



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 545/2010
Heard: 09/05/2022
Date delivered: 16/09/2022

In the matter between:

**ADVOCATE ALBERTUS JOHANNES DU TOIT N.O.
Obo MAWETHU MAXWELL NKUNA**

Applicant / Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent / Defendant

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

EILLERT, AJ

1. The Applicant applies for leave to appeal to the Supreme Court of Appeal, alternatively to the Full Bench of this Court in terms of section 17 of the Superior Courts Act, Act 10 of 2013, against the whole of my judgment delivered and order granted on 17 December 2021, in terms whereof I dismissed the Applicant's application for a special cost order against the Defendant.
2. The grounds advanced by the Applicant in his Notice of Application for Leave

to Appeal are that I had erred and/or misdirected myself, where a reasonable prospect of success exists that another Court may come to another conclusion, in respect of the following:

- “2.1 *By finding that the Applicant’s Calderbank offer (dated 14 October 2020) was ‘not available’ to the Applicant and thus the Court was precluded from considering/re-considering the costs awarded to the Applicant in the Capital/trial judgment dated 11 December 2020;*
 - 2.2 *By finding that the Applicant’s Calderbank offer was not governed by the provisions of Rule 34, nor that the mechanisms provided by Rule 34(12) were available to him;*
 - 2.3 *By finding that the Applicant’s Calderbank offer was ‘inadmissible’ in relation to costs;*
 - 2.4 *By finding that the Applicant’s attorneys had failed to ‘go far enough’ in the formulation of their 14 October 2020 offer to qualify as a Calderbank offer;*
 - 2.5 *By finding that the Applicant had failed to word, correctly or at all, the Calderbank offer to include “without prejudice save as to costs”, thus precluding the Applicant from either relying upon the offer to claim punitive costs or to have the trial party-and-party costs reconsidered;*
 - 2.6 *By failing to find that the Respondent had behaved unreasonably or had put the Applicant to unnecessary expense, by not accepting or acting upon the Calderbank offer, timeously or at all;*
 - 2.7 *By finding that the ‘mere difference’ of R20,000.00 between the Calderbank offer and the Capital/trial judgment was insufficient for the Applicant to invoke – or rely upon – the Calderbank offer;*
 - 2.8 *By finding that the R20,000.00 differential between the Calderbank offer and the Capital/trial judgment did not offer the Respondent a ‘fair discount’;*
 - 2.9 *By failing to uphold Applicant’s unopposed application (dated 25 February 2021) and the uncontested allegations of fact contained therein.”*
3. Several of the grounds for leave to appeal advanced by the Applicant are in the context of my judgment and order interrelated, and I will therefore for the sake of convenience and expediency proceed to deal with those interrelated grounds simultaneously.

THE FIRST GROUND OF LEAVE TO APPEAL

4. I am of the view that the first ground for leave to appeal advanced by the Applicant constitutes an incorrect interpretation of my judgment. In paragraph 12 of my judgment, I found as follows:

“Because I am of the view that the plaintiff’s offer of 14 October 2020 is not governed by the provisions of Rule 34, it necessarily follows that the mechanism provided by Rule 34(12) is not available to the plaintiff herein and would not allow me to consider the question of costs afresh at this stage” (my emphasis added).

There is therefore a marked difference between what the Applicant in his first ground for leave to appeal contends I found in my judgment, and what was in fact found in my judgment.

5. It is clear from the passage quoted above that it was not my finding that, in principle, the mechanism of a so-called Calderbank offer was not available to the Applicant. On the contrary, paragraph 13 of my judgment made it clear that a plaintiff is not precluded from making a secret offer to a defendant outside of the rules of court. It has been recognised practice since the judgment in **AD and Another v MEC for Health and Social Development, Western Cape**¹ that so-called Calderbank offers form part of our common law. In the same paragraph of my judgment, I also cited the matter of **Van Reenen v Lewis and Another**², where the Free State High Court applied the principles of so-called Calderbank offers and gave a punitive cost order against the second defendant.
6. Given that the Applicant’s first ground of appeal is founded upon a patently incorrect interpretation of my judgment, I am unable to find a sound and rational basis³ that would support a conclusion that the Applicant’s first ground for leave to appeal carries a reasonable prospect of success on appeal.

¹ 2017 (5) SA 134 (WCC)

² (2302/2014) [2019] ZAFSHC 55 (14 May 2019)

³ Land and Agricultural Development Bank of South Africa and Another v Van den Berg and Others [2022] 1 All SA 457 (FB) at [16]

THE SECOND GROUND OF LEAVE TO APPEAL

7. Mr Eia, on behalf of the Applicant, did not advance argument in support of the second ground for leave to appeal in either the Applicant's heads of argument or in argument before me, save to submit that the courts in **AD** and **Van Reenen** accepted that 'Calderbank' Offers are akin to Rule 34 offers when it comes to the question of costs, because both are secret/without prejudice offers which one party may rely upon when it comes to the argument of costs and the scale thereof. Given my judgment that follows on the further grounds for leave to appeal advanced by the Applicant, it is not necessary for me to decide whether the second ground for leave to appeal carries a reasonable prospect of success on appeal.

