REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU

CASE NUMBER: 1166/2018

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

DATE 4/10/19 SIGNATURE:

In the matter between:

MAGURU AZWIMBAVHI RECHARD **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGEMENT

KGANYAGO J

[1] The plaintiff has instituted an action against the defendant for damages and ancillary relief arising from a motor collision which occurred on the 24th February 2018. At the time of accident plaintiff was a passenger in one of the vehicles that were involved in the collision.

[2] The defendant defended the plaintiff's action and also filed its plea. In its plea, the defendant denied liability. With regard to the collision the defendant stated that it bears no knowledge of it and accordingly denied it, and put the plaintiff to the proof the thereof.

[3] After pleadings were closed, the plaintiff applied for a judicial pre-trial conference. The judicial pre-trial conference was set down for the 9th September 2019. On the date of the judicial pre-trial conference, the plaintiff's counsel informed the court that the matter has been settled on merits and handed in a draft order which he applied that it be made an order of court. The defendant's counsel confirmed the contents of the draft order and that he was in agreement with the plaintiff's counsel that the draft order be made an order of court.

[4] The draft order handed in by the plaintiff's counsel reads as follows:

"Having heard Counsel on behalf of the parties and by agreement between the parties;

IT IS ORDERD THAT:

1. The question of liability ("merits") be and hereby separated from question of the extent of damages (quantum) in terms of the provision of rule 33(4) of the above honourable court.
2. The defendant pays 100% of the plaintiff's proven or agreed damages.
3. The defendant pays the plaintiff's taxed or agreed party and party costs, pertaining to the question of liability ("merits") on applicable High Court scale.
4. The issue of quantum be and is hereby postponed sine die to be adjudicated upon at a later stage."

[5] The parties were requested to address the court why the costs should be on the applicable High Court Scale which at this stage it cannot be said whether at the end the award will be on magistrate or regional or High Court scale. The matter was adjourned to the 11th September 2019 to enable the parties to file short heads of arguments on that aspect. I am indebted to counsel for both parties in preparing their heads of arguments within a short space of time.

[6] The plaintiff's counsel argued that the extend of the plaintiff's injuries and nature of his employment, will qualify him for general damages and loss of earnings which will far exceed the jurisdiction of the magistrate court. The plaintiff therefore contends that there is no reason why he should not be awarded costs on merits at this stage of the proceedings on a High Court scale.

[7] The defendant's counsel argued that at this stage there are no reports that show what amount the plaintiff might be awarded due to the fact that in the clinical records filed of record, the plaintiff is said to be unemployed and does "piece jobs". The defendant therefore contends that the plaintiff will not succeed with his claim on a High Court scale. The defendant submits that a proper order should be costs in the cause.

[8] Rule 33(4) of the Uniform Rules of Court (Rules) permits the separation of merits and quantum. **In Rauff v Standard Bank Properties**[1] Flemming DJP said:

"The possibility of separation of issues is so important that an attorney should as soon as pleadings have closed make a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs. The attorney must apply himself to an assessment of how the matter can proceed with maximum expedition and without avoidable costs".

[9] The parties by agreeing to separate merits and quantum have done what is permitted in terms of the Rule 33(4) and there is nothing untoward about that.

[10] The question which the court must determine is whether the plaintiff is entitled to costs on a High Court scale at this stage of the proceedings. The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or defending action. Costs which a court may award are party and party costs; attorney and client costs; attorney and own client costs and costs *de bonis propriis*. In **Mancisco and Sons CC (In Liquidation) v Stone**[2] Flemming DJP said:

"The award of costs rest upon the object of reimbursing a person for costs to which he was wrongly put. (**Texas Co (SA) Ltd v Cape Town Municipality 1926 Ad 467 at 488**). That underlies the basic principle that a successful party should get its costs."

[11] The successful litigant is entitled to get its costs. In the case at hand the question is whether the plaintiff was successful when merits were settled at 100% in his favour. The defendant in its plea has denied liability and the accident. However, on the 15th February 2019 the defendant made an offer in

[1] 2002(6) SA 693 (W) at page 703 I-J
[2] 2001(1) SA 168 (W) at page 181 F-G

terms of rule 34(1) and (5) wherein it conceded merits on 100% in favour of the plaintiff and also offered the plaintiff's taxed or agreed party and party costs on High Court scale. It further offered the plaintiff an undertaking in terms of section 17(4) as of the Road Accident Fund Act 56 of 1996. The plaintiff accepted the defendant's offer on the 13th March 2019. The plaintiff has applied for a trial date on the 29th November 2018. On the 23rd August 2019 the plaintiff served the defendant with a set down for a judicial pre-trial.

