FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

Alice Mildred Brand **Appellant**

Road Accident Fund **Respondent**

CASE NUMBER: CA 170/09

DATE ARGUED: 27 November 2009

DATE DELIVERED: 30 November 2009

JUDGE(S): Kroon J; Plasket J

LEGAL REPRESENTATIVES:

Appearances*:*

For the Appellant: Adv. Ayerst.

For the Respondent: Adv. Boswell.

Instructing attorneys*:*
Appellant: Whitesides Attorneys: Mr. Barrow
Respondent: Netteltons: Mr Hart

CASE INFORMATION:
Nature of proceedings :

- *Topic*:
- Keywords:

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE - GRAHAMSTOWN)

Case No: CA170/09

Heard on : 27 November 2009

Delivered : 30 November 2009

In the matter between:

ALICE MILDRED BRAND **Appellant**

and

THE ROAD ACCIDENT FUND **Respondent**

JUDGMENT

KROON J:

[1]This is an appeal against the costs order granted by a magistrate in a trial action.

[2]On 4 February 2005 the appellant - plaintiff in the court below – sustained bodily injuries in a motor collision between the vehicle she was driving and another vehicle. The injuries alleged in her particulars of claim were the following: a peri-patellar haematoma of the left knee, a haematoma of the dorsal and volar aspects of the right forearm, a friction burn on the right wrist. Alleging that the collision was due to the negligence of the driver of the other vehicle the appellant instituted action in the magistrate's court in terms of the Road Accident Fund Act 56 of 1996 for the recovery of the damages suffered by her.

[3]The particulars of claim (as amended) included in the record on appeal reflect that the appellant's claim was as follows:

(a)	Future medical expenses	R30 000,00
(b)	General damages for shock, pain, suffering, loss of amenities of life, disfigurement and disability.	R70 000,00
		R100 000,00

It is, however, common cause that the appellant had initially alleged that her claim was in a higher amount (unspecified) and that she had abandoned a portion thereof to bring it within the jurisdiction of the magistrate's court (R100 000,00). Presumably, the said abandonment had been reflected in the initial particulars of claim.

[4]The respondent's plea alleged that it had no knowledge of the appellant's allegations concerning the collision, the issue of negligence or the damage suffered by her and she was put to the proof thereof.

[5]The matter was set down for trial on 8 August 2008 on both merits and quantum. The appellant's attorney, however, pursued an application for a separation of the issues, notice of which had been given to the respondent's attorney. Despite the latter's opposition (described by the magistrate as vehement) the application was granted. The magistrate's judgment did not, however, deal with the question of costs. Immediately thereafter a settlement agreement was reached between the parties in terms of which an apportionment on the issue of liability of 80% / 20% in favour of the appellant was accepted and the costs of the day would be reserved for

determination by the trial court adjudicating the issue of quantum. The settlement agreement was recorded by the magistrate and the trial on the issue of quantum was postponed *sine die*.

[6]The matter was set down again for hearing on 6 February 2009. On that day, and prior to evidence being led, the issue of quantum was settled between the parties on the basis that subject to the apportionment referred to above the appellant's general damages would be fixed at R50 000,00 and a certificate of undertaking in terms of section 17(4) of the Act would be furnished by the respondent in respect of the medical expenses that the appellant would incur in the future. Subject to para [7] below, the respondent also accepted liability for the appellant's taxed part and party costs.

[7]Two issues of costs were then argued by the parties before the magistrate:

(a) the liability for the costs which had been reserved on 8 August 2008;

(b) whether the fees of counsel who represented the appellant should be limited to the tariff set out in Part IV of Annexure 2 to the magistrate's court Rules[1] or whether the magistrate should allow higher fees for counsel in respect of the items in question in accordance with the discretion accorded to him in terms of Note (b) the tariff[2].

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[1] We were advised from the Bar that the following items in the Annexure were at issue:

22	With trial brief for the first day, not exceeding	R1360,00
24	Each necessary consultation, per quarter of an hour	R97,00
25	For every day exceeding one on which evidence is taken or arguments heard, a refresher not exceeding	R816,50

[2] The note provides that the court may on request allow a higher fee in respect of the items in question.

[8]After hearing argument the magistrate gave judgment granting the appellant her taxed party and party costs, but limited counsel's fees to those stipulated in the tariff. He omitted to deal with the costs which were reserved on 8 August 2008. In his further reasons for judgment, however, the magistrate recorded an order that the "wasted costs" of 8 August 2008 be paid by the appellant.

