

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 4820/2008

In matter between:-

MR THIBILE ELVIS SEHLABAKA

Applicant

And

ROAD ACCIDENT FUND

Respondent

HEARD ON: 23 SEPTEMBER 2010

JUDGMENT BY: K.J. MOLOI, J

DELIVERED ON: 30 SEPTEMBER 2010

JUDGMENT

MOLOI, J

[1] This is an application for a costs order against the respondent necessitated by having to compel the respondent to supply certain particulars required by the applicant for purpose of trial. The particulars having been supplied, only the order as to cost of the application formed the basis of the dispute between the parties.

[2] The applicant is the plaintiff against the Road Accident Fund, the respondent, wherein he claimed compensation for injuries sustained in a motor vehicle collision in terms of the provisions of the Road Accident Fund Act No: 56 of 1996. The main action is set down for hearing on 09 November 2010.

[3] The trajectory of the events leading to this application is as follows:

3.1 On 27 July 2009 the applicant served a notice in terms of Rule 21 of the Uniform Rules of Court requesting the respondent to supply certain particulars required for trial purposes;

3.2 On 19 August 2010, more than a year later, the applicant sent a reminder to the respondent to supply the particulars requested on 27 July 2009 by no later than 26 August 2010 and threatened to take further steps should the respondent fail so to supply the requested particulars;

- 3.3 On 03 September 2010 the applicant filed an application to compel the respondent to supply the particulars requested as well as an order of costs in terms of Rule 21(4) of the Uniform Rules;
- 3.4 On 14 September 2010 the respondent filed a notice to oppose the application and delivered the requested particulars, nonetheless. As a consequence the registrar placed the application on the roll of opposed applications to be heard on 23 September 2010.
- 3.5 On 14 September 2010 together with the filing of the notice to oppose and the particulars requested, the respondent sent a letter dated 13 September to applicant's attorney reading -

“Therefore, we request that you attend to, remove this matter from the roll, and please note the defendant will tender the wasted costs herein” (my emphasis).

3.6 On 19 September 2010 a letter from the applicant's attorneys dated 15 September 2010 was faxed to the respondent's attorneys and read

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“Ons neem kennis van u korrespondent se versoek om die aansoek om te verplig van die rol te verwyder, maar verneem ons graag wanner ons die gemelde tender ten aansein van die versplilde koste te wagte kan wees alvorens ons die ansoek van die rol verwyder”(my emphasis).

3.7 On 17 September 2010 the respondent's attorney faxed a letter to the applicant's attorney reading -

“We confirm that it is our correspondent's instruction to oppose the costs for attending to remove the matter from the roll on Thursday, 23 of September 2010, (sic) due to the fact that they provided your

offices with a letter on 13 September 2010 stating that the defendant will be liable for the wasted costs and that the matter should be removed accordingly.

We confirm that our offices have not yet received a notice of removal and seeing that today, being Friday 17 September 2010 was the last day to file same, our instructions are to oppose the costs order and that the defendant will only be liable for the wasted costs up and until 13 September 2010”.

3.8 On 20 September 2010 the applicant’s attorneys wrote to the respondent’s attorneys stating -

“Ons ontvang graag ‘n afskrif van die korrespondent se brief waarin hul die verpilde koste ten ansien van die aansoek tender aangasein die brief wat ons van die korrespondent ontvang het, meld dat hul

die koste sal tender aangesein die betrokke sin as volg lees: “Please note that the defendant’s will tender the wasted costs herein” (my emphasis).

- 3.9 On 20 September 2010, it is common course that certain e-mails were exchanged between the Bloemfontein attorneys involved as correspondents in this matter and a telephonic communication was had after which a letter from the respondent’s Bloemfontein correspondent was forwarded to the applicant’s Bloemfontein attorneys reading -

“Ons bevestig die telefoniese gesprek tussen skryfster hiervan en u Mnr Davis waarin hy skryfster meegedeel het dat die Eiser van voorneme is om heirdie aangeleentheid te beveg en is u tans besig om opdrag te gee aan ‘n advokaat om die nodige voorbereiding (hoofde van betoog) op te stel.

