IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 8281/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED yes

31/8/2016 .....
DATE SIGNATURE

31/8/2016

In the matter between:

GFE BLYTHING	**PLAINTIFF**
AND	
THE MINISTER OF SAFETY AND SECURITY	**FIRST DEFENDANT**
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	**SECOND DEFENDANT**

JUDGMENT

LEDWABA, DJP

Background

[1] The plaintiff brought a claim for damages arising from wrongful arrest and detention by a member of South African Police Service.

[2] On the December 2011 the plaintiff was on routine patrol duties for his neighbourhood watch when he confronted a suspect which assaulted him. The Plaintiff fired a single shot at the suspect, in self-defence. The suspect died as a result of the gunshot. The plaintiff was subsequently arrested and detained by members of the SAPS acting within the course and scope of their duties. The Plaintiff was 66 years old pensioner when the said incident occurred.

[3] The plaintiff was initially taken to Akasia police station and later transferred to Soshanguve police station. On 19 December 2011, the plaintiff was released without formally charged.

Procedural history:

[4] Plaintiff duly served notice in terms of section 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act[1] (herein after referred to as "Act 40 of 2000") on 7 June 2012.

[5] Summons and particulars of claim were served on the defendants on 8 February 2013 in which an amount of R150 000.00, as reflected also in the statutory demand, was claimed as well as, at prayer 2, " *interest on the above amount at the rate of 15.5% per annum calculated from the date of demand until date of payment*".

[6] On 17 March 2015, being one day before the matter was set down for trial, it was agreed *inter alia* that the defendants would not call any witnesses, and that counsel would agree on the quantum of damages at R100 000.00. The defendants would pay the plaintiff's cost of the action, including the qualifying fees of the two experts.

Issue in dispute:

[7] On 18 March 2015, both parties addressed argument before e in regard to the issue of which date was interest payable in the matter. The defendants' counsel submitted that interest is payable on the agreed amount from the date of the court's order when the court makes an order I respect of the amount of damages. Whilst submitted on behalf of the plaintiff that interest is payable on the agreed amount from

[1] 40 of 2002

date of demand, being the date on which the notice in terms of section 3(1) of Act 40 of 2002 was served on the defendants, the date being 7 June 2012.

Defendants' submission:

[8] The defendant's counsel relied on **Takawira v The Minister of Police**[2] in which Splig J and Mlonzi j adopted the view that interest, specifically in cases of wrongful arrest, dealing with unliquidated damages, interest should be reckoned from date of judgment, being the date the amount is "*actually determined*"[3].

Plaintiff's submission:

[9] The plaintiff's counsel argued that the interpretation of Splig J and Mlonzi J was with respect, inconsistence with existing case law, dealing with similar disputes.

[10] The plaintiff's counsel submitted, among others, that the court in **Takawira** incorrectly relied on s 2A (3) which deals with specifically with interest on part of a debt which consists of the present value of a loss which occur in the future.

The Law:

[11] Before the introduction of section 2A[4] (hereinafter referred to as "Act 55 of 1975"), no common law principle or statutory enactment provided for the award of pre-judgment interest on unliquidated damages.[5]

[12] Section 2A reads as follows:

"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,....., shall bear interest as contemplated in s 1.

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[2] Unreported case **[2013] JOL30554 (GSJ).**

[3] In paragraph [56] Splig J states: "I do not agree that the Act can be construed as applying indiscriminately to *all illiquid* claims. On the contrary common sense dictated that the starting point is the date upon which the damages are assessed. The learned magistrate purported to assess them not at date of demand or at date of summons, but at date of judgment. The amount ordered was therefore not an amount that came into existence on any date sooner than the date of judgment-any such amount would have been less if regard is had to the erosion of the value of money. The corollary is that the amount actually determined was not an amount due and payable at any date sooner than the date of judgment."

[4] Supra

[5] **Adel Builders (Pty) Ltd v Thompson 2000 (4) SA 1027 (SCA)** at 1031 at paragraph 11.

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

(3) ....

(4) ....

(5) Notwistanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law,.... may make such an 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 which interst shall run.

(6) ....."

