

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2019/16965

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

A handwritten signature in black ink, appearing to be "M. Min", is written above a horizontal line.

In the matter between:

MALULEKO, DAVID CORLEN

Plaintiff

And

TOTAL SA (PTY) LTD

Defendant

JUDGMENT

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by upload onto CaseLines. The date and time for hand-down is deemed to be 16h00 on 24 February 2023.

OLIVIER, AJ:

- [1] The plaintiff was injured when the ceiling of the Steers/Debonairs restaurant at the Total Panorama Petroport near Pretoria collapsed on 20 May 2016. He allegedly suffered head and spinal injuries, and multiple bruises and abrasions. The plaintiff launched action in the High Court, claiming R 900 000 in respect of past and future medical expenses, past and future loss of earnings, and general damages.
- [2] The trial had been set down for 3—4 days. On the first day I was informed by counsel that the defendant had conceded the merits (liability for payment of 100% of the plaintiff's proved or agreed damages). The parties agreed that quantum should be decided separately in terms of Rule 33(4) of the Uniform Rules of Court and be postponed *sine die*. I made an order to that effect. The parties could, however, not agree on costs.
- [3] Mr Chauke, acting for the defendant, submitted that costs should either be reserved, or be in the cause – the practical effect would be that costs would be determined only at the end of the quantum stage. Ms Lingenfelder SC, for the plaintiff, insisted that costs should be awarded now, not held over for later determination. The plaintiff seeks party and party costs on the High Court scale, including the costs of Senior Counsel.
- [4] The general principles of costs are well established.¹ The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting

¹ See D E Van Loggerenberg *Erasmus Superior Court Practice* Volume 2: Uniform Rules and Appendices, Part D5 'Costs in General', for an overview of the law of costs.

or defending an action. In *Mancisco and Sons CC (In Liquidation) v Stone*²
Flemming DJP put it as follows:

The award of costs rest upon the object of reimbursing a person for costs to which he was wrongly put. (My emphasis.) That underlies the basic principle that a successful party should get its costs.³

[5] In awarding costs, a court has a discretion which should be exercised judicially. A court should consider the circumstances of each case, 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 would be fair and just between the parties.⁴

[6] Guidance may be found in comparable cases, but they do not create binding principles. A court's discretion should not be fettered or curtailed in any way.

Plaintiff's submissions

[7] Ms Lingenfelder SC submitted that it was wise and prudent to launch action in the High Court, considering the injuries sustained by the plaintiff. She further argued that the employment of senior counsel was justified – the matter was not uncomplicated and had been set down for several days.

[8] Counsel for the plaintiff proceeded to explain how the defendant had conducted the litigation up to the point that it had conceded liability, submitting that this was a factor to be considered by the court.

[9] The defendant's plea consisted mostly of bare denials – in the alternative, disclaimers which exempted the defendant from liability. The plaintiff had requested further particulars in February 2021, but the defendant had failed to comply, resulting in an application to compel In August 2022. The defendant only

² 2001(1) SA 168 (W).

³ At 181 F.

⁴ *Fripp v Gibbon & Co* 1913 AD 354 at 363.

then supplied the particulars, but it contained little information, according to the plaintiff's counsel. At the pre-trial conference on 27 January 2022, the plaintiff had raised the issue of settlement, but the parties could not reach agreement – and in respect of a request for admissions, the defendant's response was to refer the plaintiff to the plea. At the subsequent pre-trial conference on 14 September 2022, the plaintiff again requested admissions and requested a settlement offer. The defendant said that it would revert by no later than 27 September 2022 regarding the admissions, but again there was no reply. Plaintiff's lawyers proceeded to prepare for trial, including consultations with witnesses. Only on 26 October 2022 did the defendant reply. It was recorded in the practice note that should the matter not be settled before trial, the defendant would apply for a postponement. Merits were conceded on the Friday preceding the first day of trial (Tuesday).

[10] The essence of Ms Lingenfelder's submissions is that the plaintiff was forced to incur unnecessary costs due to defendant's failure to settle the matter sooner, when it could, and should, have done so. The plaintiff is out of pocket due to the defendant's conduct, and the defendant should reimburse the plaintiff. Plaintiff's counsel argued that this pointed to dilatory conduct, but I do not consider it necessary to make any specific finding in this regard.

Mbatha v Road Accident Fund⁵

[11] The defendant relied on *Mbatha*. *In casu* the parties had settled the merits. The presiding judge at 'roll call', Satchwell J, refused to endorse the agreement between the plaintiff and the Fund in terms of which the Fund would be liable for costs of the action to date, on the high court scale, as well as the costs of medico-legal experts who had assessed and filed medico-legal reports on behalf of the plaintiff.⁶ In the absence of the reports and not knowing the opinions of the potential expert witnesses, the court declined to order the payment of their fees.⁷

⁵ 2017 (1) SA 442 (GJ).

⁶ At para 18.

⁷ At para 13.

[12] The court described a decision as to the merits as merely a preliminary stage in the process to obtain monetary damages,⁸ and expressed concern about ordering the payment of fees at this stage:

When presented with an agreement that merits have been settled but nothing else, I would expect a court to have some concern why it is expected that fees and disbursements should be paid when there is no actual outcome, no identifiable result, and no money in the pocket of the road accident victim.⁹

[13] Plaintiff's counsel referred to me to two recent cases which followed a different approach to that of Satchwell J.

