



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED NO <i>YES</i>
DATE: 19 JULY 2019	
SIGNATURE: <i>[Signature]</i>	

CASE NUMBER: 50571/2016

In the matter between:

SIPHO TREVOR NKONDE

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

Coram: A Vorster AJ

Heard: 17 July 2019

Delivered: 19 July 2019

ORDER

1. The defendant is liable to compensate the plaintiff for 100% of the loss suffered by him on 27 November 2011, which loss was caused by, or arose from, the negligent driving of a motor vehicle by a third party.
2. The defendant is ordered to compensate the plaintiff for the loss suffered by him for past medical expenses and loss of earnings in the sum of R78'687.67 (seventy eight thousand six hundred and eighty seven rand and sixty seven cents).
3. The defendant is not liable to compensate the plaintiff for pain, suffering, discomfort, mental anguish, loss of amenities or distress (general damages).
4. The defendant is ordered to forthwith furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act No. 56 of 1996, wherein the defendant should undertake to pay 100% of the costs of future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to

him pursuant to injuries sustained by him in the aforesaid motor vehicle collision.

5. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the Magistrate's Court scale.
6. Any costs associated with the plaintiff's plastic surgeon; clinical psychologist, and orthoptist & prosthetist is disallowed.
7. Notwithstanding any agreement to the contrary, the plaintiff's attorney may not recover any legal costs from the capital of the plaintiff's claim.
8. Notwithstanding any agreement to the contrary, the scale of fees to be taken by the Fund's attorneys, from the Fund, shall be that set out in Table A of Annexure 2, of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa, in addition to necessary expenses.

JUDGMENT

A Vorster AJ

1. Before me is a dispute relating to costs.

2. The genesis of this dispute is a motor vehicle collision which occurred on 27 November 2011, in which the plaintiff was involved as a passenger.
3. In this collision the plaintiff sustained injuries.
4. On 25 February 2014 the plaintiff lodged a claim, on the statutorily prescribed RAF1 form, with the Road Accident Fund, a statutory insurer established in terms of section 2(1) of the **Road Accident Fund Act**, for compensation for the injuries sustained in the motor vehicle collision.
5. The procedure prescribed for lodging the claim is dealt with in section 24 of the Act.
6. The Fund's liability arises out of the provisions of section 17(1) of the Act.
7. On 30 June 2015, after the statutory embargo on litigation of 120 days, as provided for in section 24(6)(a) lapsed, the plaintiff instituted action against the Fund.
8. On 7 July 2015 the Fund's attorneys entered an appearance to defend, and on 2 September 2015 delivered a plea.
9. During the course of litigation various procedural steps were taken, and on 18 October 2017 the plaintiff enrolled the matter on the trial roll of 27 May 2019.

10. The matter became settled on the day of the trial, namely 27 May 2019.
11. In terms of the settlement the Fund undertook to pay the plaintiff an amount of R78'687.67 in full and final settlement of his claim¹.
12. The Fund also agreed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act to provide for future medical expenses.
13. The Fund further accepted liability to pay the costs of the action, but contended that, based on the agreed quantum of the claim, costs should be on the Magistrate's Court scale.
14. The plaintiff disagreed with this contention and insisted that the costs be paid on the High Court scale.
15. Due to the state of the trial roll, no judges were available to adjudicate upon this dispute, and the matter was postponed to 17 July 2019.
16. When the matter came before me on 17 July 2019 the parties persisted with their entrenched positions regarding the scale of costs.

¹ I am conscious of the fact that the Fund is also providing an undertaking, and that a monetary value should be attached to such undertaking. However on direct questioning neither Mr. Trumpie for the plaintiff, nor Mr. Bekker for the defendant, could inform me what the monetary value of the undertaking is. For purposes of this judgement I therefore do not take the monetary value of the undertaking into account. Both parties agree that the quantum of compensation to be paid fall within the monetary jurisdiction of the Magistrate's Court.

