of all her outstanding invoices at items A1 to A34. First, the plaintiff needed to prove that she was instructed (briefed) by the defendant for each of these invoices. It was common cause that this was the case. Second, the plaintiff needed to prove that she rendered the work for which she was briefed, as reflected on those invoices. Once again, this was common cause between the parties. Third, the plaintiff needed to show that such invoices were rendered to the defendant, which was yet another common cause fact. Fourth, the plaintiff needed to show that the full value of these invoices remained unpaid, which was equally beyond contestation. This in reality leaves only one issue to be decided, namely whether all the invoices concerned were due and payable by the defendant to the plaintiff, in full.

[30] In order to determine whether the invoices are due and payable, there are two core considerations at stake. First, it must be established what the payment terms of the instructions (briefs) by the defendant to the plaintiff were, as agreed between them. Second, it needs to be established whether the work done and services rendered as reflected in the invoices were reasonable.

[31] I will first deal with the issue of the payment terms. In this context, a distinction must be drawn between the invoices at items A1 to A26, and the invoices at items A27 to A34. I start with the invoices at items A27 to A34, because this is the easiest and most uncontentious to

answer. The evidence revealed that the parties were *ad idem* that the terms of the briefs with regard to these invoices included a specific condition that the invoices concerned would be subject to assessment by the RAF, and the plaintiff would only be paid the amount as assessed by the RAF to be payable. As Duma explained, this is what was meant by these invoices being subject to 'taxation' as reflected in the defendant's plea. Using the word 'taxation' in this case is a misnomer, and a better word would have been assessment. A proper reading of paragraph 5 in the briefs provided to the plaintiff in respect of these invoices leaves me with little doubt that the clause was describing a process of assessment by the RAF, rather than what is commonly understood as a formal taxation.

- [32] Turning then to the payment terms in respect of the invoices at items A1 to A26, this is a little more convoluted. The plaintiff's testimony was that there was no payment terms agreed to, and in particular, that there was no condition that payment of her invoices was subject to any kind of taxation or assessment by the RAF. According to her, the payment terms applicable, in the absence of any specific condition, would be regulated by the Rules of the Pretoria Bar, and that meant invoices were payable unless disputed by the defendant, in which event it would be subject to assessment by the Pretoria Bar Council. The plaintiff did however concede that in the case of matters of claimants against the RAF, counsel would ordinarily wait to be paid until payment was forthcoming from the RAF to the instructing attorneys, such as the defendant.
- [33] In its plea, the defendant did not allude to any specific conditions agreed to with the plaintiff, with regard to the invoices at items A1 to A26. It was only pleaded that '... for each separate brief the defendant undertook to make payment for work done or performance of the brief. Such payment would be either as agreed between the defendant and the plaintiff when the plaintiff received the brief, or be a reasonable fee ...'.
- [34] In his testimony, Duma led no evidence to contradict anything the plaintiff has testified to with regard to payment terms from the invoices at items A1 to A26, or alluded to any other conditions that may have been agreed to in respect of each individual brief. And despite it being put to the plaintiff under cross examination that it was agreed that her invoices at A1 to A26 would be subject to taxation, and would only be payable once taxed, Duma did not lead any testimony to this effect. In short, nothing that was put to the plaintiff under cross-examination relating to the payment terms of these invoices were ever backed up by Duma when giving his evidence. Duma did concede that until the filing of the plea in the current litigation, there was no dispute raised with regard to any of the invoices rendered by the plaintiff.
- [35] It follows from the above that the payment terms relating to the invoices at items A1 to A26 did not include a condition that these invoices were subject to taxation in order to be payable. Those invoices would be payable, as rendered, once payment was received from the RAF. This of course does not include the invoice at item A10, which would be payable in the ordinary course, meaning after the 60 calendar days under Rules of the Pretoria Bar Council. In the absence of a specific condition that the invoices are subject to taxation, or

any dispute being raised with regard to those invoices, there is no legal requirement that the plaintiff had to first subject her invoices to taxation in order to be entitled to institute proceedings to collect payment thereof. As said in *Benson and Another v Walters and Others*[9]: ‘... I consequently conclude that taxation is not by law a prerequisite to the institution of legal proceedings on a bill of costs between attorney and client...’, which in my view would include the bill of counsel. Overall considered, these invoices were payable when the work had been completed,[10] however in this case, of course subject to the 60 day payment terms contained in the Rules of the Pretoria Bar Council and / or when payment is received from the RAF.

