IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT; CAPE TOWN)

CASE NO: 13312/2006

In the matter between:

RAFIEK WILLIAMS **Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT DELIVERED ON THE 26th DAY OF FEBRUARY 2010

LOUW, J:

[1] The claim for damages in this matter against the Road Accident Fund (the RAF) arose from soft tissue injuries sustained by Rafiek Williams (the plaintiff) to his neck, back and left arm in a motor vehicle collision which occurred 23 August 2005.

[2] In terms of the settlement which was made an order of this court on 5 December 2008, the RAF undertook to pay the plaintiff the capital amount of R 28 350, 00 and to provide him with an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 in respect of 70% of his future medical expenses. The RAF further undertook to pay the plaintiff's costs, including the qualifying expenses of the plaintiff's expert witnesses on the magistrates' court scale as between party and party, save for counsel's fees which stood over for determination on 9 February

2010. O that date the issue of plaintiff's counsel's fees came before me and was argued by counsel.

[3] In any decision regarding costs,

> the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence it is a question of fairness to both sides. [1]

Generally, a plaintiff who obtains a judgment that falls within the jurisdiction of the magistrates' court can expect to have costs awarded on the magistrates' court scale. Where there are facts involving considerable difficulty or questions of law of substantial difficulty and complexity the court may, in the exercise of its discretion, award costs on the high court scale even though the award falls within the jurisdiction of the magistrates' court. Other considerations that may influence the exercise of the court's discretion are cases that are of public interest, cases of great importance to the plaintiff and cases involving fraud and misrepresentation.[2]

[4] In considering the exercise of its discretion whether to award costs on the high court or magistrates' courts' scale, where the eventual judgment was within the magistrates' courts' jurisdiction, the court will have regard to whether it was reasonable, as seen from the plaintiff's

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[1] **Norwich Union Fire Insurance Society LTD v Tutt** 1960 (4) SA 851 (A) at 854 D
[2] **Barnard v SA Mutual & Fire General Insurance Co** 1979(2) SA 1012 (SECLD) at 1014H

perspective when the proceedings were launched, to proceed in the high court. [3] Regard may also be had to the subsequent developments in the case that ought to cause the plaintiff to revise his previous estimate of the importance of the case, and to explore the possibility of having the case transferred to the magistrate's court. [4]

[5] In **Small v Goldreich Buildings Ltd and Reid & Knuckey (Pty) Ltd** 1943 WLD 101 the court (per **Scheiner** J) considered the question of difficulty and had regard to whether a case presented *any very great difficulty either of fact or law*; whether a case was one of apparent *unusual difficulty* or one that turned out to be *exceptionally difficult* or whether on the other hand the case turned out to be *straightforward*. Turning to the facts before him, the learned judge held that when the plaintiff began his action he might well have expected that there would be *serious difficulty* in fixing responsibility upon one or other of the two defendants he sued and that it would reasonably have appeared to the plaintiff to be *formidable issues* which should preferably be decided by the Supreme Court. There was consequently sufficient reason for bringing the action in the higher court, the learned judge concluded and he awarded costs on the higher court scale.

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[3] **White v Saker and Company** 1938 WLD 173, at 174 per **Schreiner J** (as he then was)

[4] **Kotze v Newmarch** 1940 NPD 112

[6] In this division the general approach referred to above has been followed. I mention only the cases to which I was referred to by counsel on behalf of the parties:

[7] In **Moronta Meja o.b.o. Mpetsheni v Road Accident Fund,** an unreported judgment delivered on 15 November 2007 in which the plaintiff who instituted a claim of R200 300,00 on behalf of a minor child, was awarded R30 000,00 only, **Goodman AJ** reiterated the position as follows:

> As far as I am aware the approach adopted by Courts where a party sues in the High Court and in the event an award is made within the Magistrate's Court jurisdiction, is to award that party Magistrate's Court costs unless there is good reason for the exercise of a discretion making an award of High Court costs.

In awarding costs on the High Court scale, the learned judge took into account that the defendant never suggested that the matter be referred to the magistrates' court; the wide-ranging nature of the legal and factual disputes both in regard to a special plea that the plaintiff failed to comply with certain regulations and the disputes pertaining to the minor's injuries, *sequelae* and damages (in respect of which expert evidence was adduced at the trial) and the fact that the RAF's admissions in regard to the merits (100% in favour of the plaintiff) and the certificate in terms of section 17(4)(a) of the Act was made at a late stage.

