

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION - PORT ELIZABETH)**

**CASE NO: 3902/2011
DATE HEARD: 26/10/2012
DATE DELIVERED: 13/11/2012**

In the matter between

MANDLA GOODMAN XAKAXA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

ROBERSON J:-

[1] In this action the plaintiff claims damages from the defendant for loss of support, arising from the death of his wife (the deceased) after she was struck by a motor vehicle. The claim has been settled in the sum of R79 094.00, but the issue of costs remains, the plaintiff contending that costs on the High Court scale should be awarded and the defendant contending that costs on the Magistrates' Court scale should be awarded.

[2] In the matter of *Vermaak v Road Accident Fund* [2006] ZAECHC 10, Jones J said the following at paragraph [5]:

“The high court frequently restricts costs to the magistrates’ courts scale on the ground that the plaintiff could and should have proceeded in the magistrate’s court where litigation is less expensive. In doing so, it applies the basic principle of costs that the court has a discretion which it must exercise judicially upon a consideration of all the facts of each case, and that the underlying consideration is fairness to both sides. The amount of the judgment or settlement is always a significant factor in balancing fairness. The courts discourage litigants from choosing a more expensive forum where relief can be obtained in a less expensive one. The defendant should not have to pay more in the way costs because he has been brought to a more expensive court unnecessarily. While the amount of a judgment is always important, it is, however, not the only consideration. Various other circumstances – for example, the complexity of the factual issues, the difficulty of the legal issues, the seriousness of an imputation against reputation, the honesty of officials, the general importance of the issue to the parties or the public – might induce a court to award costs on the high court scale although the amount involved is small. But as a general rule the proper exercise of the court’s discretion on costs provides a powerful deterrent against bringing proceedings in the high court which might more conveniently be brought in the magistrate’s court, and this implies that the party who could have chosen to proceed in the lower courts will have to satisfy the high court that there are good and sufficient reasons for the exercise of a discretion to award high court costs in his or her favour¹.”

[3] In the present matter, the plaintiff initially claimed the total sum of R333 074.76, made up as follows:

Past loss of support	R13 659.53
Future loss of support	R314 169.23
Funeral expenses	R5 246.00

[4] The summons was issued on 8 December 2011. It was specifically alleged in the particulars of claim that at the time of her death the deceased was employed as a domestic worker and earned R760.00 per month, excluding bonuses and other fringe benefits. It was assumed that the deceased would have been

employed up to the age of 65 years and would have received an annual salary increase of 10%. It was also alleged that the plaintiff was at all material times dependent on the deceased, was unable to work, and had no other source of support.

[5] On 19 January 2012, in reply to the defendant's request in terms of Rule 36 (4), the plaintiff made available to the defendant the deceased's salary advice and employer's certificates, the post mortem report and the invoice for funeral expenses. The plaintiff also authorised the inspection of hospital and other relevant records.

[6] In its plea delivered on 20 February 2012, the defendant admitted the collision but pleaded no knowledge of the alleged negligence of the driver of the insured vehicle or of the plaintiff's damages, and put the plaintiff to the proof thereof.

[7] The action was set down for hearing on 26 October 2012, and the parties were notified of this date by the Registrar on 2 March 2012.

[8] In the reply to a request for particulars for trial, delivered on 9 May 2012, the plaintiff set out details of the deceased's employment at the time of her death, including the names of her employers, the number of days she worked per month, her hourly rate, her monthly salary, whether she worked overtime, and

whether deductions were made from her salary. It was pleaded that she would have worked until 65 years of age, at her current salary plus an annual increase of 10%. A schedule of how the claim was calculated was attached to the particulars. This reflected the deceased's projected earnings (including the 10% increase) for each year from the date of her death until 2028, in the total sum of R655 657.51. It was pleaded that the plaintiff and the deceased had no children and the plaintiff would have received half of this amount for his maintenance. It was further pleaded that the plaintiff is unable to work and had stopped working before the death of the deceased. Copies of the deceased's salary slips and of the funeral invoice were also attached to the trial particulars.

[9] On 1 October 2012, in response to the plaintiff's Rule 37 (4) agenda, served on 27 September 2012, the defendant admitted that the sole cause of the collision was the negligence of the driver of the insured vehicle, and that the collision was the sole cause of the deceased's death. The defendant indicated it would revert on the question of whether it was prepared to admit past loss of support in the sum of R22 158.00, future loss of support in the sum of R64 413.00 and funeral expenses as claimed. The defendant indicated that it stood by its plea, that it was in a position to proceed to trial, and that it would provide the plaintiff with a settlement offer "in due course".

[10] With regard to the question of whether or not the matter should be transferred to another court, the defendant stated that it was of the opinion that

the matter should have proceeded in the Magistrates' Court, and objected to the present forum. It reserved its right to argue that costs should be limited to the Magistrates' Court scale.

[11] With regard to the admission of documents, the defendant admitted the death register, the accident report, and the entire police docket. It did not admit the deceased's employer's certificate or the actuarial report (served on the defendant's attorneys on 10 October 2012).

[12] The defendant made an offer on 24 October 2012. The amount settled upon is the lower of the two calculations of the actuary, plus funeral expenses.

