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

Case No: 1552/14
Heard on: 23/03/2018
Delivered on: 11/05/2018

In the matter between:

ROAD ACCIDENT FUND

APPELLANT

And

JACQUELINE ISAACS

RESPONDENT

Summary: Full Bench Appeal- two issues – order by the court a quo awarding costs on the High Court scale – alleged criticism of the conduct of the appellant’s attorneys.

Coram: Pakati ADJP et Mamosebo J et Vuma AJ

JUDGMENT ON APPEAL

MAMOSEBO J

- [1] This appeal is against the findings of my sister Erasmus AJ with her leave. Two crisp issues were argued: first, that the trial court erred in awarding costs on the High Court scale whereas the damages claimed fall within the Magistrates Court jurisdiction; and, secondly, the trial court's criticism levelled against the defendant's attorney.
- [2] In the Notice of Appeal the appellant listed ten grounds upon which it relied for its appeal against the trial court's entire judgment and order delivered on 18 November 2016. Adv Salie SC appeared for the appellant and argued only the mentioned two grounds which in his submission show a misdirection on the part of the trial Judge. On 15 March 2018 the respondent filed a notice of intention to abide this Court's ruling. The appeal was heard unopposed. For convenience I will refer to the appellant as the RAF (the Road Accident Fund) and the respondent as Ms Isaacs or the plaintiff.

The salient facts underpinning this case

- [3] Ms Jacqueline Isaacs, born [...] 1997, was ten years old when her father was involved in a motor vehicle collision which claimed his life on 28 June 2007. This claim is against the RAF for loss of support for the minor child.
- [4] On 27 August 2014 the plaintiff issued summons out of this Court against the RAF. The initial claim was an amount of R50 089.00. In her amended particulars of claim, and after an actuarial report dated 05 May 2016 by Munro Forensic Actuaries, the amount was amended to R224 400.00.

- [5] The hearing in respect of the merits was set down for 01 March 2016. The parties stood the matter down to the following day. On 02 March 2016 an order by agreement was taken before Erasmus AJ. The RAF conceded 100% liability on the still to be proven damages by the plaintiff. Costs, particularly wasted costs of 01 March 2016, were reserved.
- [6] The hearing in respect of quantum was set down for 08 November 2016. On 03 November 2016 and in terms of the Rule 34 notice the RAF tendered an amount of R 201 960.00 payable within 120 days after it would have received the notice of acceptance by the plaintiff. RAF further tendered Ms Isaacs' taxed or agreed party and party costs on the Magistrates Court scale. The parties could not, however, settle the issue of costs. The RAF took the view that the agreed damages fell within the jurisdiction of the Magistrates Courts whereas it was contended on behalf of Ms Isaacs for costs on the High Court scale despite the settlement amount. An order by agreement was taken by the parties on 08 November 2016 which recorded that:
- "Judgment is reserved with regard to the costs of the action, including the wasted costs of the court attendances on the 1st of March 2016 and the 8th of November 2016, Counsel's fees, [and] costs relating to the experts and travelling costs."

Whether the trial Court should have awarded costs on the High Court scale or not

- [7] Ms Sieberhagen argued before Erasmus AJ that because the RAF had tendered R120 000.00 and costs on the High Court scale in the matter of Human and the RAF and two other matters related to the same accident, the RAF cannot now argue that Ms Isaacs is not entitled to the same scale despite her amount also being within range. On appeal Mr Salie submitted that there were no objective facts placed before the trial court

upon which to base the argument comparing the settlements in the Isaacs and Human issues.

- [8] By 09 December 2014 the defendant filed its plea to the plaintiff's particulars of claim. The defendant even denied that a collision occurred or was caused by the negligence of the insured driver and placed everything in dispute.

- [9] Dr Everd Jacobs, the plaintiff's Industrial Psychologist, filed his loss of earnings report on 30 September 2015.

- [10] Ms Sieberhagen impressed on the Court that even though the defendant had vigorously denied the collision it ultimately conceded the merits 100% on the morning of the trial date. Counsel argued that calculations for the quantum could not be finalised until the report was received from the industrial psychologist. Upon the question by Erasmus AJ why calculations were not done before the summons was issued Ms Sieberhagen's response was that the plaintiff was a minor when the collision occurred. This response did not answer the question because the claim was initially instituted by the minor's guardian until she became of age and was substituted by the minor as the plaintiff.