17. I was therefore called upon to determine whether the plaintiff was entitled to costs on the High Court or Magistrate's Court scale.
18. As would appear from this judgement, the matter is more complex than merely determining on what scale costs should be paid by the Fund.
19. At the outset it is important to deal with the chronology of events as the litigation in this matter unfolded²:
 - 18.1. As I've already mentioned the accident occurred on 27 November 2011.
 - 18.2. On 25 February 2014 the plaintiff lodged its claim with the Fund.
 - 18.3. On 30 June 2015 the plaintiff issued summons against the Fund.
 - 18.4. On 7 July 2015 the Fund entered an appearance to defend.
 - 18.5. On 27 July 2015 the plaintiff delivered a report by its orthopaedic surgeon³.

² This chronology was prepared by the respective legal representatives, and I am indebted to them.

³ As has become custom in litigation against the Road Accident Fund, this report did not comply with the provisions of either rule 36(9)(b) of the Uniform Rules of Court, or the test laid down

- 18.6. On 27 July 2015 the plaintiff delivered an RAF4 form in which the plaintiff motivated why his injuries should be regarded as serious, in order for him to qualify for general damages.⁴
- 18.7. On the same date the plaintiff delivered an employer's certificate detailing the income of the plaintiff at the time of the collision.
- 18.8. On 2 September 2015 the defendant delivered its plea.
- 18.9. In a curious turn of events the defendant was served with a notice of bar on 11 September 2015, nine days after the Fund delivered its plea.
- 18.10. On 18 May 2016 the defendant delivered a report by its orthopaedic surgeon⁵.
- 18.11. On 24 May 2016 the defendant delivered its occupational therapist's report.

in **Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingbekämpfung MBH** 1976 (3) SA 352 (A).

⁴ This is to comply with the requirements set out in section 17(1) of the Act.

⁵ The defendant's orthopaedic surgeon's report, and for that matter all subsequent reports delivered by both parties suffered from the same defects as the plaintiff's orthopaedic surgeon's report.

- 18.12. On 27 May 2016 the defendant delivered its industrial psychologists' report.
- 18.13. On 8 December 2016 the plaintiff delivered its occupational therapists' report.
- 18.14. On 16 May 2017 the parties held a first pre-trial⁶.
- 18.15. On 29 June 2017 the Health Professions Council of South Africa communicated to the parties that the tribunal was satisfied that the plaintiff's Whole Person Impairment was less than the 30% threshold, that the plaintiff's injuries could not qualify as a serious injury under the narrative test, and that the tribunal concluded that the injuries were not serious⁷.
- 18.16. On 28 July 2017 the plaintiff delivered its plastic surgeon's report and an RAF4 form, completed by a plastic and

⁶ It was recorded at this pre-trial that the issue of general damages was referred to the Health Professions Council of South Africa and that the parties were awaiting the outcome of these proceedings.

⁷ The effect of these findings were that the plaintiff did not qualify for general damages unless these findings were successfully reviewed.

It would seem from the documents filed of record that the plaintiff and his attorneys reconciled themselves with these findings, because as far as I could ascertain these findings were never challenged on review.

reconstructive surgeon, motivating why the plaintiff's injury should be considered to be serious.

- 18.17. On 3 October 2017 a judicial pre-trial hearing was held at court.
- 18.18. On 5 October 2017 a settlement was reached that the Fund would compensate the plaintiff for 100% of his agreed or proven loss.
- 18.19. On 18 October 2017 the plaintiff set the matter down for hearing on the trial roll of 27 May 2019.
- 18.20. On 9 April 2019 the plaintiff delivered a further occupational therapist's report.⁸
- 18.21. On 26 April 2019 the plaintiff delivered its industrial psychologist's report.
- 18.22. On 3 May 2019 the plaintiff delivered its actuary's report.
- 18.23. On 13 May 2019 the parties' respective occupational therapists prepared a joint minute.

⁸ This report was by a different occupational therapists to the one who prepared the initial report.

- 18.24. On 16 May 2019 the parties' respective industrial psychologists prepared a joint minute.
- 18.25. On 27 May 2019 the matter was on the trial roll, and on this date the parties settled the matter in respect of quantum and the Fund's liability to pay costs, merits having been conceded on 5 October 2017.
- 18.26. The parties, being unable to agree on the scale of costs requested that a judge be allocated to argue this issue.
- 18.27. Due to the state of the trial roll, no judges were available, and the issue of the scale of costs was postponed to 17 July 2019⁹.
- 18.28. On 17 July 2019 the matter came before me, and the parties argued the scale of costs.
19. Mr. Trumpie on behalf of the plaintiff argued that costs should be on the High Court scale with reference to the following facts:
- 19.1. the nature and complexities of the injuries as it appears from the RAF4 form, completed by Dr. Hechter Schultz, a General Practitioner, who assessed the plaintiff's injuries to be serious;

⁹ To alleviate the burden on the ordinary trial roll, provision was made for third-party matters to be heard in recess by acting judges, who presides pro bono.