[13] The defendant's admission regarding the sole cause of the collision was made at a very late stage, when it had had ample time to investigate the collision. Its offer was made two days before the trial date. The particulars of claim and the further particulars for trial were such that the defendant would have been in a position to make an offer some time before it actually did, and thus potentially curtail costs. The defendant was content to let the matter run in the High Court until the eleventh hour, and only raised the issue of the appropriate forum on 1 October 2012. There was no earlier suggestion that the matter be transferred. Similar conduct has been taken into account in deciding on which scale costs should be awarded, or whether or not costs should be reserved following an order deciding the merits in a plaintiff's favour, in case the *quantum* fell within the

jurisdiction of the Magistrates' Court. See for example *Perino v Minister of Safety and Security*, SECLD case number 559/04 judgment delivered 10 June 2005, *Vergottini v Padongelukkefonds* [2005] ZAFSHC 37, *Beetge v Road Accident Fund* case number SECLD 1970/02 judgment delivered 20 October 2003, *Brauns v SA Shoprite Checkers (Pty) Ltd* 2004 (6) SA 211 (ECD), and *George v Lid van Uitvoerende Raad, Departement van Onderwys, Bisho*, ECD case number 3261/06.

[14] I do not think that it was clearly apparent that the plaintiff's claim fell within the jurisdiction of the Magistrates' Court. The calculation of a claim for loss of support is not a simple matter, involving as it does such factors as assumptions, contingencies, inflation, and capitalisation rates. The actuary calculated the loss of support on two bases, the first being the deceased's earnings at the time of the accident, increased with inflation, and the second the prescribed minimum wage for domestic employees. As already mentioned, the settlement offer was the lower of the two calculations. The higher calculation was R86 571.00. The amount settled upon and the higher amount are not far short of the Magistrates' Court's monetary jurisdiction of R100 000.00.

[15] The eventual award remains within the discretion of the court and the court is not bound to award the amount calculated by an actuary. In that case it was not certain that the eventual award, had the trial run, would have been less than R100 000.00. As was submitted by counsel for the plaintiff, to have proceeded in

the Magistrates' Court merely to avoid the risk of an adverse costs order, would have been negligent. It was therefore prudent, in my view, to have instituted proceedings in the High Court.

[16] It is correct that the amount settled upon is substantially less than that initially claimed. However I do not think that the claim was reckless. Counsel for the plaintiff submitted that it was a *bona fide* calculation and I have no reason to believe otherwise. In the reply to the request for particulars for trial the method of calculation was disclosed. It was a rough calculation which did not allow for factors such as capitalisation and contingencies, but it was a starting point.

[17] It was submitted on behalf of the defendant that the plaintiff was in a position to calculate his claim at the outset. As pointed out by counsel for the plaintiff, the obtaining of an actuarial report is not obligatory and there is also the cost of such a report to take into account. As already mentioned, the defendant had sufficient details to make an offer, yet only did so two days before the trial. On 1 October 2012 the defendant merely indicated that an offer would be made in due course. The plaintiff therefore had no choice but to expect to proceed to trial. The plaintiff did not unnecessarily prolong the proceedings after the offer was made, thus curtailing further costs.

[18] It was submitted on behalf of the defendant that the claim could have been brought in the Regional Civil Court, which has a monetary jurisdiction of R300

000.00. The legislation governing the civil jurisdiction of Regional Courts came into operation on 9 August 2010. These courts had therefore not been functioning for very long at the time summons was issued in this case. Further, if one has regard to ss 12 (6), (7) and (8) of the Magistrates' Court Act 32 of 1944, which came into operation on 9 December 2010, there are certain requirements to be met before the Magistrates' Commission enters the name of a magistrate on a list of regional magistrates who may hear civil matters. The claim as framed was in excess of R300 000.00. As already mentioned, the defendant did not suggest at any stage that the matter should be transferred, and only raised the issue of the correct forum at a late stage. In these circumstances I am of the view that it was neither reckless nor an abuse of the legal process to have chosen the High Court in preference to the Regional Court.

[19] It was submitted on behalf of the defendant that to proceed in the more expensive forum was to restrict access to justice. Reference was also made to exorbitant legal fees charged. However, in the event of it being appropriate to have proceeded in the High Court, these arguments fall away. The plaintiff's bill of costs will be taxed and the defendant will have an opportunity to object to items in the bill.

[20] For all the above reasons I am persuaded that I should exercise my discretion in favour of the plaintiff and award costs on the High Court scale.

[21] I make the following order:

[21.1] The defendant is ordered to pay the plaintiff the sum of R79 094.00, together with interest thereon at the legal rate from a date 14 days after date of this order to date of payment.

[21.2] The defendant is ordered to pay the plaintiff's taxed or agreed costs of the action on the High Court scale, such costs to include the qualifying expenses, if any, of the actuary Mr. Gerard Jacobson, together with interest on the costs at the legal rate from 14 days after date of *allocatur* or agreement, to date of payment.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:-

For the Plaintiff: Adv A Frost, instructed by Kevin E Fourie Attorneys, Port Elizabeth

For the Defendant: Mr K Karsan, Boqwana Loon & Connellan, Port Elizabeth

