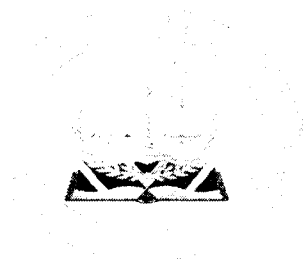


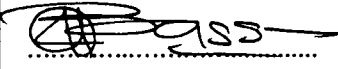
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

10/5/16

CASE NO: 68225/12

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
 SIGNATURE	
10.05.2016 DATE	

UNIVERSITY OF SOUTH AFRICA

Plaintiff

and

PROFESSOR MATOANE STEWARD MOTHATA

Defendant

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JUDGMENT: COSTS IN TERMS OF RULE 34

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AC BASSON, J

- [1] This is an action instituted by the plaintiff, the University of South Africa (hereinafter also referred to as "UNISA") against the defendant, Prof Matoane Mothata. UNISA issued summons against the defendant claiming damages in the amount of R 789 079.20 resulting from an alleged breach of contract

[2] On 15 April 2016 this court made the following order:

1. The plaintiff's claim is dismissed.
2. The defendant breached the agreement attached to the papers as "Annexure A".
3. The defendant is ordered to pay damages to the plaintiff in the amount of R 236 00.00.
4. The defendant is ordered to pay the costs.

[3] Immediately after judgment was handed down counsel for the respondent handed up an offer to settle made in terms of Rule 34 of the Rules. A date was arranged for the parties to argue the matter before court. There was no appearance on behalf of the plaintiff at the hearing of argument.

[4] In terms of the without prejudice offer of settlement, the defendant offered to settle the plaintiff's claim by payment of an amount of R 476 000.00 and to pay the plaintiff's taxed or agreed party and party costs of suit to the date of this offer. It is clear that the amount offered to the plaintiff to settle the amount is significantly less than what was ultimately ordered in favour of the plaintiff.

[5] It is trite that once a court has handed down a judgment on the question of costs and it is thereafter brought to the court's attention that a prior offer to settle without prejudice was made to the plaintiff, this court is obliged to consider afresh the issue of costs. However, although this Rule obliges the court to reconsider the issue of costs, the court retains its discretion whether or not to award the costs to the defendant incurred after the date of the offer was made to the plaintiff. The principles are succinctly summarised in *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA):

"There is no rule that entitles a plaintiff to the costs in respect of the issue of liability where a discretion of the Judge. Where a plaintiff in an action sounding in money has not succeeded in obtaining an award that exceeds an offer made without prejudice, there are two important

considerations to be borne in mind by the Judge exercising the discretion: (1) the purpose behind the Rule (which is to enable a defendant to avoid further litigation and, failing that, to avoid liability for the costs of such litigation); and (2) that the Rule in no way fetters the judicial exercise of the discretion. Ordinarily the purpose behind Rule 34 would cause the Judge to order the defendant to pay the plaintiff's costs incurred up to the date of the offer, and the plaintiff to pay the defendant's costs thereafter. That does not mean, however, that there is a 'rule' to this effect, from which departure is justified only in the case of 'special circumstances'. All it means is that the exercise of the Court's discretion as to costs in this way would usually be proper and unimpeachable, and failure to do so would, if unjustifiable, amount to a misdirection. But it needs to be emphasised, as the proviso to Rule 34(12) makes clear, that the Rule does not dictate this result, even provisionally. Where the law has given a Judge an unfettered discretion it is not for the appeal Court to lay down rules that, while purporting to guide the Judge, will only fetter that discretion. If, therefore, there are factors which the trial Court in the exercise of its discretion can and legitimately does decide to take into account so as to reach a different result, a Court on appeal is not entitled to interfere - even although it may or even probably would have given a different order. The reason is that the discretion exercised by the Court giving the order is not a 'broad' discretion (or a 'discretion in the wide sense' or a 'discretion loosely so called') which obliges the Court of first instance to have regard to a number of features in coming to its conclusion and where a Court of appeal is at liberty to decide the matter according to its own view of the merits and to substitute its decision for the decision of the Court below simply because it considers its conclusion more appropriate. The discretion is a discretion in the strict or narrow sense (also called a 'strong' or a 'true' discretion). In such a case, the power to interfere on appeal is limited to cases in which it is found that the Court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the Court of first instance exercised the power conferred

on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons”.

[6] I have considered the matter and I am of the view that, taking into consideration the fact that the defendant has made a substantial offer to the plaintiff in an attempt to settle the matter and that such offer was substantially more than what was eventually awarded to the plaintiff, the plaintiff should be ordered to pay the defendant's costs as from the date of the without prejudice offer which was 10 April 2013.

[7] In the event the following costs order is made:

The plaintiff is ordered to pay the defendant's costs from 3 April 2013 being the date on which the defendant's offer to settle without prejudice was filed with the Registrar of this court which costs include the further costs of the trial.

A handwritten signature in black ink, appearing to read 'AC Basson', is written over a horizontal line.

**AC BASSON**

**JUDGE OF THE HIGH COURT**