In the High Court of South Africa
(South Eastern Cape Local Division)

Case No 2269/99
Delivered:

In the matter between

MERVYN SYDNEY MACKAY — Plaintiff

and

THE LEGAL AID BOARD — Defendant

JUDGMENT

JONES J:

The claim and the counterclaim

The plaintiff is an attorney who practices in Port Elizabeth. He has issued summons against the Legal Aid Board for payment of R163 567.68, being fees for professional work authorized by the Board on behalf of indigent clients and done by him on instructions from the Board at its special instance and request. The total amount claimed is the sum of either the capital amount or the balance of fees allegedly owing for a number of criminal and civil trials conducted by the plaintiff. They are itemized in annexure B to the summons at page 34 of the papers.

Summons was initially issued out of the magistrates' court. Proceedings had reached an advanced stage in that court, to the point of a trial date and pre-

trial consultations. The parties then agreed to a stay of the magistrates' court action so that the matter could proceed afresh in the High Court. They also agreed that the costs of the lower court proceedings be costs in the High Court action.

There were initially 28 claims. Since then, the Board has made payments into court in respect of some of the claims, and these have been uplifted. Further payments have been made which have eliminated further issues. The result is that by the time the trial commenced only a limited number of claims remained in issue and in all of them the amount of the claim is reduced from that stated in Annexure B.

During the course of investigating the plaintiff's claims the Board discovered that it had overpaid some of the plaintiff's claims. It seeks to recover the amount of its overpayments in a counterclaim. The total amount of the counterclaim pleaded by the Board is R3120.70. This includes an overpayment of R85.50 in respect of a client named Makwakazi Mlimi which is not dealt with in the evidence but which the plaintiff concedes. At the commencement of the trial Mr *Scott* applied on behalf the defendant to amend the counterclaim by adding an overpayment in the sum of R858.71 in one of the two cases involving a client by the name of Elliot Daniel Msila. A decision on this amendment was delayed pending discussions between counsel. For reasons that are not clear, those discussions did not take place, agreement on

the amendment was not reached, and I was called upon to hear an opposed application for the amendment on 29 August 2001, some months after the evidence and argument was concluded. The amendment does not prejudice the plaintiff. It turns out that the opposition is in respect of costs only. The amendment is accordingly allowed by the inclusion of the additional amounts referred to in the notice of amendment. I shall revert to the costs of the opposed application for an amendment at the conclusion of this judgment.

The issues

The result is that the items in dispute as set out in Annexure B to the particulars of claim no longer reflect the disputes upon which the parties come to trial. The following is a shortened version of Annexure B which sets out the remaining issues as outlined by Mr *van der Linde* for the plaintiff in his opening address. It also includes items in the amendment to the counterclaim:

Claim No	Client	Claim	Counterclaim
2	Luyande Dinge	513.00	427.50
3	Philip Vuyani	85.50	
4	Thabo Windvoel	940.50	
5	Luvuyo Mthuwazi	156.75	
6	Bongani Ntayi	85.50	
7	Denver Williams	0	413.20
11	Shaun Nel (CC)	0	85.50
14	Simpiwe Zimeno	85.50	541.50
16	Boy W Molepo (CC)	0	712.50
19	Bhunca Nylminya	541.00	513.00
21	Xolani M Madope	669.75	85.50
23	Sandile Jeffrey Qolo	4800.42	
24	Elliot Daniel Msila	2188.31	
25	Themba Magenuka	22497.77	
26	Mzwanidle Coko	4104.00	

27	Elliot Daniel Msila	14973,31	858.71
	Makwakazi Mlimi		85.50

It is common cause that the Board instructed the plaintiff to act on behalf of the various legal aid clients in each of these 16 cases and the Mlimi case, and that the plaintiff accepted the instructions. An enforceable contract came into being between the parties which required the plaintiff to do the work he was instructed to do on behalf of each legal aid client and which obliged the Board to pay the plaintiff the fees to which he is entitled for that work. Each contract contains a written and signed undertaking by the plaintiff "to deal with this brief in accordance with the provisions of the current Legal Aid Guide". Extracts from the current legal aid guide (the 1996 version) are reproduced in annexure B to the minute of the pre-trial conference dated 24 April 2001. They include the standard tariff of fees in criminal matters, tariffs for counsel and attorneys' fees in civil trials and appeals in the High Court, and other provisions setting out the basis for remuneration of practitioners and the terms and conditions upon which a mandate to a legal practitioner is given and accepted. I shall refer to the detailed provisions of the legal aid guide as and when necessary.

In each of the 16 outstanding cases the plaintiff submitted accounts for payment of fees. The Board denies that it is liable to pay the amounts claimed for various reasons, and in some instances makes a counterclaim for an overpayment. In analysing the issues in argument, Mr *Scott* on behalf of the Board, has grouped the various cases into four categories, and submits

that these categories contain four separate issues which I have to determine. I find this a convenient way to proceed with this judgment. Mr *Scott*'s four categories are:

1. whether the instructions from the Board, read with the standard tariff in criminal matters, entitle an attorney to charge a fee on postponement in a criminal matter in circumstances where he was not present when the matter was called in court but where he has either arranged the postponement in advance with the prosecutor or the magistrate, or where he has obtained the assistance of another attorney to stand in for him when the case is postponed. In some instances (for example, claim No 2) the issue is broadened to include the plaintiff's entitlement to a finalization fee where he was not present when the case was finally disposed of and did none of the work for which a finalization fee is paid;

2. whether an attorney is entitled to payment of his bill of costs as taxed by the taxing master of the High Court without the bill being scrutinized by the Board, checked, and found by it to be correct, or whether the Board is entitled to check the attorney's account prior to payment and regardless of whether or not it is taxed, and to disallow items in the account where the attorney

is not entitled to payment in terms of his instructions from the Board or in terms of the legal aid guide;

3. whether or not the Board is entitled to deduct 20% from an attorney's account or, in the case of an attorney fulfilling the role of counsel, 25% from his account, with the result that the attorney's fee in civil matters is reduced in legal aid matters by 20% or 25% as the case may be; and

4. in respect of the Magenuka matter (claim 25) whether a cession to the plaintiff of Attorney Vabaza's claim against the Board for fees entitles the plaintiff to payment of the amount outstanding in respect of that claim.

The first issue: fees for postponements in criminal matters

The issue of an attorney's entitlement to a postponement or finalization fee where he is not present in court to attend to the matter when the case is called and dealt with arises in claims Nos 2, 3, 4, 5, 6, 7, 11, 14, 16, 19 and 21.