On bevestig dat ons reeds u kostes tot en met 13 September 2010 getender het (soos per skrywe gedateer 13 September 2010) en dus is daar geen verdere regs kostes tot vandag toe nie (my emphasis) .

Skryfster begryp nie waarom nog ekstra kostes in hierdie verband opgeloop moet word nie en verneem ons graag of u nog steeds van voorneme is om hierdie aangeleenheid te bestry en indien wel, ontvang ons graag skriftelik bevestiging daarvan voor die sluit van besigheid.

Ons bevestig verdermeer dat ons instruksies, Is, dat indien u voortgaan met die bestrede aansoek, ons geen ander keuse sal hê om 'n bestraffende konstebevel teen die Eiser se

prokureurs te versoek nie” (my emphasis).

[4] The following are common course:

- (a) The applicant was entitled to launch an application to compel on 3 September 2010 taking into account how long the respondent failed to respond to the request for further particulars for trial purposes and the reminder sent to its attorneys;
- (b) The particulars were necessary for the purpose of trial there being no objection raised against the request and, in fact, the particulars having being supplied; the date of hearing is closing in.
- (c) The application became opposed on the basis of the filing of the notice to oppose by the respondent, which had not been withdrawn.
- d) The respondent failed to file an opposing affidavit but counsel for respondent, Adv Els, filed the heads of argument wherein he correctly summed up the

crux of the dispute between the parties as follows:

*“From the e-mails it appears that the words
“Please note that the defendant will tender
the wasted cost herein” is the cause of
concern to the applicant. The applicant
avers that they are still awaiting the tender,
whilst the respondent avers that it is
evident that the respondent tenders the
wasted costs” (my emphasis).*

- (e) Where the request for further particulars have already been supplied subsequent to a formal application being heard and if the costs were tendered, in our case on 13 September 2010, the respondent cannot be held liable for further costs occasioned by the applicant’s insistence to proceed with the application.

[5] The issue to be decided by the court is and remains whether there was, in fact, a tender for wasted costs made by the

respondent in its letter dated 13 September 2010. The disputed phrase in the respondent letter dated 13 September 2010 is “*will tender*”. The word ‘*will*’ is defined as follows in The New Shorter Oxford English Dictionary (The New Authority on the English Language) edited by Lesley Brown, Volume 2, Clarendon Press, Oxford, 1993 edition “*desire, wish, longing (a) liking or disposition (to do) ...that which one desires; the expression of a wish and the word ‘tender’ means “formally offer or advance (a plea, an averment, evidence); offer (money etc) to discharge a debt or liability; present (anything) for approval or acceptance; offer, or proffer”*”.

- [6] From the onset the applicant indicated that he was not satisfied with the expressed desire or intent of the respondent to tender and expected a solid unequivocal tender from the respondent. There was no indication of when the tender would be made by the respondent. The respondent willed to make a tender, it had more than sufficient opportunity to do so than to engage in extensive exchange of correspondence, faxes and telephonic communications with the applicant’s attorneys.

- [7] Rule 34(5) of the Uniform Rule of Court prescribe in clear terms how an offer or tender should be made and that provision is peremptory. A simple one sentence notice of a tender could have been filed other than the insistence on writing several letters and telefaxes arguing that it is obvious the respondent would make a tender. What was required was a clear tender on notice to eliminate any factual dispute that might arise; Reilly vs Seligson and Clare vs Ltd 1976 (2) SA 847 (W). A tender just like an offer must be clear and firm and must not be open to other interpretation. It must be firm and state what it is.
- [8] Based on a clear tender the applicant would simply proceed to tax his bill of costs at the end of the day. If the tender was still envisaged or desired to be made, the applicant would have to apply to the court to compel the respondent to make a tender based on his expressed intention or desire to make it. This is so because how would one enforce an intention or desire to do something even if accepted in good faith? Would the respondent be barred from raising a defence that a tender, much as it was intended, had not yet been made

came taxation time? Would what was intended to be tendered be what the applicant would accept?

