

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

Case No: 1801/2016

Date heard: 7 August 2019

Date delivered: 17 September 2019

In the matter between:

ROAD ACCIDENT FUND

Applicant/Defendant

And

LUKA DAWN VAN SCHOOR

Respondent/Plaintiff

JUDGMENT

Goosen J:

[1] On 12 April 2019 judgment was delivered in favour of the plaintiff and an award of costs was made. On 17 April 2019 the defendant delivered a notice in terms of Rule 34(11) and (12) seeking a reconsideration of the costs order in the

light of its offer made to the plaintiff on 7 March 2018. In its offer of settlement, made in terms of Rule 34(1), the defendant offered:

- "1. Payment of the capital sum of R6 959 023.00 and which will be made within 120 (hundred and twenty) days from date of settlement.
2. The Defendant further tenders to pay the Plaintiff's taxed or agreed party and party costs, up until and including the date of the tender, on the High Court scale together with interest thereon at the legal rate of 10.25% per annum from a date 14 days after date of settlement/taxation to date of payment subject to the following conditions:
 - a. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record and;
 - b. The Plaintiff shall allow the Defendant 14 (fourteen) court days to make payment of the taxed or agreed costs.
4. The above tender is open for acceptance in accordance with the time limit allowed for in terms of the Rules of Court."

[2] The award made per the judgment was in the amount of R6 633 642.00. The Rule 34(1) offer accordingly exceeds the award made by this court. In accordance with its notice in terms of Rule 34(12) the defendant seeks an order that the plaintiff pay the costs of the action incurred after 28 March 2018 (being the date by which the offer could be accepted). It tenders payment prior to this date.

[3] The plaintiff opposed the reconsideration of the costs order upon both technical grounds and upon the basis that the circumstances of the matter militate against the exercise of the court's discretion to alter the award of costs.

[4] The "technical" grounds are two-fold. It was submitted that the offer sets out a condition regarding payment of the amount i.e. within 120 days, which is unreasonable and that the plaintiff was entitled to reject the offer on that ground alone. Secondly, it was contended that the offer is silent in respect of any interest payable and, on this basis also, the plaintiff was entitled to reject the tender.

[5] The relevant portions of Rule 34 provide as follows:

"(1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.

(5) Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state-

(a) whether the same is unconditional or without prejudice as an offer of settlement;

(b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;

(c) whether the offer or tender is made by way of settlement of both claim and costs or of the claim only;

(d) whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.

(7) In the event of a failure to pay or to perform within 10 days after delivery of the notice of acceptance of the offer or tender, the party entitled to payment or performance may, on five days' written notice to the party who has failed to pay or perform apply through the registrar to a judge for judgment in accordance with the offer or tender as well as for the costs of the application.

(11) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.

(12) If the court has given 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 subrule contained shall affect the court's discretion as to an award of costs."

[6] For a valid offer to be made in terms of Rule 34 the requirements set out in sub-rule (5) must be met. See ***Erasmus v Santam Insurance Ltd and Another***¹. In this instance the notice given by the plaintiff plainly states that it offers payment of a specified capital sum and that its offer includes payment of costs. Rule 34(5) does not preclude the imposition of conditions. The stipulation of the period within which the capital sum would be paid accordingly falls within the ambit of the rule.

¹ 1992 (1) SA 893 (W) at 895C

[7] Whether or not the plaintiff is entitled to reject the offer on the basis that a stipulated condition is unreasonable is a matter which the plaintiff will be required to establish. In this instance all that is asserted is that the period stipulated within which payment would be made is “unreasonable”. The only discernable basis for this assertion appears to be that no interest was offered. Yet, it is clear that the defendant tendered payment of a “capital” sum. The offer, therefore, envisaged the payment of interest on the capital sum in accordance with the plaintiff’s claim for such interest on the judgment debt.

[8] In the present matter the plaintiff did not accept the offer within the period of 15 days provided by Rule 34(6). I am satisfied that the offer was indeed one as envisaged by Rule 34(1) read with sub-rule (5) and that it exceeds the amount awarded to the plaintiff. Accordingly, the question arises whether in the exercise of my discretion as to costs the order previously made ought to be altered.