In each of these cases the plaintiff has charged fees which the Board refuses to pay. It is common cause that the plaintiff was not present in court when these matters were called for postponement. He had either

- arranged for another attorney to stand in for him, or
- sent his candidate attorney to arrange the postponement, or
- called at court early in the morning and arranged the postponement either with the magistrate, at the same time excusing himself from attendance, or, if the magistrate had not yet arrived, arranged the postponement with the prosecutor who would usually notify the magistrate that he had been present.

The plaintiff contends that in acting in one of these ways he attended to the postponement, i.e. he did the work he was required to do, and that he is accordingly entitled to the standard postponement fee laid down by the tariff. In order to justify his claim he has given detailed evidence of how his practice works, how postponements are dealt with in the various magistrates' courts in Port Elizabeth, and the long standing practice or custom of attorneys in Port Elizabeth in respect of arranging and charging for postponements.

The plaintiff has operated a one-man practice in Port Elizabeth since 1974. He does not employ professional assistants, but frequently has candidate attorneys. He does about 99% of his work in the regional and district magistrates' courts in the city and its close environs. Unlike the rule of practice in the High Courts and at the Bar, it is permissible and indeed common practice for attorneys to undertake cases in different courts on the same date, provided, I suppose, that this is properly managed. The plaintiff

explains that he may therefore have trials set down on the same day before the magistrates' courts at the New Law Courts in Govan Mbeki Avenue, the magistrates' courts at New Brighton, and the magistrates' courts at Gelvendale, all busy court centres in Port Elizabeth which are considerable distances from each other. He may also have a case in a neighbouring town, for example Humansdorp. In addition, he may have a number of cases set down for postponement in one or more of these courts. He has explained how he manages to keep track of all of his cases by running an efficient filing system, and by efficient entries in his desk and court diaries made by himself and his secretarial staff.

The volume of criminal work in the magistrates' courts is large. In the regional courts many more cases are set down per day than can be commenced, let alone completed, and a similar position obtains in many district courts as well. Since the Interim Constitution and subsequently the Constitution imposed a duty on the State to provide criminal defences to persons charged in the criminal courts who are not able to pay for the services of an attorney legal aid is provided in a large number of cases. A busy criminal lawyer who has private clients and who accepts work from the Legal Aid Board will therefore have a considerable number of cases at any one time, and he is likely to attend at more than one of the court centres on a daily basis.

In these circumstances, keeping abreast of cases being remanded because they are for some reason not yet ready for hearing can be a nightmare.

Cases can be remanded as often as 10 or 15 times before they are disposed of. The volume of postponements is such that in some centres special courts are set up to deal with postponements only. They are called channelling courts. Examples are court 20 at the New Law Courts and court 23 at New Brighton. They may each deal with as many as 80 postponements a day. The plaintiff explains that an attorney busy with trials cannot afford to spend the day at a channelling court waiting for his cases to be called and postponed. This is not viable at the ordinary postponement fee, particularly the postponement fee in terms of the legal aid tariff, and would only occur if a private client were prepared to pay full fees to retain the services of his attorney for the whole day. In order to overcome the practical difficulties of having to attend to postponements in one court and trials in another, the plaintiff says that there has developed over the years a longstanding practice among the Port Elizabeth attorneys to arrange their postponements *in absentia*. The plaintiff says that an attorney usually does this in one of two ways. Firstly, he would call on the magistrate in the morning before court commences to arrange postponements in advance and to excuse himself from being present when his cases are called in court. If the magistrate were not yet present and hence unable to excuse the attorney from attendance himself, he would make the necessary arrangement with the prosecutor. The second way is for an attorney to ask a colleague who happens to be attending that court and with whom he has a good relationship to appear on his behalf when his case is called, and, as it were, earn his fee for him. Countless

attorneys in countless numbers of cases have used these methods over the years. The plaintiff says that in all such cases, whether the client is a paying client or a legal aid client, the practice is for the attorney to charge a postponement fee.

Mr *Scott* argues on behalf of the Board that a practitioner who represents a client in criminal or civil litigation is required by the rules of ethics which govern his profession to attend the proceedings. He submits that his presence is required at all stages of the hearing, including even formal postponements. He cites Lewis, *Legal Ethics,* page 153 (paragraph 60) in support. He submits that if by arrangement the attorney is not personally present in court, he is not entitled to charge a fee.

The main thrust of Mr *Scott*'s argument is that an attorney's entitlement to any fee in a legal aid matter, including a postponement fee, depends on the terms of his contract with the Legal Aid Board, and must be viewed in the light of the spirit and the plain meaning of the wording of his contract and also the legislation which regulates legal aid. The tariff of fees set out in the legal aid guide is incorporated in the contract. The detailed tariff for criminal cases is headed the *proposed* standard tariff for criminal matters, but the parties accept that it lays down the applicable tariff. It provides for

(a) a fee of R75.00 in the district court, the regional court and

the High Court, irrespective of the time occupied, in the case of

> postponement for any reason, which reason must be described, other than the unavailability of the practitioner instructed by the Board and where the postponement is not subsequent to the hearing, on that day, of evidence and/or argument (other than argument as to the postponement);

(b) an hourly fee subject to a maximum of R250.00 per day in the district court, the regional court and the High Court in the case of

> adjournment to a subsequent date after the hearing of evidence and/or argument on the merits of the substantive matter;

(c) in the district court, the regional court and the High Court, a fee of R75.00 in respect of bail and other interlocutory applications if unopposed and an hourly fee subject to a maximum of R250.00 per day if opposed, subject to certain conditions; and

(d) a fee (called a finalization fee) of R550 in the district court, a fee of R725.00 in the regional court, and a fee of between R1000 and R1800 in the High Court depending on years of experience

> on the final day spent in execution of the Board's instructions, including the taking of instructions originally and all correspondence, administration, attendances and consultations.