***Mokoena v RAF*¹⁰**

[14] In *Mokoena* the plaintiff and the Fund had settled the merits (defendant would be liable for 60% of the plaintiff's proved or agreed damages); quantum was postponed *sine die*, but costs remained unresolved. As in the present case, the question was whether the plaintiff was entitled to a costs order following the defendant's concession of the merits. The defendant's counsel in that matter made the same argument as Mr Chauke, namely that costs should be costs in the cause as it was not possible at that stage to determine if the high court tariff or the magistrates' court tariff should apply. Naidoo J dismissed this concern, finding instead that the plaintiff was entitled to costs on the high court scale in accordance with the 'general rule' of success; the learned judge considered the plaintiff to be partially successful and the defendant unsuccessful.¹¹ The court found it to be 'a wholly inequitable situation' that the plaintiff would have to pay his legal fees immediately and wait several months to recover the costs incurred in respect of the merits trial, while the defendant's legal representatives would be paid immediately, irrespective of their success or failure in the merits trial.¹²

⁸ At para 27.

⁹ At para 28.

¹⁰ *Mokoena v Road Accident Fund* (1971/2018) [2019] ZAFSHC 93 (6 June 2019).

¹¹ At para 6.

¹² At para 8.

[15] Naidoo J distinguished the case from *Mbatha* on the basis that the draft order presented to Satchwell J and the manner and procedure whereby the Gauteng Division dealt with trial files, were different.¹³

Maguru v RAF¹⁴

[16] In *Maguru* the defendant had conceded the merits. The court found that the plaintiff had been successful and was entitled to costs.

[17] The vexing question was the scale of costs, specifically whether it would be appropriate to award costs on the high court scale at the end of the merits trial. The learned judge explained the potential difficulty with this approach:

The danger of awarding costs on a High Court scale after only merits have been settled, is that it may happen that at the quantum stage the award might be on magistrate or regional court scale, and it is found that it was unreasonable or unnecessary of the plaintiff to have instituted proceeding in the High Court. In that situation the Taxing Master will have no discretion up to when the merits were settled but to tax the plaintiff bill on a High court scale as that will be by virtue of the court order despite it been (sic) found that the action should have been instituted in the lower court.¹⁵

[18] Kganyago J ordered the defendant to pay the plaintiff's taxed or agreed party and party costs but let the question of scale stand over for determination only at the quantum stage.

[19] In the present case I can see no reason why the plaintiff should not be awarded costs at this stage. It is possible for the losing party at the end of the merits trial to appeal a judgment if it is definitive of their rights. In that sense the merit stage is self-standing and independent. The merits trial often comes with its own attendant costs, which differ from those of the quantum trial. The plaintiff's legal

¹³ At para 5.

¹⁴ 2020 (3) SA 225 (L).

¹⁵ At para 14.

representatives had already consulted with witnesses and prepared for trial. The plaintiff was put to unnecessary expense. He is the successful party and is entitled to his costs now.

[20] This court must state the scale of costs; it is not the decision of the taxing master.¹⁶ As *dominus litis* the plaintiff was fully entitled to bring his claim in the High Court. The entire litigation to date has been conducted in the High Court. It is appropriate in the circumstances that I order the defendant to pay the plaintiff's taxed or agreed party and party costs to date hereof on the high court scale. It would be inequitable and unfair not to do so.

[21] It should be remembered that a court has a discretion which should be exercised judicially upon a consideration of all the facts. Past decisions offer guidance but should not limit a court's discretion. *Mbatha* is distinguishable from the present case – the context and circumstances are different.

[22] Regarding the costs of senior counsel, Leach JA provides a clear answer in *City of Johannesburg Metropolitan Municipality v Chairman of the Valuation Appeal Board for the City of Johannesburg and Another*:¹⁷

Secondly, the first respondent was represented in this appeal by a senior counsel who appeared alone. He asked for costs 'on the scale of senior counsel'. I know of no such scale. Should the complexity of a matter and the amount involved justify the employment of two counsel as a wise and reasonable precaution, a court will make a special order in that regard. Where a single counsel is employed, no special order is required and it is for the taxing master to determine a fair and reasonable fee to be allowed on taxation. [My emphasis.] Even where the matter is one deserving of the employment of senior counsel (which this clearly is) it would be wrong for a court to somehow attempt to fetter that discretion; just as it would be wrong for a taxing master not to consider the reasonableness of a senior counsel's fee in a deserving case merely as the court did not order that the fee of a

¹⁶ *Graphic Laminates CC v Albar Distributors* 2005 (5) SA 409 (C) at 412H.

¹⁷ [2014] 2 All SA 363 (SCA).

senior counsel should be allowed. I therefore see no need to make any specific order as to costs.¹⁸

[23] There exists no senior counsel scale. Ms Lingenfelder SC appeared on her own without junior counsel. No special order mentioning senior counsel is required; it is the taxing master who must decide what is a fair and reasonable fee to be allowed on taxation.

I MAKE THE FOLLOWING ORDER:

The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs to date hereof on the high court scale.



M Olivier
Acting Judge of the High Court
Gauteng Division, Johannesburg

Date of hearing: 6 November 2022

Date of judgment: 24 February 2023

¹⁸ At para 34.

On behalf of Plaintiff: M.M. Lingenfelder SC (Ms)

Instructed by: Joseph's Inc

On behalf of Defendant: M. Chauke

Instructed by: Mkhabela Huntley Attorneys