

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no:

PARTIES: DAWSON FREDERICK FERREIRA N.O. AND THE ROAD ACCIDENT FUND

REFERENCE NUMBERS -

- Registrar: **2020/03**
- Magistrate:
- Supreme Court of appeal/Constitutional Court: **SOUTH EASTERN CAPE DIVISION**

DATE HEARD: 25 JULY 2006

DATE DELIVERED: 03 AUGUST 2006

JUDGE(S): JONES J

LEGAL REPRESENTATIVES -

Appearances:

- for the State/Applicant(s)Appellant(s): **ADV. L. SCHUBART & ADV J NEPGEN**
- for the accused/respondent(s): **ADV. E. BOTHA**

Instructing attorneys:

- Applicant(s)/Appellant(s): **DE VILLIERS & PARTNERS**
- Respondent(s): **JOUBERT GALPHIN & SEARLE**

CASE INFORMATION - CIVIL

- *Nature of proceedings:* **Costs - two counsels - discretion exercised to award the costs of two counsels by reason of the nature of the issue, the extent of the injuries. The large amount of compensation involved and the importance of the issues to the parties**
- *Topic:*
- *Keywords:*

In the High Court of South Africa
(South Eastern Cape Division)

Case No: 2020/03
Delivered: **03/08/06**
Not reportable

In the matter between

DAWSON FREDERICK FERREIRA N.O.

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

SUMMARY: Costs – two counsel – discretion exercised to award the costs of two counsel by reason of the nature of the issues, the extent of the injuries, the large amount of compensation involved and the importance of the issues to the parties.

JUDGMENT

JONES:

On 24 November 1998 one Emsley was driving a motor scooter along the Cotswold off-ramp on the N2 Highway in Port Elizabeth. He came into collision with a motor vehicle and suffered bodily injuries in consequence. He alleged that the collision was caused by the negligence of the driver of the motor vehicle, and claimed compensation from the Road Accident Fund in consequence.

The parties separated the issues. By agreement they first went to trial on the merits. On the morning of the hearing they settled on the basis of a 40%/60% apportionment against Emsley.

The matter then came before me on the quantum of damages. Once again the parties were able to reach agreement on the major issues, but initially they were unable to agree upon two points. One was whether the fees to be charged by a curator bonis appointed to manage Emsley's affairs were to be subject to the apportionment, and the

other was the defendant's liability for the costs of two counsel. The parties agreed upon the first issue and incorporated their agreement in a draft order covering their settlement of the quantum of damages. They argued the issue of costs.

Emsley has been represented by senior and junior counsel from the outset. When he was replaced as plaintiff by a curator ad litem, the curator continued with both counsel. The defendant's liability to pay their fees is governed by Rule 69(1) which gives the court a discretion to order the costs of two counsel. This discretion must be exercised judicially, which enjoins the court to act fairly to both sides by balancing their interests. It is not fair to compel an unsuccessful defendant to pay additional costs where the employment of more than one advocate is luxurious, extravagant, or unnecessary. The test for this is normally stated to be whether the employment of two counsel was a wise and reasonable precaution, regard being had to the circumstances of the case, the complexity or difficulty of the issues, the amount of money involved, and the importance of the matter to the parties. Applying this test to the facts of this case satisfies me that the employment of two counsel was indeed a wise and reasonable precaution.

First, the merits of the matter were by no means cut and dried. Emsley suffered a head injury in the collision. He was unconscious for some days after the incident. He had retrograde amnesia and brain damage. He was unable to give an account of the collision. He could not therefore give evidence that the other driver was to blame and was not in a position to admit or deny the respects in which he was alleged to have been contributorily negligent. This placed his legal team in a dilemma. They had no eye-witness to the collision to counteract the version of the other driver. The only independent evidence on the merits was that of a witness who saw the movements of the vehicle and the scooter in his rear view mirror after the impact. The plaintiff would have had to rely on the inferences to be drawn from his evidence and from measurements from the police plan. He was worried that he may not have had enough evidence to prove a *prima facie* case. This in itself was sufficient in my view to justify the precaution of employing two counsel.

As to quantum, this is the sort of case in which the services of two counsel are frequently engaged. I believe it was fully justified. Emsley sustained multiple injuries:

- damages to the rotator cuff of the right shoulder;
- multiple abrasions and cuts;
- facial fractures;
- a fracture at the base of the skull, and a severe head injury comprising multiple diffuse contusions, subdural haematoma, and axonal damage. This resulted in concussion, loss of consciousness, cognitive impairment, epilepsy, compromised recall, changes in personality and behaviour control, a speech, hearing and sense of smell deficit, loss of executive functioning and balance, and generalised dementia with intellectual impairment.
- past and future medical and hospital expenses;
- past loss of earnings
- future loss of earnings based on total unemployability;
- general damages for pain and suffering, disability, and loss of the amenities of life.

The parties gave notice of their intention to prove some 37 experts reports, mostly by medical and paramedical witnesses. The total quantum of damages claimed was more than a million rands. The agreed amount of 40% of Emsley's loss is R422 651.20, and in addition the fund has undertaken to pay 40% of the amount of Emsley's future hospital and medical expenses, the costs of a personal care-giver, and the fees of a curator ad litem to manage Emsley's affairs. Fulfilment of the undertaking will probably come to a considerable sum of money

My conclusion therefore is that the defendant should be ordered to pay the costs of two counsel.

There will be an order in terms of the draft order marked X which has been signed by me.

RJW JONES
Judge of the High Court
31 July 2006