- [36] The payment terms of the invoices at items A27 to A34 however did include the condition that those invoices were subject to assessment by the RAF, and the amount payable in terms of those invoices would be the amount allowed by the RAF. The invoices, as assessed, would of course be payable in the ordinary course after the assessment, and the normal applicable time limits with regard to actual payment after assessment would apply.
- [37] The aforesaid being the payment terms relating to the invoice, this leaves only the issue of whether the charges levied for the services rendered / work done, was reasonable. Whether this was indeed the case will be dealt with later in this judgment.
- [38] Applying the aforesaid, I now return to the facts of this case, and in particular, starting with what was pleaded by the defendant as to the cause for not paying the invoices, either in full or at all. Again, this determination requires a distinction between the invoices at items A1 to A26, and the invoices at items A27 to A34. Starting with the invoices at items A1 to A26, the plea offered by the defendant is clear. This plea records, at paragraphs 20 and 21 thereof, as follows:

‘20. The defendant's main defences are that:

20.1 some of the invoices whereon the claims are based are partly incorrect in that work billed for was not performed and fictitious items are included;

20.2 the fees charged have not been agreed with the defendant and the defendant objected thereto;

20.3 the plaintiff grossly overcharged given her seniority as an advocate and the complexity of the matter and the reasonableness of time taken on perusal;

20.3.1 this is stated specifically with time taken to peruse pleadings on merits and/ or quantum; and

20.3.2 with time taken to peruse expert reports filed.

20.4 the plaintiff overcharged since:

20.4.1 certain work done was charged for separately even though such work (if done) was performed on the same day as the day of trial and accordingly should be included in a day fee;

20.4.2 the contents of work performed are duplicated with a concomitant duplication of charges;

20.4.3 the plaintiff charged double day fees under the guise of a reservation fee, and such fee is charged for the same day as the day fee.

21 The above defences are generally applicable to invoices annexed as A1 to A26.'

[39] What is significant in this plea is that it is not contended that the invoices at items A1 to A26 are subject to a condition that they must be taxed, and that such prior taxation was essential before the invoices would become payable. It is also important to point out that it is not pleaded that the plaintiff is not entitled to be paid these invoices as yet, because the RAF has not paid the defendant. Obviously, and in the case of the invoice at item A10, this in any event would not be subject to the condition that the RAF first pays, because it is not a RAF matter. If the defendant wished to pursue these two defences to thwart payment of the invoices, it needed to specifically plead it. Instead, the entire basis for the defendant's plea in terms of which it is contended that these invoices are not payable, is the contention that the charges levied by the plaintiff are not reasonable, and nothing else.

[40] It is trite that a litigant is bound by the case as pleaded.[11] The Court in *Imprefed (Pty) Ltd v National Transport Commission*[12] made the following clear:

'At the outset it need hardly be stressed that:

'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.'

(*Durbach v Fairway Hotel Ltd* 1949

(3) SA 1081 (SR) at 1082.)

This fundamental principle is similarly stressed in *Odgers' Principles of Pleading and Practice in Civil Actions* in the High Court of Justice 22nd ed at 113:

'The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.' ...'

And in *Knox D'Arcy AG and another v Land and Agricultural Development Bank of South Africa*[13] the Court said:

'It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. ...'

[41] Therefore, and insofar as the defendant sought to specifically plead a case that the invoices were not payable because they are unreasonable, and then seek to advance a case at trial that the invoices are not payable because they are subject to taxation in order to be payable, or that they are not payable because the RAF has not paid, is nothing short of trial by ambush. It is simply not permitted to plead one case in defence, and then rely on another

case at trial. The problem in this case is that considering what happened, the plaintiff would never be altered, prior to trial, as to the case she would be required to meet, so that she could prepare to answer it. As held in *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality*[14], in referring to a case not pleaded, but then raised in an opening address:

‘... One knows that such address can never be a substitute for pleadings. In any event, it did not serve to forewarn the respondent of the evidence that would eventually be relied upon. What is important is that the pleadings should make clear the general nature of the case of the pleader. They are meant to mark out the parameters of the case sought to be advanced and define the issues between the litigants. In that regard, it is a basic principle that a pleading should be so framed as to enable the other party to fairly and reasonably know the case he or she is called upon to meet. These requirements in respect of pleadings are the very essence of the adversarial system. The prime function of a judge is to hear evidence in terms of the pleadings, to hear argument and to give his decision accordingly.’