The legal aid guide does not specify that counsel and attorneys acting in criminal cases must attend court in person and be physically present to deal with their cases in order to earn their fees. But Mr *Scott* is in my opinion correct when he submits that this is necessarily implicit in the wording and spirit of the legal aid guide read as a whole. The mandate from the Board is to represent the legal aid client in court. This is unquestionably so from the nature of the work described by the guide in the case of fees for *opposed* bail applications, cases where the matter is adjourned after *evidence* or *argument* on the merits, cases where the finalization fee is charged after the final day *spent in execution of the Board's instructions* (when the practitioner is also recompensed for taking instructions originally and all correspondence, administration, *other attendances* and consultations) and postponements *where argument on the question of the postponement is heard*. Mr *Scott* submits that the same applies to the case of other postponements as well. I agree. I can find no justification in the wording or the intention of the legal aid guide for treating attendances for an ordinary postponement any differently. The qualification in the guide that the postponement fee of R75.00 is payable *irrespective of the time occupied* implies that some time is occupied in the postponement of the matter. An attorney does not take up any time at all in a postponement if it is done *in absentia*.

Mr *Van der Linde* argues on behalf of the plaintiff that an attorney fulfils his mandate if he achieves the result which his mandate is designed to bring

about. In the case of postponements neither the instructions given by the Board nor the legal aid guide spell out how he is to achieve the postponement. He need not be physically present if he achieves the postponement in some other acceptable way. The accepted customs and usages obtaining in his profession are imported into the mandate for the arrangement of postponements. In arranging the postponements in this case the plaintiff has placed the infrastructure of his professional practice at the disposal of the legal aid client. He has used his system, his staff and often his own time and endeavours to have the cases postponed. He has in fact done the work and for that reason he is entitled to the fee.

Mr *Van der Linde* relies, then, on the custom or usage or practice to which the plaintiff testified. I do not see how the practice of arranging postponements to be dealt with in the absence of the attorney, whether in the ways deposed to by the plaintiff or in any other way such as by telephone or facsimile transmission or letter or e-mail, can impose upon the Board an obligation to pay a fee for an attendance at court where there has not been an attendance at court. I believe that an attorney who avails himself of this practice in order to arrange his postponements acts efficiently and appropriately. But I also believe that when he does so he must do without a postponement fee, at least in a legal aid matter where his entitlement to fees is regulated by the legal aid tariff. I do not think that this is unfair. In the present matters, the plaintiff was not available for the postponement hearings. He had other professional

commitments in other courts for which he earned other professional fees. He arranged for the postponements to be ordered *in absentia* in order to earn other fees in other courts. His unavailability was recorded in the record as the reason for some of the postponements. True, this was not the reason for the postponement in all cases. Some had to be postponed for other reasons regardless of the plaintiff's availability. But in all cases the plaintiff was busy with other matters in other courts when the postponements were ordered. I believe that the underlying spirit and intention of the legal aid guide, and the legislation which is its source, is that fees are not chargeable in these circumstances. The attorney will in due course charge a trial fee or finalization fee, part of which is designed to cover taking instructions originally and all correspondence, administration, other attendances (which presumably are not covered by the attendance fees for which specific provision is made) and consultations. This should be regarded as including recompense for going to court early to arrange a postponement *in absentia*.

Legal aid is rendered to give content to the right to a fair trial. It gives expression to the constitutional duty imposed on the State to prevent substantial injustice in cases where accused persons are unable to provide themselves with legal representation. They are to be furnished with legal representation at State expense. See sections 25(1)(c) and 25(1)(e) of the Interim Constitution, Act 200 of 1993, and sections 35(2)(c) and 35(3)(g) of the Constitution, Act 108 of 1996. The State fulfils this duty through the

Board. The Board provides legal representation at public expense. In such cases the legal profession has, by tradition, shared in the financial burden. The avoidance of substantial injustice to the indigent has frequently involved self-sacrifice by members of the legal profession. Legal practitioners who undertake work from the legal aid board today do so in the same spirit as work undertaken *pro bono* or *pro Deo* or *pro amico,* or as *amicus curiae,* or *in forma pauperis.* I cannot believe that these traditions must be disregarded because the Constitution now imposes a duty on the State to provide legal representation. The traditions of the profession are relevant and important background to the interpretation of contracts between the Board and the legal profession. In *Singh and others* v *South Central Local Councils and others* [1999] 2 All SA 578 (LCC) Dobson J says, with reference to the exercise of a judicial discretion on costs in a legal aid matter,:

> In deciding on the costs order relating to the recovery of legal aid costs, this Court must exercise its wide discretion afresh. There are particular factors which it must consider which are specific to the type of order under consideration here. Firstly and most importantly, when dealing with legal aid, one is not dealing with the costs of another party, but with scarce public funds. Secondly, those funds are made available to lawyers in the context of a relationship of trust and good faith as between the lawyers and the legal aid grantor.

I think that in interpreting a contract regulating a lawyer's entitlement to fees for legal aid work, the fact that one is dealing with scarce public funds is no less important, and also the fact that the lawyers who receive those fees do so in the spirit of the traditions of their profession relating to work done *pro Deo*

and the like. These two considerations in my view point strongly to an interpretation which does not permit charging a fee for an attendance in court in a case where there has not been an attendance.

I am also of the view that the legal aid guide precludes the plaintiff from arranging with a colleague to stand in for him. This amounts to a transfer of instructions to another practitioner for the purposes of the postponement. Paragraph 16 of the guide makes specific provision for the non-transmissibility of instructions. It says:

> 1 Roster instructions and instructions by applicants' own choice are issued to an individual practitioner and upon acceptance thereof a contract between the individual and the Legal Aid Board is completed;
>
> 2 It follows that a legal aid instruction may only be transferred to another legal practitioner with the prior approval of the Director of the Legal Aid Board.
>
> 3 A candidate attorney may on behalf of the principal to whom he is articled, carry out an instruction. Carrying out of an instruction by a candidate attorney is not regarded as a transfer of an instruction. The candidate attorney may act only on behalf of his own principal and not on behalf of other partners/directors of his principal's firm. In addition he may only appear in cases in which he is qualified.
>
> 4 Cases of unauthorised transfer of legal instructions must be brought to the attention of the Director who may order that notice be given for the removal of the ceding partner's name from the roster.
>
> 5 State Prosecutors are required in certain cases to confirm the identity of the practitioner/candidate attorney who appeared in the matter.

An illustration of an attorney getting a colleague to stand in for him is claim 2. The plaintiff was instructed to defend one Luyanda Dinge on a charge of attempted murder and to bring a bail application for him. He submitted an account for R969.00 which is made up of the following items:

To attending court 31/10/97, 27/11/97, 27/11/97, 28/11/97, 7/01/98	R300.00
Trial fee 11/02/98	R550.00
Add VAT	R119.00
Due by you to us	R969.00

The record of the proceedings reflects that the plaintiff did not attend court on any of the dates set out in the statement. The magistrate's notes say he was absent on 31/10/97. Attorney Vabaza attended on all other occasions.