- 19.2. the fact that at various pre-trials the defendant confirmed that the matter should not be transferred to a different court, and notwithstanding having had various opportunities to do so, did not object to the matter being in the High Court;
 - 19.3. the fact that the offer to settle was only forthcoming on the day of the trial.
20. Mr. Bekker on behalf of the defendant argued that costs should be on the Magistrate's Court scale with reference to the following facts:
- 20.1. the fact that the matter was settled in an amount which falls within the monetary jurisdiction of the Magistrate's Court;
 - 20.2. the fact that:
 - 20.2.1. the defendant delivered the expert reports of its Occupational Therapist and Industrial Psychologist as far back as May 2016, and
 - 20.2.2. the plaintiff was informed of the fact that the Health Professions Council Tribunal scuppered the plaintiff's claim for general damages as far back as 29 June 2017;

facts which should have alerted the plaintiff to the fact that its claim would in all probability fall within the monetary limit of the Magistrate's Court.

21. In support of these contentions both legal representatives referred me to the following cases:

21.1. **RAF v Isaacs** (1552/14) [2018] ZANCHC 27 (11 May 2018).

21.2. **Vermaak v Road Accident Fund** [2006] ZAECHC 10

21.3. **Xakaxa v Road Accident Fund** (3902/2011) [2012] ZAECPHC 79 (13 November 2012).

22. I do not read any of these cases to establish mandatory or persuasive precedent which compels me to deviate from the accepted principle that in awarding costs, the court has a discretion to be exercised judicially, upon a consideration of the facts in each case, and that in essence the decision is a matter of fairness to both sides¹⁰.

23. In the cases referred to by Counsel the respective courts took into consideration the circumstances of the cases before them, carefully weighing the issues in the cases, the conduct of the parties, and any

¹⁰ See Erasmus: **Superior Court Practice** 2nd Edition at D5-5 under the heading 'Award of costs in court's discretion' and the cases referred to by the learned author.

other circumstances which may have had a bearing on the issue of costs, and then made such orders as to costs as were justified in those cases.

24. The approach adopted by the respective courts cannot in any way be controversial and I am in respectful agreement with those decisions.
25. After all, in each instance the cost orders made were fair and just, considering the facts before the respective courts.
26. In making a cost order which is fair and just in this matter, I have to consider the peculiar facts of this case, and make an order which is justified by those facts.
27. I am of the view that, based on the facts of this case, neither the plaintiff, nor the defendant, should bear the consequences of an adverse costs order, their attorneys should.
28. An adverse costs order in as far as the plaintiff is concerned being costs on the Magistrate's Court scale, and an adverse costs order in as far as the defendant is concerned being costs on the High Court scale.
29. As I will indicate in this judgement, I am of the view that both the attorneys for the plaintiff and the defendant had a duty to ensure that this matter is instituted and prosecuted in the correct forum, and that costs are saved, a duty which in my considered view both sets of attorneys dismally failed to execute.

30. If anyone should bear the consequences of an adverse costs order, it should be the attorneys for the plaintiff and the defendant, and not their respective clients.

31. I propose to make a cost order as provided for in terms of rule 37(9)(a)(ii) of the Uniform Rules of Court which provides that:

'At the hearing of the matter, the court shall consider whether or not it is appropriate to make a special cost order as to costs against the party or his attorney, because he or his attorney –

(ii) failed to a material degree to promote the effective disposal of the litigation'

32. There were various stages in the litigation when there was an opportunity, and in fact an obligation on the respective attorneys, to conclude that this is a matter which should have been prosecuted in the Magistrate's Court.

33. Before I deal with the obligation which rested on the respective attorneys, I will first deal with the opportunities the attorneys had to conclude, as any prudent attorney should, that this matter did not belong in the High Court, and to take steps to curtail legal costs in this matter.

