

SOUTH AFRICA / JUDGMENT

A.S v A.S (2625/2019) [2024] ZAECQBHC 84 (14 November 2024) [2024] ZAECQBHC 84

COURT

Eastern Cape High Court, Gqeberha

BEFORE

M Makaula

CASE / FILE NUMBER

2625/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN THE HIGH COURT OF

SOUTH AFRICA

EASTERN CAPE HIGH

COURT GQEBERHA

CASE

NO: 2625/2019

In the matter between:

A[...]

S[...]

Applicant/Plaintiff

and

A[...]

S[...]

Respondent/ Defendant

JUDGMENT

MAKAULA J:

A.

Background.

- [1] This application concerns the reconsideration of a costs order I made at the conclusion of the matter in terms of Rule 34(12) of the Uniform Rules of Court.
- [2] Briefly, the applicant (the plaintiff) issued summons against the respondent (the defendant), in the main seeking an order that she be declared the beneficial owner of the property including the half share registered in the name of the defendant. In the first alternative claim, the plaintiff tendered to the defendant payment of a sum of R445 092. 94, being the balance of half the value of the property after considering the contributions she made towards the improvement and maintenance of the property, against the registration of the defendants have share in the plaintiff's name with the parties to share the costs of transfer on equal basis.
- [3] The defendant filed a counterclaim seeking an order (a) confirming the cancellation of the oral agreement entered between him and the plaintiff, (b) an order confirming the termination of the joint ownership, (c) payment of the sum of R1,997,554. 42 and (d) cost of suit.
- [4] For the reasons stated in the judgment especially in paragraph [50], I saw fit that there was no need to deal with the alternative claim as well as the counterclaim raised by the parties against each other. I will refrain from repeating the same in this judgment.

B.

Submissions.

- [5] Unknown to the court, on 14th October 2022, the plaintiff tendered to the defendant on a “without prejudice basis” in terms of Rule 34(1) of the Uniform Rules of Court, a sum of R 645 000.00 in full and final settlement in respect of any claims that the defendant may have against the plaintiff arising from the joint ownership of the moveable property. The condition therefore was that payment would only be made upon the sale of the property and from the proceeds thereof with each party to pay their costs.

[6] The plaintiff contends that the tender exceeds the award made by the court by an amount of R234 564. 50 and it was rejected by the defendant on 15th October 2022. The plaintiff therefore seeks an order that the defendant pay the costs of the action incurred after 15th October 2022, being the date upon which the tender was rejected. The plaintiff tenders payment of its own costs incurred prior to this date.

[7] The plaintiff submits that Rule 34(12) applies in this matter even though it is the plaintiff who seeks to enforce the tender made on the basis that;

7.1 the defendant instituted a claim in re-convention against the plaintiff, the nature of which falls within the parameters of Rule 34(1),

7.2 the purpose of the tender was to reach a compromise,

7.3 the tender was made without prejudice and this Honorable Court was unaware of the tender at the time the award and costs order were made,

7.4 had the tender been accepted by the defendant, it would have brought an end to the litigation entirely, which accords with the policy underlying the Rule as well as the purpose for which the Rule exists,

7.5 the tender was generous and the rejection thereof was unreasonable,

7.6 the continuance of the action was occasioned solely by the defendant's rejection of the tender,

7.7 the defendant's continuance with the action cannot be justified on some ground apart from the recovery of the money, and

7.8 the defendant failed in obtaining an award which exceeds the tender.

[8] The plaintiff submits that the real issue raised by the defendant was the amount he contributed towards the purchase of the property, its maintenance and improvements. The plaintiff states that, the offer was clear that it was in full and final settlement of all and any claims that the defendant may have against the plaintiff, included there in, was liability which might be determined for the alleged expenses incurred by the defendant. The plaintiff alleges further that the defendant, even though entitled to reject the offer, considerations of fairness, justice and reasonableness militate against the decision by the defendant to go on trial and run costs with impunity in circumstances where he faced the risk of being unsuccessful as is the case now. The plaintiff further alleges that as it turns out regarding the tender, the refusal or rejection of the tender was unreasonable and ought to be weighed in the balance in respect of the narrower discretion pertaining to the reconsideration

of costs. In concluding, the plaintiff submits that had the tender been accepted by the defendant, both parties would have found

themselves in a better financial position than is the current situation and that would have averted the unnecessary expense of running a protracted trial.

- [9] The contention by the defendant is that the application for reconsideration does not comply with rule 34 (1) in that it is not a claim sounding in money and further deals with defendants and not the plaintiffs, as is the case in the instant matter. The defendant further argues that even if he is wrong in the latter submission, in that the plaintiff was a defendant in the counter application, the issue of the counter application was not decided by the court and therefore he does not qualify as a defendant in that regard.
- [10] Furthermore, the defendant argues that the tender does not accord with rule 34 (5) (d) because the plaintiff did not comply with the requirements thereof in that the plaintiff does not disclaim liability for the payment of costs or for part thereof in which case no reasons for such disclaimer are given. The defendant submits that the plaintiff's tender was made three (3) days prior to trial instead of fifteen (15) days as required by Rule 34(6) thus not affording him an opportunity to consider it.
- [11] Relying on various authorities and decided cases, the defendant argues that the plaintiff would only be entitled to reconsideration of the issue of costs not as a matter of course but based on the discretion this court enjoys. The defendant submits that, this is not a case of 'the winner taking all', in that the plaintiff herself was partially successful in that she did not get all what she prayed for in the main claim. She has also been ordered to pay a substantial amount of money for the contributions made by the defendant towards the improvement of the property. The defendant therefore prays for an order that the cost order should not be varied.

