



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 1971/2018

In the matter between:

NICHOLAAS KENNY MOKOENA

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

CORAM: NAIDOO J

HEARD ON: Written Heads of Argument Submitted 21 May 2019

DELIVERED ON: 06 JUNE 2019

- [1] The cause of action in this matter arose from a motor vehicle accident

which occurred on 6 June 2015, in which the plaintiff was injured.

The plaintiff was a pedestrian at the time, and sued the defendant (RAF) for damages he suffered as a result of the negligence of the defendant's insured driver. At a Rule 37 conference held between the parties on 30 August 2018, they agreed to separate the issues of merits and quantum. The matter came before me, having been set down for trial on the merits, on 7 and 8 May 2019. On 7 May 2019, the merits were settled without the matter having proceeded to trial. The defendant agreed to accept liability for 60% of the plaintiff's proved or agreed damages. The parties could not, however, agree on the issue of costs, and resolved to file heads of argument, in order that the issue of costs may be decided by a judge in Chambers. This was done by 21 May 2019. Quantum was to be determined at a later stage. Ms KN Peterson represented the plaintiff and Mr I Sander represented the defendant

- [2] The plaintiff seeks an order that the defendant pay his costs on a party and party scale. The defendant, on the other hand contends that costs should be costs in the cause, as it is not possible at this stage to determine if the High Court tariff or the Magistrates Court tariff should apply. Where the parties have agreed to separate the issues of merits and quantum and the court makes an order to this effect (usually at the pre-trial hearing), the practice in this Division is to set the hearing of merits of the matter down for trial. Quantum stands over for determination at a later stage. After the merits are determined, either by way of the court hearing evidence and making an order, or by the parties settling the merits, the parties would normally (several months later) then enrol the quantum aspect on the pre-trial roll.

Once the matter is certified trial ready, the aspect of quantum is set down for trial, and is invariably heard by a judge other than the judge who presided at the merits trial. It also frequently happens that once all the expert reports in respect of quantum are filed, the parties would settle the issue of quantum, without proceeding to trial.

- [3] It stands to reason that where these issues have been separated, and the merits are set down for trial, the plaintiff would call only those witnesses who are able to testify about how the collision occurred and to give insight into the liability of the parties for the collision. In the Free State, RAF is represented by one firm of attorneys, who appear to have great difficulty in coping with the large number of matters that are enrolled for trial in this Division. Counsel is more often than not, briefed a day or two before trial, and often appears in court without having seen or consulted with RAF's witnesses. The nett result of this is that the plaintiff is usually obliged to come to court on the appointed trial day with his/her witnesses relevant to the merits, and defendant comes to court without any of its witnesses. That was the situation that prevailed in this matter on 7 May 2019. The added complication was that summons was issued in this matter in the Free State High Court, as well as in the North Gauteng High Court. After allowing the matter to stand down, the matter was resolved and the merits were then settled on the basis indicated above.

- [4] I outline the circumstances in detail to demonstrate that the merits trial is separate from the determination of quantum (in this Division, at any rate), and comes with its own attendant costs.

Mr Sander relied on the case of **Mbatha v Road Accident Fund 2017(1) SA 442 (GSJ)** for his contention in respect of the costs order, which I mentioned above. In Mbatha, the court was presented with a draft order, after merits were settled without proceeding to trial. The draft order contained, inter alia, an agreement to pay costs, “such costs to include the costs of counsel and costs of medico legal experts who assessed and filed medico legal reports on behalf of the plaintiff.” The draft order also contained agreement on issues such as the contingency fee agreement, which were not part of the agreement in this case. The parties in this matter did not ask for the costs of the expert witnesses to be included in the court’s order. In addition, it is clear that the manner of dealing with matters, especially the RAF matters seems to differ in the various Divisions of the High Court. It appears that Mbatha was dealt with by the judge handling the roll call (of trial matters), which is not the way it is done in this Division. Once a matter is certified trial ready (on merits, as in this case), the Registrar allocates trial dates for the hearing of merits, and the file is allocated to one of the judges on trial duty for that week. This is done several weeks before the trial date.