34. The plaintiff lodged its claim on 25 February 2014.

35. The Act provides for an embargo on the institution of legal proceedings for a period of 120 days.

36. The purpose of this embargo is to allow the Fund to investigate the claim and make a reasonable offer for compensation, thereby obviating the risk and associated costs of litigation.
37. A proper investigation would inevitably mean that the Fund will have to refer the claimant to appropriate experts to properly verify and quantify the claim.
38. If I am mistaken as to the purpose of the embargo, the embargo will be rendered nugatory.
39. There is nothing in the record to suggest that the Fund investigated the plaintiff's claim in any meaningful way.
40. I also engaged Mr. Bekker who appeared for the defendant on this issue, and he conceded that the Fund did not properly investigate the claim during the embargo period.
41. It follows from the provisions of sections 4 and 24 of the Act that the Fund and its personnel cannot just sit and relax after having received a claim for compensation. They are under a duty to investigate and if required to settle a claim lodged with the Fund¹¹.

¹¹ **Hlalele v Road Accident Fund** (5668/2016) [2017] ZAFSHC 210 (18 October 2017) at par 19.

42. The plaintiff instituted action against the fund on 30 June 2015.
43. Ex facie the particulars of claim the plaintiff's attorney, who has the right to appear in the High Court in terms of section 4(2) Act 62 of 1995, drafted the particulars of claim.
44. The following injuries were listed in paragraph 8 of the particulars of claim:
- 44.1. fracture of the left tibia;
 - 44.2. head injury ;
 - 44.3. soft tissue injury to the neck.
45. The sequelae of these injuries, from a loss perspective, were not described in any particularity.
46. Notwithstanding the fact that the plea was vacuous in respect of the sequelae of the injuries, the plaintiff still claimed compensation as follows:
- 46.1. future medical expenses in the amount of R340'000.00;
 - 46.2. general damages in the amount of R500'000.00.

- 46.2. general damages in the amount of R500'000.00.
47. It is apposite to point out that at this stage the plaintiff did not prefer a claim against the defendant for loss of earnings or past medical expenses.
48. One must accept that the author of the plea held specific instructions as to what to plead¹².
49. What was pleaded in the particulars of claim with regards to the injuries could only have been ascertained through clinical examinations by suitably qualified physicians, and with regards to the quantification of the claim, through assessments by suitably qualified occupational therapists and industrial psychologists.
50. It is reasonable to draw an inference that what was pleaded in the particulars of claim was not informed by relevant examinations or assessments by suitably qualified experts.
51. The sequelae of the injuries were at best a layman's assessment, and the quantification of the loss what is colloquially referred to as a 'thumb suck'.
52. I cannot conclude that the plaintiff's attorney had proper instructions when he drew the particulars of claim¹³.

¹² **Jwili v Road Accident Fund** (2009/12886) [2010] ZAGPPHC 37; 2010 (5) SA 32 (GNP) (6 May 2010) at par11.

53. This state of affairs is in no way surprising.
54. The majority of third party claims are done on a contingency basis, or what is also known as a no win no fee basis.
55. This means that the attorney derives his compensation partly from the compensation awarded to his client, and any cost orders made against the Fund.
56. The client would as a general proposition not contribute financially to any costs incurred in the course of prosecuting his or her claim.
57. Any costs incurred before litigation commences are generally not recoverable from the Fund.
58. Due to the operation of the **Contingency Fees Act** 66 of 1997 cost orders would often be more advantageous to plaintiff attorneys in claims with a low monetary value, than the rights accrued in terms of contingency fee agreement.
59. Differently put, in claims with a low monetary value, attorneys would often do better to recover taxed costs from the Fund, than to recover such costs from the award made to their client.

¹³ Legal practitioners often misconstrue the true meaning of the term 'instructions'. Instructions are not what a client tells an attorney, or an attorney tells Counsel. Instructions are facts upon which an attorney or counsel may advance a specific legal proposition.