[42] But the aforesaid is certainly not an immutable principle. In *Minister of Safety and Security v Slabbert*[15] the Court held:

‘The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said:

"However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue." [16]

[43] But overall considered, it can hardly be better said than to refer to the following dictum in *Molusi and Others v Voges NO and Others*[17]:

‘The purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone. Of course there are instances where the court may of its own accord (*mero motu*) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert* the Supreme Court of Appeal held:

'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'

[44] In casu, it can hardly be said that the issue of the invoices being subject to taxation and / or payment from the RAF being awaited, was fully and properly canvassed by both parties in giving evidence. These points certainly do not concern a particular question of law. Most importantly, Duma actually presented no testimony on these points. He never testified that payment was not made by the

defendant where it came to the invoices at items A1 to A26 because payment was still being awaited from the RAF. He also gave no

evidence that the plaintiff was required to first submit these invoices for taxation. Ironically, it was specifically put to the

plaintiff that the invoices at items A3, A5, A6, A7, A13, A22, A25 and A25 were subject to taxation, thus one would have expected Duma to come and substantiate such a specific proposition put. He never did. Therefore, whilst it was put to the plaintiff that these two considerations applied, which is why she was not paid, she disputed this, and surely what is put under cross examination, especially if disputed, must be backed up in evidence to follow.

[45] It was even suggested to the plaintiff that she had the duty to follow up with the RAF to see if payment was received by the defendant, but again, Duma, who in his testimony professed to be an expert where it came to dealings with the RAF, gave no such testimony. In any event, I find it hard to accept that such a duty existed. There is no relationship between the plaintiff and the RAF. Her relationship is solely that of being a service provider to the defendant. She, as counsel, would simply not have the standing to go around her instructing attorney, being the defendant, and deal directly with the RAF. Finally in this respect, whether or not the RAF had paid or not would be something that resorts under the direct knowledge of the defendant, and it would be the easiest thing in the world for it to prove it. Yet it not only did not offer such proof, but it did not even plead this as a defence. Under the circumstances, it is an untenable proposition to suggest that the defendant should not be held to its case as pleaded. In *Cooper and Others NNO v Syfrets Trust Ltd*[18] the Court had the following to say, which in my view is apposite in casu:

'... Counsel for the plaintiff argued that both parties fully covered all aspects relating to the 1990 incident in evidence. I am not so sure that that is correct. As mentioned earlier (in para 13 above) there was little cross-examination about the events in 1990 - at least not to the extent that would doubtless have been the case if this had consistently remained, as it was in argument again destined to become, the centre of gravity of the entire case. A party whose case had unravelled before a trial court cannot stitch together a new one on appeal if it is not properly covered by the pleadings or was not properly covered in evidence. He cannot in fairness be allowed to advance a case different from the one he presented on paper ...'

- [46] Appreciating the above difficulties, counsel for the defendant sought to argue that because the plaintiff waited so long to enforce payment of her invoices, it had to be inferred that she agreed that the invoices were subject to taxation. Such an inferred agreement is yet another case not pleaded. Furthermore, this suggested inference is a stretch, to say the least. To contend that an agreement to submit bills to taxation can be inferred by a mere delay in collecting debt is in my view simply untenable, especially if there was never any dispute about the invoices in the first place. And added to this, the plaintiff gave an uncontradicted explanation why she took so long. She explained that she was in essence mostly beholden to the defendant where it came to receiving briefs, and she did not want to 'rock the boat', so to speak. She indicated that she trusted that Duma would come to do the right thing and pay her. Considering that she was new counsel who did not have other briefing attorneys to rather choose, this in my view makes perfect sense. The plaintiff explained that when it became apparent only later, and after she had engaged Auxcon, that Duma was not coming to the party, that he would not take care of her, and she decided to pursue collection proceedings. This, I believe, adequately explains why it took so long for the plaintiff to pursue collection of her invoices, and from this, certainly no agreement as suggested by the defendant's counsel can be inferred.
- [47] Therefore, and in the end, the defendant's defence where it comes to the payment of the invoices at items A1 to A26 must stand or fall on the issue of reasonableness, or in other words, these invoices not being reasonable. But in this respect, the defendant faces an insurmountable obstacle. That obstacle is a complete lack of any evidence to substantiate this defence. The plaintiff's counsel took the plaintiff through the invoices rendered. She confirmed that in each matter, she only charged on the basis of actual time spent[19], and further the time spent on each matter was reasonable. She explained on what basis the day fees and reservation fees were charged. It is also clear that the hourly rate she charged, considering her level of experience, was reasonable, and there was no evidence to indicate otherwise.
- [48] So, what did Duma have to offer in response? The answer is absolutely nothing. He presented no evidence as regards to what is contained in the invoices at items A1 to A26, in respect of the work done and time spent. He never indicated what could be considered to be an unreasonable charge in any of those invoices. Despite the specific plea offered in this respect, no evidence was presented to substantiate what is contained in such plea. In order for the defendant to show that the invoices concerned were unreasonable, the defendant needed to take each invoice, indicate what was unreasonable in the invoice and why, and support this indication with proper evidence, preferably by another counsel in a position to comment thereon. But this did not happen. A further important consideration is the value of the work done,[20] and Duma did not substantiate that the value of the work was not commensurate to the invoices rendered. It was necessary for Duma to establish all the aforesaid in evidence, considering the plaintiff's direct testimony, as the one who did the work, that it was reasonable. The Court in *Reef Lefebvre (Pty) Ltd v SA Railways and Harbours*[21] had the following to say in this respect:

