REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GRAHAMSTOWN)

CASE NO: 1477/2006

In the matter between:
LITHA LUYANDA MZUVUKILE QUNTA
Plaintiff
And
ROAD ACCIDENT FUND Defendant
Coram: **Chetty, J**

Date Heard: **6 June 2008**
Date Delivered: **12 June 2008**
Summary: ***Reserved costs order – by whom to be determined – registrar or court***

JUDGMENT

CHETTY, J

[1] In *Faiga v Body Corporate of Dumbarton Oaks and another*[1] A.P. *Joubert* A.J. commented upon the obvious advantages of a separation of issues in terms of the provisions of rule 33 (4)[2] but cautioned against the undesirability of reserving the costs of such an application. This case exemplifies the disadvantages of such an order. In order to determine which of the parties to this action is liable to be mulcted with payment of those costs it is necessary to chart the action's history to the present impasse.

1 1997 (2) SA 651 (W) at 669I-G
2 Uniform Rules of Court, Erasmus, Superior Court Practice

[2] The plaintiff instituted an action for damages against the defendant arising from a motor vehicle collision in which he suffered injuries. The action was defended. The pleadings were eventually closed and in preparation for trial, plaintiff's attorney prepared and delivered a list in terms of rule 37 (4) to the defendant's attorneys. Therein he erroneously proposed that the ***"Defendant will be asked to agree that an application for separation of issues would be inappropriate in this matter"*** (emphasis supplied). The defendant's attorney's response hereto as per their corresponding rule 37 (4) list, as stated was, ***"agreed"***.

[3] The Registrar of this Court in due course notified the parties that 1 August 2007 had been allocated for commencement of the trial action. On the day preceding the trial date, plaintiff's attorney, labouring under the misapprehension that agreement had been reached as regards the separation of the merits of the action from the quantum of damages, sought confirmation thereanent from the defendant's attorneys. The response communicated to them was ***"if you want the issues to be separated, you must bring a formal application"***. The application papers were accordingly prepared and served on the defendant's attorneys. When the matter came before the trial judge, *Nepgen* J, the next day, the learned judge

made an order by agreement in chambers separating the issues, declaring the defendant liable to compensate the plaintiff for such damages as he may in due course prove and ordered that the costs of the action to date, including the costs relating to the application for the separation of the issues, be reserved. It is this latter order which, if pragmatism had prevailed, should have been amicably settled. Instead, it has generated this judgment. I pause to mention that prior to hearing argument on the question as to which party be ordered to pay the reserved costs, quantum had been settled in terms of the defendant's written offer in terms of rule 34 (1). That offer, it is common cause, included the plaintiff's taxed party and party costs but specifically excluded the reserved costs.

[4] The legal effect of an order reserving costs was pertinently examined by *Wunsh* J in *Martin N.O v Road Accident Fund* [3] where the learned judge, with reference to a number of cases, both here and in England, stated the position thus:-

> *"Costs are usually reserved if there is a real possibility that information may be put before the Court which eventually disposes of the action or the application which may be relevant to the exercise of a discretion in regard to them (cf Hillkloof*

3 2000 (2) SA 1023 (WLD) at 1026I to 1027B

Builders (Pty) Ltd v Jacomelli 1972 (4) SA 228 (D) at 233H), although, where the issues affecting interlocutory costs are clear, the Court then dealing with the matter should not choose an easy way out to shift the task to another Court (Fleet Motors (Pty) Ltd v Epsom Motors (Pty) Ltd 1960 (3) SA 401 (D) at 404h – 405B; Trust Bank of Africa Ltd v Muller NO and Another 1979 (2) SA 368 (D) at 318C-D). Costs are reserved because there is no ready view about the liability for them and they will not necessarily follow the result of the case. They are separate from the costs of the action or application. If a judgment is given for a party with costs, an award to it of costs for an interlocutory proceeding which were reserved does

'not thereby become attached to or part of the judgment in favour of that party (for the relief which it is entitled) and costs. . . . It remain(s) separate from and independent of that judgment and (does) not necessarily follow the result of the action between the parties.'

(AA Mutual Insurance Association Ltd v Gcanga 1980 (1) SA 858 (A) at 869A.)"

before concluding:-

". . . where the judgment is given in a case where costs of earlier proceedings have been reserved, the Court should, and generally does, deal with any costs that were reserved. If it overlooks its task to do so, its attention is drawn to the oversight. If this is not done as the judgment is delivered, the parties can approach the Court to deal with the outstanding issue. Costs that are reserved for the decision of the Court thereon ought, to be adjudicated upon by the Court unless the parties, by agreement, relieve the Court of that task."[4]

[5] I agree with the learned judge's reasoning and concur with his

4 Ibid at 1029C

finding that it is for the court to adjudicate upon the question of the reserved costs. With that prelude therefore I turn to address the issue of which party should be ordered to pay those costs. It is obvious from the affidavit filed by the plaintiff's attorney in the rule 33 (4) application that the plaintiff's attorney's statement in the rule 37 (4) list was erroneous. In argument before me defendant's counsel did not suggest otherwise and accepted that it was a genuine mistake on the part of the plaintiff's attorney. But, said Mr *De la Harpe*, a party should pay for his or her mistake. This is however not such a case. Prior to the plaintiff's rule 37 (4) list being furnished to the defendant's attorney, his attorney wrote to the defendant proposing that the merits be separated from quantum. The response was that they would take instructions but nothing further eventuated until the rule 37 (4) list was submitted. The intractable attitude adopted thereafter not to accede to the request to separate the issues is therefore to be deprecated particularly where, the very next day, the defendant conceded the merits of the action. In such circumstances it is appropriate that the defendant be ordered to pay the costs thereby incurred.

[6] In the result the following order will issue:-

1. That, over and above the sum of R28 617, 58 paid by the defendant to plaintiff's attorneys by way of an interim

payment in respect of past hospital expenses, medical expenses and loss of earnings, the defendant is to pay to the plaintiff the sum of R50 000, 00 as and for general damages together with interest in the said sum at the legal rate calculated from a date 14 days after the date of this order to the date of payment;

2. That in respect of the claim for future medical expenses the defendant is to issue an undertaking in terms of section 17 (4) (a) of Act 56 of 1996, for the costs of future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to him, or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle accident on 30 October 2004, after such costs have been incurred and upon proof thereof.

3. That the defendant is to pay the plaintiff's costs of suit as between party and party on the High Court scale, as taxed or agreed, which costs shall include:

3.1 the costs of the action in relation to the merits of the claim, inclusive of the costs of the application for separation of issues which were reserved by the order of this Court on 1 August 2007;

3.2 the qualifying expenses, if any, of plaintiff's expert witnesses being Dr *P A Olivier*, Dr *J Penhall*, Dr *Neil Holmberg* and Dr *W Strydom*.

4. The defendant shall pay interest on the said costs at the prevailing legal rate, calculated from a date 14 days after the allocatur to date of payment.

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D. CHETTY
JUDGE OF THE HIGH COURT

Obo the Plaintiff: **Adv Louw**

(Instructed by Neville Borman & Botha: Mr Powers)

Obo the Defendant: **Adv De la Harpe**

(Instructed by N. N Dullabh & Co: Mr Dullabh)