FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, PORT ELIZABETH JUDGMENT

ECJ:

PARTIES**:** **ELIZE HAARHOFF**

And

THE ROAD ACCIDENT FUND

Registrar: **857/08**

Magistrate:

High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABETH**

DATE HEARD: **24/08/09**

DATE DELIVERED: **17/09/09**

JUDGE(S): **JONES J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Appellant(s): **ADV: J.J. Nepgen**
- for the Respondent(s): **ADV: Van der Linde SC**

Instructing attorneys:

(i) for the Appellant(s): **LE ROUX INCORPORATION**

(ii) for the Respondent(s): **WILKE WEISS VAN ROOYEN INCORPORATED**

CASE INFORMATION -

1. *Nature of proceedings*: **COSTS**

Not reportable

THE HIGH COURT OF SOUTH AFRICA

In the Eastern Cape High Court
Port Elizabeth

Case No 857/2008
Delivered

In the matter between

ELIZE HAARHOFF **Appellant**

and

THE ROAD ACCIDENT FUND **Respondent**

Summary Costs – claim for compensation in terms of the Road Accident Fund Act 96 of 1998 – action instituted in the High Court – damages falling within the jurisdiction of the magistrates' courts – whether the circumstances nevertheless justify an award of costs on the higher scale.

JUDGMENT

JONES J:

[1] On 15 October 2005 a motor vehicle driven by the plaintiff came into collision with a motor vehicle driven by one Durandt. The plaintiff sustained bodily injuries. As a result she issued summons out of the Eastern Cape High Court, Port Elizabeth for compensation in the sum of R404 494-08, allegedly payable by the defendant (the fund) in terms of the provisions of the Road Accident Fund Act, 56 of 1996. The claim was defended.

[2] The matter came on trial before me on 24 August 2009. By then, the parties had settled most issues. They are agreed that the defendant pay R50 000-00 to the plaintiff in respect of the capital portion of her claim, and that it furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act in respect of 40% of the costs of future medical, hospital and similar expenses arising out of the injuries she sustained in the collision. They are further agreed that the defendant pay the plaintiff's taxed party and party costs, including the qualifying expenses, if any, of certain expert witnesses. The only issues for determination by me are

(iii) whether costs should be limited to the costs recoverable in the magistrates' courts, and

(iv) whether the plaintiff should be entitled to the special costs of two pre-trial inspections *in loco* attended by counsel.

The parties led no evidence. They invited me to make my decision on the papers, and, as I understand the way in which the matter was conducted by counsel, on an acceptance of certain submissions made from the Bar, unless these were challenged from the Bar.

[3] The parties went to trial on the merits and on the quantum of damages, and nothing of substance had been agreed before trial costs were incurred. The magistrates' courts' jurisdiction to award damages is limited to R100 000-00. The defendant's standpoint is that the plaintiff should have realised from the outset that her case fell within the jurisdiction of the magistrates' courts and could properly have been determined in a magistrate's court. She should have elected to sue in that forum. Her costs should accordingly be confined to the costs which she would have been entitled to recover if she had done so.

[4] The starting point in any dispute about costs is the principle that the trial court has a wide discretion to award costs in a manner which is just and fair to both parties. In determining what is just and fair to both parties the courts will consider the particular facts and circumstances of the case in hand in the light of various principles, rules of practice, and guide-lines which have evolved over many years. Those which have reference to the choice between high court costs and magistrates' courts costs are conveniently set out in Cilliers, *Law of Costs* (Lexis Nexis 3rd ed) paragraphs 2.24 – 2.28 where the authorities are collected and discussed. In an unreported judgment of this Court, *Vermaak* v *Road Accident Fund* (Eastern Cape Division, Port Elizabeth Case No 2509/03 dated 3 March 2006 and made available to me by counsel under the citation [2006] JOL 16934 (SE) paragraph 5) I summed up some of the relevant considerations as follows:

> 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 of 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]

[5] Mr *Nepgen* argued for the plaintiff that there are good and sufficient reasons in this case for the exercise of my discretion to award High Court costs in her favour. He submitted that there were problems and difficulties for the plaintiff in the presentation of her case, and certain complexities in the factual and legal issues, which remove it from the category of ordinary, run-of-the-mill, motor-accident cases which are disposed of daily in the lower courts. In my view there is merit in these submissions. The problems and complexities begin with the nature of the injuries which she sustained. The description of them in the pleadings gives some hint of how they impact on the conduct of the litigation. Paragraph 6 of the particulars of claim describes them as a whiplash injury of her neck; a closed traumatic brain injury in the form of concussion; a soft tissue injury to the right shoulder; a soft tissue injury of her right knee; and post concussional psychological disorder. The combination of a whiplash neck injury, brain damage, and post concessional psychological disorder can, and often does, spell trouble.

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[1] *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, 85-86; *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.

