FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 020/2006

PARTIES: BELINDA VERMAAK AND THE ROAD ACCIDENT FUND

REFERENCE NUMBERS –

- Registrar: **2509/03**

DATE HEARD: 20 FEBRUARY 2006
DATE DELIVERED: 03 MARCH 2006

JUDGE(S): JONES J

LEGAL REPRESENTATIVES –
Appearances:

- for the State/Applicant(s)**Appellant**(s): **P MOUTON**
- for the accused/**respondent**(s): **LA SCHUBART**

Instructing attorneys:

- Applicant(s)/**Appellant**(s): **LE ROUX INC.**
- **Respondent**(s): **JOUBERT GALPHIN & SEARLE**

Possibly reportable
For circulation

In the High Court of South Africa
(South Eastern Cape Local Division) Case No 2509/03
Delivered:

In the matter between

BELINDA VERMAAK Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

SUMMARY: Costs – action for damages for bodily injury – damages settled at R43 418-47 – whether costs on the high court scale or on the magistrates' courts scale – prior agreement at pre-trial conference not to transfer the case to another court insufficient in the circumstances of the case to justify award of costs on high court scale.

JUDGMENT

JONES J:

[1] On 16 June 2001 the plaintiff suffered bodily injuries in the course of a motor collision in Uitenhage. A motor-car drove into the rear of the stationary car in which she was a front seat passenger and propelled her car forward so that it collided into the rear of the stationary car in front of it.

[2] This is the classic situation for a whiplash injury, and that is what happened to the plaintiff. In due course she claimed compensation for her injury from the defendant (the Fund) in terms of the provisions of the Road Accident Fund Act No 56 of 1996. The particulars of claim described the injury

as severe and claimed compensation in the sum of R303 418-47 which was made up as follows:

past medical expenses	R4 318-47
future medical expenses	R120 000-00
loss of earning capacity	R100 000-00
general damages	R80 000-00.

[3] The Fund conceded liability on the merits in its plea, but alleged contributory negligence on the plaintiff's part for failure to wear a safety belt. By the time the parties came to trial (20 February 2006) contributory negligence had become a dead issue. Neither party had given notice of expert evidence on the relationship between wearing a seatbelt and the mechanism and causation of whiplash injuries. It played no part in the case. The parties proceeded to settle the quantum of plaintiff's damages. Their settlement is recorded in paragraphs 1 and 2 of a written document entitled 'Agreement on Quantum' which reflects a settlement amount of R43 428-47, plus the terms of a section 17(4)(a) undertaking in respect of future expenses. I have marked it 'X' for identification purposes.

[4] The parties could not however settle the issue of costs. The Fund took the view that, the agreed damages being well below the ceiling of an award which can be made in the magistrates' courts (R100 000-00), costs should be on the appropriate magistrates' courts scale. The plaintiff contended for costs on the high court scale despite the amount of the settlement. That is the only issue before me.

[5] The high court frequently restricts costs to the magistrates' courts scale on the ground that the plaintiff could and should have proceeded in the magistrate's court where litigation is less expensive. In doing so, it applies the basic principle of costs that the court has a discretion which it must exercise judicially upon a consideration of all the facts of each case, and that the underlying consideration is fairness to both sides. The amount of the

judgment or settlement is always a significant factor in balancing fairness. The courts discourage litigants from choosing a more expensive forum where relief can be obtained in a less expensive one. The defendant should not have to pay more in the way costs because he has been brought to a more expensive court unnecessarily. While the amount of a judgment is always important, it is, however, not the only consideration. Various other circumstances – for example, the complexity of the factual issues, the difficulty of the legal issues, the seriousness of an imputation against reputation, the honesty of officials, the general importance of the issue to the parties or the public – might induce a court to award costs on the high court scale although the amount involved is small. But as a general rule the proper exercise of the court's discretion on costs provides a powerful deterrent against bringing proceedings in the high court which might more conveniently be brought in the magistrate's court, and this implies that the party who could have chosen to proceed in the lower courts will have to satisfy the high court that there are good and sufficient reasons for the exercise of a discretion to award high court costs in his or her favour[1].