[12] When the plaintiff set down the matter for a judicial pre-trial conference, it was five months after it has accepted the defendant's offer. In my view, the judicial pre-trial of the 9th September 2019 should have been for quantum as merits have long being settled. By setting the matter for a judicial pre-trial merely to make the draft order an order of court on merits which have long being settled, in my view, was unnecessary escalation of costs, and this practice should be discouraged.

[13] However, that does not solve the issue whether the plaintiff was successful or not when the defendant conceded the merits and also offered a section 17(4) (a) undertaking. Taking into consideration that the defendant was initially disputing both liability and collision, in my view, the plaintiff has partially succeeded with his claim and should be reimbursed costs for that.

[14] The question which this court must now determine is whether it will appropriate to award costs on a High Court scale at this stage of the proceedings. **In Mbatha v Raf**[3] Satchwell J said

[3] 2017 (1) SA 442 (GJ) at para 18

"It is correct that, at the end of a trial, a judge would make an order as to merits and, assuming that there has been separation of issues and quantum is to be heard at a later date, would usually be asked to make an order as to costs. However, the difficulty both for a trial judge where there is separation and also for the judge managing the trial roll call is that the judge has no idea as to whether or not costs should be awarded on the magistrate or regional or High Court scale."

[15] In the case at hand merits have been settled, and the parties have agreed on separation of issues, and also that the quantum be heard at a later stage. At this stage the court has no idea whether the award will be an amount within the jurisdiction of the magistrate or regional or High court as no experts reports or actuarial calculations have been filed by both parties. However, the issue of which court the plaintiff should have approached when instituting his action is not determined only by the award given to him. The complexity of issues raised, both factual and legal should be taken into consideration even though the amount awarded might be found to be within the jurisdiction of the magistrate or regional court. (See the unreported case of **Mafela Munyadziwa Beauty v RAF case no 909/2017 Limpopo Local Division Thohoyandou (14 December 2018))**[4]

[16] 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

[4] at para 24 Kgomo J said: "It finds that the plaintiff was justified when it initially instituted these proceedings in the High Court: There are several heads of damages and all cumulatively justified an approach to the High Court. It will be a travesty of justice if this court fragmented the plaintiff's claim into parts going to be dealt with in terms of Magistrates Courts jurisdiction and other destined for the High Court".

virtue of the court order despite it been found that the action should have been instituted in the lower court.

[17] Once the merits have been settled, there will be no need to revisit them. An order in relation to that must therefore be formulated in such a way that it will not lead to different interpretations. In **Graphic Laminates CC v Albar Distributors**[5] van Reenen J said:

> "In a litigious setting the question of liability for costs as between party and party is one for the decision of the court and not the Taxing Master. In the absence of an order that compelled the applicant to pay the first respondent's costs in a winding-up application, the Taxing Master has no authority to tax item 1 to 37 in the bill of costs and to include in the allocator issued by him/her amounts totalling to R11990 in respect thereof. The Taxing Master, by having done so, clearly acted ultra vires".

[18] In my view, when an order on the merits is made and there is a separation of issues, and quantum is to be heard at a later date, it must be clear on the order which scale of costs is awarded. It is undesirable to leave it to be determined at a later date, unless the circumstances so warrant. The fundamental principle is that liability for costs is in the discretion of the court that is called upon to adjudicate merits of the issues between the parties. In **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others**[6] the court held that one of the general rules is that, although an award of costs is in the discretion of the court, successful parties should usually be awarded their costs and that this rule should be departed from only where good grounds for doing so exists.

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[5] 2005 (5) SA 409(C) at 412 H-I
[6] 1996 (1) SA 984 (CC)

[19] In the absence of an express statutory provision to the contrary and good grounds shown not to award costs after the merits have been settled, the general rule that costs follow the result is subservient to that fundamental principle. If the court intends to depart from the general rule, it will be appropriate to call the parties to first make submissions before an order is made. In my view, in the case at hand there exists no good grounds why the plaintiff should not be awarded costs, and it will therefore, be appropriate to order the defendant to pay plaintiff's taxed or agreed party and party costs. The issue whether the costs should be on High Court or regional or magistrate scale is best placed to be argued during quantum proceedings.

[20] I will therefore amend paragraph 3 of the draft order by deleting the words **"on applicable High Court scale".**

[21] In the result the following order is made:

(21.1) The draft order as amended is made an order of court.

(21.2) The draft order is amended by deletion the words **"on applicable High Court scale"**

M.F KGANYAGO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, POLOKWANE, LIMPOPO DIVISION

APPEARANCE

FOR THE PLAINTIFF	**: Mr S.O Ravele**
INSTRUCTED BY	**: S.O RAVELE ATTORNEYS**
FOR THE DEFENDANT	**: ADV: M Musetha**
INSTRUCTED BY	**: MATHOBO-RAMBAU & SIGOGO ATTORNEYS**
DATE OF HEARING	**: 11TH SEPTEMBER 2019**
DATE OF JUDGEMENT	**: 4TH OCTOBER 2019**