[8] In **Scull v Santam Limited** 1996 (4) C and B, C 4 – 9 the plaintiff, whose claim was in excess of R 100 000, 00 with the largest portion namely the claim for future loss of income being abandoned during trial, was awarded damages in the sum of R25 346, 10. Evidence of two orthopaedic surgeons had been led and **Traverso, J** (as she then was) ordered costs to be taxed on the Magistrate's Court scale, except that the Magistrate's Court tariff would not apply to counsel's fees because

> The medical evidence was of a complex nature although the quantum was small and the future loss of earnings was abandoned during the course of the trial.

[9] In **Majiedt v Santam Limited** 1997 (4) C&B 3 – 1 the plaintiff had suffered emotional and psychogenic shock as a result of her coming upon the body of her nine year son who had been killed in a motor vehicle accident lying in the road. Damages in the sum of R47 679,00 were awarded. **Cleaver, J** in awarding High Court costs stated:

> The claim is not only an unusual and complex one, but in view of the legal principles involved, an extremely important one. It is important because in a sense it breaks new ground. It required not only the consideration of expert evidence, but an exhaustive review of the law in this country and elsewhere.

[10] I turn to the facts of this case and consider whether counsel's fees should be awarded on the High Court scale.

[11] The plaintiff who worked as a marine engineer on board ship sustained soft tissue injuries of his neck, back and left arm in a collision which occurred on 23 August 2005 when he was 24 years old. He instituted his claim on 9 January 2006 for a total amount of R 350 529, 00 which included estimated future medical expenses of R 100 000, 00, estimated past and future loss of earnings or loss of earning capacity of R 150 000, 00, general damages of R 100 000, 00 and past medical expenses of R 529, 00. The claim was repudiated and the plaintiff issues summons on 5 December 2006. The RAF filed its plea on 7 February 2007 and the matter was set down for trial on Monday 1 December 2008.

[12] Given the nature of the plaintiff's injuries and the distinct possibility of an apportionment (this was a front end collision), the plaintiff and his legal representatives could not but have known that they were running the risk of eventually recovering an award worth less than R 100 000, 00.

[13] In due course, the plaintiff filed expert summaries in the form of reports by Ms Mouton a physiotherapist, Dr Bernstein an orthopaedic

surgeon, Ms Bell an occupational therapist, Dr Domingo a neurosurgeon, Ms Besselaar an industrial psychologist and Mr Munro an actuary.

[14] Ms Mouton, the physiotherapist who saw the plaintiff on 11 July 2007, reported that the plaintiff complained of intermittent episodes of parathesia in his fingertips and that he sometimes had difficulty in gripping objects. She stated that it was possible that he had sustained a mild brachial plexus strain. She recommended six to eight physiotherapy treatments and advice on kinetic handling, posture and stretches as well as an assessment by a neurologist to determine whether there were any neurological changes present.

[15] In a report dated 27 November 2007 the orthopaedic surgeon Dr Bernstein found the plaintiff to be suffering from subjective weakness and intermittent paraesthesia in his left hand. He recommended an investigation for a possible partial brachial plexus injury to the left arm and commented that a formal OT grip strength assessment and neurologist nerve conduction studies may be useful.

[16] Ms Bell was the occupational therapist who saw the plaintiff approximately 4 months before the trial date on 7 August 2008. She reported that he complained of pins and needles about twice a month

for a few minutes in his left fingertips, a reduced sensation in the palmar surface of the left forearm and a feeling of loss of strength and lameness in the left arm and hand. She felt that these symptoms posed difficulties for the plaintiff when performing heavy tasks, that he was not a versatile as before the accident and that he would need assistance with heavy tasks. She recommended that he undergo physiotherapy.

[17] The neurosurgeon Dr Domingo saw the plaintiff also some four months before the trial date on 6 August 2008 and found that it is likely that he had a bracial plexus neuropraxia which resulted in mild intermittent ongoing symptoms. Aside from the altered sensation, the neurological examination was normal. He was of the opinion that with reasonable accommodation the plaintiff would be able to continue working as a marine engineer. He recommended X-rays of the cervical spine and 10 courses of physiotherapy.