60. Attorneys therefore avert the risk of incurring irrecoverable expenses on a claim with marginal prospects of success, or demonstrable low monetary values, by drawing particulars of claim without specific instructions, and only properly formulating the claim after the institution of legal proceedings, when costs may be recovered.
61. This practice is not acceptable.
62. If the plaintiff's attorneys obtained proper instructions, by appointing relevant experts, before they instituted action, they would in all likelihood have realised that the ultimate compensation to be awarded to the plaintiff would have fallen within the monetary jurisdiction of the Magistrate's Court.
63. After all, there were no foreseeable supervening circumstances which might have changed the plaintiff's position from the date of the accident to the date of the hearing of the matter.
64. I do not know, and could not ascertain from the documents filed of record, whether the Fund instructs its attorneys when a claim is lodged, or only after summons had been issued.
65. Whatever the case might be, when the Fund's attorneys receive an instruction from the Fund, and it appears that the Fund neglected its duty to properly investigate the claim, the attorneys for the Fund should do so.

"The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to

*"The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed."*¹⁴

66. The duty espoused in the aforementioned quote does not only extend to the Fund, but also to its attorneys.
67. So when the Fund's attorneys receive a summons without proper instructions, they have to slam the brakes on any further litigation by acting in terms of rule 36(1) & (2) of the Uniform Rules of Court and insist that the plaintiff submit him or herself to medical examinations in order to determine the true extent and sequelae of the injuries sustained by the plaintiff, and the quantum loss suffered as a result of the injuries.
68. This would enable the Fund's attorneys at an early stage of the litigation to make a reasonable offer to the plaintiff, or properly formulate a defence.
69. The Fund's attorneys did not act in the manner suggested above, but rather filed a plea which contained bare denials.

¹⁴ Per Howie JA (as he then was) in **Road Accident Fund v Klisiewicz**, Case No. 192/2001 (SCA), at para [42], as quoted by Maya AJA in **Madzunya and another v Road Accident Fund** 2007 (1) SA 165 (SCA) at para [17]) and Froneman J (as he then was) in **Bovungana v Road Accident Fund** (2090/2007) [2009] ZAEHC 22; 2009 (4) SA 123 (E) (27 February 2009) par 1.

70. As has become the practice in third-party claims, attorneys routinely refer plaintiffs to medical experts, only after merits have been conceded or disposed of.
71. As a result of this practice, claims and defences are only properly formulated at a very late stage in the proceedings.
72. Earlier in the judgement I've dealt with the dates on which the respective expert reports were delivered.
73. From a simple reading of these reports it should have become apparent to both sets of attorneys that the plaintiff could never succeed with his initial claim for compensation as set out in the particulars of claim, and that a possibility existed that the ultimate compensation payable to the plaintiff would fall within the monetary jurisdiction of the Magistrate's Court.
74. When the expert reports came to light, both sets of attorneys should have properly considered the reports, and should have discussed the issue of transferring the matter to the Magistrate's Court.
75. They failed to do so.
76. On 15 August 2017 the plaintiff's attorneys delivered an amendment in which they increased the quantum of the plaintiff's claim from R840'000.00 to R1'078'240.00.

77. The amended particulars of claim now included a claim for loss of earnings.
78. This amendment was not justified if one has regard to the content of the expert reports which were delivered prior to the date of the amendment.
79. Apart from an orthopaedic surgeon, occupational therapist and plastic surgeon's reports, the plaintiff had not at that stage filed any further reports.
80. The defendant's industrial psychologist report was available when the amendment was affected, and that report did not support the exorbitant amounts claimed in the amendment.
81. Shortly after the plaintiff delivered its occupational therapist' report, it affected a further amendment in which the quantum of the plaintiff's claim was adjusted downward to an amount of R849'320.77
82. This amendment preceded to plaintiff's industrial psychologist and actuary's reports and it is hard to imagine how the plaintiff's attorneys arrived at the amount in respect of loss of earnings.
83. The amended particulars now included a further claim for past medical expenses.