- [11] It must be borne in mind that in an e-mail by the plaintiff's attorneys to the appellant's attorneys an amount of R201 600.00 and High Court costs was proposed. It was in this communication wherein the three other linked cases relating to the earlier claims and costs on a High Court scale were settled. The amount in the attached matter of Human versus RAF was also within the jurisdiction of the Magistrates Court but settled on the High Court scale.

- [12] The trial court did not find the plaintiff blameless. It also did not consider the amount involved or the fact that parties conceded that the issues were not complex and necessitated the attention of the High Court nor the late filing of the actuarial report. Had the issues been limited to the aforementioned issues, Erasmus AJ remarked, it would have been justifiable for her to grant costs on the Magistrates Court scale. However, the trial court went further and considered the role of the RAF and highlighted what it perceived to be the compelling reasons that tilted the scale towards granting costs on the High Court scale.
- [13] The court was alive to the considerations akin to the case at hand as succinctly expressed in the unreported judgment of *Vermaak v Road Accident Fund*¹ where Jones J said that:
- “The High Court frequently restricts costs to the magistrates’ courts scale on the ground that the plaintiff could and should have proceeded in the magistrates’ court where litigation is less expensive. In doing so, it applies the basic principle of costs that the court has a discretion which it must exercise judicially upon a consideration of all the facts of each case, and that the underlying consideration is fairness to both sides. The amount of the judgment or settlement is always a significant factor in balancing fairness. The courts discourage litigants from choosing a more expensive forum where relief can be obtained in a less expensive one. The defendant should not have to pay more [by way of] costs because he has been brought to a more expensive court unnecessarily. While the amount of a judgment is always important, it is, however, not the only consideration. Various other circumstances - for example, the complexity of the factual issues, the difficulty of the legal issues, the seriousness of an imputation against reputation, the honesty of officials, the general importance of the issue to the parties or the public – might induce a court to award costs on the high court scale although the amount involved is small. But as a general rule the proper exercise of the court’s discretion on costs provides a powerful deterrent against bringing proceedings in the high court which might more conveniently be brought in

¹ [2006] ZAECHC 10 at para 5 (ECJ No 020/2006 delivered on 03 March 2006)

the magistrates' court, and this implies that the party who could have chosen to proceed in the lower courts will have to satisfy the high court that there are good and sufficient reasons for the exercise of a discretion to award high court costs in his or her favour."

- [14] It is discernible from the record of proceedings that the court has considered and repeatedly demanded justification from the plaintiff's counsel why the matter could not have been proceeded with in the Magistrates' Court. Considerations of fairness played a role. The court even went to an extent of considering and engaging the parties on the presence of factors or circumstances that would necessitate the matter being heard in the High Court, namely, the complexity of the factual or legal issues, the seriousness of the imputation against reputation, the honesty of officials and the general importance of the issue to the parties or the public.
- [15] Regard being had to the absence of the aforementioned circumstances, the trial court, in the exercise of its discretion, considered the following:
- 15.1 That the plaintiff's claim appeared not to have been properly or timeously investigated whereas the causation of liability was ascertained and investigated;
 - 15.2 Some of the matters emanating from the same collision were settled in amounts falling under the magistrates' jurisdiction but on a High Court scale;
 - 15.3 The RAF did not request that the matter be transferred to the lower court at any stage of the proceedings including at pre-trial conference stage;
 - 15.4 The RAF on both the merits and quantum waited for the matter to be set down for trial and offers were tendered on the day of trial.

These aspects informed the decision to award the costs on a High Court scale.

[16] Smalberger JA's pronouncements on costs are instructive. In *Intercontinental Exports (Pty) Ltd v Fowles*² the Judge stated:

"[25] The basic rule is that, statutory limitations apart, all costs awards are in the discretion of the court (*Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69, a decision which has consistently been followed). 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 party's conduct in relation to the litigation. Is it to be precluded by agreement from 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 regard to costs."

[17] I share the sentiment as expressed by Jones J in *Brawns v Shoprite Checkers (Pty) Ltd*³. In actual fact the parties were *ad idem* to go on trial on the merits in the High Court. At no stage did the RAF protest or insist that the summons should have been instituted in the Magistrates Court.

