



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

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number:	1552 / 2014
Datum aangehoor / Date Heard:	08 / 11 / 2016
Datum gelewer/Date delivered:	18 / 11 / 2016

In the application of:

JACQUELINE ISAACS

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Coram: Erasmus, AJ

JUDGMENT

ERASMUS, AJ

Introduction

[1] The merits and quantum in this matter were settled on 2 March 2016 and 8 November 2016, respectively. The only issue argued before me on 8 November 2016 was whether the defendant was liable for the plaintiff's costs on the scale applicable in the High Court or the lower court.

- [2] It is trite that an award of costs is in the discretion of the Court and that such discretion must be exercised judicially upon a consideration of the facts of each case, and that in essence it is a matter of fairness to both sides.¹ Several principles relevant to this matter have been laid down in respect of the adjudication of the award of costs.
- [3] A party is liable to pay costs incurred unnecessarily through his or her failure to take proper steps or because he or she took wholly unnecessary steps.² In ***Jele v Ngcango***³ it was held that, in the absence of special circumstances, a successful plaintiff must himself pay for the luxury of having resorted to a more expensive form of litigation. Innes CJ in the well-known case of ***Scheepers and Nolte v Pate***⁴ held that it is the duty of a litigant to avoid any course which unduly protracts a lawsuit, or unduly increases its expense.
- [4] The choice of forum has a direct impact on the costs of litigation. Litigants should guard against adopting a reckless attitude in their choice of forum merely because costs have, in other instances in the exercise of a Court's discretion, been awarded on the scale applicable in the High Court. The practice of instituting action in the High Court should be discouraged where a lower court also has

¹ *Fripp v Gibbon & Co* 1913 AD 354

² *Ntuli v Baloyi* 1962 (1) SA 834 (D) 836; *Bennett v Minister of Police* 1980 (3) SA 24 (C)

³ 1951 (2) SA 157 (T) at par 2.24

⁴ 1909 TS 353 at 356

jurisdiction and can be dealt with in that court at a lesser expense to the litigants. This practice can be discouraged by making costs orders on the scale applicable in the lower court which could have adjudicated the matter.⁵

[5] It is for the party who could have chosen to proceed in the lower court to satisfy the Judge of the High Court that there are good and sufficient grounds for the exercise of its discretion in its favour. Some of the factors to be taken into account are not only the amount of the judgment, but also the complexity of the matter (factual or legal) and the importance of the issues to the parties or the public at large.⁶

[6] The conduct of the parties is also a relevant factor, especially so when one of the parties is an organ of state. As stated by Plasket J in ***Mlatsheni v Road Accident Fund***⁷:

"It is expected of organs of state that they behave honourably – that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly. This is particularly so in the case of the defendant: it is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity as a result of road accidents. The very mission of the defendant is to rectify those violations, to the extent that

⁵ *Vermaak v Road Accident Fund* [2006] JOL 16934 (SE) at par [5] - [6]; *Ierse Trog CC v Sulra Trading CC* 1997 (4) SA 131 (C) 135G-H; *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W) 819D

⁶ *Vermaak supra* at para [5] and the cases referred to in footnote 1 thereof

⁷ 2009(2) SA 401 (E) at para [17] See also *Daniels and others v Road Accident Fund* (8853/2010) [2011] ZAWCHC (28 April 2011)

monetary compensation and compensation in kind is able to. That places the defendant in a position of great responsibility: its control of the purse-strings places it in a position of immense power in relation to the victims of road accidents, many of whom, it is well-known, are poor and 'lacking in protective and assertive armour'."
(Footnotes omitted)

[7] In ***Ketsekele v Road Accident Fund***⁸ the plaintiff's claim was settled for an amount falling well within the jurisdiction of the Magistrate's Court. The parties agreed to costs on the High Court scale and they were required to advance reasons why the claim had not been instituted in the lower court in the first instance and on what basis the costs agreed upon were justifiable. It was held that the defendant's approach to litigation constituted a serious dereliction of its duties to road accident victims, the public and the courts. The Court ordered that neither party's legal representatives were entitled to any fees or disbursements in respect of any work or service performed in respect of that matter. This decision is indicative that Courts will not tolerate behaviour of officials and litigants where unnecessary expenses are incurred.