84. Although the claim was adjusted downwards, the quantum was still not justified if one has regard to the content of the expert reports delivered prior to the amendment having been effected.
85. The only claim which was justified in as far as quantum was concerned was the negligible claim for past medical expenses in the amount of R683.77.
86. During the course of litigation two pre-trials were held, the first between the respective legal teams on 16 May 2017, and the second, a judicial pre-trial held on 3 October 2017.
87. As I understand from Mr. Trumpie for the plaintiff, and from a reading of the pre-trial minutes, the defendant's attorneys at both these pre-trials agreed that the matter should not be transferred to another court.
88. Mr. Trumpie argued that, based on the failure of the defendant's attorneys to object to the jurisdiction of the High Court, and their failure to insist that the matter be transferred to the Magistrate's Court, the defendant in effect acquiesced to the jurisdiction of the High Court, and by parity of reasoning, should now be non-suited to argue that costs be on the Magistrate's Court scale, irrespective of the value of the award.
89. I find this argument bizarre and perverse in the extreme.
90. If there were facts present which should have moved the attorneys for the defendant to insist that the matter be transferred to the Magistrate's Court, these facts would also have been known to the plaintiff's attorneys.

91. It cannot be accepted that a duty to curtail costs only rests on the defendant's attorneys, and not on the plaintiff's attorneys.
92. Both parties should have insisted on a transfer of the matter from the High Court to the Magistrate's Court when it became apparent that the quantum of the claim did not justify the prosecution thereof in the High Court.
93. There were various other stages in the litigation when there were opportunities to curtail costs.
94. However for purposes of this judgement, the instances referred to in the preceding paragraphs would suffice.
95. I am of the view that the attorneys for both parties had an obligation and a duty to curtail costs, an obligation and duty which they neglected to observe.
96. In **Cape Law Society v Gihwala** (14154/17) [2019] ZAWCHC 1; [2019] 2 All SA 84 (WCC) (29 January 2019) at pars 74 and 75 a full bench of the Western Cape High Court held as follows (footnotes omitted):

[74] *In **General Council of the Bar of SA v Geach** Ponnann JA pointed out that as members of a 'distinguished and venerable' profession lawyers occupy a very important place in our society. As officers of the Courts they play a vital role in upholding the Constitution and ensuring that our justice system is efficient and*

effective, and as a result 'absolute personal integrity and scrupulous honesty' are required of them. In addition, the law expects the 'highest possible degree of good faith' from practitioners in their dealings with those for whom they act, and in their dealings with the Courts.

[75] *Without these fundamental qualities neither members of the public to whom they turn for help and advice in times of need, nor the Courts before whom they appear to plead their cases, can trust and therefor rely on them, and in such circumstances the edifice on which the system is built may come tumbling down. Because of this, the Courts must be vigilant in seeking to uphold these values. '*

97. The quote by Ponnann JA as referred to in this judgement is relevant on two scores.
98. The first is that as an incidence of integrity and scrupulous honesty, attorneys, both for plaintiffs and defendants, have a duty, not only towards their clients, but also towards the courts and the administration of justice, to ensure that unnecessary costs in litigation are avoided.
99. But more importantly, Ponnann JA remarked that, as officers of the Courts, attorneys play a vital role in upholding the **Constitution**.
100. I am in respectful agreement with the sentiment expressed by Ponnann AJ.

101. When attorneys and Counsel are admitted to practice as such, they swear or affirm that they will be faithful to the Republic of South Africa, and uphold and protect the Constitution and the human right entrenched in it.
102. The scope and tenor of the pledge towards the Republic should be understood with reference to the **Constitution**.
103. For attorneys to be faithful to the Republic, they should subscribe to the norms and values enshrined in the **Constitution**.
104. Section 34 of the **Constitution** provides as follows:
- 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'*
105. A fair public hearing does not only implicate the dispute between the parties, but also the costs associated with the litigation.
106. An incidence of a fair public hearing is that the legal costs associated with litigation should be reasonable, and curtailed to what is strictly necessary to prosecute the matter to finality.
107. When attorneys unnecessarily proliferate the costs of litigation, or fail to take positive steps to curtail costs, they act in breach of section 34 of the **Constitution**, and the oath or affirmation which they took when they were admitted as attorneys.

