

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – PORT ELIZABETH**

Case No.: 701/2017

In the matter between:

ZANDISILE MICHAEL MNTWAPHI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

REVELAS J:

[1] On 8 February 2018 Judgment was delivered in respect of general damages (the only issue in dispute), awarded to the plaintiff and suffered by him during a motor vehicle accident. The evidence

relating to the nature of the plaintiff's injuries are contained in the judgment. The order made was to the effect that that the plaintiff was to be compensated by the defendant, in the amount of R75 000.00 for general damages, which figure took into account the plaintiff's contributory negligence which was fifty percent. The defendant was ordered to pay the plaintiff's costs of suit.

[2] On 13 February 2013, the defendant served and filed a Notice of Enrolment wherein the Registrar was to appoint a date for a reconsideration of the costs order made on 8 February 2018, in terms of Rule 34(12) of the Uniform Rules of Court.

[3] The matter was enrolled and during the subsequent hearing of argument on the question of costs, the defendant handed up two separate offers of settlement made in terms of Rule 34(1) and (5).

[4] The first offer was made on 18 January 2018 and the second on 25 January 2018. In the first offer the defendant offered to pay the plaintiff without prejudice the sum of R125 000.00 in respect of general damages, and the plaintiff's taxed or agreed party and party costs on the applicable court scale.

[5] In the second offer of 25 January 2018, the earlier offer was withdrawn, and the figure increased to R150 000.00. Costs were

tendered on the same terms as the previous offer. The costs included the payment of the qualifying fees, if any, of any experts in respect of whom the plaintiff had given notice in terms of Rule 36(9)(a) and (b).

[6] It is plain that the award made in respect of general damages was exceeded by the defendant's offer to a considerable degree, namely fifty percent.

[7] Rule 34(12) reads:

"if a court has judgment on the question of costs in ignorance of the offer or tender and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender. Provided that nothing in this sub rule contained shall affect the court's discretion as to an award of costs."

[8] The object of sub-rule (12) is to enable the court to take into account, when exercising its discretion as to a fair costs order in all the circumstances of the case, the fact that a generous offer, as in the present case, had been rejected by the plaintiff. The rule provides a court with an opportunity to reconsider the matter afresh, after learning about the tender¹. Once it has been established that the tender or offer beat the amount awarded, the discretion becomes

¹ Erasmus: Superior Court Practice, Volume 2 D1 - 449

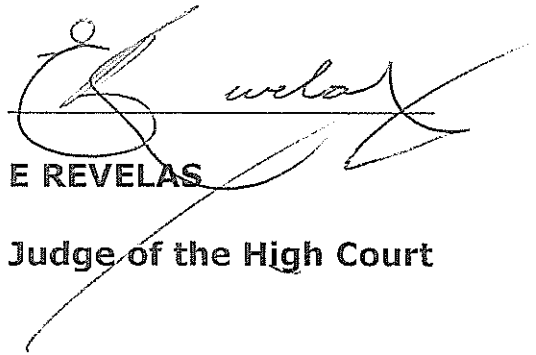
limited, apart from determining the *spatium deliberandi*², which in this case has to be the period between the two offers. The usual practice is, if the offer or tender exceeds the amount of the judgment, to order the defendant to pay the plaintiff's costs incurred up to the date of the offer and the plaintiff to pay the costs thereafter.

[9] In applying the aforesaid principles, there are no facts or other considerations in this case indicating a departure from the general practice referred to. The relevant period for purposes of such an order is from 25 and 26 January 2018 to 8 February 2018 (date of judgment).

[10] In the circumstances, paragraph 2 of the order made on 8 February 2018 is substituted with the following:

1. The defendant shall pay the plaintiff's cost of suit up to 25 January 2018, with interest thereon, at the current legal rate as from a date fourteen days after taxation to date of payment.
2. The plaintiff shall pay the defendant's cost of suit from 26 January 2018, with interest thereon, at the current legal rate as from a date fourteen days after taxation to date of payment.

² Winlite Aluminum Windows and Doors v Pyramid Freight 2011 (1) 571 at 573 para [9]



E REVELAS
Judge of the High Court

Appearances:

For the Applicant: Adv Mullins instructed by Gregory Clark & Associates, Port Elizabeth

For the respondent: Adv Paterson instructed by Friedman Scheckter, Port Elizabeth

Date heard: 15 February 2018

Date delivered: 16 February 2018