[8] In certain matters, and in suitable circumstances, the courts have regarded it as legitimate to take into account the circumstances of the plaintiff and to make a cost order other than that which it would ordinarily have

⁸ 2015 (4) SA 178 (GP) at para [28] – [39]

made.⁹ In ***Resnick v Government of the Republic of South Africa and Another***,¹⁰ although the plaintiff's appeal was dismissed, no order as to costs was made particularly, as the court put it, "given the position of appellant". In another matter¹¹ the plaintiff, in her capacity as natural guardian of two minors who had been dependants of a person killed in a car accident, brought a loss of support claim against the fund. Although the claim was ultimately unsuccessful, the court made no order as to costs, in recognition of the fact that the dependants of the deceased had suffered loss of support and had been minors at the time.

[9] Against this legal framework it is to be decided what, in the circumstances of this case, would be fair to both parties. When doing so, it is necessary to set out the background and facts of this case.

[10] Rachel Isaacs, suing in her capacity as mother and guardian of Jacqueline Isaacs ('the minor') instituted action in this court against the defendant during August 2014. The claim initially was for payment in the amount of R50,089-00, interest thereon and costs, in respect of

⁹ *Seria v Minister of Safety and Security* 2005 (5) SA 130 (C) 151; *Van Rensburg v City of Johannesburg* 2009 (2) SA 101 (W) at 111

¹⁰ *Resnick v Government of the Republic of South Africa and Another* 2014 (2) SA 337 (WCC)

¹¹ *Peeverett obo Smith and Another v Road Accident Fund, Johannesburg* (13/13626) [2014] ZAGPJHC 355 (28 October 2014) at para [32]

loss of maintenance and support from the minor's father who, as a passenger, had died in a motor vehicle collision on 28 June 2007. At the time of the collision the minor was only 10 years old. During October 2015, after having reached majority, the guardian was substituted by Jacqueline Isaacs.

[11] It was explicitly averred in the original Particulars of Claim that an actuarial report would be obtained and delivered in due course and that the plaintiff had reserved her right to amend the estimated claims in future.

[12] There was no delay in the exchange of pleadings. In its plea the defendant denied all allegations set out in the Particulars of Claim.

[13] From the reply to a pre-trial questionnaire, dated 23 March 2015, it appears that both the merits and quantum were still in dispute at that stage, that the merits and quantum would not be separated and that the parties would continue to engage each other in order to attempt to settle the merits and the quantum. The issue whether the case should be transferred to another court, as envisaged in Rule 37(6)(e), had not been raised.

[14] On 21 April 2015 the plaintiff filed a notice in terms of Rule 36(9)(a) indicating that Munro Consulting Actuaries would be called to give evidence in this matter. No report was filed at that stage.

[15] Although the plaintiff's attorneys gave notice in terms of Rule 37(2) to the defendant's attorneys to attend a pre-trial conference on Tuesday 5 May 2015, it does not appear from the papers whether this conference had indeed been held.

[16] From the minutes of the pre-trial conference held on 16 October 2015 it appears that the merits had still been in dispute. It was noted that neither the plaintiff nor the defendant intended appointing experts for purposes of the merits. Both parties agreed that the matter was trial ready in respect of the merits. It was specifically noted that the parties agreed that *"There was no basis upon which the case should be transferred to another court."*

[17] Plaintiff's attorneys applied for a trial date during October 2015 and the trial in respect of the merits was set down to be heard on 1 March 2016. It was indicated that one day would be required for adjudication thereof.