‘... The quantification of counsel's fees has always been a nettlesome problem, particularly for those who do not have intimate

knowledge of advocates' practice and traditional working methods. Even attorneys, although they are closely associated with counsel's

work, have frequently not an adequate understanding thereof. There are many facets and factors involved therein ...’

[49] For what it is worth, I in any event considered the invoices at items A1 to A26. The invoice at item A10, which was consultation and drafting, appears to be in line with what would be considered to be reasonable time spent on such a matter. As to all the other invoices, and considering they all relate to opposed trial proceedings where the plaintiff was briefed to conduct the trial, there is nothing that stands out to me as being materially excessive where it comes to trial preparation. Whilst some might say certain jobs as reflected in the invoices can be done quicker, that is not the point where it comes to deciding reasonableness thereof. [22] Once again, the Court in Reef Lefebvre supra[23] appositely dealt with this kind of consideration as follows:

‘... there is a further rather elusive element which influences the fee. This is an amalgam of abstract thought, concern, responsibility

and commitment, which is bound up with the complexity and gravity of the brief. This element may cause particular individuals to spend more time on a brief than is warranted, objectively speaking, and in determining the reasonableness of a fee, one should strive for balance and not allow this aspect to produce odd results ...’

[50] Finally, the day fees and reservation fees raised by the plaintiff in her invoices were in line with the Rules of the Pretoria Bar Council, in all instances where the plaintiff was reserved for a two-day trial.

[51] In conclusion with regard to the invoices at items A1 to A26, there is simply no cause or reason as to why these invoices should not be paid by the defendant. The plaintiff carried out her instructions from the defendant, did the work required, and rendered proper invoice for such work. These invoices were received by the defendant, were unchallenged, and not subject to taxation. It follows that the invoices are due and payable, and the plaintiff is entitled to judgement where it comes to the outstanding balance on all these invoices.[24] The total amount payable by the defendant to the plaintiff for these invoices, as outstanding, amounts to R323 095.84.

[52] This leaves the invoices at items A27 to A34. This part of the claim can be disposed of on the basis of what was the agreed condition that these invoices were subject to assessment by the RAF. With regard to these invoices, it must firstly be pointed out that not one of these invoices were entirely unpaid. Each one of them were paid, albeit short paid. A consideration of the plea offered by the defendant does show that it was part of the defendant's case is that this short payment occurred as a result of taxation. I have dealt with,

above, what is meant by taxation in this context, and what was really being referred to was assessment by the RAF. It follows that the issue to be decided is whether these invoices were short paid because of RAF assessments.

