

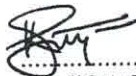


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 42992/2015

- REPORTABLE: YES / NO
- OF INTEREST TO OTHER JUDGES: YES/NO
- REVISED.

17/05/2021
DATE


SIGNATURE

In the matter between:

N. M. SIMELANE obo S. A. SIMELANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

K. STRYDOM (AJ):

1. This matter was placed before me on the 16th of April 2021 on the Settlement Roll in terms of Directive 1 of 2021. On that date it was indicated to the Plaintiff's counsel that the scale of costs appeared to fall within the jurisdiction of the Magistrate's Court being R112 248.00 (One Hundred and Twelve Thousand Two Hundred and Forty Eight

Rand). The matter was subsequently stood down to the 19th of April 2021 to enable counsel to file Heads of Arguments and make submissions to the aspect of costs.

The Claim and Settlement:

2. The Plaintiff claims on behalf of a minor child for loss of support suffered as a result of the death of the minor's father in a motor vehicle collision.

3. The settlement is based on a calculation assuming an income of R18 000.00 (Eighteen Thousand Rand) per year received by the deceased up until the age of majority of the minor child. The deceased was paid a salary of R800.00 (Eight Hundred Rand) a month in addition to a further R700.00 (Seven Hundred Rand) per month working as a gardener.

Plaintiff's submissions:

4. Mr Lubbe prepared well researched Heads of Argument on the matter and the Court expresses its gratitude in this regard.

5. The facts underlying the Plaintiff's contention that it is entitled to High Court costs can be summarised as the following:

5.1 On the 20th of October 2017 the Honourable Ledwaba DJP granted an order in terms of which the Defendant was found liable for 100% of Plaintiff's proven or agreed damages. These costs were awarded on the High Court scale;

5.2 In two pre-trials held respectively in October 2015 and May 2018 the Defendant did not raise the point that High Court costs should not be awarded or reserved.

6. The Road Accident Fund, no longer having legal representation, did not make any submissions however the following can be extracted as to their view of the matter:

6.1 In the document “Offer and Acceptance of Settlement” dated the 7th of October 2020 the Road Accident Fund makes the tender. However, it is noted that in Section C the costs on the *appropriate scale* will be paid following the settlement.

6.2 In a letter from the claims handler dated the 11th of January 2021 the claims handler confirms the settlement amount, however it notes that the scale of costs are reserved and postponed *sine die* (It is uncertain where the concept of the reservation and postponement come from, considering that there was no previous appearance in this regard). A further e-mail from the claims handler dated the 19th of April 2021 confirms that costs were tendered on the High Court scale.

7. The Heads of Argument indicated that the differing attitude of the claims handler pertaining to the costs were as a result of correspondences between the parties, where the Plaintiff indicated that costs were previously settled on the High Court scale and the Road Accident Fund did not object to the matter being in the High Court.

8. The gist of the Plaintiff’s argument is that the Defendant’s “reprehensible and dilatory” conduct in finalising this matter is the reason why this matter remained in the High Court. The Plaintiff submits that the Plaintiff should not be penalised with the Magistrate’s Court cost order in circumstances where the Road Accident Fund could have finalised this case at the merits stage. The so-called dragging out of the matter by the Defendant and failure to, for instance, file its own experts are mentioned as some of the reprehensible conduct by the Defendant.

9. The Plaintiff referred to the matter of **Road Accident Fund v Izaaks** a Full Bench Appeal in the High Court of South Africa Northern Cape Division, Kimberley, Case Nr. JA78P10, Case Nr. 1552/14 hear on 23 March 2018 and Judgment delivered on 11 May 2018.

9.1 In this matter the Court considered the fact that the Plaintiff's claim was not properly and timeously investigated and that the RAF did not request to transfer the matter as factors the Court can consider in exercising its discretion regarding the scale of costs.

9.2 In that case the Court placed great emphasis on the use of the Rule 37(4) procedures and indicated that the Road Accident Fund at that stage should have insisted on the matter being transferred.

Discussion:

16. I am in agreement with the sentiments in the matter of ***Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) SA 1045 at 1055 f-i*** where it was stated:

"The Court's discretion is a wide, unfettered and equitable one. It is a facet of the Court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A Court may wish, in certain circumstances to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done, as a mark of its displeasure at such parties' conduct in relation to the litigation. Is it to be precluded by agreement by doing so? A Court should not be obliged to give its imprimatur to an order of costs which, in the circumstances, it considers entirely inappropriate or undeserved. In my view as a matter of policy and principle, a Court should not, and must not, permit the ouster of its discretion because of agreement between the parties with regards to costs".

