


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 31416/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
 SIGNATURE	2016 -10- 13 DATE

13/10/2016

In the matter between:

AMON SIBARA

PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

J U D G M E N T

MALI J

- [1] The plaintiff herein seeks costs for the employment of Senior Counsel. The issue for costs arises out of a postponement of the matter as agreed between the parties legal representatives, based on the request of the defendant.
- [2] The plaintiff sued the defendant for an amount of R500 000 for damages arising out of his unlawful arrest by the members of the South African Police Service ("SAPS"). The defendant is the Minister of Safety and Security a ministry responsible for SAPS.
- [3] It is common cause that on 13 November 2013 the plaintiff conceded the merits, the order was granted by agreement and the quantum was postponed for hearing.
- [4] The plaintiff proceeds to prepare for trial and the matter was set down for 29 April 2016. The plaintiff went to the extent of filing 7 (seven) various medico legal reports and an actuarial report, as well as serving a Rule 35 (3) Notice to discover specific documents. The defendant's attorneys wrote a letter requesting indulgence to respond to the Rule 35 (3) Notice.
- [5] On 15 January 2016 the plaintiff amended its particulars of claim. As a result of the amendment the amount claimed for damages increased to R13, 620, 000.00 (Thirteen Million, six hundred and twenty thousand rand only). The defendant never reacted to the said amendment. Instead, on 17 February 2016 the defendant's attorneys

wrote a letter requesting an indulgence to respond to Rule 35 (3) Notice. The defendant failed to attend thereto despite the indulgence being granted.

- [6] On 29 March 2016 the plaintiff's attorneys wrote to the defendant's attorneys and informed them that they were not in possession of the defendant's amended pleas and that they were neither in possession of a reply to the plaintiff's Notice in terms of Rule 35 (3) Notice. The plaintiff's attorneys enclosed a copy of the said notice in the correspondence.
- [7] On 11 April 2016 the defendant's attorneys requested a copy of the notice of set down which the plaintiff provided. On 12 April 2016 the plaintiff's attorneys dispatched correspondence to the defendant's attorneys appraising them of their failure to file their medico legal reports as well as their omission to file the defendant's plea to the plaintiff's amended particulars of claim. They further requested the defendant's offer of settlement under the new circumstances and indicated that the plaintiff's experts have been reserved for trial.
- [8] Only on 21 April 2016, eight days before the trial the defendant's attorneys indicated that the merits should not have been conceded. They were conceded without the defendant's approval, in that regard they indicated that they had instruction to proceed with an application to rescind the order of 13 November 2013. On 26 April 2016 the defendant filed an application for rescission, and the plaintiff agreed

to a postponement of the trial in order to deal with the application for rescission. The dispute now is about the costs, in particular that of Senior Counsel.

COSTS

- [9] In *The Civil Practice of the High Courts of South Africa* by Herbststein & van Winsen, Volume 2 page 954 to 956 the learned authors states:

"III FUNDAMENTAL RULES RELATING TO AWARDS OF COSTS

The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrived at. In leaving the magistrate (or judge) a discretion,

... the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such an order as to costs as would be fair and just between the parties. And if he does this, and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion.

Even the general rule, viz that costs follow the event, is subject to the overriding principle that the court has a judicial discretion in awarding costs.

An appellate tribunal, in its reluctance to interfere with the discretion of a trial judge, refused to set aside the order as to costs given by him merely on the ground that the appellate tribunal might have taken a different view of the sufficiency of the grounds upon which the discretion was exercised. The court's discretion should be exercised within the limits of certain general rules that the courts have, over the course of many years, laid down for guidance. The most important of these rules is that the successful party is entitled to costs unless the court for good reason, in the exercise of its discretion, deprives him of those costs.

In Ferreira v Levin, Vryenhoek v Powell Ackermann J delivered an important judgment concerning costs, which was concurred in by all the other members of the court. In the course of his judgment Ackermann J Stated:

[3] The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party, as a general rule, have his or her costs. Even the second principle is subject to the first. The

second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs... the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adapted to meet new needs which may arise sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted: this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.

A statute may in isolated cases, expressly authorise a court to depart from the general rule that costs follow the event. For instance, the National Environmental Act, 1998, expressly authorises courts not to award costs against unsuccessful litigants in certain proceedings aimed at the protection of the environment and some related matters. It has been held that, in order to avoid persons aggrieved by pollution being discouraged from bringing proceedings under section 28(12) or section 32(1) of the above-mentioned Act, 'the Legislature sought to ameliorate the general principle that an unsuccessful party should guide the court are as follows:

(1) As a general rule, the successful party is entitled to costs.

(2) In determining who is the successful party, the court should look to the substance of the judgment and not merely its form.

(3) The court can, for good reason, deprive a successful party of costs, in whole or in part.

(4) The court can, for good reason, order a successful party to pay the whole or portion of the costs of the other party.

The court can, in special cases, make an order that the unsuccessful party must pay the costs of the successful party on an attorney-and-client basis."

[10] Argument tendered on behalf of the plaintiff is that the amount claimed (of R13 260 000.00) is enormous. It was further stated that the nature of medico-legal experts including *inter alia* neurologist, neurosurgeons, etc and because of the serious injuries sustained by the plaintiff the involvement of Senior Counsel is justified.

[11] It was argued on behalf of the defendant that the matter set down was for the claim of R500 000.00, effectively disregarding the amended particulars of claim. According to the Counsel for the defendant the defendant brought the application for rescission in respect of the judgment obtained for the claim of R500 000.00, therefore the involvement of one Counsel was justified. I cannot accept this

contention, it is common cause that the judgment was granted in respect of merits only.

[12] The defendant was served with a notice to amend the particulars of claim and was sent various follow up correspondence pertaining to same. As indicated above there has never been any reaction on the part of the defendant. The plaintiff's amendment is valid, the amount being claimed is R13 620 000.00. The contention on behalf of the defendant that both Counsel for the plaintiff proceeded to prepare for trial on 22 April 2016 fully knowing that the defendant would be bringing an application for rescission cannot be accepted. I do not see how the plaintiff's legal team would have started preparing a mere 7 days before the trial. It is clear from the exchange of correspondence between the parties that the plaintiff's attorneys were preparing for a trial based on amended particulars of claim. It is reasonably acknowledged that in cases of this magnitude the preparations commence as early as possible and the Counsel get reserved on time as submitted on behalf of the plaintiff.

[13] In exercising my discretion *inter alia* I have considered the defendant's conduct. The defendant unjustifiably took time to institute the application for rescission, therefore causing the plaintiff's legal team to believe that the matter would go on trial. Having regard to the above I am persuaded that the plaintiff's case justifies the cost of two Counsel, both junior and senior.

[14] In the result the following costs order is made;

14.1 The defendants are ordered to pay the wasted costs of the plaintiff including costs of Senior Counsel.



N.P. MALI
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:

J G Cilliers SC & N Swart

Instructed by:

ERWEE ATTORNEYS

Counsel for the Defendant:

B F Gededger

Instructed by:

SATE ATTORNEY PRETORIA

Date of hearing:

29 April 2016

Date of Judgment:

2016 -10- 13