108. In light of the factual findings I've made, and having regard to the legal position referred to in the preceding paragraphs, I deem it necessary to sanction the conduct of both sets of attorneys through the costs orders I propose to make.
109. After all, what is good for the goose is good for the gander.
110. The plaintiff's attorneys will be adequately sanctioned if I order that they are only entitled to recover costs from the Fund on a Magistrate's Court scale, and that they be precluded from recovering any legal costs from the capital of the plaintiff's claim.
111. I propose to make such an order.
112. An appropriate sanction to be visited upon the defendant's attorneys is a bit more involved.
113. An order that costs are only recoverable on Magistrate's Court scale would obviously have no effect on the defendant's attorneys, because in terms of their Service Level Agreement with the Fund - they are entitled to fees irrespective of the scale of costs.
114. An appropriate sanction should circumvent this state of affairs.
115. The order which I propose to make, namely that costs only be recoverable on the Magistrate's Court scale, will further not serve as a

disincentive for the Fund's attorneys in general to engage in unnecessarily costly litigation.

116. I therefore propose to make an order that the scale of fees to be taken by the Fund's attorneys, from the Fund, shall be that set out in Table A of Annexure 2, of the **Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa**, in addition to necessary expenses.
117. Apart from sanctioning the attorneys in this matter, I also believe that such orders would 'inhibit the exuberance of litigants and induce them to exercise discretion and moderation in the prosecution and defence of actions'¹⁵.
118. Before I make the proposed orders there is one last issue which should be dealt with, and this is the issue of superfluous expert reports.
119. The plaintiff's attorneys gave notice of the plaintiff's intention to call the following experts to give evidence as experts at the hearing of the matter:
 - 119.1. a plastic surgeon;
 - 119.2. a clinical psychologist;

¹⁵ See the commentary in Jones & Buckle: **The Civil Practice of the Magistrates Courts in South Africa** 10th Edition, on the scale of costs.

- 119.3. an orthoptist & prosthetist.
120. The plaintiff did not proceed to deliver reports in respect of the plastic surgeon and clinical psychologist, only in respect of the orthoptist & prosthetist.
121. None of these experts' evidence would have been relevant, relevance being determined with reference to the disputed issues in the pleadings, and perhaps the expert reports of relevant experts.
122. Plaintiffs, who are mostly lay people, cannot assess which experts to appoint, and the decision is, as a matter of course, taken by the attorneys.
123. I do not believe that plaintiffs should be penalised if unnecessary experts are engaged, or unnecessary costs incurred, because attorneys should be circumspect when they appoint experts, and be conscious of the requirement that the evidence of experts should be relevant.
124. It was unnecessary to incur any costs in relation to the experts listed in paragraph 119, and such costs should be disallowed.
125. I propose to make such an order.
126. The plaintiff also delivered two occupational therapist reports, by two different occupational therapists.

127. Mr. Bekker on behalf of the defendant submitted that in as far as it was reasonable for the plaintiff to revisit the occupational therapist's report, considering the time that elapsed between the initial report and the trial date, the second report should be treated as an addendum, and costs should be taxed accordingly.
128. I agree with Mr. Bekker's submission.
129. There was no need to engage the services of a second occupational therapist.
130. The occupational therapist who first assessed the plaintiff could have been approached to prepare an addendum report, and through that costs could have been saved.
131. For these reasons, the following order is made:
- i) The defendant is liable to compensate the plaintiff for 100% of the loss suffered by him on 27 November 2011, which loss was caused by, or arose from, the negligent driving of a motor vehicle by a third party.
 - ii) The defendant is ordered to compensate the plaintiff for the loss suffered by him for past medical expenses and loss of earnings in the sum of R78'687.67 (seventy eight thousand six hundred and eighty seven rand and sixty seven cents).

- iii) The defendant is not liable to compensate the plaintiff for pain, suffering, discomfort, mental anguish, loss of amenities or distress (general damages).
- iv) The defendant is ordered to forthwith furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act No. 56 of 1996, wherein the defendant should undertake to pay 100% of the costs of future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him pursuant to injuries sustained by him in the aforesaid motor vehicle collision.
- v) The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the Magistrate's Court scale.
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- viii) Notwithstanding any agreement to the contrary, the scale of fees to be taken by the Fund's attorneys, from the Fund, shall be that set out in Table A of Annexure 2, of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa, in addition to necessary expenses.



A VORSTER AJ

Acting Judge of the High Court

Date of hearing:	17 July 2019
Date of Judgment :	19 JULY 2019
Counsel for plaintiff:	D BEKKER
Instructed by:	GELDENHUYS INC
Counsel for defendant:	B TRUMPIE
Instructed by:	FOURIE FISMER INC