IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~

(3) REVISED.

21/07/2014

DATE SIGNATURE

CASE NO: A474/2012

DATE: 25/07/2014

IN THE MATTER BETWEEN:

ROAD ACCIDENT FUND **APPELLANT**

AND

REFILWE DANIEL MASHALA **RESPONDENT**

JUDGMENT

KOLLAPEN J:

1. This is an appeal against the order of SOUTHWOOD J of the 30th of March 2012, dismissing the appellant's application to reconsider the costs order the Court made on the 08th of March 2012. Leave to appeal was granted by VAN DER MERWE DJP (as he then was) on the 29th of May 2012.

2. The facts relevant to the adjudication of this appeal are as follows:

   i. The respondent brought an action for damages against the appellant in terms of the provisions of the Road Accident Fund Act 56 of 1996;

   ii. The appellant opposed the action and both the merits and the quantum of the respondent's claim were in dispute, and when the trial proceeded, the Court made an order separating the merits of the matter from the quantum. The trial proceeded only on the issue of liability;

   iii. On the 08th of March 2012 the Court delivered judgment on the question of liability and made an order that the appellant be liable for fifty per cent of all damages that the respondent was able to prove, and in addition ordered the appellant to pay the costs of the hearing;

   iv. The appellant thereafter brought an application in terms of Rule 34(12) for the Court to reconsider the question of costs afresh and it premised such application on the following grounds:

      a) That on the 11th of January 2012, the appellant's attorneys delivered a notice of offer of settlement in terms of Rule 34(1) and Rule 34(5) in which the appellant offered to pay fifty per cent of all damages proven by the respondent as well as the costs of the action insofar as it pertained to negligence up to and including the 11th of January 2012;

      b) That considering that the Court on the 08th of March 2012 made an order, in respect of merits, identical to the terms of the tender, the Court should have reconsidered the order of costs it had made on the 08th of March 2012 and it should have, in the light of the offer of settlement, ordered the respondent to pay the costs of the hearing.

3. In its judgment on the application for reconsideration, the Court concluded that Rule 34(1) of the Uniform Rules of Court deals with monetary claims and the only offer capable of settling a monetary claim was an offer for the payment of a sum of money. Accordingly an offer not sounding in money was not possible in terms of the Rule and the appellant's offer of the 11th of January 2012 was not an offer sounding in money and, as such, it fell outside of what Rule 34(1) contemplated. On that basis, the Court proceeded to dismiss the application for reconsideration.

4. The central issue for determination in this appeal is whether the Court a quo was correct in concluding that the offer of settlement made in terms of Rule 34(1) and Rule 34(5) fell outside of the ambit of the Rule. A related issue is whether, notwithstanding that the offer of settlement was made in terms of Rule 34(1), the common law is of relevance and is of possible application in determining the matter. If the answer to that question is that the offer of settlement falls outside of both the Rules and the common law, it disposes of the appeal in that the order of the Court *a quo* is unassailable as there could conceivably be no reconsideration of an order of costs when an offer of settlement fell outside of the parameters of Rule 34(1) and the common law.

5. On the other hand if the offer is found to be regulated by the Rules or by the common law, then this Court may either refer the matter back to the Court *a quo* for reconsideration or it may deal with the reconsideration itself as contemplated in Section 19 of the Superior Courts Act 10 of 2013.

ANALYSIS

6. It is of course necessary in adjudicating the issue in dispute, to have regard to both the common law, the provisions of Rule 34(1) as well as the rationale for the Rule and the object it seeks to advance.
   Rule 34(1) provides as follows:

'34 Offer to settle

> *In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by the attorney if the latter has been authorised thereto in writing.'*

7. In ***NAYLOR AND ANOTHER v JANSEN* 2007 (1) SA 16 (SCA)**, the Court dealt with both the purpose behind the Rule as well as the important matter of the question of the judicial exercise of discretion in the matter of costs generally.

