Know the rules! Understanding the correct interpretation of r 34 of the uniform rules of court

By Francois Robert van Zyl

The Road Accident Fund (RAF) is a public entity established in terms of the Road Accident Fund Act 56 of 1996 (the Act) as amended, to compensate victims of road accidents where serious injury or death arose as a consequence of wrong doing or fault. Central to the payment of a claim under the current legislative framework is the common law principle of delict where fault must be proven before a claimant is compensated. As a consequence, the historic trend has been to determine fault and the extent of compensation in the courts, through a highly litigious process, which has seen claimants appointing third party attorneys to claim against the RAF. The RAF in turn appoint legal representatives through a panel of attorneys to defend the matters over what is a considerably lengthy period of time.

According to the Road Accident Fund's Integrated Annual Report, R 22,2 billion has been paid out to victims of road accidents during the 2013/2014 general financial review. This amount excludes, but is not limited to, the legal costs relating to successful claimants via the court process, the panel attorney's fees in defending these matters, as well as the costs relating to witnesses and various expert evidence. One can therefore appreciate the regular increase in the fuel levy, which places an enormous strain on the public purse. It comes as no surprise that various measures have been put in place, such as amendments to the legislation, Road Accident Fund Legislative Schemes, Uniform Rules of Court and Practice Directives in order to enhance and facilitate the speedy and justifiable settlement of claims.

One of these measures, in an endeavour to curb litigation costs, is contained in r 34 of the Uniform Rules of Court. Sub-rules 1,5 and 12 to this rule provides as follows:

‘34(1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff’s claim …’

…

34(5) ‘Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state –

(*a*) whether the same is unconditional or without prejudice as an offer of settlement;

(*b*) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;

(*c*) whether the offer or tender is made by way of settlement of both claim and costs or of the claim only;

(*d*) whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.

...

34(12) If the court has given judgment on the question of costs in ignorance of the offer or tender and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender: Provided that nothing in this sub-rule contained shall affect the court’s discretion as to an award of costs.’

In the recently reported appeal matter of *Road Accident Fund v Mashala* (GP) (unreported case no A474/2012, 25-7-2014) (Kollapen J) handed down by the Gauteng Division, Pretoria, the court was called on to consider the proper interpretation and purpose behind r 34 of the Uniform Rules of Court. In this case, the respondent brought an action for damages against the appellant in terms of the provisions of the Act. The appellant opposed the action and both the merits and quantum of the respondent’s claim were in dispute and when the trial proceeded, the court made an order separating the merits of the matter from the quantum. The trial, therefore, only proceeded on the issue of liability. On 8 March 2012 the court delivered judgment on the question of

liability and made an order that the appellant be liable for 50% of all the damages that the respondent was able to prove, and in addition ordered the appellant to pay the costs of the hearing. The appellant thereafter brought an application in terms of r 34(12) for the court to reconsider the question of costs afresh and it premised such an application on the following grounds:

- That on 11 January 2012, the appellant's attorneys delivered a Notice of Offer of Settlement in terms of r 34(1) and r 34(5) in which the appellant offered to pay 50% of all damages proven by the respondent, as well as the costs of the action insofar as it pertains to negligence up to and including 11 January 2012.
- That considering on 8 March 2012 the court made an order, in respect of merits, identical to the terms of the tender, the court should have reconsidered the order of costs it had made on 8 March 2012 and it should have, in light of the offer of settlement, ordered the respondent to pay the costs of the hearing.
- In its judgment, on the application for reconsideration, the court concluded that r 34(1) of the Uniform Rules of Court deals with monetary claims and the only offer capable of settling a monetary claim was an offer for the payment of a sum of money. Accordingly an offer not sounding in money was not possible in terms of the rule and the appellant's offer of 11 January 2012 was not an offer sounding in money and, as such, it fell outside of what r 34(1) contemplated. On that basis, the court proceeded to dismiss the application for reconsideration.
- The central issue for determination in this appeal is whether the court *a quo* was correct in concluding that the offer of settlement made in terms of r 34(1) and r 34(5) fell outside the ambit of the rule. A related issue was whether, notwithstanding that the offer was made in terms of r 34(1), the common law is of relevance and is of possible application in determining the matter.

The court referred to the Supreme Court of Appeal decision in *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) where this court remarked that: 'The purpose behind the Rule is clear. It is designed to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of such litigation. The rule is there not only to benefit a particular defendant, but for the public good, generally.'

The court went further and cautioned that courts should take account of the purpose behind the rule and not give orders that undermine it. Accordingly in the context of litigation, the rule provides an incentive to the reasonable and prudent litigant who makes an informed and concerted effort to bring litigation to an end, as well as a disincentive to the intransigent and unreasonable litigant. The incentive lies in the risk attendant on the court exercising its discretion with regard to costs. A litigant faced with the choice of disputing liability *in toto* for making an offer of settlement may well, regard being had to the purpose of the rule, be said to bring to an end at least that part of the litigation by making an offer of settlement. Such an approach would be consistent with the purpose of the rule and may also be considered as advancing the public good. The court held that it would of course follow in such instances where the question of quantum remains unresolved, that an offer of settlement on liability could never be in precise monetary terms but could certainly be structured in terms capable of ascertainment. Arising out of this is the question of whether failure to make a specific monetary offer has the effect of taking the offer outside of the ambit of r 34(1) as the court *a quo* concluded. The court did not believe this to be the case.

If one has regard to the text of r 34(1), it does not encapsulate a requirement that the offer be one precisely sounding in money. If regard is had to the rationale of the rule, to enable a party to avoid future litigation, interpreting r 34(1) as requiring a precise monetary offer to be made, will have the effect of undermining the rule. The conclusions of the court *a quo* would mean that where separation of liability and quantum has taken place, no offer of settlement would be possible in terms of r 34(1) simply because it is not an offer sounding in money. Such a result would not only undermine the rational for the rule but would serve to encourage unnecessary litigation to the costs of litigants and the fiscus.

The court furthermore referred to the author Erasmus in the Superior Court Practice (P Farlan & DE van Loggerenberg *Erasmus: Superior Court Practice* (Cape Town: Juta 2011) at B1 – 5), who makes the following observation:

‘The object of the rules is to secure inexpensive and expeditious completion of litigation before the courts; they are not an end in themselves. Consequently the rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible. Thus it has been held that the rules exist for the court, and not the court for the rules.’ The court found on that basis, and even while accepting that the power of the court of appeal to interfere with the exercise of a true discretion is limited, the discretion was exercised on an incorrect principle, namely that the offer of settlement fell outside of r 34(1) and, therefore, the court *in casu* was entitled to interfere. The offer of settlement was, therefore, a competent one in both in terms of r 34(1) and the common law and if it was accepted it would have brought the litigation on the question of liability to an end on the same terms the court *a quo* found on 8 March 2012. Such an outcome would have justified the court, on reconsideration of the costs order it made, to avoid costs in favour of the appellant and as a result the appeal succeeded and the respondent was ordered to pay the appellant’s costs in the first instance, as well as the costs of the appeal.

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