

Sirkuleer aan Landdroste: Ja /Nee

**IN THE HIGH COURT OF SOUTH-AFRICA
(NORTHERN CAPE DIVISION)**

KIMBERLEY

CASE NO.: 1406/04

DATE HEARD:18-04-2006

DATE OF JUDGMENT:21-04-2006

In the matter between:

JOHANNA ADAMS N.O

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

CORAM: C.C WILLIAMS J:

J U D G M E N T

WILLIAMS J:

1. The plaintiff in this matter instituted an action against the defendant, in her personal capacity as well as in her representative capacity as mother and guardian of her minor son who was injured in a motor vehicle collision, for the damages sustained as a result of his injuries.

2. The trial was set to commence on 18 April 2006, it having been agreed between the parties at the Rule 37 conference held on 2 March 2006 that the Court only decide upon the issue of the merits, the issue of quantum to be determined later.
3. On Thursday 13 April 2006, the day before the Easter long weekend, thus effectively one court day before the trial was set to commence, the defendant's correspondent attorneys locally, Haarhoffs Inc, received a telefax from the defendant's Bloemfontein attorneys, Honey Attorneys, that they had just received instructions from their client, the defendant, to concede the merits of the matter and to tender the costs of the merits trial. Hereto a draft order was attached and instructions were given that arrangements be made with the plaintiff's attorneys that an order be taken in terms of the draft on 18 April 2006, the day of the hearing.
4. The draft order reads as follows:
"By agreement between the parties the following order is made:
 - 1.) *Defendant is liable for payment of the plaintiff's full (100%) proven or agreed damages.*
 - 2.) *Defendant is liable for payment of the plaintiffs taxed or agreed party and party costs, on High Court scale, pertaining to the merits trial."*
5. These documents, under cover of a letter from defendants local attorneys, which states;

“We refer to the above matter and annexed hereto the letter received from our instructing attorney together with draft order.

We trust you find same in order.”,

were faxed to the plaintiff’s local attorneys at 12:13 on 13 April 2006.

6. What seems to have happened though, is that plaintiff’s local attorneys closed early for the long weekend and only received the fax on the Tuesday morning after the long weekend, which was also the day the trial was due to commence.
7. In the meantime plaintiff’s attorney in Cape Town, also unaware of the developments, had proceeded with counsel to fly to Kimberley on Monday 17 April, at the same time busing witnesses from Upington where the motor vehicle accident occurred, with the necessary overnight accommodation arranged in Kimberley.
8. On 18 April 2006 the plaintiff agreed to the offer made by the defendant, the only remaining issue related to costs incurred after 13 April 2006. Mr. Nortier, who appeared for the plaintiff, argued that plaintiff was entitled to her costs up to 18 April 2006 while Ms. Lloyd who appeared for the defendant was of the view that the matter be left to the Taxing Master to determine.
9. I see no reason why this issue should be left for the Taxing

Master to decide when the facts are before me. In the normal course of events where costs have been settled by agreement between the parties the trial Court would have no discretion to award the plaintiff any costs other than what defendant has undertaken to pay. See *Erasmus v Santam Insurance Ltd and Another* 1992(1) SA 893(W) at 898B-C where Flemming DJP states the following:

“On the basic principles of conclusion of a contract, the plaintiff could indeed accept only what is offered. Nothing else was available to be accepted. It is not possible to have an acceptance which succeeds in creating a contract of settlement, but which operates, despite the defendant's intention, as if it also contained a further clause to the effect that the plaintiff retains the right to ask the Court to award something in addition to what is offered”.

10. However, unlike in the Erasmus case *supra*, where the offer to pay the plaintiff's costs was made “to date of this tender”, which was only accepted by the plaintiff therein a week later, after unnecessary and avoidable expenses had been incurred, no cut-off date is attached to the tender to pay the plaintiff's costs in the present matter.
11. Of course this does not mean that the plaintiff has now acquired the luxury to deliberate the offer at her own leisure, meanwhile incurring avoidable expenses. What must be determined in the present situation is whether the plaintiff acted reasonably in the circumstances. To this extent it is necessary to examine the actions of the defendant.

12. It is clear from the letter from the defendant's Bloemfontein attorneys that "*arrangements*" had to be made with the plaintiff's attorneys that an order be taken in terms of the draft submitted. However, despite being made aware of the fact that plaintiff's local attorney, Mr. Haddad of Elliot, Marris, Wilmans & Hay would not be in office on 13 April 2006, it appears as if, besides the fax being sent to plaintiff's local attorneys offices on 13 April, no further effort was made concerning any arrangements with either plaintiff's local or Cape Town attorneys in this regard on that date. Considering the very late stage at which the offer was made as well as the particular timing thereof (just before the Easter weekend), the defendant should have been well aware of the danger that certain expences relating to the period after the offer was made would be unavoidable.
13. Even if the defendant's offer had stipulated that costs were tendered up to the date of the offer, in these circumstances I would be hesitant to disallow the costs incurred by the plaintiff after 13 April 2006.
14. The defendant took the risk upon itself, not only in the form that the offer was made, but also in spite thereof not to take any steps to ensure that it came to the notice of the plaintiff's attorneys. In my opinion the plaintiff is entitled to her costs up to 18 April 2006, which is in any event nothing more than what

was offered by the Defendant.

The following order is made:

- a) Defendant is liable for payment of the plaintiff's full (100%) proven or agreed damages.**
- b) Defendant is liable for payment of the plaintiff's taxed or agreed party and party costs, on High Court scale, pertaining to the merits trial up to and including 18 April 2006.**

C.C WILLIAMS
JUDGE

For Plaintiff: Adv. Nortier
Elliot, Marris, Wilmans & Hay

For Defendant: MS. Lloyd
Haarhoffs