The record shows that Attorney Vabaza also moved a bail application. The plaintiff's evidence is that he does not do opposed bail applications in legal aid cases because the fee is inadequate. If bail is opposed the client must either pay ordinary fees or get the services of another attorney to bring the application. He takes the attitude that because an official once employed by the Board in Port Elizabeth, a Ms van Hall, is aware that he does not do opposed bail applications in legal aid cases, the Board accepts this when giving instructions to him, with the result that opposed bail applications are implicitly excluded when he is instructed. That cannot be right. In the present case the Board's written letter of instruction addressed to the plaintiff specifically instructs him to bring a bail application. There are no

qualifications. The plaintiff accepted the instructions without qualification. He signed the document in question (page 92 of the papers) and sent it back to the Board. The plaintiff's evidence is that on 28 November 1998 Mr Vabaza did the bail application, for which the client and not the Board paid him a fee. The plaintiff did not attend court on that day. After bail was fixed, the matter was postponed to 7 January 1999. The plaintiff has charged a postponement fee for 28 November 1998 because, after Mr Vabaza had attended to the bail application, he ceased acting for the client as a privately briefed attorney, and reverted to his arrangement with the plaintiff in terms of which he stood in for him as a legal aid attorney. This is because of the plaintiff's interest in the proceedings at that stage, an interest limited to fixing the future trial date.

The trial fee is what is called a finalization fee. It becomes due when the case against the accused is finally disposed of. It is payable on the final day spent in executing the Board's instructions. In this instance the case was finally disposed of on 11 February 1998 when the charge was withdrawn in the plaintiff's absence. The plaintiff spent no time in executing the Board's instructions. He set aside no time for this purpose. He did not reserve the day or any part of it for the case.

The Board has paid an amount of R427.50. The plaintiff claims the balance of R513.00. The Director of Legal Aid was not advised of the arrangement between the plaintiff and Attorney Vabaza, and he did not authorize or ratify a transfer of instructions. The Board now considers that it should have paid

nothing at all, and claims back the sum of R427.50 as part of its counterclaim.

Mr *Van der Linde* argues on behalf of the plaintiff that an arrangement in terms of which one attorney stands in for another when his case is postponed does not amount to a transfer of instructions from one practitioner to another within the meaning of the legal aid guide. I do not see how it can be anything else. I can find no basis for concluding that for a transfer to be hit by the provisions of regulation 16 it must be an absolute transfer, as where an attorney passes a case on to another and does not ever come back into it. An attorney transfers his instructions if he passes the case on to another practitioner to do any legal work in connection with the case which he was instructed to do himself. This includes a postponement. There is nothing in the language of paragraph 16 which suggests that postponements are excluded, or that the Board was ever party to an agreement that they be treated differently. Indeed, this is conceded by the plaintiff during cross-examination on this claim. His evidence is:

> Had I given my instruction from the Board to Mr Vabaza and said to him, "Here Mr Vabaza, you submit this to the Board in your name. Tell them you appeared on my behalf," the response Mr Vabaza will get, which I have received time and again, is, "You Mr Vabaza, were not instructed by us, therefore we cannot pay you," and if I submit the same account and say Mr Vabaza appeared on my behalf, they will say, "You Mr MacKay, we cannot pay because you did not appear."
>
> Record 154(25)-155(5)

In the light of this evidence there is no room for the contention that the

practice deposed to by the plaintiff of attorneys standing in for each other was imported into the Board's instructions by necessary implication. The evidence is an explicit recognition of the contrary. It was to the knowledge of the plaintiff specifically excluded by the provisions of the legal aid guide, and the officials of the Board had made it plain to him that they insisted on strict compliance with the legal aid guide in that regard.

In claims 6 (Bongani Ntayi) and 14 (Simpiwe Zimeno) the plaintiff sent a candidate attorney to attend to the postponement on his behalf, and in claim 19 (Boy Molepu) the candidate attorney attended when the matter was finally disposed of. Representation by a candidate attorney is permissible in terms of the legal aid guide and is not regarded as a transfer of instructions, but the candidate attorney must be qualified to appear in the matter. The legal aid guide is specific in this regard. In claims 6, 14 and 19, the candidate attorney had no right of appearance. He could not and did not represent the client at the hearing when the matter was dealt with in court. The position is no different from an attorney sending his secretary to court with a client. There is no basis whatever upon which he can charge a professional fee in these circumstances.

In claim No 3 (Philip Vuyane) the Board declined to pay the postponement fee plus VAT (R85.50) because *ex facie* the documentation the fee claimed was in respect of an appearance which was before legal aid was granted and the

plaintiff was instructed. The legal aid guide precludes the Board from paying a fee for work done before the legal aid instruction is given, unless special authorization is given, which was not done in this case (paragraph 5.18.4(e) of the legal aid guide). The plaintiff explains that he must have received instructions by telefax before he received the formal instruction in the post. But this is reconstruction. In effect, the plaintiff's case is that he must have received some form of instruction from the Board before the appearance because otherwise he would not have charged a fee. This is contrary to the express provisions of the guide which provides that no fees may be charged for work which preceded the date indicated on the Board's instruction form LA2. It also begs the question, and it does not allow for the possibility of the fee having been charged in error. The evidence as a whole shows that fees were sometimes charged in error and leads to the conclusion that error is a real possibility which cannot be excluded. Indeed, in claim No 11 the plaintiff concedes a counterclaim where he mistakenly charged a fee for work done before he was instructed by the Board. In the circumstances I have no alternative but to hold that the plaintiff has not discharged the onus in respect of this claim.

My conclusion is that the plaintiff has failed to discharge the onus of proving his entitlement to a fee in all instances where he has claimed payment of a postponement fee or a finalization fee where he did not appear in court in person when the postponement was ordered or the matter was finalized. In all cases where the Board has paid him a fee in these circumstances and

seeks to recover the amount paid in its counterclaim, the Board has proved that the payment was not due and that it is entitled to repayment. Indeed, the plaintiff concedes a large number of the items in the counterclaim. The result is that the plaintiff's claims in claims Nos 2, 3, 4, 5, 6, 14, 19 and 21 must be dismissed, and the counterclaim in respect of claims Nos 2, 7, 11, 14, 16, 19, 21, and 27 and the claim of Makwakazi Mlimi succeeds.