[18] In my view and again bearing in mind the possibility of an apportionment (the RAF had by then offered to settle the merits at a 50/50 apportionment), the plaintiff and his legal representatives should have had serious doubts at the very least, some four months before the trial date that the plaintiff would be able to obtain an award above the R100 000, 00 limit of the magistrates' court jurisdiction. They would have

known that the future medical expenses would be limited to 8 to 10 courses of physiotherapy and some investigations.

[19] Ms Besselaar the psychologist saw the plaintiff approximately six weeks before the trial date on 13 October 2008 to asses his employability. She concluded that the plaintiff faced future income losses should he no longer be employed by his present employer, a family friend.

[20] At the pre-trial conference held on 24 October 2008 some five weeks before the trial date, the parties agreed that the matter would proceed on the merits and the quantum. It was recorded that the defendant's expert summaries were awaited. The defendant expressed the view, with which view the plaintiff disagreed, that the matter should be transferred to the magistrates' court. The parties agreed to reconvene by 10 November 2008 to explore the possibility for a settlement.

[21] The defendant filed the expert summary of the occupational therapist Ms Pringle three weeks before the trial date, on 11 November 2008. She saw the plaintiff on 27 October 2008 and reported that he complained of pins and needles on the left hand fingertips. This did not affect his work and it was merely an irritating factor. He also experienced subjective weakness of his left arm and hand when picking up heavy

weights, a task which always required a least two persons. Since 2008 he has been performing all work related tasks independently. He was looking forward to becoming a shore skipper. Ms Pringle expressed the view that the plaintiff would be able to continue his work as a mechanic on board, making use of assistance for the heavier tasks when necessary. He would be able to perform the work as a shore skipper independently until retirement age. This should have given the plaintiff and his advisors further cause to doubt that he would be able to substantiate a claim for future loss of earnings.

[22] The plaintiff nevertheless filed the report of the actuary, Mr Munro dated 27 November 2008, who calculated a future loss of income at R 141 500. He did so simply on the basis of applying a 15% reduction for contingencies to the uninjured income scenario and a 25% contingency deduction for the injured income scenario.

[23] The defendant filed the expert summaries of the orthopaedic surgeon Dr Rodseth and the industrial psychologist Mr Crous two court days before the trial date on 27 November 2008. Dr Rodseth had seen the plaintiff on 4 November 2008 and reported that the plaintiff complained of pins and needles 2-3 times per month in the fingers of his left hand. Although he could not find evidence of weakness of the left arm, he

accepted that it may become fatigued sooner than the right arm. He considered that the residual symptoms were more of a nuisance than a functional problem. Mr Crous interpreted the medico-legal reports as excluding any future loss of income.

[24] The RAF first offered to settle the merits on the basis of a 50/50 apportionment during 2007. Thereafter it offered to settle the merits and the quantum on a 70/30 apportionment in favour of the plaintiff and with a capital payment of R 21 370, 30 on Thursday 27 November 2008. On Friday 28 November 2008 the RAF offered to settle on the 70/30 apportionment together with a capital payment of R 28 350, 00 with cost on the magistrates' court scale. This is the offer which was accepted by the plaintiff, save for the rider regarding counsel's fees and which resulted in the settlement being made an order of court on 5 December 2010.

[25] Plaintiff's counsel, who also appeared on behalf of the plaintiff to argue the issue of counsel's fees on 9 February 2010, submitted that since the RAF only improved its tender from the 50/50 offer made in respect of the 'merits' in 2007, to a 70/30 apportionment in favour of the plaintiff on 27 November 2008, the day it filed its final two expert summaries, the plaintiff's attorney was only then able to finally quantify the plaintiff's claim and to advise and make a recommendation to the plaintiff in regard to

the settlement offered. I do not agree. In my view the plaintiff's advisors were in a position to advise the plaintiff on the quantum of his claim some weeks before the trial date and to make a settlement proposal and should not have delayed doing so. By this time they were aware of the RAF's contention that the matter should be removed to the magistrates' court.

