

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case Number.: 1970/2023

In the matter between:

FELICITY MARY GROGAN

Plaintiff

and

CHANGING TIDES (PTY) LTD

Defendant

JUDGMENT

Beshe J

[1] On the 7 August 2024 by agreement between the parties, I issued an order paragraph 1 of which reads thus:

‘1. The Defendant shall make payment to Plaintiff in the sum of R915 125.00 (Nine Hundred and Fifteen Thousand and One Hundred and Twenty Five Rand), in full and final settlement of all claims (past, present and future) arising from the cause of action pleaded by the Plaintiff (‘the capital amount’).

Even though the parties were in agreement that the defendant should pay party and party costs of plaintiff’s action, they could however not agree on the scale of such costs, as to which of the recently introduced rungs of scales A, B or C should apply. Plaintiff contends that the appropriate scale should be scale C, whilst the defendant contends that the appropriate scale should be scale B.

[2] Following the introduction of Rule 67A and the amendment to Rule 69 of the Uniform Rules of this court, a court is given a direction as to how to exercise its discretion in awarding costs. The effect of these changes to the Rules is that a court must determine on what scale costs, in that particular matter should be allowed, A, B or C. The changes came into effect on 12 April 2024. This applies to a party and party bill of costs in the High Court.

[3] In this matter I am required to determine the scale on which the defendant should pay plaintiff's costs. As stated earlier, plaintiff contends that the defendant should be ordered to pay her costs based on scale C, being the highest scale of costs. Defendant on the other hand contends for scale B.

[4] Rule 67A provides that:

‘(a) A cost order shall indicate the scale in terms of Rule 69 under which costs have been granted.

(b) In considering the factors to award an appropriate scale of costs, the court may have regard to:

(i) the complexity of the matter; and

(ii) the value of the claim or importance of the relief sought.’

[5] Rule 69(7) provides that the scale of fees contemplated by subrule (3) of Rule 67A shall be:

Scale A	Scale B	Scale C
R 375,00 per quarter of an hour or part thereof (maximum allowed)	R 750,00 per quarter of an hour or part thereof (maximum allowed)	R 1 125,00 per quarter of an hour or part thereof (maximum allowed)

[6] What culminated in the order I issued on the 7 August 2024 is briefly stated, the following:

On 10 October 2022 plaintiff fell headlong down a flight of stairs while leaving the Boardwalk Mall after shopping. As a result of the fall, plaintiff suffered the following injuries:

A comminuted intra-articular fracture of the distal femur on the right leg

Multiple contusions to the right leg; and she

Suffered post-traumatic disorder.

[7] Plaintiff initially instituted an action for damages against the defendant and another, claiming the two defendants were liable for damages she suffered in the amount of R2 022 663.00. It was after defendants' plea that the action was withdrawn against the erstwhile first defendant – Emfuleni Resorts (Pty) Ltd. However, this necessitated the amendment of plaintiff's particulars of claim so that they can apply to the present defendant only.

[8] In her particulars of claim plaintiff alleged that she suffered damages as a result of act and or omissions on the part of the defendant in relation to the mall premises. That defendant had a duty to take all necessary steps to ensure that walkways, passages and steps did not pose a danger to anyone. Plaintiff proceeded to state (in her particulars of claim) how they failed to carry out this duty of care with particular reference to how the design of the ramp, steps, colour of tiles, edging thereof etc. The defendant was referred to a comprehensive report that was compiled by architect detailing the defects referred to hereinabove.

[9] In its plea, defendant raised a number of defences, *inter alia* that plaintiff's fall was due to her sole negligence, alternatively contributory negligence. Also raised by the defendant was a contractual defence, namely that notices were displayed on notice boards to the effect that persons entering the premises in question did so at own risk and that defendant's liability was excluded. The so-called indemnity clause.

The allegations made in the Architects' report were denied. So were the reports compiled by other experts regarding plaintiff's injuries and their sequelae.

[10] This was followed by a replication by the plaintiff regarding defendant's contractual defence in particular.

[11] In turn, the defendant filed a consequentially amended plea challenging the legal points raised in plaintiff's replication. The matter was set down for trial on 13 May 2024. On that date an order in the following terms was issued:

IT IS ORDERED (BY AGREEMENT) THAT:

1. The defendant's liability be and is hereby separated from the quantification of the Plaintiff's damages.
2. The negligence of the Defendant contributed 75% towards the loss causing event and yet to be proven quantum of Plaintiff's damages.
3. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs, such costs to include the qualifying expenses of the expert Andrew Thompson of Thembela Architects and the costs of photographs up to 30th April 2024.
4. The Determination of the applicable scale of costs together with the costs incurred after 30th April 2024 in terms of Rule 67A read with Rule 69 of the Uniform Rules of Court be and hereby reserved and postponed for argument to be heard together with the determination of the quantum of the Plaintiff's claim on 5th August 2024.