[6] In this case there were in my view no factual or legal issues of complexity, or other special circumstances, which would warrant proceeding

1 These principles are well known. See, for example, *Gelb* v *Hawkins* 1960 (3) 687 (AD) Holmes AJA 694 A-E; *Norwich Union Fire Insurance Society Ltd* v *Tutt*, 1960 (4) SA 851 (AD) 854; *Jones* v *Uniswa Co Ltd* 1970 (2) SA 768 (E) 769D-770B; *Mofokeng* v *General Accident Versekering Bpk* 1990 (2) SA 712 (W). *Hendricks* v *President Insurance Co Ltd* 1993 (3) SA 158 (C) 167D-F; *Koch* v *Realty Corporation of South Africa* 1918 TPD 356; *Goldberg* v *Goldberg* 1938 WLD 83, 85-85; *Standard Credit Corporation Ltd* v *Bester and others* 1987 (1) SA 812 (W) 819D;*Swanepoel* v *Roelofz and others* 1953 (2) SA 524 (W) 526C.

in the high court rather than the magistrate's court. But Mr *Mouton* argued on behalf of the plaintiff that there are two considerations in this case of sufficient weight to justify an award of high court costs.

[7.1] The first is an argument that the cash award of R43 418-47 together with the section 17(4)(a) undertaking is likely to exceed what the magistrate could award if the undertaking is reduced to its real value. He seeks to quantify the value by reference, first, to the content of the expert notice of Mr McKenzie, an orthopaedic surgeon, who estimated that an amount of R10 500-00 should cover the total costs of the further conservative treatment which, in his view, the plaintiff will require for the rest of life. Added to the cash amount of the settlement, this gives the settlement an uncapitalized present value of some R54 000-00.

[7.2] Next, Mr *Mouton* refers to the report of an occupational therapist, Ms Joan Andrews, who stated in her recommendations that the plaintiff requires a domestic assistant once a week. There is no estimate of the costs of a domestic assistance in the report, and nothing on record upon which the cost can be estimated. There is, moreover, no claim in the plaintiff's particulars of claim for the costs of a domestic servant. The claim for future expenses is confined to analgesics, anti-inflammatory substances, physiotherapy and psychotherapy.

[7.3] During the course of argument Mr *Mouton* suggested that once a section 17(4) undertaking is given, it cannot be qualified (*Baboo v RAF*[2]). He submitted that this produces the result that an undertaking covers all future expenses which arise from the collision, whether they are claimed or not. In the *Baboo* matter the Fund sought to qualify its undertaking by limiting the

2 SECLD Case No 664/02 38/08/2003 per Ludorf J.

payment of future medical expenses to those expenses which were not payable by the compensation commissioner. I believe, with respect, that the judgment is correct where it holds that this goes beyond the provisions of the Act, and the Fund may not qualify its undertaking in this way. But I am by no means certain that it follows from this that an undertaking, once given, must be unqualified in the sense that it would cover future expenses which were never claimed. However, I prefer to express no definitive view on the point because it arose almost in passing and was not given specific and detailed consideration by either counsel in the course of argument.

[7.4] Even assuming payment by the Fund of the future costs of a domestic servant in terms of the undertaking, it is not possible in the circumstances of this case to conclude that the settlement will then exceed what the magistrate could have awarded. This is because I do not know what the amount for a domestic servant is going to be. If I am to be fair to both parties, I cannot just assume that it would bring the 'real value' of the settlement to more than what the magistrate can award. This would involve giving an unclaimed, unspecified and unquantified expense nearly the same value as the rest of the plaintiff's damages put together.

[7.5] The plaintiff has therefore not succeeded in satisfying me that I should exercise my discretion in her favour by reason of the amount she will receive in terms of the undertaking.

[8] Mr *Mouton*'s second argument is that the Fund cannot be heard to complain about high court costs being ordered against it because it agreed at the pre-trial conference held on 7 October 2005 that 'there is no need at this stage to transfer this matter to any other court'. This, he argues, implies that the parties agreed to the matter continuing in the high court and, further, that

they agreed to costs on the high court scale. Mr *Mouton* has referred me to a number of cases in this division where this argument has been raised successfully.