[9] The object of sub-rule (12) is to enable the court to consider the award of costs having regard to the fact that payment of a sum exceeding that which was awarded was rejected by the plaintiff. In ***Bloom v General Accident and Life Assurance Corporation Ltd and Another***² it was held that the intention of Rule 39 (9)(b) (which is the equivalent of the current Rule 34(12)),

“is to enable the Court to take into account the fact that what, in the event, proved to be a generous offer of settlement had been refused by the plaintiff or by one of the defendants, when it exercised its discretion as to what order as to costs would be fair in all the circumstances of the

² 1967 (2) SA 116 (D) at 118H-119A

case. As the Court was unaware of the circumstances of the offer when judgment was delivered it was unable at that stage to take it into account, and the Rule accordingly gives the Court an opportunity to consider the matter afresh after it has learned about the secret tender.”

[10] This purpose of the Rule was reiterated by Revelas J in ***Mntwaphi v Road Accident Fund***³ where the learned judge held:

“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 tender. Once it has been established that the tender or offer beat the amount awarded, the discretion becomes limited, apart from determining the *spatium deliberandi*, 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.”

[11] Revelas J noted the usual order which follows in circumstances such as the present and that the court's discretion is fairly limited. See also ***Winlite Aluminium Windows & Doors (Pty) Ltd v Pyramid Freight (Pty) Ltd t/a Uti***⁴.

[12] In ***Naylor and Another v Jansen***⁵ the nature of the discretion is described as follows:

³ Unreported, Case No 701/2017 ECHPE, 16 February 2018 at par 8

⁴ 2011 (1) SA 571 (SCA) at 573H

"[12] Where a plaintiff in an action sounding in money has not succeeded in obtaining an award that exceeds an offer made without prejudice, there are two important considerations to be borne in mind by the Judge exercising the discretion. The first is the purpose behind the Rule. The second is that the Rule in no way fetters the judicial exercise of the discretion.

[13] The purpose behind the Rule is clear. It is designed to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of such litigation. The Rule is there not only to benefit a particular defendant, but for the public good, generally, as Denning LJ made clear in *Findlay v Railway Executive*:

'The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs.'

It is therefore important that Courts should take account of the purpose behind the Rule, and not give orders which undermine it. Clayden FJ put the position thus in *Doyle v Salgo* (2):

'In cases in which the continuance of the action cannot be justified on some ground apart from the recovery of money, as for example to establish a disputed right, the Courts, in exercising the discretion to award costs, must obviously be concerned to ensure that the Rules do not fail in this purpose.'

[14] Ordinarily the purpose behind Rule 34 would cause the Judge to order the defendant to pay the plaintiff's costs incurred up to the date of the offer, and the plaintiff to pay the defendant's costs thereafter. That does not mean, however, that there is a 'rule' to this effect, from

⁵ 2001 (1) SA 16 (SCA) at par 12 - 14

which departure is only justified in the case of 'special circumstances', as suggested in *Van Rensburg v AA Mutual Insurance Co Ltd* and *Mdlalose v Road Accident Fund*. All it means is that the exercise of the Court's discretion as to costs in this way would usually be proper and unimpeachable, and failure to do so would, if unjustifiable, amount to a misdirection. But it needs to be emphasised, as the proviso to Rule 34(12) makes clear, that the Rule does not dictate this result, even provisionally. Where the law has given a Judge an unfettered discretion, it is not for this Court to lay down rules which, while purporting to guide the Judge, will have the effect only of fettering the discretion. If, therefore, there are factors which the trial Court, in the exercise of its discretion, can and legitimately does decide to take into account so as to reach a different result, a Court on appeal is not entitled to interfere - even although it may or even probably would have given a different order. The reason is that the discretion exercised by the Court's giving the order is not a 'broad' discretion (or a 'discretion in the wide sense' or a 'discretion loosely so called') which obliges the Court of first instance to have regard to a number of features in coming to its conclusion, and where a Court of appeal is at liberty to decide the matter according to its the view of the merits and to substitute its decision for the decision of the Court below, simply because it considers its conclusion more appropriate. The discretion is a discretion in the strict or narrow sense (also called a 'strong' or a 'true' discretion). "

[13] Mr Schubart SC, for the plaintiff, argued that in reconsidering the costs award this court ought to consider the reasonableness of the plaintiff's conduct in pursuing the claim after the offer and the effect that a cost award against the plaintiff would

have. It was submitted that considerations of fairness and equity require that this Court not make the usual order in matters such as this.