Mr *Scott* on behalf of the defendant has questioned the ethics of charging a fee for attending to a postponement without being present to represent the client at the postponement. The propriety of a lawyer charging a fee when not in attendance has long been the subject of debate. As long ago as 1882 WS Gilbert, in Gilbert and Sullivan's *Iolanthe,* places the following satirical lyric in the mouth of the Lord Chancellor of England as a description of how he came to progress to high judicial office:

> When I went to the Bar as a very young man
> (Said I to myself – said I),
> I'll work on a new and original plan
> (Said I to myself – said I),
> …
> My learned profession I'll never disgrace
> By taking a fee with a grin on my face,
> When I haven't been there to attend to the case
> (Said I to myself, said I!)

I understand the lyric to express criticism, in the Gilbertian manner, of the practice of senior counsel in England charging fees for a number of cases, all running simultaneously in different courts with a junior in each court, where the senior flits from court to court to cross-examine a witness in one case,

then to address the court in another, leaving his junior in some instances to deal with the matter virtually or perhaps entirely in the absence of his leader. It is not generally accepted practice in our courts, in modern times at any rate, for senior counsel to charge fees where he has not been there to attend to the case, unless he has set aside the time to do. Nor, as far as I am aware, has it been generally accepted practice in our courts for counsel or attorneys to charge a postponement fee without being there to move or consent to the postponement.

This is not a disciplinary hearing at which the focus is upon allegations of unethical conduct. Although Mr *Scott* raised the point, it was not as fully canvassed in evidence and it was not as fully dealt with in argument as if it were a disciplinary hearing. But the point has been raised, and I have listened with disquiet to evidence of a “practice” or “tradition” in the magistrates’ courts in Port Elizabeth of legal practitioners charging attendance fees when not in attendance. I have also listened with disquiet to evidence of the plaintiff accepting legal aid instructions which include bringing a bail application and then refusing to do an opposed bail application unless a greater fee than the legal aid fee is paid directly to him by the client.

I believe that I should do more than voice disquiet. I should express my disapproval. This “practice” or “tradition” has no part in the relationship of trust and good faith between legal practitioner and legal aid grantor in terms of

which scarce public funds are made available to the legal practitioner as his fee, (*Singh and others* v *South Central Local Councils and others, supra*). Considerations of trust and good faith apart, I think that it is improper to charge a fee for court work, including postponements, where counsel or attorney has not attended court or reserved his time to do so. I further think that it is improper for counsel or attorney to accept a legal aid instruction to do a bail application, and then to refuse to do the bail application unless the client is prepared to become a paying client for the purposes of bail. The justification offered - that the legal aid fee for opposed bail applications is inadequate – is not proper justification. A practitioner who accepts legal aid work must take the good with the bad. If he is not prepared to do so, he should not take it at all.

There is a further matter of which I disapprove. I have already quoted a passage from the plaintiff's evidence about charging fees where one attorney stands in for another, but I shall quote it again. The plaintiff said:

> Had I given my instruction from the Board to Mr Vabaza and said to him, "Here Mr Vabaza, you submit this to the Board in your name. Tell them you appeared on my behalf," the response Mr Vabaza will get, which I have received time and again, is, "You Mr Vabaza, were not instructed by us, therefore we cannot pay you," and if I submit the same account and say Mr Vabaza appeared on my behalf, they will say, "You Mr MacKay, we cannot pay because you did not appear."

The plaintiff acknowledges that he knew all along that the legal aid board would not, without prior approval, pay a fee where an attorney stands in for

the attorney instructed by the board. He says that it was nevertheless his practice to get colleagues to stand in for him and to charge fees in these circumstances, obviously without disclosing the true facts to the board. Needless to say, this conduct also merits censure.

The second issue – whether or not an attorney is entitled to a fee because it is taxed by the taxing master, and irrespective of whether it is in terms of the legal aid instructions or the legal aid guide.

The argument by the plaintiff appears to be that once the taxing master has taxed an attorney and client bill, the client is obliged to pay it. This is a *non sequitur*. Taxation establishes that the fees charged by an attorney are reasonable. It also liquidates the fee. Where the contract between attorney and client is for payment of the attorney's usual fees, or fees which must be objectively determined as reasonable, and the client objects to the fees charged because he considers that they are excessive, the attorney's remedy is to have his bill taxed. The client will be obliged to pay the taxed fee. But taxation does not override an enforceable contract between the parties, unless the agreed fee is so unreasonable as to be unconscionable and hence *contra bonos mores* (in which event the contract is not enforceable). Thus in *Muller* v *The Master and others* 1992 (4) SA 277 (T) Preiss J (at 285F-G)

issued the following *declarator* by the full court after considering the authorities:

> Where a Taxing Officer of the Supreme Court taxes a bill of costs on an attorney and own client scale in terms of the provisions of s 73 of the Insolvency Act 24 of 1936 as amended in circumstances where the client, a trustee duly authorised so to do, and his attorney have agreed upon a tariff or scale of fees, the Taxing Officer is obliged to give effect to the agreement, provided:
>
> 1) the services claimed have been rendered;
> 2) the disbursements claimed have been made; and
> 3) the trustee is not thereby overreached.

See also *Mort NO* v *Henry Shields-Chiat* 2001 (1) SA 464 (C), *Ben McDonald Inc and Another* v *Rudolph and another* 1997 (4) SA 252 (T), *Composting Engineering (Pty) Ltd* v *The Taxing Master* 1985 (3) SA 249 (C) and *Botha* v *Themistocleous* 1966 (1) SA 107 (T).

Thus, the client is not bound to pay items in the taxed bill where the work was not done or where the items are included in the bill in error. He may not be obliged to pay for work even if it was done, where for example the contract with the client excludes incurring disbursements for the services of expert witnesses without specific authorization. An attorney who does not get specific authorization will not be entitled to recover those disbursements, whether or not they are reflected in the taxed bill of costs. The position in a contract with the Legal Aid Board is no different. The example of expert witnesses is taken from paragraph 5.7.1 of the legal aid guide, which requires express authorization before expert witnesses are engaged.