[9] The point first arose in two decisions (*Brauns'*s case and B*eetge's* case) in the Eastern Cape which were until recently not reported[3]. The court held that an agreement at the pre-trial conference not to transfer the matter to another court, when combined with an agreement to proceed to trial on the merits only, was in the circumstances good reason to award high court costs of the trial on the merits to a successful plaintiff even though it had not yet been established that damages will exceed the magistrate's jurisdiction. In neither case did the defendant specially reserve its right to argue that costs of that portion of the case should be on the inferior courts' scale. In the circumstances the parties specifically agreed to run the trial on the merits in the high court, and the defendant could hardly complain when he was required to pay the costs of that part of the proceedings on the higher scale. In the *Brauns* case, which came before me in 2001 but which has only recently been reported, the issue was the liability of the defendant for injury caused by the slippery condition of a supermarket floor. I dealt with the matter of costs in the following terms:

> Mr *Ford* argues that I should not make a costs order in favour of the plaintiff at this stage because of the possibility of an award of damages within the

3 *Brauns* v *Shoprite Checkers (Pty) Ltd* (2004 (6) SA 211 (E) 221B – 222C)). *Beetge v RAF* (still unreported, ECD Case No 1970/02, 20 October 2003 Froneman J).

jurisdiction of the magistrates' courts. He submits that I should reserve the question of costs. This is a point not infrequently raised where issues of negligence and damages are dealt with separately. An award of costs is within my discretion. It is invidious for me to speculate on allegations in the pleadings about the likelihood or otherwise of damages being awarded which exceed what can be awarded in the magistrates' courts. Whatever damages are awarded, there are significant advantages to litigants to separate the issue of liability from that of quantum, not least a tremendous saving in time and expense if the issue of quantum either falls away or else is agreed once the issue of liability has been determined. The experience in the courts is that this saving is made in the large majority of cases. It is but rarely that the parties go to trial on quantum after the merits have been determined. This kind of advantage cannot be advanced and could possibly even be frustrated if a plaintiff must wait for costs because they are reserved despite his or her success on the merits. A successful defendant does not have this disadvantage.

In *Faiga* v *Body Corporate of Dumbarton Oaks and another* Joubert AJ puts the issue thus at 660E-I:

> Mr *Bruwer*, who appeared for first defendant, prevailed upon me to reserve costs in the event of first defendant being held liable for plaintiff's damages. The substance of the argument is that the court deciding the issue of quantum of damages would be better suited to decide the proper scale of costs. There exists a prospect, so the submission went, that the amount of damages might turn out to be so low that costs should be ordered on the magistrate's court scale. The argument is not without attraction. Other considerations, however, bear greater weight. The issues raised in these proceedings were not without difficulty; both factually and in law. Some of the answers in law had to be found without the guiding light of precedent. These considerations tend to support this matter having been brought in the Supreme Court. Then there is the principle of finality. A separation of issues in terms of the provisions of Rule 33(4), by its very nature, fragments a hearing. This undesirable feature is counterbalanced by the prospective advantage of a saving in costs. One of the great advantages of the Rule is that in matters of delict, depending on the outcome of the hearing on the merits, the issue of quantum might never arise. Also, in those instances where the plaintiff succeeds on the merits, the matter of quantum is often settled. Reserved costs orders cannot bolster this advantage, but might detract from it. Evidence and argument in this matter lasted eight days. It is in my judgment time to bring the curtain down on this part of the proceedings and not to have decisions on costs left in abeyance.

It cannot be said of this case that the legal or factual issues are so complicated or difficult that they warrant the attention of the High Court. But

> the other points made by the learned judge are weighty and they apply generally in cases where issues are separated and a trial is fragmented. In my view a plaintiff whose entitlement to damages is established in these circumstances should ordinarily be awarded his or her costs of the proceedings to date, unless the reservation of costs is pertinently dealt with in the agreement to separate the issues. In this case it was not. The pre-trial conference minute records instead an agreement that the case should not be referred to another court. The parties in effect accepted that they should go to trial on the merits in the High Court. I think that in these circumstances the costs of the trial which have already been incurred should follow the event and should be on the ordinary scale of the court in which they were heard.

In *Beetge*'s case Froneman J quoted and approved this dictum, and applied it to the costs of a trial on the merits of a motor collision case, the parties having agreed that the quantum of damages would stand over.

[10] The same kind of reasoning was adopted in *Standard Bank of SA Ltd* v *Mbewu,*[4] but this time after judgment at the conclusion of the case as a whole.

Ludorf J is reported as follows:

> With regard to costs, the loan agreement provides for costs on the scale as between attorney and client. Mr *Totos*, on behalf of the defendants, submits that the claim falls within the jurisdiction of the magistrate's court and, accordingly, that the order should be one of costs taxed on the scale as between attorney and client, but on the magistrate's court scale. In my judgment, the submission obviously loses sight of the fact that during the course of a pre-trial conference in terms of the Rules of Court held on 16 September 2002, and attended by the parties' representatives, including Mr *Totos* himself, it was specifically agreed that 'the matter would not be transferred to another court', and so agreed without any reservation. In the circumstances, the submission can, in my judgment, not be sustained.