- [53] In her testimony, the plaintiff did not offer a suggestion as to why these invoices were short paid. According to her, and simply put, she did not know why, and was never told why. On the other hand, Duma testified that each of these invoices were assessed by the RAF, and that the RAF had determined that the fees charged by the plaintiff for preparation were excessive, considering each of the particular cases, and then assessed these preparation fees downwards to reflect lesser hours. Duma pointed out that the day fees charged in these invoices were in line with the agreed RAF tariffs, not assessed downwards, and were all paid. It therefore appears that the short payments were all as a result of RAF assessments, and this would be in accordance with the condition stipulated in paragraph 5 of the briefs to the plaintiff.
- [54] Counsel for the plaintiff suggested that the testimony by Duma as to the assessments of these invoices should be rejected on the basis that it is hearsay, because a witness from the RAF needed to be called to testify as to the veracity of the assessments made in respect of each of the invoices at items A27 to A34. I cannot agree with this proposition. In terms of the Law of Evidence Amendment Act (Evidence Act),[25] 'hearsay evidence' means '... evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.[26] In this context, Duma never testified for the purposes of justifying the assessments made. Or in other words, his testimony does not relate to whether the assessments were accurate, reasonable or correct. He simply testified that he received the assessments,

considered what they contained, and made payments to the plaintiff accordingly. This is not hearsay evidence as contemplated by the Evidence Act. The following example provided by the Court in *Makhathini v Road Accident Fund*[27] is apposite:

'In *Mdani v Allianz Insurance Ltd* [1990] ZASCA 119; 1991

- (1) SA 184 (A) at 189H - 190A this Court, in dealing with the testimony of a policeman (A) that an insured driver (B) made admissions to him,

held, with reference to s 3 of the Act, that such evidence is not hearsay if tendered for the purpose of determining whether such an admission was made. Whether B in fact made the admission (in the absence of testimony by B) depends on A's credibility and could be tested by cross-examination. The Court held further that the content of the admission, if it is to be used to establish the truth of what was said, constitutes hearsay ...'

- [55] Further, Duma is a director at the defendant who has spent more than a decade working with the RAF, and then ultimately ended up working for it as a client. He was the instructing attorney working on all the particular matters of the RAF the plaintiff had been briefed to attend to. In short, he was directly responsible for those matters, and would have personal

knowledge of the instructions that come from the RAF. In this case, truth be told, the assessments made by the RAF, referred to by Duma as 'trigger documents', is nothing but an instruction to Duma as to what the RAF is willing to pay. It simply does not matter why the RAF decided to do so. Duma would have direct knowledge of such instruction, and would be in a position to testify about it, without the need to have this corroborated by someone from the RAF. Comparable is the following dictum in *Cornerstone Logistics (Pty) Ltd and Another v Zacpak Cape Town Depot (Pty) Ltd*[28]:

'Regarding the contention that the contents of the founding affidavit constituted inadmissible hearsay evidence because the deponent, namely Mr Petersen, did not have personal knowledge of the facts to which he deposed, the court a quo found that in his capacity as Zacpak's financial manager, Mr Peterson had access to the relevant records and documentation upon which Zacpak's claim was founded. In that capacity he had sufficient knowledge of the facts, and his affidavit, consequently, did not constitute hearsay evidence. ...'

Reference is also made to *Stanfield v Commissioner, South African Revenue Service*[29] where it was said:

'Whilst I accept that Mr P J Koekemoer, who is the other deponent to the opposing affidavit, is employed as an advocate in Pretoria and thus cannot have personal knowledge about the applicant's account, the same cannot be said for Ms Hendrickse. The nature of the applicant's cause of action is such that one would have to refer to the income tax or value added tax returns submitted, the assessments made, payments and credits passed for one to know exactly the amount to be refunded, if any. Obviously the applicant's file would be attended to by a number of people within the respondent's office. The one person who would thus be best disposed to depose to such an affidavit would be the supervisor, in a position similar to the one occupied by Ms Hendrickse. Accordingly, I am of the view that the evidence is admissible. ...'

[56] It would of course been preferable for the defendant to have discovered the so-called trigger documents referred to by Duma, but this does not, in my view, detract from the testimony of Duma in this respect. There is in my view no reason why this testimony of Duma cannot be accepted, especially considering it is not contrary to anything offered by the plaintiff in her testimony. In any event, Duma's explanation ties in with the documentary evidence that has been discovered. It is evidence that makes sense in the context of the terms of paragraph 5 of the briefs to the plaintiff. The fact that the greater part of each invoice was in fact paid clearly suggests that the reduced parts thereof relate to the preparation time being moderated by the RAF, as one of the specific agreed brief terms between the plaintiff and the defendant.

[57] It is unfortunate that all the above was not explained to the plaintiff by Duma. I know that Duma suggested in his evidence that he did explain this to her and Auxcon, but for the reasons as set out above, I cannot accept this version over that of the plaintiff that it was never explained to her. The correspondence emanating from Auxcon also contradicts Duma's suggestion of having had several meetings with Auxcon where this was explained. As

critical as one may be of this conduct of Duma, it does not detract from the fact that there exists a legitimate cause for not paying the full amounts of these invoices, and the plaintiff thus not being entitled to the payment of the balance.