[18] On 24 February 2016, a week before the trial, plaintiff served a notice in terms of Rules 36(9)(a) and (b) notifying the defendant that the plaintiff intended calling an industrial psychologist and that his report dated 30 September 2015 had been annexed to the notice. A report of Munro Consulting Actuaries dated 23 November 2015 was also filed. It appears from this report, as contained in the plaintiff's expert bundle, that the total loss of support amounted to R294,000-00. It does not appear from the papers if that report had been made available to the defendant at an earlier stage.

[19] On 1 March 2016, by agreement between the parties, the matter stood down until 2 March 2016.

[20] From the bundle of correspondence, handed up during argument, it appears that plaintiff's attorneys directed an e-mail to the defendant's attorneys at 09:43 on 2 March 2016 in which:

20.1 the plaintiff's attorneys expressed their discontent with the manner in which the plaintiff's claim had been handled, and

20.2 attached a draft order, indicating that the plaintiff wished to argue costs.

[21] On 2 March 2016 the attorneys of both parties appeared and, by agreement, an order in terms of which the defendant had conceded the merits and agreed to pay 100% of the plaintiff's yet to be proven damages, was made. The costs of suit and specifically the wasted costs of the court attendance on 1 March 2016 were reserved.

[22] On 12 May 2016 plaintiff's attorneys again dispatched an e-mail to defendant's attorneys, and from its contents the following appeared:

22.1 It had now been ascertained that the deceased had had two children and had attached three affidavits in support of this assertion;

22.2 Further information had been obtained by the industrial psychologist of the plaintiff in respect of the income of the deceased;

22.3 The actuary, as reflected in his report filed on 18 May 2016 and dated 5 May 2016, calculated the

plaintiff's loss of support at R201,960-00, such amount being the total claim of R224,400-00 less 10% contingencies;

22.4 The plaintiff raised several issues with regard to the conduct of the defendant pertaining to the causation of liability and the manner in which the defendant had handled the claim of plaintiff, who had been a minor. The defendant was specifically referred to the fact that three other matters, which had been linked to and had arisen from the same accident, had been finalized;

22.5 The plaintiff requested payment of the capital amount above and costs on high court scale.

[23] It appears from the bundle of documents that offers in terms of Rule 34 had been made in respect of claims of other plaintiffs injured in the same collision.

23.1 On 21 October 2013 the plaintiff in case 1423/11 was offered the amount of R120,000-00 and an undertaking in terms of section 17(4) of Act 56 of 1996, plus costs on the scale applicable in the High Court;

23.2 On 25 November 2015 the plaintiff in case 977/12 was offered the amount of R300,000-00 and an undertaking in terms of section 17(4) of Act 56 of 1996, plus costs on the scale applicable in the High Court;

[24] Further to the report of Munro Consulting Actuaries dated 5 May 2016, it appears that the loss of support in respect of the plaintiff had been calculated to be R224,400-00 and in respect of the second dependant to be R294,200-00.

[25] On 1 June 2016 a further pre-trial conference was held. From the minutes it appeared that the quantum of the plaintiff's claim remained in dispute. It was indicated on behalf of the plaintiff that she was intending to amend her Particulars of Claim.

[26] On 30 June 2016 the plaintiff amended her Particulars of Claim by, *inter alia*, amending the amount of her claim for loss of support from R50,089-00 to R224,400-00.

[27] The matter was set down for trial on the quantum to be heard on 8 November 2016. On 3 November 2016 the defendant submitted an offer in terms of Rule 34 to the

plaintiff's attorneys, tendering payment of the amount of R201,960-00, as well as party and party costs on the Magistrate Court scale.

[28] In a letter also dated 3 November 2016, the plaintiff's attorneys were invited to indicate, should they persist with costs being paid on High Court scale, on what basis such relief was sought.

[29] On 7 November 2016 plaintiff's attorneys responded and indicated the acceptance of the settlement amount, but continued to insist on costs on the High Court scale. The defendant was again referred to the case law contained in the e-mail correspondence of 2 March 2016 and 12 May 2016 as authority for their insistence.