[11] In a further unreported decision, *Taljaard* v *RAF*[5], Mhlantla AJA (as she then was) came to the same conclusion. *Taljaard* was a motor collision case

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4 2003 (4) SA 418 SE at 421 I – 422 B.

5 Unreported, ECD Case 108/02 19 December 2002

like the present. The plaintiff had claimed damages in the sum of R898 947-36 for loss of support as a result of the death of her husband. However, she accepted an offer of settlement in the sum of R88 495-81 on the morning of the trial because by then things had changed. She had remarried. The defendant refused to concede that costs should be on the high court scale. The court decided not to limit the costs to the magistrate's court scale.

[10] These are recent examples of the court exercising its discretion in favour of a plaintiff who has been or might be awarded less than high court damages. I have been invited by Mr *Mouton* to follow them. But I must not forget that each decision was the result of the exercise of the court's discretion in the light of the particular facts and circumstances of the case, and that the facts and circumstances of this case are different. I must also not forget that the principle here is 'that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that in essence it is a matter of fairness to both sides'.[6] What is necessary therefore is an evaluation of the facts of this case relevant to the exercise of my discretion. The important facts are:

1. The amount of the settlement is far short of the ceiling which a magistrate can award. The plaintiff does not come close. This raises the question of fairness. Why is it fair to her to give her costs on the higher scale? Why is it fair that the defendant should have to pay costs on the higher scale?

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6 *Gelb* v *Hawkins supra* footnote 1 *per* Holmes AJA at 694 A.

2. The nature of the plaintiff's injuries and their consequences have always indicated that her claim was a modest one and likely to be well within the limits of the magistrate's jurisdiction. The medical reports filed by the parties make it plain that the injury was not severe as described in the particulars of claim. The report of the plaintiff's expert orthopaedic surgeon, Mr Mackenzie, who examined her on 23 July 2002, shows that her injury was no more than moderate. By then, she had made a good recovery. Her pain was never very severe, but it nevertheless required use of conservative treatment in the form of physiotherapy and analgesics from time to time. She will continue to need analgesics, anti-inflammatory medication and physiotherapy for about three years because the injury precipitated symptoms caused by a pre-existing condition by about three years. Thereafter she will need them occasionally for the rest of her life. Her condition did not prevent her from working, would be unlikely to do so in the future, and did not compromise her normal working life span. Her ability to enjoy the normal amenities of life has not been adversely affected. This report was available before summons had been issued. Her condition was unchanged when Mr Mackenzie saw her again on 25 January 2006. From the very outset therefore the plaintiff must have been alerted to the probability that she would receive less than R100 000-00 in the way of damages. Nothing happened in the interim to make her think otherwise;

3. The Fund agreed at the pre-trial conference that there was no reason to transfer the case to another court at that stage and did not couple this with any reservation about costs. This is part of the context of the costs issue. It is a relevant consideration, but it does not have the same effect on the exercise of a judicial discretion as a specific agreement to pay costs on a higher scale. Unlike in the *Brauns* and *Beetge* cases the parties did not at the same time agree to run the trial on restricted issues in the high court, thereby accepting that those costs at any rate would be on the higher scale. Here the merits were conceded in the pleadings at an early stage. Settlement of the whole case was always contemplated. The Fund was specifically asked to make settlement proposals at the pre-trial conference, and, failing that, to state which portions of the plaintiff's case on quantum were in dispute. The relationship between quantum and costs should always have been at the forefront of the minds of her legal advisers and so should the prospect of agreeing upon quantum without incurring further costs.

[10] If I balance these circumstances I do not believe that the joint decision not to transfer the matter to another court is sufficient to warrant ordering high court costs despite the quantum falling within the magistrate's jurisdiction. There are in my judgment no considerations of fairness which require that the defendant should have to pay costs on the high court scale.

[11] I make the following order:

1. There will be an order in terms of paragraphs 1 and 2 of the

agreement on quantum marked ‘X”.

2. The defendant is ordered to pay the plaintiff’s taxed party and party costs on the appropriate scale applicable to proceedings in the magistrates’ courts, such costs to include the qualifying costs, if any, of Mr Mackenzie, Dr Roux, Ms Staples, Ms Andrews and Dr Malherbe.

RJW JONES
Judge of the High Court
24 February 2006