REPUBLIC OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: **64226/2011**

11/10/2016

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

NBam 11/10/2016

SIGNATURE **DATE**

In the matter between:

STRYDOM BRITZ MOHULATSI INC. **PLAINTIFF**

And

CHRIISTIAAN JOHANNES MOUTON **DEFENDANT**

J U D G M E N T

BAM AJ

[1] The Plaintiff's claim against the Defendant is for payment of fees for legal services rendered to and on behalf of the Defendant in a motor vehicle accident

claim against the Road Accident Fund ("The RAF case"). The Defendant is resisting the claim by way of a counterclaim in terms of which the Plaintiff's fees are to be set off against the Defendant's damages arising from an alleged failure by the Plaintiff to carry out the RAF case mandate professionally.

[2] The Plaintiff's claim on the one hand is supported by a taxed bill of costs in the amount of R135 896.40; which bill was duly served on the Defendant. The Defendant's counterclaim in the amount of R149 527.67 on the other hand, is said to compromise of R31 109.90 in wasted costs and additional legal costs as well as R118 417.77 in lost interest calculated from 31 July 2009 to 13 August 2010 on the amount of R737 710.00 awarded to the Defendant in the RAF case on 13 August 2010, ("the final offer"). The difference between the amounts of the claim and the counterclaim is R13 631.27, which the Defendant now claims from the Plaintiff with costs a *tempore morae* in the event that the counterclaim succeeds.

[3] It is common cause that:

1. The Defendant instructed the Plaintiff to act as his attorneys to institute a claim against the RAF in 2003 after being injured in a motor vehicle accident.

2. The parties entered into a contingency fee agreement.

3. The RAF made an offer of **R325 000.00** in full settlement of the Defendant's claim, ("the initial offer") in July 2009.

4. On 30 July 2009 Mr. Etsebeth, the Defendant and the Defendant's attorney Mr Mohulatsi attended at the offices of Advocate Lopen where a discussion on the settlement ensued with the RAF legal representative Ms Strydom. The defendant had asked Mr Etsebeth to act as a watching brief.

5. The trial of the matter which was set down for the following day, 31 July 2009, was subsequently postponed.

6. The Defendant thereafter terminated Plaintiff's mandate and the Plaintiff was requested to hand over the contents of the RAF case file by Lockets Attorneys in September 2009.

7. On 22 January 2010, Mr Etsebeth wrote another letter requesting the Plaintiff to submit a taxed bill of costs. In this letter, the contingency fee agreement between Plaintiff and Defendant was acknowledged and furthermore an undertaking was made in the following terms:

> *"Having regard to the termination of your mandate by Mr Mouton, our instructions are to place on the record that our client commits himself to payment of your taxed bill in respect of legal services rendered on conclusion of the matter."*

8. The Defendant is now resisting the Plaintiff's claim for payment of the same taxed bill of costs; and has instituted a counterclaim as indicated.

[4] The Court has to decide on two issues. Firstly, it is whether the Plaintiff failed to carry out the RAF mandate in a professional and diligent manner as would be expected of an attorney. Secondly; and in the event of a finding in favour of the Defendant on issue one; whether the Defendant is entitled to claim damages in the form of *mora* interest for such breach. At the trial of this matter, the parties agreed that the Defendant will begin and lead evidence on his defence and on the counterclaim. The Defendant called Mr. Etsebeth as the only witness and the Plaintiff closed its case without leading any evidence.

[5] What must be kept in mind is that the Plaintiff's bill of costs is not being disputed. The Defendant is asking the court to set off the claim amounts against one another and grant him judgment on the difference.