In accepting instructions from the Board, the plaintiff agreed to deal with his brief in accordance with the provisions of the legal aid guide. Paragraph 5 of the legal aid guide lays down the details which must be incorporated in the accounts he submits to the Board for payment. The plaintiff is contractually bound to follow the agreed format. Paragraph 5.18. 4 of the guide provides that if the account is in order, the Board must pay the attorney who must in turn pay the correspondent or advocate or witnesses, if any. It specifically excludes certain kinds of work from an attorney's account, such as work done in connection with getting instructions from the Board and work done before the date upon which instructions are given by the Board in terms of the Board's formal instruction document (form LA2). Clearly, if the account is not in order or if excluded items are contained in an account, the Board is not obliged to pay it. Thus, paragraph 5.18.6 says that mistakes in an attorney's account or items not allowed will be recorded by the Board on the duplicate of the account, and the duplicate of the account together with the Board's cheque, obviously for the balance, will be returned to the attorney.

There is no suggestion that any of these provisions are unreasonable or unconscionable or that they place the legal practitioner at some kind of unfair disadvantage from which he requires protection. They are all enforceable terms of a valid contract. They bind the plaintiff. The Board is accordingly entitled to check the plaintiff's account, record any items disallowed in terms of the contract on the duplicate account, and send him a cheque for the

balance.

The plaintiff's accounts in claims 23 (Sanidle Jeffrey Qolo), 25 (Temba Magenuka) and 26 (Mzwandile Coko) were submitted to the Board. The Board subjected them to its ordinary checking procedure, rejected certain items as incorrect, and it paid or tendered to pay the portion of the account found to be correct. The plaintiff did not choose to refer the items which were disallowed to the Law Society. Instead he taxed the bills. He also taxed bills in claims 24 and 27 (both of which involve the client Elliot Daniel Msila). He gave notice of the taxations in items 23, 25, 26 and 28 to the Board, but not in the Msila matters.

In *ex parte MJ Silver, Rothbart and Cohen*: *in re Local Macademia Industries BPK (in likwidasie)* 1996 (4) SA 633 (T) the court held that a party is not bound by taxation of a bill of costs if he is not a party to the taxation. If the plaintiff wishes to tax a bill before the taxing master which the Board is expected to pay, fairness requires that he should at least give notice of the taxation to the Board. I mention in passing that whether or not the Board is given notice, it is not the client for the purposes of the litigation. But it is in the position of the client for the purposes of payment. Mr *van der Linde* argues that the Board is not a party to the litigation, and enjoys no rights under the rules of court with respect to taxation of a bill of costs. This argument is self-defeating. If the Board has no rights on taxation it has no obligations. It is not

obliged to pay a bill just because it has been taxed, particularly if the rules of taxation deny it a right to be heard on taxation. The Board's obligation is to pay the practitioner what it agreed to pay the practitioner. The agreement as amplified by the legal aid guide enables the Board to check the practitioner's account, to disallow incorrect items, and to pay the balance. Furthermore, it provides the practitioner with the special remedy of referring any dispute to its professional body. Paragraphs 5.18. 7 & 8 provide:

> 7. In the event of a dispute between a legal practitioner and the Board over any aspect or item of an account or the refusal by the Board to pay the account or any part thereof, the matter shall be referred to the provincial Law Society or bar council concerned for resolution. The Director must receive reasonable notice in writing of the date of hearing so as to submit his comment to the Law Society or bar council should he choose to do so.
> 8. Pending finalisation of any dispute relating to account items referred to in par 5.18.7 or any ethical or disciplinary matter persuant (*sic*) to such dispute, the Board shall be entitled to withhold any monies due to such practitioner.

This remedy does not, in my view, exclude any of the practitioner's other common laws remedies, and it does not amount to an arbitration agreement which binds the parties to accept the professional body's decision.

In the result, I am satisfied that taxation does not oblige the Board to pay the taxed amount of the bill regardless of whether or not that amount differs from the amount agreed to by the Board and the practitioner.

The third issue: whether or not the plaintiff is obliged to give up 20% of his ordinary fees in legal aid matters where he acts as an attorney, and 25% where he is briefed as counsel.

The question whether the plaintiff must give up a portion of his fees in legal aid matters depends, once again, on the terms of the contract between the plaintiff and the Board. I have already had occasion to refer to the tradition in the legal profession of shouldering some or all of the financial burden in order to prevent substantial injustice in cases where the indigent find themselves without legal representation. The current legal aid guide imposes a contractual obligation upon practitioners who do legal aid work to share the financial burden by accepting less than their ordinary fees, an obligation which, I would have thought, the legal profession readily embraces. I think that it probably holds out more benefits for the legal profession than burdens. No practitioner is obliged to undertake legal aid work if he or she is not prepared to forego a portion of his or her fees.

Annexure E of the legal aid guide lays down the tariff of fees payable to attorneys in civil cases. It provides for special fees in undefended divorce actions and rule 43 applications. For the rest, it specifically provides for a fee in accordance with the current statutory tariff of the Appellate Division of the Supreme Court, now the Supreme Court of Appeal, or the current statutory tariff for the Supreme Court, now the High Court, or the current statutory tariff

for the magistrates' courts, as the case may be, less 20%. Similarly, Annexure F sets out the tariff of fees payable to advocates for legal aid work. Special fees are set for certain kinds of work, such as undefended divorces. In other cases, the procedure is for counsel to charge his ordinary fees which are submitted to the Bar's taxing secretary. The taxing secretary must then tax counsel's fees, and, once he has done so, he must certify that they are fair and reasonable. Paragraph 6.5(f) of the annexure to the legal aid guide specifically provides that counsel must then receive an amount equal to 75% of the fee certified by the Bar's taxing secretary.

When the plaintiff accepted legal aid instructions in claims 23, 24, 25, 26, and 27 he therefore agreed in terms to give up 20% of his fees when acting as attorney, and 25% when he fulfils the role of counsel. No sensible argument is adduced for not holding him to his agreement. The plaintiff suggests that claim No 26 is different from what it appears to be and that he acted in reality as the attorney. He may well have done some of the work normally done by an attorney. But he fulfilled the role of counsel; he was, according to all the documentation, instructed and briefed throughout by an attorney; and he taxed and presented his account as if he were counsel. I can see no reason why he is not obliged to give the Board a discount of 25% of his certified fee. Once again, this is not an unreasonable or unconscionable stipulation, and it does not place the legal practitioner at an unfair disadvantage.

The plaintiff argues that he is not bound by the fee structure set out in the

legal aid guide because this is not authorized by statute. He submits that the legal aid guide's deduction of 20% and 25% of the fees payable to attorneys and counsel is not authorized by statute and that it is *ultra vires*. He is correct that there is no specific provision for it in the Legal Aid Act No 22 of 1969. Is it therefore *ultra vires*?