Applying the law to the dispute in this case:

[13] It is general principle that delictual cause of action and the liability for damages arises from the date of delict.[6]

[14] In context of unlawful detention, in **Ngcobo v Minister of Police**[7], Shearer J stated the following:..... *at any given moment during detention there is only one cause of action for damages during the period of detention up to that moment; and that at the conclusion of the period of detention there exist only one cause of action which has assumed its final and complete form at the moment of release."*

[15] I am in agreement with the submission made by the plaintiff that the court in **Takawira,** incorrectly relied on section 2A (3) in coming to the conclusion that the unliquidated damages could not incur interest due to it being undetermined until date of judgment.

[16] Section 2A (3) deals with the consequential damages which occur after but due to the same cause of action.

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[6] See**General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassossiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo 1987 (3) SA 577 (A), Eenden & Another v Pienaar 2001 (1) SA 158 (W)** at 167F, **SA Eagle Insurance CO Ltd v Hartley 1990 (4) SA 833 at 841G-J**

[7] **1978 (4) SA 930 (D)** at 932H-933A

[17] The position in respect of unliquidated damages has been set out in several judgments in our law and in Coetzee AJ in **Du Plooy v Venter Joubert Ing. en Ander**[8] at paragraph [23] states as follows:

" In as far as s 1 do not provide for the calculation of interest on unliquidated debts, Grosskopf JA, prior to s 2A being enacted, in **SA Eagle Insurance Co Ltd v Hartley**[9], remarked as follows:

'.... If a plaintiff through no fault of his own has to wait a substantial period of time to establish his claim is seems unfair that he should be paid in depreciated currency. Of course, in respect of many debts this problem is resolved (or partially resolved) by an order for the payment of interest, and the Prescribed Rates of Interest Act 55 of 1975 is flexible enough to permit the Minister of Justice to prescribe rates of interest which reflect the influence of inflation on the level of rates generally (see s 1(2)). Its application is, however, limited to debts bearing interest (s 1(1)); and it is trite law that there can be no *mora*, and accordingly no *mora* interest in respect of unliquidated claims of damages. See **Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD** at 31-33, a decision which has been consistently applied and followed, also in this Court. It follows that there is no mechanism by which a court can compensate a plaintiff like the present for the ravages of inflation in respect of monetary losses incurred prior to the trial.'

[18] In terms of the Prescribed Rates of Interest Act it is permissible to recover *mora* interest on amounts awarded by a court which, but for such award, were unliquidated.[10] Once judgment is granted such interest 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 earlier- section 2A(2) (a) of Act 55 of 1975.[11] The word "demand" is defined in the Act to mean a written demand setting out the creditor's

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[8] **2013 (2)SA 522 (NCK).**
[9] **1990 (4) SA 833 (A)** at 841G-842A
[10] See unreported case **Kwenda and others v Minister of Safety and Security [2015] JOL 34203(GNP)**
[11] *Supra*

claim in such a manner as to enable the debtor reasonably to assess the quantum thereof.[12]

[19] In the **Kwenda case**, Murphy J accepted that in the particular case, it was reasonably possible for the defendant to assess the quantum once the summons was issued.

[20] In **Eden & Another v Pienaar** [13] referring to the critism in **Hartley's case**[14] the Full Court of the then WLD, stated that the effect of the inserted section 2A, is that; *"the position in our law is now both liquidated and unliquidated debt beat interest (the latter from the date on which payment is demanded or claimed by summons) at the rate prescribed by the Minister of Justice in terms of s 1(2)."*

[21] The Supreme Court of Appeal in **Thorough Breeders Association v Price Waterhouse**[15] it was held that in the absence of a letter of demand, section 2A of Act 55 of 1975, ordained *mora* interest at 15.5% per annum from the date of summons. The court observed that *"if the award was one for mora interest there is no reason why, having regard to s2A of the Act, interest should only run from the date of judgment and not from the date of summons."* [16] In paragraph [79] the court concludes: "*since no demand prior to summons was proved, the date for the commencement for the calculation would therefore be the date upon which summons was served."*

[22] The Supreme Court of Appeal further held, in **Steyn NO v Ronald Bobroff**[17] that *[t]he term mora simply means delay or default. The mora interest provided for in the Act is thus intended to place the creditor, who has not received due payment... in the position that he or she would have occupied had the payment been made*" when it was first requested from the defendant.