[14] In developing the argument Mr Schubart placed reliance upon a judgment of Brooks AJ (as he then was), in ***Shanin Syed v Metaf Limited t/a Metro Cash and Carry***⁶. In that matter the learned judge was called upon to reconsider a cost award made in favour of the plaintiff. At paragraph [6] of the judgment the learned judge said the following:

“[6] In my view in the exercise of a judicial discretion in a consideration of a costs award at this stage, consideration must be given *inter alia* to the following factors:

- the reasonableness of the plaintiff’s conduct after the introduction of the secret tender in accordance with the provisions of Rule 34 of the Uniform Rules of Court;
- the nature and effect of the costs award made in the judgment;
- the desirability in the interests of justice of making an eventual award of costs that is just and equitable in all the circumstances of the matter, including due consideration of the secret tender made and the effect *inter partes* which would be created by an adherence to the usual practice identified in paragraph [4] hereof.”

[15] I do not understand the judgment to suggest that these are the only factors which fall to be considered. Rather, they represent appropriate considerations which are relevant to the exercise of the court’s discretion. Each matter must, in my view,

⁶ Unreported, Case No 4094/2009 [2016] ZAECGHC 38 (31 May 2016)

necessarily be considered upon its own circumstances and the discretion is to be exercised having due regard to relevant factors and the underlying purpose of Rule 34.

[16] That this is so is apparent from a consideration of both the reconsideration judgment of Brooks J, referred to above, and the main judgment⁷ in that matter. The following summary of factors which were considered at the time of making the original costs award are set out in the former judgment⁸:

“[11] At the time of the trial on *quantum*, the bulk of the value of the plaintiff’s claim was represented by his claim for loss of income in the sum of R8 823 600,00. Approximately one half of the time spent in court was dedicated to the resolution of the plaintiff’s claim for loss of income. That claim was dismissed. The claim for legal expenses was abandoned due to a lack of evidence. The plaintiff succeeded in his claim for hospital expenses and was substantially successful in his claim for future medical expenses and general damages.

[12] In making the award for costs which is not under reconsideration cognisance was taken of the substantial court time which had been dedicated to the unsuccessful pursuit of the claim for loss of income. Cognisance was also taken of the extent to which certain of the plaintiff’s expert witnesses had made no useful contribution to the proceedings. The award of costs which resulted was intended to prevent the defendant from being mulcted in costs generated by the pursuit by the plaintiff of claims in which he was unsuccessful. It was deemed

⁷ Unreported, Case No. 4094/2009 [2016] ZAECGHC 38 (31 May 2016)

⁸ Supra at par [11] and [12]

necessary to adopt this approach in the interests of justice in order to ensure an equitable result *inter partes*."

[17] It is appropriate to note that a feature of the main judgment in relation to the decisions regarding the different heads of damages is trenchant criticism of the evidence of certain expert witnesses called by the plaintiff. A further reading of the judgment regarding the reconsideration of the costs award indicates that the learned judge was satisfied that the original award had achieved an equitable result *inter partes*; that the pursuit of plaintiff's partially successful claim was not unreasonable in the light of the unspecified globular tender made; and that an order awarding all costs to the defendant would unjustly render the order for liability nugatory.

[18] Mr Schubart's argument was that the plaintiff had reasonably pursued her claim for a more substantial award after the date of the offer. It was submitted that at that stage much was still uncertain regarding the quantification of the claim. The pre-morbid career path was in issue; key aspects of the appropriate actuarial assumptions viz. the nett discount/capitalisation rate to be applied; the form of investment strategy to be followed and the costs thereof; and the future rate of taxation. Given these uncertainties the actuaries had prepared calculations which at that stage exceeded the amount of the offer. It was accordingly submitted that the plaintiff's attorney and counsel could not have advised acceptance of the offer until all of those issues were determined.