8. In expounding the purpose of the Rule, the Court remarked as follows:

> *"The purpose behind the Rule is clear. It is designed to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of such litigation. The Rule is there not only to benefit a particular defendant, but for the public good, generally, as Denning LJ made clear in Findlay v Railway Executive:*
>
> > *'The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs.'"* (at 22I-23B)

9. The Court went further and cautioned that courts should take account of the purpose behind the Rule and not give orders which undermine it. Accordingly in the context of litigation, the Rule provides an incentive to the reasonable and prudent litigant who makes an informed and concerted effort to bring litigation to an end as well as a disincentive to the intransigent and

unreasonable litigant. The incentive lies in the risk attendant upon the Court exercising its discretion with regard to costs.

10. The Rule is also consistent with advancing public policy imperatives that seek to avoid using the public resources associated with the functioning of the Courts in the advance of unnecessary and avoidable litigation.

11. The Supreme Court of Appeal in *NAYLOR* (supra) also reaffirmed the principle that the discretion vested in a court with regard to costs was a discretion in the strict and narrow sense and that the power of a court of appeal to interfere with its exercise was limited to instances where it could be said that the discretion was not exercised judicially. The Supreme Court of Appeal said that this can be done by showing that the Court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or it did not bring its unbiased judgment to bear on the question, or it did not act for substantial reasons.

12. Reverting to the rationale and the purpose of the Rule, it must follow that the Rule must be interpreted and given effect to in a practical manner, regard being had to how the litigation is structured, the manner in which issues are separated and dealt with, and the approach of courts generally in ensuring that litigation is practical, cost effective and does not constitute an unwarranted claim on the public purse.

13. Litigation for the payment of monetary damages arising out of motor vehicle collisions constitutes a substantial portion of the trial work in this and many other divisions of the High Court. The disputes that emerge invariably may be divided into disputes relevant to liability or disputes relevant to quantum or to both. It has become common practice and expedient for orders of separation to be made in terms of Rule 33(4) and in the overwhelming majority (if not in all) of such instances, a court has pronounced on the question of liability first, which has the effect of determining the extent, if any, of an insurer's liability for damages. If the court should find totally in favour of the insurer, that is the

end of the matter. Simply put, the issue of the determination of liability is a necessary precursor to any successful claim for compensation.

14. Thus a litigant faced with the choice of disputing liability *in toto* or making an offer of settlement may well, regard being had to the purpose of the Rule, seek to bring to an end at least that part of the litigation by making an offer of settlement. Such an approach would be consistent with the purpose of the Rule and may also be considered as advancing the public good.

15. It would of course follow in such instances where the question of quantum remains unresolved (it not being expedient or practical to resolve it in the absence of certainty on the question of liability), that an offer of settlement on liability could never be in precise money terms but could certainly be structured in terms capable of ascertainment. Arising out of this is the question of whether a failure to make a specific money offer has the effect of taking the offer outside of the ambit of Rule 34(1) as the Court *a quo* concluded. I believe it does not.

16. If one has regard to the text of Rule 34(1), it does not encapsulate a requirement that the offer be one precisely sounding in money. If regard is had to the rationale for the Rule, to enable a party to avoid future litigation, interpreting Rule 34(1) as requiring a precise money offer to be made will have the effect of undermining the Rule, something the Court cautioned against in ***DAYLE v SALGO* 1988 (1) SA 41 (FC) at 43A**.

17. The conclusions of the Court a quo would mean that where separation of liability and quantum has taken place, no offer of settlement would be possible in terms of Rule 34(1) simply because it is not an offer sounding in money. Such a result would not only undermine the rationale for the rule but would serve to encourage unnecessary litigation to the cost of litigants and the fiscus.

