IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 6010/01

In the matter between:

MARGARET JOANNE HOYLE FOX Plaintiff

and

CANGO WILDLIFE CENTRE (PTY) LTD
t/a CANGO WILDLIFE RANCH Defendant

JUDGMENT ON COSTS AND INTEREST: 1 NOVEMBER 2004

VAN ZYL J:

[1] In my judgment handed down on 2 August 2004, I granted an order in terms of which the defendant was required to pay the plaintiff past medical expenses in the amount of £4 404,85, past loss of income in the amount of £1 461,00 and general damages in the amount of R100 000,00. The defendant was further required, in terms of paragraph 4 of the order, to pay interest on the past medical expenses and past loss of income at the prescribed statutory rate from date of issue of summons to date of payment. In addition the defendant was required, in terms of paragraph 6 of the order, to pay the plaintiff's costs of suit, including the reasonable qualifying fees and expenses of Drs G A Versfeld and H J Edeling.

[2] The defendant subsequently (on 3 August 2004) gave notice to the plaintiff, in terms of rule 34 (12), of three prior offers of settlement made by it. The first was an offer of R260 000,00 on 12 July 2002, the second an offer of R400 000,00 on 16 August 2002 and the third an offer of R600 000,00 on 10 March 2004. In the event the defendant requested the court to reconsider its judgment on the question of costs.

[3] On the same day (3 August 2004) the defendant applied for variation and/or correction of the order relating to interest on past medical expenses and past loss of income, on the basis that interest should run from the date of judgment (2 August 2004) to date of payment. In his supporting affidavit the defendant's attorney, Mr

Nigel Everingham, relied on section 2A(4) of the *Prescribed Rate of Interest Act* 55 of 1975, which reads:

> Where a debtor offers to settle a debt by making a payment into court or a tender and the creditor accepts the payment or tender, or a court of law awards an amount not exceeding such payment or tender, the running of interest shall be interrupted from the date of the payment into court or the tender until the date of the said acceptance or award.

[4] Inasmuch as the award made by this court on 2 August 2004 did not exceed any of the offers or tenders and did not specify the applicable exchange rate, the award became payable on 2 August 2004 at the exchange rate obtaining on that day, namely R11,37 to one pound sterling. The sums of £1 461,00 and £4 404,85 aforesaid hence translated into a total of R66 694,71. Interest on these sums could run only from the date of judgment, being 2 August 2004.

[5] In response to the defendant's application the plaintiff's attorney, Mr Tzvi Brivik, submitted that the defendant's respective tenders should be reviewed in the light of what their values were in pounds sterling at the date of the tender in question. In this regard he pointed out that, in terms of rule 34 (6), the plaintiff had fifteen days within which to accept such tender. On the date of each tender the exchange rate was, respectively, R15,7364, R16,3615 and R11,9982. After deduction of the past loss of income and general damages, the respective tenders in respect of past medical expenses, which should be regarded as a separate debt for purposes of the tenders, would be the equivalent of £4 893,66, £16 874,72 and £40 211,92. Interest on these amounts, Mr Brivik submitted, should be granted from the date of issue of summons to the date of tender and thereafter from the date of the award. This would make allowance for the interruption of interest from the date of the tender to the date of the award.

[6] In reply to this response Mr Everingham submitted that, even accepting the different exchange rates applicable at the time of each tender, Mr Brivik's calculations were wrong. He illustrated this with reference to tables containing various calculations and persisted in his contention that the tenders exceeded the award made by this court, regardless of what approach was adopted. In this regard he rejected, quite correctly in my view, Mr Brivik's submission that the claim for past medical expenses should be regarded as a separate debt to which the tenders would not apply. The defendant, he averred, had, in making the respective tenders, acted reasonably and approached the litigation in a sensible and responsible manner. Its offers of settlement, which were generous in the circumstances, had been made some time before the enormous costs that were later incurred had been run up. Because of the misleading information concerning her medical condition the plaintiff had given her South African experts, however, her amended claim was "grossly inflated".

[7] The parties were in agreement that the running of interest on past medical expenses and loss of income would be interrupted by the tender, in which event it

should run from the date of service of summons until 12 July 2002, and then again from the date of judgment (2 August 2004) until date of payment. In regard to the costs of suit Mr Everingham submitted that the defendant should pay the plaintiff's costs until 14 July 2002 (allowing a *spatium deliberandi* of two days), whereas the plaintiff should pay the defendant's costs incurred after that date. Such latter costs should include the costs of two counsel, where two counsel have been employed, and the reasonable qualifying expenses of Dr Sagor (orthopaedic surgeon), Dr Badenhorst (neurologist), Dr Le Fevre (psychiatrist), Mr van Wyk (psychologist), Mr Fritz (industrial psychologist), Mrs Andrews (occupational therapist) and Mr Koch (actuary).