Section 3 of the Act provides:

> 3 Objects and general powers of board
>
> The objects of the board shall be to render or make available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the Constitution, and to that end the board shall, in addition to any other powers vested in it by this Act, have power-
>
> (a) to obtain the services of legal practitioners;
>
> (b) …
>
> (c) …
>
> (d) to fix conditions subject to which legal aid is to be rendered, including conditions in accordance with which any rights in respect of costs recovered or recoverable in any legal proceedings or any dispute in respect of which the aid is rendered, shall be ceded to the board, and conditions relating to the payment of contributions to the board by persons to whom legal aid is rendered.

The plaintiff's contention is that the deduction of a percentage of fees is unauthorized because subsection 3(d) authorizes contributions to the Board by persons to whom legal aid is rendered, and not by the persons who render it. This contention has only to be stated to be rejected. Subsection 3(d) has

nothing to do with the fees payable to practitioners in legal aid matters. It relates to the recovery of costs by the Board and to a possible contribution to the costs of the litigation by the recipients of legal aid.

Subsection 3(a) authorizes the Board to obtain the services of legal practitioners. This carries with it the authority to arrange for payment for those services, which the board does in the legal aid guide and its contracts with practitioners. I can find nothing in these provisions of the guide or in the contractual terms and conditions of the Board's appointment of legal practitioners which is in any way offensive to or *ultra vires* the provisions of the Act. The plaintiff accepted instructions from the Board on the basis that he would be paid ordinary fees less 20% or 25%. He is bound to honour his agreement.

As I understand the issues, the Board has already paid or tendered to pay the plaintiff, 75% or 80%, as the case may be, of his fee, and the only issue in respect of items 23, 24, 26 and 27 is his entitlement to the further 25% or 20%. My conclusion is that he is not. In dismissing his claims, I do not of course, preclude payment of the 75% or 80% which is admittedly owing if the amount has been tendered but not yet paid over.

<u>The fourth issue: whether or not the plaintiff has proved his entitlement as cessionary to payment from the Board in claim 25.</u>

Claim No 25 is for fees for a High court action for damages claimed by one Temba Magenuka, who was represented by Attorney Vabaza on the instructions of the Board. The total amount of the fees initially claimed from the Board is R38 415.90. The plaintiff alleges that Vabaza ceded this claim to him. According to the schedule annexure B as modified by counsel the amount of the claim is now R22 497.77. The plaintiff arrived at this amount in the course of his evidence by deducting certain payments which were made to Vabaza before the cession, and also the amount now offered by the Board. The amount of R22 497.77 does not allow for the 20% and 25% deduction from fees due to attorneys and counsel. This must still be deducted. Mr *Scott*'s calculation of the amount differs. He brings into account an additional payment, with a balance of R12 721.34 which he says is claimed but not owing.

The arithmetic is incorrect. The mistake comes from the amount of R38 415.90 alleged in the particulars of claim which, in turn, comes from the written confirmation of the cession which is attached to the particulars of claim as "C". The amount should be R35 560.22. That is the amount of the taxed bill in the Magenuka claim (see page 698 of the papers). The figure of R22 497.77, which is correct, is arrived at by subtracting payments of R1026.00 and R3078.00 previously made to Vabaza and the amount of the offer of R8958.45. The Board's case is that a further payment of R12 632.11 was

made and must also be deducted, and that the amount of the offer is the total amount of Vabaza's account which has not been paid.

It is common cause that the Board instructed Vabaza to represent Magenuka in a claim for damages against the Minister of Safety and Security. The particulars of claim allege the incorrect amount of R38 415.90 as Vabaza's total account for fees and disbursements; that Vabaza instructed the plaintiff to act as counsel for Magenuka; that the plaintiff acted in that capacity and that his fees are included in the amount of R38 415.90; that the Board has refused to pay the account; and that Vabaza ceded the claim for R38 415.90 to the plaintiff.

The plea (paragraph 5.25 as amended) denies liability in the amount claimed. It acknowledges that the Board is liable to Vabaza for fees, but only in an amount of R1684.18 for fees earned up to 3 September 1997, on which date Vabaza terminated his mandate by withdrawing as attorney of record; that it has subsequently and in any event paid Vabaza R1026.00 and R3078.00, and a further amount of R12 632.11 on 12 August 1999, which was prior to notice to it of the cession, and that it has made an open offer for payment of an amount of R8 958.45 for the balance which it says is the amount of the unpaid bill of costs, less certain impermissible charges which the board is entitled to deduct in terms of the legal aid tariff. (A further allegation in the plea relating to an alleged ceiling of R8000.00 for attorneys' fees was not pursued in argument and need not detain me.)

The issues are, firstly, whether or not the payment of R12 631.11 to Vabaza on 12 August 1999 must be credited to the Board, and, secondly, whether or not Vabaza was and is entitled to be paid more than he has been paid, regard being had to the termination of his mandate to represent his client on 3 September 1997.

I shall deal firstly with the payment of R12 631.11 to Vabaza on 12 August 1999. The plaintiff accepts that this payment was made, but contends that it is not a valid discharge of its liability because it was paid after the Board had received proper notice of the cession of the debt from Vabaza to the plaintiff (*Goode, Durrant and Murray (SA) Ltd.* v *Glen and Wright* 1961 (4) SA 617 (C) 621G-H). In this regard, the plaintiff's case in his particulars of claim (paragraph 8.5) is an oral cession of the claim of R38 415.90 or any portion thereof against the Board to the plaintiff on 21 June 1999, and a subsequent written confirmation of the cession in an undated document annexed to the particulars of claim as "C". Annexure "C" indeed confirms the cession and its date. There is no evidence of any formal notice of the cession to the Board. The plaintiff relies on constructive notice. He says that the Board must have realised that he had taken cession of Vabaza's claim on 7 May 1999 when he gave notice of his intention to amend his particulars of claim in the magistrates' court action between the same parties. The amendment alleged a cession of R38 415.90, but not its date. I am asked in effect to accept an

absurdity, namely that the Board had knowledge of the cession of 21 June 1999 by reason of a notice of amendment to pleadings in the magistrate's court action which pre-dates it.