[9]Mrs *Ayerst*, on behalf of the appellant, sought orders from this court:

> (a) setting aside the magistrate's order and substituting therefor an order allowing counsel's fees in an amount three times the amount set out in the tariff;
>
> (b) amplifying the magistrate's order (made when judgment was given) by the addition thereto of an order that the costs of the hearing on 8 August 2008 be paid by the respondent.

[10]Counsel were agreed, and correctly so, that the following principles were applicable. An order for costs falls within the discretion of the trial court. An appellate tribunal will not readily interfere with the exercise by a trial court of such discretion. It will only do so where the trial court exercised its discretion, not judicially, but capriciously or upon a wrong principle or where the order is incompetent. The question to be asked is whether the exercise of the discretion was based on grounds on which a reasonable person could have reached the same decision, even if the appellate tribunal would probably have made a different order. Non-interference by an appellate tribunal would not mean that the order made by the

trial court would be the only reasonable order that could be made or that the same order should be applicable in a similar matter. See eg. *Cronje v Pelser* 1967 (2) SA 589 (A) at 592H-593A; *Merber v Merber* 1948 (1) SA 446 (A) at 452-3.

[11]In his judgment the magistrate recorded that he had been referred to two unreported decisions in this Division: *Road Accident Fund v Forbes* (Case No CA 197/05, 28 September 2006) and v*an Zyl v Road Accident Fund* (Case No CA 243/07, 19 October 2008). Both decisions were given in appeals against costs orders made by a magistrate in matters of the same nature as the present. In the first matter *Jones* J (with whom *Schoeman* J concurred) *inter alia* upheld the magistrate's order allowing counsel's fees at three times the amount set out on the tariff. In the second matter *Jones* J (*Makaula* AJ concurring) set aside a magistrate's refusal to allow counsel's fees at a rate higher than the tariff provided for and substituted therefor an order that the defendant pay the costs of counsel's fees in an amount not exceeding three times the amount set out in the tariff (the taxing master to determine the actual amount to be allowed). The magistrate, however, sought to distinguish these two decisions.

[12]The first basis on which a distinction was drawn was that in the two earlier cases expert evidence was led on the issue of the quantum to be awarded, whereas in the present matter the quantum was settled without any evidence being led. The distinction is without merit. As recorded earlier, the settlement of the quantum was reached only on the day the matter was set down for hearing. The appellant, and her legal team, had therefore perforce to prepare themselves on the issue of quantum (and initially also the issue of liability) in order to be in a position to lead the

necessary evidence to establish her case on both issues. I am persuaded that the magistrate's approach was not a judicial one, but on the contrary that he proceeded on a wrong principle.

[13]The second basis of distinction was that in *van Zyl* the defendant had conceded that there was no contributory negligence on the part of the plaintiff and that it was liable for all of the plaintiff's damages, whereas in the instant matter the appellant had accepted and agreed that her contributory negligence be fixed at 20%. Again, the magistrate proceeded on a wrong principle: the appellant had achieved success in the action and to base the refusal to make an order in terms of Note (b) referred to above on the fact of the apportionment of liability was not a judicial exercise of the discretion.

[14]While the magistrate did conclude his judgment by finding that because of the fact that counsel had been engaged the costs thereof had to be awarded (but limited to the tariff), his earlier comments, read with the comments in his further reasons for judgment, concerning the briefing of counsel are instructive as to his attitude thereanent. Adverting to the fact that the parties had reached agreement on the issues the magistrate again stated that no expert witnesses had been called; hence, there was nothing justifying the court finding that "this is a matter which warrants an advocate as such" in that it was a case which the court dealt with on a daily basis; his assessment of the case was that there was "nothing which is complicated as such and as such ……. I do not see ….. that there was any need for a counsel to be involved". In his further reasons the magistrate stated as follows:

> "First this case is one of the many cases which are 10 per day in the Magistrate's Court. There was no need for a counsel to be used. I highly regard counsels as experts which are needed only in special cases. Therefore for them to be in the district court on a daily basis will be an equivalent of travesty of justice."