- [58] I therefore conclude that where it comes to the invoices at items A27 to A34, the reason why these invoices were not paid in full was because the preparation time on these invoices had been assessed downwards by the RAF. This took place specifically within the context of the conditions of the briefs to the plaintiff, which provided for this. As also provided for in such briefs, the plaintiff would only be entitled to payment of the amounts as assessed by the RAF to be payable. As such, the plaintiff is not entitled to payment of the balance of the invoices at items A27 to A34, that have not been paid by the defendant, and this part of her claim must fail. This part of the claim amounts to R43 216.00.
- [59] In summary, the plaintiff is entitled to judgment in the sum of R323 095.84, being the unpaid parts of the invoices at items A1 to A26 she rendered to the defendant, in respect of which she has shown that she is entitled to payment.
- [60] As to the issue of interest payable, it was common cause that the plaintiff demanded payment from the defendant on 6 December 2016, with payment to be made within seven days. For mora interest to accrue, the defendant would have to be in mora.[30] As a matter of principle, and because the claim is disputed, the defendant could only be in mora once the Court has determined the claim.[31] However, and despite this, the issue of interest in these kinds of unliquidated claims is dealt with in the Prescribed Rate of Interest Act (Interest Act)[32]. Section 2A of the Interest Act deals with interest on unliquidated debts (claims). Section 2A(1) provides that any unliquidated debt once determined by a Court or an arbitrator shall bear interest as determined by subsection 1.[33] Next, section 2A(2)(a) provides: 'Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 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 is the earlier' (emphasis added).[34] It follows that simple interest on the amount due to the plaintiff, by the defendant, must accrue from the expiry of the time period contained in the demand of 6 December 2016, thus being as from 15 December 2016.
- [61] This only leaves the issue of costs. The plaintiff was, overall considered, substantially successful in her claim. She thus should be entitled to her costs, and nothing has been advanced by the defendant to indicate otherwise. In my view, a costs order on the party and party scale B would be justified in this case.

[62] In all the circumstances as set out above, the following order is made:

Order

1. Judgment is granted in favour of the plaintiff and against the defendant in the amount of R323 095.84.

2. The defendant is ordered to make payment to the plaintiff of the amount of R323 095.84 within 10(ten) days of date of this order.
3. The defendant is ordered to pay simple interest on the sum of R323 095.84, at the rate of 10.5% per annum, calculated from 15 December 2016 to date of final payment.
4. The defendant is ordered to pay the plaintiff's costs, on the party and party scale B.

SNYMAN AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Appearances:

Heard on:

10 and 11 February 2025

For the Appellant:

Adv A Thompson

Instructed by:

Du Bruyn & Morkel Attorneys

For the Respondent: Adv R Baloyi

Instructed by:

T S Makhubela Attorneys

Date of Judgment:

18 February 2025

[1] 2003

(1) SA 11 (SCA) at para 5. See also National Employers' General Insurance Co Ltd v Jagers 1984

(4) SA 437 (E) at 440D – G; Oosthuizen v van Heerden t/a Bush Africa Safaris 2014

(6) SA 423 (GP) at para 31.

[2] Act 68 of 1969.

[3] Save of course for the invoice at item A10, which was for consultation and drafting, and had nothing to do with the RAF.

[4] None of these anomalies are material.

[5] Paragraphs 3, 4 and 5 were marked in bold on the brief.

[6] 2000

(1) SA 1 (CC) at para 61.

[7] Id at para 63.

[8]

(2005) 26 ILJ 1652 (LAC) at para 39.

[9] 1984 (1) SA 73 (A) 86C. See also XM Petse Incorporated v Nabile (Appeal) 2024 JDR 2258 (ECM) at para 33.

[10] Van Der Merwe and Associates Incorporated v Premax Trading 2 CC 2023 JDR 2492 (GP) at para 22; Verveen Incorporated v Ngoma Trading CC 2019 JDR 1765 (GP) at para 45; Praxley Corporate Solutions (Pty) Ltd v Werksmans Incorporated 2017 JDR 0482 (GJ) at para 29; Weavind and Weavind Incorporated v Manley NO. 2020 JDR 0523 (GP) at para 31.