17. In the matter of **Rafiek Williams v Road Accident Fund** (Western Cape High Court Case Nr. 13312/2006, Judgment delivered on the 26th of February 2010) it was stated that:

“(4) In considering the exercise of its discretion whether to award costs on the High Court or Magistrate’s Court scale, where the eventual judgment was within the Magistrate’s Court’s jurisdiction, the Court will have regard to whether it was reasonable, as seen from the Plaintiff’s perspective when the proceedings were launched, to proceed in the High Court.” [Underlining my own]

18. The learned Judge went further and referred to an unreported case of **Moronta Meja obo Mpetsheni v Road Accident Fund** (unreported judgment delivered on the 15th of November 2007) where the Court took into account that the Defendant never suggested that the matter be referred to the Magistrate’s Court; the wide ranging nature of the legal and factual disputes both in regard to a special plea that the Plaintiff failed to comply with certain regulations and the disputes pertaining to the minor’s injuries, sequelae and damages and the fact that the RAF’s admissions pertaining to merits and the undertaking was made at a late stage.

19. In the matter of **Nobantu Confidence Mafumana v Road Accident Fund** (High Court of South Africa Gauteng Division, Case Nr. 4900/2017, Judgment delivered on the 29th of April 2019) the Plaintiff had died at some point during the course of the proceedings, which effectively served to lower the quantum amount to within the jurisdiction of the Magistrate’s Court. The parties were *ad idem* that had the Plaintiff not died, the Plaintiff would have been entitled to costs on the High Court scale. Rule 39(22) of the Uniform Rules of Court deals with the transfer of matters from the High Court to the Magistrate’s Court and states:

"By consent the parties to a trial shall be entitled, at any time, before trial, on written application to a judge through the registrar, to have the cause transferred to the magistrate's court."

20. The learned Judge held that the section does not place an obligation on a party to transfer a matter but only provides for an entitlement. He held that:

"It leaves a party with a choice and thereby suggests that a party should not be penalised for exercising an option not to transfer the matter."

"But, on the other hand it does not deal with costs and the discretion of a Court remains unfettered. I am of the view that a Plaintiff with knowledge that the amount of damage he will be able to provide will not be more than the jurisdictional amount of the Magistrate's Court, should use his entitlement and transfer the matter. If this is not done a Court should only award costs on a Magistrate's Court scale from the time where the matter should have been transferred. " [Underlining my own]

21. In the present instance the matter pertains to a relatively straightforward loss of support claim and cannot be construed as one of severe complexity or difficulties. It is important to note, at this juncture, that, at inception of the matter, the Particulars of Claim estimated the loss of support to be at R129 200.00 only. This amount has never gone above the threshold to place it within the jurisdiction of the High Court.

22. The entitlement to transfer a matter resides not only with the Defendant but also with the Plaintiff. The Plaintiff has *dominus litis* in all these cases. It is the Plaintiff who, at inception, decides in which Court a matter should be brought and through his or her legal representatives makes that election - presumably advised of the risks that should he not

prove High Court costs entitlement, such costs will be on the Magistrate's Court scale. I disagree with the contention that where a Defendant does not object to the forum in a pre-trial, that automatically ousts the Court's discretion to decide on costs. As stated, the rule pertaining to transfers does not deal with costs and the Court's discretion in this regard remains unfettered.

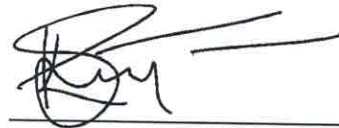
23. Insofar as there is an argument that, an award for High Court costs for a matter falling within the Magistrate's Court's monetary jurisdiction can be regarded as punitive in the High Court, the argument is circular. Punitive costs are awarded at the end of a trial during which the conduct of a party has become evident. The decision to institute a matter in the High Court is taken at the very outset of the matter, when there can be no argument that the conduct of the impugned party would have been anticipated as being reprehensible. Punitive cost orders are usually awarded on attorney client scales, costs a *bonus propriis*, disallowance of costs etc, at the end of the matter. The election regarding the forum of institution of the matter falls squarely to the Plaintiff. *In casu*, it was clear to the Plaintiff from the outset that this matter should not have been brought in the High Court. Had the proceedings been brought correctly in the Magistrate's Court, the Plaintiff would not have been prohibited in that forum for applying for punitive cost orders in the normal course. To use the Plaintiff's own incorrect institution of the matter in the High Court retrospectively as a punitive cost order would be unjust and illogical.

24. In the ***Mafunana*** case *supra* the learned Judge indicated that he was of view that the Plaintiff's legal representatives, upon the death of the Plaintiff should have proactively transferred the matter to the Magistrate's Court causing cost effective litigation. It was accordingly held that the Plaintiff would only be entitled to costs on a High Court scale up

until the date when it reasonably should have transferred the matter to the Magistrate's Court.

25. *In casu* this is a matter that should never have been instituted in the High Court, but, in view of the previous Court order, the Plaintiff has already been awarded High Court scales for a portion of its preparation. Should my finding against considering the scale of costs (Magistrate's Court vs High Court) as a punitive element, be incorrect, I find that any such punitive costs have already been addressed by the previous Court order.

26. I accordingly am of the view that costs should be awarded on the Magistrate's Court scale as per the draft order marked "X" attached herewith.



**K STRYDOM
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA**

Heard on: 19 April 2021
Judgement delivered:

Appearances:

For the Plaintiff: Adv G Lubbe
Instructed by: Nell Kotze & Van Dyk Attorneys
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No appearance for Defendant