- [9] The applicant was represented by Schoeman Kellerman & Kotze Inc. of Welkom and had Rossouw Attorneys as its Bloemfontein correspondents. The respondent was represented by Maponya Attorneys of Pretoria who had Honey Attorneys as its Bloemfontein correspondents. It is generally accepted that a correspondent attorney acts on instructions of an instructing attorney strictly unless he/she wants the perils of going outside his/her mandate visited upon him /her. During the hearing the court asked both Advocate Zietzman for the applicant and Advocate Els for the respondent whether this matter was not a case of befitting punitive costs order to be paid *de bonis propriis* by the respondent's instructing attorney for two reasons: (a) it could be accepted that the respondent had agreed and instructed its attorney to tender wasted costs of the application as at 13 September 2010 according to his letter of even date and (b) from the onset the applicant clearly would not accept the "*will tender*" offer and required a solid, finite and unequivocally tender as correctly pointed out by

Advocate Els when he correctly summed up the real dispute between the parties in his heads of argument as pointed out above in paragraph 4(d).

- [10] Instead of making the tender the instructing attorney simply insisted it was “*evident*” from his letter dated 13 September 2010 that it was “*abundantly clear*” that the respondent “*will tender the costs*” and “*will be liable for the wasted costs*” in his lengthy letter of 17 September 2010. This being contrary to the clear instructions of his client to tender the wasted costs which would really read something like: “*Take notice that the respondent hereby tenders the wasted costs of the application to date*”, and whether this attitude would not be “*frowned upon*” by the court (Erasmus Superior Court Practice B1-428A); and “*I think it is the duty of a litigant to avoid any cause which unduly protracts a law suit or unduly increase its expenses*”. (Scheepers & Nolte vs Pete, 1909 TS 353 at 356” quoted by advocate Els in his heads of argument which must be disapproved by the court as unauthorised conduct: Intercontinental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industrial Ltd 1979(3) SA 740(W) at 754C-E; or a departure from

responsibility of office: Blou v Lampert and Chipkin, 1973(1) SA 1(A) at 14A-F; or unreasonable action: Visser v Cryopreservation technology CC 2003(6) 607(t) at 609 or even improper conduct: Moeca v Addissionel Kommissaris Bleomfontein 1981(2) SA 357(o) at 366 B-C on the part of the respondent's Pretoria attorneys.

[11] Expressions such as *“Ons bevestig verdermeer dat ons instruksies is, dat u indien voortgaan met die bestrede aansoek, ons geen ander keuse sal hê om ‘n bestraffende kostebevel teen die Eiser se prokureurs te versoek nie”* (letter of the respondent's Bloemfontein correspondent to applicant's Bloemfontein correspondent dated 20 September 2010 above. This when respondent's attorney knew or at least ought to have known that he/she still intended to tender the wasted costs there being no firm tender on the table.

[12] I was not provided with clear cut- out answer to my question but from both counsels submissions were made that they were not of the view that the seriousness of the attitude of the respondent's attorney warranted such drastic action by the court. I do not agree. The court cannot tolerate such

frivolous, unreasonable and argumentative conduct having as a consequence protracted, unnecessary and expensive litigation instead of simply carrying out client's instructions to tender the wasted costs.

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

13.1 The respondent is ordered to pay the wasted costs of the application up to and including 13 September 2010.

13.2 The respondent's instructing attorney is ordered to pay the costs of the application from 14 September up to and including 23 September 2010 *de bonis propriis*.

MOLOI, J

To: Honey Attorneys
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(Ref: SCH41/0373 (JHC/OVZ))