[8] In his argument on behalf of the plaintiff Mr Trengove concentrated on the costs issue, submitting that, if this court had applied the prevailing law regarding lost wages as set forth in the case of *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C), the plaintiff's claim for lost income would have been considerably higher than the amount awarded and the total damages would have been in excess of the first two tenders. Interesting as this argument may be, the present application is not one for leave to appeal, but for an amendment of the order relating to interest and costs.

[9] Mr Butler, for the defendant, submitted that Mr Everingham's calculations should be accepted as demonstrating unequivocally that the tender of 12 July 2002 already exceeded the award of this court. He suggested that a *spatium deliberandi* of two days, namely up to and including 14 July 2002, would have been reasonable for the plaintiff to consider accepting or rejecting such tender.

[10] In exercising its discretion as to costs, Mr Butler suggested, this court should award the plaintiff only those costs incurred prior to 12 July 2002, such costs not to include any expenses relating to the experts who were consulted by the plaintiff but were never called to testify. The plaintiff, however, should be ordered to pay the defendant's costs incurred after 14 July 2002, such being the usual order under the circumstances. Had the plaintiff not decided to abandon her British experts and "cast her bread upon the water" by seeking support from South African experts for a massive increase of her claim, she would have avoided the risk of herself being mulcted in costs should she not be successful. There was no sound reason, Mr Butler argued, for this court to deprive the defendant of costs it would not have incurred had the plaintiff not decided, unjustifiably, to increase her initial claim many times over.

[11] In regard to interest, Mr Butler relied on the provisions of section 2A(4) of Act 55 of 1975 cited above. He likewise relied on this court's power to vary or rectify its judgment in terms of rule 42, the common law and the court's inherent jurisdiction to do justice between the parties. It was a procedural matter which required the court to revisit its original order, particularly in exceptional circumstances such as the present.

[12] Rule 34 (12) provides:

> If the court has given judgment on the question of costs in ignorance of the offer or tender and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender: Provided that nothing in this subrule contained shall affect the court's discretion as to an award of costs.

The purpose of this sub-rule, as I understand it, is to give the court the opportunity to consider the effect of the plaintiff's refusal to accept an offer of settlement, which

could have put an end to the matter. Since the court could not have known of the circumstances existing at the time the tender was made, it is now enabled, and required, to give all such circumstances full consideration and to decide afresh, in the exercise of its discretion, what an appropriate order as to costs would be. See *Bloom v General Accident and Life Assurance Corporation Ltd and Another* 1967 (2) SA 116 (D) at 118H-119A; *Minister van Landboukrediet en Grondbesit v McDonald* 1969 (2) SA 473 (A) at 481A; *Tinta v AA Mutual Insurance Association Ltd* 1979 (4) SA 203 (E) at 205F; *Hassett v Santam Insurance Co Ltd* 2000 (1) SA 403 (C) at 406E-F.

[13] In this regard the court must bear in mind that the very purpose of rule 34 is to limit costs and avoid unnecessary litigation. The procedure envisaged is less cumbersome than that provided in the previous rule relating to payment into court, thereby rendering it relatively easy for a court to consider whether the plaintiff's rejection of a tender was reasonable under the circumstances. See *Turbo Prop Service Centre CC v Croock t/a Honest Air* 1997 (4) SA 758 (W) at 764G.

[14] In considering an amended costs order the court will usually allow itself to be led by considerations of justice, fairness and reasonableness subject, however, to its overriding and unfettered discretion in this regard. See *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 678H; *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) at 549A-B. Should the tender exceed the amount of the judgment, the usual order would be that the defendant pay the plaintiff's costs up to the date of the tender and that the plaintiff pay the defendant's costs incurred thereafter. This is not, however, a rule of thumb and the court can make a different apportionment if it should deem it appropriate under the circumstances. See the *Omega Africa Plastics* case (*supra*) at 677H-678A.

[15] In this regard provision should be made for a reasonable period within which the plaintiff may consider accepting or rejecting the offer or tender. This "period of deliberation" (*spatium deliberandi*) is pre-eminently a matter falling within the court's discretion. See *Hassett v Santam Insurance Co Ltd* 2000 (1) SA 403 (C) at 406J-407E.