[6] The evidence before court is that Mr. Etsebeth and the Defendant got involved in discussions about the RAF case around June 2009. The Defendant, who is a regular client of Lockets Attorneys indicated that he was not happy with how the claim was being handled. He was particularly concerned about the loss of the use of one of his eyes. With regard to the damages claim, Mr. Etsebeth testified that the reason why the initial offer was so low was because the Plaintiff had failed to secure documents pertaining to the Defendant's business activities, and thus proof in support his portion of the *quantum* (loss of income) was not presented to the RAF. Mr. Etsebeth said that he on the other hand obtained the documents, supplemented the already discovered documents and as such managed to secure a satisfactory settlement amount of **R737 631.27** ("the final offer") which was more than double what was offered initially. He added that the Plaintiff would not have been able to lead evidence on *quantum* on the trial date because they had not obtained the necessary information timeously hence the postponement of the case.

[7] In cross examination, counsel for the Plaintiff presented evidence showing that the very same documents Mr.Etsebeth managed to secure, had been requested from the Defendant on a number of occasions without success. He referred the court to requests for documents made to the Defendant on pages 94 and 97 vol. 1 of the bundle and a letter dated 30 January 2008 from the Plaintiff to the RAF attorneys, Dysons Incorporated, on page 98 pointing out the Defendant's non-co-operation in this regard. Ms Strydom on behalf of the RAF had indicated that they would object to the Defendant's bookkeeper giving evidence of income before and after the accident in the absence of source documents.

[8] Mr Etsebeth also admitted in cross-examination that expert reports were already in place at the time the RAF made the initial offer as appears on pages 239–249 in volume 1 and pages 586,516,542 and 582 in volume 2. He added that before the meeting of 30 July, the Defendant told him that the offer was upsetting and wanted him, Etsebeth, to protect his interests.

[9] With regard to his watching brief, Mr Etsebeth admitted that he was not present all the time during the meeting in advocate Lopen's Chambers, but had felt that

the attorney and counsel supported the initial settlement. This is because he did not hear them say it was not acceptable. Thus it was not because of any positive conduct on their part but because he did not hear them advise the Defendant against accepting the offer.

THE COUNTERCLAIM

[10] It is not clear how the amount of R31 109.90 in wasted and other legal costs was arrived at. It is alleged that Ms Strydom counsel for the RAF had indicated that they would ask for costs occasioned by the postponement of 31 July 2009 but they had not discussed this with the Plaintiff and had not yet submitted a taxed bill, so it was just an estimate by the Defendant. I am satisfied that both parties are in agreement that this amount should be ignored. The other amount of R118 714.44 made up of lost interest is what I will concern myself with going forward. My understanding of the Defendant's explanation regarding this amount is that had the Plaintiff not breached the mandate as described, the RAF would have offered him the amount of R737 711.00 on 31 July 2009 or the court would have awarded him that same amount and since the matter was postponed and he only received this amount on 13 August 2010, he is entitled to claim interest thereon as damages.

[11] I agree with counsel for the Plaintiff that the facts of this matter fall squarely within the ambit of ***Steyn v Ronald Bobroff & Partners [2012] ZASCA 184***. In that case Mrs Steyn, acting on behalf of her minor son, claimed damages against the attorneys because they delayed in prosecuting and finalising the claim against the RAF. The damages were in the form of lost interest on the amount that was finally awarded by the RAF. The court had to answer the question whether it was competent for Mrs Steyn to claim *mora* interest as damages in a matter involving a contract and where the RAF and not the attorney was her debtor. Similarly in this case, the Defendant is requesting the court to award damages in the form of *mora* interest which would have placed him in a better position had the Plaintiff not breached the mandate of conducting his RAF case with diligence and skill expected of an attorney. The Defendant

thus accuses the Plaintiff of having breached a contractual obligation which breached led to the delay in finalising the claim.

[12] The often cited authority on whether breach of a contract can attract delictual liability is that of ***Lillicrap, Wassenar and Partners v Pilkington Brothers (SA) (PTY) LTD 1985 (1) SA 475 (A)***. The case was specifically concerned with whether the breach of a contractual duty to perform professional work with due diligence is per sè a wrongful act for purposes of delictual liability; with the collary that if the breach were negligent, damages could be claimed *ex delicto*. The court decided that, mainly for reasons of policy, it was not desirable to extend the *Aquilian Actum* to the duties subsisting between parties to a contract for professional services. The Plaintiff had instituted action under delict because its contractual remedies had prescribed.