18. The legal and practical consequences of the order of separation fortify this view. In ***DAVID HERSCH ORGANISATION (PTY) LTD v ABSA***

***INSURANCE BROKERS (PTY) LTD* 1998 (4) SA 783 TPD**, the Court concluded that 'the effect of the order made in terms of Rule 33(4) was that the issues on the pleadings would be resolved in two separate and self-contained trials.' That being the case and once the order of separation had been made, the only issue which required determination in a separate and self-contained trial was the issue of liability and the trial that followed dealt exclusively with that issue. The offer of settlement was clearly intended to dispose of that issue (the question of liability) in its entirety. It must then follow that the offer of settlement, whilst not one sounding in money, dealt with a substantial and insulated issue whose resolution was a *sine qua non* of the determination of a money claim. To suggest that it fell outside the rules would be to ignore the rationale for the rule and the need to be practical in litigation. Litigation is more than a test of technical skills and ability – it is after all the pursuit of justice where the law and the rules must serve the cause of justice.

19. In addition to the above it is worth recalling that the Rules of Court while seeking to give effect to the common law do not oust the common law. In ***UNIT INSPECTION CO OF SA (PTY) LTD v HALL LONGMORE & CO (PTY) LTD* 1995 (2) SA 795 AD** the Court reaffirmed the position that 'an offer to settle need not be made in terms of the Rule, and if otherwise sufficient, it will protect the defendant from further costs.' *In casu* and even while the offer was couched in the language of the Rule, this Court is entitled to interrogate the question as to whether it was 'otherwise sufficient '. The answer to that question must the decisively in the affirmative for the reasons already given.

20. In this regard the author Erasmus in Superior Court Practice makes the pertinent observation at B1-5 that "*the object of the rules is to secure inexpensive and expeditious completion of litigation before the courts; they are not an end in themselves. Consequently the rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible. Thus it has been held that the rules exist for the court, and not the court for the rules.*"

21. On that basis and even while accepting that the power of the court of appeal to interfere with the exercise of a true discretion is limited, it is my view that the discretion was exercised on an incorrect principle, namely that the offer of settlement fell outside Rule 34(1), and this entitles this Court to interfere.

22. That being the case, it is my view that the offer of settlement was a competent one both in terms of Rule 34(1) and the common law and if it was accepted it would have brought the litigation on the question of liability to an end on the same terms as the Court *a quo* found on the 08th of March 2012.

23. Such an outcome would have justified the Court, on reconsideration of the costs order it made, to award costs in favour of the appellant. In my view the appeal is destined to succeed and I propose the following order:

23.1 The order of SOUTHWOOD J of the 30th March 2012 is hereby set aside and replaced with the following:

"The plaintiff is ordered to pay the costs of the hearing."

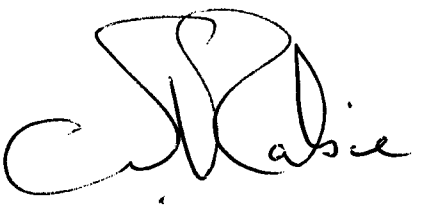
23.2 The order of SOUTHWOOD J of the 30th of March 2012 is hereby set aside and replaced with the following order:

"The defendant's application for the Court to reconsider the costs order made on 08 March 2012 is upheld with costs, such costs to be paid by the plaintiff."

23.3 The respondent is ordered to pay the cost of this appeal.

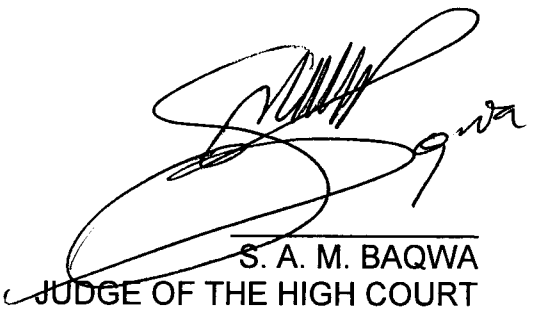
N. KOLLAPEN
JUDGE OF THE HIGH COURT

I AGREE,



C. P. RABIE
JUDGE OF THE HIGH COURT

I AGREE,



S. A. M. BAQWA
JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

A474/2012

HEARD ON: 23 APRIL 2014

FOR THE APPELLANT: ADV C. A. KRIEL

INSTRUCTED BY: DYASON INC (ref: L Coetzee-(cvc)-DD1290)

FOR THE RESPONDENT: ADV A. MOJA

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