Suffice it is to say that the magistrate's approach can clearly not be endorsed. The restriction of the engagement of counsel to "special cases" enjoys no foundation in the rules of the magistrate's court nor in the practice followed in that court, and is clearly unacceptable. I may add that, as will appear below, the engagement of counsel in the matter was in fact a proper and prudent course for the appellant to have adopted. It need hardly be commented that the inference is inescapable that the magistrate's unacceptable attitude towards the briefing of counsel to appear in his court featured largely in his coming to the decision reached by him.

[15]With reference to the circumstance that the appellant abandoned a portion of her claim to bring it within the jurisdiction of the magistrate's court the magistrate's further reasons contain the following paragraphs:

> "Though someone may argue that the matter has been brought to district court because of expenses I strongly feel that a irregardless (sic) of that argument a High Court matter deserve to be taken to High Court otherwise we will find ourselves in a situation where a Mini High Court is created by practice in the District Court.
>
> I do not think this is the intention of our legislature."

Suffice it to say that this reasoning is difficult to follow and that to the extent that this approach contributed to the magistrate's coming to the conclusion reached by him, it is clear that a wrong principle was adopted. (See, however, the further comments below on the weight to be attached to the abandonment).

[16]It follows from what has gone before that the magistrate materially misdirected himself in his determination of the rate at which counsel's fees should be allowed. His conclusion was vitiated thereby, and this court is at large to determine the matter afresh.

[17]In *van Zyl* the claimant had reduced an initial claim of R118 321,00 to R100 000,00 to bring it within the magistrate's court's jurisdiction. That circumstance was recorded by *Jones* J as one favouring the grant of the order sought in that the aim of the abandonment was to have the matter heard before a less expensive forum. Mrs *Ayerst* urged us to adopt a similar approach in the present matter.

[18]I have some difficulty with the suggested approach, however. On appeal the magistrate's award of R35 000,00 for general damages in *van Zyl* was increased to R50 000,00. In addition, it was held that the magistrate had erred in not ordering the defendant to furnish a certificate in terms of section 17 (4) of the Act to cover future expenses that the claimant might incur. On this score the judgment adverted to acceptable evidence that had been given by an orthopaedic surgeon that the claimant's future medical expenses over an apparently extended period were an estimated R20 000,00 and in addition the claimant would reasonably require the assistance of a domestic servant at a cost of R780,00 per month over a limited

period of three years (a total of some R28 000,00). The furnishing of a certificate was accordingly ordered. It should be pointed out, however, that the total of the three figures set out above was R98 000,00 and that if, instead of the defendant's furnishing an undertaking, an award in respect of the future expenses was to be made, the two figures of R20 000,00 and R28 000,00 would have had to be discounted to obtain the present value thereof and to allow for contingencies. The total claim as assessed was therefore cognisably within the jurisdiction of the magistrate's court. The matter was therefore properly brought in the magistrate's court. Indeed, had the claimant pursued her claim in the High Court she would have run the real risk of securing only a costs order restricted to that obtainable in the magistrate's court. It may be added that the question which scale of costs should be allowed in the magistrate's court (ie which of scales A, B or C) is determined by the amount involved, and where the costs are awarded to a plaintiff the amount involved is the amount awarded, not the amount claimed[3]. I am persuaded therefore that where a plaintiff is awarded an amount that falls within the jurisdiction of the magistrate's court it does not lie within the mouth of that plaintiff, in an attempt to secure an order for costs on a higher scale, to point to the fact that it was *alleged* that the claim was in an amount in excess of that jurisdiction, but that the claim was reduced to the limit of that jurisdiction.

[19]In the instant matter the quantum of the appellant's general damages was agreed in the sum of R50 000,00, which, because of the apportionment of liability, fell to be reduced to R40 000,00. As regards the claim for future medical expenses one orthopaedic surgeon, Mr Swart, in a report dated June 2005, opined that the appellant would benefit from an arthroscopy debriding the articular surfaces of the

[3] Paragraph 2(a) of the General Provisions of Part 1 of Table A of Annexure 2 to the Rules.