[13] The essence of the *Lillicrap* decision and subsequent cases such *as* ***Durr v ABSA Bank Ltd 1997 (3) SA 448 (SCA)*** is that a Plaintiff cannot rely on the breach of contract alone as wrongful conduct for purposes of a delictual claim. They go further to acknowledge that there are instances where the factual matrix can give rise to both contractual and delictual actions, and this is in instances where the facts pleaded before the court clearly disclose a cause of action in delict. In **Principles of Delict (Juta & CO, 1993)** J Burchell deals with the distinguishing features of delictual and contractual liability and describes a delict as *" a civil wrong to an individual for which damages can be claimed as compensation and for which redress is not usually dependent on a prior contractual understanding to refrain from causing harm"* **(page 9)**. The reluctance to extent delictual liability to the contractual sphere is mainly due to the fact that a contract normally has adequate remedies and parties to a contract expect their reciprocal rights and obligations to be regulated by their agreement.

[14] Like the Plaintiff in *Lillicrap* and *Bobroff supra* the Defendant in this case is asking that the contractual agreement between him and the Plaintiff be circumvented by the application of the law of delict, without having established an independent cause of action in delict. Given the facts of this case, I cannot agree that the Plaintiff acted unprofessionally and without due diligence in the

absence of further evidence as to how a reasonable attorney dealing with personal injury cases would have acted. Once the mandate had been terminated, the new attorney (Mr Etsebeth) had to come on record, collect financial documents and work out the loss of income portion of the claim and finally supplement the discovery as well as attend to the pre-trial conference. All these involve a process that takes time. This is the same process that the Plaintiff had to go through in order to lodge and proof the claim. It is not clear how, under the circumstances it can be said that the Plaintiff did not pursue the RAF claim with the requisite professionalism. By the time the meeting was held at advocate Lopen's chambers, all documents, save for the loss of income evidence, were in the file.

[15] I further take into account that with regard to the loss income portion of the *quantum*, it was the Defendant himself who failed to provide the required source documents to the Plaintiff. That Mr. Etsebeth managed to get hold of this information was probably because after seeing the initial offer, the Defendant realised that he had to furnish that information as a matter of necessity. When the claim was settled on the morning of the trial on 10 August 2010, again through an improved offer of settlement which the Defendant this time around accepted, the amount had increased because proof of loss of income had now been properly submitted. The source documents contained factual evidence which did not need the bookkeeper to be called as an expert witness as the defence contended and the fact is the Defendant failed to submit those to the Plaintiff despite several requests. I find under the circumstances that the Defendant has failed to prove a breach of the mandate given to the Plaintiff on the RAF case.

[16] Turning to the issue of whether the Defendant would have been entitled to *mora* interest, even though the counterclaim was based on breach of contract, the court notes the following:

Firstly, it can never be that the Plaintiff would have received R737 771.00 from the RAF on 31 July 2009 as there was already an offer in place.

Secondly, the initial offer was just that, a proposal that was subject to acceptance and indeed it was rejected and thus fell off.

Thirdly it must be remembered that when the initial offer was rejected by the Defendant, there was still a further opportunity to engage in negotiations or go to trial. The court is aware that the actual claim lodged against the RAF was for R1.3 million, and the Defendant eventually accepted the offer of R737 771.00. This is how RAF matters normally play out. The letter of 22 January 2010 referred to in paragraph [3] sub-8 above clearly states in paragraph 2 thereof that the Plaintiff was to cease any negotiations with the RAF on behalf of the Defendant. This means that while the plaintiff still had the mandate, the matter was still being worked on and eventually would have ended up with another offer or a court order.