[6] Whiplash injuries are frequently nebulous. They can produce subjective symptoms without evidence of physical degenerative changes to the neck. The experience of the courts is that sometimes the symptoms resolve within a period of some 6 months or so. In other cases they persist for many years, and can become chronic and disabling. This is particularly so where there is the added complication of brain damage and psychological disorder. There are cases where these considerations in themselves have given rise to considerable difficulty in the proof and quantification of general damages and damages for loss of earnings.[2] When a prudent attorney has reason to believe that he may be faced with problems of this nature, he may understandably be induced to advise his client to proceed in the High Court because he considers that the experience and expertise of that Court and of counsel who conduct litigation in it is better equipped to deal with them. In this case the plaintiff was obliged to rely on the evidence of a number of medical witnesses, some of them specialist experts, which included a neurosurgeon, a neuropsychologist, an orthopaedic surgeon, a radiologist, and the medical doctor who treated her immediately after the collision. As it happened, the amount of the damages turned out to be comparatively small, but the quantity and quality of the evidence necessary to establish it was nevertheless considerable.

[7] The gravity of the brain injury in this case was moderately severe. This was objectively verified, for example, by the length of the period of retrograde amnesia (at least several hours) and post-traumatic amnesia (30 hours or more), with a possible total amnesic gap of about 3 days. The amnesia turns out to be of importance to the proof of her claim. The plaintiff has no memory whatever of the motor collision. She had the disadvantage, therefore, of being unable to offer a version by the driver of her vehicle to contradict the other driver's version. She was, furthermore, obliged to take the opinion of an expert in the reconstruction of motor collisions in order to counterbalance and contradict the opinion of the

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[2] In other cases, such as the *Vermaak* case *supra*, the problems of whiplash type injuries have been held to be such that High Court costs were not justifiable. It will depend on the facts of each case.

expert who had been consulted by the defendant. On the merits, there were also questions of the proper inferences, if any, to be drawn from reports relating to the blood-alcohol and breath-alcohol concentration levels of the driver of the insured vehicle, which may have had bearing on issues of reaction time, avoiding action, and causation generally.

[8] It is proper to conclude that the real possibility of significant complexities of law and fact, and difficulties of proof, were present in this matter when the plaintiff issued summons. They persisted as the parties proceeded to preparation for trial. Were they sufficiently significant to justify the plaintiff's decision to select the High Court as her forum when she issued summons, and to persist with that decision as the conduct of the case progressed? The answer depends on the balance between them and the amount of compensation. Amount is always a significant consideration. The value of the cash component of the award is increased by the value of the undertaking in respect of future expenses. The total quantum is appreciable, even though it does not, in my view, exceed the amount which the magistrates' courts may order. It is not as if I am being asked to give High Court costs although the amount of the claim is trivial. The process by which that amount was determined depended upon working through the same complexities of law and fact and the same difficulties of proof which have been present throughout and which were sufficiently significant to induce the defendant to brief senior counsel on trial, although the plaintiff was content with junior counsel. When I consider the various problems and complexities in relation to the amount of the award, the latter does not seem to me to a be good enough reason to deprive the plaintiff of costs, the order of which, both parties decided, should be incurred for the proper conduct of their respective cases. The defendant considered it prudent to employ senior counsel in this particular matter in circumstances when it knew that it would be paying its own counsel on the scale of High Court fees. I do not believe that it is unfair in this case if it should also be ordered to pay the plaintiff's costs on the same scale. This is because this litigation warranted High Court fees. I should therefore exercise my discretion to award the plaintiff her costs on the High Court tariff.

[9] There remains the question of the costs of two pre-trial inspections *in loco*. Mr *Nepgen* explained that two inspections were necessary because a last minute eye-witness on the merits was found just before the hearing who could not have been consulted with at the scene when the previous inspection was held. I have difficulty, however, in seeing why the defendant should have to pay for a second inspection because of this.

[10] There will be the following order:

1 The defendant is ordered to pay the amount of R50 000-00 to the plaintiff in respect of the capital component of her claim, payable into the plaintiff's attorneys' trust account within 14 days of the date of this order, particulars of the account being:

Name	Le Roux Incorporated
Bank	Nedbank
Branch	Uitenhage
Branch Code	126317
Account No	126 309 4678
Type of Account	Trust Cheque Account

2 The defendant is ordered furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Traffic Fund Act No 56 of 1996 in terms whereof the defendant will compensate the plaintiff in respect of 40% of her costs of future accommodation in a hospital or nursing home, or the treatment of, or the rendering of service to, or the supplying of goods to the plaintiff resulting from the collision which occurred on 15 October 2005.

3 The defendant is ordered to pay the plaintiff's party and party costs of suit on the High Court tariff in a sum as taxed or agreed, including any costs incurred in obtaining payment of the amount referred to in paragraph 1 hereof, which costs shall include

(i) the costs of a single inspection *in loco*;

(ii) the reasonable taxed or agreed qualifying expenses, if any, of the following expert witnesses instructed on behalf of the plaintiff:

(a) Dr C Edelstein, orthopaedic surgeon;
(b) Dr MJ Marais, radiologist;
(c) Dr R Keeley, neurosurgeon;
(d) Vernon Sack, clinical psychologist;
(e) Prof D Raubenheimer, accident reconstruction specialist.

4 In the event of the capital amount of R50 000-00 not being paid in accordance with paragraph 1 hereof, the defendant is ordered to pay interest thereon at the rate of 15.5% *per annum* from due date, being 14 days of the date of this order, to date of payment.

5 In the event of the plaintiff's taxed party and party costs not being paid within 14 days of the date of *allocatur* the defendant is ordered to pay interest thereon at the rate of 15.5% *per annum* from due date, being 14 days of the date of *allocatur*, to date of payment.

RJW JONES
Judge of the High Court
9 September 2009