- [5] The judge reads the file and prepares to hear the trial. It is not usual for the costs of medico-legal experts, or obtaining of medico-legal expert reports to be included in a draft order settling the merits of a matter. If it is so included, my experience has been that such expert costs will not be allowed, unless the experts are those necessary to decide the merits of the matter, for example, an accident reconstruction specialist. The other possible situation would be where merits and quantum were not separated, and the

reports of medical experts were obtained and consultations were held with such experts to prepare them for trial.

In that event, the court would possibly consider, at the merits stage, granting those costs, if merits were settled without hearing evidence, and quantum stood over (for whatever reason) for later determination. In such a case, only costs reasonably incurred in preparing experts for trial may well be what the court will allow. The remarks of the court in *Mbatha*, relating to costs must be seen in the context of the draft order presented to it as well as the manner and procedure by which trial files are dealt with in that Division. In my view, *Mbatha* can be distinguished from this case.

- [6] It is well established in our law that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale. The determination of an appropriate costs order is in the discretion of the court, which discretion is usually informed by a number of factors in order that such discretion be exercised judiciously. These factors include consideration of the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties. **(Erasmus, Superior Court Practice, D5-6).** In this matter, the plaintiff came to court, ready to proceed to trial. The defendant did not have its witnesses at court and would not have been able to proceed. The fact that the merits were settled without the court having heard any evidence, and with the defendant accepting liability for more than fifty percent of the plaintiff's damages does not change the position that the plaintiff was substantially successful, and that the defendant was

the unsuccessful party. In that event, the general rule that costs follow the result must apply.

- [7] Quantum will be determined at a later stage, most probably in the course of a trial, where different witnesses to those that are called in a merits trial, are led. Such witnesses would usually be medical experts who examined the plaintiff and assess his damages based on his injuries. The order that the defendant seeks in this matter will have the result that the plaintiff would have to pay his legal fees immediately, while having to wait several months to recover the costs incurred in respect of the merits trial. In my view this would be a wholly inequitable situation, considering that the defendant's legal representatives will be paid immediately, irrespective of their success or failure in the merits trial. In my view, therefore, the submission made by Mr Sander that "If the matter had been heard as a trial and the court itself had decided on the merits, then the successful party would be entitled to ask for costs", is without merit and cannot be sustained. The acceptance of liability by the defendant is akin to a court making the order, in that such acceptance places the plaintiff in the position of the successful party and the defendant in the position of the unsuccessful party. Both counsel attached proposed draft orders to their respective Heads of Argument. I am inclined to accept the draft order proposed by the plaintiff, with the necessary amendments I have effected thereto.

- [9] In the circumstances, I make the following order:

9.1 The defendant shall pay Sixty Percent (60%) of the plaintiff's proven or agreed damages;

9.2 The defendant shall pay the plaintiff's taxed or agreed party and party costs, on the High Court scale, such costs to include

9.2.1 The plaintiff's reasonable travel expenses and costs of accommodation, if any;

9.2.2 Reasonable travel expenses and costs of accommodation, if any, of the plaintiff's witnesses, who must have been necessary witnesses for the purpose of the trial on merits, and

9.2.3 Costs of counsel, including preparation and reservation fees.

9.3 In the event that such costs are not agreed:

9.3.1 The plaintiff's attorney of record shall serve a Notice of Taxation on the defendant's attorney of record;

9.3.2 The plaintiff shall allow the defendant fourteen (14) court days, from the date of the Taxing Master's allocator, to make payment of the taxed costs;

9.3.3 In the event that the plaintiff's taxed costs are not paid in terms of paragraph 9.3.2, the defendant shall be liable for the payment of interest on such costs, at 10.25 % per annum, calculated from the date of default to the date of payment.

S. NAIDOO, J

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