C. The Issue.

- [12] The issue for determination is whether this court, in the exercise of its discretion, should reconsider the costs order previously made in the judgment, in terms of rule 34(12) of the Uniform Rules of Court and award costs to the plaintiff as at the date of the tender.

D.

Analysis.

- [13] An offer to settle can take two forms namely, (a) an offer in terms of Rule 34 and (b) an offer or tender made outside the Uniform Rules of Court generally known as Calderbank offer. The latter form is an offer made on a 'without prejudice basis' in cases not covered by the Rules and which is made subject to the qualification 'except in relation to costs' (or words to that effect). There is no reason why a litigant should not be permitted to rely on such an offer in support of a particular costs order once judgment has been granted. Similarly, Rule 34 does not provide, expressly or by necessary implication, that a secret tender made by the plaintiff outside the Rules cannot be relied upon when it comes to costs[1].

- [14] The plaintiff issued an offer in terms of Rule 34(1) on 14 October 2022 tendering to settle the matter incorporating the defendant's counter claim on a 'without prejudice basis on the following terms:

"1 The plaintiff shall pay the defendant the sum of R645 000. 00 in full and final settlement in respect of all or and any claims that the defendant may have against the plaintiff arising from their joint ownership of the immovable property situated at [...] M[...] St. Framesby, Gqeberha.

2. Payment of the aforesaid sum of R645 000.00 shall be made upon the sale of said property and from the proceeds thereof, which sale is to occur within three months from the date of acceptance of this offer.
3. The parties are required to do all that is necessary to give effect to the sale of the property and the sum to be paid to the defendant shall be paid upon registration of the transfer of the sale which is to occur as soon as possible after the sale referred to in paragraph 2 above.
4. Each party to pay their own costs in respect of the action."

- [15] As aforesaid, the offer was made three (3) days before the trial started and was not considered by the defendant as there was no response to it. The defendant attacks the offer on the basis that it did not allow him the required 15 days in terms of rule 34(6). Furthermore, the offer is assailed because it does not comply with rule 34 (5)(d).

- [16] Foremost is the purpose of Rule 34. Rule 34 is to limit costs and avoid unnecessary litigation, and thus entails consideration of whether the rejection of a tender was reasonable under the circumstances. Rule 34 is designed to enable a defendant or plaintiff in reconvention, to avoid further litigation and failing that, to avoid liability for the costs of such litigation[2].

- [17] The relevant provisions which are applicable in this matter are those of rule 34(1) and (5). Rule 34 provides:

"34 Offer to Settle

- (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. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorized thereto in writing.

.....

- (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 be set down on the question of costs alone.”

[18] Rule 34 applies to offers made by a defendant or any other party who may be ordered by a court to contribute towards costs and not a plaintiff. A plaintiff may rely on Rule 34 only in an instance where the plaintiff is a defendant in reconvention. A plaintiff may make an offer to settle in instances outside the Rules as enunciated in paragraph 13 above. In this instance the plaintiff made an election to issue an offer in terms of Rule 34. Such an election would have to follow the provisions of Rule 34 to the latter.[3]

[19] It is common cause that the plaintiff is the defendant in reconvention and thus qualifies to the protection of Rule 34. Further, the tender was made after the defendant had instituted his claim in reconvention. Thus, the plaintiff had full knowledge of the defendant’s claim in mind when she made the offer. The plaintiff contends that the rejection of the tender was unreasonable and ought to be weighed in the balance of the narrower discretion pertaining to the reconsideration of costs. All these factors ring true but for the plaintiff to succeed, she must fulfill the requirements of Rule 34 especially 34(5).

[20] The offer made by the plaintiff relates to a claim the defendant may have been entitled to “arising from their joint ownership of the immovable property”. Further, the amount tendered would have been payable “upon the sale of the said property and from the proceeds thereof.” In the judgment, I did not find that the parties were co-owners of the property, nor did I order the sale of the property which were the conditions upon which the tender was made or based by the plaintiff. The provisions of section or rule 34(5)(b) are peremptory in that they stipulate that the tender “shall be

subject to such conditions as may be stated therein.” It is not the case in this instance. As aforesaid, payment of the tendered

amount was conditional, as the tender stipulated that it “shall be made upon the sale of the property and from the proceeds thereof.” On this condition only the tender made by the plaintiff cannot be said to have been compliant with Rule 34(5)(b).

[21] I do not agree with the defendant that the plaintiff in its tender disclaims payment of costs. The cost order suggested by the plaintiff should be read in context. The context of such is glaring and stems from the joint ownership of the property as propounded by the plaintiff. If I were to order the sale of the property as tendered, the only plausible order would have been each party to pay its costs. The same order was made in the judgement based on the reasons stated therein. I have no reason to change such order.

Consequently, I make the following order:

The application is dismissed with costs.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances

For the Applicant/ Plaintiff : Adv Nepgen

Instructed by

: Joyzel Obbes Inc.

For the Respondent/ Defendant : Adv Barnett

Instructed by:

: Vic Skelton Attorneys

Date heard

: 22 March 2024

Judgment

delivered

: 14 November 2024

- [1] AD v MEC for Health and Social Development, Western Cape 2017 (5) SA 134 (WCC) at 145I-146A and Erasmus Superior Court Practice; Second Edition; Van Loggerenberg; D1-443 and D1- 464).
- [2] Naylor and Another v Jansen 2007 (1) SA 16 at para 13.
- [3] Du Toit obo Nkuna v Road Accident Fund [2021] ZANCHC 66 para 11].

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECQBHC/2024/84.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/as-v-as-unknown-topic-aecqbhc-2024>

Prepared on 9 October 2026 · Esheria