injured left knee, and, if necessary, a correction of the meniscus through a partial meniscectomy. In a report dated 6 July 2006 another orthopaedic surgeon, Mr Forgus, expressed the view, with reference to Mr Swart's report, that the arthroscopy would entail an all-inclusive cost of R11 000,00 to which should be added approximately 15 post operative physiotherapy treatments at R260,00 each (in toto R3 900,00). The last orthopaedic surgeon consulted by the appellant, Mr MacKenzie, furnished a report dated December 2008. Therein he postulated that the appellant would require future medication, at least over an initial period, at a total cost of R9 000,00 as well as physiotherapy and biokinetics at a total cost of R6 500,00. Thirdly, he recorded that an arthroscopic joint debridement, including pre-operative and post-operative investigations and treatment, would entail a total cost of R45 000,00. He stated, however, that this operation would be justified only if the appellant developed significantly great loss of left thigh girth and/or joint effusion, and that in his opinion the likelihood that the operation would ever be medically indicated during the appellant's lifetime (she being 48 years old at the time) was less than 50%. Leaving aside the fact that the appellant only claimed R30 000,00 in respect of future medical expenses it is highly probable that had the trial court been required to make an award in respect of future medical expenses (instead of ordering the respondent to furnish a certificate of undertaking) then, having regard to the need to discount the amounts in question and to allow for contingencies, the assessment of the claims would have been in a sum cognisably less than the R30 000,00 claimed, which would further have had to be reduced by 20% by reason of the apportionment of liability. As the appellant's award would have been markedly less than R100 000,00 she cannot invoke the fact that she abandoned part of her initial alleged claim to seek to be favoured with a special costs order.

[20]The final question is whether there are factors present justifying the order sought on behalf of the appellant. In *Forbes Jones* J made the comment that the courts have frequently pointed to the inadequacy of a tariff as a relevant consideration in making special costs awards. By way of example he referred to *Trevor v Nordien t/a Builders and Plasterers* 1987 (3) SA 199 (C) at 200G. This case concerned the then provisions of Rule 69 of the High Court which laid down *inter alia* that in an appeal from the magistrate's court counsel's maximum fee on a party and party basis was R120,00 with the proviso that the appeal court could order that this provision of the Rule should not apply. The question was whether it should be ordered that the limitation of fees provided for in the Rule should not apply. Such an order was issued. The specific tariff provided for had, however, as a result of the erosion in the value of money, become outdated and the judgment contained the strong exhortation that the matter required legislative intervention. On the strength of this case it was stated in *Forbes* that counsel had incorrectly argued that the magistrate had misdirected himself by referring to the "low fees" set out in the tariff, in contradistinction to the amount recommended by the Eastern Cape Society of Advocates, and choosing a fee between the two, the contention of counsel being that the magistrate's approach had set at nought the object of laying down a tariff in the Rules. On the other hand I am of the view that regard should be had to that object. The tariff must be accorded due recognition and should not be departed from unless good reason exists therefor, but, as will appear below, the circumstance that the tariff provides for fees which are correctly to be described as low is a factor to be taken into account. It does not appear that in the present case the magistrate was referred to any scale of fees recommended by the Society of Advocates or favoured with any

argument why, by reason of a comparison between any such scale and the tariff contained in the rules of the magistrate's court, the latter was inadequate. Nor, for that matter, were we so favoured.

[21]Counsel pointed out that it had been argued before the magistrate that, having regard to the nature of the injuries sustained, in particular the knee injury and its sequelae, the issue of quantum had been a complex matter, and that five expert witnesses were to be called on behalf of the appellant. I will deal with the latter aspect first.

[22]The five witnesses in question were the three orthopaedic surgeons referred to above, Dr Wannenburg, the general practitioner who treated the appellant immediately after the accident, and Dr Landman, a radiologist who attended to the taking of X-rays of the appellant's injured knee. The last mentioned prepared two reports. The first one dated April 2005 merely recorded that the only abnormality noted was that it appeared that there was a small amount of fluid in the joint space. This observation was not made in the second report dated November 2008. None of the orthopaedic surgeons referred to the observation and it would seem therefore that it was not of significance. In the second report it was noted that the only abnormality observed were osteophytes on the tibial tuberosities. In this regard Mr MacKenzie's report read as follows:

> "The "osteophytes" on the "tibial tuberosities" noted by the reporting Radiologist are diagnostically and prognostically irrelevant. More important is the lack, nearly four years after the accident, of any features of medial or lateral femoro-tibial compartment osteoarthritis. My

conclusion, therefore, is that Mrs Brand presented with no significant clinical features of internal joint derangement."

Dr Landman could therefore not have made any contribution to the matter and accordingly there would have been no purpose in calling him as a witness.

Nor, in the light of Dr MacKenzie's report, was there any cognizable likelihood of Mr Forgus being called as a witness, who would not have advanced the appellant's case.

