

5/9/17.

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case Number: 67069/2015

**DELETE WHICHEVER IS NOT APPLICABLE****(1) REPORTABLE: NO.****(2) OF INTEREST TO OTHER JUDGES: NO.****(3) REVISED: 1 SEPTEMBER 2017**  
**SIGNATURE**

In the matter between:

JACOBUS CLAASSENS

Plaintiff

versus

ENGELA SWART

Defendant

*In re:* Defendant's application in terms of Rule 34(12) of the Rules of Court

---

**JUDGMENT**

---

BAM, J

Appearances:

For Plaintiff: Adv D du Pessis SC.

For Defendant: Adv R Arcangeli.

1. This application, lodged by the defendant in the principal case in terms of the provisions of Rule 34(12) of the Rules of Court, concerns the reconsideration, and

amendment of the costs order I have made on 26 May 2017 in that case. My judgment in the principal case is attached.

2. The plaintiff initially claimed payment of R500 000,00 as well as costs, from the defendant for defamation. During the trial the amount claimed was amended to the lower figure of R50 000,00. The amount eventually awarded to the plaintiff was R2 000,00. The costs order reads as follows:

*"Plaintiff is ordered to pay the defendant's taxed costs, incurred by being represented by counsel in the High Court on the date of trial, 22 May 2017."*

3. Rule 34(12) provides the mechanism for a litigant to apply for the amendment of a costs order (in his/her favour) in circumstances where an offer or tender to settle has been made prior to the trial, and of which the court, at the trial, was ignorant. It goes without saying that the tender, or offer, should have been in excess of the amount eventually awarded to the plaintiff.
4. After having received the plaintiff's letter of demand, dated 29 June 2015, the defendant, in writing, tendered to pay plaintiff R2000,00 for the defamation and R3000,00 for costs. However, this was not a formal offer in terms of Rule 34 and was referred to during the trial.
5. For this application the defendant relies on two formal offers in terms of the provisions of Rule 34(1):
  - (i) On 29 September 2015 an offer in the amount of R5 000,00, excluding costs.
  - (ii) On 18 May 2017, four days before the trial, in the amount of R25 000,00, inclusive of taxed costs. The defendant also tendered a written apology.

6. It appears, as pointed out by Adv du Plessis, that the latter offer came to the attention of the plaintiff one day before the trial. It is, however, apposite to note in this regard that the pre-trial conference minute, held on 11 May 2017, reflects the following:

*"3.8 The defendant will be requested to make a settlement proposal to be considered by the plaintiff."*

*Reply: The defendant will take instructions and revert. A possible settlement was discussed."*

7. The plaintiff issued summons on 21 August 2015. The settlement offers were obviously not acceptable to the plaintiff and the matter went on trial.
8. The defendant now applies for reconsideration of the costs order referred to in paragraph 2 above and for the amendment thereof in the following terms:
  1. *"The plaintiff is ordered to pay the defendant's taxed costs incurred in defending the action from date of summons to the date of judgment on a party and party scale."*
  2. *The plaintiff is ordered to pay the defendant's costs, incurred by being represented by counsel in the High Court on the date of the trial, 22 May 2017, as well as counsel's reserved fee for the day of 23<sup>rd</sup> May 2017."*
9. The circumstances clearly justify the application in terms of Rule 34(12). The formal offer made by the applicant (defendant) on 8 October 2015 complied with the provisions of Rule 34(1). In compliance with the pre-requisite in Rule 34(12) the trial court was ignorant of the offer. Mr du Plessis' argument that the offer was indeed before the court as contained in the correspondence between the parties canvassed at the trial is rejected. In the first place, as pointed out by Mr Arcangeli, it was not a formal offer, and secondly, the terms differ.
10. In view of my eventual finding, I am satisfied that the offer made on 8 October 2015 was a generous offer of settlement, and, accordingly that the plaintiff should be ordered to pay the defendant's taxed costs in defending the action from the date the offer was received by the plaintiff. In rejecting the second offer, although it was apparently received one day before the trial, clearly reflected the plaintiff's attitude that he was not amenable to any settlement.
11. In respect of the reserved costs of counsel for a possible second day of trial, I am in agreement with Mr Du Plessis's submission that the agreement between Mr Arcangeli and the defendant's attorney in that regard had nothing to do with the plaintiff. In my view, there is no basis upon which the plaintiff should be held liable for such a reserved fee.



12. This application was initially enrolled on 7 June 2017. Both parties were represented. However, it appears, on the probabilities that the matter was erroneously enrolled due to some misunderstanding in the offices of the Registrar. It is very unfortunate that this happened, but I am not prepared to make any order about the costs of that day.
13. Accordingly, after having considered the costs order afresh, the original costs order, par 3, is substituted by the following:
3. *The plaintiff is ordered to pay the defendant's taxed costs, incurred in defending the action from 29 September 2015 to the date of judgment, on a party and party scale.*
- The costs to include the defendant's taxed costs incurred by being represented by counsel in the High Court on 22 May 2017.*
14. The plaintiff is ordered to pay the costs of the application in terms of Rule 34(12).

A handwritten signature in black ink, appearing to read 'Bam', is written over a horizontal line.

AJ BAM

JUDGE OF THE HIGH COURT