[18] Had the RAF used Rule 37⁴ to its advantage, it ought to have, in the mandatory pre-trial conference which is aimed at narrowing down issues and reaching agreement on matters which may expedite the proceedings, suggested or reserved its rights to have the matter resolved on the

² 1999 (2) SA 1045 at 1055F - I

³ 2004 (6) SA 211 (ECD) at 221B -222C

⁴ Rule 37 of the Uniform Rules of Court

magistrates' court scale from the onset. Costs already incurred should follow the event on the scale of the court in which they were heard. Each decision by the court is informed mainly by the court's discretion in light of its own facts and circumstances. See *Gelb v Hawkins*⁵. I could not discern any misdirection on the part of the trial court in respect of granting costs on the High Court scale. The Court exercised its discretion properly which, in my view, does not necessitate tampering. This ground of appeal must therefore fail.

The statements by Erasmus AJ

[19] On 08 November 2016 Erasmus AJ uttered a statement to this effect: “*No I fully, fully, fully agree with you that the conduct of the defendant in not settling this matter at an early stage is unacceptable.*”

[20] The Court also made this intimation at para 31 of the judgment:

“I find the conduct of the legal representatives of the plaintiff and the defendant to be both unacceptable and difficult to comprehend. The plaintiff had lost her father in a motor vehicle collision at the tender age of 10. She has only now, being almost 20 years old, been compensated for the loss of support. The best interests of the minor had not been served, as provided for in terms of section 28(2) of the Constitution of the Republic of South Africa.”

[21] Mr Salie submitted that the statement by the trial court is damning for the RAF attorneys who still aspire to grow and to be on the panels for the RAF. I do not agree. The pronouncements are directed at the delay in having the matter brought to court and finalised. I have not read into the remarks anything demeaning or career limiting. I also have not detected or recognised any remarks that impugn the dignity of the legal representatives as argued by Mr Salie.

⁵ 1960 (3) SA 687 (A) at 694A.

[22] Counsel was further unsure whether the pronouncements by the Court were aimed at a specific attorney or firms or whether they were aimed at the current attorneys or to all the attorneys who had dealings on this matter. As a result, submitted counsel, the Court ought to have afforded the attorneys the opportunity to explain themselves in court. Mr Salie argued that there is no basis for the criticisms labelled against the attorneys. I disagree. The two statements are mainly directed at the appellant, the Road Accident Fund and the plaintiff's attorneys for not having settled the matter earlier. Sight must not be lost of the fact that the accident happened on 28 June 2007 and this matter was only settled or concluded in 2016.

[23] The appellant has a duty and responsibility to compensate. Sec 17(1) of the Road Accident Fund Act⁶ stipulates:

“17 Liability of Fund and agents

(1) The Fund or an agent shall-

- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
- (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee

⁶ Act 56 of 1996

in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be by way of a lump sum."

[24] Nowhere in the judgment does the name of a specific firm get mentioned. I could not establish a direct link between the aforementioned obiter remarks at paras 19 and 20 (above) by the Court to the firm that Mr Salie seeks to be absolved from the said remarks. Counsel argued that the dignity of the firm was impaired and that the attorneys' rights in terms of s 10 (the right to dignity) and s 22 (freedom of trade, occupation and profession) of the Constitution⁷ were not observed. I disagree. The ten year delay before the matter could be finalised is indeed inordinate and regrettable. Irrespective of whether an attorney represents the plaintiff or the defendant it is always expected of them to execute their duties with the necessary diligence, skill and care required of a reasonable attorney.

[25] In my estimation Mr Salie has not only blown the obiter remarks of the trial Judge out of proportion but has distorted them as well. More fundamentally, the remarks had no bearing or impact on the outcome of the case. This second ground of appeal, which is without substance, must also fail.

[26] In the result, the following order is made:

1. The appeal is dismissed with costs where applicable.

⁷ The Constitution of the Republic of South Africa, Act 108 of 1996 as amended.

2. The appellant is ordered to pay the costs of suit, including the wasted costs of the court attendances on the 1st of March 2016 and the 8th of November 2016, counsel's fees, and the costs relating to the experts and travelling costs on the High Court scale.

MAMOSEBO J

NORTHERN CAPE DIVISION

I concur

Pakati ADJP

NORTHERN CAPE DIVISION

I concur

Vuma AJ

NORTHERN CAPE DIVISION

For the appellant:	Adv M Salie SC
Instructed by:	Robert Charles Attorneys & Conveyancers
For the respondent:	P Joubert Inc (Not opposed)