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[12] *Supra*
[13] **2001(1) SA 158 (W)** at 197 F
[14] *Supra*
[15] **2001 (4) SA 551(SCA)** at 591-595
[16] The court referred to **Adel Builders Ltd v Thompson** (supra at paragraph [8].
[17] **2013 (2) SA 311 (SCA)** at paragraph [35]

[23] In **Minister of Safety and Security and others v Janse van der Walt and another**[18] the Supreme Court of Appeal ordered the first defendant to pay the interest on the amount of damages awarded at the rate of 15.5% per annum from the date of demand to the date of payment. Similarly the Supreme Court of Appeal in **Woji v The Minister of Police**[19] ordered the defendant to pay interest on the sum of R500 000.00 at the rate of 15.5 % per annum a *tempore morae* from date of demand to date of payment.[20]

[24] Having regard to the above-mentioned case law and the reasoning therein concluding that interest in illiquid claims for damages may be awarded interest a *tempore morae* from the date of demand or summons, whichever is earlier, in terms of section 2A (2)(a) of Act 55 of 1975, it is clear in Takawira case the court in finding that interest on an illiquid claim for damages, can be determined from the date of judgment.

Discretion in terms of section 2A (5):

[25] In the unreported case of **Nel v Minister of Safety and Security**[21] Kubushi J held that: *The default position of the Act is that the amount of every unliquidated debt as determined by any court of law shall bear interest at the prescribed rate a tempore morae, unless a court of law orders otherwise. Where a court deviates from this position, an order that it any make, must appear just in the circumstances of that case."*

[26] In the current matter, I find no circumstances justifying the deviation from the prescribed rate.

Order:

[27] I make the following order:

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[18] **[2015] JOL 32548 (SCA).**

[19] **2015 (1) SACR 409 (SCA)**

[20] See also the unreported case of **Van Rooyen v Minister of Police 2013 JDR 1149 (GNP)** in which Pretorius J referred to **West Rand Estates v New Zealand Insurance Co Ltd AD 173** at 83 where Solomon JA found: "There is no satisfactory reason foe following any other practice, and we think that we should now definitely lay down the rule that mora begins to run from the date of receipt of the letter of demand" .Also **in Van Rensburg v City of Johannesburg 2009 (1) SACR 32 (W)** interest was payable on the awarded amount at the rate of 15.5 % per annum from date of delivery of demand to date of payment.

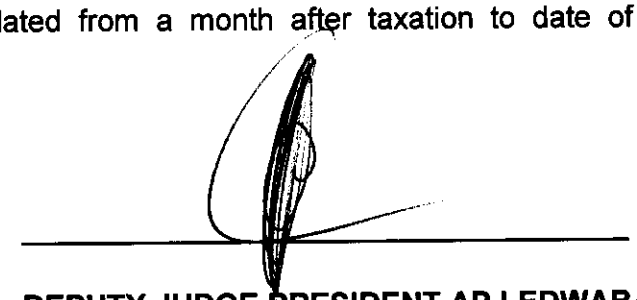
[21] **A1009/2010ZAGPPHC 188 (22 August 2012)**

1. The defendants, jointly and severally, are ordered to pay the plaintiff of the amount of R100 000.00(one Hundred Thousand Rand);

2. to pay interest on the capital amount at the rate of 15.5 % per annum as from the date of 7 June 2012 (date of demand) to date of final payment;

3. to pay the plaintiff's costs of the action, including the qualifying fees of Dr FJA Snyders and Dr Gideon Haasbroek, on the scale between party and party;

4. the costs are payable within one month of taxation, whereafter the taxed amount due to the plaintiff shall accrue interest at the rate of 9% per annum, calculated from a month after taxation to date of final payment.



DEPUTY JUDGE PRESIDENT AP LEDWABA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

Appearances:

For the Plaintiff:	:	Adv SW Davies
Instructed by	:	JW Wessels & Partners Inc.
For the First and Second defendants	:	Adv FM Snyman
Instructed by	:	

HANDED DOWN ON 31 AUGUST 2016.