[19] It was furthermore argued that to order the plaintiff to pay the defendant's costs after the date of the offer would substantially reduce the effective award of damages and, therefore, bring about an inequitable result.

[20] Mr Frost, for the defendant, pointed to the underlying purpose of Rule 34 which is to enable a defendant to determine its potential liability and to protect itself against further litigation costs. He submitted that at the stage that the offer was made in this instance, both parties were in the position of uncertainty regarding the eventual basis upon which the court would decide the quantum of the claim. The defendant had, however, made an assessment of its potential liability; it had investigated the matter as it is obliged to do and had made the offer upon such carefully considered basis.

[21] What followed, it was submitted, was the plaintiff's insistence upon obtaining a definitive judgment regarding the nett discount rate aspect. Mr Frost pointed out that it was known that this matter would serve as a guide for several other cases which were being held in abeyance. This, he submitted, was not of the making of the defendant.

[22] The centrality of the dispute regarding the nett discount/ capitalisation rate is noted in the main judgment⁹. Mr Frost argued that, despite acceptance of the case-specific nature of a determination of the nett discount rate, the plaintiff had pursued a determination of the issue which might possibly find more general application. The defendant's resistance to this was necessary and, ultimately, successful. In these circumstances should the court not amend its order in accordance with ordinary practice it would negate or undermine the very purpose of the Rule. Such a result would also be inequitable vis-à-vis the defendant.

⁹ Main judgment at §5 and §47.

[23] Whilst the plaintiff was not successful insofar as her contentions regarding the nett discount rate which ought generally to apply, the original award of costs did not particularize that aspect and disallow such costs¹⁰. That however is no reason to now alter the original order. What is required is an assessment of what is fair and equitable having regard to the fact that a generous offer was not accepted.

[24] Mr Schubart placed heavy reliance on the fact that the plaintiff acted reasonably given what was known at the time of the offer. It seems to me, however, that contentions regarding the reasonableness of the plaintiff's conduct should not be elevated to a defining consideration. After all it will usually be the case that a plaintiff who rejects an offer believes that an award in excess of that offered will be made. In this the plaintiff will invariably be advised by her representatives upon an appraisal of the matter. The fact that a plaintiff relies upon such advice does not preclude reconsideration of an award of costs.

[25] The circumstances of this matter are different to those at issue in the **Syed v Metaf Limited t/a Metro Cash and Carry** matter. There several heads of damage were in issue and the offer was in respect of an unspecified globular amount which was considerably lower than the total claimed. Also, the original costs order already provided for a partial indemnity for the defendant regarding costs. In this matter the tendered payment was founded upon an actuarial assessment and concerned the only claim in issue, viz. loss of earning capacity. Whether the plaintiff reasonably believed that a higher award would be made because of the then as yet undetermined exigencies does not alter the fact that the plaintiff was placed at risk.

¹⁰ See *Winlite (supra)* at 574F-G; See also *Gentiruco AG v Firestone SA Pty Ltd* 1972 (1) SA 589 (A)

This is the purpose of the Rule. It serves to impose risk of continuation and thereby bring about a resolution of the dispute or, failing acceptance, a degree of indemnification of the defendant.

[26] The following passage in *Erasmus v Santam Insurance Ltd and Another*¹¹ highlights the underlying considerations of fairness which are relevant in circumstances such as the present:

“Both the substantive law and the Courts in their day-to-day approach to litigation have taken protective care of attempts of parties to find each other through negotiation. The line runs through the exclusion of evidence about settlement discussions to rules which govern the making and acceptance of tenders. The willingness of a party (who I will henceforth call the defendant) to make a payment to the other party is the key to the process. It deserves to be so handled that the defendant knows that his liability will not exceed what he has declared himself willing to pay. The process needs to be so handled that a defendant is able to make an adequate offer on the claim without a need in respect of costs to comply with unjustified demands from the plaintiff. The settlement process needs such handling by Courts that a defendant, in order to induce acceptance despite a known dispute about the justification of overseas witnesses who work lavishly to 'qualify' themselves, can offer more on the 'claim' to make overall settlement attractive despite the dispute. It is patently unfair and even ineffective to encourage settlement if the defendant has added a monetary element to overcome the said dispute and induce settlement, only to find that the Court takes an own view and in fact adds the qualifying fees to the offer.