THE THIRD, FOURTH AND FIFTH GROUNDS FOR LEAVE TO APPEAL

8. In my judgment of 17 December 2021, I found the Applicant's offer of 14 October 2020 to be inadmissible in relation to the aspect of costs. The basis for this finding was set out in paragraphs 14 to 16 of my judgment, in that I held that the wording employed by the Applicant, both in the offer itself, as well as in the e-mail under cover of which the offer was dispatched, did not properly qualify the Applicant's offer as a 'Calderbank offer'.
9. Mr Eia submitted that the Applicant's offer of 14 October 2020, being a secret offer, by legal implication made it a '*without prejudice*' offer. The Applicant is further of the view that the wording employed by the Applicant in the offer contained an express recordal or reservation in respect of costs, and as such met the requirements for admissibility.
10. Mr Eia further contended that the issues of how far an applicant must go in the formulation of his or her Calderbank offer and what the formulation of a Calderbank offer ought to be are particularly suited for referral to the Full Bench for decision.

11. It is currently still the position, as it was at the time of writing my judgment, that Calderbank offers had only been considered in two South African reported cases, being that of **AD** and **Van Reenen**. In both such cases, the plaintiff's Calderbank offers were held to be admissible with regard to costs, but the wording of the offers were not recounted in the reported judgments.
12. I am persuaded in the circumstances that on the third, fourth, and fifth grounds for leave to appeal a reasonable prospect of success exists and that another court may come to a different conclusion on such grounds.

THE SIXTH, SEVENTH AND EIGHTH GROUNDS FOR LEAVE TO APPEAL

13. It was held in **AD** that a plaintiff who has made a Calderbank offer is not entitled to attorney and client costs merely because he made a secret offer which was less than what the Court awarded. The Court must still consider whether the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counteroffer.⁴
14. As stated in **AD**⁵, certain factors are mentioned in the Commonwealth cases which would guide a court in determining whether a defendant's conduct may be said to be unreasonable, being: whether the defendant has engaged reasonably in attempting to settle; whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome; whether the plaintiff allowed the defendant a reasonable time to consider the offer; the extent of the difference between the amount offered and the amount awarded; and the nature of the proceedings and resources of the litigants.
15. In my considered view there is a reasonable prospect that another court, in applying the aforementioned factors to the facts of the matter at hand, may weigh the factors differently and in doing so, may conclude that the Defendant's conduct in this matter may have been unreasonable. This may of course lead

⁴ At paragraph [61].

⁵ *Ibid.*

another court to making an adverse cost order against the Defendant.

16. Mr Eia advanced two further arguments, which are compelling. He submitted that when considering whether the Plaintiff offered a significant discount, it must be borne in mind that such discount cannot be offered arbitrarily, as the Plaintiff's attorneys would thereby expose themselves to the risk of being found professionally liable. This consideration might form part of the question of what a realistic assessment of the case was. It was also submitted that, because the taxation of the expenses relating to the Plaintiff's experts were still left in the discretion of the taxing master, the Plaintiff would be left significantly out of pocket with regard to such expenses.
17. In the premise I am of the view that the sixth, seventh and eighth grounds for leave to appeal also carry a reasonable prospect of success.

THE NINTH (AND FINAL) GROUND FOR LEAVE TO APPEAL

18. It is so, that the Applicant's application for a special cost order, was not opposed by the Respondent and that the Applicant's allegations of fact were uncontested. In my view, this of course did not relieve the court of its responsibility in determining whether the Applicant met the requirements in law for the order sought. Furthermore, it is trite that costs are always in the discretion of the court, which discretion must be exercised judicially.
19. What is then left of this ground for leave to appeal, in my view, constitutes a conclusion in law, based on all the other grounds for leave to appeal already advanced by the Applicant. Having found that a reasonable prospect of success exists on several of the other grounds advanced by the Applicant, this ground must also follow suit.

CONCLUSION

20. In the premise, I find that the Applicant has shown a reasonable prospect of success on appeal in respect of the third to ninth grounds for leave to appeal advanced by the Applicant.

21. In this instance I am of the view that none of the considerations set out in section 17(6)(a)(i) or (ii) of the Superior Courts Act are currently present, and the Applicant must therefore be granted leave to appeal to the Full Bench of this Court.

The following order is made:

1. **The Applicant is granted leave to appeal to the Full Bench of this Court in respect of the judgment and order of 17 December 2021.**


EILLERT, A

**ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the Applicant/Plaintiff:
Instructed by:

Adv. PC Eia
Elliott, Maris, Wilmans & Hay
HvN/H5192

For the Respondent/Defendant:
Represented by:

No opposition
The Road Accident Fund
LINK: 250 7904
REF: 70/1353411/13/0