It cannot be excluded that in addition to Mr MacKenzie the appellant would have tendered the evidence of Mr Swart and Dr Wannenburg.

[23]Having regard particularly to the report of Mr MacKenzie (who was required to canvass a number of sub-issues) I am persuaded that while the complexity of the issue of the quantum should not be overstated, the issue is certainly not to be described as a simple matter. That conclusion is a relevant factor favouring the grant of higher fees in respect of counsel's services than the maxima provided for in the tariff.

[24]A further argument before the magistrate that was persisted in on appeal was that regard should be had to the complexity of the issue of liability in that the accident occurred at a robot controlled intersection with a concomitant impact on the issue of contributory negligence. Without any further detail, however, I am not persuaded that the complexity contended for merits emphasis. It may be added that

the respondent's plea had not raised the defence of contributory negligence on the part of the appellant and it was therefore not an issue on the pleadings.

[25]In *Forbes* (followed in *van Zyl* on the point) it was held that where the court allows a higher fee than the tariff in terms of Note (b) the taxing master still retains a proper measure of discretion when he comes to tax the bill in the matter: the tariff provides, for example, for a trial fee not exceeding the amount set out in the tariff (item 22), and this provision is to be translated to the higher fee allowed by the court in the sense that the taxing master has discretion to allow costs *not exceeding* the higher fee allowed by the court. In other words the court merely raises the maximum. I take cognizance of this consideration.

[26]I return to consider the quantum of the relevant fees set out in the tariff. The following bears mention. Item 24 provides for a fee R97,00 for each quarter of an hour in which counsel is engaged in a necessary consultation. Scale C (applicable when the amount in dispute exceeds R50 000,00) of item 11 provides that an attorney is entitled to a fee of R116,00 for each quarter of an hour that he or she is engaged in the recording of statements by witness. The attorney's fee is accordingly higher. The maximum fee to be allowed to counsel for the first day of trial is R1 360,00 (item 22) and in respect of a refresher a maximum fee of R816,50. Item 15(a) on the other hand provides that where an attorney attends court during a trial in which counsel has not been briefed the fee to be allowed is R116,00 for each quarter of an hour while the case is actually being heard, and in addition the attorney is allowed R887,50 for preparing for trial. The result is that the attorney's fees may exceed the maximum fee allowed for counsel to a substantial extent. It is therefore

not to be gainsaid that the maximum fees allowed to counsel as laid down in the tariff must be stamped as markedly low fees. While, as has been stated earlier, the tariff must be accorded recognition, the consideration just referred to is a factor which should incline the court to be more ready to allow higher fees in all but the simplest of cases. As already recorded, I am persuaded that the matter was one of cognizable complexity.

[27]The question is then what higher fees are to be allowed. While the fact that in *Forbes* and *van Zyl* counsel's fees in an amount three times the maximum amount provided for in the tariff received the stamp of approval does not dictate that similar fees should be allowed in the present matter, those cases do provide some guidance as to what allowance should be made. A comparative analysis of those cases and the present case persuades me that the former were of more complexity than the instant matter. In all the circumstances I consider that fairness dictates that counsel's fees should be allowed up to a maximum amount double the maxima provided for in the tariff.

[28]The issue of the costs of the hearing on 8 August 2008 remains. The magistrate was not entitled in his further reasons to supplement the orders made in his judgment by the addition of a further order. In any event he did not motivate his finding that the costs in question were "wasted costs" nor his ruling that same should be paid by the appellant. Neither can be supported and counsel for the respondent correctly abandoned the opposition to the appeal in respect of those costs (the abandonment being subject to the respondent's opposition to any order allowing counsel's fees in amounts higher than those prescribed in the tariff.)

[29]The appeal succeeds, The costs order issued by the magistrate is set aside and for it is substituted the following:

> "The defendant will pay the plaintiff's taxed party and party costs, such costs to include
>
> (a) the costs of the hearing on 6 August 2008;
>
> (b) counsel's fees in amounts not exceeding double the amounts set out in the relevant tariff contained in Part IV of Annexure 2 to the Rules."

_____
F KROON
Judge of the High Court

Plasket, J

I agree

_____
C M PLASKET
Judge of the High Court

30 November 2009

Appearances:

For Appellant:	Adv Ayerst instructed by: Whitesides Attorneys 53 African Street Grahamstown (Mr Barrow)
For Respondent:	Adv Boswell, instructed by: Netteltons Attorneys Grahamstown (Mr Hart)