[12] It was submitted on behalf of the plaintiff that the following factors call for a cost order on scale C: The value of the amount initially claimed or of the claim, a sum of R2 million, interest thereon which will ramp the amount to R2.5 million. It being submitted that this is a large amount justifying costs on scale C. It was submitted that the matter was complex. The importance of the relief to the plaintiff,

the issue of the indemnification, the breach of building regulations being important to the general public in view also of the fact that the incident took place in a busy shopping mall, were also cited as reasons that call for costs on scale C.

[13] The submissions were countered by the defendant, it being contended that the “complexity” of the matter was self-created. And further there is no justification for departing from awarding costs on scale B. Furthermore, that the absence of a claim for loss of income entails that the computation of the damages was not challenging because damages were limited to the basic heads of damages. It was also submitted on behalf of the defendant that the matter was not complex because there were no co-defendants, and therefore no questions of factual causation needed to be determined. Further that the court should not be swayed by the number of expert witnesses identified by the plaintiff into concluding that the matter is a complex one. The defendant contended for the awarding of plaintiff’s costs on scale B.

[14] Both parties gave a helpful exposition of the recently amended rule, Rule 67A read with Rule 69 and referred the court to decided cases, all of which have been taken into consideration.

[15] I do not understand that there is an issue as to whether Rule 67A read with Rule 69 only applies after the date on which the rule became effective, namely 12 April 2024. In other words, applies to work undertaken by counsel after the 12 April 2024. In particular costs on a party and party scale. This position is also confirmed in the matter of Mashavha v Enaex Afrika (Pty) Ltd.¹ The rule therefore only operates prospectively.

[16] Even though Rule 67A read with Rule 69 has recently been introduced, already there seems to be a general acceptance of what constitutes complexity in a matter warranting the awarding of counsel’s party and party costs on scale B or C. For example, the following features may render a matter complex:

¹ (2022/18404) [2024] ZAGPJHC 38 (22 April 2024) at paragraph [12].

A matter that requires a determination of an unusual or novel aspect of law.

A protracted trial involving disputed technical expert evidence.

[17] As for the value of the claim or the importance of the relief sought, the value part is not difficult to discern. As far as the importance of the relief sought is concerned, this may be a subjective matter pertaining to the applicant/plaintiff. Invariably, one will institute an action or launch an application because the relief sought is important to them. Especially so if such litigation is instigated in the High Court. There are other aspects to look to in order to determine the importance of the matter. The relief sought may not only be important to the claimant, but to the community at large. The relief sought may be of interest to the public. There can be no doubt that shoppers or visitors accessing a mall, in particular Boardwalk Mall, have an interest or need to be assured that care will be taken by management or owners of the mall that they will be safe from harm/injury. That the facilities at the mall do not pose a danger to anyone. Further that in the event of being injured or harmed, the mall will not lightly escape liability. This by means of raising a contractual defence to the effect that persons entering the mall concluded a tacit contract with the defendant that the latter would not be liable should they suffer injury or damage while inside the mall. In my view, this contributes to the relief being of importance not only to the plaintiff but to the community at large. The relief sought is also important from the point of view of that the plaintiff's claim also encompasses future medical expenses which form a great portion of the claim.

[18] The value of plaintiff's claim is substantial. I have already alluded to the settlement amount being R915 125.00 with interest. The claim having initially been for R2 million. In the matter of *Bulbulia Sulliman and Road Accident Fund*² it was stated that the matter concerned was an ordinary everyday matter for lawyers who deal with such cases. But is a significant matter for the plaintiff. Further that the settlement in the amount of R2.9 million large, but the case from lawyer's perspective is not out of the ordinary. It was accordingly held that in the circumstances scale B was fair for the costs concerned. In the instant case, I am of

² (2019/26898) [2024] ZAGPJHC 506 (23 May 2024).

the view that the architectural aspect takes the plaintiff's claim out of the ordinary. The aspect of the architectural layout of the mall lands complexity to the claim.

[19] The question is whether the matter was so complex, and the relief sought so important and valuable to the plaintiff that it entitles the plaintiff to costs calculated on scale B or C. The parties seem to be in agreement that scale A is out of the question in the circumstances. Plaintiff contends for costs on scale C and defendant on the other hand contends for scale B. See parties' heads of argument and draft orders in this regard.

[20] There is no doubt that the relief sought is important to both the plaintiff and the community accessing Boardwalk Mall. The value of the claim is substantial. The relief sought was complex for reasons stated earlier. I however do not think that it involved the determination of unusual or novel aspects of the law or the interpretation of new legislation to warrant costs on scale C.

[21] Accordingly, the following order will issue:

The defendant shall pay plaintiff's agreed or taxed party and party costs, which shall include costs of counsel on High Court scale B in terms of Rule 69 for:

20.1 The merits hearing up to and including 30 April 2024.

20.2 The quantum hearing up to and including 7 August 2024.

20.3 Any costs attendant upon payment of the capacity amount and payment agreed or taxed party and party costs.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 7 August 2024

Date Reserved : 7 August 2024

Date Delivered : 25 September 2024