[30] Both parties instructed counsel to argue the issue of costs before me on 8 November 2016.

[31] 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.

[32] The plaintiff has not shown why action had not been instituted in the lower courts.

32.1 The initial amount claimed falls well below the civil jurisdiction of the Magistrates Court. The amount of the settlement is less than R2,000-00 above the threshold of the jurisdiction of the Magistrate Court and falls well within the civil jurisdiction of the Regional Court.

32.2 Neither the legal nor the factual issues were so complicated that they warranted the attention of the High Court.

32.3 The report of the actuary, although dated 23 November 2015, appears to have been filed on 24 February 2016. The particulars of claim had not been amended and the amount claimed remained the initial amount.

[33] Had the factors above been the only considerations, the defendant would have been fully entitled to tender costs on the scale applicable in the Magistrates Court. I would then, as in the matter of ***Daniels v Road Accident Fund supra***, have awarded costs on the scale applicable in that court.

[34] Although the plaintiff is not without blame for the manner in which this trial progressed, the defendant did not execute its statutory mandate in a reasonable and proper manner and did not act in the best interest of the plaintiff, who had been a minor for most of the period under consideration.

34.1 It appears as if the claim had not been investigated timeously and/or properly. It appears that the causation of liability had long been investigated and ascertained. The merits and quantum of other claims arising out of the same collision had been settled for amounts falling within civil jurisdiction of the lower courts and their costs were tendered on the scale applicable in the High Court.

34.2 There is no indication on the papers before me that the defendant, at any stage before the trial

date of 1 March 2016, had requested the matter be transferred to the lower court. The defendant could and should have requested, at least as far back as 23 March 2015 when it replied to the pre-trial questionnaire, that the matter be transferred to the lower court. It also failed to direct such a request later during the pre-trial conference held on 16 October 2015 and agreed that "*There was no basis upon which the case should be transferred to another court*". At that stage the merits still seemed to be in dispute. It thus appeared that the parties had accepted that they would be going to trial in the High Court.¹² The conduct of the defendant could have brought the plaintiff's attorneys under the impression that the scale of the costs would not be an issue.

- 34.3 As in so many matters before the courts, the defendant did nothing until the very last moment; both in respect of the merits and the quantum. This resulted in the matter having to be set down for trial, both in respect of the merits and then later in respect of the quantum. On both occasions offers were only forthcoming on the day of the trial or very shortly before.

¹² See *Standard Bank of SA Ltd v Mbewu* 2003(4) SE at 421I – 422B

[35] The conduct of the defendant often results, as in this instance, in a plaintiff having to wait for many years to have his/her claims finalised. Matters that could have been settled for a fraction of the costs proceed to a date set for trial and then the matter is almost routinely settled. As stated many times before, this results in the court system being overcrowded, often with cases that could and should have been dealt with by a lower court.

[36] Had the defendant taken the necessary steps to prevent this matter from progressing to where it had, both in respect of the merits and the quantum, I would have been inclined to deny the plaintiff her costs on the scale applicable in the high court. The fact that compensation for the loss of support payable to the plaintiff had been delayed for so long, tips the scale of fairness in favour of the plaintiff. The specific circumstances of this case require that the defendant should pay the costs on the scale applicable in the High Court.

Wherefore I make the following order:

THE DEFENDANT IS ORDERED TO PAY THE PLAINTIFF'S TAXED OR AGREED PARTY AND PARTY COSTS OF THE ACTION, INCLUDING THE WASTED COSTS OF 1 MARCH 2016, ON THE SCALE APPLICABLE IN THE HIGH COURT.

A handwritten signature in cursive script, appearing to read "Erasmus", is written above a horizontal line.

ERASMUS, SL

ACTING JUDGE

<u>On behalf of the Plaintiff:</u>	Adv. N. Sieberhagen (oio P Joubert Inc.)
<u>On behalf of Defendant:</u>	Adv. A. Stanton (oio Robert Charles Attorneys)