¹¹ *Supra* at 897D-J

Nothing arises as a matter of fairness, desirability or a need for effectiveness to call for qualification of the basic proposition that a party should not be exposed to the need to pay more than he has offered. If he has offered less on the 'claim' than the plaintiff could have proved, or has qualified his offer in some other way, that still is all that he has offered. That holds good also if his offer is qualified insofar as it relates to costs. It is of no consequence that a qualification of any part of the offer would, if there had been no acceptance, have caused it to be inadequate to influence the Court's normal approach to awards of costs. It is of no consequence that in that event the plaintiff would have or could have been awarded more or was entitled to claim more. It is of no consequence whether the offer or any qualification thereof was decided upon for good or for bad reason or was influenced by some erroneous impression, belief, or calculation."

[27] What the passage highlights is the underlying policy considerations which favour the settlement of disputes by agreement between the litigants. Effect is to be given to the bargain where there has been an acceptance of the offer made by a defendant. Equally, effect must be given to the purpose to be achieved by the Rule. As noted in the **Naylor** matter¹² the Rule is for the public benefit since it seeks to ensure that a plaintiff who goes to trial, when she has been offered reasonable compensation, must do so without impunity in respect of costs.

[28] It is of course necessary to balance the particular interests of a plaintiff who may be deprived of costs against the public benefit sought to be achieved. Hence the discretion vested in the court.

¹² Supra at 23A-B

[29] I accept that the effect of an order mulcting the plaintiff in costs after date of the *spatium deliberandi* would serve to reduce the value of the compensation awarded to her. That consequence will invariably follow in circumstances where an order of monetary compensation has been made. That in itself does not mean that such order ought not be made. The reduction in value of the award is undoubtedly a hardship in this case but it is not such as would render the plaintiff impecunious.

[30] I am also alive to the nature of the compensation awarded and that it flows from the liability of an organ of state which has been established to compensate victims of road accidents. In this the defendant fulfils a vital social assistance need which is mandated by the values and rights enshrined in our Constitution as supreme law. It must, however, equally be emphasized that the defendant is duty bound to fulfil its statutory obligations whilst exercising proper stewardship of the public funds allocated to it for the task. It is accordingly entitled to the ordinary protections afforded to a defendant who elects to make an offer in terms of Rule 34.

[31] When I take into account all of these factors I am of the view that it will be fair and equitable to order the plaintiff to pay the defendant's costs after the date of the offer. As already stated the defendant conceded its liability prior to that date.

[32] In the result the following order is made:

1. Paragraph 3 of the Order dated 12 April 2019 is set aside and replaced with the following:

"3. Defendant is to pay Plaintiff's costs, as taxed or agreed, together with Vat thereon, on the party and party scale up to and including 28 March 2019. Such costs to include the qualifying expenses, if any of the following:

1. Dr Olivier;
2. Prof Dunn;
3. Dr Cronwright;
4. Ansie van Zyl;
5. Dr V Gardiner;
6. Mr Eaton;
7. Dr Badenhorst;
8. Dr J Gardiner;
9. Dr Holmes;
10. Mr Roux;
11. Dr Frost;
12. Mr Loots;
13. Dr Naude.

4. Plaintiff is to pay Defendant's costs, as taxed or agreed, together with VAT thereon, on the party and party scale from 29 March 2018 to 12 April 2019. Such costs are to include the qualifying expenses, if any, of the following:

1. Mr B Swart;
2. Mr M Jacobson."

2. Plaintiff is to pay the costs of the application pursuant to Rule 34(12), as taxed or agreed, together with VAT thereon, on a party and party scale.

G. G GOOSEN

JUDGE OF THE HIGH COURT

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