[11] See Naidoo v Minister of Police and Others [2015] 4 All SA 609 (SCA) at para 30; Minister of Safety and Security v Slabbert [2010] 2 All SA 474 (SCA) at para 11; First National Bank of Southern Africa Ltd v Barclays Bank PLC and Another 2003 (4) SA 337 (SCA) at para 6; Absa Bank Limited v IW Blumberg and Wilkinson [1997] ZASCA 15; 1997

(3) SA 669 (SCA) at 681G-H; Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd 1992

(2) SA 807 (A) at 816D-F.

[12] 1993

(3) SA 94 (A) at 107C-H.

[13] [2013] 3 All SA 404 (SCA) at para 35.

[14] 2018

(1) SA 391 (SCA) at para 28.

[15]

[2010] 2 All SA 474 (SCA) at paras 11 – 12. See also the minority judgment as approved of by the majority at para 22, where

it was said: ‘... A court is not bound by pleadings if a particular issue was fully canvassed during the trial. ...’. See further *Director of Hospital Services v Mistry* 1979

(1) SA 626 (A) at 636C-D, where the Court held: ‘... in the absence of an averment in the pleadings or the petition, a point may arise which is fully canvassed in the evidence, but then it must be fully canvassed by both sides in the sense that the Court is expected to pronounce upon it as an issue. ...’.

- [16] The Court was referring to *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976
- (1) SA 708 (A) at 714G-H. See also *HWJ Coal (Pty) Ltd and another v NI-Da Transport (Pty) Ltd* (Appeal) 2024 JDR 1913 (GP) at para 16.
- [17] 2016
- (3) SA 370 (CC) at para 28.
- [18]
- [2000] ZASCA 128; 2001
- (1) SA 122 (SCA) at para 21.
- [19] In *City of Cape Town v Arun Property Development (Pty) Ltd and Another* 2009 (5) SA 227 (C) at para 22, it was held: ‘... The modern trend - if I may call it that - of charging a fee based on time actually expended is both acceptable and in the interest of transparency. ...’.
- [20] See *Society of Advocates of KwaZulu-Natal v Levin* 2015
- (6) SA 50 (KZP) at para 20.
- [21] 1978 (4) SA 961 (W) at 963G-H.
- [22] In *The Member of The Executive Council Responsible for the Department of Roads and Public Works, North West Province v Oosthuizen* 2009 JDR 0325 (GNP) at para 36, the Court held that: ‘The advocates’ profession is sui generis and it may fairly be described as one of, if not the most, individualistic of professions. No two advocates are the same. No two advocates have the same intelligence, legal knowledge and expertise, forensic ability and personal qualities or the same professional and social advantages. ...’.
- [23] Id at 964B-D.
- [24] It was common cause that the defendant did pay a sum of R215 025.00 where it came to all these invoices, to the plaintiff.
- [25] Act 45 of 1988.
- [26] See section 3(4).
- [27] 2002 (1) SA 511 (SCA) at para 16. Also compare *S v Nomazoza* 2008 JDR 1440 (SCA) at para 6.
- [28] 2022 JDR 0101 (SCA) at para 2.
- [29] 2002
- (1) SA 726 (C) at para 35. See also *Maharaj v Barclays National Bank Ltd* 1976
- (1) SA 418 (A) at 424A-D.

[30] See *Scoin Trading (Pty) Ltd v Bernstein* NO 2011

(2) SA 118 (SCA) at para 11.

[31] See *Mashaba and Another v Telkom SA SOC Ltd* (2020) 41 ILJ 2437 (LAC) at para 12.

[32] Act 55 of 1975 (as amended).

[33] Section 1(1) of the Interest Act provides: '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 such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt,

orders

otherwise'.

[34] The respondent has not applied nor has it sought to make out a case for the exercise of a discretion as contemplated by section 2A(5), for an alternative date from which interest shall run and at what rate it should be calculated. In *Adel Builders (Pty) Ltd v Thompson* 2000

(4) SA 1027 (SCA) at para 15, the Court said: '... The discretion afforded by section 2A(5) was of the nature referred to in a long line of cases in this Court from *Ex Parte Neethling* 1951 (4) SA 331 (A) onwards. Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them See also *See King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd* 2013 JDR 1389 (SCA) at para 38; *Drake Flemmer & Orsmond Inc and Another v Gajjar* 2018

(3) SA 353 (SCA) at para 85.

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