[17] *Mora* interest is relevant in the law of damages in *inter alia*, as a measure of damages which is sustained on account of **non-possession of money that is due to the creditor** (my emphasis). In the case ***Crookes Brothers V Regional Land Claims Commissioner for the Province of Mpumalanga [2012] ZASCA 128***, the court ruled in favour of the appellants that they were entitled to *mora* interest because the purchase price was paid later than the agreed date. The court distinguished *mora* interest from interest as a component in the calculation of damages by indicating that in a claim for *mora* interest the claimant is not required to prove any damages because money is already owing to him. *Mora* interest thus presupposes the existence of an underlying principal debt.

[18] Counsel for the Defendant argued that the Defendant's damages were liquidated because they were ascertainable. Thus the amount paid to the Defendant in settlement of the RAF claim had assumed the characteristic of a debt. It is not clear how an offer can become a debt owing to the offeree. The nature of an offer is that it needs to be accepted, failing which it falls off, and also it can be conditional, thus entitling the offeror to withdraw it if certain conditions are not met. That can hardly be said to constitute a debt.

[19] A further difficulty arises when asking the question as to whether the Defendant's claim was with the RAF or the Plaintiff. In the absence of the offer by the RAF, or in the event of rejection of the offer, the Defendant would ordinarily be expected to obtain his remedy against the RAF in court. The court would then determine how much he should be paid and in addition how the interest on the principal amount should be dealt with. Until an order of court is issued, there is no debt to speak of; hence there is no *mora* interest to speak of. Brand JA summarises the position clearly in his supplementary judgment of the ***Bobroff*** case *supra* at paragraph [38] thus:

> *"By contrast, it is clear to me that in this matter interest was not claimed as an accessory or an ancillary obligation to a principal debt. The Road Accident Fund was the appellant's debtor for the amount of the award. The respondent was not. There was therefore no principal debt owing by the respondent. The rate of interest prescribed under the Prescribed Rate of Interest Act therefore simply did not apply. In consequence I agree with the respondent's argument that, absent any evidence that had the appellant received the amount of the award fourteen and a half months earlier, it would have been invested at a certain rate of return, the appellant had failed to establish a quantified claim for damages. For this reason alone – and apart from all the other reasons that appear from the judgment of Bosielo JA – I therefore believe the appeal should fail."*

[20] *Mora* interest also suggests the presence of delay. The creditor with a valid monetary debt is entitled to receive the interest with effect from the date the debt becomes due and payable. In the present case *"the interest is not ancillary or accessory to any principal monetary debt, but it is used as a component in the calculation of damages for alleged breach of a mandate"* - **paragraph 36 *Bobroff* case**.

In the premises it is my view that the Defendant even if he had proved a breach of the RAF mandate, would not have been able to recover any

damages under delict, certainly not *mora interest.* The claim cannot succeed because it is based on an incorrect fusion of remedies under the law of contract and of delict. Litigants should heed the warning of Brand J's opening remarks where he states in **paragraph [32]:**

"..... I should say something about the quantification of the damages claimed by the appellant because it appears to proceed from a premise which is fundamentally flawed. Unless attention is called to this fundamental flaw, it may perpetuate and snare future litigants in the same trap"

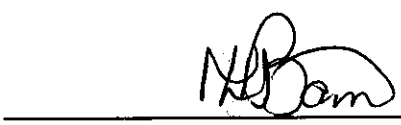
This in my view is one such case.

[21] In light of the above, I make the following Order:

[1] The counter-claim is dismissed.

[2] Judgment is granted in favour of the Plaintiff against the Defendant for:
- Payment of the amount of R135 896-40.
- Interest on the above amount calculated from date of taxation (05 August 2011) to date of payment at the rate of 15.5% per annum.

[3] The Defendant to pay the costs of this action.



BAM AJ

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicants	:	Advocate Sheperd NT
Instructed by	:	Strydom Britz Mohulatsi Incorporated

Counsel for Respondent	:	Advocate West HP
Instructed by	:	Locketts Attorneys C/O Kennie Boonzaaier Attorneys
Date of Hearing	:	07 June 2016
Date of Judgment	:	11 October 2016