I do not see how I can possibly do so. The evidence given by the plaintiff on the Magenuka claim is a mess. I find it unintelligible. The plaintiff prepared the written confirmation of the cession in his own hand, giving the date as 21 June 1999. He said in evidence that the date is wrong. But he does not explain why. He says simply that the date must have been before the date of the amendment to the magistrate's court pleading in May 1999. As I have said, the notice of amendment does not give a date of the alleged cession. There is no proper evidence before me of when and in what circumstances an earlier cession was concluded, and how it came about that the date 21 June 1999 was incorrectly given in the written confirmation. There is no evidence to support the plaintiff's suggestion that 21 June 1999 is the date when the amendment "was perfected", whatever that may mean. I would have thought that the document Annexure C and the pleadings in both actions would have been prepared with considerable care. Surely, special attention would have been given to the date of the cession. Attorney Vabaza did not give evidence to shed light on this confusion. The plaintiff's evidence is that Vabaza signed the written confirmation of the cession during consultations shortly before the trial was due to commence in the magistrates' court in August 1997. He does not explain why, when Vabaza signed it, he also made the same mistake about the date. I would be surprised if he signed it without giving its contents

his considered attention, given the intention at that time to call him as a witness and the intended evidential purpose of the document. As it is, he was quite happy to accept and bank the Board's cheque which, according to the plaintiff's evidence, he did very shortly after he signed the document annexure C.

I am left then, firstly, with evidence that the Board has paid Vabaza, whom they appointed, on 12 August 1999; secondly, an allegation in the pleadings of a cession entered into on 21 June 1999 coupled with a written confirmation attached to the pleadings that that was indeed the date of the cession; thirdly, evidence by the plaintiff that the date given in the pleadings is, for unexplained reasons, incorrect; fourthly, evidence that the Board should have known of the cession because of an allegation of an undated cession made in an amendment to pleadings in other litigation between the parties which pre-dates the cession relied upon; and, fifthly, Vabaza's acceptance of the payment to himself on 12 August 1999, almost immediately after he had signed a document categorically stating that he had ceded away his right to payment. I cannot make sense of any of this.

The plaintiff has not amended his pleadings to bring them into line with his evidence. His case is still a cession entered into on 21 July 1997. I am not prepared to go behind the pleadings where the evidence is so unsatisfactory. The result is that the plaintiff cannot rely on the principle in the *Goode,*

Durrant and Murray case *supra* without proof on a balance of probability that the cession dated 21 June 1999 upon which he relies in his pleadings was brought to the attention of the principal debtor before the payment was made. Such proof is not before me.

The evidence of the respective roles played by the plaintiff and Vabaza in this litigation is equally unintelligible. The plaintiff was instructed to conduct the case as counsel because Vabaza had been blacklisted by the Bar and could not brief counsel. It is common cause that on 3 September 1997, after briefing the plaintiff, Vabaza officially withdrew as attorney of record. Thereafter the plaintiff substituted himself as attorney of record and also acted as counsel. He conducted the case without any further reference to or instruction from Vabaza, until preparation of the bill of costs which the plaintiff arranged on Vabaza's behalf. It appears that he even paid disbursements, although he says that he did not open a trust account for the client.

The plaintiff accepts that Vabaza withdrew as attorney of record on 3 September 1997. He accepts that he substituted himself at attorney of record and from then onwards did all the work as attorney and as counsel. He accepts that this was all done without the Board's knowledge or consent. He was never appointed by the Board. That is why he bases his claim on a cession.

The Board's argument is that the effect of Vabaza's withdrawal on 3 September 1997 was to terminate his mandate to represent the client and, further, to terminate the contractual relationship between himself and the Board. He did not represent the client after that date. He was accordingly not entitled to charge fees after that date. The result of this is that he therefore had nothing to cede beyond that date. The plaintiff attempts to meet that argument by saying that although Vabaza withdrew as attorney of record on 3 September 1997 he did not *really* cease to be Magenuka's attorney. The client remained his client throughout. The notice of withdrawal was merely a device to enable formal delivery of process in the action to be made to the plaintiff directly instead of through Vabaza. I find this incomprehensible. If Vabaza withdrew as the client's attorney, he was no longer the client's attorney. He was not entitled to act under his power of attorney. He was no longer entitled to represent the client in the litigation. The suggestion that in fact he continued as the client's attorney is objectively contradicted by all the facts. Nobody who perused this court file could reasonably conclude that Vabaza was still in reality Magenuka's attorney. Nobody who compared the work done by the plaintiff and Vabaza on the case could reasonably conclude that Vabaza was in reality the attorney. The fact of the matter is that Vabaza handed the whole case over to the plaintiff, and left its conduct entirely to him. He fell out of the picture entirely. He had nothing further to do with the case until it had been fought and lost. He earned no further fees. He was not entitled to charge fees after his withdrawal. The Board is not obliged to pay

him fees after his withdrawal.

The withdrawal of Vabaza and the substitution of the plaintiff for him is nothing more or less than a purported transfer of Vabaza's instructions from the Board to the plaintiff. This is expressly precluded by paragraph 16 of the legal aid guide. The Board is not bound by it. The result is that Vabaza is not entitled to claim fees from the Board after his withdrawal. Nor is plaintiff entitled to do so through him by way of cession. To paraphrase the evidence of the plaintiff already quoted, the Board is entitled to say: "You, Mr McKay, were not instructed by us, therefore we cannot pay you, and you, Mr Vabaza, we cannot pay because you withdrew and did not appear".

My conclusion is that the plaintiff has failed to discharge the onus of proving that the Board is liable to him by reason of the cession. The Board has indeed paid and tendered to pay more than it is obliged to pay.

Order

It follows that the plaintiff's claims must be dismissed with costs, which by agreement include the costs of the proceedings in the magistrate's court. In respect of the counterclaim, judgment must be ordered in the defendant's favour in the sum of R3 722.91 with costs, which also include the costs in the magistrate's court action. The costs of the application for summary judgment were reserved. They should be costs in the cause.

There remain the costs of the late amendment moved on 1 September 2001. The costs of opposition should not have been incurred. The financial adjustment which the amendment sought to regularize is common cause, the amendment caused no prejudice, and no costs would have been incurred if a rule 28(3) notice of opposition had not been given. There is no reason why these costs should not also be costs in the cause.

The following is my order:

1. The plaintiff's claim in convention is dismissed with costs which shall include the costs of the proceedings in the magistrate's court under case No 77480/98 and the costs of the application for summary judgment.
2. There will be judgment for the defendant on the claim in reconvention in the sum of R3 722.91 with costs, which shall be on the High Court scale and which shall include the costs in the magistrate's court action in Case No 77480/98 and the costs of opposition to the application for the amendment of 1 September 2001.

RJW JONES
Judge of the High Court
22 December 2001