[26] Counsel submitted, however, that having regard to the fact that up to 27 October 2008 both the merits (save for the earlier offer to settle the merits at 50/50) and the quantum were in dispute and having regard to the fact that two of the defendant's expert summaries were late in being filed and the very late tender to settle both merits and quantum, the plaintiff was entitled to retain the services of counsel in order to represent him at the imminent trial. Had the defendant timeously filed his expert summaries and made its offer to settle, counsel submitted, it would not have been necessary to employ counsel.

[27] Counsel's contentions conflate two issues, namely whether the use of counsel was justified and the second, on which scale the fees of counsel should be taxed, having regard to the fact that the award fell well within the jurisdiction of the magistrate's court. It does not follow that even if the plaintiff was correct to retain counsel that the fees should be

taxed on the High Court scale. In reality, it is clear that the plaintiff would have relied on the advice of his attorney and counsel on whether to continue to be represented by counsel.

[28] Further, the defendant tendered in its heads of argument to pay counsel's fees in the sum of R5 600, 00 per day plus R700,00 per hour. This is the tariff the Road Accident Fund pays its own counsel on an attorney-client scale. This tender was not acceptable to the plaintiff's counsel who stated in argument that he would rather 'go down' than accept a compromise. I have little doubt that this could only have been counsel's decision and not the decision of the plaintiff.

[29] This was from the start a perfectly straightforward claim for damages arising from a motor vehicle collision. It did not involve difficult questions of fact or law as regard the damages claimed by the plaintiff. It was not suggested that the merits involved difficult issues of fact or law. In my view it should have been apparent to the plaintiff and his advisors, if not at the institution of the action, well before the trial date, that the value of the claim in all probability did not exceed the jurisdiction of the magistrates' court and that there was consequently a very distinct probability that damages in excess of R 100 000, 00 would not be

recovered and that the plaintiff would be limited to magistrates' court costs.

[30] In the circumstances it will in my view be appropriate that counsel's fees be taxed in accordance with High Court Rule 69(3), which reads as follows:

> Save where the Defendant or Respondent is awarded costs, the tariff of maximum fees for Advocates between party and party referred to in Part IV in Table A of Annexure 2 to the Rules for the Magistrate's – Court . . . shall apply where the amount or value of the claim, unless the Court, on request made before or immediately after the giving of judgment, otherwise directs.

[31] Plaintiff's counsel, in accordance with Scale C (being the highest scale of the Magistrate's Court) I am advised from the bar will on this basis be entitled to a day fee of R937, 00 and R67, 00 per hour. This is a modest tariff, particularly when regard is had to the fact that should costs be awarded and taxed on the high Court tariff counsel's fees might well be taxed in excess of R 10 000, 00 per day. However, as the history of the matter I have set out above reveals, the plaintiff's counsel was not faced only with a stark choice between these alternatives.

[32] Given the result of the proceedings on 9 February 2010, there should in my view be no order as to costs as between the parties in respect of that day.

[33] In view of the facts set out in this judgment and in particular the admitted delay in advising the plaintiff of the quantum of his claim and the relatively small amount he was ultimately (correctly it would appear) advised to accept, it would in my view not be appropriate for the plaintiff to be out of pocket in respect of counsel's fees and in respect of any fees of his own representatives in regard to the hearing on 9 February 2010. I therefore intend to order that the plaintiff's counsel not be entitled to recover any fees from the plaintiff on an attorney and own client basis in excess of the award of costs made herein in terms of the tariff referred to above and that the plaintiff's attorney and counsel not recover any fees whatsoever from the plaintiff in respect of the hearing on 9 February 2010.

[34] I consequently order as follows:

1. The fees of plaintiff's counsel (excluding the fees for 9 February 2010) shall be paid by defendant in accordance with the provisions of Rule 69(3) of the Rules of the High Court;

2. The plaintiff's counsel shall not be entitled to recover from the plaintiff any fees on an attorney and own client basis in excess of the order made in par 1 above;

3. In respect of the cost associated with the hearing on 9 February 2010, there shall be no order as to costs between the parties; and

4. The plaintiff's counsel and attorney shall not be entitled to recover from the plaintiff any fees on an attorney and own client or any other basis in respect of the hearing on 9 February 2010.

W. J. LOUW, J