[16] In my judgment of 2 August 2004, I gave substantial consideration (par 110-115) to the aspect of costs, particularly bearing in mind that the defendant had been substantially successful. Despite my credibility findings against the plaintiff I decided to make her a substantial award on costs on the basis that she had probably acted on the advice of her lawyers and medical experts. Had I been aware of the various tenders, however, I would certainly not have treated her so generously. Although she doubtless allowed herself to be advised by her lawyers and South African medical experts, her motivation in increasing her claim more than six-fold appears to have been mercenary rather than rational. This motivation in fact prompted her to feign *sequelae* of the cheetah bite in an attempt to bolster the new case. She persisted with this even when confronted with generous offers of settlement, the last

being as recent as 10 March 2004.

[17] On reconsideration of all the relevant facts and circumstances, and accepting, as I do, that the first tender of 12 July 2002 exceeded the award of damages to the plaintiff, I believe that there is no reason why the usual order as to costs should not be made. In all the circumstances I deem it just, fair and reasonable that the plaintiff be awarded her costs up to and including 14 July 2002, provision being made for a reasonable *spatium deliberandi* of two days from the date of tender. Such costs would not, however, include the costs of those of her experts whom she consulted but deliberately chose not to call as witnesses at the trial. The defendant, in turn, is fully entitled to its costs after 14 July 2002, including those of two counsel where such were employed, and likewise including the reasonable qualifying expenses of its various experts (referred to in par 7 above). In this regard I do not believe that a case has been made out for the qualifying fees of the defendant's actuary, Mr Koch, whose contribution to the resolution of the various issues was, as I recall, negligible. Paragraph 6 of my order will nevertheless have to be amended substantially. Mr Butler voiced no objection to the existing paragraphs 7 and 8, which can hence remain as they are.

[18] On the issue of interest it is clear that the terms of section 2A(4) of the *Prescribed Rate of Interest Act* 55 of 1975 are applicable. This means that interest on the past medical expenses and loss of income fall to be interrupted from the date of the first tender, namely 12 July 2002, until the date of my award on 2 August 2004, from which date it will continue to run. In view of my ignorance of the various tenders, I was unable to consider the said statutory provisions in formulating my award on interest. I fully agree with Mr Butler that it is in the interests of justice for my order to be corrected in this regard. This court clearly has the inherent power to do so in terms of the provisions of section 173 of the Constitution, Act 108 of 1996, and in terms of the provisions of rule 42. In any event courts have an inherent jurisdiction to revisit their orders on the basis of the relevant common law. See *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 *passim*; *Ex Parte Barclays Bank* 1936 AD 481 at 485-486; *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F-H.

[19] In this regard it should be pointed out that the usual order as to interest is that it is payable from the date of service of summons rather than the date of issue of summons, as appears from paragraph 4 of my order. This rectification is of a trivial nature in that it will not have a substantial effect on the amount of interest payable to the plaintiff. It should nevertheless, in my view, be effected.

[20] Inasmuch as the defendant has been successful in the applications for variation of the order as to interest and costs, the plaintiff must be ordered to pay the costs of such applications.

[21] In the event:

1. The applications for variation of the order dated 2 August 2004 in respect of interest and costs are granted with costs.

2. Paragraphs 4 and 6 of the order dated 2 August 2004 are amended to read as follows:

4. Interest on the past medical expenses and past loss of income shall accrue at the prescribed statutory rate:

4.1 from the date of service of summons until 12 July 2002; and 4.2 from the date of this judgment until date of payment.

No interest shall accrue during the period from 13 July 2002 until date of judgment.

6.

6.1 The defendant is directed to pay the plaintiff's costs of suit until 14 July 2002, excluding the costs of experts whose evidence was not led at the trial.

6.2 The plaintiff is directed to pay the defendant's costs of suit from 14 July 2002 to date, including:

6.2.1 the costs of two counsel where two counsel were employed;

6.2.2 the reasonable qualifying expenses of the defendant's experts, namely Dr S J Sagor (orthopaedic surgeon), Dr F H Badenhorst (neurologist), Dr K Le Fevre (psychiatrist), Mr G van Wyk (clinical psychologist), Mr G Fritz (industrial psychologist) and Ms J Andrews (occupational therapist).

D H VAN ZYL
Judge of the High Court